REDUCING PENSION COSTS NOW: THREE SUGGESTIONS

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". . . if we wait until the baby boom generation retires before we begin to deal with the tremendous long-term deficit in Social Security, we will see the greatest tax revolt and age warfare in the history of the United States."[1]

Generally speaking, the work force in the United States supports those in the population who are not working.[2] Traditionally it did so directly—a husband supported his wife and children, and sometimes his parents or other relatives; an unmarried adult child remained at home and supported his or her aged parents. To the extent that direct support was unavailable, dependent persons without resources turned either to charity or to various kinds of limited public assistance programs.

In nineteenth and early twentieth century America, life for those in the work force tended to be hard and brief. Most of those able to work labored throughout their lives—only a fortunate few "retired" as old age approached. Income maintenance difficulties for those in the

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1. *Senate Special Committee on Aging*, Nov. 21, 1980, BNA PENSION REPORTER, Dec. 1, 1980, at R-11, R-13 (Statement of Michael J. Boskin). In the 1960s the "dependency ratio"—those in the work force compared to those drawing Social Security—was 5 to 1; by the year 2035, the ratio will be 2 to 1. Beck, *The Baby Boomers Come of Age*, NEWSWEEK, March 30, 1981, at 34, 37.

2. If an employee or a self-employed person foregoes consumption to save earned income in the traditional way and, on becoming unemployed, disabled, or old draws on savings for replacement income, he or she is not dependent on the work force for replacement income. Such saving occurs, but it is not the principal source of replacement income, and it has not been for several decades. "Contributions" to pension plans are the "savings" from which some disability or retirement incomes are paid, and pension plans are part of the income transfer (or transfer payments) system. *See generally* Lynn, *Private Pensions in Perspective: Problems of the Years Ahead*, 15 GA. L. REV. 269, 275-76 (1981). There is great disparity in earned incomes in the United States. Persons with high incomes can, if they wish, save in the traditional way. Some persons have incomes large enough to permit saving, but they do not choose to save. Others have such low incomes that they cannot save. The inequities of the earned income structure underlie the income maintenance system of which pensions are a part, but the inequities are beyond the scope of this article.

work force originated in disability or in periodic unemployment resulting from economic distress or turmoil. When the head of the household had no income, his dependents suffered, and both he and his dependents turned to charity or sought public assistance.

Because the traditional support system simply failed in times of widespread economic distress, it was gradually supplanted by a public support or income maintenance system. In the 1930s, some elements of the present support system appeared and achieved public acceptance, and in the ensuing forty years numerous other programs providing support payments in money or in kind were added.[3] Even prior to the 1930s some income maintenance or income replacement programs (veterans' pensions, civil service pensions, railroaders' pensions, military pensions) existed, but they affected only a small part of the population and were not directed to relieving the effects of prolonged disability or unemployment on a large scale.

Today, workers' compensation, unemployment compensation, Social Security, federal and state civil service pensions, military pensions, veterans' pensions, railroaders' pensions, Supplemental Security Income, "private" pensions, Medicare, Medicaid, and numerous food, health, and housing programs provide support for the disabled, the unemployed, the retired, the old, the young, and the poor. So-called "private" pensions antedate the 1930s, but their spectacular growth paralleled the expansion of Social Security and closely related benefit plans in the period from 1940 to 1980.[4]

Providing support payments to numerous beneficiaries has become burdensome on a year-to-year basis. Immediate burden aside, however, there is reason to think that the pension components of the income maintenance system, whether public, like OASDI (old-age, survivors, and disability insurance under Social Security),[5] or quasi-public, like private pensions,[6] will be in severe financial difficulties in the years ahead. Some of those financial difficulties originate in population changes, while others arise from insufficient funding. But whatever the cause of the difficulty, there is general agreement that it is essential to determine as quickly as possible how to control pension costs.

The income maintenance system is chaotic. Programs overlap, and there is inefficiency and waste in providing benefits. Not surpris-

3. B. STEIN, SOCIAL SECURITY AND PENSIONS IN TRANSITION 38-60 (1980).
4. D. MCGILL, FUNDAMENTALS OF PRIVATE PENSIONS 16-28 (3d ed. 1975).
5. Wiener, *Coming: Drive to Overhaul Social Security*, U.S. NEWS & WORLD REP., Jan. 12, 1981, at 64.
6. Ehrbar, *Those Pension Plans Are Even Weaker Than You Think*, FORTUNE, Nov. 1977, at 104.

ingly, the pension components of the income maintenance system provide disability and retirement benefits inefficiently. Because the pension system is complex, reducing pension costs through reducing duplication and waste will not be easy. Nonetheless, three measures to reduce pension costs can be adopted without great delay: (1) We can raise the "normal" retirement age and reduce incentives to retire "early." (2) We can adopt an equitable system of "offsets" to ensure that disability or retirement income, irrespective of pension source, is replacement of earned income and does not exceed earned income. (3) We can index pensions sparingly and use an index appropriate to the task of guaranteeing the disabled and the retired adequate income that does not exceed earned income.

THE DEMOGRAPHIC IMPERATIVE

Generally speaking, persons receiving support payments, including those receiving pensions, are consuming, not producing. Money and money equivalents in the form of goods and services that are channeled to pensioners are not being directed to investment and production. That being so, a case can easily be made for controlling pension costs on the ground that it is economically sensible to do so. Spending less on pensions permits greater spending on expanding and improving productive capacity.

The case for reducing pension costs, however, does not rest solely on economic grounds. A realistic assessment of age groups within the population makes explicit the desirability of examining our pension systems now in order to restructure and improve them before false expectations are raised and undesirable intergenerational conflict occurs.[7] There is reason to believe that the American work force willingly supports a reasonable number of nonworking persons. Nothing in the American character, however, suggests that the work force will support what it perceives to be an unreasonable number of nonworking persons, and indeed there is accumulating evidence that it simply will not do so.[8]

Although demography—the study of the characteristics of human populations—is a comparatively new discipline, characteristics of particular populations have always been of interest to life insurers and pension planners. For example, the greater longevity of females as opposed to males is reflected by the mortality tables long used by insur-

7. S. ROSS, INCOME SECURITY PROGRAMS: PAST, PRESENT AND FUTURE 51-58 (WORKING PAPER FOR THE PRESIDENT'S COMMISSION ON PENSION POLICY, OCT. 1980).

8. Quinn, *The Affluent Elders*, NEWSWEEK, Aug. 4, 1980, at 53.

ers.[9] Now, as the proportion of older persons in the population increases,[10] demography becomes a matter of interest to all, particularly those in the work force supporting the old, the retired, the disabled, the unemployed, the young and the poor.

What does the "population profile" look like now? How will it change before the turn of the century?

Because information on population is gathered with regularity, we know a great deal about living Americans.[11] We know also that the dramatic increase in the life span that resulted from the control of various insidious diseases is behind us, and we know that the decline in the birth rate that set in after the post-war "baby boom"[12] will result ultimately in a smaller proportion of persons within the population of childbearing age. But we do not know that decline in the birth rate will continue, and we cannot be certain that a means of slowing the aging process will not be devised. Therefore, the population profile of the year 2000 is necessarily based in part on conjecture.

As we move into the 1980s we have a population profile that, although not ideal, does not pose a threat to pension systems in the short run. The median age is slightly over 30. Although the median age will rise gradually until well into the next century, we shall nonetheless have during the next several decades a proportionately large group within the population of working age to support the nonworking.

These comparatively numerous middle-age persons who finance and will continue to finance the support system will themselves age, and having been somewhat healthier than those in the generation preceding theirs, will live just a little longer and be somewhat more socially and politically active in later life than their parents were. Many in this age group have been beneficiaries of one or more segments of the support system from birth, and all in this age group naturally ex-

9. In City of Los Angeles, Department of Water & Power v. Manhart, 435 U.S. 702, 717 (1978), the Supreme Court held that under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963 it is unlawful to require female employees to make larger pension fund contributions than those required of male employees in order to receive the same monthly benefit on retirement. Abandonment of sex-based actuarial tables has run into difficulties. Fields, *TIAA's 'Unisex' Pension Calculations Stalled Nationwide by New York Ban*, THE CHRONICLE OF HIGHER EDUCATION, Feb. 9, 1981, at 1, cols. 2-4.

10. Between the years 1976 and 2020, the number of persons age 65 and over is expected to double. Siegel, *Recent and Prospective Demographic Trends for the Elderly Population and Some Implications for Health Care*, in SECOND CONFERENCE ON THE EPIDEMIOLOGY OF AGING 289 (U.S. Department of Health and Human Services Publication No. (NIH) 80-969, July 1980).

11. *See generally* STAFF OF JOINT ECONOMIC COMMITTEE, 96th CONG., 2d SESS., HUMAN RESOURCES & DEMOGRAPHICS: CHARACTERISTICS OF PEOPLE AND POLICY 9-37 (Comm. Print Nov. 1980).

12. The most significant identifiable group in the working population in the decades ahead consists of those born in the years from 1946 to 1962—about 45 million. The youngest persons in this group will reach "normal" retirement age in the third decade of the next century. *See generally* Guzzardi, *Demography's Good News for the Eighties*, FORTUNE, Nov. 5, 1979, at 92.

pect the support system to persist throughout life, including old age. To try without warning to withdraw part of the system—pensions in particular—from this age group would create intergenerational bitterness and conflict not seen before in this country.

Yet some modification of support for the old is probable because the age group succeeding that which is now most numerous in the work force is a smaller generation. Therefore, the burden of support will bear on that group more heavily. Although our population continues to grow, the proportion of the aged in the population grows faster.[13] There is thus sporadic grumbling at what is perceived to be the privileged position of the pensioner. Unless we devise a more rational and less chaotic system for supporting the nonworking (including the aged), the grumbling will become an insistent chorus. Indeed, that clamor might be heard at a time much earlier than that conventionally predicted. Because those numerous persons born in the fifteen years after World War II will not retire in significant numbers until the next century is underway, and those born in the 1960s and 1970s who are then in the work force are from a smaller generation, the pension "crunch" is frequently viewed as a matter that will not become critical until several decades have passed.

That view might prove to be illusory. There is a real possibility that an insistent demand for reducing the pension burden will be made during this decade. Those numerous persons born in the fifteen years after World War II have not found the job market as inviting as it was to the generation born in the 1930s and early 1940s who sought jobs in the 1950s and 1960s. Being exceptionally numerous, they must compete more vigorously with one another for entry level jobs and promotion.[14] After successfull entry into the labor force, advancement seems deferred for an unreasonable length of time. Moving up the ladder to better paying jobs is the key to fulfilling expectations with respect to marriage, family, and "lifestyle."[15] If the work force does not absorb this large generation in a way that its members think to be appropriate—if they think themselves to be "relatively deprived"—they are highly unlikely to forego consumption themselves to support either the "early" retirement or the "normal" retirement of others who receive pensions that approach or exceed replacement income. Being numerous, and having the vote, their voices soon will be heard on income maintenance reform.

13. *See generally* Mayer, *The Graying of America*, NEWSWEEK, Feb. 28, 1977, at 50.
14. P. BLUMBERG, INEQUALITY IN AN AGE OF DECLINE 48-50 (1980); R. EASTERLIN, BIRTH AND FORTUNE 19-32 (1980).
15. *See generally* Kiechel, *Two-Income Families Will Reshape the Consumer Markets*, FORTUNE, Mar. 10, 1980, at 110.

The relevant question is whether pension reform (and reform of the income maintenance system of which pensions are a part) can be deferred or avoided permanently. Will work and production in the future be so different from work and production now that the "problem" of income transfers (including pension costs) will be no problem at all?

Several decades ago it was suggested that automation would significantly transform the workplace. It was assumed that many employees would be idled, that relatively effortless production would result in an abundance of goods and services for distribution, and that an income base could be provided for all with little social and political friction.[16] Technology was to provide us the key to social and political harmony. Automation did affect the workplace. It idled some employees, and it unquestionably affected production. And we do have a guaranteed income of sorts, consisting of a variety of money payments, payments in kind, and subsidies. But we do not produce goods and services in such an abundance and at such low prices that allocation is not a problem. There are reasonable differences of opinion with respect to the emergence of a classless society in the United States. There can be no reasonable differences of opinion with respect to marked disparities in income which provides access to goods and services. Those at the top of the income scale are better housed, clothed, and fed than those at the bottom. Automation has made changes, but it has not created paradise.

Furthermore, expectations change. We should not assume that what is considered a luxury by most Americans today will be considered a luxury twenty years hence. Such notions as "poverty level" and "income floor" are relative. And we should not assume that attitudes toward disparities in income will continue to be relatively tolerant. If the most numerous group within the work force finds itself precluded by sheer numbers alone from achieving the career advancement and concomitant income deemed its due, we might find the income floor complemented by an income ceiling—that is, there might be an insistence on income levelling.

In short, experience with technological change suggests that we have only an outside chance of achieving, with minimal effort, a superabundance that will provide us all with the good life. And even if superabundance based on current standards were to exist, rising expectations might transform it into abundance. The robot revolution is upon us,[17] but it is unlikely to prevent intergenerational and interclass dis-

16. *See The Guaranteed Income Proposal as Set Out in Free Men and Free Markets*, THE GUARANTEED INCOME 227-33 (R. Theobald ed. 1966).

17. *See generally* Friedrich, *The Robot Revolution*, TIME, Dec. 8, 1980, at 72.

pute over cutting the pie.

Reducing Pension Costs Through Full Employment

The most effective way to reduce the costs of support payments—including pensions—is to change the conditions that create the call for such payments. To the extent that we can both insist upon and achieve full employment, we can reduce the costs of providing "welfare," unemployment compensation, disability pensions, and old age pensions. Full employment in this context means just that—getting into the work force and keeping in the work force as many persons as feasible regardless of age, disability, race, religion, national origin, sex, or sexual preference.

Although feasible full employment accommodates the desire for early retirement where the burden of providing this option does not fall too heavily on those in the work force, it emphasizes remaining in the work force in some capacity throughout life. Feasible full employment takes account of mothers or fathers who prefer to remain with infants and small children rather than entrust them to relatives or day-care centers, but it recognizes the fact that women, including women with young children, are a permanent part of the work force and are entitled to equality with men.[18] Feasible full employment requires rethinking well-meant but sometimes pernicious efforts to raise the minimum wage. Both teenages and society might be better off if adolescents and some other readily identifiable groups in the population (such as the severely handicapped) were at work at a wage that is substantially lower than that paid to other segments of the work force. One need not invoke the work ethic to demonstrate that work even at a comparatively low wage is preferable to long periods of empty idleness.

Lack of job opportunities open to those seeking work, long layoffs of those regularly employed, and excessive amounts of "make-work" of various kinds[19] contribute heavily to the costs of support borne by those who are working. Feasible full employment therefore requires determining how to maintain a stable economy, how to maintain the economic growth that provides jobs,[20] and how to slow the growth of governmental and service employment where it has become clear that such growth is unhealthy. Full employment requires facing up to the fact that much work is, and will continue to be, distasteful to some extent. Not all who wish to do so can engage in work that they find

18. Broad, *Ending Sex Discrimination in Academia*, 208 SCIENCE 1120 (June 6, 1980).
19. *See* Gilder, *The Make-Work Economy*, HARPER'S, Nov. 1979, at 39.
20. *See generally* Bowen, *Better Prospects for Our Ailing Productivity*, FORTUNE, Dec. 3, 1979, at 68.

"meaningful." Even with the explosive growth of professional sports, not all who have prepared for and who aspire to professional sports careers can be accommodated. The number of professional historians who can practice their craft on a full-time basis is limited. A pattern of preparation for and aspiration to a particular career choice, followed by disappointed expectations, repeats itself with regrettable frequency in numerous contexts.

There are, and will continue to be, identifiable groups within the population who remain outside the work force for either an appreciable period of time or as long as life lasts. Among those outside the work force for an appreciable period of time are children, young adults in school on a full-time basis and mothers or fathers of small children who remain with their children rather than enter the work force. Some of the mentally or physically disabled are also absent from the work force for long periods, and some of the severely disabled are absent for their entire lifetimes. The very old (those in their late seventies and beyond) traditionally do not work, and even an enlightened work force is unlikely to encourage the very old to continue working. It is one thing to discourage early retirement (thus keeping those in their fifties and sixties engaged in work), but it is another to insist on work by those whose productivity might prove to be marginal at best because of advanced age and impaired agility. In sum, although we might reasonably expect to reduce the costs of support payments to some extent by insisting upon and achieving full employment, there are some groups within the population who understandably do not work in the conventional sense and who are not expected to do so because of age, engagement in other tasks, or disability.

There are even some persons who might work but do not so choose. Within this group are both those of inherited wealth who do not work and those receiving support payments who refuse to work (despite the existence of devices within the support system intended to induce work). We do not think conventionally of the nonworking wealthy as being supported by the work force, although of course some are. With the exception of the share of a deceased spouse's wealth taken by or awarded to the surviving spouse of a marriage of long duration, inherited wealth is *unearned income*. Just as a pension is realistically a claim to such goods and services provided by the work force as are available for distribution from time to time, so too wealth, whether accumulated or inherited, is a claim to resources. At any particular time, essential resources are always limited and allocated to competing claimants. In an ideal world there might be no "idle rich," on the one hand, or "welfare cheats,"[21] on the other, but we have not achieved an ideal world and we are not likely to do so. Considerable time and effort have gone into investigating and reporting on both the idle rich and welfare cheats, with no visible change in the attitudes of either. Although feasible full employment seeks to keep in the work force as many persons as can reasonably be accommodated, the costs required to bring in the recalcitrant at times unquestionably will exceed the benefits achieved, and therefore pursuit of the recalcitrant should be undertaken with skepticism.

Keeping the Work Force at Work

Both public pensions (like those payable under Social Security) and quasi-public pensions (originating in numerous plans created by business, labor, or the two in concert) are part of the income transfer (or transfer payments) system. In this system, those who are working share with those who are not, and those with higher incomes share with those of lower incomes or no incomes at all. Although some income transfers occur without the mediation of government, by far the most important income transfers occur under federal law and are bottomed on the federal income tax. Of the federal departments engaged in income transfers, the Department of Health and Human Services dispenses the most money, principally in Social Security benefits. Beneficiaries of Social Security payments include the retired and the disabled.

Because the average life span can be predicted with considerable certainty, the number of persons receiving Social Security retirement benefits from year to year can also be predicted with considerable certainty. As the number of older persons increases, the costs of providing retirement benefits likewise increases. But there being larger numbers of recipients from year to year does not in itself account for the mounting costs of providing retirement benefits. Social Security payments are "indexed"—they are tied to a variable and rise as prices rise. And from time to time additional occupations or groups have been "blanketed in" (that is, given coverage under Social Security), creating benefit costs not necessarily altogether borne by the groups added.

Disability pensions became available under Social Security in 1956. Whether a person is chronologically old is a matter of elapsed time; whether a person is disabled is a matter of opinion. Between 1965

21. In describing how Mrs. Barbara Williams collected nearly $290,000 for 30 children she did not have, Los Angeles County Deputy District Attorney Ron Wheeler said, "We don't know of a bigger welfare fraud case in the history of the country." Columbus (Ohio) Citizen-Journal, June 15, 1978, at 19, cols. 1, 2.

and 1978 the number of persons receiving disability pensions under Social Security tripled.[22]

Retirement—to say nothing of early retirement—is a comparatively new notion. Formerly, when numerous occupations were hazardous (so that accidental death was more frequent then it is now) and deadly diseases were common, the average life span was shorter. Withdrawing from the work force because of age was the exception; persons died while still employed. But as the proportion of "killing" jobs declined and control of many diseases was achieved the average life span lengthened. Prosperity and relative abundance both permitted and encouraged the creation of a new leisure class consisting of retired employees and their spouses.[23] Just fifty years ago the number of retired persons in the population was minimal. Today the retired number in the millions, supported by those who work.

It is actual retirement of a member of the work force that puts a burden on those remaining in the work force and those thereafter entering the work force. This is because a withdrawal from work usually draws in its wake support or income maintenance payments, most commonly pensions. Nonetheless, both the time at which a person *might* retire (irrespective of whether he in fact does so) and the time at which a person *must* retire (although in fact he retires at an earlier time) are of interest to those in the work force because the possibility of "early" retirement and the specter of "mandatory" (forced) retirement affect actual retirement.[24]

The normal retirement age for Social Security purposes is 65, just as it is for numerous other public and private pension plans. Social Security permits early retirement at age 62.[25] Some public and private pension plans permit early retirement at an age younger than 62, and some permit retirement after a specified number of years of service, irrespective of age, thus inviting early retirement. Further, mandatory retirement at age 70 is still lawful in most lines of work.[26] In sum, existing pension systems invite those in the work force to retire when in

22. *The Beneficent Monster*, TIME, June 12, 1978, at 24, 26-27.

23. *See Rich New Market among Nation's Elderly*, U.S. NEWS & WORLD REP., Nov. 12, 1979, at 80.

24. Provision for early retirement unquestionably has induced substantial actual retirement of some persons who otherwise would have remained in the work force. Mandatory retirement carries some social stigma. Therefore, an employee approaching mandatory retirement might quit before he is "forced out."

25. A majority of those retiring under Social Security now retire at age 62 rather than at age 65. STAFF OF JOINT ECONOMIC COMMITTEE, 96th CONG., 2d SESS. SOCIAL SECURITY AND PENSIONS: PROGRAMS OF EQUITY AND SECURITY 21 (Comm. Print Oct. 1980). In 1950 about 80 percent of men in the age bracket 60-64 were in the work force. In 1979 the percentage had fallen to about 62 per cent. *Id.* at 20.

26. Congress in 1978 raised the legal mandatory retirement age for most working Americans from 65 to 70. 29 U.S.C.A. § 631 (Supp. 1980), *amending* 29 U.S.C. § 631 (1975).

their sixties, if not before, and require retirement of those entering their seventies.

Pension costs can be reduced by raising the normal retirement age (when a full pension becomes payable) and by deemphasizing early retirement (when a pension often sufficient to induce retirement is payable). We can reduce pension costs, release funds for investment, and add to the gross national product simply by keeping the work force at work.

Raising the Normal Retirement Age

It has been suggested that raising the "normal" retirement age under Social Security from 65 to (say) 70 must be deferred until the end of this century because raising the age before that time breaks the "social contract" that sustains the system.[27] The notion is that a change of this particular kind can never be made because such a change would be unfair to those expecting to retire at 65.

There are several observations that should be made with respect to the social contract. First, and perhaps most significantly, the burden of this compact is borne in part by persons who were either unborn when the compact was made or who had little significant voice in setting its terms. Although persons in their sixties, seventies, and eighties who are drawing Social Security benefits were alive when the Social Security system was adopted, persons in their twenties and thirties who must bear part of the costs were not. It is one thing to be born advantaged by a social contract that puts a high premium on freedom of speech. It is quite another to be born deprived in advance of a significant part of earned income to provide for one's predecessors.

Second, if we assume a social contract, might we not inquire into what the original contract encompassed? At its inception Social Security was intended to provide a retirement income *base*; it was not intended to provide replacement income, as that term is now generally understood. Replacement income was visualized (somewhat unrealistically) as originating in part in private savings and investments and in private pension plans. Nonetheless, for many aged persons Social Security income has been, and still is, virtually the sole source of retirement income. That being so, there has been, and will continue to be, effective political pressure brought to bear to make Social Security retirement income an earned income replacement. Furthermore, Medicare, which for many retired persons is just as important as the Social Security retirement component, was added to Social Security three de-

27. An Interim Report, President's Commission on Pension Policy 46 (May 1980); *Id.* at 47-48 (Nov. 1980).

cades after its inception. This has added enormous costs to the public support system.

Third, if we assume both a social contract and the general desirability of fulfilling that contract, we must then consider the weight of the burden that the work force can reasonably be expected to bear, and having done so, we must take account of what in all probability will occur. The inevitable conclusion is that the work force reasonably can be expected to forego some consumption to provide for those in the population who cannot reasonably be expected to support themselves. But to think that the work force will support in relative comfort comparatively large numbers of persons capable of supporting themselves is to dream. Human nature being what it is, the social contract in its present wasteful form will be broken.

Is it feasible to keep the old at work? Will keeping them at work frustrate the young seeking entry into the work force and promotion after employment? Will keeping the old at work merely exacerbate the problem of unemployment?

Within every age group there are variations in health. Persons between the ages of 50 and 75 are less likely to be healthy than persons between the ages of 20 and 45, but even so, there are many over 50 in good health, capable of working and willing to work. Although those in their seventies are less likely to be in good health than those in their fifties, there are many persons in their seventies in good health, capable of working and willing to work. Some possess extraordinary skills. Not all are wise, but some have the wisdom that is acquired from long experience. It is in the best interests of neither the work force nor the individual forced from work to allow such skills and wisdom to lie unused.

Whether members of the work force should be encouraged to retire early, on the one hand, or forced to retire (irrespective of age), on the other, ought to be decided on the basis of a number of factors of which age is only one.[28] For example, in some lines of work, although the number of positions available fluctuates from time to time, the number is always limited. Because the number of positions to be filled from year to year cannot be predicted with certainty, entry into and exit from the occupational group cannot be regulated so as to assure work to all of those who are prepared to take it in a given year. In that event it might be in the public interest both to *require* retirement of those who have already experienced a long and fulfilling career, and to *encourage*

28. Costa & Mc Crae, *Functional Age: A Conceptual and Empirical Critique*, in SECOND CONFERENCE ON THE EPIDEMIOLOGY OF AGING 23, 44-45 (U.S. Department of Health and Human Services Publication No. (NIH) 80-969, July 1980).

early retirement of sufficient numbers of others in the occupational group to make way for the new entrants. Adjustments of this kind are not easy to make, but it is arguably better to think through the possibility of such adjustment in advance, and to try to set fair standards for entry into and exit from an occupational group, rather than have such adjustments made on an *ad hoc* basis. This would avoid arbitrariness and resulting ill-will.

Another factor that should be considered in fixing retirement principles is the feasibility of the retiree's continuing to work on a part-time basis or undertaking a second (or third) career, on either a full-time or a part-time basis. Although vigor declines with age, the decline is usually gradual, not precipitous. There is nothing about either the human body, despite the physiology of aging, or the nature of work in America that makes retirement an all-or-nothing proposition. Just as it is in the public interest that the young and the severely handicapped be employed at a wage somewhat lower than that earned by more mature or able-bodied employees, so too is it in the public interest to structure public and private pension plans in such a way that persons who can work continue to do so, even if the work is part-time or the wage lower than that previously earned.

One of the ways in which the old can continue to work full-time or part-time beyond a "normal" retirement age is to spend a substantial amount of the work day teaching the young or the inexperienced. In nearly all lines of work various skills are acquired on the job, and nowhere else. Experienced employees can assist the inexperienced in acquiring needed skills more quickly. Thus, older employees to whom teaching is congenial can remain productive themselves and can improve productivity generally by remaining on the job in a teaching capacity. Similarly, many who have taught throughout life prefer to teach as long as they are permitted to do so. As vigor declines, they might be encouraged not to retire, but to continue to teach part-time, with adjustments in pension payments made to reflect the principle that post-retirement income not exceed pre-retirement income. Once we view the entire support or income maintenance system, including pensions, as principally directed toward affording *replacement* income, we can adjust pension payments in individual cases in accordance with that objective.

Some occupations are so taxing physically or mentally (or both) that they do not lend themselves to pursuit throughout a working lifetime on a full-time basis. These afford limited teaching possibilities. For example, even with advanced technology and improved mechanical equipment, much construction work is exceptionally demanding, giving the edge to younger, stronger, and more vigorous employees. In such lines of work, keeping persons in the work force requires periodic shifting of employees to less strenuous tasks within an occupation, if feasible, or assisting them to shift to less strenuous work in some other vocation. In this connection we need to develop and use a national "job opportunity" network. In what is touted as the computer age, it is a scandal that persons seeking work and employers seeking employees so frequently are brought together in an unsystematic and inefficient way.[29]

Changing jobs requires a willingness by employers to accept qualified applicants for work, irrespective of age, and changing jobs often requires job retraining. American experience in both matters leaves much to be desired. Despite legal prohibitions against discrimination in employment based on age, such discrimination persists in part because unlawful discrimination is difficult to prove. Job retraining for the old and their reentry into the work force traditionally have been regarded as difficulties to be overcome by individuals rather than as economic or social problems. To the extent that achieving feasible full employment depends upon job retraining and reentry into the work force, progress is likely to be slow.

Keeping persons at work, irrespective of age, in a preferred career choice as long as possible, shifting some in the work force from demanding work to less demanding tasks as middle age sets in, adapting the work place to part-time employment, and retraining where required, all presuppose the substantially good health of those encouraged to remain at work. Although Americans support the most expensive health care system in the world, we are not as healthy as we might be.[30] Poor health is said to force eight times as many men from employment as does mandatory retirement.[31] To some extent poor health is a consequence of alcohol, tobacco, and drug abuse. Poor health is sometimes attributable to chance (including genetic chance). If we are to keep persons at work as long as possible, a higher degree of success in coping with the infirmities associated with aging is essential. As a matter of immediate administrative convenience (and as an accommodation to those who wish to cease work) it is sometimes easier to certify an ailing person as disabled then it is to puzzle out the cause of an infirmity. The dramatic increase in the number of those receiving disability pensions under Social Security attests to the generosity built

29. R. Bolles, What Color Is Your Parachute 9-11 (rev. ed. 1980).
30. *See generally* Health United States 1980, at 271-83 (U.S. Department of Health and Human Services Publication No. (PHS) 81-1232, Dec. 1980).
31. Halloran, *Social Security Needs Long-Term Policy Changes*, OSU On Campus, Oct. 30, 1980, p. 5, col. 1.

into the definition of disability and to the discretion given to those assessing state of health.

To get persons into the work force and keep them there as long as possible, a healthy population is crucial. During the past half century medicine has made great strides, but health care in the United States understandably is still directed largely to treatment of disease[32] and to sustaining the disabled, not rehabilitating them. Physician training stresses treatment, and health facilities are most often places for treatment. To a considerable degree this state of affairs is inevitable—we cannot sensibly assume that if we tripled the number of gymnasiums and running tracks we would have a responsive reduction in the number of hospitals. Improving the health of Americans over the life span will take time, and we cannot postulate success in improving health to such an extent that substantially all in the work force will remain capable of working until death. The evidence runs to the contrary.

Deemphasizing Early Retirement

Persons who need not be drawing income maintenance benefits such as "welfare," unemployment benefits, disability pensions or retirement pensions add unnecessarily to the burden of income maintenance costs. To the extent that we can get people of working age into the work force and keep them there during their working lives, we can reduce income maintenance costs. In recent years, however, the minimum wage (which tends to curtail entry into the work force) has steadily risen and early retirement (which tends to remove an employee from work well before the end of his or her working life) has been encouraged under both public and private pension plans. Mandatory retirement forces many from the work force who are unquestionably capable of work. And "disability" looms as never before as a drain on income maintenance funds. Pension costs are enhanced by the tendency to retire early, by forcing productive employees out of the work force solely on the basis of age, and by granting disability pensions indiscriminately. Early retirement, mandatory retirement, and disability adjudication and compensation need re-examination. Costs are out of hand now. We cannot wait until the year 2000 to bring them under control.

If we are serious about reducing pension costs, we must abandon early retirement as a preference, cease to encourage it, and regard it as exceptional. We can change attitudes toward early retirement in a

32. Stevens, *Social Values Changed Medical System*, Columbus (Ohio) Dispatch, March 15, 1981, § D, at 2, cols. 1-6.

number of ways. One way to make early retirement less attractive is to make work more tolerable. Much work is and will continue to be hard, demanding and distasteful. It does not follow that we cannot improve working conditions. Our rush to get work done need not always preclude considering how it is done. Although democratizing the work place is suggested from time to time as a means of making work more attractive,[33] working conditions can be improved by methods short of proliferating committees. For example, "flex-time" (varying the time of arrival at and departure from work) can be remarkably helpful to the employee who is the parent (frequently the single parent) of infants or children of school age. We can vary the length of the work day and work week. The half-time employee is seldom accorded the same status as the full-time employee, regardless of his or her relative productivity. Just as age 65 is not immutable as the age of normal retirement, so too the eight-to-five day, the eight hour day, and the five day work week are not immutable for purposes of work.

Similarly, we can make early retirement less attractive by trying to provide alternative lines of work to those who have worked long under trying conditions and "want out." We conventionally think of manual laborers as particularly afflicted by poor working conditions, but numerous lines of work are difficult and enervating. If employees long at work under trying circumstances can be directed to more attractive work rather than to subsidized idleness, both they and the rest of the work force are better off. (Instead of promising the novice fireman a pension after twenty years of service, why not offer him training for alternative employment?)

Probably the most effective way to discourage early retirement is to make it less attractive economically. If benefits payable on early retirement substantially approximate benefits payable at normal retirement age, those in the work force marginally motivated to work choose early retirement. The situation here is almost identical to that encountered when unemployment benefits approximate earned income—there is little incentive to work.[34] If we wish to reduce pension costs, we must face up to the price paid by having transformed early retirement into normal retirement.

Undesirable Side Effects?

If early retirement were not encouraged, and mandatory retire-

33. M. CARNOY & D. SHEARER, ECONOMIC DEMOCRACY 170-81 (1980).
34. *See generally R. Munts & I. Garfinkel*, THE WORK DISINCENTIVE EFFECTS OF UNEMPLOYMENT INSURANCE 55-59 (1974); REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL, UNEMPLOYMENT INSURANCE—INEQUITIES AND WORK DISINCENTIVES IN THE CURRENT SYSTEM i-iv (Aug. 28, 1979).

ment were severely restricted, it is possible that some in the work force who would otherwise have retired will remain in the work force simply to draw their pay, continuing as unproductive employees. Mandatory retirement frequently is defended on the ground that it impersonally requires withdrawal from the work force of some who are no longer efficient.

If legal devices that remove older employees from the work force are modified to encourage them to continue working as long as is feasible, it is indeed true that a consequence may be that inefficient employees will remain on the job in significant numbers. Because mandatory retirement has been the norm for a long time in many occupations, we have some knowledge of the effects of compulsory withdrawal from the work force. Raising the age of mandatory retirement, and eliminating it altogether with respect to some lines of work, are recent phenomena. Therefore, we cannot predict with assurance what results will follow. Nonetheless, this can be said: There are in all lines of work employees who are inefficient, irrespective of age. Aging can, and no doubt does, affect productivity but is only one of a number of factors. At some time, of course, age becomes the sole factor. Although it might be that encouraging older employees to remain on the job will result in significant numbers of older employees who are mere "hangers-on" in the work force, we do not know that such a consequence will ensue, and if it were to occur, it would not be a unique state of affairs. Like many other labor problems, it would have to be dealt with on a case by case basis.

Neither the unemployed nor the retired are in the work force, yet both groups are supported by the work force. The fewer the number of persons in each group, the lighter the burden on the work force. If the aging and the old remain at work, the number of unemployed might temporarily rise because job openings attributable to retirement will be deferred for a time. In that event, the work force will not be advantaged because reduced pension costs will be offset by increased unemployment costs.

This consequence is possible and perhaps more probable than not. But it is not inevitable. First, measures to keep the work force at work can be phased in gradually. Second, an undesirably high rate of unemployment has been with us for some time.[35] Governmental attempts at job training and job creation have had mixed results.[36] We are about to turn to the private sector to increase capital expenditures, reduce

35. Byron, *The Idle Army of Unemployed*, TIME, Aug. 11, 1980, at 44, 45.
36. Ginsburg, *Manpower Policy: Retrospect and Prospect*, in THE BUSINESS CYCLE AND PUBLIC POLICY 1929-80, at 299, 309 (Joint Economic Comm. Print 1980).

unemployment, and improve productivity. If this effort proves to be successful, keeping the aging at work will result in a net gain. If it does not, we shall be none the worse for having attempted lifelong employment of the able.

REDUCING PENSION COSTS THROUGH COORDINATING BENEFITS (OFFSETTING)

"Double-dipping"—drawing disability or retirement benefits from more than one source,[37] often tax-supported sources—is usually explicitly or implicitly characterized as antisocial. Pensioners not so fortunate as to draw from more than one source regard the practice as "unfair." Taxpayers think that the practice borders on fraud.

Whether double-dipping is inequitable turns on our perceptions of the principal objectives of the support or income maintenance system in the United States, including disability and retirement pensions. One objective of the income maintenance system supported by the work force is to provide the unemployed, injured, disabled or retired employee with *replacement* income—an income that approximates earned income, but does not exceed earned income as adjusted for inflation.[38] A familiar axiom of insurance law is that a contract of insurance (other than life) is a contract of indemnity. The insured is to be compensated for loss, but not *over*-compensated. The income maintenance system is a system of social insurance. A participant in the system is entitled to replacement income, but no more than that.

It follows that in some cases double-dipping is not inequitable because the total amount of income received from multiple income maintenance sources does not exceed earned income. Indeed, in some instances income received by a disabled or retired employee would fall short of adequate income in the absence of double-dipping. For example, it is not remarkable for a married woman to have worked part-time during her twenties and thirties at employment where she was "covered" by Social Security. At age forty-five she finds herself widowed and not eligible for Social Security benefits based on either her own work record or that of her deceased spouse. Forced into the work force on a full-time basis at a time when she is likely to be discriminated

37. A retired United States Department of Commerce analyst reportedly was drawing an $18,000 pension while earning $25,000 from a private employer. He was quoted as saying, "I've got more money now than I ever had in my life. I figure on working at least until I'm 62. Then I'll have social security as well as a small pension from my company." Pauly & Joyce, *Poor No More*, NEWSWEEK, March 22, 1976, at 68, 70.

38. About 40 per cent of retired state and local government employees covered by both state or local pension plans and by Social Security receive total retirement benefits of 100 per cent to 125 per cent of pre-retirement earnings. S. ROSS, *supra* note 7, at 64.

against because of age, to say nothing of sex,[39] she takes employment at a relatively low wage with a municipality offering a pension plan that pays modest retirement benefits. If she leaves the work force either voluntarily or involuntarily in her sixties, and draws both her municipal pension and Social Security benefits based either on her own work record or that of her deceased spouse, it is unlikely that her total income will exceed earned income. Where total income from multiple pension sources does not exceed earned income, as in this kind of case, double-dipping cannot rationally be viewed as inequitable.

Some General Considerations

Double-dipping that results in disability or retirement income exceeding earned income invites setting a ceiling on disability or retirement benefits and creating controls to assure that the ceiling is not exceeded. Generally speaking, there has been no clear articulation of a ceiling on disability or retirement income, and existing controls have taken the form of "offsets"—a dollar-for-dollar reduction in one kind of tax-supported benefit to the extent that a similar benefit originates in a comparable tax-supported source. Denying or reducing income maintenance benefits because the applicant for, or beneficiary of, such benefits has other sources of income is an old and pervasive device for controlling costs. A familiar example of the device is the much deplored "means" test for determining eligibility for welfare benefits. From time to time abolition of the means test is urged because inquiry into the financial resources of an applicant is deemed to be degrading. Whatever it is called, the means test is unlikely to disappear. If we can require those seeking public office to make full disclosure of means as a condition of public employment paid for by taxpayers,[40] *a fortiori* we can require full disclose of means by those seeking disability or retirement income provided by the work force. It is not disclosure that is demeaning. It is the scope and the method of disclosure that bring disclosure into disrepute. From the fact that disclosure of income sources causes difficulties it does not follow that we can abandon disclosure. We simply cannot afford to do so.

A ceiling on disability or retirement income should originate both from what a beneficiary's earned income was and from an assessment of what the work force can afford to provide willingly to nonworking segments of the population. Using earned income as a ceiling on disa-

39. REPORT BY WORKING WOMEN, NATIONAL ASSOCIATION OF OFFICE WORKERS, VANISHED DREAMS: AGE DISCRIMINATION AND THE OLDER WOMAN WORKER 6-14 (Aug. 1980).

40. The Ethics in Government Act of 1978, Pub. L. 95-521, (Oct. 26, 1978) requires key federal governmental personnel to make public disclosures of their personal finances. The Act is intended to reveal possible conflicts of interest.

bility or retirement income implicitly assumes that earned income is sufficient to provide an adequate standard of living. Clearly that is not always the case. When earned income does not provide an adequate standard of living, it is pointless to consider using earned income as a ceiling on disability or retirement income because the pensioner likely was a beneficiary of the income maintenance system while in the work force. In short, we are not dealing with the troublesome kinds of cases where benefit formulas or double-dipping or indexing produces disproportionate disability or retirement incomes that provoke resentment among those still working.

Similarly, when determining whether disability or retirement income can equal rather than exceed earned income, we should recognize the desirability of differentiating kinds of cases to the extent that differentiation is administratively feasible. For example, we might sensibly view a disabled husband and father in his mid-thirties as having income maintenance requirements that are different from those of the retired couple in their seventies.

In sum, because disability or retirement income is replacement income, it should not ordinarily exceed earned income, and coordination of benefits should be used to assure that it does not. However, if earned income fails to provide an adequate standard of living, it is an inappropriate ceiling on disability or retirement income. And if income maintenance requirements are significantly different after disability or retirement than they are before disability or retirement, earned income is a relevant factor in fixing the support payment, but it should not be decisive.

Setting a ceiling on disability or retirement income and refining controls for assuring that the ceiling is not exceeded will assist in controlling pension costs. Eliminating inequitable double-dipping will not reduce pension costs in the dramatic way that achieving feasible full employment will reduce costs, but the savings will nonetheless be significant and public perception of the income maintenance system will be improved.

Multiple Sources

It is not always an easy task to determine which pension systems or plans fall within those multiple income maintenance sources that are, or might become, subject to controls for achieving equitable replacement income. Candidates mentioned with some frequency include federal civil service pensions, military pensions, veterans' pensions, state and municipal civil service pensions, and Social Security. All have the common characteristic of being sponsored by government. Private pensions are not sponsored by government directly, but their creation is attributable in part to federal income tax deduction, exclusion, deferral and exemption devices, and nearly all are subject to federal regulation. Proliferation of private pensions is attributable in part to a United States Court of Appeals decision.[41] Often accumulated private pension funds ostensibly are created solely by employers, but the actual costs of creating such funds are borne by employees, stockholders and purchasers of goods. When private pension plans falling under ERISA fail, the costs of failure are borne by successful plans through the medium of the Pension Benefit Guaranty Corporation. Private pensions, then, are a part of the income transfer system by which those who are working share with those who are not, and those receiving higher incomes share with those of lower incomes or no income. They are at least quasi-public in nature, and although they can be and are differentiated from public pensions, private pensions and public pensions have more common than divergent characteristics. Resistance to including private pensions within the array of multiple income maintenance sources subject to controls in undoubtedly great, but they cannot rationally be excluded, and it is unlikely that a work force perceiving itself as unduly burdened by pension costs will permit exclusion.

Creating Offsets

"Coordination of benefits" and "offsets" (or "setoffs") are well established techniques for controlling pension costs. As pressures for reducing costs intensify, they will be used more frequently. The task ahead is to use them fairly. How should we go about constructing offsets that work fairly?

Where a beneficiary of the income maintenance system is entitled to benefits from more than one source, the inclination of each source is to reduce its own payment to the extent that benefits are payable from other sources. For example, if *A* is entitled to retirement benefits from both public source *X* and public source *Y*, public source *X* might reduce its benefits payable to *A* to the extent that *A* is entitled to benefits payable by public source *Y*. As indicated above, such reduction of benefits will deprive *A* of adequate income if total income from sources *X* and *Y*, absent offsetting, will not exceed earned income. Furthermore, if both source *X* and source *Y* insist upon offsetting to the extent that *A* is entitled to benefits from the other source, offsetting more than reduces benefits—it altogether eliminates them.

If earned income was sufficient to provide an adequate standard of

41. Pensions are a mandatory subject of collective bargaining under Inland Steel Co. v. NLRB, 170 F.2d 247, 251 (7th Cir. 1948), *cert. den.*, 336 U.S. 960 (1949).

living (so that earned income can be used as a ceiling on disability or retirement income), and *A* is entitled to disability or retirement benefits from multiple sources that cumulatively exceed earned income (so that offsetting is appropriate), the multiple sources of benefits might provide replacement income in proportion to the present values of the benefits payable from each source when benefit payments from multiple sources begin. For example, if *A* draws a military (unfunded) pension, retires from a second career and is entitled to a municipal (unfunded) pension, the respective sources of *A*'s two unfunded pensions will bear the expense of *A*'s total benefits (not exceeding replacement income) in proportion to the present values of the benefits payable from each source when *A* retires for the second time.

Circumstances calling for the use of offsets are frequently much more complicated than those of the foregoing example. Therefore, creating a system of offsets that works fairly and is administratively feasible will be difficult and time consuming. The nature of offsetting inevitably encourages dispute and litigation. The history of the income maintenance system precludes the ready creation of offsetting formulas. Although most of the elements of the income maintenance system are new, some are old. The retirement and disability pension system is part public and part quasi-public ("private"). Some pension funds originate solely in employer contributions, and others originate in part in employee contributions. Some pension plans are unfunded. Some pension plans pay a fixed annuity to a beneficiary, and others pay a variable annuity. Private pension plans frequently require offsetting by "integration" of plan benefits with Social Security benefits,[42] but the offsetting that is anticipated by a pension plan does not exhaust all possibilities for offsetting.

Furthermore, perceptions of the elements in the income maintenance system vary from group to group and change over time. There are those receiving benefits from the system and those still in the work force. There is a large group of persons engaged in "servicing" the system: bankers, insurers, investment counselors, lawyers, accountants, actuaries, social workers, computer experts, investigators, and a great army of clerks. Those receiving benefits perceive them not as gratuities, but as an entitlement received as a matter of right. Those in the work force are ambivalent. When the need for benefits is non-existent or remote, benefits frequently are perceived as gratuities provided by the work force. When earned income ceases because of lay-off, disabil-

42. Deducting ("offsetting") Social Security retirement benefits from the benefits that would otherwise be payable under a private pension plan is the simplest means of "integrating" benefits payable under the plan with benefits payable under Social Security.

ity or retirement, perceptions of benefits change. Finally, those servicing the income maintenance system view the system as providing employment, and indeed in this part of the twentieth century the income maintenance system is an industry.

A benefit component of the income maintenance system (including a pension plan) of any appreciable age probably has acquired characteristics described by such words as "reward," "entitlement," "compensation," "vested," "nonforfeitable" and "inalienable." There is no right less susceptible to diminution than the indefeasibly vested right, and deprivation of a "reward" invokes emotions that often have no connection with facts from the distant past. It follows that creating offsets is acrimonious.[43] Participants and beneficiaries who are organized

43. For example, the question of whether the nonforfeitability provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1053(a) (1975), prohibit the reduction of pension retirement benefits by the amount that a pensioner receives in workers' compensation insurance benefits is a current issue presenting the difficult burden of statutory interpretation of ERISA in conjunction with various Treasury Regulations and Revenue Rulings.

ERISA § 203(a)(2)(A), 29 U.S.C. § 1053 (a) provides:

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition . . . an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

The requirement of nonforfeitability is one of the essential elements of ERISA's pension reform plan. However, Treasury Regulations recognize the validity of offsets for benefits provided under federal or state law as long as the benefit offsets are part of an integrated and correlated retirement system. One regulation provides:

> Furthermore, nonforfeitable rights are not considered to be forfeitable by reason of the fact that they may be reduced to take into account benefits which are provided under the Social Security Act or under any other Federal or State law and which are taken into account in determining plan benefits.

26 C.F.R. § 1.411(a)-4(a) (1980).

The above Treasury Regulation is a legislative rule, *see* Baker v. Otis Elevator Co., 609 F.2d 686, 691 (3d Cir. 1979), and thus must be given the same deference by the courts as a valid statute. It is binding on the courts unless its promulgation is an abuse of discretion, is either arbitrary or capricious, or is contrary to the governing statutory section and ERISA as a whole. *Id.* at 692.

Integration offsets are implicitly permitted by section 1021(e) of ERISA, 26 U.S.C. § 401(a)(15) (1976). This section provides: "[A] trust shall not constitute a qualified trust under this section unless under the plan of which such trust is a part . . . such benefits are not *decreased* by reason of any *increase* in the benefit levels payable under title II of the Social Security Act . . . . (Emphasis added.)"

The Treasury Department has issued revenue rulings stating that workers' compensation benefits qualify as part of an integrated and correlated retirement system. This conclusion, however, has been held to be at odds with the statutory language of ERISA and with its legislative history under the standard of review that all Treasury interpretations, legislative or otherwise, must be set aside if the Secretary has exceeded his statutory authority or if the interpretation is not in accordance with the law. *See, e.g.*, Utility Workers Union v. Consumers Power Co., 637 F.2d 1082, 1089 (6th Cir. 1981); Buczynski v. General Motors Corp., 456 F. Supp. 867, 870-71 (D.N.J.), *aff'd on reconsideration*, 464 F. Supp. 133, 138 (D.N.J. 1978); Alessi v. Raybestos-Manhattan, Inc., Civil No. 78-0434 (D.N.J. 1979). Both held that workers' compensation offsets constitute forfeitures under ERISA. However, these two cases were recently reversed by the United States Court of Appeals for the Third Circuit in Buczynski v. General Motors Corp., 616 F.2d 1238, 1239-40 (3d Cir. 1980), *cert. granted*, 101 Sup. Ct. 352 (1981). The Third Circuit gave great deference to the Treasury Regulation as a legislative rule. 616 F.2d at 1243. In Employee Benefits Committee v. Pascoe, 504 F. Supp. 958 (D. Hawaii 1980), the court followed the reasoning of the Sixth Circuit in Utility Workers Union v. Consumers Power Co., 637 F.2d 1086 (6th Cir. 1981), and not the Third Circuit's conclusion in *Buczynski* in holding that "the compensatory nature of workers' compensation benefits and the clear policy to prohibit forfeitures except in certain specified instances" lead will resist any procedure that reduces benefits, and organizations have political clout. Individual beneficiaries adversely affected by offsets will seek legal redress for loss of income, further burdening crowded court dockets. Nonetheless, if pension costs are to be manageable, offsets must be used with increasing frequency. If created carefully, they will withstand testing, for even the United States Supreme Court cannot be indifferent forever to the intolerable burden of runaway pension costs.

REDUCING PENSION COSTS THROUGH INDEXING

Although "indexing"—the raising or lowering of disability or retirement benefits in accordance with some variable—is associated with inflation, adjustment of benefits occurs in the absence of inflation because perceptions of what constitutes an adequate income, or an adequate standard of living, change with time. For example, a pension plan providing benefits based on average income during years of service might "index" earned income during the earlier years of service (when income is usually lower) to yield an average that more nearly approximates earned income during the years immediately preceding retirement (when income is usually higher). Or a number of years of service at lower income might be ignored altogether in calculating the average, another means of achieving an average more nearly approximating earned income during the last years in the work force. Because the value of the American dollar has steadily declined since World War II, adjustments of this kind are related to inflation. But they also reflect an understandable desire not to require those who have participated in a general rise in the standard of living to forego altogether their more comfortable status on leaving the work force.[44] Irrespective of whether we characterize the re-writing of a prospective pensioner's work history through "indexing" or "adjustment," this kind of modification will continue. Only reluctantly will we concede that our standard of living is falling.

It is not getting the pensioner off to a "good start" through indexing that gives pause. It is giving him what is perceived to be an unfair

to the conclusion that offsets for workers' compensation benefits are forfeitures under ERISA. 504 F. Supp. at 969.

On May 18, 1981, in Alessi v. Raybestos-Manhattan, Inc., and Buczynski v. General Motors Corp., Nos. 79-1943 and 80-193, 49 U.S.L.W. 4503, 4505 (May 19, 1981), the Supreme Court held that Congress contemplated and approved pension plan provisions providing for offsetting of workers' compensation insurance benefits against pension retirement benefits, and that such offsetting is not a violation of the nonforfeitability provisions of ERISA.

44. On Congressional efforts to keep Social Security up-to-date, *see generally* Martin, *The Art of Decoupling: Keeping Social Security's Promise Up-to-Date*, 65 CORNELL L. REV. 748-800 (1980).

advantage thereafter that raises hackles. In this connection, criticism is directed at using the Consumer Price Index for raising retirement benefits.[45] Constructing the Consumer Price Index includes factoring expenses not typically borne by retirees, such as home mortgage payments. Some think that in any event the Consumer Price Index overstates the rise in the cost of living. To the extent that using an inappropriate index for varying pension payments results in increased benefits that are disproportionate to the rise in prices encountered by pensioners, pensioners with respect to their *pensions* (as differentiated from their *savings*) seem advantaged by inflation. And where prices rise faster than wages, using an index based on prices makes those in the work force bear a greater inflationary burden than do pensioners.

We should, then, differentiate between adjustments intended to assure to a pensioner replacement income that approximates earned income when disability occurs or retirement begins, and adjustments intended to assure that the purchasing power of replacement income remains stable. The former are directed to creating replacement income sufficient to maintain a standard of living comparable to that existing when disability occurs or retirement begins. The latter are directed to maintaining that standard, and indeed raising it, where productivity gains result in a general rise in the standard of living.

Adjustments will always be with us. For example, as our income maintenance system matures, if we refuse to pay "minimum" pensions from one or more sources we should do so as a matter of coordinating benefits from multiple pension sources, not because we have ceased to provide an income floor that approximates earned income as closely as possible. The difficulties associated with inflation can best be alleviated by ending inflation,[46] but we are not likely to end inflation quickly, if at all. That being so, we should insist on the use of adjustments appropriate to the task at hand.[47] The index used to vary pensions for the elderly might sensibly be constructed from elements different from those used to construct an index used to vary disability pensions for those in their thirties and forties. Pensioners in their thirties and forties are more likely than the elderly to be burdened with family responsibilities, including mortgages and child education costs. They are more likely than the elderly to be heavily in debt when disability strikes. The elderly are more likely to encounter heavy hospital and medical expenses,

45. Fritz, *Is Consumer Price Index "Loaded"?* U.S. NEWS & WORLD REP., Feb. 4, 1980, at 86.

46. Sloan & Miles, *Inflation Indexing—A Hair of the Dog*, FORBES, Jan. 5, 1981, at 37, 39, 42.

47. It has been suggested that a price index rather than a wage index be used to calculate initial benefits payable on retirement under Social Security. Ehrbar, *How to Save Social Security*, FORTUNE, Aug. 25, 1980, at 34, 37. *See generally* Kahn & Leveson, *How Not to Index the Economy*, FORTUNE, Nov. 17, 1980, at 60.

and are less likely to be burdened by transportation costs. In sum, the replacement income needs of the elderly can be differentiated from the replacement income needs of those in their middle years. Indexing should thus take account of that fact if the savings effected by differentiation exceeds the costs of constructing and using different indices.

CONCLUSION: THE PROSPECTS FOR SUCCESS

If we raise the normal retirement age and reduce incentives to retire early, and if we restructure work to accommodate the handicapped and the old, can we bring into the work force some who are now dependent on the work force? Or should we assume, rather, that the advantage to be gained through such changes will originate with those already at work and those newly entering the work force thereafter? If employees in their late forties or early fifties who are approaching or have reached the age of early retirement can be persuaded to remain in the work force, there should be little difficulty in keeping them at work. Frequently they are then at their very best: still enthusiastic, vigorous and experienced. More importantly, they are presently employed and need not seek work.

Similarly, if an employee becomes disabled, we might be successful in keeping him or her at work if we grant disability benefits sparingly and view departure from the work force as a last resort. In the short run it might indeed be attractive to "pay off" the disabled rather than to rehabilitate and perhaps retrain them. But when we consider the average length of life, we cannot consider just the short run. Rehabilitation might indeed be impossible, and if so, that ends consideration of alternatives. Where alternatives are realistic, we should try to keep the employee at work. The disabled who are already outside the work force can be brought into the work force only with difficulty. The rate of unemployment in the United States is high, and it is high even conceding that counting some as "unemployed" is questionable. There are many able-bodied persons seeking full-time work and not finding it. If the able-bodied have difficulty finding employment, many of the handicapped find it impossible to find employment. This is true even when the handicapped are capable of performing some kinds of work though not all.[48]

Likewise, the retired already outside the work force are not likely to be brought back into the work force in appreciable numbers. Just as there is discrimination against the handicapped in hiring, there is discrimination against the elderly in hiring, and the discrimination in hir-

48. Davidson, *For Disabled, Jobs Few—but Many Make It*, U.S. NEWS & WORLD REP., Sept. 8, 1980, at 45.

ing exists even with respect to those in their forties and fifties who do not view themselves as old.[49] Legislation directed toward ending employment discrimination against the handicapped and the elderly has had little impact on hiring practices, and that state of affairs is likely to persist.

Furthermore, some pension systems are structured to discourage a pensioner from competing with those in the work force for earned income. Receipt of *unearned* income (interest, dividends) by a beneficiary of Social Security retirement benefits does not affect benefit levels, but receipt of earned income can. Similarly, a pensioner may find that returning to work for the employer sponsoring the pension plan from which he draws retirement benefits results in a suspension or reduction of benefits as long as he receives earned income. Where benefits payable under pension plans are suspended or reduced by earned income, pension costs are reduced on re-entry of a pensioner into the work force. The probability of re-entry, however, is low.

By way of contrast, some pension systems are structured to encourage a pensioner to remain in the work force, but his remaining in the work force will not reduce pension costs. For example, a firefighter retiring at age 50 after thirty years of service simultaneously might draw a firefighter's pension and receive earned income from a new job. The great variety in pension systems precludes assuming that keeping persons in the work force or returning them to the work force will automatically reduce pension costs.

We can reduce pension costs by systematically structuring conditions of employment, including disability and retirement benefits, in such a way as to keep those already in the work force at work. Although we can try to reduce costs by bringing at least some of the retired and the disabled into the work force, our optimism on this prospect should be tempered by knowledge of the features of existing pension systems, and by experience. Some of the disabled have never been in the work force. Some of the retired are completely satisfied with their situation and would re-enter the work force only reluctantly. If some of the disabled and retired are nonetheless willing to seek employment, jobs are not plentiful and discrimination persists. Reducing pension costs through feasible full employment principally depends simply on keeping the employed at work.

Coordinating benefits to assure that replacement income does not exceed earned income is a cost reduction device that is already a part of the income maintenance system. Coordinating benefits is not used,

49. *Discrimination Begins at 40*, TIME, Feb. 2, 1981, at 81.

however, in all circumstances where it might be, and offsets encounter stiff resistance wherever efforts are made to introduce them. This state of affairs will persist, and progress in creating acceptable offsets will be slow. Progress can be hastened through increasing both public awareness of the pervasive and costly nature of the income maintenance system and awareness by the work force of the burden of support. Resistance to introduction of offsets can be softened by clear, firm assurances that devices used to limit replacement income will not be used to reduce replacement income to a point that it proves inadequate for providing the recipient with a decent standard of living.

Although neither the disabled nor the retired should bear a disproportionate share of the ill effects of inflation, indexing their benefits to assure to them stable purchasing power should not result in their being advantaged at the expense of those still in the work force. Indexing is distasteful at best. It is relatively new to Americans and not well understood. As we learn more about indexing, we may reasonably expect a better informed use of indexing during this decade. Nonetheless, where an index favorable to the disabled and the retired is already in place, resistance to modification will be firm. Change will come, but it is unlikely to be summary.

The income maintenance system is firmly entrenched; it will not be abandoned. But if the system is not to be a continuing source of waste, conflict, and bickering, it must be improved. Disability and retirement pensions are significant parts of the income maintenance system. Costs of providing pensions have increased remarkably in a short period of time, and costs presently are out of hand. Costs can be reduced in a number of ways. It is unquestionably true that some cost-cutting devices are less politically acceptable than others or create difficult legal problems. But raising the established retirement age and de-emphasizing early retirement are not revolutionary ideas. Coordinating benefits is controversial, but not novel. Indexing can be mastered. Therefore, let us get on with the task of cutting pension costs. Not in 1990, not in 2000, but now.