RETIREMENT (IN)SECURITY: A CLOSER LOOK INTO THE UNITED STATES' RETIREMENT CRISIS

by
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The retirement system in the United States is typically thought to consist of Social Security, pension plans, and personal savings. Despite the availability of various methods to save money, Americans are struggling more than ever to adequately prepare for retirement. This Note examines the current structure of the retirement system in the United States and the shortcomings of the system as it stands today. This Note proposes changes that re-envision the United States' current retirement system to allow Americans to maximize their retirement savings during their time in the work force, with the hopes of allowing retirees to start their new chapter at a reasonable age and free from financial stress.

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INTRODUCTION

The common metaphor for the United States' retirement system is a three-legged stool.[1] This stool of retirement income is supported by Social Security, pensions, and personal savings.[2] Despite the availability of multiple different methods to save for retirement, Americans are increasingly struggling to adequately save for retirement, leading to questions as to how well this stool will continue to support retirees in the United States. Each of these three "legs" of the retirement stool pose critical issues that significantly impair the ability of workers to sufficiently save for retirement. Without some significant changes to our current retirement system, millions of retirement age individuals are looking toward the possibility of continuing to work well into their seventies, or facing the reality of living below the poverty line during what are supposed to be their sunset years. This Note evaluates the structure of the retirement system in the United States, analyzes the inefficiencies of this system, and poses recommendations as to how the current retirement system can be changed in order to produce increased retirement savings and timely departure from the workforce.

The Note will proceed in seven parts. Part I discusses Social Security and the potential implications of its coming insolvency. Part II outlines defined benefit pension plans and the reasoning behind the shift away from them. Part III addresses defined contribution plans and why this new method of saving seems to produce such low savings results in workers today. Part IV discusses the role of personal savings in the retirement system and why this is no longer a feasible way to account for retirement. Part V analyzes the effect the COVID-19 pandemic has had on each area of the retirement system and how this is impacting worker's ability to retire. Part VI explores the behavioral reasons behind why we save the way we do, and how our perceptions regarding spending impacts our saving habits. Finally, Part VII proposes potential changes that can be made to the retirement system in order to begin increasing workers' participation in retirement savings plans, and therefore, increase the value of their retirement savings accounts.

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[1] Joan Entmacher & Amy Matsui, *Addressing the Challenges Women Face in Retirement: Improving Social Security, Pensions, and SSI*, 46 J. MARSHALL L. REV. 749, 749 (2013).

[2] Stephen F. Befort, *The Perfect Storm of Retirement Insecurity: Fixing the Three-Legged Stool of Social Security, Pensions, and Personal Savings*, 91 MINN. L. REV. 938, 939 (2007).

I. SOCIAL SECURITY

If individuals continue to struggle to save for retirement through pensions or private savings, retirees will primarily rely on Social Security to fund their retirement. Though not uncommon, this will likely pose a significant financial struggle for these individuals as Social Security typically only replaces 40% of pre-retirement income.[3] Prior to Social Security, older Americans made up at least half of the population of poorhouses in the United States, as more than half of Americans aged 65 and older depended completely on others for their day-to-day survival.[4] In 1935, Social Security was introduced to protect workers aged 65 and older who were aging out of the workforce.[5] Since then, the program has been expanded to provide additional support through spousal death benefits and disability benefits.[6] More recently, the program also allows a reduced retirement benefit at age 62 but the age for full retirement benefits is 67.[7]

Social Security provides retired individuals access to a consistent stream of income, given that they have paid into Social Security through a payroll tax.[8] The payroll tax is a 12.4% tax that is split between an employer and a worker so that each pay a 6.2% tax on any taxable wages.[9] Self-employed individuals are supposed to pay the full 12.4%, but are allowed to deduct the 6.2% that would typically be apportioned to an employer.[10] Social Security retirement benefits continue throughout the individual's lifetime and are calculated based on their lifetime earnings and time in the workforce.[11] The formula used is complicated, but generally, Social Security benefits are computed by using an individual's "average indexed monthly earnings" for up to 35 years of a worker's income.[12] A worker can

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[3] Mark Miller, *'Retirement Crisis' or Not, Americans Need to Reboot Their Approach*, REUTERS, https://www.reuters.com/markets/us/retirement-crisis-or-not-americans-need-reboot-their-approach-2023-01-12/ (Jan. 12, 2023, 7:06 AM).

[4] John Burritt McArthur, *Private Pensions and the Justification for Social Security*, 48 S. TEX. L. REV. 1, 4 (2006).

[5] Chad Burkitt, *A More Secure Choice: Minnesota's Two-Pronged Approach to State Level Retirement Savings Programs*, 40 MITCHELL HAMLINE L. J. PUB. POL'Y & PRAC. 183, 191 (2019).

[6] Entmacher & Matsui, *supra* note 1, at 751–52.

[7] Burkitt, *supra* note 5, at 191; CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: TOP TEN FACTS ABOUT SOCIAL SECURITY 4 (2024) [hereinafter POLICY BASICS], https://www.cbpp.org/sites/default/files/atoms/files/8-8-16socsec.pdf; SOC. SEC. ADMIN., RETIREMENT BENEFITS 3 (2025), https://www.ssa.gov/pubs/EN-05-10035.pdf.

[8] Burkitt, *supra* note 5, at 191.

[9] Kelley R. Taylor, *Social Security Tax Limit for 2025*, KIPLINGER, https://www.kiplinger.com/taxes/social-security-tax-wage-base-jumps/ (Jan. 2, 2025).

[10] *Id.*

[11] Burkitt, *supra* note 5, at 191–92.

[12] *Social Security Benefits Amounts*, SOC. SEC. ADMIN., https://www.ssa.gov/oact/cola/Benefits.html (last visited May 28, 2025).

max out on the benefit they are eligible for by working for 35 or more years at a job where they paid into Social Security through the payroll tax and had "maximum-taxable earnings" each year.[13] Today, around 67 million United States residents collect Social Security benefits, with 4 out of 5 of these beneficiaries being retired.[14]

The government never intended for Social Security to be the only source of retirement income, but rather a basic floor that other forms of retirement income could build on.[15] While this might have been the case years ago, Americans are increasingly relying on Social Security to provide the bulk of their retirement income. According to the Center on Budget and Policy Priorities, while Social Security benefits are modest, averaging $1,862 per month in 2024, this benefit is the biggest source of retirement income for the majority of retirees in the United States, providing at least 90% of retirement income for 1 in 7 retirees.[16] Without these benefits, almost half of Americans aged 65 and older would fall below the poverty line.[17] While it is clear that Social Security is one of the most important retirement benefits, the program still faces many criticisms as to the adequacy of support it provides to retirees and the sustainability of the program as the United States faces a huge demographic shift in its retirement-aged population.

A. *The Coming Insolvency of Social Security*

For years, a major concern regarding Social Security has been the solvency of the government program as life expectancy has increased and the ability to contribute a sufficient amount to personal savings and pensions has decreased. Beginning in 2024, the United States will experience its largest surge of retirement-age individuals in the nation's history.[18] Between 2024 and 2027 over four million Americans will turn 65, officially reaching retirement age.[19] With this increase in the retirement-age population and the recent slowing of population growth, the benefits being paid out from the Social Security Trust are exceeding the revenue into the system.[20] In 1950, the worker-to-beneficiary ratio was 16.5:1.[21] This fell to

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13 *See id.*

14 POLICY BASICS, *supra* note 7, at 1.

15 Kathryn L. Moore, *An Overview of the U.S. Retirement Income Security System and the Principles and Values it Reflects*, 33 COMP. LAB. L. & POL'Y J. 5, 7 (2001).

16 POLICY BASICS, *supra* note 7, at 4, 8.

17 *Id.* at 7.

18 Jason J. Fichtner, *American's Retirement Thinking is Stuck in the Past. How to Fix It*, BARRON'S (Jan. 17, 2024, 10:33 AM), https://www.barrons.com/articles/retirement-savings-social-security-pensions-cd9d916d.

19 *Id.*

20 Scott Horsley, *Social Security is Now Expected to Run Short of Cash by 2033*, NPR (Mar. 31, 2023, 1:49 PM), https://www.npr.org/2023/03/31/1167378958/social-security-medicare-entitlement-programs-budget.

21 McArthur, *supra* note 4, at 31.

3.4:1 in 2006 [22], and fell further to 2.7:1 in 2022.[23] This stark decline in the worker-to-beneficiary ratio should have been a warning sign that significant changes needed to be made to Social Security for it to remain intact and capable of producing full benefits payments for future retirees.

Current estimates predict that the Social Security Trust will be unable to pay full benefits in about ten years, at which point recipients could see their benefits reduced by about 25%.[24] Using the 2024 average benefit payment, this would reduce average monthly benefits from $1,862 to $1,397, sending those with heavy or complete reliance on the program only slightly above the poverty line.[25]

The repercussions that the insolvency of the Social Security Trust will have on the dignity and financial security of the elderly population in the United States is of huge concern to human rights advocates today. Specifically, the United Nations Principles for Older Persons provides that "[o]lder persons should have access to adequate food, water, shelter, clothing, and health care . . . ."[26] Internationally, the United States ranks in the bottom third of developed countries in the percentage of wages replaced by a public pension system.[27] Human rights advocates suggest that the inadequacy of public benefits support in the United States for retirees puts into question "the willingness of the [country] to promote and protect internationally recognized human rights for its elderly population."[28]

In 2018 it was estimated that more than four million elderly people live below the poverty line in the United States, with millions more sitting just above the poverty line.[29] Without any changes to our current retirement system, if Social Security becomes insolvent, many more millions of elderly citizens will become subject to poverty. These potential human rights implications will stretch throughout generations, forcing retirement-age individuals to remain in the workforce or face poverty in old age, when retirees have historically hoped to reap the rewards of their years in the workforce.

For almost 30 years, a common suggestion as to the pending insolvency of Social Security has been to continue to raise the retirement age, keeping pace with increasing life expectancy.[30] This recommendation was first made by the

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[22] *Id.*

[23] Horsley, *supra* note 20.

[24] *Id.*

[25] *Poverty Guidelines*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines (last visited May 28, 2025).

[26] G.A. Res. 46/91, annex, United Nations Principles for Older Persons (Dec. 16, 1991).

[27] POLICY BASICS, *supra* note 7, at 4.

[28] Regina T. Jefferson, *"Let Them Eat Cake": Examining United States Retirement Savings Policy Through the Lens of International Human Rights Principles*, 31 HARV. HUM. RTS. J. 63, 66 (2018).

[29] *Id.* at 90.

[30] Befort, *supra* note 2, at 967.

1994–1996 Social Security Advisory Council, and is currently being proposed by Republicans in the U.S House of Representatives.[31] However, since the COVID-19 pandemic, life expectancy in the United States continues to decline, while other comparable countries have rebounded with average life expectancies about six years higher than the United States.[32] Additionally, proponents of raising the retirement age fail to take into account the attitudes that younger generations, like Gen Z, have about work. Among recent studies regarding the attitudes of Gen Zers regarding work, one found that less than half of this generation says that work is central to their identity, compared to 62% of millennials.[33]

Gen Z is also very critical of their employers and how they are treated by their employers. For example, 87% of Gen Zers stated that they are willing to leave their current job if they find a job at a company that has values that are more aligned with their own.[34] Additionally, Gen Z reports to be less engaged than other generations, with only 31% of them stating that they are actively engaged while at work.[35] As a Gen Zer myself, and understanding these attitudes towards work, I think it would be a mistake to assume that most of Gen Z would even consider remaining in the workforce longer just to acquire their full Social Security benefit. Assuming that these attitudes will not change with future generations and life expectancy does not suddenly shoot up, it seems unlikely that raising the retirement age would stall the insolvency of Social Security for very long, let alone at all.

B. Bias Within the Calculation of Social Security Benefits

Social Security has also faced criticisms regarding the lower benefits provided to women and racial minorities than that of men.[36] Women and racial minorities have historically faced a pay disparity in comparison to men, particularly white men.[37] This pay disparity is not just detrimental throughout the careers of these

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[31] *See id.*; Ryan Chatelain, *House GOP Panel Calls for Raising Retirement Age, Drawing Democratic Attacks*, SPECTRUM NEWS, https://ny1.com/nyc/all-boroughs/politics/2024/03/21/house-gop-panel-calls-for-raising-retirement-age (Mar. 22, 2024, 9:35 AM).

[32] Selena Simmons-Duffin, *'Live Free and Die?' The Sad State of U.S. Life Expectancy*, NAT'L PUB. RADIO (Mar. 25, 2023, 7:01 AM), https://www.npr.org/sections/health-shots/2023/03/25/1164819944/live-free-and-die-the-sad-state-of-u-s-life-expectancy.

[33] Zoe Kaplan, *'Problems' with Gen Z in the Workplace (From a Gen Zer)—And How to Fix Them*, FORAGE: BLOG, https://www.theforage.com/blog/basics/problems-gen-z-workplace (Feb. 28, 2024).

[34] *Id.*

[35] *Id.*

[36] Philip C. Aka, Aref A. Hervani & Elizabeth Arnott-Hill, *Protection Against the Economic Fears of Old Age: Six Micro and Macro Steps for Bridging the Gap in Retirement Security Between Blacks and Whites*, 40 VT. L. REV. 1, 8 (2015); Caroline Lewis Bruckner & Jonathan Barry Forman, *Women, Retirement, and the Growing Gig Economy Workforce*, 38 GA. ST. U. L. REV. 259, 330 (2022).

[37] Bruckner & Forman, *supra* note 36, at 350, 352–54.

individuals, but into retirement when the reality of the pay disparity causes smaller Social Security benefit, smaller retirement savings, significantly less assets, and more debt.[38]

On its face, the Social Security formula used appears to be objective, when looking at both lifetime earnings and time in the workforce. However, the formula fails to account for the pay disparity that exists between men, women, and minorities.[39] Additionally, the formula fails to account for time out of the workforce that women are more likely to take due to caregiving responsibilities.[40] Both of these things impact time in the workforce and lifetime earnings, both of which are used to calculate the Social Security benefit.[41] Therefore, the Social Security benefit formula should be revamped to account for these circumstances, and others, that impact an individual's ability to spend time and make money in the workforce.

In 2012, the average Social Security benefit per year for men was $16,700, compared to the average benefit of $12,700 per year for women.[42] This disparity is due to the fact that women generally have a lower lifetime income than men.[43] Women are more likely to spend time out of the workforce caring for both children and aging parents.[44] Following time out of the workforce, women are also more likely to seek part-time jobs or perform low-wage work that affords the flexibility that is needed when having to caretake as a second "job."[45] Additionally, a pay disparity still exists between men and women, leading to lower lifetime earnings for women for the same amount of work.[46] Finally, there are social constraints and biases that exist regarding women in the workplace, limiting women's opportunity for career advancement, and therefore, higher pay.[47]

Despite this disparity that exists, women actually need more income than men in retirement as women generally live longer than men and face higher healthcare costs.[48] Because of this increased need, more women end up in poverty than men.

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38 *Id.* at 357–62.

39 Moore, *supra* note 15, at 42.

40 Bruckner & Forman, *supra* note 36, at 352.

41 *Id.*

42 Entmacher & Matsui, *supra* note 1, at 751.

43 Grace Enda & William G. Gale, *How Does Gender Equality Affect Women in Retirement?*, BROOKINGS INST. (July 2020), https://www.brookings.edu/articles/how-does-gender-equality-affect-women-in-retirement/.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 Jefferson, *supra* note 28, at 97; Entmacher & Matsui, *supra* note 1, at 749; Bruckner & Forman, *supra* note 36, at 357.

In 2012, 11% of women aged 65 and older lived in poverty, in comparison to just 6% of men 65 and older.[49]

There are also other factors weighing against women that make the need for sufficient Social Security benefits so important. First, women are less likely to be eligible for pension benefits.[50] In a 2020 study, only 64% of women were offered to participate in a 401(k)-type plan, while 72% of men were.[51] Additionally, women now make up the majority of individuals earning degrees in higher education, which has resulted in women owing almost two-thirds of the total student loan debt in the United States.[52]

Racial minorities also face an increased reality of retirement insecurity and heavily rely on Social Security benefits due to lack of access to employer-provided pension plans and pay disparities in low earning jobs.[53] Social Security makes up 90% or more of retirement income for 41.1% of Asians, 45.2% of African Americans, and 52.2% of Hispanics in comparison to 31.7% of white workers.[54] While this benefit is clearly heavily relied on by the minorities that are able to receive it, minorities are also less likely to qualify to receive this benefit compared to white individuals.[55] Due to the unavailability of Social Security benefits to some minorities and the smaller than average benefit received by those who do qualify, minorities face increased poverty in retirement. While only 12% of white individuals over the age of 65 live in poverty, 22% of African Americans and 21% of Hispanics over the age of 65 do.[56]

Additionally, the maximum taxable wage base in the program treats high-income workers differently than low-income workers. Since Social Security was enacted, the program has included a maximum taxable wage that is at $176,100 in 2025.[57] This means that workers only pay the Social Security payroll tax on the first $176,100 that they make that year and only earn benefits up to this amount.[58] If a worker makes more than the threshold, and retires at the full retirement age of 67

[49] Entmacher & Matsui, *supra* note 1, at 749.

[50] Bruckner & Forman, *supra* note 36, at 359.

[51] *Id.*

[52] *Id.* at 360.

[53] Aka, Hervani & Arnott-Hill, *supra* note 36, at 8.

[54] Bruckner & Forman, *supra* note 36, at 330.

[55] Aka, Hervani & Arnott-Hill, *supra* note 36, at 8.

[56] Jefferson, *supra* note 28, at 93.

[57] Taylor, *supra* note 9.

[58] Moore, *supra* note 15, at 42.

in 2024, their monthly Social Security benefit would be $3,822.[59] However, the average earner would only see a $1,862 monthly benefit in 2024.[60]

While workers all pay the same flat contribution rate, higher-wage workers receive a benefit that is larger in terms of a dollar amount but is a smaller proportion of their total income.[61] In other words, Social Security replaces a higher percentage of wages for low-wage earners than high-wage earners. This makes sense on its face, but as the wealth gap in the United States becomes more severe, high-wage earners should bear a larger burden in contributing to Social Security, while still maintaining a maximum benefit payout based on the maximum taxable wage. High-wage earners are not dependent on Social Security in the way that mid- and low-wage earners are, and typically have significantly more disposable income to contribute to a pension or add to personal savings.[62]

C. *The Rise of the Gig Economy*

A new problem facing Social Security is the rise of the gig economy and gig workers. As of 2023, the gig economy included 73.3 million individuals.[63] Gig workers are freelancers, often times working through service-based platforms like Uber and DoorDash, and are typically classified as independent contractors, not employees.[64] The result of this classification is that gig workers are not provided with any form of employer-based retirement plan.[65] However, gig workers are still supposed to pay the Social Security payroll tax by filling out a 1099 tax form each year.[66] Because Social Security benefits are calculated from reported lifetime earnings, if an individual fails to file a 1099 and pay the Social Security payroll tax,

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[59] *What is the Maximum Social Security Retirement Benefit Payable?*, SOC. SEC. ADMIN. (Jan. 2, 2024), https://faq.ssa.gov/en-us/Topic/article/KA-01897 [https://web.archive.org/web/20241223163640/https://faq.ssa.gov/en-us/Topic/article/KA-01897].

[60] Aimee Picchi, *Social Security is Boosting Benefits in 2024. Here's When You'll Get Your Cost-of-Living Increase*, CBS (Dec. 19, 2023, 1:22 PM), https://www.cbsnews.com/news/social-security-2024-cola-increase-payment-dates/.

[61] Nancy J. Altman, *The Striking Superiority of Social Security in the Provision of Wage Insurance*, 50 HARV. J. ON LEGIS. 109, 116–17 (2013); POLICY BASICS, *supra* note 7, at 2.

[62] Altman, *supra* note 61, at 117.

[63] Nigel Wilson, *Research Shows U.S. Gig Workers Are Underprepared for Retirement*, FORBES (Apr. 13, 2023, 12:25 PM), https://www.forbes.com/sites/nigelwilson/2023/04/13/research-shows-us-gig-workers-are-underprepared-for-retirement/.

[64] Bruckner & Forman, *supra* note 36, at 264–65.

[65] *Id.* at 265.

[66] Annie Nova, *Gig Economy Workers May Get Short Changed When it Comes to Social Security Checks*, CNBC (June 20, 2019, 3:00 PM), https://www.cnbc.com/2019/06/20/gig-economy-workers-face-smaller-social-security-checks-down-the-road.html.

the individual's income from that year will not be counted towards their lifetime income for the sake of calculating their Social Security benefit.[67]

The failure of gig workers to file and pay Social Security taxes leads gig workers to receive a much smaller Social Security benefit than a worker classified as an employee.[68] Gig workers are not to blame for this failure to file, as many gig workers or independent contractors are not supplied with tax forms, and do not know the proper way to report their income.[69] This is not an infrequent issue, as independent contractors and gig workers failed to pay almost six billion dollars in Social Security taxes in 2014.[70] By mandating companies that utilize gig workers to provide workers with proper tax forms at the end of each tax year, the government could reduce this deficit in the payment of taxes by gig workers. Additionally, gig workers would be entitled to a larger Social Security benefit than if they failed to report their income for the sake of paying Social Security taxes.[71] Given that Social Security is a large amount of retirement income for many Americans, it is imperative that the government take all of the steps they can to encourage gig workers to properly report their income.

II. DEFINED BENEFIT PLANS

Social Security is the only retirement income that is guaranteed and provided by the federal government.[72] Outside of Social Security, other mechanisms for saving for retirement include pensions that are made available as an employment benefit by some employers. There are two basic types of pension plans: defined benefit plans and defined contribution plans. A defined benefit plan is a more traditional pension where an employer has promised the worker a certain benefit at their retirement.[73] In 2019, Americans had $15.9 trillion invested in defined benefit plans.[74] This type of retirement benefit provides for a fixed payment every month for the life of the retiree and their spouse that is based on the retiree's years of work and salary.[75] Historically, a defined benefit pension was the most common type of pension.[76] In 1975, 87% of pension participants were covered by a defined benefit

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67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 Darby Joyce, *Understanding Gig Work for Retirement Security*, KOGOD SCH. BUS. (June 8, 2022), https://kogod.american.edu/news/gig-work-retirement.

72 Ronda Gooden, *Securing Our Future: The Importance of Social Security*, AARP (Oct. 10, 2024), https://states.aarp.org/mississippi/securing-our-future-the-importance-of-social-security.

73 Bruckner & Forman, *supra* note 36, at 334.

74 *Id.* at 332.

75 Moore, *supra* note 15, at 20.

76 *Id.*

pension, while in 2009, only 39% of plan participants were covered by a defined benefit plan.[77] Defined benefit plans are typically completely or almost completely funded by employers and employers have complete control over how the money is invested.[78]

Prior to 1974, the pension system was largely unregulated by the government. In 1974, the Employee Retirement Income Security Act of 1974 (ERISA) was signed into law.[79] ERISA does not mandate employers to provide a pension plan, but it does protect plan participants by imposing vesting requirements, fiduciary obligations on the employer, and mandated minimum funding standards. It also established the Pension Benefit Guaranty Corporation (PBGC) to guarantee that employers that go bankrupt can still pay the pension benefits of their workers.[80] While ERISA was passed in the time of defined benefit plans, some of the protections still apply to the now-common defined contribution plans, including vesting rules and some fiduciary obligations, but not the PBGC program and minimum funding rules.[81]

Defined benefit pensions are relatively uncommon today among private employers, but they are still the form of pension used in public sector employment.[82] In the face of the retirement crisis, some have suggested a turn back to defined benefit pensions in the private sectors would increase retirement security.[83] However, there is still debate as to the criticisms of defined benefit plans and why they are no longer the right fit in today's world of employment.[84]

A. Underfunding of Defined Benefit Plans

One of the major arguments against the use of defined benefit pensions today is that these plans are too costly for employers to sustain. Not only is promising your workers income for the rest of their life expensive, but under many defined benefit plans "the costs necessary to fund the plan could change every year depending on

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77 *Id.*

78 Kat Tretina, *Pensions vs. 401(k): What's the Difference*, FORBES, https://www.forbes.com/advisor/retirement/pension-vs-401k/ (Nov. 6, 2023, 3:31 PM).

79 Moore, *supra* note 15, at 25.

80 *Id.*

81 *What is ERISA and How Does it Apply to 401k Plans?*, VITA, https://help.vitacompanies.com/knowledgebase/article/KA-01336/en-us (last visited May 28, 2025); Pension Benefit Guaranty Corporation, *General FAWs About PBGC*, https://www.pbgc.gov/about/faq/pg/general-faqs-about-pbgc (Sept. 19, 2024).

82 Moore, *supra* note 15, at 32.

83 STAFF OF S. HEALTH, EDUC., LABOR, & PENSIONS COMM., 118TH CONG., A SECURE RETIREMENT FOR ALL 8–12 (2024).

84 *See* James McWhinney, *The Demise of the Defined-Benefit Plan and What Replaced It*, https://www.investopedia.com/articles/retirement/06/demiseofdbplan.asp (May 12, 2024).

rates of return in the markets."[85] With defined benefit plans, employers may have to make significant contributions to pension plans if the market did not act as predicted.[86] The more popular defined contribution plans offload this risk onto workers by having them determine how much and where they want to invest their money, while employer costs remain stable.[87]

Additionally, defined benefit plans often have vesting requirements that are incompatible with the movement of today's job force. Prior to ERISA, less than 10% of defined benefit participants attained benefit eligibility due to long service requirements and a multitude of disqualifying events.[88] While ERISA was successful at increasing benefit eligibility by imposing minimum vesting requirements, today's workforce moves employers frequently. In 2022, more than 22% of workers aged twenty and older spent a year or less at their job.[89] Despite the frequent negative commentary engaged in by older generations regarding this practice, job-hopping often results in workers reaching a higher salary much faster than their counterparts who remain at the same job for a longer period of time.[90] In 2022, 49% of job-hoppers were able to beat the rampant inflation following the pandemic by quickly moving through jobs and reaching an increased salary that negated the impact of inflation.[91] However, this frequent movement by workers means that many workers would not be able to meet these minimum requirements today. ERISA's minimum vesting requirements for defined benefit plans ensure that workers are fully vested after five years of service or vest on a graduated schedule that becomes fully vested within seven years.[92] Because many workers do not remain employed with the same company for five years, it is unlikely that many workers today would vest into a defined benefit plan.

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85 Jeanne Sahadi, *Traditional Pension Plans are Pretty Rare. But Here's Who Still Has Them and How They Work*, CNN (Sept. 7, 2023, 2:24 PM), https://www.cnn.com/2023/09/07/success/pensions-retirement-savings-explained/index.html.

86 PENSION BENEFIT GUAR. CORP., A PREDICTABLE SECURE PENSION FOR LIFE 13–14 (2000), https://www.pbgc.gov/documents/A Predictable_Secure_Pension_for_Life.pdf.

87 Sahadi, *supra* note 85.

88 Moore, *supra* note 15, at 26.

89 Caroline Castrillon, *Why Job Hopping is Going to Continue for the Foreseeable Future*, FORBES (Sept. 3, 2023, 4:00 PM), https://www.forbes.com/sites/carolinecastrillon/2023/09/03/why-job-hopping-is-going-to-continue-for-the-foreseeable-future/.

90 *Id.* (citing John Robertson, *Real Wage Growth: A View from the Wage Growth Tracker*, FED. RSRV. BANK OF ATL. (Feb. 14, 2023), https://www.atlantafed.org/blogs/macroblog/2023/02/14/real-wage-growth—view-from-wage-growth-tracker.aspx); Eilene Zimmerman, *For Younger Workers Job-Hopping Has Lost Its Stigma, Should It?*, N.Y. TIMES (Aug. 9, 2023), https://www.nytimes.com/2023/08/09/business/job-hopping-young-workers-gen-z.html.

91 Castrillon, *supra* note 89 (citing Robertson, *supra* note 90).

92 Moore, *supra* note 15, at 26.

Prior to ERISA, a major problem with defined benefit plans was underfunding. If plans were underfunded, employers could terminate them, causing participants to lose all or most of their benefits.[93] ERISA attempted to address this issue through the imposition of minimum funding standards, but these standards were inadequate; from 1999 to 2004 the PBGC fell from a $9.7 billion surplus to a $23.3 billion deficit.[94] New minimum funding rules emerged from the Pension Protection Act of 2006 with the goal of fully funding defined benefit plans within seven years.[95] While these rules were designed to shore up the funding for defined benefit pensions, many argue that these rules still push employers toward defined contribution plans due to the volatility of the market increasing contributions needed on the employer's side.[96]

III. DEFINED CONTRIBUTION PLANS

Following the passage of ERISA, the use of defined contribution plans by employers became increasingly popular in light of the potential issues with defined benefit pensions as discussed above, and the regulation of defined benefit plans by ERISA.[97] Unlike defined benefit plans, defined contribution plans do not promise individuals a lifetime benefit at retirement and are not primarily funded by employers.[98] Rather, a percentage of the worker's wages are withheld and contributed into a savings account, like a 401(k) account, where the money can be invested and hopefully grow throughout the worker's career.[99] Employers may sometimes make contributions to the worker's defined contribution plan, but the risk of investing this money sits on the worker's side and this benefit is only available until the fund runs out.[100] Similar to defined benefit plans, participation in a defined contribution plan is completely voluntary and it is up to the worker how much they decide to contribute to the plan.[101] In 2020, there were 85.3 million active defined contribution plans in the United States.[102]

While a portion of Americans have access to defined contribution plans and have made contributions, these plans are not seeing enough growth to sustain

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93 *Id.* at 29.

94 *Id.*; Befort, *supra* note 2, at 951.

95 Moore, *supra* note 15, at 29–30.

96 *Id.* at 30.

97 John Langbein, *ERISA's Role in the Demise of Defined Benefit Pension Plans in the United States*, 31 ELDER L.J. 1, 3–4, 20 (2023).

98 Moore, *supra* note 15, at 20.

99 Bruckner & Forman, *supra* note 36, at 334.

100 Tina Orem, *Pension Plan vs. 401(k): Types, Pros & Cons*, NERDWALLET, https://www.nerdwallet.com/article/investing/pension-plan (June 26, 2023).

101 Moore, *supra* note 15, at 21.

102 Sahadi, *supra* note 85.

retirement. For example, at the end of 2022, the average retirement balance in Vanguard accounts, which are defined contribution plans, was only $112,572.[103] Keeping in mind that a few high balances can skew the average, the median balance was just $23,376.[104] Despite the fact that defined contribution plans ideally eliminate the market volatility that employers experience in defined benefit plans and allow more freedom for workers to contribute as they wish, 401(k)s lost 23% of their value in 2022,[105] and 22% of plan participants did not contribute to their contribution plans in 2023.[106] Looking at these numbers, defined contribution plans are not adequate in helping Americans save for retirement, largely due to employer decisions regarding plan options and set-up, the complexity of the operation of the plans to the average worker, and the lack of widespread access to an employer-based savings plan.

A. Employer Manipulation of Defined Contribution Plans

One criticism of the way defined contribution plans currently operate is that, despite the fact that investments are no longer in the employer's hands, employers are not effective at controlling the risks in choosing defined contribution programs for their workers; workers are actually subject to a greater risk of inadequately saving for retirement when putting savings decisions in their employers' hands.[107]

While it could be beneficial to some individuals that defined contributions plans allow individuals to make their own decisions surrounding their retirement savings and investments, for a majority of Americans, this results in poor saving decisions and low retirement savings.[108] Studies done by psychologists and behavioral economists demonstrate that while classic economic theory posits that rational individuals would not under-save, cognitive biases often interfere with decision making surrounding saving.[109] There are several different theories as to these cognitive biases that are discussed in Part VI of this Note.

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[103] Brian Baker, *Survey: 22% of Americans Haven't Contributed to Their Retirement Savings in the Last Year*, BANKRATE (Sept. 28, 2023), https://www.bankrate.com/retirement/americans-not-contributing-to-retirement-savings/.

[104] *Id.*

[105] Erica Pandey, *America is Not Ready for Retirement*, AXIOS (Apr. 15, 2023), https://www.axios.com/2023/04/15/retirement-savings-enough-401k-roth-stocks.

[106] Baker, *supra* note 103.

[107] Raymond Murphy, *Managing Risks in Defined Contribution Plans*, https://www.soa.org/library/newsletters/the-actuary-magazine/2005/april/man2005april (last visited May 28, 2025); Regina T. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 9 FL. TAX REV. 607, 615–16 (2000).

[108] Susan Stabile, *The Behavior of Defined Contribution Plan Participants*, 77 N.Y.U L. REV. 71, 86–91 (2002).

[109] Amy B. Monahan, *Employers as Risks*, 89 CHI.-KENT L. REV. 751, 753 (2014).

Even though workers have the ultimate choice to participate in an employer-provided defined contribution plan and how much to withhold, employers still hold the key to structuring individual's choices to participate and how they participate in these retirement savings plans. Employers make lots of decisions as to how they implement their defined contribution plan with their workforce that are determinative as to how many workers participate and withhold adequate funds to save for retirement.[110] First, employers can choose whether to automatically enroll all workers in their plan, or to give workers the option to opt-in to a plan.[111] Additionally, employers can pick a default contribution rate for plan participants to increase the worker contribution rate initially, forcing workers to opt-out to decrease the contribution if they wish to.[112] A more in-depth discussion of the impacts of automatic enrollment, defaults, and opt-out programs are discussed in Part VI of this Note.

Employers can also incentivize participation in their savings plan by providing employer contributions that are not contingent on any specific choice by the worker or matching contribution rates.[113] Workers also face the risk of making poor investment decisions when deciding where their contributions should go. Many workers are not sophisticated parties and have less than a basic knowledge about investing.[114] Employers can decrease this risk by investing the worker's plan assets on their behalf, likely making more informed investments that protect long-term savings[115] and earn higher investment returns.[116] While there is nothing stopping employers from doing this, employers are unlikely to do so as it could potentially subject the employer to liability similar to defined benefit plans.[117]

Another risk workers face in defined contribution plans are high fees. Often employers provide workers with different fund options, which have received heavy pushback for charging excessive fees.[118] High fees can easily diminish a worker's investment return over time, and there is evidence that workers typically end up in these sorts of plans because employers have chosen to only offer plans with exorbitant fees, exposing participants to this investment risk.[119] While ERISA does impose fiduciary duties on employers, including the duty of loyalty, the duty of

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110 Ryan Bubb, Patrick Corrigan & Patrick Warren, *A Behavioral Contract Theory Perspective on Retirement Savings*, 47 CONN. L. REV. 1317, 1320 (2015).

111 *Id.* at 1325.

112 Monahan, *supra* note 109, at 754, 757–58.

113 Bubb, Corrigan & Warren, *supra* note 110, at 1325–26.

114 Monahan, *supra* note 109, at 758.

115 *Id.*

116 Moore, *supra* note 15, at 27.

117 Monahan, *supra* note 109, at 758–59.

118 Bubb, Corrigan & Warren, *supra* note 110, at 1357.

119 Monahan, *supra* note 109, at 760.

prudence, the duty to diversify, and the duty to act in accordance with plan documents and instructions, these duties were created in the era of defined benefit plans, and have thus far not been successful in resolving employer-related issues with respect to defined contribution plans.[120] Unfortunately, these duties do not impose a responsibility for employers to offer plans with low fees.[121] This has become a particularly contentious issue in federal courts recently as there is a circuit split regarding an employer's duty to provide plans with low fees.[122]

Finally, employers frequently allow workers to take early withdrawals from their retirement savings plan prior to the distribution age of 59 and a half, forcing workers to take a 10% tax penalty on the amount withdrawn.[123] While this can be a necessary source of financial help for some, it will end up really hurting most individuals as they drain their retirement income, subject to this large tax penalty. Each year, more than six million individuals cash out their savings from their retirement plans for reasons other than retirement, a phenomenon known as "cashout leakage."[124] According to the Employee Benefit Research Institute, in 2015, approximately $92.4 billion in retirement savings were cashed out prematurely for reasons other than retirement.[125] Again, this is just another example as to how employers are not setting up their retirement savings plans to best allow their workers to adequately save for retirement.

B. Lack of Widespread Access to Defined Contribution Plans

Another big criticism of defined contribution plans is that they are not as accessible as they should be, especially for women and racial minorities. Additionally, it is also important to mention that gig workers, or 73.3 million Americans, lack access to an employer-sponsored retirement plan, as they are not classified as employees.[126]

Most defined contribution plans available today require employer sponsorship for participation.[127] In 2019, the Bureau of Labor Statistics found that 23% of full-time workers do not have access to any form of an employer-sponsored retirement plan, and an even larger percentage of part-time workers are without access, leaving

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[120] Moore, *supra* note 15, at 27.

[121] Bubb, Corrigan & Warren, *supra* note 110, at 1357.

[122] *See* Bugielski v. AT&T Servs., Inc., 76 F.4th 894 (9th Cir. 2023); Sweda v. Univ. of Penn., 923 F.3d 320 (3d Cir. 2019); Albert v. Oshkosh Corp., 47 F.4th 570 (7th Cir. 2022).

[123] Bubb, Corrigan & Warren, *supra* note 110, at 1327.

[124] Benjamin Silver & Michael Slomovics, *Retiring the 401(k): A New Framework for Retirement Savings*, 39 YALE L. & POL'Y REV. INTER ALIA 1, 11–12 (2021).

[125] *Id.* at 12.

[126] Wilson, *supra* note 63.

[127] Stabile, *supra* note 108, at 75 (2002).

at least 40 million American workers barred from participating in defined contribution plans as a way to save for retirement.[128]

Unsurprisingly, lower wage workers are less likely to have access to an employer-sponsored retirement savings plan, and low-wage work tends to skew heavily towards women and minorities.[129] While 62.3% of white workers have access to employer-sponsored retirement plans in the United States, numbers are significantly lower for racial minorities, providing access for 53.8% of Asian workers, 54.3% of Black workers, and 37.8% of Hispanic workers.[130] It is also important to note that these numbers are averages, and an even smaller percentage of workers have access to employer-sponsored plans in the private sector.[131]

Even when workers do have access to an employer-sponsored plan, racial minorities are significantly more likely to have no assets in these accounts. About 37% of white workers that have access to a plan have no assets in these accounts.[132] While this is already a large population of workers with no assets in their plans, 62% of Black workers and 69.2% of Hispanic workers have no assets in their plans.[133] This disparity is likely due to a plethora of reasons explored throughout this Note, including maintaining a low-wage job, rising costs prohibiting savings, lack of default contribution in employer's plan, and the complexity in figuring out how to invest contributions for maximum outcome.

There are also indications of a gender disparity in regard to access to employer-sponsored retirement plans. Research indicates that women are less likely to have access to employer-sponsored plans than men,[134] likely due to taking up more low-wage jobs, along with spending more time outside of the workforce when having children. When women do have access and participate in employer-sponsored

[128] Silver & Slomovics, *supra* note 124, at 6; U.S. DEP'T OF LAB. & U.S. BUREAU OF LAB. STAT., NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2018 (2018), https://www.bls.gov/ebs/publications/pdf/bulletin-2789-september-2018-employee-benefits-in-the-united-states-march-2018.pdf.

[129] Silver & Slomovics, *supra* note 124, at 6; Wesley Jenkins, *Segregation in the Low-Wage Workforce*, WORKRISE (Oct. 24, 2024), https://www.workrisenetwork.org/features/segregation-low-wage-workforce.

[130] NARI RHEE, NAT'L INST. ON RET. SEC., RACE AND RETIREMENT INSECURITY IN THE UNITED STATES 3 (2013), https://www.nirsonline.org/wp-content/uploads/2017/07/race_and_retirement_insecurity_final.pdf.

[131] *Id.*

[132] *Id.* at 7.

[133] *Id.*

[134] Annika E. Sundén & Brian J. Surette, *Gender Differences in the Allocation of Assets in Retirement Savings Plans*, 88 AM. ECON. REV. 207, 1 (1998); Bruckner & Forman, *supra* note 36, at 359.

retirement plans, they tend to invest their contributions much more conservatively than men, leading to a smaller lifetime investment portfolio in their account.[135]

C. Lack of Participation in Defined Contribution Plans

It is clear that access is an issue in defined contribution plans, but even when workers have access, many still do not participate in their employer-sponsored plan. This was not an issue in the era of defined benefit plans because a worker would be automatically enrolled in these plans, but most defined contribution plans require that the worker opt-in, as the contributions are derived from the worker's earnings.[136] In the era of defined contribution plans, it is estimated that up to one-third of workers covered by an employer-sponsored plan do not participate, with young and low-income workers most likely to not participate.[137]

The increased likelihood of younger and low-wage workers to not participate is likely due to a variety of factors. Younger workers often do not understand the importance of saving for retirement early, and choose to have more disposable income now, rather than saving for the future.[138] Both groups are likely to have debt that eliminates the ability to make contributions.[139] Additionally, increasing costs of food, clothing, housing, and healthcare have shrunk or eliminated what was likely an already small disposable income.[140]

In the case that a worker has access to a defined contribution plan through their employer and participates in the program, there are serious concerns about the durability of employer-sponsored retirement plans, as many workers move from job to job and lose access to their accounts due to the complexity of the system. When a worker leaves a job where they have an employer-sponsored retirement plan, one of two things usually happen.

One common outcome is that the worker does not combine their retirement savings, and they end up losing track of the plans they have entirely.[141] When a worker is leaving their job, they may have the option to roll over their vested account balance, including employer contributions into the new account with their new

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135 Sundén & Surette, *supra* note 134, at 1–2.

136 Befort, *supra* note 2, at 953–54.

137 *Id.* at 954.

138 *See* TIAA INST., YOUNG ADULTS, THEIR ATTITUDES AND OUTLOOK TOWARD RETIREMENT AND THE FUTURE 9–12 (2023), https://georgetown.app.box.com/s/czfiwh9g5l8boy0ws8kblxpb4vn05iw7.

139 *Id.*; *Young Workers Show Poor Commitment to Save*, NBC NEWS (Aug. 28, 2008, 7:50 AM), https://www.nbcnews.com/id/wbna26438632.

140 John Kelly, *CBS News Price Tracker Shows How Much Food, Gas, Utility and Housing Costs are Rising*, CBS NEWS, https://www.cbsnews.com/news/price-tracker/ (Apr. 10, 2025, 8:46 AM).

141 Anna-Marie Tabor, *Retirement Lost: Enhancing the Durability of the 401(k) Account*, 126 DICK. L. REV. 515, 518 (2022).

employer.[142] However, only 10–15% of plan participants roll their accounts to their new employer's plan, likely due to the process being an "obstacle course," as described by the ERISA Advisory Council.[143] Employers are not required to allow workers to roll over their retirement plans and there is largely no standardized process to roll over plans.[144] It is likely that the complexity of the rollover process increases the amount of participants who choose to withdraw their funds, potentially jeopardizing the growth of significant life savings, in addition to taking a tax penalty on the contributions being withdrawn.

A second common outcome is that workers withdraw their savings entirely, subjecting their contributions to a tax penalty of up to 30%.[145] In 2013, it is estimated that 43% of defined contribution plan participants that left their job withdrew their contributions entirely, as opposed to attempting to roll over the plan.[146] It is hard to know why exactly these participants chose to withdraw their funds entirely. Perhaps there was immediate financial need for access to these funds that was prioritized over maintaining retirement savings. However, it is also possible that in attempting to figure out how to roll over their contributions, they were only able to succeed in obtaining the funds from their prior employer's plan and then never actually completed the process of moving the contributions into the new account.

These common issues are a good indication that the process of maintaining an employer-sponsored retirement plan between jobs is too complex, and the process needs to be streamlined and standardized to allow for the preservation of retirement savings accounts.

IV. PERSONAL SAVINGS

Access to personal savings is the third leg of the stool that supports retirement income. Today, the reality is that many Americans do not have personal savings to support them in retirement. The median personal savings balance for those approaching retirement, aged 55 to 64, is only $8,000.[147] Of course, these numbers are offset when examining savings based on race and education. Americans that are white have a median savings balance of $12,000, just about six times the median

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[142] *Id.* at 531.

[143] *Id.* at 532 (quoting ADVISORY COUNCIL ON EMP. WELFARE & PENSION BENEFIT PLANS, PARTICIPANT PLAN TRANSFERS AND ACCOUNT CONSOLIDATION FOR THE ADVANCEMENT OF LIFETIME PLAN PARTICIPATION 6 (2016), www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/participant-plan-transfers-account-consolidation.pdf).

[144] *Id.* at 532.

[145] *Id.* at 534.

[146] *Id.*

[147] Jessica Merritt, *The Average Savings Account Balance*, U.S. NEWS (Feb. 15, 2024, 9:59 AM), https://www.usnews.com/banking/articles/the-average-savings-account-balance.

balance of Black Americans ($2,110) and Hispanic Americans ($2,100).[148] Additionally, college-educated Americans have a median savings balance of $23,370, far surpassing those without a high school diploma ($900), those with only a high school diploma ($3,030), and those who attended some college ($5,200).[149] These differences in personal savings balances displays how the impact of racial pay disparities and low-earning work bleeds into these individuals' ability to retire and maintain a lifestyle above the poverty line.

Additionally, Americans today are facing increased costs and expenses in almost all areas of their lives. At the end of 2023, a survey revealed that 78% of Americans were living paycheck to paycheck.[150] One in five Americans cannot live off of their savings for more than two weeks.[151] This is attributed to many different factors, including high monthly bills and the increased cost of living.[152] As Americans struggle to break even each month, it is infeasible to set aside personal savings, unless it is at the expense of paying bills or cutting out necessities. This also potentially explains low retirement savings through employer-provided retirement saving plans. The real issue is that "workers simply don't *have* enough to *save* enough" and a larger conversation needs to be had regarding current employment conditions and the stark income inequality that exists in the United States.[153]

V. THE EFFECT OF THE COVID-19 PANDEMIC ON THE RETIREMENT SYSTEM

Following the onset of the COVID-19 pandemic, millions of Americans lost their jobs, impacting the financial position of many workers, along with their access to employment benefits such as retirement savings.[154] As we continue to understand the ways in which the pandemic has impacted the world we live in, it is important to understand the long-lasting impacts the pandemic has made on the United States' retirement system as a whole, and many workers' retirement savings individually.

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[148] *Id.*

[149] *Id.*

[150] Emily Batdorf, *Living Paycheck to Paycheck Statistics 2024*, FORBES (Feb. 15, 2024, 3:13 PM), https://www.forbes.com/advisor/banking/living-paycheck-to-paycheck-statistics-2024/.

[151] David English, *Covid-19 and Its Impact on America's Retirement System*, 46 ACTEC L.J. 35, 37 (2020).

[152] Batdorf, *supra* note 150.

[153] Deepa Das Acevedo, *Addressing the Retirement Crisis with Shadow 401(k)s*, 92 NOTRE DAME L. REV. ONLINE 38, 46 (2016).

[154] *See* Jesse Bennett, *Fewer Jobs Have Been Lost in the EU than in the U.S. During the COVID-19 Downturn*, PEW RSCH. CTR. (Apr. 15, 2021), https://www.pewresearch.org/short-reads/2021/04/15/fewer-jobs-have-been-lost-in-the-eu-than-in-the-u-s-during-the-covid-19-downturn/.

Starting with Social Security, while payments were not affected by the pandemic, it is estimated that the Social Security Trust will be insolvent approximately two years earlier than expected, between 2031 and 2033.[155] This is due to the disproportionate impact that pandemic job loss had on older workers.[156] Between March and June of 2020, nearly three million workers aged 55 to 70 left the labor force with an additional estimated four million older workers being pushed out of the workforce and involuntarily retiring throughout the following two years.[157] In regard to Social Security, the implication of this large exodus of retirement age workers from the workforce means that many of these older individuals have not been able to find new work or have decided to retire earlier than expected.[158] Therefore, more Americans have claimed their Social Security benefit earlier than expected, pushing the prospect of insolvency even sooner than previously estimated.[159]

Significant job loss throughout the pandemic was not restricted to just those of older age, but throughout all age groups. In April 2020, unemployment rates were at 15.4% for workers 65 and older, 12.3% for workers aged 56 to 64, and 13% for workers aged 25 to 44.[160] This loss of a stable income led to more than 25% of Americans "raiding" their retirement accounts, with an average withdrawal of $6,757.[161] Due to the fact that many individuals do not have a large amount in their retirement accounts already, this indicates that many workers who did take from their retirement accounts, took everything that they had saved. For those workers who still had a job with access to employer-sponsored retirement plans, 11.8% of employers decreased or halted contributions to their workers plans.[162]

While the pandemic has impacted the solvency of Social Security and decreased savings in employer-sponsored retirement plans, for those who did not lose their job during the pandemic, personal savings increased at an unprecedented rate.[163] This is likely due to multiple factors, including the pause on student loan payments,

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[155] English, *supra* note 151, at 35–36.

[156] Bruckner & Forman, *supra* note 36, at 377.

[157] *Id.* at 377–78.

[158] *Id.*

[159] English, *supra* note 151, at 36–38.

[160] Bruckner & Forman, *supra* note 36, at 377.

[161] English, *supra* note 152, at 37.

[162] *Id.*

[163] *See* Abdallah Fayyad, *Pandemic Savings Helped Keep the Economy Afloat. What Happens When They're Gone?*, VOX (Dec. 13, 2023, 6:00 AM), https://www.vox.com/policy/23998805/pandemic-excess-savings-us-economy-recession.

government stimulus checks, and the fact that many "extras," like travelling and eating out, were suspended or limited for a period of time during the pandemic.[164]

During a part of the pandemic (early 2020 to late 2021), Americans amassed more than $2.1 trillion in excess savings.[165] As the United States started to ease out of pandemic restrictions, Americans began to spend these pandemic savings at a pre-pandemic rate, and they haven't stopped since.[166] Despite the continuation of student loan payments, inflation, and rising interest rates, Americans continue to spend down pandemic savings, with excess savings returning to about $430 billion in 2024.[167] However, it appears that most American's savings have returned to their pre-pandemic levels as more Americans return to living paycheck to paycheck, struggling to keep up with the risings costs of rent, food, and healthcare.[168] While the pandemic provided many Americans with a temporary bump in personal savings, increased spending and rising costs have brought these excess savings back down to less than favorable levels.

VI. BEHAVIORAL PHENOMENON AFFECTING SAVING HABITS

As discussed earlier, there are many flaws within the retirement system in the United States, resulting in insufficient savings upon reaching retirement age. However, another part of changing the retirement system involves understanding behavior surrounding saving money and accounting for these patterns of behavior in structuring our retirement system. Making decisions about saving money is highly psychological, and many studies have been done to understand the behavioral phenomena that often impact individuals' voluntary savings.

A. Myopia

Myopia is a phenomenon that describes the behavior of an individual who prefers to "consume excessively in the present at the expense of future

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164 *See* Cian Allen & Cyril Rebillard, *The Unequal COVID Saving and Wealth Surge*, INT'L MONETARY FUND: BLOG (Nov. 9, 2021), https://www.imf.org/en/Blogs/Articles/2021/11/09/the-unequal-covid-saving-and-wealth-surge.

165 Fayyad, *supra* note 163.

166 *Id.*

167 *Id.*

168 *See* Batdorf, *supra* note 150; English, *supra* note 151, at 37; Hamza Abdelrahman & Luiz Edgard Oliveira, *Pandemic Savings are Gone: What's Next for U.S. Consumers?*, FED. RSV. BANK S.F. (May 3, 2024), https://www.frbsf.org/research-and-insights/blog/sf-fed-blog/2024/05/03/pandemic-savings-are-gone-whats-next-for-us-consumers/; Kristopher J. Brooks, *Inflation is Cooling, Yet Many Americans Say They're Living Paycheck to Paycheck*, CBS NEWS (July 15, 2024, 12:01 AM), https://www.cbsnews.com/news/americans-living-paycheck-to-paycheck-survey/.

consumption."[169] Ultimately, someone who is myopic prefers to spend in the present rather than saving for the future, failing to maximize the lifetime utility of their earnings.[170] Two different types of myopia can be established, naïve myopia and sophisticated myopia.[171]

Naïve myopia is irrational spending behavior when an individual prefers present consumption over future consumption in a way that is not in line with the individual's best overall utility.[172] In other words, someone who is behaving in this manner understands that they have a future that will also require money, but in the present they ignore this inconsistency in their behavior and are unwilling (or possibly psychologically unable) to curb their current consumption in order to save for the future.[173] In terms of retirement savings, naïve myopia manifests itself in a way that as individuals make money from their jobs, they prefer (perhaps unconsciously) to spend that money on things in the present, rather than saving this money for retirement, even though they know that they will need money to retire one day.[174] This phenomenon seems to reflect the "you only live once" mindset that exists in our society; encouraging individuals to live in the present.[175] However, this mindset might be at the expense of their retirement in the future.

Sophisticated myopia differs from naïve myopia in that the individual realizes that they are undermining their long-term welfare by consuming excessively in the present, and therefore, they plan in advance to commit excessive consumption.[176] An example of sophisticated myopia is setting aside a portion of each paycheck throughout the year, for the purpose of splurging on the holidays at the end of the year.[177]

Both forms of myopia can have significant impacts on retirement savings. Generally, naïve myopia indicates that individuals are much more likely to attribute less weight to consumption during retirement than consumption in the present.[178] The repercussions of this are not just failing to curb excessive consumption in individuals' daily lives. In terms of retirement savings, this could mean delaying

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169 Adi Libson, *Confronting the Retirement Savings Problem: Redesigning the Saver's Credit*, 54 HARV. J. ON LEGIS. 207, 223 (2017).

170 *Id.*

171 *See* Daniel Shaviro, *Multiple Myopias, Multiple Selves, and the Under-Saving Problem*, 47 CONN. L. REV. 1215, 1246–48 (2015).

172 Libson, *supra* note 169, at 223–24.

173 Shaviro, *supra* note 171, at 1246–47.

174 *See id.*; Libson, *supra* note 169, at 223–24.

175 Katie Kelton, *Survey: Would You Go into Debt to Have Fun This Year? More Than 1 in 3 Americans Say They Would*, BANKRATE (Apr. 3, 2024), https://www.bankrate.com/credit-cards/news/discretionary-spending-survey.

176 Shaviro, *supra* note 171, at 1248.

177 *Id.*

178 Libson, *supra* note 169, at 224.

contributing to a pension plan, taking out Social Security earlier, reducing present contributions to a pension plan, or choosing a contribution rate that is too low to allow for adequate savings.[179] Understanding that myopias are a phenomenon that impact perceptions in saving is critical to setting up a retirement system that allows for adequate savings. This phenomenon indicates that employers need to auto-enroll workers into employer-sponsored pension plans and set workers' default contribution rate at a percentage that allows for sufficient saving. Perhaps even a mandatory contribution rate could help stave off the impact of myopias in retirement savings.

B. Prevalence of Active vs. Passive Decision-Makers

A more well-known behavioral phenomenon is the difference between active versus passive decisions.[180] In the retirement savings context, this phenomenon presents itself as the difference in retirement savings when an employer makes their employer-sponsored pension plans opt-out versus opt-in.

The way an opt-in retirement savings plan works is that when an individual is hired, they must submit a form in order to "opt-in" or begin making contributions to the employer-sponsored plan.[181] On the other hand, an opt-out model automatically enrolls all workers into the employer-sponsored retirement savings plan, and in order for the worker to stop contributions, they must submit the paperwork to "opt-out."[182] Approximately 85% of individuals are passive savers, meaning that they stick to the default and do not make any changes, whereas only about 15% of individuals are active savers, meaning that they pay attention to wealth accumulation and make changes in hopes of increasing their return on investment.[183] Given the knowledge that most individuals are passive savers, automatic contributions or opt-out retirement savings plans are more effective at increasing retirement savings and boosting participation in employer-sponsored pension plans.[184]

In addition to automatically enrolling workers into their employer-sponsored retirement savings plan, employers also need to choose a default rate of contribution that will be effective in accumulating enough savings for the worker to retire at

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[179] Shaviro, *supra* note 171, at 1245.

[180] Yu Pan, Fujun Lai, Zhuo Fang, Sihua Xu, Li Gao, Diana C. Robertson & Hengyi Rao, *Risk Choice and Emotional Experience: A Multi-Level Comparison Between Active and Passive Decision-Making*, 22 J. RISK RSCH., 1239, 1252–55 (2019).

[181] Bubb, Corrigan & Warren, *supra* note 110, at 1325.

[182] *Id.*

[183] *See* Raj Chetty, John N. Friedman, Søren Leth-Petersen, Torben Heien Nielsen & Tore Olsen, *Active vs. Passive Decisions and Crowd-Out in Retirement Savings Accounts: Evidence from Denmark*, 129 Q.J. ECON. 1141, 1143–44, 1184–85 (2014).

[184] Monahan, *supra* note 109, at 754.

retirement age. Further, they should institute an automatic escalation process, whereby the worker's contribution rate increases as they move closer to retirement age and presumptively have a higher income.[185]

Typically, automatic enrollment programs or opt-out programs have a conservative default contribution rate of 2–3%.[186] Knowing that most individuals are passive savers, plan participants remain at this default rate, which is much too low to provide sufficient savings for retirement.[187] Automatic escalation of worker contribution rates could eliminate plan participants from remaining stagnant at this low default contribution rate.[188]

The Save More Tomorrow plan was created for this purpose.[189] In this plan, workers can commit to increasing their contribution rate in the future, and the planned increases in contributions are linked to pay raises, diminishing the likelihood that the worker has lost wages.[190] Once opting into automatic escalation, the worker remains in the plan until they reach a preset contribution limit or choose to opt out.[191] Early implementations of this automatic escalation program resulted in 78% of workers opting into automatic escalation, with participants almost quadrupling their contribution rate from 3.5% to 13.6% in the span of four years.[192]

The success of the opt-out model in retirement savings plans indicates that workers need a push in the right direction in making decisions regarding their participation and contribution to their pension plan. It should be mandated that employers automatically enroll workers into their employer-sponsored plans and start workers off with a higher default contribution rate or automatic escalation plan, so that workers will be placed in a better position to efficiently save for retirement.

C. *Circulation of Peer Information*

When employers choose to circulate information regarding their retirement plans, they might include peer information, or information about what an

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185 GLORIA GUZMAN & MELISSA KOLLAR, U.S. CENSUS BUREAU, INCOME IN THE UNITED STATES: 2023, at 15 (2024).

186 Shlomo Benartzi & Richard H. Thaler, *Heuristics and Biases in Retirement Savings Behavior*, 21 J. ECON. PERSP. 81, 83 (2007); *see also* Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.J. ECON. 1149, 1150 (2001) [hereinafter Benartzi & Thaler, *Heuristics and Biases*].

187 Benartzi & Thaler, *Heuristics and Biases*, *supra* note 186, at 83; *see also* Madrian & Shea, *supra* note 186, at 1150.

188 Shlomo Benartzi & Richard H. Thaler, *Behavioral Economics and the Retirement Savings Crisis*, 339 SCIENCE 1152, 1152 (2013).

189 *Id.*

190 *Id.*

191 *Id.*

192 *Id.*

individual's peers typically do regarding retirement savings and what the average peer has saved by a certain point.[193] The hope behind this is that, by sharing information regarding a group's saving behaviors, it will teach others that certain savings behaviors are more common than they thought, and hopefully motivate them to engage in the same kind of saving behavior.[194] Essentially, this distribution of information acknowledges the impact that other peoples' behavior has on us, and attempts to display positive saving behaviors as a "social norm" in order to encourage better saving behavior.[195]

While sharing peer information sounds both reasonable and beneficial on its face, a study regarding the impact of sharing peer information seems to demonstrate the opposite effect for lower income groups who struggle the most to save for retirement.[196] In this study about the dissemination of peer information regarding retirement savings, those making a lower income were most discouraged from increasing their retirement savings, likely due to the fact that they were receiving information that encompassed the savings habits of workers who were making more than them and had the ability to save more.[197] The crux of this is that when individuals have a goal that they find difficult, hearing that others have already been able to achieve that goal is extremely damaging to that person's self-esteem, and makes the goal seem even more unattainable.[198] Once a goal is perceived as too difficult, people are much more likely to perform poorly regarding that goal.[199]

This study can also be applied directly to retirement savings. When workers on the lower end of the pay distribution at a company receive information that co-workers within their company have saved X amount for retirement, and they are a similar age and are not even close to having that amount saved, it damages their self-esteem in regard to savings, and can result in a decline in saving habits.[200]

Because peer information has been noted to be significant in influencing positive saving behavior in many situations, employers should distribute this information in order to encourage saving. However, they should only distribute peer information regarding the savings habits of peers that are within the same pay range and age to eliminate the negative effects of comparisons being made to the saving habits of co-workers who make significantly more money.

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[193] John Beshears, James J. Choi, David Laibson, Brigitte C. Madrian & Katherine L. Milkman, *The Effect of Providing Peer Information on Retirement Savings Decisions*, 70 J. FIN. 1161, 1162 (2015).

[194] *Id.*

[195] *Id.*

[196] *See id.* at 1187, 1193.

[197] *Id.*

[198] *Id.* at 1189.

[199] *Id.*

[200] *See id.* at 1166–67.

D. Misunderstandings About the Exponential Growth of Savings

In addition to the behavioral phenomenon discussed above, there is also a generally poor understanding as to how savings in a pension account works due to low financial literacy in the United States. The reality of the retirement system in the United States is that we have "created a set of systems . . . that call for expertise and knowledge beyond what is reasonable to expect from the average person."[201] There are many different difficult decisions that go into retirement planning. Considerations include how to save for retirement, how to invest assets for retirement, when is the right time to retire, when and how to file for Social Security, how to move from employer health insurance to Medicare, and how to save for long-term care that will not be covered by Medicare.[202]

The difficult nature of retirement planning is compounded by the fact that many Americans struggle with financial literacy and misinformation regarding savings.[203] Traditional economic principles make the assumption that people are generally able to calculate future values in savings due to exponential growth.[204] However, studies have indicated that even college-educated individuals have a difficult time understanding the exponential growth of savings over time.[205] In fact, most people believe that savings grow linearly, leading them to grossly misunderstand and underestimate how much money can accumulate in a retirement savings account over the course of their career.[206] This misunderstanding as to exponential growth leads to discouragement in savings for retirement and lower contributions being made to savings accounts. Despite the complicated nature of calculating savings that are exponential and compounded with interest, only a subtle increase in the awareness of the exponential growth of savings is needed for individuals to appreciate the benefits of savings and save more for retirement.[207] To counter this prevalent misunderstanding, employers, or their chosen employer-sponsored pension plan, should provide workers with educational materials about how their savings will grow in their account over time. The easiest way that this can be done is by distributing information regarding the exponential growth of savings over one's career and including basic calculations using the worker's pay to demonstrate how certain savings decisions would alter their retirement account balance over time.[208]

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[201] Miller, *supra* note 3.

[202] *See id.*

[203] Monique Morrissey, *Policy Solutions for the Retirement Crisis*, 43 J. AM. SOC'Y. AGING 98, 100 (2019).

[204] Craig R.M. McKenzie & Michael J. Liersch, *Misunderstanding Savings Growth: Implications for Retirement Savings Behavior*, 48 J. MKTG. RSCH. S10 (2011).

[205] *Id.*

[206] *Id.*

[207] *Id.* at S2.

[208] *Id.* at S11.

VII. REIMAGINING THE RETIREMENT SYSTEM

Throughout this Note, I have discussed just a few of the different issues that exist within the United States' retirement system. If one thing is clear, it is that the current retirement system has not provided a widespread ability for workers to generate enough savings to retire at retirement age and maintain financial stability following exit from the workforce. With continued inadequate saving by workers and the seemingly unavoidable insolvency of the Social Security Trust looming in the near future, the big question continues to be: What changes need to be made to our retirement system to solve the retirement crisis?

A. Mandated Private Pensions

In a perfect world, the optimal retirement system seems to be one that reduces the employer's role in retirement savings and provides necessary guidance to workers in making decisions regarding saving. Since employers in the United States have shifted from using defined benefit plans to defined contribution plans, the result has been that employers are offering and setting up their retirement savings plans in a manner that is not optimal for workers to save for retirement.[209] Additionally, employer-provided pension plans are not accessible to everyone and even when they are, there is low participation.[210] A solution that would eliminate a lot of the issues associated with employer-provided retirement savings plans and make the coming insolvency of the Social Security Trust irrelevant is the creation of a privatized pension system that is run and regulated by the government. Essentially, we would completely eliminate our three-pronged retirement system and institute just one method of retirement savings, with that being a private pension that is not optional.

This kind of retirement savings system was originally instituted by Chile in 1981, and is now also implemented in the United Kingdom, Australia, and Sweden.[211] This privatized pension system would look similar to privatizing Social Security and eliminating employer-based plans entirely.[212] Here is how this kind of retirement system would operate: Throughout a worker's time in the workforce, they will pay a mandated percentage of their income into their retirement account that is determined based on the contribution percentage that would equate to an adequate savings amount for an average worker.[213] In Chile, 10% is the mandated

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[209] *See* discussion *supra* Part III.

[210] *Id.*

[211] Elizabeth D. Tedrow, *Social Security Privatization in Other Countries—What Lessons Can Be Learned for the United States?*, 14 ELDER L.J. 35, 42–43 (2006).

[212] *Id.*

[213] Manisha Padi, *Markets and Mandates: Retirement in Chile and the United States*, 102 B.U. L. REV. 1215, 1221, 1228–29 (2022).

contribution amount, and if you choose to contribute more, then your retirement benefit will increase proportionally to the percentage that you contributed.[214]

Workers are automatically entered into this system, as it is required by the Chilean government, except for self-employed workers who have the option to contribute.[215] Upon entering the workforce, contributions are automatically deducted from workers' pay, but workers still have the ability to diversify their portfolio if they wish.[216] While the Chilean system is somewhat similar to a worker's ability to make decisions regarding their 401(k), a privatized set-up would be more beneficial to the worker because the private pensions are managed by a few different financial institutions who have experts in investing that help workers decide how to distribute their plan assets.[217] Additionally, these private pension plans also set up a default investment strategy, whereby assets are invested in high risk accounts while the worker is young, and is gradually shifted to safer investments as the worker moves closer to retirement.[218]

The use of this type of savings plan does not mandate a specific retirement age, and when a worker is ready to retire, they request a withdrawal of benefits from their plan directly, or through some sort of intermediary, like a financial adviser.[219] Then, much like a 401(k), the account total is divided out into monthly payments for as long as the fund lasts.[220]

Additionally, Chile provides public benefits that complement its privatized pensions. First, Chile provides a small amount of basic income to all retirees, regardless of income level, aimed at boosting the income of individuals who worked low-wage jobs.[221] Second, as a way of countering the gender disparity that exists between the retirement savings of men and women, the government also provides a "child bonus" to women that have children, as a way of covering some of the income that women lose when taking time off to have children.[222]

A shift to a mandated private pension system, like what Chile uses, would benefit workers not only by forcing them to save for retirement throughout their time in the workforce, but because the plan includes investment companies to

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[214] *Id.* at 1229.

[215] Tedrow, *supra* note 211, at 43.

[216] Padi, *supra* note 213, at 1229–30.

[217] Barry P. Bosworth and Gary Burtless, *Privatizing Social Security: The Troubling Trade-Offs*, BROOKINGS INST. (Mar. 1, 1997), https://www.brookings.edu/articles/privatizing-social-security-the-troubling-trade-offs/; Eric Droblyen, *401(k) Investing – Professional Advice is Easy to Access Today*, EMP. FIDUCIARY (Feb. 19, 2020), https://www.employeefiduciary.com/blog/401k-investing-professional-advice-easy-to-access.

[218] Padi, *supra* note 213, at 1229–30.

[219] *Id.* at 1230.

[220] *Id.* at 1233.

[221] *Id.*

[222] *Id.*

manage and oversee the pensions, the plans are set with defaults that will allow workers to accumulate adequate savings for retirement, regardless of if they ever make any changes to this default plan.

B. Employer-Side Changes in the Design of Employer-Sponsored Pension Plans

While a mandated private pension system would certainly rectify many of the issues we see in our retirement system, it is somewhat of an aspirational solution, as the legislative red tape and extreme political polarization in the United States is an insurmountable barrier to restructuring our entire retirement system at this point in time.[223] In envisioning realistic changes that can be made to improve retirement savings, smaller changes to our current retirement system seem more possible at this time and can still significantly impact retirement savings.

Starting with Social Security, there are few changes that can be made to increase the solvency of the program without suggesting a complete overhaul, like the mandated private pension that was discussed above. However, one significant barrier to the funding of Social Security is the wage base limit that exists for the Social Security payroll tax, which limits this tax on only the first $176,100 of income each year.[224]

I recommend that we increase this base to impose the Social Security payroll tax on the first $500,000 of income each year but maintain a maximum benefit payment consistent with cost of living, as we calculate it now. The reality is that despite the fact that wealthy individuals are still eligible to claim their Social Security benefit, they are not relying on it in the same way that the average worker is. For individuals making multiple millions of dollars each year, their Social Security benefit is just a drop in the bucket. In addition to increasing the wage base, we should also consider other mechanisms of increasing the Social Security Trust, like increasing the payroll tax for individuals making a certain amount of income and restricting the ability to claim Social Security for individuals who have excessive wealth. By identifying individuals who do not need Social Security, we can begin to redistribute Social Security benefit payments to keep our most vulnerable populations out of poverty in old age.

In regard to employer-sponsored pension plans, the government should mandate employers make changes to how they administer their plans to their workers based on the common behaviors and perspectives that workers use when making decisions about saving for retirement.

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[223] *See* Sarah A. Binder, *Polarized We Govern*, BROOKINGS INST. (May 27, 2014), https://www.brookings.edu/articles/polarized-we-govern/; DIANA EPSTEIN & JOHN D. GRAHAM, POLARIZED POLITICS AND POLICY CONSEQUENCES 9, 17 (2007).

[224] Taylor, *supra* note 9.

First, we know that workers are more likely to participate in a plan if the employer automatically enrolls them in the program, rather than giving the worker the option to opt-in to the retirement plan after being hired.[225] Additionally, we know that individuals prioritize current consumption over future savings.[226] Putting these two together, participation in employer-sponsored plans could increase and be made durable over the course of the worker's time in the workforce by automatically enrolling all workers into the available plan, and not letting workers remove their funds earlier than retirement age, with the allowance of some qualifying reasons for making early withdrawals. This alone would at the very least set up all workers who are eligible with a plan.

We also know that most employer-sponsored plans have a default contribution rate of about 2–3%, much too low for adequate savings.[227] Combining this with our knowledge that most individuals are passive savers,[228] it makes sense that workers who contribute to an employer-sponsored plan are not saving enough throughout their tenure in the workforce. Workers are being enrolled at a low contribution rate and are never making any changes to increase their contributions.[229] To rectify this, depending on the company, employers should be required to either provide information regarding their contribution rate and the implications of keeping that contribution rate, or set the default contribution rate to a percentage that would allow workers to adequately save for retirement.

I offer two options here because in workplaces where workers are making a lower wage, it is reasonable to assume that a high default contribution could restrict the worker's ability to remain financially stable in their day-to-day. However, in higher-wage workplaces, where workers have disposable income after paying bills, it makes sense to make the default contribution higher with the understanding that if it wasn't set there, the worker is unlikely to increase the contribution themselves.

Finally, we know that the average worker has a less than basic understanding regarding investing.[230] A very easy solution is to provide some sort of financial advisor or service for workers who participate in employer-sponsored plans, making someone available to them who can help them understand the decisions they are making in regard to their pension plans. Therefore, employers should be required to provide this kind of service to their workers. In order to provide an incentive and relieve concerns regarding liability, the employer should also be relieved of any potential liability that may be created by any bad advice given by this financial

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[225] Bubb, Corrigan & Warren, *supra* note 110, at 1325.

[226] Libson, *supra* note 169, at 223–24.

[227] Benartzi & Thaler, *Heuristics and Biases*, *supra* note 186, at 83.

[228] Chetty et al., *supra* note 183, at 1143–44.

[229] Alicia H. Munnell, *How Helpful is Auto-Enrollment in 401(k) Plans?*, CTR. FOR RET. RSCH. AT BOS. COLL. (Jan. 9, 2025), https://crr.bc.edu/how-helpful-is-auto-enrollment-in-401k-plans/.

[230] Monahan, *supra* note 109, at 758.

advisor that the company provides. This establishes a sort of compromise where workers are able to get the information they need from someone who knows about investing, ideally leading to increased returns on investments, while the employer escapes liability should there be any mistake made by the financial advisor that the company hires.

CONCLUSION

Our retirement system is failing to provide workers with a way to adequately save for retirement. As a result, millions of elderly Americans are facing poverty or continuing to work into old age. With the Social Security Trust on the verge of insolvency, and retirement savings plans being withdrawn early, we must take action to improve the efficiency of our retirement system in order to ensure that individuals reaching retirement age are able to retire on their own terms.

While a complete overhaul of our current retirement system has the potential to produce ideal results, even small changes in the way employers are allowed to set up their retirement plans have the ability to significantly increase workers' retirement savings, allowing them to retire feeling financially stable and able to reap the rewards of their time in the workforce.