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Sex Discrimination in Pension Benefits in England and the United States

I. INTRODUCTION

With the number of women in the work force increasing, the issue of discrimination in pension benefits is a growing concern in England and the United States. England, however, specifically excludes death and retirement benefits from protection under its sex discrimination legislation. The European Economic Community (EEC) to which England belongs, has not yet applied the principles of equality directly to occupational pension plans. U.S. law, on the other hand, recognizes that an inconsistency exists when principles of equality in pay are not applied to retirement benefits. The U.S. Supreme Court has held in two recent decisions that pension plans must maintain equality for men and women in both contributions and benefits.

Women now comprise a greater proportion of the work force in the United States and in England than they have at any time in the past. Almost twice as many women as men participate in pension plans in England. Although traditionally men have been the sole supporters of their families, the combination of longer lives, younger marriages, smaller families, and financial necessity has

1. In 1960, 39.5 percent of the women in Great Britain participated in the labor force. U.S. Bur. of Labor Statistics, 106 MONTHLY LAB. REV. 23, 25 (Feb. 1983). By 1981, that number had risen to 46.6 percent. Id. at 60. In 1960, 37.7 percent of all U.S. women were employed and in 1981, 52.1 percent were employed. Id. The importance of the number of working women to the issue of discrimination in pension plans becomes apparent when it is noted that $481.1 billion was invested in private pension funds in the United States in 1981. STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83, 330 (103rd ed. 1982). Similarly, the 100,000 occupational pension plans in Great Britain had assets of approximately 60 billion pounds in 1982. Dawes, Pensions and Insurance, 10 INT'L Bus. LAW. 388, 388 (1982).
2. Equal Pay Act, 1970, ch. 41, § 6(1) and Sex Discrimination Act, 1975, ch. 65, § 6(4).
3. The EEC is a union of European countries organized to promote the economic and social integration of those nations. 1 COMMON MKT. REP. (CCH) ¶ 100 (1977).
7. Norris, 103 S. Ct. at 3499.
8. See supra note 1.
created situations where many women are now required to work.\textsuperscript{10} As the English Secretary of State for Social Services has said, to have one group of workers treated differently from another group, in any respect, is no longer acceptable.\textsuperscript{11}

While the principle of equality in pay for men and women has been accepted in England,\textsuperscript{12} it has not been applied to occupational pension plans.\textsuperscript{13} Both the Equal Pay Act\textsuperscript{14} and the Sex Discrimination Act\textsuperscript{15} specifically exclude death and retirement benefits from their coverage. English courts have strictly construed these exclusionary provisions of the sex discrimination legislation, permitting different treatment of men and women with regard to pensions.\textsuperscript{16} In addition, employers are permitted to maintain different retirement ages for men and women workers.\textsuperscript{17}

The English government, in enacting anti-discrimination legislation, did not extend the principles of equality to pension plans because of the difficulty in defining equal treatment.\textsuperscript{18} One major problem in achieving equality is that women retire at a younger age than men do and thus receive smaller pensions.\textsuperscript{19} Parliament has not equalized retirement ages because of the anticipated cost to both the National Insurance Fund and supplementary pensions.\textsuperscript{20} As one commentator suggests, however, as long as retirement ages are different and gender-based mortality tables are used, true equality of benefits cannot be achieved.\textsuperscript{21}

\textsuperscript{10} 889 Parl. Deb., H.C. (5th ser.) 511 (1975).
\textsuperscript{11} 888 Parl. Deb., H.C. (5th ser.) 1492 (1975).
\textsuperscript{12} Equal Pay Act, 1970, ch. 41.
\textsuperscript{13} Occupational pension plans are employer-created schemes providing benefits for qualifying workers on termination of service or on death or retirement. Social Security Act, 1973, ch. 38, § 51(3). These schemes include plans contributed to by employees, employers, or both. Id. at § 51(4)(a)(ii).
\textsuperscript{14} Equal Pay Act, 1970, ch. 41, § 6(1). The Act states:
6(1) In so far as -
(a) the terms and conditions of a woman's employment are in any respect, affected by compliance with the law regulating the employment of women; or
(b) any special treatment is accorded to women in connection with the birth or expected birth of a child; then to that extent the requirement of equal treatment for men and women as mentioned in section 1(1) of this Act shall not apply (but without prejudice to its operation as regards other matters), nor shall that requirement extend to requiring equal treatment as regards term and conditions related to retirement, marriage or death or to any provision made in connection with retirement, marriage or death; and the requirements of section 3(4) of this Act shall be subject to corresponding restrictions.
\textsuperscript{15} Sex Discrimination Act, 1975, ch. 65, § 6(4), states "Subsections (1)(b) and (2) do not apply to provisions in relation to death or retirement."
\textsuperscript{16} See, e.g., Roberts v. Tate & Lyle Food Distribution Ltd. and Barber v. Guardian Royal Assurance Group, [1983] I.C.R. 521 [Employment Appeal Tribunal] [hereinafter cited as Roberts v. Tate & Lyle].
\textsuperscript{17} Social Security Act, 1973, ch. 38, § 23. The statutory social security scheme establishes the retirement age for men at 65 and for women at 60.
\textsuperscript{20} See, e.g., 905 Parl. Deb., H.C. (5th ser.) 545 (written answers) (1976).
In contrast, the United States has addressed the issue of equality for men and women in pension plans. The U.S. Supreme Court found, in *Arizona v. Norris*, that different treatment of pension benefits for men and for women is inconsistent with equality of pay in employment, as required by Title VII of the Civil Rights Act of 1964. The Court reasoned that pension benefits are a form of wages, directly related to employment, and, therefore, must be distributed in a non-discriminatory manner.

This comment compares the law on pension benefits in England and the United States, specifically focusing on the applications of that law to men and women workers. The author first discusses the English law in light of the Sex Discrimination Act and EEC law, with particular emphasis on judicial interpretations of existing legislative and EEC acts. The author then discusses the U.S. law and the Supreme Court’s view that Title VII mandates equality in pensions. Finally, the responses of each country to the issue of discrimination against women in pension benefits are compared. This comparison will suggest that the U.S. response offers some solutions to the English problems with equality in pension benefits.

II. SEX DISCRIMINATION LAW IN ENGLAND AND THE EUROPEAN ECONOMIC COMMUNITIES

A. Great Britain and the EEC

Great Britain joined the EEC in 1973 by signing the Treaty of Accession, thereby adopting the Treaty of Rome. In an accompanying document, Great Britain agreed to bind itself to all earlier EEC decisions as well as to later ones. Article 119 of the Treaty of Rome, which requires equal pay for equal work,

23. Id. at 3498-3499.
24. Id. at 3497 n.8.
25. Act Concerning the Conditions of Accession and the Adjustments to the Treaties, art. 2, 2 COMMON MKT. REP. (CCH) ¶ 7035 [hereinafter cited as Treaty of Accession]. This treaty was signed on January 22, 1972, and became effective on January 1, 1973.
26. Treaty Establishing the European Economic Community, Rome, March 25, 1957, 298 U.N.T.S. 3, 2 COMMON MKT. REP. (CCH) ¶ 7013. The signatories to this treaty (commonly known as the “Treaty of Rome”) were Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, and the Netherlands. Id. See generally A. PARRY & S. HARDY, EEC LAW 9 (1973). The EEC is a union of European countries with its purpose being to “ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe....” Treaty of Rome, supra, at Preamble.
27. Treaty of Accession, supra note 25, at art. 2. In 1972, Great Britain enacted the European Communities Act, 1972, ch. 68, which incorporated this principle into British law.
28. Treaty of Rome, supra note 26, at art. 119, states: Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work. For the purpose of this article, “pay” means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer. Equal pay without discrimination
thus became part of English municipal law upon Great Britain's entry into the EEC. 29

1. The European Council and Directives

The Treaty of Rome creates a council, consisting of representatives from member states,30 responsible for ensuring that the objectives of the treaty are attained.31 To fulfill this mission, the council issues various instruments necessary to implement EEC law,32 including directives that are binding on all members to whom the particular directive is addressed.33 Because each member chooses its own method of implementing a directive, they have been used sparingly.34 In essence, they are orders from the council directing member states to conform their national legislation to the directive.35

The European Council has issued three directives dealing with equality of treatment for men and women.36 The Equal Pay Directive implements the principle embodied in Article 119 of equal pay for equal work.37 This directive, which applies to "all aspects and conditions of remuneration,"38 calls for the

based on sex means: (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time rates shall be the same for the same job.

31. Parry & Hardy, supra note 26, at 35.
32. Treaty of Rome, supra note 26, at art. 189 states:
   In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.
   A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
   A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
   A decision shall be binding in its entirety upon those to whom it is addressed.

See Parry & Hardy, supra note 26, at 61.
33. See also Ellis & Morrell, supra note 21, at 16 n.9. "[A] directive is an order from the Community to member states to alter their internal laws so as to achieve a certain harmonized result." Id.
34. Parry & Hardy, supra note 26, at 61-62.
35. Schneebaum, The Company Law Harmonization Program of the European Community, 14 LAW & POL'Y INT'L BUS. 293, 296 (1982). Directives are used generally when uniformity is unnecessary or unanimity unattainable, or a standard rather than a procedure is being promulgated. Parry & Hardy, supra note 26, at n.61. An example is a standard of quality for the packaging of food. Id.
38. Art. 1 states:
   The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called 'principle of equal pay,' means, for the same work or for work to which equal
elimination of all discrimination on the basis of sex between workers performing
the same work or work of equal value.39 Pension schemes, however, were not
included,40 and no court has applied the Equal Pay Directive to such plans.41 The
Council stated explicitly that it would not include pensions in the Equal Treat­
ment Directive,42 preferring to adopt specific provisions on equal treatment in
social security schemes in a later directive.43

Specific provisions were issued two years later in the third directive, the Social
Security Directive, which requires progressive implementation of equal treat­
ment principles to matters of social security.44 This directive applies to all aspects
of social security legislation, including access to plans, obligations to contribute,
calculations of contributions and benefits, and the duration of benefits.45 The
directive, however, allows member states to legislate certain exceptions46 to the
equal treatment principle; for example, it need not apply to statutory retirement
ages, benefits granted to parents or increases in long term benefits for a depend­
ten wife.47 These exceptions, particularly the exclusion of retirement ages from
coverage, limit the directive's scope and impact.48 In addition, the Council has
not yet issued a directive or other statement relating specifically to occupational
pension schemes.49

value is attributed, the elimination of all discrimination on grounds of sex with regard to all
aspects and conditions of remuneration. In particular, where a job classification system is used
determing pay, it must be based on the same criteria for both men and women and so
drawn up as to exclude any discrimination on grounds of sex.

_id._ at art. 1.

39. _Id._

40. Laurent, _European Community Law and Equal Treatment for Men and Women in Social Security_, 121
Int'l. Lab. Rev. 373, 375 (1982).

cases, the court found for the plaintiff on the basis of Article 119 and did not reach the issue of the
Equal Pay Directive's applicability to member states. See _infra_ notes 65-67 and accompanying text.

42. Equal Treatment Directive, _supra_ note 36, at art. 1, states:

1. The purpose of this Directive is to put into effect in the Member States the principle of
equal treatment for men and women as regards access to employment, including promotion,
and to vocational training and as regards working conditions and, on the conditions referred to
in paragraph (2), social security. This principle is hereinafter referred to as 'the principle of
equal treatment.'

2. With a view to ensuring the progressive implementation of the principle of equal treat­
ment in matters of social security, the Council, acting on a proposal from the Commission, will
adopt provisions defining its substance, its scope, and the arrangements for its application.

43. _Id._ at art. 1(2). See Laurent, _supra_ note 40, at 375 (stating the Council's decision to wait for a future
directive on social security).

44. Social Security Directive, _supra_ note 4, at art. 1. This article became effective in December, 1984.

See Laurent, _supra_ note 40, at 375.


46. _Id._ at 378.


49. Article 3(3) of the Social Security Directive states that the Council will produce legislation on
occupational schemes in the future. Ellis & Morrell, _supra_ note 21, at 17.
2. The European Court of Justice

While the Council issues directives necessary to implement the provisions of the Treaty of Rome, it is the role of the European Court of Justice to interpret and enforce EEC law. The court will only address issues covered by EEC law and will not address national concerns. It has jurisdiction to make preliminary rulings on interpretations of the treaty and on acts of EEC institutions. Any domestic court, but no individual, may refer a question to the Court of Justice if it concerns an issue of EEC law that is necessary to a judgment of that domestic court. In practice, this means that, prior to judgment, a domestic court may stay the proceedings pending an interpretative decision by the Court of Justice on the EEC law in question. The domestic judge alone decides if the issue involving EEC law is necessary to the decision. If a controverted and pertinent issue of EEC law is raised before a court of last resort, however, that court must refer the issue to the European court.

3. Applicability of EEC Law in Member States

Although EEC law has supremacy over national law, not all Treaty of Rome provisions are directly applicable to member states. A directly applicable Treaty

50. Treaty of Rome, supra note 26, at art. 165. The Court consists of eleven independent judges who possess the qualifications necessary to be appointed to the highest judicial post in their own countries. PARRY & HARDY, supra note 26, at 71. The Court is assisted by five advocate-generals, whose role is to assist the judges by offering independent and impartial opinions on the cases before the Court. Note, Sex Discrimination: Some Recent Decisions of the European Court of Justice, 21 COLUM. J. TRANSNAT'L L. 621, 624 n.16 (1983) [hereinafter cited as Note, Sex Discrimination]. These opinions are not binding on the court, but are influential in the court's decision-making process. They are published to aid in understanding the Court's decisions. Id.

51. PARRY & HARDY, supra note 26, at 126.

52. Treaty of Rome, supra note 26, at art. 177.

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

See PARRY & HARDY, supra note 26, at 119, for a discussion of referrals to the Court of Justice. See also Note, Sex Discrimination, supra note 50, at 624 note 15 (discussing the purpose of article 177).


54. PARRY & HARDY, supra note 26, at 119.

55. Id. at 126.

56. Id. at 124-25. In Great Britain, both the Court of Appeals and the House of Lords are courts of last resort.

57. Ellis & Morrell, supra note 21, at 16.

article or EEC act is one that has immediate force of law in the member states without the need for enabling legislation, giving individuals enforceable rights that may be brought before domestic courts. The Court of Justice has adopted the rule that in order for EEC law to be directly applicable, it must be capable of being given immediate effect by a municipal court without the need for either EEC or national enabling legislation regarding implementation or explanation of terms.

The Court of Justice has held that the equal treatment provisions in Article 119 are directly applicable in the member states as enforceable law when discrimination can be determined solely on the basis of equal work and equal pay, as described in the Article, without the use or need of any further legislation. Individuals may rely on the principle of equal pay in cases before national courts where the discrimination arises directly from legislative provisions, collective bargaining agreements, or individual employment contracts. But protection from indirect or disguised discrimination requires specific EEC or national legislation. Indirect discrimination occurs when an employment practice, regardless of intent, has an unjustifiable discriminatory effect on persons of one sex. An example of indirect discrimination is an employer setting a height requirement that most women cannot meet but that is unrelated to job performance.

Neither the Council nor the Court of Justice have applied the principles of equality, as stated in Article 119 and the supplementary directives, to occupational pension plans. The court has said that directives of the European Council can be directly effective against member states. It has not ruled, however, on whether the Equal Pay or the Equal Treatment Directives are directly applicable. In addition, the court has not resolved the issue of whether a directive can be enforced by one individual against another individual or a private employer.


60. Ellis & Morrell, supra note 21, at 21.


64. 889 Parl. Deb., supra note 10, at 513-14.


B. National Law

The English Parliament has enacted legislation that prohibits unequal treatment of persons on the basis of sex, particularly in the area of employment. This principle of equality has not been applied, however, to death or retirement benefits. Pension benefits are treated differently than other employment benefits received by English workers.

1. Provisions for Retirement Benefits

All workers in England must contribute to the state social security system until they retire, which is for men normally at sixty-five and for women at sixty, as established by statute. No English government has introduced legislation to equalize retirement ages because of the anticipated difficulties and costs. Lowering the male retirement age to sixty, with the resulting lower pension and greater number of non-working years, is considered undesirable by critics. Yet, since women have been contributing to the plan with the expectation of retiring at age sixty, critics argue, it would be unfair to raise their age requirement.

In 1982, over 11.8 million of the 22.8 million workers in Great Britain participated in an occupational pension plan in addition to the state social security system as a means of supplementing article 119. Otherwise, employers would be required to treat men and women equally with regard to the amounts they are paid but would not be required to treat them equally with respect to other terms of employment, such as vacation time. Directives should be directly applicable to employers (and other non-state parties) as a means of supplementing article 119. Otherwise, employers would be required to treat men and women equally with regard to the amounts they are paid but would not be required to treat them equally with respect to other terms of employment, such as vacation time.

69. Equal Pay Act, 1970, ch. 41, § 6(1); Sex Discrimination Act, 1975, ch. 65, § 6(4).
70. Dawes, supra note 1, at 388. The weekly pension, which the worker receives after retirement, consists of a flat rate component and an additional, variable, earnings-related component based on the worker's twenty best earning years. Social Security Pensions Act, 1975, ch. 60, § 6(1), (2). See 888 Parl. Deb., supra note 11, at 1488-90 (explaining 1975 changes in the social security system). Social security pensions are paid by the National Insurance Fund by contributions collected from earners, employers, and the government. Worringham, [1981] I.C.R. 558, 562 [E.C.J.] (opinion of Advocate-General Warner). The earnings-related component is directly related to the amount the employee and employer contribute. The more money a worker makes, the more is contributed, and, therefore, the greater the pension at retirement.
71. Social Security Act, 1973, ch. 38, § 23. The disparity in retirement ages is justified by the government with the following reasons: "(a) the average age disparity between husbands and wives; (b) the fact that women often have, in effect, two jobs — running a home and going out to work; (c) reduced working efficiency of women in their sixties; and (d) women's greater proneness to ill-health." Cmd. No. 6599, supra note 9, at 47. The Occupational Pensions Board found that some, if not all, of the above reasons will apply more frequently to men as time goes on. Id. at 52.
72. Ellis & Morrell, supra note 21, at 28. See also, e.g., 905 Parl. Deb., supra note 20, at 544, 545. Lowering the retirement age of men would result in higher costs, due to the longer period of retirement in which men would collect pension benefits. Ellis & Morrell, supra note 21, at 25.
73. Id. at 27.
74. Cmd. No. 6599, supra note 9, at xv.
system. While the terms of these plans, which are designed to supplement retirement benefits received from the security system, are not prescribed by law, the state does regulate the full content of these plans. Each occupational pension plan must fulfill the following criteria: it must be established under an irrevocable trust; the employer must contribute some money to the fund; both employer and employee must recognize the plan; and the benefits may not exceed certain levels. In addition, the Social Security Pensions Act of 1975 requires equal access to any plan for both men and women. The plan must also be certified by the Occupational Pensions Board, which is authorized to approve requirements for the preservation of and equal access to these schemes.

Occupational pension plans are closely linked to the state system. Most employers who provide an occupational pension scheme follow the state's example by setting the retirement age of women five years younger than that of male employees. Moreover, if the Occupational Pensions Board permits, members of an occupational pension plan may decline to participate in the earnings-related component of the state social security system. Employees may do so if the Board issues a certificate for the plan and if the private pension plan provides earnings-related benefits between the state minimum level and the upper limit on benefits. At a minimum, however, employees must receive the same amount of benefits as they would have had they remained in the state scheme.

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75. Dawes, supra note 1, at 388. See supra note 13 (defining occupational pension plans).
76. Laurent, supra note 40, at 380. Occupational schemes sometimes also cover sickness, unemployment, invalidity, or death. Id.
79. Social Security Pensions Act, 1975, ch. 60 § 53. The act states that membership in a plan must be "open to both men and women on terms which are the same as to the age and length of service needed for becoming a member and as to whether membership is voluntary or obligatory." Id.
81. Dawes, supra note 1, at 389.
82. Ellis & Morrell, supra note 21, at 19.
83. Cmd. No. 6599, supra note 9, at 17. Even when an employer sets the same retirement age for men and women, the employee's retirement decision will often reflect the state pension age, to maximize benefits from both plans. See Ellis & Morrell, supra note 21, at 27. Nonetheless, some of the large schemes have set the same pension ages for men and women. Cmd. No. 6599, supra note 9, at 13.
84. Worringham, [1981] I.C.R. at 562 (opinion of Advocate-General Warner). Workers and employers agree to this arrangement, generally referred to as "contracting-out," because they then pay reduced rates of contribution to the state system. Members receive their earnings-related component from the pension scheme and, therefore, are eligible only for the basic component from the state pension. Id.
85. Cmd. No. 6599, supra note 9, at 15. Certificates are issued if the scheme fulfills the requirements of the Social Security Pensions Act, 1975, ch. 60, §§ 30-41. Worringham, [1981] I.C.R. at 562. Other requirements for "contracting-out" under the Social Security Pensions Act, 1975 include: provision of benefits for widows; transference of accrued pension rights for members who leave the employer's service prior to retirement; and rules governing the surrender of pensions. Id.
86. Cmd. No. 6599, supra note 9, at 15. This is known as a guaranteed minimum pension, and it must
2. Inequalities in Occupational Pension Plans

The rate of benefits under any private pension plan must be the same for men and women if they have the same earnings records. 87 Women, however, actually receive lower benefit payments than men, because women earn their pensions over a shorter period of time due to their earlier retirements. 88 In addition, the cost of benefits to women is greater because, according to statistics, women live longer than men. 89 Insurance companies therefore use different mortality tables for men and women in order to calculate the costs accurately and to determine the periodic benefits a pensioner is entitled to receive. 90 The result is lower benefit payments to women since, on the average, women will receive them for a longer period of time. 91

Inequalities in pension benefits exist because women on the average earn less than men; 92 therefore, benefits based on earnings will be lower. Frequently, businesses that mainly employ female workers do not offer occupational pension plans. 93 In addition, pension schemes in Great Britain generally have different provisions for male and female workers regarding availability of dependents’ benefits and the means by which pensions can be committed or allocated. 94 Parliament eliminated one source of discrimination by requiring all private pension plans to be equally accessible to both men and women. 95 At present, however, women in Great Britain generally receive smaller pensions on retirement from their occupational pension schemes than do their male colleagues. 96

3. Legislation Against Sex Discrimination in England

England has enacted legislation to eliminate certain types of discrimination against women, covering conditions and terms of employment and including the accrue usually at a minimum rate of 1/80th of pensionable earnings for each year of contracted-out employment. Id. at 16.

87. Id. at 16.
88. Ellis & Morrell, supra note 21, at 25-26. This is true even when they have been working their entire adult lives and have not taken time for child-rearing. Id.
89. Cmd. No. 6599, supra note 9, at 18-19.
90. Id. at 16. Benefits are calculated based on the period over which the pension is likely to be paid. Id. Controversy over the use of gender-based mortality tables, which existed in the United States, has not yet occurred in Great Britain, probably because the fundamental question of whether to apply equality principles to pension plans has not yet been decided.
91. Cmd. No. 6599, supra note 9, at 62.
92. Laurent, supra note 40, at 376.
93. Id. at 380.
94. Ellis & Morrell, supra note 21, at 15. Many occupational pension plans provide for a widow, but not for a widower. Plans that have contracted-out of the state system are required only to provide widow’s benefits. Many schemes also allow for commutation (reduced pension in return for a lump sum) or for allocation of a portion of the pension to the pensioner’s dependents. These terms are generally different for male and female pensioners. Id. at 25-26.
95. Social Security Pensions Act, 1975, ch. 60 § 53. This provision became effective in 1978. See Cmd. No. 6599, supra note 9, at 82-100 (discussing the equal access requirements).
right to equal compensation. Employers must pay their workers equal amounts for equal work. But no such requirement exists with regard to pension benefits, which are future compensation for present work.

a. The Equal Pay Act 1970

The Equal Pay Act prohibits discrimination against women in compensation, when male and female workers are engaged in the same place of employment and doing the same or similar work. Actions brought under this Act are heard solely by the tribunal system, which has considerable power to order adjustments in pay and working conditions if the allegations are proven to be true. In order to achieve its goals, the Act requires that every employment contract concluded with women must have an equality clause; if it does not have one, such a clause is implied by law into the contract. An equality clause provides that if a woman’s contract has a less favorable term than a man’s contract or is lacking a favorable term altogether, the contracts will be treated as if both had the same favorable condition.

The requirement of an equality clause is limited, however, by the provision in the Equal Pay Act excusing those discriminatory contracts that the employer can prove are the result of genuine, material differences other than sex. The provision is intended to cover establishments that base compensation on length


98. Equal Pay Act, 1970, ch. 41. Section 1 of the Act states:

[F]or men and women employed on like work the terms and conditions of one sex are not in any respect less favorable than those of the other; and (b) for men and women employed on work rated as equivalent (within the meaning of subsection (5) below) the terms and conditions of one sex are not less favorable than those of the other in any respect in which the terms and conditions of both are determined by the rating of their work.


100. Note, Sex Equality, supra note 99, at 149. Section 2 of the Equal Pay Act gives industrial tribunals initial jurisdiction to hear claims of discrimination in employment. Complaints, initiated by written “originating applications,” are brought before tribunals consisting of a lawyer chairperson and two lay members with knowledge or experience in industry. Covington, American and British Employment Discrimination Law: An Introductory Comparative Survey, 10 Vand. J. Transnat'l L. 359, 369 (1977). Legal issues are appealable to the Employment Appeal Tribunal (EAT), which also consists of lawyers and lay persons with special knowledge of industrial relations. Id. From there, appeals of issues of law may be had to the Court of Appeals by leave only. Id. at 570. The Court of Appeals may grant a party leave to appeal to the House of Lords, or that body may on its own decide to hear the case. PARRY & HARDY, supra note 26, at 126. The tribunal system was created to be an informal part of the judiciary, “adjudication being made by those with actual experience of the industrial field.” Note, Sex Equality, supra note 99, at 156.


102. Id.


of service, level of output, or quality of performance.\footnote{105} The Equal Pay Act is further limited since it excludes from the requirement of equality any terms and conditions of employment relating to death or retirement.\footnote{106}

The government was reluctant to include pensions within the coverage of the Equal Pay Act because of the problems of defining equality in private pension plans.\footnote{107} While employers argue that equality in pension schemes means the cost to the employer of providing the plans, employees contend that equality is the contribution made by employees and the resulting benefits.\footnote{108} One commentator noted that the additional problem of different retirement ages for men and women makes it impractical to achieve equality in private occupational plans until equality is attained at the state level.\footnote{109}

b. \textit{Sex Discrimination Act 1975}

The Equal Pay Act, which only became fully enforceable in 1975, was amended in that year by the Sex Discrimination Act 1975.\footnote{110} Prohibitions against sex discrimination were expanded to cover not only non-compensatory areas of employment, including training, but also education, housing, and the provision of goods, facilities, and services.\footnote{111} It is now unlawful for employers to discriminate in any respect on the basis of sex,\footnote{112} unless a statutorily defined bona fide

\footnote{105. Note, \textit{Sex Equality}, supra note 99, at 150.}
\footnote{106. Equal Pay Act, ch. 41, § 6(1). Also excluded from the requirement are “retirement, whether voluntary or not, on grounds of age, length of service or incapacity,” \textit{id.} at § 6(2), and special provisions concerning maternity. Sex Discrimination Act, ch. 65, § 6(4), modifies this section to include provisions concerning marriage within the Act’s coverage. \textit{See also} infra notes 109-19 and accompanying text.}
\footnote{107. Cmnd. No. 6599, \textit{supra} note 9, at 10 (citing 800 Parl. Deb. H.C. (5th ser.) 736-74 (1970)). The parliament debate over this Act included a discussion of an amendment to the Act deleting the exclusion for pensions, which was later withdrawn. Cmnd. No. 6599, \textit{supra} note 9, at 10.}
\footnote{108. Ellis & Morrell, \textit{supra} note 21, at 26.}
\footnote{109. \textit{Id.} at 27. Equalizing ages at which workers are eligible for their occupational pensions, without a corresponding change in the state system, would result in undue hardship. Workers eligible to receive their private pensions five years before receiving their social security benefits might find it difficult to live on just their private pension benefits. \textit{Id.}}
\footnote{110. Sex Discrimination Act, 1975, ch. 65.}
\footnote{111. Cmnd. No. 6599, \textit{supra} note 9, at 5. The statute covers both direct and indirect discrimination. Sex Discrimination Act, ch. 65, Part I, states in part: 1-(i) A person discriminates against a woman in any circumstances relevant for the purpose of any provision of this Act if — (a) on the ground if he treats her less favorably than he treats or would treat a man, or (b) he applies to her a requirement or condition which he applies or would apply equally to a man but (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and (iii) which is to her detriment because she cannot comply with it. The Act specifically provides that it shall be read so as to require equal treatment of men as well as women. \textit{Id.} at § 2(1).}
\footnote{112. \textit{Id.} at § 6. This act covers all employers with more than five employees, employer associations, trade unions, partnerships of six members or more, employment agencies, and vocational training bodies. Cmnd. No. 6599, \textit{supra} note 9, at 6.}
occupational qualification exists.\textsuperscript{113} Such a qualification exists when members of one sex cannot fulfill the requirement for a particular job because there is a genuine occupational qualification requiring members only of the other sex.\textsuperscript{114}

Complaints brought under the Sex Discrimination Act are heard by industrial tribunals if the complaints concern employment, and by county courts for allegations relating to other parts of the act.\textsuperscript{115} In addition, the act created the Employment Opportunities Commission ("EOC"), which was given authority to conduct investigations into any area covered by both the Equal Pay Act and the Sex Discrimination Act.\textsuperscript{116} While the EOC is responsible for bringing actions on behalf of groups, individuals may bring suit under the act to redress their own grievances.\textsuperscript{117} The EOC is empowered to assist individual complainants and is kept informed by the tribunals of all such proceedings.\textsuperscript{118} The EOC is also required to attempt conciliation when requested to do so by a party or if it considers success possible.\textsuperscript{119}

One commentator has charged that, aside from the equal access requirements,\textsuperscript{120} women are afforded no protection from discrimination in the area of pension plans under the British statutory scheme.\textsuperscript{121} The Sex Discrimination Act, like the Equal Pay Act, excludes death and retirement benefits from the general prohibition against discrimination.\textsuperscript{122} In addition, the Act provides a general exception for the insurance industry when discrimination is based on reliable actuarial data.\textsuperscript{123} Because the Sex Discrimination Act was already lengthy and

\begin{itemize}
\item \textsuperscript{113} Sex Discrimination Act, ch. 65, § 7.
\item \textsuperscript{114} Id.
\item \textsuperscript{115} \textit{See supra} note 100 for an explanation of the tribunal system. When discrimination is found, an industrial tribunal may grant relief by: (1) issuing an order declaring the rights of the parties concerned; (2) ordering the respondent to pay damages; or (3) making recommendations for action to obviate or reduce the adverse effects of the discrimination in question. Sex Discrimination Act, ch. 65, § 65(1). Injuries to feelings are considered when granting relief. Id. at § 66(4). Section 65(2) limits compensation to an amount not to exceed the amount stated in the Trade Union and Labor Relations Act, 1974, ch. 52, Schedule 1, ¶ 20(1)(b), which is presently listed as \\(5,200\) pounds. A respondent, however, can avoid paying damages if he can prove there was no intent to discriminate. Sex Discrimination Act, ch. 65, § 66(3). Damage awards are limited to the two years preceding the date on which proceedings under the equal pay clause are instituted. Equal Pay Act, ch. 41, § 2(5).
\item \textsuperscript{116} Id. at § 57. \textit{See also} Note, \textit{Sex Equality, supra} note 99, at 158. The EOC may issue nondiscrimination notices if it finds a violation of the act. Failing voluntary compliance, the EOC may then enforce its order in the courts. Id. at §§ 67-73.
\item \textsuperscript{117} Id. at § 63.
\item \textsuperscript{118} Id. at §§ 74-75.
\item \textsuperscript{119} Id. at § 64.
\item \textsuperscript{120} \textit{See supra} notes 78-79 and accompanying text.
\item \textsuperscript{122} Ch. 65, § 6(4).
\item \textsuperscript{123} Sex Discrimination Act, ch. 65, § 45, states:
\item Nothing in Parts II [Employment] to IV shall render unlawful the treatment of a person in relation to an annuity, life insurance policy, accident insurance policy, or similar matter involving the assessment of risk, where the treatment — (a) was effected by reference to actuarial or other data from a source on which it was reasonable to rely, and (b) was reasonable having regard to the data of any other relevant factors.
\end{itemize}
complex, the House of Lords continued the pension exclusion rather than complicate the statute. 124 Parliament delayed further action until the Occupational Pensions Board could produce its report on equality for women in occupational schemes. 125 As of January 1985, Parliament had not taken any further action on the issue of equality in occupational pension plans, leaving it to the courts for further consideration.

C. Judicial Interpretation of English and EEC Legislation

1. State Social Security Schemes Under Article 119

Since under English law, pension benefits have been excluded from anti-discrimination legislation, plaintiffs argue that pension benefits constitute pay within the concept of Article 119 of the Treaty of Rome and therefore fall under EEC law. 126 The problem with this argument, however, is in the interpretation of the term pay as used in Article 119. 127 Article 119 defines remuneration as "the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer." 128 The Court of Justice, in Defrenne v. Belgium State, 129 interpreted this language to exclude statutory social security schemes. 130

The plaintiff in Defrenne, an airline hostess, claimed that she was subjected to discrimination in violation of Article 119 because the state excluded female airline hostesses from its social security system, but not male stewards who were engaged in the same work. 131 In rejecting plaintiff's argument, the court did not say that all pension benefits are beyond the scope of pay as defined by Article 119. 132 Rather, it held that benefits from state-supplied social security plans "which are directly regulated by law and not the result of any element of agreement within the enterprise or occupational group, and that apply to general categories of employees" are not remuneration under the Treaty. 133 Employers contribute to the financing of statutory social security schemes in com-

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125. Gm. No. 6599, supra note 9, at 10.
126. Note, Equal Pay, supra note 66, at 83. Article 119 was inserted into the Treaty of Rome for two reasons: the social policy for ensuring that all workers receive equal pay for equal work and the economic goal of preventing some countries from gaining a competitive advantage by employing female workers at a lower rate of pay. McCallum & Snaith, supra note 62, at 266-67.
127. Laurent, supra note 40, at 373.
130. Id. at 7568. See McCallum & Snaith, supra note 62, at 267.
132. Id. at 7567.
133. Id.
pliance with social policies established by the state.134 This does not constitute
direct or indirect pay to a worker because the employee receives benefits merely
by fulfilling conditions set by law, rather than as a result of the employment
relationship.135 The court concluded that state pension benefits were not
emoluments indirectly paid and therefore EEC law did not apply to this case.136
As a result, the state social security system was exempt from compliance with the
equality principles enunciated in Article 119.137

2. Contribution to a Private Pension Plan as Pay Within Article 119:
Worringham v. Lloyds' Bank

Soon after Defrenne v. Belgium State, the English court had an opportunity to
resolve the conflict between the Article 119 principle of pay equality for men and
women and the inequality in private pension plans in Worringham v. Lloyds'
Bank.138 Lloyds' Bank maintained two compulsory contracted-out retirement
benefit schemes, one for men and one for women.139 Both schemes required
employees to contribute five percent of their salary, which was deducted by the
bank and paid to the trustees of the pension plan.140 The plans differed in that
men were required to contribute when first hired whereas women under age of
twenty-five were not required to participate in the plan.141 In order for the
take-home pay of all bank employees in Great Britain to be the same,142 Lloyds
paid all its employees, except women under twenty-five, five percent more than

134. Id.
135. Id. See McCallum & Snaith, supra note 62, at 267 (reviewing EEC law in relation to pensions as of
1977).
136. Defrenne v. Belgium State, COMMON MKT. REP. ¶ 8136, at 7567. While the court did not reach the
issue, Advocate-General Dutheillet de Lamothe did suggest that occupational pension plans that are
separate from the state scheme would be covered by article 119. Id. at 7575.
137. Id. at 7568.
All E.R. 373 (Ct. App.). See Ellis & Morrell, supra note 21, at 17-22.
139. Worthingham, [1981] 1 W.L.R. at 952. The plans are the result of collective bargaining between
the bank and the union. The national authorities approved and certified the scheme as a contracted-out
retirement plan. Id. at 966. See supra notes 84-86 and accompanying text for description of contracted-out
retirement plans.
140. Worthingham, [1981] I.C.R. at 560 (opinion of Advocate-General Warner). To qualify for bene-
fits, an employee must have been with the bank for at least five years and have reached the age of 26.
Employees who left before this point were allowed to transfer their rights to another scheme or to the
state system. Id. at 562.
141. 1 W.L.R. at 967. Neither the women under 25 nor the bank contributed to the plan; therefore,
if they left before age 25, the women received nothing from the plan. Worthingham, [1981] I.C.R. at 562
(opinion of Advocate-General Warner).
142. The Joint Negotiating Council for Banking set the salary scales of all clearing bank employees,
scales be adjusted for employees participating in a contributory pension scheme to achieve equality in
take home pay of all bank employees. Id. at 561. Lloyds' Bank was the only one of four major banks to
operate a contributory scheme. Id.
the other national banks. These payments were immediately deducted and contributed to the pension scheme. The result was higher gross pay for men under twenty-five, with a corresponding increase in financial advantages and benefits. The take-home pay was the same for both sexes.

The plaintiffs, two women who had left the bank before they were twenty-five years old, complained to an industrial tribunal, claiming that equality clauses implied in their contracts by virtue of section 1(2)(a) of the Equal Pay Act entitled them to five percent more gross salary. The industrial tribunal rejected the claim on the basis of the pension exclusion provision in the Equal Pay Act. The Employment Appeal Tribunal reversed on the ground that the pension exclusion covers only terms relating to pensions; here the inequality related to a term of gross pay to which the equality clause applied. Shortly thereafter, the Court of Appeal held that the words “provisions in relation to death or retirement” in the Sex Discrimination Act of 1975 must be read broadly to mean any provision about death or retirement. Plaintiffs’ counsel was therefore forced to concede that Equal Pay Act Section 6(1) must be given the same broad meaning as Section 6(4) of the Sex Discrimination Act, thereby negating the Employment Appeal Tribunal’s earlier holding. On review to the court of appeal, plaintiffs turned to EEC law for support.

Unable to agree on the effect of EEC law, the Court of Appeal referred the case to the European Court of Justice for a preliminary ruling, pursuant to Article 177 of the Treaty of Rome. The English court sought a ruling on whether Community law requiring equal treatment applies to employer-provided pension schemes. The Court of Justice narrowed the issue, however, to whether Lloyds payment to male employees under age twenty-six was com-

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143. Id. at 561.
144. Id. at 560.
145. 1 W.L.R. at 967. Gross salary is used in calculating, for example, redundancy payments, unemployment benefits and allowances, and credit facilities. Id.
147. 1 W.L.R. at 966.
148. Ellis & Morrell, supra note 21, at 18.
149. Worringham, [1979] I.C.R., at 180 [E.A.T.]. The tribunal held that terms relating to pay are different from terms relating to pensions. It therefore did not need to reach the issue of whether community law applies because its decision is consistent with the EEC’s equality of pay principles. Id. at 181.
151. Ellis & Morrell, supra note 21, at 19. Thus, any term relating to pensions, regardless of whether it also relates to pay, is excluded under § 6(4). Id.
152. Id.
154. Id.
pensation within the meaning of Article 119. 155 The court held that sums of money that are included in gross income and used in calculating additional benefits constitute part of a worker's pay under paragraph 2 of Article 119, despite an immediate reduction and contribution to the pension plan. 156 By making contributions for male workers only, the employer violated the equal pay requirement for the Treaty of Rome. 157 In limiting its decision to the specific facts in question, the court was able to avoid answering the broader question of whether Article 119 applies to all facets of private pension schemes. 158 Moreover, the court found that the Equal Pay Directive 159 adds nothing to the meaning of pay and therefore had no impact on this case. 160

The Court of Appeal raised the broader issue of equality in pension plans, which Advocate-General Warner also addressed in his opinion. This issue, however, was not settled by the Court of Justice's decision. 161 Advocate-General Warner took the position in Worringham that while some private pension plans are covered by Article 119, Lloyds' plan and many other English schemes are not. 162 Like many occupational pension plans, Lloyds' plan is linked to the state system through the contracting-out provision. 163 If Lloyds' plan fell within Article 119, an anomaly would exist whereby the state would have to ensure equal rights for men and women in a contracted-out scheme, but would have no corresponding obligation in its own system. 164 Warner suggested that when a plan is used as a substitute for the state scheme, rather than as a supplement like the

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157. Id.
158. Id. See Ellis & Morrell, supra note 21, at 21, for a discussion of the court's rephrasing of the referral questions and its avoidance of the more fundamental question of how to achieve equality in pension benefits.
159. Equal Pay Directive, supra note 56. See supra notes 37-41 and accompanying text. The court does not discuss the Equal Treatment Directive, supra note 35, in its decision. Advocate-General Warner points out, however, that the Directive was not effective when this litigation began and therefore should not apply. Worringham, [1981] I.C.R. at 570.
160. Worringham, [1981] 1 W.L.R. at 969. The European Court affirmed its earlier decision in Defrenne v. Sabena, [1976] I.C.R. 547 [E.C.J.] in which it held that article 119 is directly effective against all discrimination that can be identified solely by the principles of equal pay and equal work. In Worringham, the employer's payment to a pension plan for men, but not for women engaged in the same work, resulted in discrimination identified solely by the criteria established by article 119. Id. The inequality lay not in the pay itself, which after deductions was roughly equal, but rather in the financial benefits men received because of their higher gross pay. Id.
161. Crishman, supra note 155, at 607.
162. Worringham, [1981] I.C.R. at 568. This is consistent with Advocate-General Dutheillet de Lamothée's opinion in Defrenne v. Belgium State that purely private plans are covered by article 119 since they constitute a form of remuneration.
163. Id.
164. Id. See Ellis & Morrell, supra note 21, at 20 (discussion of Advocate-General Warner's remarks in Worringham).
contracted-out plans, then the plan should be beyond the scope of Article 119.165 Advocate-General Warner also suggested that even if Article 119 did apply to rights and benefits created by Lloyds' scheme, it cannot be directly effective in the member states because of the difficulty of applying the concept of equality to these schemes.166 Because of the broad language of Article 119, a court cannot decide problems such as the effect of different retirement ages on equality in pensions or whether maternity leave should be pensionable without further legislation.167 While the Court of Justice thus failed to decide whether Article 119 was directly applicable to private pension schemes, the English courts have continued to uphold the validity of the retirement benefits exception.

3. The English Court's Interpretation of The Pension Benefit Exclusion

Several plaintiffs have challenged the pension benefits exclusion in both the Equal Pay Act and the Sex Discrimination Act.168 In three cases heard together,169 the Court of Appeal broadly interpreted the clause "provision in relation to death or retirement" in Section 6(4) of the Sex Discrimination Act to mean any provision about death or retirement.170 In Roberts v. Cleveland, the court using this interpretation found that the age of retirement is a provision "in relation to retirement" and, therefore, the plaintiff could not complain about being dismissed after age sixty.171 Under the Redundancy Payments Act of 1965 a woman employee can be dismissed without compensation after age sixty if her dismissal arises because her job has become redundant while her male counterpart cannot be dismissed without compensation until age sixty.172 The court stated that the law reflects the

166. ld. at 569. See Note, Pensions and European Law, note 121, at 361 (discussing the problems of applying article 119 or the directives directly to pension plans). The court, however, rejected the defendant's request to limit the temporal effect of this judgment, as had been done in Defrenne v. Belgium State, ld. at 970-71. The court used the phrase "temporal effect" as a term of art, meaning a judgment prospective in nature only. In Defrenne v. Sabena, one lower court found that member states had not realized that article 119 was directly effective, nor had the European Commission taken steps to enforce this provision. Defrenne v. Sabena, [1976] I.C.R. at 571. The Worthingham court found that the criteria for a judgment limiting the temporal effect was lacking in this case and refused to limit the judgment. Worthingham, [1981] 1 W.L.R. at 970. See Note, Pensions and European Law, supra note 121, at 359-60, for a review of the court's handling of the temporal effect issue in both cases. In Worthingham, the Court of Appeal accepted the European court's decision and awarded the plaintiffs a sum equal to the amount of contributions that would have been paid for two years in their names had they been male. Worthingham, [1982] 3 All E.R. 973-74. The Equal Pay Act, ch. 41, § 2(5), as amended, establishes a two year limit on back pay awards. ld.


169. Id.


171. Id.

172. Redundancy Payments Act, 1965, ch. 62, § 2(1). An employer must make redundancy payments to any employee, other than male employees over 65 years old and female employees over 60 years old, who is dismissed because of redundancy. The Act defines redundancy as follows:
fact a woman employee is entitled to her pension after age sixty, and a male employee must wait until age sixty-five. The court then applied the same reasoning in *MacGregor Wallcover Ltd. v. Turten*, in which the employer provided redundancy payments for men, but not for women between the ages of sixty and sixty-five. The plaintiff complained of discrimination because she could never be eligible for this payment after age sixty. The court held that the fact that she is not entitled to a payment because of an earlier retirement age is permissible discrimination under the section 6(4) exception.

The Court of Appeal relied on section 6(4) in *Garland v. British Rail Engineering Ltd.* to dismiss a charge of discrimination brought by a retired female worker of British Rail. While working for the railroad, the plaintiff and her family received the same concessionary travel benefits as her male counterparts. Upon retirement, the families of retired male workers continued to receive those travel benefits, whereas the plaintiff’s family did not. Speaking through Lord Denning, the court held that those travel rights were not a continuation of employment benefits, but rather a provision related to retirement, and that section 6(4) permits this type of discrimination.

The Employment Appeal Tribunal subsequently adopted the decision that section 6(4) referred to any provision relating to death or retirement benefits. Parliament’s intent in section 6(4) can be achieved only if that provision is read to

For the purposes of this Act any employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish.

§ 2(1). See also *Roberts v. Cleveland*, [1979] I.C.R. at 564.

175. *Id.*  
176. *Id.*  
177. *Id.* at 566.  
179. *Id.* at 565.  
180. *Id.*  
181. *Id.* The Court of Justice held, however, that article 119 prohibits such discrimination in benefits. See infra notes 193-205 and accompanying text.  
182. *Roberts v. Tate & Lyle*, [1983] I.C.R. at 528. This discussion involves two cases with similar facts. In the first, the employer, who was forced to make certain employees redundant, offered early retirement to all employees who had reached age 55. Ms. Roberts was 53 at the time and complained that since she was within ten years of retirement, as was a man age 55 who was offered retirement, she should have been offered it as well. *Id.* at 524. In the second case, the employer offered early retirement to those within ten years of the normal retiring age, which was 50 for women and 55 for men. Mr. Barber argued that he was discriminated against because at age 52 he was not able to retire, but a woman of the same age was able to do so. *Id.* Both cases were dismissed on the ground that the discrimination in question was excluded under § 6(4) as a provision related to retirement. *Id.* at 529, 533.
exclude any complaint based on the existence of contractual terms relating to retirement. According to the tribunal, while Parliament intended to eliminate all discrimination with the enactment of the Sex Discrimination Act, it was faced with widespread discrimination regarding different retirement ages for men and women. The court further stated that this discrimination existed in both state and private pension plans. Rather than eliminate this difference, Parliament found it necessary to exclude any claim based on contractual terms relating to retirement because those terms would be linked to retirement ages. As a result, section 6(4) covers not only benefits received from a retirement plan, but also the "terms of access to such benefits and the circumstances under which the benefit is payable."

After examining the parliamentary intent, the tribunal found the appropriate test for whether section 6(4) applied was to determine whether the action involved was part of the employer's system of providing for retirement or was merely a privilege of employment that is continued after retirement. Applying this test, the tribunal held that the terms in question, the age at which redundancy and immediate pensions are offered, were terms relating to retirement. While accepting plaintiff's contention that the severance terms were made because of redundancy, the tribunal nevertheless held that the use of these terms, namely different retirement ages, resulted in discriminatory application of the pension schemes. Section 6(4), therefore, operated to exclude plaintiff's claim under the Sex Discrimination Act. With the national legislation excluding retirement schemes from protection against discrimination, plaintiffs turned to Community law.

4. The Court of Justice Applies EEC Law to English Pension Plans

The plaintiff in Garland appealed her case to the House of Lords, where the applicability of Article 119, the Equal Pay Directive and the Equal Treatment Directive was raised. Receiving the case from the House of Lords, the Court

183. Id. at 529.
184. Sex Discrimination Act, 1975, ch. 65, § 82(1) states as follows: "Retirement includes retirement (whether voluntary or not) on grounds of age, length of service or incapacity." Id. See Roberts v. Tate & Lyle, [1983] I.C.R. at 528-29, 889 Parl. Deb., supra note 10, at 511; 905 Parl. Deb., supra note 20, at 546.
186. Id.
187. Id.
188. Id. at 528. This test was first articulated in Garland v. British Rail Engineering Ltd., [1978] I.C.R. 495, 498-99 [E.A.T.]
190. Id.
191. Id.
192. See, e.g., id. at 530.
194. Id.
of Justice held that Article 119 covers both cash and in kind benefits, whether provided for presently or in the future.\footnote{195} Because travel benefits were bestowed on all employees during the employment years, the court found that granting such concessional travel after retirement was an extension of the conditions of employment.\footnote{196} This constituted pay within the meaning of Article 119\footnote{197} and, therefore, the employer could not discriminate against women in providing this privilege.\footnote{198} The House of Lords, in accepting this decision, agreed that the section 6(4) exception does not apply to privileges that existed during employment and are continued after retirement, thus modifying the Court of Appeal’s interpretation of section 6(4).

Once again, the Court of Justice did not consider either the Equal Pay or Equal Treatment Directives in making its findings.\footnote{199} It repeated its holdings from prior cases\footnote{200} that Article 119 is directly applicable to member states when, as here, discrimination can be identified solely with the criteria stated in Article 119.\footnote{201} The court’s holding is consistent with Advocate-General Thermatt’s opinion in this case\footnote{202} that enabling legislation is not always necessary to identify discrimination in retirement benefits.\footnote{203} As the court observed in Garland, not all benefits are calculated on the basis of retirement ages and life expectancies in determining the cost of those benefits.\footnote{204} Here, differences in benefits existed regardless of the employee’s age at the time of retirement.\footnote{205}

The Garland decision can be distinguished from Burton v. British Railways Board,\footnote{206} in which no discrimination was found on the basis of access to retirement benefits.\footnote{207} Burton, an employee of British Rail, argued that he was discriminated against because female employees of his age were offered voluntary redundancy several years before he was eligible.\footnote{208} The European Court of Justice, to whom the Employment Appeal Tribunal referred the matter, found that this case involved the question of whether access to benefits was discrimina-

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196. Id.
197. Id. This is true regardless of the legal nature of the benefit, which in this case does not arise out of a contractual obligation. The important issue is whether the benefits are granted as a part of the employment. Id.
198. Id.
201. Snaith, supra note 66, at 301.
203. Snaith, supra note 66, at 302.
204. Id.
205. Id.
207. [1982] 3 All E.R. at 530.
208. Id. at 548-49. Women employees were eligible for voluntary redundancy benefits at age 55 whereas men were required to wait until age 60. Mr. Burton was 58 at the commencement of the proceedings. Id. at 548.
tory, thereby falling under the terms of the Equal Treatment Directive and not Article 119 or the Equal Pay Directive. The court construed the word "dismissal" in Article 5(1) of the Equal Treatment Directive to include termination of employment when it is part of a voluntary redundancy scheme.

The court went on to note, however, that the challenged scheme is closely linked to the state's retirement system through the Redundancy Payment Act of 1965, which regulates the dismissal of employees. Because benefits are calculated in the same manner for both men and women, the court found the only difference in treatment arises from different retirement ages as established by the Social Security Act of 1973. Given this close link with the national retirement system, the court found that it was not discriminatory under the Equal Treatment Directive for British Rail to maintain different access requirements to voluntary redundancy for men and women.

In applying the Equal Treatment Directive to Burton, the Court of Justice modified the terms of the Directive by applying Article 7 of the Social Security Directive. The Equal Treatment Directive prohibits discrimination in access to benefits and working conditions, including dismissal. It does not mention any exception for differences based on different retirement ages. In addition, the Equal Treatment Directive expressly excludes social security schemes from its coverage. The court held, however, that since the Social Security Directive permits nations to have different retirement ages for men and women, and the plan in question was closely linked to the state system, there was no discrimination under EEC laws. Because it held that EEC law did not apply in Burton, the court did not need to reach the issue of the applicability of Article 119 or the directives to pension plans. Thus, the conflict between the EEC's stated policy of equal treatment for all workers, on the one hand, and the discriminatory nature of occupational pension plans, on the other, continues despite two recent

209. Id. at 549. See supra notes 42-43 and accompanying text.
210. Id. Equal Treatment Directive, supra note 36, art. 5(1) states, "Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on the grounds of sex." Id.
213. Id.
214. Snaith, supra note 66, at 303. The Social Security Directive is aimed at implementing the principle of equal treatment for men and women in the area of state social security. Social Security Directive, supra note 4, at art. 11. It excludes, however, coverage of pensionable wages for men and women. Id. at art. 7.
216. Id.
217. Id. at art. 2.
218. Snaith, supra note 66, at 302. The court reached this holding despite the fact that the Social Security Directive would not become effective until 1984. Id.
219. Id. at 303.
opportunities for the Employment Appeal Tribunal to apply EEC law and policies.

5. Recent Employment Appeal Tribunal Interpretations of EEC Law

English courts continue to hold that neither English nor EEC law requires them to apply equality principles to retirement benefits. Following this approach, the Employment Appeal Tribunal recently affirmed earlier court decisions broadly interpreting Section 6(4) of the Sex Discrimination Act. In Southampton v. Marshall, the plaintiff was forced to retire at age sixty-two even though she was willing and able to work until sixty-five, which was the retirement age for men. The court held that because of Section 6(4), it was permissible for an employer to maintain different retirement ages. After denying relief for the plaintiff under Section 6(4), the Southampton tribunal asked whether anything in European Community law preempts English law. The tribunal found that Section 6(4) conflicts with Article 5(1) of the Equal Treatment Directive. In addition, the tribunal stated that the English government had not yet taken any measures to implement that Directive. Neither the House of Lords nor the Court of Justice, however, has held that a Directive is directly effective in member states. The Employment Appeal Tribunal held that until either body says that a Directive is paramount, English law controls. The Court could not find any authority in either English or EEC law overriding Section 6(4). The unanimous Tribunal did say that if the Equal Treatment Directive is found to be directly applicable to the member states, then the policy of retiring women


221. Southampton, supra note 220.

222. Id.

223. Id.

224. Id. Article 5(1) of the Equal Treatment Directive adopts the principle that equal treatment requires that men and women be guaranteed the same conditions of employment, including dismissal from employment. Equal Treatment Directive, supra note 36, at art. 5(1).

225. Southampton, supra note 220.

226. Id. The Court rejected the argument that Lord Denning's opinion in E. Coomes (Holdings) Ltd. v. Shields, [1975] I.R.L.R. 263 (i.e., that a Directive may have direct binding effect) was controlling. The Court stated that Lord Denning's opinion was not a decisive part of that judgment and therefore not controlling. In addition, Lord Justice Bridges suggested in the same opinion that Directives need national legislation in order to be implemented. Id.

227. Id. See supra notes 57-60 and accompanying text for treatment of the applicability of EEC law in Member States.

228. Southampton, supra note 220. The Court rejected the Health Authority's argument that the Court of Justice's decision in Burton should also be applied to occupational pension plans. Id. Rather, the Court interpreted the Burton decision as limited to the question of access to retirement benefits at different ages in the context of social security. The Employment Appeal Tribunal found that the Court of Justice has not yet ruled on whether a practice is discriminatory, which prevents a woman from working and is to her detriment. Id.
earlier than men conflicts with the principle of equality stated in Article 5(1) of the Equal Treatment Directive.\footnote{Id.}

Even if Article 119 or any of the Directives were found to be directly effective, the EEC law is itself unsettled.\footnote{Id. As the Employment Appeal Tribunal pointed out in \textit{Barber v. Guardian} the law is not clear as to access to retirement benefits.\footnote{Id.} Although actual benefits may be paid within the meaning of Article 119, the \textit{Burton} court held that the issue of when a person is entitled to benefits is a question of access to benefits, which is covered by the Equal Treatment Directive.\footnote{Id. The \textit{Barber} court read the \textit{Burton} decision as limited to a situation where rights are linked to a national retirement scheme governed by national social security provisions.\footnote{Id. Furthermore, while several Advocates-General have suggested that Article 119 would be applicable to a strictly occupational pension plan,\footnote{Id. the Court of Justice has not actually held that nor has it dealt with pensions linked to the state system via a contracting-out provision. In addition, EEC law is not clear on how the principle that different age conditions for men and women must be non-discriminatory applies to contracted-out pension plans.\footnote{Id. When EEC law becomes clear, the English courts have said they will construe English law to conform with it.\footnote{Id.} Article 119 has not been held to apply to rights and benefits of occupational pension plans. The difficulty in defining equality in retirement schemes, particularly with the allowable differences in retirement ages between men and women, probably precludes the direct application of Article 119 to occupational pension plans.\footnote{Id. In addition, the Court of Justice has held that the Equal Treatment Directive permits different requirements for men and women for access to retirement benefits when those benefits are closely linked to the state social security system. Critics argue that further legislation will be needed, either by the EEC or the English Parliament, before equality will be attained in pension benefits.\footnote{Id. There is a basic conflict in present English law. Both England and the EEC have adopted the principle of equality in employment. Yet this principle has not been applied to retirement benefits, which are arguably a different form of compensation. The U.S. courts have faced this problem and resolved it. The U.S.

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\footnotetext[229]{Id.}
\footnotetext[230]{\textit{Roberts v. Tate \\& Lyle}, [1983] I.C.R. at 530.}
\footnotetext[231]{Id.}
\footnotetext[232]{\textit{Burton}, [1982] 3 All E.R. 531.}
\footnotetext[233]{\textit{Roberts v. Tate \\& Lyle}, [1983] I.C.R. at 530.}
\footnotetext[235]{\textit{Roberts v. Tate \\& Lyle}, [1989] I.C.R. at 530.}
\footnotetext[236]{See, e.g., \textit{Southampton}, supra note 220.}
\footnotetext[237]{\textit{Note, Pensions and European Law}, supra note 121, at 361.}
\footnotetext[238]{Id.}
Supreme Court has held that discrimination in pension benefits is inconsistent with equality of men and women in employment.  

III. SEX DISCRIMINATION LAW IN THE UNITED STATES

A. The Insurance Industry and Pension Plans

Predictions about longevity are a necessary element in determining the costs for and benefits from retirement plans making monthly annuity payments. Statistics have shown that, as a group, women live longer than men. As a result, the insurance industry in the United States has traditionally used gender-based mortality tables to predict the period over which pension benefits will be paid. Because women on the average will receive benefits for a longer period of time, their annuity will yield lower monthly payments. The insurance industry justifies the use of different mortality tables for men and women on the ground that the different tables are actuarially sound. The purpose is to create homogeneous groups in which all members have equal risk. Differences based on sex, however, do not necessarily create homogeneous groups. While strong statistical evidence shows that women live longer than men, sex is not the only

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241. Mortality tables utilize past mortality rates for different age and sex groups in order to show the probability of death or survival at each age level. *Key, Sex-Based Pension Plans in Perspective: City of Los Angeles, Department of Water and Power v. Manhart*, 2 HARV. W.I.J. 1, 10 (1979).
242. *Ryan & Burkley, supra* note 240, at 203-04. Retirement income generated from employer-sponsored pension plans may be received in one of three ways: a single life annuity (which provides for periodic payments for the life of the individual), a joint and survivor annuity (like the single life annuity but with provisions for benefits to continue during the life of the survivor), or a lump sum payment. *Id.* at 203. These can be provided by either a defined benefit or defined contribution plan. *Id.* Benefits from defined contribution plans depend upon the option selected and actuarial assumptions about life expectancy. *Halperin & Gross, Sex Discrimination and Pensions: Are We Working Toward Unisex Tables?*, 30 N.Y.U. CONF. ON LAB., 221, 236-38 (May 1977). 71% of the estimated 46,000 pension plans serving approximately 46 million persons are defined contribution plans. *Ryan & Burkley, supra* note 240, at 203.
246. *Id.*
characteristic that may explain this phenomenon.\textsuperscript{247} It is not clear what role past organic and environmental factors play in creating greater longevity for women.\textsuperscript{248} Sex and age characteristics are used because they are visible, unambiguous, and unchangeable by the individual.\textsuperscript{249}

Risk clarification in the pension industry is based on the idea that actuarial equity permits individual differences in risk to be considered whenever it is sufficiently supported by statistics.\textsuperscript{250} This means that all persons with similar risks are classified together.\textsuperscript{251} The practice of loss-spreading is also used in the insurance industry so that all persons, through their premiums, pay for the losses incurred by some.\textsuperscript{252} The actuary must find a compromise between sharing the risk and subsidization, which occurs when people of varying risks are combined into one group.\textsuperscript{253} It is up to the actuary to use his best judgment in determining which classifications may be used.\textsuperscript{254} What may be actuarially sound, however,\textsuperscript{255} may be socially unacceptable.\textsuperscript{256} Many argue that race and sex, are two characteristics which fall into this category.\textsuperscript{257} While the insurance industry deals with group classifications,\textsuperscript{258} U.S. anti-discrimination legislation requires treating each person as an individual and not as a member of a class.\textsuperscript{259}

B. Employment Discrimination Legislation

The U.S. Congress, in 1964, passed Title VII of the Civil Rights Act, prohibiting discrimination in employment on the basis of race, color, religion, sex, or national origin.\textsuperscript{260} The Act applies to all employers, public and private, who employ fifteen or more persons.\textsuperscript{261} The broad language of Title VII is limited by

\textsuperscript{247} Id. See Brilmayer I, supra note 244, at 542-51 and Brilmayer II, supra note 244, at 236-47 (actuarial mortality differences are not determined solely by biological factors); see also Key, supra note 241, at 5-8 (sex is not an accurate predictor of longevity). But see Benston, supra note 244, at 271-73 (life expectancy is directly related to gender).

\textsuperscript{248} Key, supra note 241, at 5.

\textsuperscript{249} Halperin & Gross, supra note 242, at 246.

\textsuperscript{250} Key, supra note 241, at 44.

\textsuperscript{251} Id.

\textsuperscript{252} Halperin & Gross, supra note 242, at 247.

\textsuperscript{253} Key, supra note 241, at 11.

\textsuperscript{254} Id. at 44.

\textsuperscript{255} Id. See Brilmayer I & II, supra note 244, for a contrary opinion.

\textsuperscript{256} Key, supra note 241, at 44.

\textsuperscript{257} Id. at 44-45.

\textsuperscript{258} Ryan & Burkley, supra note 240, at 202.

\textsuperscript{259} Manhart, 435 U.S. at 708.


\textit{It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.}

\textsuperscript{261} 42 U.S.C. § 2000e(b). The following are excluded from this requirement: The United States, a corporation wholly owned by the United States, an Indian tribe, any department of the District of
the Bennett Amendment, which states that a wage differential based on sex is not unlawful if it is authorized by the Equal Pay Act of 1963. The Equal Pay Act, in turn, prohibits discrimination between men and women in compensation for work of equivalent value, unless the differential is based on one of the four specified exceptions. That Act permits disparity in earnings for men and women when a differential arises as the result of a seniority system, merit system, or system which measures earnings on the basis of productivity. In addition, the Act exempts wage differentials based on any factor other than sex.

At the time that Title VII was debated, Senator Humphrey, the floor manager of the Civil Rights Bill, stated that the Bennett Amendment would not alter existing industrial benefit plans, many of which treated men and women differently. The next interpretation of Title VII relating to pension plans came in the form of an administrative ruling. In 1964, the Wage and Hour Administration, which was charged with enforcing the Equal Pay Act, issued flexible guidelines for dealing with retirement plans. The guidelines stated that an employer who either makes equal contribution to or provides equal benefits for similarly situated males and females fulfills the requirements of the Act. In a separate ruling, however, the Wage and Hour Administration held that differences in wages for men and women justified on the basis of differences in the average cost of employing each group does not fall within the exceptions to Title VII and would, therefore, be a violation of the Equal Pay Act. The Equal
Employment Opportunities Commission (EEOC), the agency charged with the enforcement of Title VII, in its first set of guidelines in 1965,271 followed this approach.272

The EEOC issued new sex discrimination guidelines in 1972 requiring employers to provide similarly situated male and female workers with equal benefits from retirement programs.273 The regulations specifically disallow the defense that the cost of providing benefits for one sex is greater than another.274 In 1979, the EEOC was given the authority to enforce the Equal Pay Act as well as Title VII.275 The Commission then issued regulations on discrimination in fringe benefits, stating that it would be unlawful for a pension plan to differentiate on the basis of sex or to maintain different optional or compulsory retirement ages for men and women.276 It remained for the Supreme Court, however, to finally resolve the conflict among the executive agencies over whether Title VII requires equality in private pension plans.

may not justify a wage differential. If it were held otherwise, the wage differentials would perpetuate the discrimination sought to be eliminated. Id.

271. 42 U.S.C. § 2000e-4(a), 5(a). See Rozmarin, Employment Discrimination Laws and Their Application, 7 BARRISTER 29 (Spr. 1980) (outlining the primary laws dealing with employment discrimination). Any individual alleging employment discrimination must file a claim with the EEOC within 180 days of the alleged incident. 42 U.S.C. § 2000e-5(e). This not only guarantees the rights of individuals who file on time, but it also protects employers from liability which occurred in the past. Ann. Surv. of Lab. L., 24 B.C.L. Rev. 47, 221 (1982). The EEOC is required to seek conciliation and mediation regarding all charges filed with the Commission. 42 U.S.C. § 2000e-5(f)(1). If within thirty days after the charge is made the EEOC has been unsuccessful in its mediation efforts, then civil action may be brought. Id. Either the EEOC or the individual complainant may bring an action in federal district court, unless the respondent is a governmental body in which case the U.S. Attorney General alone has the authority to sue. Id. An individual has the right to intervene in any suit brought by the EEOC or the Attorney-General on the individual's behalf. 42 U.S.C. § 2000e-5(g). The district court has the authority to enjoin any unlawful practice, as well as to order reinstatement or the hiring of employees with or without back pay. 42 U.S.C. § 2000e-5(g). Back pay is limited, however, to the two years prior to the filing of the initial charge with the Commission. Id.

272. 29 C.F.R. § 1604.7(a), (b), (c) (1965). See Sher, supra note 267, at 1175-76 (discussing the administrative conflict over applying Title VII to pension plans).

273. 29 C.F.R. § 1604.9(b).

274. Id. at § 1604.9(3).


276. See 29 C.F.R. § 1604.9(f) which states: "[I]t shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates on the basis of sex." This ruling is also consistent with certain legislative acts that prohibit discrimination on the basis of age. See, e.g., the Age Discrimination in Employment Act [hereinafter cited as ADEA], Pub. L. 990-202, § 2 et seq., 81 Stat. 602, 29 U.S.C. 621 et seq. The ADEA parallels the terms of Title VII. Blackburn, Charting Compliance Under The Age Discrimination in Employment Act, 57 CHICAGO - KENT L. Rev. 559, 578-79 (1981). The ADEA prohibits discrimination against any persons between 40 and 70 by an employer of 20 or more persons, public or private. 29 U.S.C. at 623. Discrimination on the basis of bona fide occupation qualifications or bona fide employee benefit plans, however, is not prohibited. Id.
C. Manhart: Equal Contributions to Pension Plans

The Supreme Court held in *Los Angeles v. Manhart*\(^{277}\) that an employer violated Title VII when it required female employees to make larger contributions to a self-insured pension plan than male employees.\(^{278}\) The employer in *Manhart* maintained a defined benefit plan, whereby men and women of the same age, seniority, and salary received equal monthly benefit upon retirement.\(^{279}\) Based on its findings that women live longer than men, the employer determined that the cost of providing a pension to the average female retiree is greater than for her male colleague because, on the average, she will receive more monthly payments.\(^{280}\) The employer therefore required female employees to contribute 14.84% more than male workers in order to receive the same monthly benefits.\(^{281}\)

The Supreme Court held that Title VII unambiguously requires that all employees be treated as individuals and not simply as components of a class based on race, religion, sex, or national origin.\(^{282}\) Although on the average women do live longer than men, any one individual woman may not live as long as the average members of her class.\(^{283}\) Thus, a generalization about a protected class, even if true, may not be used to discriminate against an individual.\(^{284}\) The focus of the statute is fairness to individuals, not classes.\(^{285}\) Therefore, while it may be unfair to require men as a class to subsidize women, it is not unlawful.\(^{286}\) Rather, the Court held, at least in defined benefit plans, it is unlawful to make individual women pay the cost of greater female longevity when it is not known that any one of them will live longer than the average man.\(^{287}\)

In *Manhart*, the employer had used separate mortality tables to calculate the cost of funding the program as well as the amount of benefit payments derived from contributions to the plan.\(^{288}\) These tables reflect the fact that a woman’s life span is longer than a man’s.\(^{289}\) Generalizations, however, often preserve traditional assumptions rather than help differentiate individuals from each other.\(^{290}\) As the Court pointed out, longevity may be the result of sociological and environmental factors as well as biological ones.\(^{291}\) The Court therefore held that

\(^{277}\) 435 U.S. 702.

\(^{278}\) *Id.* at 717.

\(^{279}\) *Id.* at 705.

\(^{280}\) *Id.*

\(^{281}\) *Id.*

\(^{282}\) *Id.*

\(^{283}\) *Id.*

\(^{284}\) *Id.*

\(^{285}\) *Id.* at 709.

\(^{286}\) *Id.* at 708-09.

\(^{287}\) *Id.* at 708. See Key, *supra* note 241, at 16 (use of mortality tables by gender in pension plans).

\(^{288}\) *Manhart*, 435 U.S. at 705. See *supra* note 241 for a discussion of mortality tables.

\(^{289}\) *Manhart*, 435 U.S. at 705.

\(^{290}\) *Id.* at 709.

\(^{291}\) *Id.* See Brilmayer I, *supra* note 244, at 547 (discussion of the various factors attributed to the longevity differential found to exist between men and women).
mortality tables may not be used to require higher contributions from women in order to fund the plan.292

The holding of the Manhart Court comports with the generally accepted principle of the insurance industry that risks should be spread among the group of insured so that all premiums pay for those who suffer losses.293 This principle is consistent with the Court's holding that Title VII focuses on the individual rather than on the individual's gender.294 For instance, smokers subsidize health benefits for non-smokers.295 Likewise, men ought to subsidize pension benefits for women.296 It is a common practice for different classes of risks to be grouped together for the purposes of insurance. It is no less unfair to men for this industry practice to be applied to pension plans.

The Manhart Court found that the employer's practice of requiring larger contributions from women treats women differently because of their sex.297 While this constitutes employment discrimination, the employer argued that it was exempted by the fourth exception to the Equal Pay Act, which allows wage differentials based on any factor other than sex.298 The Court held that the Equal Pay Act does not protect the employer in this case from liability under Title VII because the actuarial data based on sex, which was used to discriminate against women, is not a factor other than sex.299 Rather, "[s]ex is exactly what it is based on."300 Sex is only one factor in determining a person's longevity; no evidence was offered that any other factor was considered.301

The Court also rejected the defendant's reliance on Senator Humphrey's statement that Title VII does not apply to industrial pension plans.302 The plain language of the statute, adopted a year before Senator Humphrey made his remarks, contradicts that interpretation.303 Finally, the Court rejected the employer's argument that the difference in the cost of providing benefits for each

292. Manhart, 435 U.S. at 710-11. See Key, supra note 241, at 16. The Court stated, however, that mortality tables and the composition of an employer's work force can be used in determining the probable cost of the death or retirement plan to the employer. Manhart, 435 U.S. at 718.


294. Manhart, 435 U.S. at 710.

295. Id. at 710.

296. Id. at 708-09.

297. Id. at 711.

298. Id. See supra note 263 (quoting the exceptions to the Equal Pay Act). The Court did not have to reach the issue of whether retirement benefits or contributions to a pension plan are wages because the Bennett Amendment, 42 U.S.C. § 2000e-2(h), extended the Equal Pay Act, 29 U.S.C. § 206(d), to include all forms of compensation.

299. Id. at 712. See Canter, Legislative and Judicial Developments in Pension Plans, 17 Forum 166, 177 (1981-1982).

300. Manhart, 435 U.S. at 713 (citing the Ninth Circuit's decision in this case). 553 F.2d 581, 588 (9th Cir. 1976).

301. Manhart, 435 U.S. at 712. See Brilhayer I, supra note 244, at 530 (the authors state that sex is irrelevant to longevity because it is not an accurate predictor of longevity).

302. Manhart, 435 U.S. at 714.

303. Id.
sex rebuts the plaintiff’s *prima facie* showing of discrimination. 304 Congress did not write an affirmative defense of cost-justification into Title VII and the Court declined to imply one. 305

The Court limited its decision in *Manhart* to the issue of equalizing contributions to pension plans by men and women in order that they may receive equal benefits. 306 It left open the question whether Title VII also requires equal benefits from a defined contribution plan. The Supreme Court answered this question five years later in *Arizona v. Norris*. 307

D. Title VII and Pension Plan Benefits

In the *Norris* case, the state of Arizona had offered its employees the option of participating in a deferred compensation plan under which they could receive a portion of their wages upon retirement. 308 This plan, which was administered by several private insurers, offered three options for the employee upon retirement: a lump sum payment, periodic payments for a fixed time, or a monthly annuity for the remainder of the employee’s life. 309 The monthly annuity was calculated on the basis of the amount of compensation the employee deferred, the employee’s age at retirement, and the employee’s sex. 310 All of the insurers involved used sex-based mortality tables in calculating the monthly benefits. 311 No other factor was used in predicting the longevity of retirees. 312

Nathalie Norris, an employee and participant in the plan, brought a class action alleging that the employer violated Title VII by administering an annuity plan that discriminated on the basis of sex. 313 The Supreme Court, affirmed the Ninth Circuit’s finding of discrimination, 314 and held that sex-based mortality tables could not be used to determine retirement benefits when those tables generated different monthly payments for men and women. 315 Participation in a deferred retirement plan constitutes a condition of employment which results in compensation in the form of retirement benefits. 316 The Court held that because

304. *Id.* at 716.
306. *Id.*
308. *Id.* at 3494.
309. *Id.*
310. *Id.* at 3495.
311. *Id.* at 3494-95.
312. *Id.* at 3495.
313. *Id.*
314. *Norris*, 671 F.2d 330, 336 (9th Cir. 1982).
315. *Id.* at 3499. Justice Marshall, joined by Justices Brennan, White, Stevens, and O’Connor, wrote the majority opinion on the substantive issue of discrimination. Justice Powell was joined by Chief Justice Burger, and Justices Blackmun, Rehnquist, and O’Connor on the decision to grant prospective relief only.
316. *Id.* at 3496.
Title VII requires employees to be treated as individuals, the use of sex to predict the longevity of women or men as a class is inconsistent with its holding in Manhart.\textsuperscript{317}

The use of sex-based mortality tables treats individual women differently from individual men because the only means of differentiation is on the basis of sex.\textsuperscript{318} This is true despite the fact that at the time of retirement, the annuity policies would be actuarially equivalent.\textsuperscript{319} The Court accepted without discussion the employer's argument that annuity policies for similarly situated men and women will have roughly the same present actuarial value because the lower monthly payments a woman is promised is offset by the likelihood that she will receive more payments.\textsuperscript{320} Nonetheless, the Court, relying on its decision in Manhart, stated that class-based treatment, whether at the pay-in or pay-out stage, violates Title VII's proscriptions against classifications based on sex.\textsuperscript{321}

The Court in Norris responded to several questions left unanswered by its decision in Manhart. The employer argued that since their plan, unlike the one in the Manhart case, was a voluntary one, Title VII did not apply.\textsuperscript{322} Title VII, however, forbids discrimination in all terms and compensation.\textsuperscript{323} The Norris court held that this applies to any term whether or not such terms are voluntary.\textsuperscript{324} A similar question arose regarding the fact that the plan in Norris offered two non-discriminatory options.\textsuperscript{325} Both the lump-sum payment and the fixed periodic payment provide equal benefits to men and women who contribute the same amount of money.\textsuperscript{326} The Court held it is no defense to a discrimination charge that the employer also offers non-discriminatory fringe benefits.\textsuperscript{327}

The Court also addressed the issue of whether the employer could be held...
liable for the discriminatory practices of a third party, here, the insurance company. The employer in Norris relied upon the Court's earlier statement in Manhart that an employer may lawfully set aside equal retirement contributions for each employee, which upon retirement can be used to purchase annuities on the open market. The defendants maintained that because the annuities reflected what was available on the open market, they had not violated Title VII. The Court rejected this argument because the employer created the plan, selected the insurance companies and contracted with them as to specific terms. An employee choosing to participate in the plan had to use a company selected by the state.

As a result of Norris, an employer may not escape liability because a fringe benefit scheme it adopts contains discriminatory features maintained by outside insurance companies. Further, the Court in Norris held that an employer cannot defend itself by claiming that it could not find an insurer who would treat employees equally under the law.

The Supreme Court rulings in Manhart and Norris make it unacceptable under the terms of Title VII for an employer to discriminate on the basis of sex in providing fringe benefits to its employees. This is true whether the employer furnishes the pension plan or contracts it out; whether it is optional or compulsory; and whether the employee as well as the employer contributes funds. While the Supreme Court has dispelled any existing uncertainties as to the applicability of Title VII to pension benefits, the impact of the Court's decision is lessened by the prospective nature of the relief granted.

E. Retroactive Relief: Manhart and Norris

The Court held in both Manhart and Norris that the rulings were prospective only. While relief in Title VII cases is normally retroactive, such relief is not

328. Id. at 3499.
329. Id. at 3500.
330. Id.
331. Id. at 3501-02.
332. Id. at 3501.
333. Id. at 3502. Both parties to a contract are liable regardless of which one initiated inclusion of the discriminatory provision. Id.
334. Id. The Court expects employers to either find companies who will use neutral or integrated tables, supply the benefits themselves, or not provide pension plans at all. Id.
335. Manhart, 435 U.S. 702 (contributions); Norris, 103 S.Ct. 3493 (benefits). See also Newport News v. EEOC, 103 S.Ct. 2022 (1983) (pregnancy benefits). Cf. 29 C.F.R. § 1604.9 which supports these holdings by making it unlawful to have pension or retirement plans which establish different retirement ages based on sex.
337. Norris, 103 S.Ct. 3493.
338. Id.
339. Id.
340. Id. at 3510.
341. Manhart, 435 U.S. at 723; Norris, 103 S.Ct. at 3512.
mandated by law.\textsuperscript{342} The Court stated that retroactive relief should not be awarded when a new law is established, which would have a potentially disruptive impact on the employer's practice.\textsuperscript{343} In both Manhart and Norris, the majority of the Court held that the employers could have reasonably assumed that their employment practices were lawful and, therefore, could not have anticipated the change in law expounded by the Court.\textsuperscript{344}

Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insured's benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect. Consequently, the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result.\textsuperscript{345}

Prior to the Court's decision in Manhart the law regarding pension plans was unclear.\textsuperscript{346} Pension administrators were faced with vague statutory language and inconsistent rulings from two administrative agencies.\textsuperscript{347} The Court created new law with its decision.\textsuperscript{348} In addition, the financial impact of retroactive relief on the large number of pension plans in the United States would have been devastating, with the most harm falling on innocent third parties such as the beneficiaries of these plans.\textsuperscript{349} The concern was that retroactive relief would require greater disbursements than had been originally planned, thus jeopardizing the solvency of these plans and the insureds' benefits.\textsuperscript{350}

Justice Powell's opinion in Norris reiterated this reasoning.\textsuperscript{351} The Court found

\begin{itemize}
\item \textsuperscript{342} 42 U.S.C. § 2000e-5(g). See Manhart, 435 U.S. at 718-19.
\item \textsuperscript{343} Norris, 103 S. Ct. at 3510.
\item \textsuperscript{344} Manhart, 435 U.S. at 720; Norris, 103 S.Ct. at 3510. But see Justice Marshall's dissent in Norris at 3501 stating that Manhart had given employers fair warning that discrimination in annuity schemes violated Title VII.
\item \textsuperscript{345} Manhart, 435 U.S. at 721.
\item \textsuperscript{346} Id. at 720.
\item \textsuperscript{347} Id. See note 270 and accompanying text. The Wage and Hour Administration required an employer to maintain equal contributions or benefits, while the EEOC required equal benefits.
\item \textsuperscript{348} Manhart, 435 U.S. at 722. The Court held that prior to this decision it was reasonable for employers to believe that it would be unfair to make men carry more than their "actuarial share" of the cost of these plans. Id.
\item \textsuperscript{349} Id. at 722-23. If relief was awarded retroactively, the money to pay such an award would come from the pension funds. Diminishing the assets of the funds would possibly jeopardize their solvency, resulting in either the lowering of current mortality benefits to retirees or raising the contributions of current employees. Id. at 725.
\item \textsuperscript{350} Id. at 721. See Note, The Supreme Court, supra note 319, at 257 n.40, which criticizes the Court's holding in Norris that substantial costs militate against retroactive relief. It also states that prospective relief diminishes the impact of the holding because it perpetuates the discriminatory treatment of women. Id. at 257-58.
\item \textsuperscript{351} Norris, 103 S.Ct. at 3510.
\end{itemize}
that the question of equality of benefits had not been decided by its earlier
decision in *Manhart*.

Because *Manhart* expressly allowed employers to set aside contributions for later purchases of annuities on the open market, an employer could have reasonably believed that making such annuities available to its employees was lawful, and therefore the entire plan was acceptable. In addition, retroactive relief would cause great economic disruption, with the largest burden carried by economically poor states. The Court, therefore, held that only benefits based on contributions made from the date of judgment onward would have to be equal.

The United States, mainly through the decisions of the Supreme Court, has resolved the issue of pension benefits in favor of full equality for men and women. England, on the other hand, has not followed the U.S. example. Mechanisms for change, however, are available in the English system. Equality can be achieved either through changes in existing legislation, which is very similar to the U.S. statutory scheme, or through the efforts of the EEC and the European Court of Justice.

IV. COMPARING U.S., ENGLISH, AND EEC LAW

A. Title VII and The Sex Discrimination Act

Both England and the United States ban discriminatory employment practices, whether blatant acts or facially neutral policies that have a discriminatory impact. The two legislative acts are similar in their approach as well as their structure. Both the U.S. Congress and the English Parliament created em-

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352. *Id.*
353. *Id.*
354. *Id.* See * supra* note 348 on the effect of a retroactive award on the pension industry.
355. *Norris*, 103 S.Ct. at 3510 n.12. Employers must insure that all benefits received from contributions made on or after August 1, 1983 are calculated "without regard to the sex of the employee." *Id.* Justice O'Connor indicated that the Equal Pay Act, while prohibiting the lowering of compensation to comply with the law, would not necessarily require employers to "top-up" benefits (bringing women's benefit levels up to men's). Rather, employers could use tables reflecting the longevity of the employee population as a whole. *Id.* at 3512 n.4. See, e.g., Ryan & Burkley, * supra* note 240, at 204-07 (suggesting possible methods of implementing the changes now required by *Norris*). See also Halperin & Gross, * supra* note 242, at 292-94 (the problems of unisex tables).
357. Title VII, 42 U.S.C. § 2000e; Sex Discrimination Act, 1975, ch. 65. See Covington, * supra* note 100, at 407-15 (the two statutory schemes are similarly drafted). While the British statute covers all employees, including trade unions, the U.S. statute is limited to employers of fifteen or more persons. Title VII, 42 U.S.C. § 2000e(b); Sex Discrimination Act, 1975, ch. 65, § 10. U.S. labor unions are only covered if they operate a hiring hall, have fifteen or more members, or act as bargaining representatives. 42 U.S.C. § 2000e.
employment opportunity commissions\textsuperscript{358} with similar enforcement responsibilities.\textsuperscript{359}

The U.S. statute provides individuals with the opportunity to present their claims to the administrative agency.\textsuperscript{360} The employees also have the right to pursue their claims in federal district courts if they fail to receive satisfaction from the EEOC.\textsuperscript{361} The English act, on the other hand, provides that individuals may assert their claims directly before an industrial tribunal.\textsuperscript{362} In both countries, individuals may receive assistance from the Commission.\textsuperscript{363}

Both Title VII and the Sex Discrimination Act prohibit employment discrimination on the basis of sex.\textsuperscript{364} Both statutes also allow for a bona fide occupational qualification exclusion.\textsuperscript{365} Section 7 of the English Act, unlike Title VII, gives a detailed description of what constitutes a bona fide occupational qualification.\textsuperscript{366} While Title VII is broadly written so as to permit a "differential based on any . . . factor other than sex," the English Act is limited to specified situations.\textsuperscript{367}

The statutes, however, differ in two material respects. First, the English statute allows employers to maintain different retirement ages for men and women.\textsuperscript{368} Not only is it permitted in occupational pension plans, but it also specifically prescribes a five year difference in pensionable ages for men and women qualifying for state social security benefits.\textsuperscript{369} It follows from this, that pension benefits

\textsuperscript{358} Title VII, 42 U.S.C. § 2000e-4(g), creating the EEOC; and Sex Discrimination Act 1975, ch. 65, § 53, creating the Equal Opportunities Commission ("EOC").

\textsuperscript{359} 42 U.S.C. §§ 2000e-4, e-5 and 3-8; Sex Discrimination Act, 1975 §§ 54-61, 74-75. Each Commission is authorized to conduct research and education; monitor employment discrimination, including reporting to the appropriate legislative body; participate in enforcement of the statute, by bringing suit on its own behalf or assisting individuals; and conduct investigations into employment discrimination. Id.

\textsuperscript{360} 42 U.S.C. § 2000e-5.


\textsuperscript{362} Sex Discrimination Act 1975, ch. 65, § 6.

\textsuperscript{363} 42 U.S.C. § 2000e-4(g)(3); Sex Discrimination Act, 1975 § 75. The EEOC is empowered to furnish technical assistance to persons bringing claims under Title VII as well as to assist in an individual's civil action through intervention in the proceedings. 42 U.S.C. § 2000e-4(g)(3) and (6). Likewise, the EOC has the authority to assist individuals by giving advice, procuring advice, and arranging for representation. Sex Discrimination Act, 1975, ch. 65, § 75(2). This includes financial assistance when necessary.

\textsuperscript{364} 42 U.S.C. § 2000e-2; Sex Discrimination Act, 1975, ch. 65, § 6(1). The British statute, in addition, narrowly prescribes different treatment on the basis of marriage. Id. at §§ 1(2), 2(2), 3(1) and 3(2). See Covington, supra note 100, at 409, for a discussion of this section.

\textsuperscript{365} 42 U.S.C. § 2000e-2(e) and (h); Sex Discrimination Act, 1975, ch. 65, § 7. A bona fide occupational qualification ("BFOQ") based on sex is one in which members of one sex cannot adequately, safely, and efficiently perform the duties of the job involved. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969). The EEOC agrees with the Fifth Circuit's holding in Weeks that the BFOQ exception should be construed narrowly. 29 C.F.R. § 1604.2. The Commission sets out guidelines for interpreting the BFOQ exception in 29 C.F.R. § 1604.2.

\textsuperscript{366} Sex Discrimination Act, 1975, ch. 65, § 7.


\textsuperscript{368} Social Security Act, 1973, ch. 38, § 23.

\textsuperscript{369} Id.
are inherently discriminatory since men and women can never receive the same benefits.\textsuperscript{370} Second, both the English Equal Pay Act and the Sex Discrimination Act specifically exclude death or retirement benefits from their coverage.\textsuperscript{371} The result in England is that women are afforded no protection from discrimination in the receipt of pension benefits.\textsuperscript{372}

The United States, on the other hand, has by legislative fiat prohibited age discrimination in employment.\textsuperscript{373} While the legislation does not specifically address the issue, the Supreme Court has held that Title VII does apply to pension benefits.\textsuperscript{374} Further, it has ruled that the use of actuarial tables which discriminate on the basis of sex violates the employment discrimination act.\textsuperscript{375} The EEOC has adopted this reasoning by enacting regulations which prohibit employers from maintaining pension schemes with different retirement ages for men and women.\textsuperscript{376} While England has not followed the United States in achieving equality of benefits for men and women, the EEC has made some efforts toward achieving this result.

B. The Impact of the EEC on Pension Benefits in England

Because of its membership in the EEC, England must follow Community law.\textsuperscript{377} In the context of employment compensation, this means member states must insure that men and women receive equal pay for equal work.\textsuperscript{378} The Court of Justice has ruled that retirement benefits which are merely a continuation of benefits received during employment are considered pay within the meaning of Article 119.\textsuperscript{379}

The Court of Justice, however, has not yet decided the issue of whether the principles of equality must be applied to pension benefits.\textsuperscript{380} In addition, the European Council has affirmed the right of member states to maintain different retirement ages in providing for social security benefits.\textsuperscript{381} The Court of Justice

\textsuperscript{370} See supra notes 86-99 and accompanying text. Different benefits for men and women result because women do not work as many years as men and, therefore, do not make as many contributions. Ellis & Morrell, supra note 21, at 25-26.

\textsuperscript{371} Equal Pay Act, 1970, ch. 41, § 6(1); Sex Discrimination Act, 1975, ch. 65, § 6(4). The latter act explicitly allows discriminatory treatment when that conduct is based on reliable actuarial data. Id. at § 45. See supra note 123.

\textsuperscript{372} Note, Pensions and European Law, supra note 121, at 357. See also supra text accompanying note 121.

\textsuperscript{373} ADEA, 29 U.S.C. § 623.

\textsuperscript{374} See, e.g., Manhart, 435 U.S. at 702.

\textsuperscript{375} Norris, 103 S.Ct. at 3499.

\textsuperscript{376} 9 C.F.R. § 1604.9(f).

\textsuperscript{377} See supra note 27 and accompanying text.

\textsuperscript{378} Treaty of Rome, supra note 26, at art. 119. See supra notes 28-29 and accompanying text.


\textsuperscript{380} See supra notes 65-67 and accompanying text.

\textsuperscript{381} This is true of both the Council and the Court of Justice. See, e.g., Social Security Directive, supra note 4, at 382. Burton, [1982] 3 All E.R. at 550.
has interpreted this right as applicable to private plans closely linked to the state system of redundancy. It is not clear how this decision will apply to contracted-out private occupational pension plans.\(^{382}\)

Given the economic status of England and the EEC, and the record number of women workers, fairness requires that the principle of equality eventually be applied to all forms of compensation, including retirement benefits. Parliament, however, is reluctant to alter the difference in retirement ages for men and women due to the expected increase in cost and the concern that implementing equality in pension benefits will cause many plans to go bankrupt. It seems likely, therefore, that the change will have to come from the EEC. If this happens through the Court of Justice, the court will then have to decide the issue of prospective or retroactive relief.

The United States Supreme Court in *Manhart* and *Norris* applied relief prospectively because the court was creating new law which employers could not have anticipated. In addition, the economic consequences were such that the court felt retroactive relief would cause devastating results and undue hardship.\(^{383}\) If the English Parliament does not act, and the European Court of Justice finds that Community law requires equality, then that Court should apply the U.S. example to the English situation. Applying the U.S. example to English or EEC law is not a novel idea; the European Court did just that in *Defrenne v. Sabena*.\(^{384}\) In an effort not to interfere with the economy of the member states,\(^{385}\) the Court in *Defrenne* limited the effects of its holding to claims arising over pay periods beginning after the judgment.\(^{386}\) The Court ruled prospectively because Member States had not realized that Article 119 was directly applicable without further legislation and the Commission itself had not taken any measures to enforce this provision.\(^{387}\) In addition, the Court found that it would be very difficult to ascertain with certainty what the pay should have been in both public and private markets, thereby making it impossible to decide cases arising from the past.\(^{388}\)

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\(^{382}\) See, e.g., *Southampton*, supra note 220.

\(^{383}\) See supra notes 349-55 and accompanying text.


\(^{386}\) *Defrenne v. Sabena*, [1976] I.C.R. at 571. Judgment was entered on April 8, 1976. The Court's prospective holding excludes, however, claims instituted by workers prior to April 8, 1976.

\(^{387}\) Note, *Equal Pay and Article 119*, supra note 29, at 499 (referring to *Defrenne v. Sabena*). This is true despite the fact that in the original Treaty, article 119 stated that it was to be fully implemented by the end of the first stage, which was December 1961. 298 U.N.T.S. 3.

\(^{388}\) *Defrenne v. Sabena*, [1976] I.C.R. at 571. The judgment also applied to new member states. The Commission had previously held that article 119 should have been fully applicable in new member states by January 1, 1973 (the date of accession). Id. at 570. The European Court was not willing, however, to apply this innovative ruling to the case of *Worringham v. Lloyds' Bank*. Note, *Pensions and European Law*, supra note 121, at 359. That case was decided, however, after the scope of article 119 had
It is not clear whether occupational schemes are covered by either Article 119 or the Equal Treatment Directive. If the Court of Justice were to find that either Article 119 or the Equal Treatment Directive is directly applicable in the area of pension plans, it should consider applying its decision prospectively as it did in Defrenne v. Sabena. Neither the Commission nor the member states are certain that Community law requires equality within occupational pension plans. Further, the financial impact on employers and insurers if such a decision were issued retroactively would be considerable. By applying the decision prospectively, the Court would lessen the hardship imposed on employers who are uncertain as to the existing law, while at the same time implementing the principles of equality which have in theory been adopted by all members of the Community.

While prospective relief does solve the problem of avoiding substantial, unanticipated costs, it also frustrates the legislative purpose of eliminating all discriminatory practices. Limiting victims of discrimination to prospective relief in effect leaves past discrimination uncompensated. A similar problem exists for a court when ordering changes to an occupational pension plan which maintains different retirement ages. If women retire earlier than men, then they can never accrue the same amount of benefits. On the other hand, if the court orders changes in order to achieve equality by raising the retirement age for one sex, it will have made a legislative decision that working longer for a greater pension is preferable to early retirement. Given these problems, the most effective means for achieving equality in pension plans in England will be through an act of Parliament, rather than a court decision.

V. Conclusion

Parliament enacted legislation in 1970 and 1975 which was designed to combat employment discrimination on the basis of sex. It excluded retirement benefits,

already been determined in Defrenne v. Sabena. Worringham, [1981] I.C.R. at 591. The Court held that the conditions found in Defrenne v. Sabena necessitating a prospective ruling did not exist in Worringham. Id.

389. See, e.g., Ellis & Morrell, supra note 21, at 20; McCallum & Snaith, supra note 62, at 270.
390. McCallum & Snaith, supra note 62, at 268-69. In a consultative document on equal treatment for men and women in occupational pension schemes the British government stated that it did not view article 119 and the Equal Pay Directive, standing alone, as requiring equality in pension plans. Id. at 270. See also Note, Pensions and European Law, supra note 121, at 360.
391. Note, Pensions and European Law, supra note 121, at 361. See also Cmd. No. 6599, supra note 9, at 52-56.
392. Note, The Supreme Court, supra note 318, at 257.
393. Id.
394. Id. at 257-58.
395. Ellis & Morrell, supra note 21, at 427.
396. Id.
however, from the areas of employment covered by both the Equal Pay Act and 
the Sex Discrimination Act. The English courts have interpreted the pension 
benefits exceptions as excluding any employment provision relating to pensions. 
While somewhat more successful in the Court of Justice, plaintiffs have been 
unable to get that court to rule on whether private pension plans are covered by 
the equality requirements of EEC law.

Article 119 of the Treaty of Rome requires member states to insure that men 
and women receive equal pay for equal work. The European Council has issued 
several directives interpreting and applying the principles stated in Article 119. 
In addition, the Court of Justice, through cases such as Worringham and Garland, 
has expanded the meaning of pay in EEC law. Neither the court nor the Council, 
however, has applied the equality principles to private pension benefits. It is still 
unclear whether employers are required to achieve equality for men and women 
in the occupational pension plans they maintain.

By permitting inequality in pension benefits, England contravenes the principle 
of equal pay embodied in Article 119. The Court of Justice has held that pay 
within the meaning of Article 119 constitutes more than cash payment. In Garland, 
for instance, the court held that gratuitous travel privileges for workers, 
even after retirement, were pay. Pension benefits, like travel privileges, are 
remuneration for work, just a different form than wages. Changes will have to be 
made in either English anti-discrimination legislation or in EEC laws in order to 
correct these contradictory positions.

The U.S. law, on the other hand, is clear and settled. Title VII prohibits 
employment discrimination on the basis of immutable characteristics. Persons 
must be treated as individuals and not as members of a class based on race, color, 
nationality, religion, or sex. Based on the broad language of Title VII, the 
Supreme Court held that employers may not discriminate against women in 
providing retirement benefits. Employers must insure that contributions to and 
benefits from these plans are maintained equally for men and women.

In making these decisions, the Supreme Court issued its ruling prospectively. 
By broadly interpreting Title VII, the Court changed the law regarding pension 
benefits. It was concerned that if the holding was applied retroactively, the 
solvency of many pension plans would be placed in jeopardy. Employers could 
not anticipate the change in law and, therefore, should not be penalized.

The Court of Justice should, on the basis of Article 119 or one of the directives, 
decide that employers must achieve equality in occupational pension plans. 
The Court should also follow the U.S. example and make its ruling prospective 
in nature. The Court has issued prospective rulings in the past. In Defrenne v. 
Sabena, the Court held that Article 119 was directly applicable in Member States 
only after the date of that judgment. Because it would in effect be creating new 
law, the Court's decision would be less economically harsh if the decision to grant 
relief was made prospective.

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