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“Let Them Eat Cake”: Examining United States Retirement Savings Policy through the Lens of International Human Rights Principles

Regina T. Jefferson*

ABSTRACT

This Article uses an international human rights framework to analyze and critique the effectiveness of the United States' retirement system and its underlying policies. The Article challenges the ongoing pension reform debate to include considerations outside traditional economic theory, such as income inequality, the dignity of the elderly, and the irreducible mutuality of people. While a human rights analysis will not yield a precise policy prescription for the retirement savings crisis, it will serve as an additional framework within which the government's economic and social policies regarding the treatment of the elderly can be evaluated, expanding the focus and range of responses. The Article provides an overview of human rights law and the concept of the welfare state as they apply to the elderly, as well as an analysis and critique of the current private retirement system through the lens of human rights law. The final portion of the Article sets forth four proposals for pension reform that reflect fundamental human rights considerations aimed at increasing retirement security across the income spectrum. These proposals are as follows: (1) minimum benefits under Social Security should be restructured to prevent individuals with significant work histories from living in or falling into poverty; (2) Social Security benefits should be adjusted using a price index that more accurately reflects the spending patterns of older persons in order to prevent a decline in purchasing power due to inflation; (3) the current wage cap on Social Security taxes should be eliminated to stymie the funding shortfall of the program and to generate new revenue to help pay for the increase in minimum benefits; and (4) to augment the private retirement system, a Universal Retirement Sav-

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ings Program with Minimum Guaranteed Benefits should be mandated to provide adequate retirement savings and protection against the risk of loss for all workers.

INTRODUCTION¹

The American tax system contains numerous provisions designed to encourage activities consistent with certain public policy concerns and to relieve various forms of personal hardship.² Much of the debate surrounding tax policy relates to questions about the types of activities that governments should or should not support, the manner in which governmental support should be structured, the extent to which such support should be provided, and the effectiveness of tax-preferred programs.³ This Article considers these questions as they relate to the private retirement system, one of the nation's largest tax expenditures, and also compares and contrasts the effectiveness of this program with Social Security, the nation's public retirement system.⁴

Historically, the private retirement system has been successful in providing retirement security to a cross section of American workers, many of whom could not have saved for retirement on their own.⁵ However, a confluence of economic, social, and demographic changes over the last three decades has impacted the private retirement system,⁶ rendering it unable to

1. A course that I taught called Tax Policy and Human Rights, which analyzed the relationship between numerous tax expenditures and human rights, inspired the topic of this Article. The consideration of human rights for elders provided a uniquely interesting perspective because the classification of older people encompasses numerous categories for which human rights are promoted. Thus, in many ways, exploring the relationship between retirement policy and human rights for elders can be a touchstone issue for considering tax policy and human rights in general.

2. Regina T. Jefferson, *Redistribution in the Private Retirement System: Who Wins and Who Loses?*, 53 *How. L.J.* 283, 290 (2010) [hereinafter Jefferson, *Redistribution*]. For examples of such relief see I.R.C. § 163(h) (2012) (providing a tax deduction for home mortgage interest payments); I.R.C. § 32(b) (2012) (providing a refundable tax credit for low-income families); I.R.C. § 24(a) (2012) (providing a tax reduction of as much as \$1,000 for each qualifying child).

3. See, e.g., JOINT COMMITTEE ON TAXATION, JCX-37-08, A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS (2008), <http://www.jct.gov/x-37-08.pdf> [<https://perma.cc/U8M4-APVP>]; see generally J. Clifton Fleming & Jr. Robert J. Peroni, *Can Tax Expenditure Analysis Be Divorced from a Normative Tax Base?: A Critique of The "New Paradigm" And Its Demise*, 30 *VA. TAX REV.* 135 (2010); see generally Robert Lepore, Note, *Bringing Balance to The Budget Debate: Challenging The Privileged Procedural Status of Regressive Tax Expenditures Over Progressive Discretionary Spending Programs*, 17 *GEO. J. ON POVERTY L. & POL'Y* 103 (2010).

4. JOHN H. LANGBEIN, DAVID A. PRAIT, SUSAN J. STABILE & ANDREW W. STUMPF, *PENSION AND EMPLOYEE BENEFIT LAW* 4 (6th ed. 2015) (noting that the private retirement subsidy is estimated at more than \$147 billion for fiscal year 2015).

5. See LANGBEIN ET AL., *supra* note 4.

6. In 1978, Congress passed the Revenue Act of 1978, which contained a provision that expressly allowed employees to avoid being taxed on the portion of income they elected to receive as deferred compensation rather than as direct pay. Since that time, the offering of such plans by employers has continuously increased. See LANGBEIN ET AL., *supra* note 4, at 3–6 for an overview of the emergence of the private retirement system caused by increased life expectancy, demographic revolution, a settled retirement age, and the cultural shift toward the novel idea of retirement in general.

provide retirement security for millions of American workers, especially those who are low- and middle-income.⁷ This development has exacerbated existing social and economic inequalities in American society by widening the retirement income gap between higher and lower income workers.⁸ In addition, Social Security is experiencing a funding shortfall that threatens the program's success in reducing elderly poverty.⁹ The combination has created a retirement savings crisis that poses a threat not only to the dignity of individual workers in their old age, but also to the financial security of families and communities.¹⁰ This crisis cannot be resolved simply by instructing individuals who have limited resources to save for retirement any more so than a famine can be eliminated by ordering individuals who have no bread to eat cake.¹¹ The reality is that some workers have competing consumption needs that prevent them from being able to save in the private retirement system.¹² Thus, as a matter of individual and social well-being,

7. On average, scholars and studies define a low-income worker as someone who earns between \$0 and \$32,500 annually. A middle-income worker is someone who earns between \$32,500 and \$60,000 annually. See David Francis, *Where Do You Fall in the American Economic Class System?*, U.S. NEWS MONEY (Sept. 13, 2012), <http://money.usnews.com/money/personal-finance/articles/2012/09/13/where-do-you-fall-in-the-american-economic-class-system> [<https://perma.cc/VTN8-4GHB>].

8. See, e.g., EDWARD HARRIS & JOSHUA SHAKIN, U.S. CONGRESSIONAL BUDGET OFFICE, PUB. NO. 4038, *THE DISTRIBUTION OF MAJOR TAX EXPENDITURES IN THE INDIVIDUAL INCOME TAX SYSTEM*, at 15, tbl.2 (2013), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/43768_DistributionTaxExpenditures.pdf [<https://perma.cc/38SF-8SEN>] (finding that the highest quintile gets the majority of the tax benefits from the retirement system tax expenditure); see also Press Release, Nancy Hwa, Pension Rights Center., *Nation's Retirement Income Deficit Now \$7.7 Trillion* (Mar. 12, 2015), <http://www.pensionrights.org/newsroom/releases/nations-retirement-income-deficit-now-77-trillion> [<https://perma.cc/PF4G-FW6H>] (“The Retirement Income Deficit (RID) is the gap between what American households have actually saved today and what they *should have* saved today to maintain their living standards in retirement [T]he nation's . . . RID . . . has risen from \$6.6 trillion to \$7.7 trillion.”).

9. SOCIAL SECURITY & MEDICARE BOARD OF TRUSTEES, *A SUMMARY OF THE 2017 ANNUAL REPORTS* (2017), <https://www.ssa.gov/oact/trsum/> [<https://perma.cc/TY8G-TVLR>] (outlining the long-term budget shortfalls in the current Social Security program); see also Charles P. Blahous, III, & Robert D. Reishauer, *The Upcoming Social Security and Medicare Trustee's Report: A Preview*, BIPARTISAN POLICY CENTER, 7 (2017), <https://bipartisanpolicy.org/wp-content/uploads/2017/06/BPC-Economy-The-Upcoming-Social-Security-and-Medicare-Trustees-Reports.pdf> [<https://perma.cc/L5GY-K36L>] (explaining the budget shortfall threatens to disrupt scheduled benefits and provider payments); see also Charles Blahous & Robert Reishauer, *Why This Social Security Budget Nightmare Must Be Resolved Now*, CNBC: RETIREMENT (July 10, 2017), <http://www.cnbc.com/2017/07/10/social-security-budget-nightmare-must-be-resolved-commentary.html> [<https://perma.cc/ZBL9-5FJM>] (arguing the current shortfall will result in a 19 percent reduction in benefits for future beneficiaries).

10. See generally Ariel Min, *Asking for help at 80 – America's new faces of hunger*, PBS: NEWS HOUR (May 22, 2015) (profiling how Naples' local Jewish Family and Community Services' senior center provides necessary additional help with buying and delivering food due to a lack of retirement funds), <http://www.pbs.org/newshour/updates/senior-hunger-photo-essay/> [<https://perma.cc/7WRC-9X9L>].

11. Although often ascribed to Marie Antoinette, the famous phrase was never uttered by the infamous queen. Rather, in an effort to express his displeasure at his own lack of bread, Jean Jacques Rousseau attributed the phrase to a “thoughtless saying of a great princess.” JEAN JACQUES ROUSSEAU, *CONFESSIONS* (1781–1788), reprinted in *FAMILIAR QUOTATIONS*; see also Karen N. Barker, “*Let Them Eat Cake*”: *The Mythical Marie Antoinette and the French Revolution*, 55 *THE HISTORIAN* 709, 709 (1993).

12. See Bradley T. Heim & Shanthi S.P. Ramnath, *The Impact of Participation in Employment-Based Retirement Savings Plans on Material Hardship*, 15 *J. PENSION ECON. & FIN.* 409–10 (2016), <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9114DE1204C1D411FF33C7198>

significant pension reform is needed to ensure that all workers have sufficient resources in their old age for an adequate standard of living.

The Universal Declaration of Human Rights is the most significant source of human rights law. It provides that every living person has a right to an adequate standard of living.¹³ Other sources of human rights law require governments to generate the “maximum available resources”¹⁴ for the progressive realization of civil, political, economic, social, and cultural rights.¹⁵ Furthermore, the United Nations Principles for Older Persons specifically provides that “older people should have access to adequate food, clothing, shelter, and health care.”¹⁶ Thus, the retirement savings crisis has both economic and moral implications.¹⁷ It raises questions not only about the effectiveness of domestic retirement savings policy, but also about the willingness of the United States to promote and protect internationally recognized human rights for its elderly population.

This Article uses an international human rights framework to analyze and critique the effectiveness of the United States retirement system and its underlying policies. This Article contends that framing retirement policy in

F04ABBC/S1474747215000050a.pdf/impact_of_participation_in_employmentbased_retirement_savings_plans_on_material_hardship.pdf [https://perma.cc/6ZL8-5FV8] (noting that low-income individuals must either reduce consumption or take on debt in order to contribute to a retirement account).

13. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25(1) (Dec. 10, 1948) (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”) [hereinafter UDHR]; Amy J. McMaster, *Human rights at the Crossroads: When East Meets West*, 29 VT. L. REV. 109, 119 (2004) (“Perhaps the most important source of international human rights is the [UDHR]”).

14. The term “maximum available resources” has been defined as the combination of five factors: “(1) government expenditure; (2) government revenue; (3) development assistance (both official development assistance and private resource flows); (4) debt and deficit financing; and (5) monetary policy and financial regulation.” See RADHIKA BALAKRISHNAN ET AL., MAXIMUM AVAILABLE RESOURCES & HUMAN RIGHTS, CENTER FOR WOMEN’S GLOBAL LEADERSHIP 5 (2011), <http://www.cwgl.rutgers.edu/docman/economic-and-social-rights-publications/362-maximumavailableresources-pdf/file> [https://perma.cc/2UFG-7P78].

15. International Covenant on Economic, Social, and Cultural Rights art. 2, ¶ 1, 993 U.N.T.S. 3 (Dec. 19, 1966) [hereinafter ICESCR] (providing “[e]ach State Party to the present Covenant undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant”); G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/217(III), International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR]. For the purposes of this paper, civil, political, economic, social and cultural rights will be used interchangeably with “fundamental rights,” “international human rights,” or “human rights.”

16. G.A. Res. 46/91, U.N. Principles for Older Persons art. 11, para. 1 (Dec. 16, 1991). *But see* Maggie Murphy, *International Human Rights Law and Older People: Gaps, Fragments and Loopholes* 3–6, HELPAGE INT’L (2012), <https://social.un.org/ageing-working-group/documents/fourth/Rightsfolderperpersons.pdf> [https://perma.cc/HIS5P-A43K] (noting that older persons are not explicitly mentioned in binding international human rights law; rather they are mentioned in non-binding, non-enforceable soft law).

17. UDHR, *supra* note 13; *see also* NARI RHEE & ILANA BOIVIE, THE CONTINUING RETIREMENT SAVINGS CRISIS 13–17 (Mar. 2015), https://www.nirsonline.org/wp-content/uploads/2017/07/final_rsc_2015.pdf [https://perma.cc/7LSJ-UKB6]; *see also* MONIQUE MORRISSEY, THE STATE OF AMERICAN RETIREMENT: HOW 401(K)S HAVE FAILED MOST AMERICAN WORKERS, ECON. POL’Y INST. (2016) (explaining the gravity of the retirement savings crisis).

the context of international human rights challenges the ongoing pension reform debate to include considerations outside traditional economic theory regarding resource allocation. Furthermore, this Article argues that adopting a non-traditional approach to retirement savings policy that explicitly considers issues of economic inequality, the dignity of the elderly, and the irreducible mutuality of people could lead to a more equitable and effective distribution of retirement benefits in the United States. Finally, this Article also contends that human rights considerations could help policymakers to realize that reliance on a self-help approach to retirement savings by the United States, one of the richest countries in the world, without allowances for workers who have insufficient income to save, is incongruous. This Article does not claim that a human rights analysis will yield a precise policy prescription for the retirement savings crisis. Rather, this Article claims that a human rights analysis provides an additional framework within which the government's economic and social policies regarding retirement should be evaluated and may also help to identify a more expansive range of responses to the ongoing pension reform debate.

Specifically, Part I provides an overview of the recent history of human rights law and the recognition of human rights for the elderly. Part II describes the concept of the social welfare state and the United States' chief social welfare program, Social Security. Part III examines the interplay of the United States' current private retirement savings system and tax expenditures. Part IV analyzes and critiques the current private retirement system through the lens of international human rights law and addresses the need for pension reform. Part V presents four proposals that reflect fundamental human rights considerations in providing greater retirement security across the income spectrum.

I. OVERVIEW OF INTERNATIONAL HUMAN RIGHTS LAW

A. *The Origins and Scope of Human Rights Law*

The genesis of human rights principles can be traced back to ancient religious writings—including the Torah, the Bible, and the Quran—all of which provide instruction on how individuals in society should treat one another.¹⁸ Contemporary human rights, however, adopts a more comprehensive approach and asserts the belief that everyone is entitled to certain rights simply by virtue of being human.¹⁹ This view emerged after World

18. See MICHAEL HAAS, *INTERNATIONAL HUMAN RIGHTS: A COMPREHENSIVE INTRODUCTION* 44 (2nd ed. 2013) (noting that as early as 300 B.C., the Edicts of the Indian Emperor Asoka contained references to the need for relief from individual suffering); see also University of Minnesota, *A Short History of Human Rights*, in *HUMAN RIGHTS HERE AND NOW: CELEBRATING THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 5 (Nancy Flowers ed.), <http://hrlibrary.umn.edu/edumat/hreduseries/here-andnow/Part-1/short-history.htm> [https://perma.cc/5TCD-8T8U].

19. *A Short History of Human Rights*, *supra* note 18.

War II, when war crimes and atrocities led the international community to establish the United Nations as a means of ensuring that individuals never again be unjustly denied “life, liberty, freedom, food, or shelter.”²⁰

Since its founding in 1945, the United Nations has focused on promoting and protecting human rights.²¹ In 1948, the United Nations adopted the Universal Declaration of Human Rights (UDHR), which asserts that governments have an affirmative obligation to ensure and protect civil and political rights as well as social and economic ones.²² The UDHR, which functions as an international bill of rights,²³ reflects the first authoritative step by the international community to collectively recognize and affirm universal principles of human rights.²⁴ Thus, the purpose of human rights law is not to establish human rights, but rather to guarantee them.²⁵

There has always been a theoretical connection between political and economic rights in human rights law. In practice, however, the connection has not always been clear.²⁶ Some UN members initially advocated for a division among classes of human rights, believing that combining them would undermine individual rights.²⁷ As a result, the United Nations Commission on Human Rights, which was replaced by the UN Human Rights Coun-

20. See *id.* at 6 (paraphrasing President Franklin D. Roosevelt’s 1941 State of the Union Address).

21. See U.N., *Protect Human Rights*, U.N.: What We Do, <http://www.un.org/en/sections/what-we-do/protect-human-rights/> [https://perma.cc/8ULR-64J2] (“The term ‘human rights’ was mentioned seven times in the UN’s founding Charter, making the promotion and protection of human rights a key purpose and guiding principle of the Organization.”).

22. UDHR, *supra* note 13, at Preamble (“Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms”); see also Mimi Abramovitz, *The U.S. Welfare State: A Battleground for Human Rights*, in *HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM* 46, 47 (Shareen Hertel & Kathryn Libal, eds., 2011); GABRIEL MORAN, *UNIQUELY HUMAN: THE BASIS OF HUMAN RIGHTS* 14 (2013) (ebook).

23. Adrienne Anderson, *On Dignity and Whether the Universal Declaration of Human Rights Remains A Place of Refuge After 60 Years*, 25 *AM. INT’L L. REV.* 115, 125 (2009) (explaining that the UDHR, ICCPR, and ICESCR combine to form an International Bill of Rights).

24. U.N. Charter, art. 13, ¶ 1 (noting the role of the General Assembly in “promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights”); UDHR, *supra* note 13; see also, Julia Tavares de Alvarez, *Human Rights for Elders*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: FIFTY YEARS AND BEYOND* 226 (Yael Danieli et. al. eds., 1999). But see MORAN, *supra* note 22, at 12 (noting that the Universal Declaration of Human Rights “clearly was not universal” because only forty-eight nation-states approved it while eight others abstained).

25. MORAN, *supra* note 22, at 9–10 (stating that these guarantees protect individuals and groups against both national and international actions that interfere with fundamental freedoms, justice, and human dignity); see, e.g., Human Rights Educators’ Network of Amnesty International USA, *What Are Human Rights?*, in *AMERICA NEEDS HUMAN RIGHTS* 164, 168 (Anuradha Mittal & Peter Rosset eds., 1999) (observing that principles of the UDHR have been incorporated in the constitutions of more than 185 nations).

26. See, e.g., Barbara Stark, *Urban Despair and Nietzsche’s “Eternal Return”*: *From the Municipal Rhetoric of Economic Justice to the International Law of Economic Rights*, 28 *VAND. J. TRANSNAT’L L.* 185, 226–232 (1995) (illustrating how during the 1990s urban minorities’ economic rights were systematically denied and arguing for ratification of the ICESCR).

27. Linda M. Keller, *The Indivisibility of Economic and Political Rights*, 1 *HUM. RTS. & HUM. WELFARE* 9, 9–10 (2001) (reviewing AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999)); see also Philip Alston, *U.S. Ratification of the Covenant on Economic, Social, and Cultural Rights: The Need for an Entirely*

cil,²⁸ drafted and adopted two separate treaties as a means of enforcing the UDHR.²⁹ These treaties were the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).³⁰ The prevailing view today, however, is that economic, social, and cultural rights are inextricably linked with civil and political ones.³¹ This perspective reflects the understanding that the exercise of civil and political rights hinges on the economic needs of individuals being met.³² In other words, it is difficult to believe the protection of civil and political rights can be fully meaningful if an individual lacks basic necessities such as food, shelter, or healthcare.³³

Not only has the structure of human rights law changed over time, but so too has the role of government.³⁴ Since the adoption of the UDHR, human rights law has evolved from focusing on standard setting and promotion to focusing on protection and prevention.³⁵ Accordingly, there is

New Strategy, 84 AM. J. INT'L L. 365, 366 (1990) (noting that Americans viewed the ICESCR as a "Covenant of Uneconomic, Socialist, and Collective Rights").

28. G.A. Res. 60/251, Human Rights Council (Mar. 15, 2006).

29. ICCPR, *supra* note 15. Nevertheless, the United States to date has ratified only the ICCPR; it has signed but not ratified the ICESCR. See U.N. TREATY COLLECTION, *Status of Treaties: International Covenant on Civil and Political Rights*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en [<https://perma.cc/KS9K-G2X4>].

30. *Id.*; ICESCR, *supra* note 15.

31. See Michael H. Posner, *The Four Freedoms Turn 70: Embracing an Integrated Approach to Human Rights*, 105 AM. SOC'Y INT'L L. PROC. 27, 28 (2011) (quoting President Obama's Nobel Prize acceptance speech, "Just peace included not only civil and political rights—it must encompass economic security and opportunity. For true peace is not just freedom from fear, but freedom from want."); see also Boutros Boutros-Ghali, Symposium, *The United Nations Family: Challenges of Law and Development*, 36 HARV. INT'L L.J. 267, 268 (1995) (noting "[d]evelopment can no longer be viewed merely as a matter of economic policy and resources, but rather development involves many dimensions. Political, social, and environmental factors are integral parts of development.").

32. See generally, U.N. COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, FACT SHEET NO. 16 (2010), <http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf> [<https://perma.cc/SA3K-QQME>].

33. See, e.g., Linda M. Keller, *The American Rejection of Economic Rights As Human Rights & The Declaration of Independence: Does the Pursuit Of Happiness Require Basic Economic Rights?*, 19 N.Y.L. SCH. J. HUM. RTS. 557, 607–609 (2003) (arguing that as the United States has failed to meet the standards of the ICESCR, it has also failed to allow its citizens the right to truly exercise their right to pursue happiness as asserted in the Declaration of Independence).

34. See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 511 (1991) (noting that governments are now viewed as having responsibility of providing protections as well as some modicum of services, including income, housing, and health care). But see Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L. J. 1, 69 (2010) ("[T]he federal government has increasingly devolved primary responsibility for both individual rights protection and social service provision back to state, local, and private capacities, deemed better suited and more responsive to the task."). Melish goes on to argue that the federal government should expand the welfare state further. *Id.*

35. See Elizabeth F. Defeis, *Universal Declaration of Human Rights: A Standard for States*, 28 SETON HALL LEGIS. J. 259, 278 (2004) ("On the fiftieth anniversary of the Universal Declaration of Human Rights . . . it is fitting to recall that 'the [] protection of human rights is a matter of priority for the international community.'" (quoting Pope John Paul II, Address at World Day of Peace: From the Justice of Each Comes Peace For All (Jan. 1, 1998)).

now a recognized duty for governments to respect and protect human rights as well as to promote and fulfill them.³⁶

B. *The Development of Human Rights Policies for Specific Groups*

Although human rights extend to all people, the recognition of special rights has developed for certain groups because of the unique and persisting challenges of their circumstances.³⁷ The elderly population is such a group.³⁸ Throughout the world, older individuals continue to disproportionately face discrimination in employment and access to credit, abuse in the home, and violence in public arenas.³⁹ These occurrences, which often go unreported, cause tremendous human suffering.⁴⁰ As a result, a body of human rights law has emerged that explicitly focuses on the rights of the aged.⁴¹

The recognition of elder rights is a particularly important and timely issue in the United States as one of the largest demographic groups in its history,⁴² the Baby Boomers,⁴³ reaches retirement age.⁴⁴ Because of this de-

36. See Human Rights Council, *A/HRC/30/49, Role of local government in the promotion and protection of human rights – Final report of the Human Rights Council Advisory Committee* 5 (2015); see generally Yael Danieli, *Introduction to THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: FIFTY YEARS AND BEYOND* 5, 5 (Yael Danieli, Elsa Stamatopoulou, & Clarence J. Dias eds., 1999).

37. For an example of the expansion and recognition of human rights law for a particular group, see U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *WOMEN'S RIGHTS ARE HUMAN RIGHTS* 5 (2014) <http://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf> [<https://perma.cc/JE3L-2GD7>] (noting that “The Convention [on the Elimination of All Forms of Discrimination Against Women] . . . pays specific attention to particular phenomena such as trafficking, to certain groups of women, for instance rural women, and to specific matters where there are special risks to women’s full enjoyment of their human rights, for example marriage and the family.”); for another example of human rights expansion see Library of Cong., *Children’s Rights: International Law*, <https://www.loc.gov/law/help/child-rights/international-law.php> [<https://perma.cc/PXC3-S9B7>] (outlining the development of human rights law for children).

38. Part I. C., *infra*.

39. See Alvarez, *supra* note 24.

40. See WORLD HEALTH ORGANIZATION, *Elder Abuse Fact Sheet*, <http://www.who.int/mediacentre/factsheets/fs357/en/> [<https://perma.cc/N6UQ-8TYG>] (noting that “only 1 in 24 cases of elder abuse is reported”); see also Centers for Disease Control and Prevention, *Understanding Elder Abuse Fact Sheet*, <https://www.cdc.gov/features/elderabuse/index.html> [<https://perma.cc/A8QS-KQAV>] (noting that one out of every ten elder persons is abused, but that that number is likely underestimated because of the lack of elder abuse reporting); see also Murphy, *supra* note 16, at 8–9 (explaining that elderly women, minorities, and LGBT person “undergo disproportionate challenges to enjoying their fundamental rights.”). For example, Murphy notes that elderly abuse in the home is rarely reported after the age of forty-nine due to the reliance by the abused elderly on her abuser. *Id.* at 10.

41. See Sandra Huenchuan & Luis Rodriguez-Pinero, *AGEING AND THE PROTECTION OF HUMAN RIGHT: CURRENT SITUATION AND OUTLOOK*, U.N. ECON. COMM. FOR LATIN AM. AND THE CARIBBEAN 25 (2011), <http://repositorio.cepal.org/bitstream/handle/11362/38501/S2011003.pdf> [<https://perma.cc/HD4P-XASZ>] (“The review of the standards enshrined in existing human rights instruments . . . as well as the authoritative construction of those standards by human rights bodies and mechanisms, allows [us] to conclude that a clear international normative consensus has emerged concerning the minimum content of the rights of older persons under international law.”).

42. Press Release, U.S. Census Bureau, *Millennials Outnumber Baby Boomers and Are Far More Diverse*, Census Bureau Reports (June 2015), <https://census.gov/newsroom/press-releases/2015/cb15-113.html> [<https://perma.cc/WQR9-BBME>] (stating that millennials, at a population of 83.1 million, now exceed the Baby Boomers’ population of 75.4 million).

velopment, the laws, policies, and duties relating to the treatment of older individuals in American society should be reviewed more critically than ever before to ensure that they remain equitable and effective.

C. *The Recognition of Human Rights Law for Elders*

Although the United Nations Organizational Charter makes no reference to age, the UDHR states that every person has a right to an adequate standard of living “in the event of unemployment, sickness, disability, widowhood, *old age*, or other lack of livelihood in circumstances beyond . . . control.”⁴⁵ Thus, this language, which sets a common standard of achievement for all people and nations, explicitly includes the elderly among populations that warrant special attention regarding their basic human rights.⁴⁶

In 1978 the United Nations formally recognized the issue of human rights for the elderly, when it funded the World Assembly on the Elderly.⁴⁷ Subsequently, at its inaugural event in 1982, the Assembly adopted an International Plan of Action on Aging that asked member countries to review their laws and policies relating to the protection of rights for the elderly.⁴⁸ Almost a decade later, in 1991, the United Nations Principles for Older Persons was adopted.⁴⁹

The Principles for Older Persons explicitly assert the rights of the elderly and encourage governments to incorporate in their social programs principles that promote independence, full participation, health care, self-fulfill-

43. Sandra L. Colby & Jennifer M. Ortman, *The Baby Boom Cohort in the United States: 2012 to 2060*, CENSUS.GOV 2 (May 2014) <https://www.census.gov/prod/2014pubs/p25-1141.pdf> [<https://perma.cc/FK7U-FD4D>]. (“The term ‘baby boomer’ refers to individuals born in the United States between mid-1946 and mid-1964.”)

44. D’Vera Cohn & Paul Taylor, *Baby Boomers Approach 65 — Glumly*, PEW RES. CTR. (Dec. 20, 2010), <http://www.pewsocialtrends.org/2010/12/20/baby-boomers-approach-65-glumly/> [<https://perma.cc/Y3X8-6RXX>] (“By 2030 all Baby Boomers will have turned 65, when 18% of the nation’s population will be at least that age.”)

45. UDHR, *supra* note 13, at art. 25 cl. 1 (emphasis added).

46. *Id.*; see also Alvarez, *supra* note 24, at 227.

47. G.A. Res. 33/52, ¶ 1, International Plan of Action on Ageing (Dec. 14, 1978). No other measures were taken to protect and promote these rights prior to this time. See generally Diego Rodriguez-Pinzon & Claudia Martin, *The International Human Rights Status of Elderly Persons*, 18 AM. U. INT’L L. REV. 915 (2003) (outlining the development and status of international human rights law and the elderly).

48. Elaine S. Kuntz, *Social Security Systems Around the World: Do Cultural Priorities Affect Their Development?*, 18 ELDER L.J. 99, 102 (2010) (noting that the Assembly called upon governments to “implement the plan in the ways they best see fit . . . [b]ased on principles such as . . . the value of the contributions of the elderly to society, and the responsibility that government has to the elderly, the [Ageing] Plan set[] out recommendations for action.”).

49. U.N. Principles for Older Persons, *supra* note 16. Additionally, on December 21, 2010, by resolution 65/182, the General Assembly established “The Open Ended Working Group on Aging.” This Group considers possible gaps in the human rights of older persons, and seeks ways of addressing them. Since its establishment, the “Working Group” has held eight sessions; however, it has not released any major documents. See General Assembly Res. 65/182 U.N. Doc. A/66/173, ¶ 80 (Dec. 2010).

ment and the ability to live with dignity and security.⁵⁰ This document states that the elderly should be afforded “adequate food, clothing, shelter, and health care” as well as “appropriate support services.”⁵¹ The Principles for Older Persons additionally require governments to create environments that value and appreciate the contributions of the elderly.⁵² All of these efforts are necessary in order to combat prevailing attitudes that too often marginalize the contributions of older persons, viewing them as burdens on society rather than valuable resources.⁵³ These attitudes not only are incompatible with human rights principles, but also detract from a communal sense of responsibility for the well-being of the elderly.

The reality is that seniors as a group make significant contributions to society. For example, older individuals shop abundantly, pay taxes, and frequently use services that employ other people. Seniors also tend to give more generously than do other age groups to charities and provide substantial volunteer services to numerous organizations and non-profits.⁵⁴ Consequently, protecting the economic and social rights of elders impacts all of society, as families, businesses, and the broader community lose valuable resources when workers have insufficient means in their old age to meet their financial needs.⁵⁵ It is therefore important to encourage workers *who can save* for retirement to do so. For individuals who cannot afford to save on their own, additional assistance is necessary. As a matter of pension policy,

50. See generally U.N. Principles for Older Persons, *supra* note 16.

51. *Id.* The year 1999 was proclaimed the International Year of Older Persons, marking the tenth anniversary of the adoption the International Plan of Action on Aging by an international conference. See, e.g., Alvarez, *supra* note 24, at 227.

52. Alvarez, *supra* note 24, at 227.

53. Verena Menec, *Why Seniors Matter – And How They Contribute to Our Everyday Lives*, in CANADIAN HEALTH POLICY IN THE NEWS: WHY EVIDENCE MATTERS 54, 55 (Noralou Roos et al. eds., 1st ed. 2012) (ebook) (“Stories abound in the media about how seniors are going to bankrupt the healthcare system or how the Canadian pension system will collapse under the burden of a growing senior population.”) (ebook); see also Sebastian J. Sanchez Rivera, *Worldwide Ageing: Findings, Norms, and Aspirations*, 79 REV. JUR. U.P.R. 237, 260 (2010) (“[D]espite older persons past efforts and contributions to our societies, today many still are subject to exploitation and silently excluded from participating in productive roles in their societies.”); see generally *The Americas and The Human Rights of Older Persons: Historical Overview and New Developments*, 45 IUS GENTIUM 215, 220 (2015) (“[R]ecognizing] ‘the need to address matters of . . . ageing from a human rights perspective that recognizes the valuable . . . contributions of older persons to the common good, to cultural identity . . . to human, social, and economic development, and to the eradication of poverty.’”) (quoting Draft Inter-American Convention on the Human Rights of Older Persons, Preamble).

54. See Menec, *supra* note 53, at 54-55; see, e.g., Vinay Bhagat, Pam Loeb & Mark Rovner, *The Next Generation of American Giving: The Charitable Habits of Generations Y, X, Baby Boomers, and Matures* (March 2010), <http://www.convio.com/files/next-gen-whitepaper.pdf> [<https://perma.cc/UXL3-EHNA>] (noting that the elderly make up almost half of all charitable giving); see also Press Release, Corporation for National & Community Service, Senior Volunteering at a 10-Year High (May 6, 2013), <https://www.prnewswire.com/news-releases/senior-volunteering-at-a-10-year-high-206296111.html> [<https://perma.cc/38CL-W9NW>] (“[The Corporation for National and Community Service] found that the percentage of volunteers who are seniors has steadily increased over the last decade (up six points – from 25.1% in 2002 to 31.2% in 2011). Nearly three-quarters (72.4%) are volunteering informally by doing favors for and helping out their neighbors, seven points higher than the national average.”).

55. Families stand to lose because seniors provide services of intangible value, such as: babysitting, raising children, providing emotional support, and educational tutoring. See Menec, *supra* note 53.

it is also important to protect money saved for retirement against risks, such as unexpected longevity, market volatility, and inflation, which all have the potential to erode value.⁵⁶

II. HUMAN RIGHTS AND THE SOCIAL WELFARE STATE

A. *The Concept of the Welfare State*

Similar to human rights law, the welfare state concept rests upon principles of human dignity, community values, and the government's responsibility to aid those who are unable to "avail themselves of the minimal provisions for a good life."⁵⁷ The welfare state recognizes the government as playing a key role in the protection and promotion of the economic and social well-being of its citizens.⁵⁸ This role is necessary due to mistakes, losses, miscalculations, and catastrophes with which individuals often are incapable of coping alone.

The United States' modern welfare state was influenced by President Franklin D. Roosevelt's New Deal programs and his 1941 State of the Union address, in which he identified the four fundamental freedoms that he believed "everyone in the world ought to enjoy."⁵⁹ Those freedoms include freedom from want and freedom from fear.⁶⁰

Some modern analysts contend that in discharging responsibility for individuals who cannot provide for themselves, the welfare state should incorporate theories of equal opportunity and equitable distribution of wealth.⁶¹ Accordingly, the welfare state currently has two separate and distinct functions.⁶² First, it redistributes income in order to reduce poverty and ine-

56. See discussion *infra* Parts VII. B–C.

57. Kwong Leung Tang, *Comparing Welfare States: Britain in International Context*. Allan Cochrane and John Clark. Reviewed by Kwong Leung Tang, University of Northern British Columbia, 23 W. Mich. U. 189 (1996) (book review) (examining Cochrane and Clark's "loose definition" of welfare state: "the involvement of the state in social security and social services"); see also Jeanne Curran & Susan R. Takata, *Modern Welfare State as Used by Quinney: Definitional Essay*, CSUDH LAW (Dec. 4, 1999), <https://www.csudh.edu/dearhaberamas/cnmodwel.htm#cndef> [<https://perma.cc/5VZY-U86M>].

58. Monica Prasad, *Tax "Expenditures" and Welfare States: A Critique*, 23 J. POL'Y HIST. 251, 257 (2011).

59. President Franklin D. Roosevelt, Annual Address to Congress on the State of the Union: Four Freedoms Speech 20–21 (Jan. 6, 1941), (transcript available at <http://voicesofdemocracy.umd.edu/fdr-the-four-freedoms-speech-text/> [<https://perma.cc/T9VM-2AJ7>]).

60. In addition to the freedoms from want and fear, President Roosevelt stated that the freedom of speech and expression and the freedom of worship were fundamental rights afforded to all. See Roosevelt, *supra* at 59.

61. See Bruce M. Price, *Halting, Altering and Agreeing*, 38 S.U. L. REV. 233, 258 (2011) ("Prior to the development of the welfare state, society did not have a rational expectation of the legal regulatory system preventing the free market operation by providing various safety nets against calamities which befell people, or to affect redistributions in the interests of fairness and social well-being."); see also Jacob S. Hacker, *THE GREAT RISK SHIFT: THE ASSAULT ON AMERICAN JOBS, FAMILIES, HEALTH CARE, AND RETIREMENT AND HOW YOU CAN FIGHT BACK* (2006) (advocating for a welfare state with more redistribution and stronger economic protections for workers).

62. Prasad, *supra* note 58.

quality—ideally from rich to poor, healthy to unhealthy, and abled to disabled.⁶³ Second, it pools risks on a society-wide scale.⁶⁴ As explained by social scientists, risk pooling improves society’s ability to operate more effectively by allowing it to disregard “the dictates of nature, fate or circumstance.”⁶⁵ The Social Security program, described below, exemplifies how tax policy can achieve this function by pooling the resources of all workers to protect individuals against the risk of income loss resulting from old age, disability, unemployment, and widowhood.⁶⁶

B. Overview of the Social Security Program

The United States has a history of protecting and promoting human rights through social benefits.⁶⁷ Since the passage of the New Deal in the 1930s, policymakers have promoted a human rights agenda, legislating numerous social programs that endorse the belief that government has an obligation to protect civil, cultural, economic, social and political rights.⁶⁸ The most notable of these programs was the Social Security Act of 1935, which is the foundation of the United States welfare state.⁶⁹ This Act holds that the government has a responsibility to protect the well-being of its citizens,

63. *Id.* Income redistribution can also occur from poor to rich. See Alice Gresham Bullock, *The Tax Code, the Tax Gap, and Income Inequality: The Middle Class Squeeze*, 53 *How. L.J.* 249, 256–266 (2010) (discussing income redistribution from the bottom up through certain tax code provisions).

64. Prasad, *supra* note 58, at 258.

65. See PETER BALDWIN, *Introduction to the Politics of Social Solidarity* 2 (1990).

66. See discussion *infra* Part VI. Much like Rawls’s “original position” philosophy of justice, which suggests planners of society should operate as though they are behind a “veil of ignorance”—knowing nothing about individuals’ sex, race, nationality, or tastes—the proper function of the welfare state is to pool risks without regard to such information. See JOHN RAWLS, *A Theory of Justice* 12 (1971).

67. Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 *HARV. HUM. RTS. J.* 53, 56 (1990) (arguing that American constitutional law, coming before the UDHR, has led to many of the international human rights that are now protected by the UDHR) (quoting Louis Henkin, “most of the Universal Declaration of Human Rights, and later the International Covenant on Civil and Political Rights, are in their essence American constitutional rights projected around the world.”); Louis Henkin, *Rights: American and Human*, 79 *COLUM. L. REV.* 405, 415 (1979); Franklin Delano Roosevelt, U.S. President, Radio Address on Unemployment and Social Welfare from Albany, New York (Oct. 13, 1932) (“[M]odern society, acting through its Government, owes the definite obligation to prevent the starvation or the dire want of any of its fellow men and women who try to maintain themselves but cannot. To these unfortunate citizens, aid must be extended by the Government – not as a matter of charity, but as a matter of social duty.”); OECD Glossary of Statistical Terms, *Social Benefits* (2001), <https://stats.oecd.org/glossary/detail.asp?ID=2480> [<https://perma.cc/74RC-9H2W>].

68. See Abramovitz, *supra* note 22. Though the United States was an early participant in the development of international human rights and did pass several pieces of legislation to protect its own citizens’ rights, it has failed to be a continuous force in international human rights. See Makau Mutua, *Standard Setting in Human Rights: Critique and Prognosis*, 29 *HUM. RTS. Q.* 547, 568 (2007) (detailing the United States’ reluctance to continue the development of international human rights).

69. See W. Andrew Achenbaum, *From the Margins to Pacesetter: The Place of the Elderly in U.S. Legal History from a Historian’s Perspective*, 7 *MARQ. ELDER’S ADVISOR* 93, 108 (2005) (“The 1935 Social Security Act became the centerpiece of the New Deal, and the foundation of the nation’s welfare state.”).

especially those in financial or social need, through grants, pensions, and other forms of benefits.⁷⁰

Congress established Social Security as a social welfare program⁷¹ with two primary objectives.⁷² The first objective was to provide a minimum standard of living to the elderly, the disabled, and their dependent survivors.⁷³ This function reflects the humanitarian view that covered workers and their dependents should not be allowed to live in abject poverty, and that society has a responsibility to provide them with at least a subsistence standard of living.⁷⁴ The program's second objective was to help moderate the decline in living standards when workers lose wages due to retirement, disability, or death.⁷⁵ This focus is a direct response to the obligation under human rights law to affirm human dignity and protect basic economic and social rights when individuals are unable to provide for their own basic needs.⁷⁶ By making the program mandatory, the government draws upon the earning power of the entire workforce to provide support for the retirement needs of the nation's elderly and disabled.⁷⁷

Social Security has been one of the most successful and popular social programs in U.S. history.⁷⁸ The program has been particularly effective in reducing poverty among the elderly.⁷⁹ Social Security retirement benefits initially were designed to be a safety net for the elderly, supplementing

70. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified at 42 U.S.C. §§ 301 to 1397mm (2012)); see discussion *infra* Parts I. A–B.

71. See Patricia P. Martin & David A. Weaver, *Social Security: A Program and Policy History*, 66 SOC. SEC. BULL., no. 1, 2005, at 3–6 (A social welfare program is “any of a variety of governmental programs designed to protect citizens from the economic risks and insecurities of life.”).

72. See JOSEPH A. PECHMAN, HENRY J. AARON & MICHAEL K. TAUSSIG, SOCIAL SECURITY: PERSPECTIVES FOR REFORM 215 (1968).

73. Wilbur J. Cohen, *Social Security Objectives and Achievements*, 18 SOC. SEC. BULL. 2, 2–3 (1955).

74. G.A. Res. 55/2, para. 11, United Nations Millennium Declaration (Sept. 6, 2000) (“We will spare no effort to free our fellow men, women and children from the abject and dehumanizing condition of extreme poverty, to which more than a billion of them are currently subjected.”).

75. Cohen, *supra* note 73.

76. See UDHR, *supra* note 13, at art. 22 (“Everyone, as a member of society, has the right to social security and the realization . . . of the economic, social, and cultural rights”); see also *What is the Human Right to Social Security?*, NAT'L ECON. & SOC. RTS. INITIATIVE, <https://www.nesri.org/programs/what-is-the-human-right-to-social-security> [<https://perma.cc/35AK-PBZT>] (noting that Social Security and Human Rights both include similar principles: comprehensiveness, flexibility, and non-discrimination).

77. LANGBEIN ET AL., *supra* note 4, at 21.

78. See Regina T. Jefferson, *Privatization: Not the Answer for Social Security Reform*, 58 WASH. & LEE L. REV. 1287, 1290 (2001) [hereinafter Jefferson, *Privatization*].

79. The National Bureau of Economic Research reports that between 1960 and 1995 poverty rates of individuals aged 65 and older fell by 25 percent, down from 35 to 10 percent, with similar declines dating back to 1939. See generally NATIONAL BUREAU OF ECONOMIC RESEARCH, SECURITY AND ELDERLY POVERTY (Nov. 2017). See also Jonathan Barry Forman, *Making Social Security Work for Women and Men*, 16 N.Y. L. SCH. J. HUM. RTS. 359, 366 (1999); Larry DeWitt, *The Development of Social Security in America*, 70 SOC. SEC. BULL. 1, 1, 21, chart 4 (2010) (showing that when Congress established Social Security in 1935, approximately 50% of the elderly lived in poverty); see, e.g., WORLD BANK, WORLD DEVELOPMENT INDICATORS 24–28 (2015), <https://openknowledge.worldbank.org/bitstream/handle/10986/21634/9781464804403.pdf> [<https://perma.cc/LZ22-B6QD>] (stating that the U.S. has a GNI per capita of \$53,750, which ranks the U.S. in the top-ten wealthiest countries); see also *Social Security and Elderly Poverty*, NAT'L BUREAU OF ECON. RES., <http://www.nber.org/bah/summer04/w10466.html>

private savings, employer provided retirement benefits, and contributions from family members.⁸⁰ As of 2015, however, 62 percent of retired households rely on Social Security benefits for more than half of their total income, with 34 percent of retired households having no other significant source of income.⁸¹ Accordingly, Social Security has become the foundation for retirement security in the United States.⁸²

C. Social Welfare and Human Rights Principles Promoted through the Social Security Program

Universal coverage makes the structure of the Social Security program more compatible with human rights principles than the structure of the private retirement system.⁸³ In the United States, the private retirement system covers only 50 percent of workers;⁸⁴ in contrast, as many as 97 percent of individuals aged 60 to 89 receive, or expect to receive, Social Security benefits.⁸⁵ The objectives, structure, and distribution of the Social Security program are also more compatible with human rights principles than are those of the private retirement system.⁸⁶

The distribution of benefits in the Social Security program is progressive and therefore compatible with human rights principles.⁸⁷ Benefits are based on a formula that provides higher replacement rates for low-wage workers.⁸⁸

[<https://perma.cc/XTP4-S6AU>] (noting that the Social Security program significantly reduced poverty among the elderly in the United States).

80. See Martin & Weaver, *supra* note 72, at 1–3.

81. See SOCIAL SECURITY ADMINISTRATION, FAST FACTS & FIGURES ABOUT SOCIAL SECURITY 8 (2017), https://www.ssa.gov/policy/docs/chartbooks/fast_facts/2017/fast_facts17.pdf [<https://perma.cc/G5YF-ANKY>]. The numbers used to calculate these percentages are from 2015.

82. See RHEE & BOIVIE, *supra* note 17, at 1–2 (“[Social Security] serves as the primary foundation of retirement income security for most Americans and provides a critical bulwark against old-age poverty.”).

83. See Human Rights Council, Preamble, *supra* note 28 (recognizing that universality is an important consideration in human rights issues).

84. See Peter Brady & Michael Bogdan, *A Look at Private-Sector Retirement Plan Income After ERISA*, 16 RES. PERSP. 1, 4 fig.2 (2010), <https://www.ici.org/pdf/per16-02.pdf> [<https://perma.cc/8EAS-TXB7>] (finding that 50 percent of private-sector workers are covered).

85. See generally SOCIAL SECURITY ADMINISTRATION, OFFICE OF RETIREMENT POLICY, NEVER BENEFICIARIES, AGED 60–89 (2015), <https://www.ssa.gov/retirementpolicy/fact-sheets/never-beneficiaries.pdf> [<https://perma.cc/L9M9-YHJJ>] (“About 3% of the total population aged 60–89 never receive Social Security benefits.”); see also CTR. ON BUDGET & POL’Y PRIORITIES, POLICY BASICS: TOP TEN FACTS ABOUT SOCIAL SECURITY 3 (2015), http://www.cbpp.org/sites/default/files/atoms/files/PolicyBasics_SocSec-TopTen.pdf [<https://perma.cc/4Q67-EFQC>] (depicting the percentage of social security current and future recipients in a graph).

86. See, *infra*, notes 203–06 and accompanying text.

87. NOAH MEYERSON & JOHN SABELHAUS, CONGRESSIONAL BUDGET OFFICE, IS SOCIAL SECURITY PROGRESSIVE?, ECON. AND BUDGET ISSUE BRIEF 1 (Dec. 15, 2006), <http://www.cbo.gov/ftpdocs/77xx/doc7705/12-15-Progressivity-SS.pdf> [<https://perma.cc/X2MC-H2FK>] (“For people with lower than average earnings, the ratio of the lifetime benefits they receive from Social Security to the lifetime payroll taxes they pay for the program is higher than it is for people with higher average earnings.”).

88. SOCIAL SECURITY ADMINISTRATION, ACTUARIAL NOTE NUMBER 2017.9, 3–10 tbl.A–D (2017), <https://www.ssa.gov/oact/NOTES/ran9/an2017-9.pdf> [<https://perma.cc/HVN2-LXX3>]; see also TOP TEN FACTS ABOUT SOCIAL SECURITY, *supra* note 85.

For example, individuals who retire today at age 65 with earnings of 45 percent of the average wage will receive Social Security retirement benefits that equal approximately 52 percent of their pre-retirement earnings.⁸⁹ In contrast, individuals who earn the maximum taxable wage of \$128,400 will receive benefits that replace only 25 percent of their pre-retirement earnings.⁹⁰

Additionally, because Social Security benefits automatically receive cost of living adjustments, they keep pace with inflation.⁹¹ This form of protection ensures that workers do not fall into poverty as they age.⁹² As will be discussed in Parts IV and V, the private retirement system disproportionately benefits high-income workers and many plans fail to provide protection against benefit losses through inflation or other events.⁹³ Therefore, as a matter of both retirement policy and human rights, it is important to analyze and critique the effectiveness of the private retirement system in an effort to provide greater retirement security.

III. THE PRIVATE RETIREMENT SYSTEM AND TAX EXPENDITURES IN THE UNITED STATES

A. Overview of the Private Retirement System

The private retirement system is voluntary, employment-based, and tax-preferred.⁹⁴ Each of these characteristics plays an important role in the structure, function, and effectiveness of the program. The fact that the private system is voluntary makes it necessary for the government to provide incentives to encourage employers to establish and maintain qualified retirement plans.⁹⁵ This creates tension between having stricter rules about participation and coverage rates on the one hand, and not deterring employers from offering and maintaining qualified retirement plans on the other.⁹⁶

Because the system is employment-based, the receipt of benefits from the private retirement system is uncertain. As a result, plan coverage often by-

89. See ACTUARIAL NOTE NUMBER 2017-9, *supra* note 88, at 5–6 tbl.B (showing career average earnings for various levels of income along side the career average earnings percentage an employee would expect to get back as a minimum replacement rate).

90. *Id.*

91. SOCIAL SECURITY ADMINISTRATION, *History of Automatic Cost-Of-Living Adjustments (COLA)*, <https://www.ssa.gov/news/cola/> [<https://perma.cc/3A68-593Q>] (stating that the cost of living adjustment is to ensure that Social Security benefits are not “eroded by inflation”).

92. *Id.*

93. See generally Michael Lind et al., EXPANDED SOCIAL SECURITY: A PLAN TO INCREASE RETIREMENT SECURITY FOR ALL AMERICANS, NEW AM. FOUND 1, 3–7 (2013), http://www.demos.org/sites/default/files/publications/LindHillHiltonsmithFreedman_ExpandedSocialSecurity_04_03_13.pdf [<https://perma.cc/G9QP-UHJR>].

94. LANGBEIN ET AL., *supra* note 4, at 3–4.

95. *Id.* at 289 (noting that the term “qualified plan” isn’t explicitly mentioned in the Internal Revenue Code, but that it simply means a retirement plan that meets the requirements of either I.R.C. §§ 401(a) or 402(a)(2)).

96. *Id.*

passes a significant percentage of the labor force. The type of job that an individual selects can determine whether a private retirement plan is offered or not because there are notable differences in coverage rates from one industry to another.⁹⁷ As many as 77.6 percent of workers in the public sector are covered by employer-sponsored plans, compared to only 35 percent of workers in the service industry. The aggregate coverage rate in the agricultural, mining, and construction industries is even lower, at 28.7 percent.⁹⁸ Additionally, workers in the private retirement system who lose their jobs prior to becoming vested also lose their retirement benefits.⁹⁹ Because low-income workers are more likely than higher-income workers to be employed in industries that do not offer retirement plans—and also have higher attrition rates—these variances and trends in employment practices significantly widen the retirement savings gap relative to income.¹⁰⁰

The tax preferences for the private retirement system are necessary to incentivize employers to establish and maintain retirement programs; however, they raise serious concerns about the fairness of such programs. These tax incentives consist of deductions and deferrals.¹⁰¹ Contributions to qualified plans by employers are not taxed as income when they are made; they are taxed later when the employee retires and begins to take distributions. Moreover, the earnings on the contributions accumulate tax-free and are not taxed until distribution.¹⁰² The fact that deductions and tax deferral are more valuable to workers who have higher marginal tax rates contributes to lower coverage and participation rates among low- and middle-income workers in the private retirement system.¹⁰³ This disparate impact is particularly apparent in the new 401(k) plan dominated landscape, where partici-

97. Id. at 23.

98. EMPLOYEE BENEFIT RESEARCH INSTITUTE, EBRI DATABOOK ON EMPLOYEE BENEFITS ch.6, fig.6.3 (2014), <http://www.ebri.org/pdf/publications/books/databook/DB.Chapter%2006.pdf> [<https://perma.cc/HZ36-CQND>].

99. “Vesting is the process by which an employee earns a right, generally nonforfeitable, (i.e., unconditional) to a portion of the employer-derived benefit or account under a plan.” See Pamela D. Perdue, *Fundamentals of Vesting*, SP046 A.L.I.-A.B.A. 333, 335 (2009). Vesting can occur immediately, through a graduated schedule, or after a specified waiting period. See LANGBEIN ET AL., *supra* note 4, at 112–13; see also Regina T. Jefferson, *Increasing Coverage in Today’s Private Retirement System*, 6 DREXEL L. REV. 463, 473–74 (2014) [hereinafter Jefferson, *Increasing Coverage*].

100. Low-income workers are also more likely to leave employment prior to becoming vested, which further impacts their retirement security. See Colin Gordon, *The Perils of Private Welfare: Job-Based Benefits and American Inequality*, in GROWING APART: A POLITICAL HISTORY OF AMERICAN INEQUALITY, INEQUALITY.ORG (2014), <http://scalar.usc.edu/works/growing-apart-a-political-history-of-american-inequality/job-insecurity-employment-based-benefits?path=differences-that-matter> [<https://perma.cc/HJT5-WB5T>].

101. See HARRIS & SHAKIN, *supra* note 8, at 14, fig.5 (2013), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/43768_DistributionTaxExpenditures.pdf [<https://perma.cc/3UJE-JK3R>]; see also Daniel I. Halperin, *Interest in Disguise: Taxing the “Time Value of Money”*, 95 YALE L.J. 506, 523–24 (1986).

102. See Regina T. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4 FLA. TAX REV. 607, 637 (2000) [hereinafter Jefferson, *Rethinking Risk*].

103. See discussion *infra* Part III.B.

pants choose both whether and to what extent they contribute to their employer sponsored plans.

B. Coverage and Participation in the Private Retirement System

When ERISA¹⁰⁴ was established in 1974, approximately 50 percent of the private, nonagricultural workforce was covered by a private retirement plan.¹⁰⁵ The coverage rate in the private retirement system has remained relatively constant since then, notwithstanding ongoing efforts to increase it.¹⁰⁶ The overall percentage of workers whose employers offered a private retirement plan was 54 percent in 2012,¹⁰⁷ and it reached an all-time high of 55 percent in 2013.¹⁰⁸

There are numerous reasons for workers not to be associated with an employer-sponsored plan. A worker may not work for an employer who offers a plan. Even when an employer does offer a plan, the employee may not fall within the category of employees the employer-plan is established to benefit. It is common practice for employers to differentiate plan offerings based upon categories, such as geographic location or whether employees are paid by the hour or by salary.¹⁰⁹ There also is a strong correlation between earnings and coverage in the private retirement system.¹¹⁰ As many as 72 percent of workers who earn less than \$15,000 do not have access to an employer sponsored plan; in contrast, only 22 percent of workers with compensation of \$50,000 or more do not have such access.¹¹¹ Thus, employees who are low-wage workers are unlikely to be covered by an employer-sponsored plan, and do not receive the benefits that such plans provide.

104. The Employee Retirement Income Security Act of 1974 (ERISA) is a federal tax and labor statute that sets minimum standards for pension and other benefit plans established by employers in the private sector. ERISA was enacted in an effort to protect interests of employers' benefit plan participants and their beneficiaries. 29 U.S.C. ch. 18 § 1001 et seq. (1978); see generally DEPARTMENT OF LABOR, HISTORY OF EBSA AND ERISA, <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa> [<https://perma.cc/7WQ4-BLZG>].

105. See Jefferson, *Increasing Coverage*, *supra* note 99.

106. See Brady & Bogdan, *supra* note 84.

107. See LANGBEIN ET AL., *supra* note 4, at 23; see generally KEITH MILLER, DAVID MADLAND & CHRISTIAN E. WELLER, THE REALITY OF THE RETIREMENT CRISIS 2 (Jan. 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/01/RetirementCrisis1.pdf> [<https://perma.cc/96J2-E4PV>].

108. Studies based on long-term analysis indicate that coverage rates have not been getting better over time, with access to employer-sponsored retirement plans actually decreasing since the 1980s. See RHEE & BOIVIE, *supra* note 17, at 3–5.

109. See Daniel L. Halperin, *Retirement Security and Tax Equity: An Evaluation of ERISA*, 17 B.C. INDUST. & COM. L. REV. 739, 742 (1976) (noting that some employers exclude workers in certain areas or make distinctions based on the employee's pay-rate).

110. LANGBEIN ET AL., *supra* note 4 at 27.

111. EBRI DATABOOK, *supra* note 98, at fig.6.

A worker may also not be associated with a plan offered by the employer because the worker may not “participate” in the plan.¹¹² The term “participate” refers to whether the worker actually benefits from the plan in a given year.¹¹³ Thus, a worker can be covered by a plan but not participate in it. This often occurs when a worker, although a member of the covered class of employees, has not satisfied the minimum age and service requirements imposed by the plan.¹¹⁴

In 1974, rather than mandating universal coverage, the framers of ERISA chose to address the coverage problem by using non-discrimination rules that limit the employer’s ability to exclude certain workers from their plans.¹¹⁵ The non-discrimination rules operate by comparing the coverage rates of highly compensated employees to those of non-highly compensated ones.¹¹⁶ Enforcement of the rules hinges on a quantifiable level of permitted disparity between the participation rates for the two groups.¹¹⁷

C. Plan Types—Defined Benefit and Defined Contribution

In traditional defined benefit plans, assets are pooled in an aggregate trust, and the employer promises a fixed amount to plan participants, usually based on final pay and years of service.¹¹⁸ In such plans, participation is typically non-elective.¹¹⁹ The employer is required to fund the plan sufficiently to pay for the promised benefit and is liable for the payment of the benefit, regardless of the actual investment performance of the plan assets.¹²⁰ Thus, the employer bears the funding responsibility as well as the investment risk in defined benefit plans.¹²¹

112. John Turner et al., *Defining Participation in Defined Contribution Pension Plans*, 126 MONTHLY LAB. REV. 36, 36–37 (2003), <http://www.bls.gov/opub/mlr/2003/08/art3full.pdf> [<https://perma.cc/2MQF-5E9Q>].

113. *Id.*

114. I.R.C. §410(a)(1)(A) (2012) (allowing employers to condition participation in the plan on an employee’s age and years of service).

115. The Senate warned that universal coverage could lead employers to reduce benefits or stop offering new plans. See S. REP. NO. 93–383, at 18–19 (1973).

116. See I.R.C. §§ 401(k)(12), 401(m)(11); see also, Peter M. van Zante, *Mandated Vesting: Suppression of Voluntary Retirement Benefits*, Part III.B, 75 NOTRE DAME L. REV. 125, 187–200 (1999) (providing an overview of the non-discrimination rules); Bruce Wolk, *Discrimination Rules for Qualified Retirement Plans: Good Intentions Confront Economic Reality*, 70 VA. L. REV. 419, 426–29 (1984) (offering a further discussion on the origin of the non-discrimination rules).

117. I.R.C. §§ 401(m), 410(b)(1) (2012). 401(k) plans must pass the “actual deferral percentage test,” which satisfies the special participation and non-discrimination rules for 401(k) plans. See Jefferson, *Increasing Coverage*, *supra* note 99, at 464.

118. See I.R.C. §410(a)(1)(A) (2012); see also Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 455–58 (2004) (noting that “[a] defined benefit pension . . . specifies an output for the participant.”).

119. ERISA § 3(35), 29 U.S.C. § 1002(35) (2012).

120. LANGBEIN ET AL., *supra* note 4, at 40.

121. To protect defined benefit plan participants in the event that the employer becomes insolvent, the Pension Benefit Guaranty Corporation (“PBGC”) insures a limited accrued benefit. See generally 29 U.S.C. §§ 1301–1311 (2012).

In contrast, in defined contribution plans, each participant is assigned an individual account, and the participant is not guaranteed a specific amount at retirement.¹²² The benefit payable at retirement is determined by the balance of the account, which reflects both employer and employee contributions, as well as the investment returns.¹²³ Therefore, because there is no promised benefit in defined contribution plans, the participant, rather than the employer, bears the risk of poor investment performance.¹²⁴

Section 401(k) plans are a special type of defined contribution plan. In these plans, participants are required to elect to have portions of their compensation contributed to the retirement plan; thus, the term “participation” has a different meaning. Workers are considered to participate if they are eligible to make elective contributions, whether or not they choose to do so.¹²⁵

D. Coverage and Participation Rates

Federal pension policy has long aimed to expand pension coverage for non-highly compensated workers.¹²⁶ The House Ways and Means Committee Report that accompanies the Revenue Act of 1942 refers to the function of the non-discrimination standards as preventing “the [pension] trust device from being used for the benefit of shareholders, officials, or highly paid employees.”¹²⁷ In the Committee on Finance Report accompanying the Comprehensive Private Pension Security Act of 1973, one of the listed goals of the legislation was to “increase the number of individuals participating in retirement plans.”¹²⁸

The prevalence of 401(k) plans has exacerbated the disparity in participation rates between low- and high-income workers because in such plans contributions are elective.¹²⁹ Although employers are permitted to make non-elective contributions to plan participants in 401(k) plans, most contri-

122. See, e.g., 29 U.S.C. §§1107(d)(3)(A)–(B)); see also Jose Martin Jara, *What Is The Correct Standard of Prudence in Employer Stock Cases?*, 45 J. MARSHALL L. REV. 541, 547 (2012).

123. See, e.g., Jeffery M. Colon, *Oil and Water: Mixing Taxable and Tax-Exempt Shareholders in Mutual Funds*, 45 LOY. U. CHI. L.J. 773, 801 (2012).

124. See, e.g., Anne Tucker, *Retirement Revolution: Unmitigated Risks in the Defined Contribution Society*, 51 HOUS. L. REV. 153, 184 (2013) (discussing three risks shifted to employees through defined contribution plans).

125. See Jefferson, *Increasing Coverage*, *supra* note 99, at 469 (noting that the reported rates of participation may significantly overstate actual participation and understate the coverage problem).

126. Under the current law, a pension is considered discriminatory under I.R.C. § 401(a)(4) if it does not benefit 70 percent of non-highly compensated employees. See, e.g., *General Tax Reform: Panel Discussions Before the H. Comm. on Ways and Means*, 93D CONG. 1ST SESS. 1122–23 (1973) (statement of Prof. Daniel Halperin, University of Pennsylvania Law School).

127. H.R. REP. NO. 2333, 77th Cong., 2d Sess. 103–04 (1942), reprinted in 1942–2 C.B. 372, 450.

128. S. REP. NO. 93–383, at 1 (1973).

129. I.R.C. § 401(k)(2)(A) (2012).

butions are made on behalf of those employees who elect to participate.¹³⁰ Many low- and middle-income workers who have access to employer sponsored plans do not choose to participate.¹³¹ As many as 54 percent of workers with earnings between \$20,000 and \$40,000 do not contribute to the 401(k) plans that their employers sponsor.¹³²

The most obvious reason for the disparity in participation rates is that low- and middle-income workers cannot afford to contribute.¹³³ Another reason is that some low-income workers are covered by means-tested welfare programs. These programs can discourage participation by effectively imposing an implicit tax on all forms of savings.¹³⁴ Lower participation rates among low- and middle-income workers also relate to the structure of the tax incentives, which favors high-income workers.¹³⁵

Not only are participation rates lower among non-highly compensated workers in 401(k) plans, but their contribution levels are lower as well.¹³⁶ Total assets in defined contribution plans exceeded \$7.0 trillion in 2016; however, relatively few of these assets were attributable to low- and middle-income households.¹³⁷ Households in the top 20 percent of income owned

130. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-08-8, PRIVATE PENSIONS: LOW DEFINED CONTRIBUTION PLAN SAVINGS MAY POSE CHALLENGES TO RETIREMENT SECURITY, ESPECIALLY FOR MANY LOW-INCOME WORKERS 8 n.12 (2007) <http://www.gao.gov/new.items/d0-88.pdf> [<https://perma.cc/G4C5-A9E8>].

131. See AON HEWITT, 2015 UNIVERSE BENCHMARKS RESEARCH HIGHLIGHTS – MEASURING EMPLOYEE SAVINGS AND INVESTING BEHAVIOR IN DEFINED CONTRIBUTION PLANS 12 (2015) <http://www.aon.com/attachments/human-capital-consulting/universe-benchmarks-2015-highlights.pdf> [<https://perma.cc/9GFR-6HDD>]. According to a report prepared by the National Institute on Retirement Savings, households with retirement accounts had more than 2.4 times the annual income of households without them, and the median income for households without retirement accounts is \$35,000. See RHEE & BOIVIE, *supra* note 17, at 2.

132. AON HEWITT, *supra* note 131, at 12 (noting that not only is this percentage number high, it has been rising since 2012). Additionally, workers may be covered by a retirement plan, but may choose not to participate due to income constraints or other reasons.

133. See Jefferson, *Increasing Coverage*, *supra* note 99, at 475–78 (noting that workers may have access to a retirement plan, but may choose not to participate due to income constraints or other reasons).

134. See William F. Bassett et al., *How Workers Use 401(k) Plans: The Participation, Contribution, and Withdrawal Decisions*, 51 NAT'L TAX J. 263, 270 (1998).

135. See *id.*; see also discussion *supra* Part III.A and *infra* Part IV.A.

136. See Eric Toder & Karen E. Smith, *Do Low-Income Workers Benefit from 401(k) Plans?*, URBAN INST. DISCUSSION PAPER No. 11-03, 11 (2011) (“[H]igh-income employees contribute more than [low-income ones],” which results in “high-income households hold[ing] a disproportionate share of assets in employer-sponsored defined contribution plans and individual retirement accounts.”); see also Craig Copeland, *Employment-Based Retirement Plan Participation: Geographic Differences and Trends*, EMP. BENEFIT RES. INST. ISSUE BRIEF no. 392, Nov. 2013, at 12, http://www.ebri.org/pdf/briefspdf/EBRI_IB_011-13.No392.Particip.pdf [<https://perma.cc/92UC-D7VG>] (finding that only employees earning between \$20,000–\$29,000 contribute at levels of 30.5 percent to retirement plans, compared to employees making over \$75,000 who contribute at levels of 67 percent).

137. See INVESTMENT COMPANY INSTITUTE, 2015 INVESTMENT COMPANY FACTBOOK 136–38 (55th ed. 2015), http://www.icifactbook.org/pdf/2015_factbook.pdf [<https://perma.cc/LY3Q-Q7D5>]; see also RHEE & BOIVIE, *supra* note 17, at 18–19; see also MILLER ET AL., *supra* note 107, at 6–7.

almost 68 percent of all retirement account assets, as compared to only 7.4 percent for households in the bottom 50 percent of income.¹³⁸

Notwithstanding these disparities, section 401(k) plans are the fastest growing type of retirement plan in the private sector. The placement of investment risk on the employee is one of the primary reasons 401(k) plans are popular with employers.¹³⁹ Another reason for their popularity is that there are fewer administrative costs and regulatory burdens placed on them than on traditional defined benefit plans.¹⁴⁰ Thus, the prevalence of 401(k) plans in the private sector is a function of convenience and cost rather than retirement security.¹⁴¹ This raises questions about both the effectiveness of the private retirement system and the justification for its cost.

IV. THE USE OF TAX EXPENDITURES FOR THE PRIVATE RETIREMENT SYSTEM

In the Budget and Impoundment Control Act of 1974 (“Budget Act”), the term “tax expenditure” is defined as “revenue losses attributable to provisions of the federal tax law” that allow preferential tax treatment.¹⁴² Therefore, the determination of whether a provision is considered a “tax expenditure” depends on whether it is consistent with generally accepted measurements of net income.¹⁴³ Tax expenditures are measured in terms of

138. See MILLER ET AL., *supra* note 107, at 3–4.

139. Avoiding fiduciary liability is another reason that 401(k) plans are popular, as evidenced by the existence of 404(c) plans, which shift the risk of investment returns to the plan’s participants. See LANGBEIN ET AL., *supra* note 4, at 47.

140. See John A. Turner & Gerard Hughes, *Large Declines in Defined Benefit Plans Are Not Inevitable: The Experience of Canada, Ireland, the United Kingdom, and the United States* 8–9 (Pensions Inst. Discussion Paper PI-0821, 2008), <http://www.pensions-institute.org/workingpapers/wp0821.pdf> [<https://perma.cc/3FXJ-KC2X>] (noting that defined benefit plans require actuarial valuations and insurance, two expenses not required for defined contribution plans).

141. See Scott Tong, *Father of Modern 401(k) Says it Fails Many Americans*, MARKETPLACE CONSUMED (June 13, 2013), <http://www.marketplace.org/topics/sustainability/consumed/father-modern-401k-says-it-fails-many-americans> [<https://perma.cc/W5AH-4LP6>] (noting that Ted Benna, the father of the 401(k), stated that the reason for the creation of the 401(k) came when employers asked “how can I get the biggest tax break, and give the least to my employees, legally?”) This explains why 401(k) plans initially were used as supplemental plan that provided additional benefits beyond traditional plans for high-ranking executives. See Elizabeth O’Brien, *10 Things 401(k) Plans Won’t Tell You*, MARKETWATCH (Feb. 23, 2013), <http://www.marketwatch.com/story/10-things-401k-plans-wont-tell-you-2012-11-09> [<https://perma.cc/U4TP-CA5M>]; see also SHLOMO BENARTZI, *SAVE MORE TOMORROW: PRACTICAL BEHAVIORAL FINANCE SOLUTIONS TO IMPROVE 401(K) PLANS* 2 (2012).

142. Congressional Budget Act of 1974, Pub. L. No. 93-344 § 3(a)(3), 88 Stat. 297 (1974). Tax expenditures exist in many forms, including exclusions and deductions from income, credits against a taxpayer’s tax liability, favorable tax rates, and the deferral of payment of tax liabilities. *see, e.g.*, I.R.C. § 121 (2012) (providing an exclusion of gains from the sale of a principal residence); *see also* I.R.C. § 32(b) (2012) (providing credits against tax liability); I.R.C. § 1031 (2012) (providing tax deferral for exchanges of certain held property). The Budget Act also requires that any budget submitted to Congress contain a detailed analysis and tabulation of all income tax expenditures. *See* PHILIP D. OLIVER, *TAX POLICY* 682 (2d ed. 2004).

143. *See* Congressional Budget Act of 1974, *supra* note 142; *see also* Alan Cole, *Corporate vs Individual Tax Expenditures*, TAX FOUNDATION: SPECIAL REPORT NO. 218 (2014), <http://taxfoundation.org/>

forgone revenue.¹⁴⁴ The exact cost is determined by calculating the difference between the existing tax liability and what the tax liability would have been in the absence of a particular provision, assuming that all other tax expenditures remain constant.¹⁴⁵

There are numerous costs and complexities that occur when tax expenditures, rather than direct expenditures, are used to accomplish social spending.¹⁴⁶ For example, tax expenditures add administrative burdens to the Internal Revenue Service,¹⁴⁷ and they do not always receive sufficient scrutiny and oversight.¹⁴⁸ To the extent that these and other externalities are unaccounted for, the true costs of tax expenditures are understated.¹⁴⁹

In theory, most tax expenditures are universal in their application and are not limited to specific sectors of the population.¹⁵⁰ In reality, however, this is not the case. One of the biggest criticisms of the use of tax expenditures for social spending is that they disproportionately benefit high-income tax-

article/corporate-vs-individual-tax-expenditures [https://perma.cc/Q5S4-U49N] (stating that the definition of a tax expenditure “depends crucially on what [] ‘normal’” is, adding that “the true nature of tax expenditures will always be somewhat subjective.”).

144. See STANLEY SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 30–31 (1973). In addition, the staff of the Joint Committee on Taxation publishes annual reports on tax expenditures. See JOINT COMMITTEE ON TAXATION, *JCX-97-14, ESTIMATES OF TAX EXPENDITURES FOR FISCAL YEARS 2014–2018*, 2–3 (2014), <https://www.jct.gov/publications.html?func=start-down&id=4663> [https://perma.cc/9B9M-727T]; see also, U.S. GOV'T ACCOUNTABILITY OFF., *GAO-94-122, TAX POLICY: TAX EXPENDITURES DESERVE MORE SCRUTINY* 33–35 (1994), <http://www.gao.gov/assets/160/154424.pdf> [https://perma.cc/4HUY-6VAD].

145. ESTIMATES OF TAX EXPENDITURES FOR FISCAL YEARS 2014–2018, *supra* note 144; see also Teresa Ghilarducci & Ismael Cid-Martinez, Article, *Transforming Federal and State Retirement Tax Deductions to Refundable Tax Credits*, 17 MARQ. BENEFITS & SOC. WELFARE L. REV. 87, 109 (2015).

146. See ESTIMATES OF TAX EXPENDITURES FOR FISCAL YEARS 2014–2018, *supra* note 144, at 2 (stating that tax expenditures “allow policymakers to evaluate the tradeoffs among these and other potentially competing policy goals.”); see also PAUL R. MCDANIEL ET AL., *FEDERAL INCOME TAXATION* 362 (6th ed. 2008); CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE UNITED STATES* 17 (1997) (noticing the controversy surrounding classifications of tax provisions as expenditures).

147. Cf. Internal Revenue Serv., *The Agency, Its Mission and Statutory Authority*, <https://www.irs.gov/uac/the-agency-its-mission-and-statutory-authority> [https://perma.cc/MW58-7R4S].

148. LILLIAN WOO & DAVID BUCHHOLZ, *SUBSIDIES FOR ASSETS: A NEW LOOK AT THE FEDERAL BUDGET* 2 (2007), at 11 http://cfed.org/assets/pdfs/Subsidies_for_Assets%20Jan%202007%20Revision.pdf [https://perma.cc/H48K-SE96]; see also, MCDANIEL ET AL., *supra* note 146, at 362; see generally Mary L. Heen, *Reinventing Tax Expenditure Reform: Improving Program Oversight Under the Government Performance and Results Act*, 35 WAKE FOREST L. REV. 751, part IV (2000) (arguing generally for government oversight reform over tax expenditures).

149. See Leonard E. Burman & Marvin Phaup, *Tax Expenditures, the Size and Efficiency of Government, and Implications for Budget Reform*, TAX POL'Y AND THE ECON. 93, 99 (2012) (explaining that the exclusion of tax expenditures causes overall spending to be understated by approximately one third).

150. See, e.g., I.R.C. § 32(b) (2012) (utilizing income phase-outs to target specific groups, such as the Earned Income Tax Credit (“EITC”)); see also THOMAS L. HUNGERFORD, CONGRESSIONAL RESEARCH SERVICE, RL33641, *TAX EXPENDITURES: TRENDS AND CRITIQUES* 2 (2008) (“[M]ore well-off taxpayers benefit disproportionately from tax expenditures because of the progressive nature of the income tax system.”); see also Gillian Lester, *Can Joe the Plumber Support Redistribution? Law, Social Preferences, And Sustainable Policy Design*, 64 TAX L. REV. 313, 334 (2011) (“[M]iddle- and high-income citizens receive benefits through a system of quasi-private ordering subsidized by tax expenditures that in turn are financed by general revenues, while low-income citizens depend on means-tested benefits that are ungenerous, short-term, and administratively burdensome to qualify for.”).

payers.¹⁵¹ In 2015, approximately 27.5 percent of the benefits of tax expenditure programs went to 1 percent of the wealthiest taxpayers, as compared to less than 5 percent to taxpayers in the lowest quintile of income.¹⁵² This result occurs primarily because incentives in the form of exclusions, deductions, and tax deferrals are more valuable to taxpayers with higher marginal tax rates, due to the progressive rate structure of the federal income tax.¹⁵³ Additionally, the types of activities that are encouraged and the extent to which certain preferences are available often favor high-income taxpayers, who have more disposable income.¹⁵⁴ For these reasons, the use of tax expenditures for social spending raises serious questions about the equity and effectiveness of the programs they support. As increasing numbers of American workers face the prospect of having insufficient resources for an “adequate standard of living” in their old age, these concerns are especially relevant to the private retirement system, which at \$178 billion for fiscal year 2016, is one of the nation’s largest tax expenditures.¹⁵⁵

151. See DONALD J. MARPLES, CONG. RESEARCH SERV., R44012, TAX EXPENDITURES: OVERVIEW AND ANALYSIS 4-6, fig.1 (2015), <https://fas.org/spp/crs/misc/R44012.pdf> [<https://perma.cc/62MK-7F2Y>].

152. See Yifan Zhang & Daniel Berger, *Who Benefits From Tax Expenditures?*, TAX POL’Y CTR.: TAX LINE (Sept. 28, 2016), <http://www.taxpolicycenter.org/taxvox/who-benefits-tax-expenditures> [<https://perma.cc/83DL-U94Z>]; see also Thomas D. Griffith, *Theories of Personal Deductions in The Income Tax*, 40 HASTINGS L.J. 343, 352-53 n.60 (1989) (“[A] disproportionate share of the benefits of most code provisions that are classified as tax expenditures accrue to high income individuals.”).

153. See Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U.L. REV. 329, 341 (2009) (noting that tax deductions are less valuable for low-income workers); see also Eric M. Zolt, *Deterrence Via Taxation: A Critical Analysis of Tax Penalty Provisions*, 37 UCLA L. REV. 343, 358 n. 73 (1989) (“Professor Surrey contended that tax expenditures benefit high-income taxpayers more than low-income taxpayers because they provide greater dollar benefits as a taxpayer’s marginal tax rate rises.”); see also Griffith, *supra* note 144, at 353 n.63 (“[U]nder a progressive rate structure a deduction or exclusion of a given amount has a greater dollar value to the rich than to the poor because the rich are subject to higher marginal rates.”).

154. See A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS, *supra* note 3, at 52 (“[T]ax expenditures formulated as deductions will generally reduce the progressivity of the tax system, by reducing average tax rates more for higher marginal rate taxpayers than for lower marginal rate taxpayers”); see also CHUCK MARR & BRIAN HIGHSMITH, REFORMING TAX EXPENDITURES CAN REDUCE DEFICITS WHILE MAKING THE TAX CODE MORE EFFICIENT AND EQUITABLE: RECENT PROPOSALS UNDERSCORE BIPARTISAN SUPPORT FOR REFORM, CTR. ON BUDGET & POL’Y PRIORITIES 5 (2011), <https://www.cbpp.org/sites/default/files/atoms/files/4-15-11tax.pdf> [<https://perma.cc/EF38-EAJD>] (“[T]he wealthiest households [] receive the largest tax subsidies [through expenditures], while the benefits to middle-class families are considerably smaller and many of the most vulnerable families are left out entirely. This structure generally reduces both the efficiency and the fairness of these tax incentives.” *Id.* at 4).

155. See, e.g., Peter G. Peterson Foundation, http://www.pgpf.org/sites/default/files/0009_largest-tax-expenditures.pdf [<https://perma.cc/6V9X-QJLY>].

V. HUMAN RIGHTS AND UNITED STATES RETIREMENT SAVINGS POLICY

A. *Human Rights Analysis of the Existing Private Retirement System*

Under human rights law,¹⁵⁶ governments have a moral obligation to generate the maximum available resources for the “progressive realization of economic, social, and cultural rights” of their citizens.¹⁵⁷ Tax policy can play a fundamental role in the redistribution of national resources to address economic inequalities;¹⁵⁸ consequently, it is not uncommon for governments to use tax expenditures to further human rights objectives.¹⁵⁹

In an effort to assess the effectiveness of various tax programs and policies used throughout the world for this purpose, the U.N. Special Rapporteur on Extreme Poverty submitted a questionnaire to member states to help evaluate the impact of fiscal and tax policies on human rights.¹⁶⁰ Based on the questionnaire, the Special Rapporteur created a report, the Human Rights Impact of Fiscal and Tax Policy, to identify trends in policies, highlight human rights concerns, and supply member states with recommendations.¹⁶¹

The report included responses to the following three survey questions: (1) is your government’s tax policy compatible with the obligation to use maximum available resources to realize economic and social rights?, (2) is your government’s tax structure regressive or progressive?, and (3) are there special mechanisms in place to protect marginalized and vulnerable groups with respect to the “design, implementation, and monitoring of tax provisions and policies in accordance with principles of transparency, non-discrimination, and accountability?”¹⁶² Although the questions were written

156. See *infra* Part I.

157. See *Advancing Tax Justice Through Human Rights*, CTR. FOR ECON. AND SOC. RTS. (2015), <https://www.escri-net.org/news/2015/advancing-tax-justice-through-human-rights> [<https://perma.cc/ZLD5-8CSS>].

158. MARPLES, *supra* note 151, at 2 (noting that a common goal of tax expenditures is “altering the distribution of fiscal benefits and burdens”); see also IMF, *Fiscal Policy and Income Inequality*, IMF Policy Paper, 1 (2014) (“Fiscal policy is the primary tool for governments to affect income distribution.”).

159. See RADHIKA BALAKRISHNAN ET. AL, *supra* note 14, at 6–9 (2011).

160. SPECIAL RAPPORTEUR ON EXTREME POVERTY AND HUMAN RIGHTS, QUESTIONNAIRE ON THE HUMAN RIGHTS IMPACT OF FISCAL AND TAX POLICY (2014), http://www.ohchr.org/Documents/Issues/EPoverty/Questionnaire_Civil_Society.pdf [<https://perma.cc/6DLJ-XSFN>].

161. Magdalena Sepulveda Carmona, UNITED NATIONS SPECIAL RAPPORTEUR ON EXTREME POVERTY AND HUMAN RIGHTS, THE HUMAN RIGHTS IMPACT OF FISCAL AND TAX POLICY (Mar. 11, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676346 [<https://perma.cc/2VV8-VARA>] (“After assessing how revenue-raising policies and practices can be strengthened through a human rights-based approach, the paper makes recommendations for fiscal and tax policies that are grounded in human rights”).

162. See QUESTIONNAIRE ON THE HUMAN RIGHTS IMPACT OF FISCAL AND TAX POLICY, *supra* note 160. “1. Is your government’s tax policy compatible with the obligation to use maximum available resources to realize economic and social rights? If not, why? Do obstacles of a national or international nature impinge on your government’s ability to mobilize the maximum available resources through taxation?”; “2. In general, would you say that the tax regime is regressive or progressive? Why? Please provide examples (for instance: proportions of wealth, income, and consumption taxes in total revenue;

to elicit responses regarding the relationship of human rights principles to broad fiscal and tax policies, applying the questions more narrowly to the United States private retirement system is useful for evaluating the program's impact on the human rights of the elderly.

1. *Maximizing Available Resources to Realize Economic and Social Rights*

The United States' private retirement system does not appear to fully maximize available resources in order to realize economic and social rights for all citizens. There are two primary reasons for this. One is that the program is voluntary. Voluntariness leads to lower coverage rates for low- and middle-income taxpayers and greater benefits for taxpayers with higher marginal tax rates.¹⁶³

The second reason comes from the reallocation of risk associated with the shift from using defined benefit plans to defined contribution plans as primary retirement savings vehicles.¹⁶⁴ In defined benefit plans, the Pension Benefit Guaranty Corporation (PBGC), a federal agency, insures a limited benefit in the event that an employer becomes insolvent and is unable to pay the promised benefits.¹⁶⁵ Therefore, in defined benefit plans, the government is secondarily liable for the payment of retirement benefits. Participants in such plans bear the risk of loss only to the extent that their vested accrued benefits exceed the insured limit, which is a situation that

distributional impacts of tax schemes between and within households, including deduction and exemptions for women, people living in poverty, single household heads, or based on marital status). What are the shares of tax revenue paid by different groups and the rate of taxation on different social groups?"; 3. What is the tax/GDP ratio of your country? Would you say that the tax regime allows the State to: a) raise adequate resources to ensure the realization of human rights, including sustainable financing of social protection systems; b) mitigate poverty and inequalities; and c) ensure that rights of disadvantaged and marginalized individuals and groups are not disproportionately affected? Please explain. If the answer was negative, why are different rates or other types of taxes not in place?"; 4) How does the government guarantee that the design and implementation of taxation measures, as well as monitoring of their impacts, are carried out in accordance with principles of public participation, transparency, non-discrimination and accountability? Are there special mechanisms to protect these guarantees, in particular for marginalized and vulnerable groups?" *Id.* There were additional questions that are not related to the purpose of this Article.

163. See discussion *supra* Pt. IV.B.

164. CHRISTINE C. MARCKS & JOHN J. KALAMARIDES, WHAT EMPLOYERS LOSE IN THE SHIFT: FROM DEFINED BENEFIT TO DEFINED CONTRIBUTION PLANS . . . AND HOW TO GET IT BACK, PRUDENTIAL 5 (2017), http://research.prudential.com/documents/rp/What_Employers_Lose_in_the_Shift.pdf [<https://perma.cc/STR7-GTH8>] (explaining that direct benefit plans protect employees against investment and longevity risks, while direct contribution plans do not).

165. 29 U.S.C. § 1322 (a) (2012) ("[T]he corporation shall guarantee . . . the payment of all nonforfeitable benefits"); see also Press Release, Pension Benefit Guaranty Corporation, PBGC Maximum Insurance Benefit Level for 2016 (Oct. 25, 2016), <http://www.pbgc.gov/news/press/releases/pr14-12.html> [<https://perma.cc/NWC3-GECE>] ("[T]he annual maximum guaranteed benefit for a 65-year-old retiree in a single-employer plan remains at \$60,136 for 2016."); see PENSION BENEFIT GUARANTEE CORPORATION, PBGC'S GUARANTEE LIMITS—AN UPDATE 1 (Sept. 2008), <https://www.pbgc.gov/documents/guaranteelimits.pdf> [<https://perma.cc/ND2C-UD89>] ("PBGC will fully cover benefit improvements made more than five years prior to the day of the plan's termination.").

rarely occurs.¹⁶⁶ In 401(k) plans and other defined contribution plans, there is no federal protection against plan losses.¹⁶⁷ Thus, the failure to provide some form of guaranteed benefit in 401(k) plans reallocates the risks associated with retirement savings from the government to the participant.¹⁶⁸ This shift does not maximize resources for the advancement of economic and social rights, as it places greater risks on individual workers who are less likely than the government to be in a position to protect themselves.

2. *Regressive or Progressive Structure*

The United States' private retirement system cannot accurately be described as progressive. All taxpayers, including the least wealthy, subsidize the preferential tax treatment of the private retirement system by paying higher taxes on the portions of their incomes that do not receive special tax treatment.¹⁶⁹ However, as explained above, the private retirement system provides relatively few benefits to low- and middle-income workers.¹⁷⁰ When tax subsidies are skewed in favor of high-income taxpayers, they are referred to as "upside-down-subsidies."¹⁷¹ This is because they have the perverse economic effect of giving more to individuals with more and less

166. This is because relatively few plan participants have vested accrued benefits in excess of the insurable limit. Further protection is offered in the form of generally built-in cost-of-living-adjustments (COLAs) in defined benefit plans; whereas, defined contribution plans do not offer such protection against inflation. These COLAs protect against the erosion of the value of the accrued benefits due to inflation. See Robert Kleine & Mitch Bean, *A Cost Benefit Comparison of Defined Benefit and Defined Contribution Retirement Plans*, COAL. FOR SECURE RETIREMENT – MICHIGAN 17 (2014).

167. MARCKS & KALAMARIDES, *supra* note 165, at 5 ("DC plan participants bear the risks of investment losses and outliving their assets.")

168. For an in-depth discussion on insurance protection in defined contribution plans, see Jefferson, *Rethinking Risk*, *supra* note 102, at 640–71. Even if a worker elects to save in 401(k) plans but losses occur due to a sudden market downturn, there is no available protection. See Frans Pennings & Paul M. Secunda, *Towards the Development of Governance Principles for the Administration of Social Protection Benefits: Comparative Lessons from Dutch and American Experiences*, 16 MARQ. BENEFITS & SOC. WELFARE L. REV. 313, 385 (2015) ("Although the United States has pension insurance for defined benefit plans that become financially distressed under the scheme set up by the federal PBGC, there is no protection for private-sector defined contribution plans (like 401(k) plans)") (emphasis added).

169. The United States' government has created federal tax laws that allow favorable tax treatment for private sector employers to sponsor pension and retirement savings plans, and for employees to participate in those plans. These tax incentives are paid for in the form of tax expenditures, which cost the government and taxpayers roughly \$177.9 billion as of 2016. Even though the government's attempt was to encourage retirement savings, "[defined contribution] participants with high incomes and other assets benefited the most." See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-18-111SP, *The Nation's Retirement System: A Comprehensive Re-evaluation Is Needed* 52, 84–86 (2017).

170. See Norman Stein, *Slouching Towards A Consumption Tax and the End of Retirement Income Security*, 9 FLA. TAX REV. 119, 126–27 (2008) ("[T]he [private retirement] system is both over-inclusive in that it provides benefits for those who would save for their own retirement without tax incentives, and under-inclusive because it fails to provide meaningful benefits to many low- and middle-income workers."); see also MARPLES, *supra* note 151.

171. David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 977 (2004) (explaining that because the value of deductions rises with marginal tax rates, lower-income taxpayers receive less than higher-income taxpayers, which results in the lower-income taxpayers subsidizing for the wealthiest to receive deductions).

to individuals with less.¹⁷² Accordingly, the private retirement system currently redistributes income from those without coverage to those with coverage, which generally results in redistribution from low-income workers to higher-income ones.¹⁷³ Thus, it is difficult to conclude that the private retirement system's redistributive function is progressive.¹⁷⁴

3. *Transparency, Accountability, and Non-Discrimination*

One of the primary criticisms of tax expenditures is that they are more esoteric and opaque than direct payments.¹⁷⁵ Therefore, as a tax expenditure, the private retirement system cannot be considered transparent in either its design or its operation. This assessment also affects the degree to which the program has accountability. Unlike direct payment programs, which are visible to the public, programs supported by tax expenditures are less apparent because they are buried in the tax law.¹⁷⁶ As a result, these programs are more immunized from public debate and scrutiny than are direct expenditure programs.¹⁷⁷

The private retirement system also fails at being non-discriminatory. Although employer sponsored plans are subject to non-discrimination rules, there is a level of permitted disparity that allows qualified plans to disproportionately benefit highly compensated workers.¹⁷⁸ The safe harbor tests¹⁷⁹

172. See A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS, *supra* note 3, at 49; see also Wendy A. Bach, *Poor Support / Rich Support: (Re)viewing the American Social Welfare State*, 20 FLA. TAX REV. 495, 520 (2017) ("Because [tax expenditures] tend to benefit the wealthy far more than the poor, the overall effect of social spending on income inequality is far less significant than [other] OECD countries.").

173. See Bach, *Poor Support / Rich Support*, *supra* note 172, at 517 (explaining that "social insurance goes to nearly all with distribution being overall progressive, distributing more to those on the lower end of the income spectrum. In contrast, tax expenditures flow primarily to those in the top quintiles of the economic distribution."). This effect is directly at odds with human rights goals. See ICESCR, *supra* note 15 (stating that states need to "progressively [view] the full realization of rights recognized in the present Covenant").

174. See LANGBEIN ET AL., *supra* note 4, at 300; cf. Michele Gilman, *A Court for The One Percent: How The Supreme Court Contributes to Economic Inequality*, 2014 UTAH L. REV. 389, 450 pt. III.B. (2014) (expressing the need for a more progressive tax code to combat economic inequality).

175. See STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 70, 93 (1985) (explaining that the presence of tax expenditures makes the tax system more complex and harder to comprehend, and that if tax expenditures were converted to direct programs, it would reduce the complexity of the tax law).

176. TAX POLICY CENTER, BRIEFING BOOK 87, http://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc-briefing-book_0.pdf [<https://perma.cc/FXH5-WYT7>] (2016) (explaining that tax expenditures are controversial because "they operate very much like spending programs but are hidden in the tax code.").

177. See generally GAO-94-122, *supra* note 144 ("GAO recommends that the tax-writing committees . . . exercise more scrutiny over indirect 'spending' through tax expenditures.").

178. See discussion *supra* Part IV.B.

179. The non-discrimination rules for 401(k) plans are complex and costly, as they require extensive record keeping; thus employers lobbied for the safe harbor rules that automatically satisfy the non-discrimination test. See LANGBEIN ET AL., *supra* note 4, at 453. A qualified plan must meet not only the participation and non-discrimination standards under section 410(b)(1), but also either satisfy the designed-based safe harbor test under section 401(k)(12) or meet one of the "actual deferral percentage" (ADP) tests. 26 C.F.R. § 1.401(k)-2 (2015). These tests compare contribution rates of the highly com-

for non-discrimination in 401(k) plans, which significantly lessen the employer's administrative burdens, allow even greater discrimination in favor of highly-compensated employees.¹⁸⁰ This occurs because as long as the employer meets the safe harbor minimum contribution or match for every non-highly compensated participant, highly compensated employees are free to contribute up to the limit.¹⁸¹ Although the non-discrimination rules are not per se inconsistent with desirable pension policy, they do raise questions about whether the degree of permitted disparity is justifiable. In summary, based on the three survey questions discussed above, human rights principles seem to have little impact on the United States' private retirement system and its underlying structure.

B. *Human Rights and Elderly Poverty in the United States*

It is estimated that over 4 million seniors in the United States currently live under the poverty line,¹⁸² while millions more live just above the federal poverty level.¹⁸³ These numbers represent as much as 45 percent of the senior population.¹⁸⁴ Based on existing trends and patterns in the private retirement system, increasing numbers of American workers will be forced to live in poverty in their old age.¹⁸⁵ Poverty has been described in human

pensated employees for the current year to the contribution rates of non-highly compensated employees for the previous year under section 401(k)(3)(A). See LANGBEIN ET AL., *supra* note 4, at 333.

180. For further discussion on safe harbor rules see YOUR GUIDE TO SAFE HARBOR 401(K) PLANS (2016), VANGUARD, <https://institutional.vanguard.com/iam/pdf/SMSAFE.pdf> [<https://perma.cc/Q2T4-5NDU>].

181. LANGBEIN ET AL., *supra* note 4, at 453.

182. The poverty line is equivalent to the poverty threshold, which is the statistical process of gathering data to determine the number of people who are in poverty. It is typically used to set financial eligibility criteria for federal programs. It is updated each year by the U.S. Census Bureau. See U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES., FREQUENTLY ASKED QUESTIONS RELATED TO THE POVERTY GUIDELINES AND POVERTY, <https://aspe.hhs.gov/frequently-asked-questions-related-poverty-guidelines-and-poverty> [<https://perma.cc/5J9N-DYF2>].

183. These numbers are based on 2015 data. BERNADETTE D. PROCTOR ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2015, 13 tbl.3 (Sept. 2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf> [<https://perma.cc/6E9L-VWK3>]. *But see* Mary Borrowman, *Understanding Elderly Poverty in the U.S.: Alternative Measures of Elderly Deprivation* 3 (Schwartz Ctr. for Econ. Policy Analysis, Working Paper No. 2012-3, 2012) (arguing that the federal poverty line of 9 percent for the elderly is too low); *see also* U.S. CENSUS BUREAU, POVERTY STATUS IN THE PAST 12 MONTHS: 2012-2016 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES (2013), <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> [<https://perma.cc/XFL5-UVST>]; *see also* Notice, Annual Update of the HHS Poverty Guidelines, 82 Fed. Reg. 8831-32 (Jan. 31, 2017) (noting that the poverty level for 2017 will remain unchanged at \$12,060).

184. See JULIETTE CUBANSKI, GISELLE CASILLAS & ANTHONY DAMICO, POVERTY AMONG SENIORS: AN UPDATED ANALYSIS OF NATIONAL AND STATE LEVEL POVERTY RATES UNDER THE OFFICIAL AND SUPPLEMENTAL POVERTY MEASURES 4 (June 2015), <http://files.kff.org/attachment/issue-brief-poverty-among-seniors-an-updated-analysis-of-national-and-state-level-poverty-rates-under-the-official-and-supplemental-poverty-measures> [<https://perma.cc/5X2P-UPN7>] (claiming that as of 2013, under the Supplemental Poverty Measure, those 65 and older had incomes below twice the poverty level at a rate of 45 percent, compared to only 33 percent under the official measure).

185. *See generally* MILLER ET AL., *supra* note 107 (reporting that as of 2013, "approximately one out of every five near-retirement households" had no savings or pension).

rights literature as the social condition that threatens human rights more than any other.¹⁸⁶ A report on poverty given to the General Assembly of the United Nations explains that poverty not only deprives individuals of economic and material resources, but also violates their human dignity.¹⁸⁷ Consequently, the retirement savings crisis, elderly poverty, and human rights are all closely connected.

The fact that millions of Americans will have insufficient retirement savings in their old age is a problem of national importance that warrants government intervention. One commentator predicted that unless major changes in retirement savings patterns occur, the new normal for many elderly Americans will be captured by the slogan, “[t]oo frail to work, too poor to retire.”¹⁸⁸

Disturbingly, the number of older Americans living in poverty is on the rise.¹⁸⁹ From 2005 to 2009, poverty rates for individuals ages 65 to 74 rose by nearly 2 percent.¹⁹⁰ During this same period there was an even steeper increase of 3.1 percent for individuals ages 75 to 84.¹⁹¹ The number of seniors who fall into poverty in their later years is also on the rise. In 2009, as many as 6 percent of individuals above age 85 were new entrants into poverty, up from 4.6 percent in 2005.¹⁹²

As alarming as these percentages are, when health care costs are factored in, the rate of elderly poverty significantly increases.¹⁹³ This is because medical expenses for individuals between the ages of 55 and 64 are nearly twice the amount spent by individuals between the ages of 35 and 44.¹⁹⁴ In

186. U.N. Economic and Social Council, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, ¶¶ 4–6, U.N. Doc. E/C.12/2001/10 (May 10, 2001).

187. *Id.* at ¶¶ 7–8.

188. See generally Edward Siedle, *The Greatest Retirement Crisis in American History*, FORBES (Mar. 20, 2013), <https://www.forbes.com/sites/edwardsiedle/2013/03/20/the-greatest-retirement-crisis-in-american-history/#3aa4c21155b6> [https://perma.cc/3BM5-AS2K].

189. Mary Helen McNeal, *Say What? The Affordable Care Act, Medicare, And Hearing Aids*, 53 HARV. J. ON LEGIS. 621, 639 (2016) (“Many experts project that poverty rates among seniors will continue to rise in the foreseeable future, with one source anticipating a 180% increase in the number of seniors living in poverty by the year 2050.”).

190. Emily Brandon, *Poverty Increasing Among Retirees: The Gap Between the Wealthiest and Poorest Retirees Is Growing*, U.S. NEWS (May 21, 2012), <http://money.usnews.com/money/retirement/articles/2012/05/21/poverty-increasing-among-retirees> [https://perma.cc/68A8-QSL2].

191. *Id.*

192. *Id.* This result is due partly to the fact that inflation erodes the value of retirement benefits over time. See GAO-18-111SP, *supra* note 169, at 61–62.

193. McNeal, *supra* note 189, at 639 (highlighting the fact that medical costs account for 15 percent of total Medicare household budgets compared to non-Medicare households); see also Christian Weller, *Medicating the Elderly Into Poverty?*, ECON. POL’Y INST.: ECON. SNAPSHOT (July 16, 2003), http://www.epi.org/publication/webfeatures_snapshots_archive_07092003 [https://perma.cc/WNM2-QH62].

194. See Professor Mary Helen McNeal, *Affordable and Accessible Hearing Health for Seniors*, NAELA J., Fall 2017, 97, 107 n.78 (noting that medical costs have outpaced GDP between 1.1 and 3 percent over the past 5 decades); see also Weller, *supra*, note 193; see also Kathryn Campbell, *Granny Dealing Drugs On the Government’s Dime: Why Medicare and Medicaid Should Have Safeguards in Place to Prevent Abuse*, 24 ELDER L.J. 401, 407 n.42 (2017) (noting a Fidelity report “estimat[ing] that a sixty-five-year

an analysis conducted by the Kaiser Family Foundation that adjusted for increased health care costs—by deducting out-of-pocket medical expenses from income according to the Supplemental Poverty Measure (SPM)—the elderly poverty rate in the U.S. increased from 10 percent to 15 percent. For elderly at 200 percent below the poverty threshold, the rate increased by 12 percent, from 33 percent to 45 percent.¹⁹⁵ Advocates for the SPM argue that it is a better way of measuring poverty because it provides a more accurate accounting of income necessary for basic needs.¹⁹⁶ Increased health care costs have also been identified as the primary reason for a significant increase in bankruptcy filings among seniors.¹⁹⁷

Elderly poverty is not gender neutral.¹⁹⁸ As of 2015, over 10 percent of women lived at or below the poverty line as compared to only 7 percent of men.¹⁹⁹ Women ages 75 and older are approximately three times more likely to live in poverty than are men of the same age.²⁰⁰ This is true for several reasons. Women are less likely to have worked in jobs that have employer-sponsored retirement plans; women are more likely to have had lower earnings due to wage discrimination; and women also are more likely to have had absences from the labor market, due to childbirth and other

old couple retiring in that year required \$245,000 to cover medical expenses through retirement, more than a fifty percent increase from the estimate in 2002.”) (emphasis added). See Alexandra Cawthorne, *Elderly Poverty: The Challenge Before Us*, CTR. FOR AM. PROGRESS (2008), http://cdn.americanprogress.org/wp-content/uploads/issues/2008/07/pdf/elderly_poverty.pdf [<https://perma.cc/5QVB-ZAXM>] (explaining that energy costs also disproportionately impact the elderly).

195. CUBANSKI, ET. AL., *supra* note 184, at 3–4. For another example, a study conducted by the National Academy of Science that adjusted for increased health care costs, found that the elderly poverty rate in New York City increased 14 percent, from 18 to 32 percent. See Cawthorne, *supra* note 194, at 1.

196. *Id.*

197. See generally Christine Dugas, *Bankruptcy rising among seniors*, USA TODAY (June 20, 2008), http://usatoday30.usatoday.com/money/perfi/retirement/2008-06-16-bankruptcy-seniors_N.htm [<https://perma.cc/2S49-2WVN>].

198. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-12-699, RETIREMENT SECURITY: WOMEN STILL FACE CHALLENGES 4–7 (2012) (concluding that women face a substantially higher risk than men of inadequate resources in old age due to a “greater likelihood of being single, higher life expectancy, and lower average earnings,” which adds to the inability of women to adequately “sav[e] for retirement and avoid[] late-life poverty”); see also STAFF OF JOINT ECONOMIC COMMITTEE, 11TH CONG., SOCIAL SECURITY PROVIDES ECONOMIC SECURITY FOR WOMEN (2010), https://www.jec.senate.gov/public/_cache/files/d0036901-2da3-4387-b77f-d33affe6f7f/social-security-provides-economic-security-to-women—jec—10.28.pdf [<https://perma.cc/X27A-DY44>] (demonstrating the importance of Social Security to women and its effect on keeping women out of poverty); NATIONAL WOMEN’S LAW CENTER, FACT SHEET: WOMEN AND SOCIAL SECURITY (2015), <https://nwlc.org/wp-content/uploads/2015/08/socialsecuritykeyfactsheetfeb2015update.pdf> [<https://perma.cc/7WFF-4MBX>] (noting the various ways in which women rely and depend on Social Security); Stan-Hinden, *Women and Social Security Benefits*, AARP (2017), <http://www.aarp.org/work/social-security/info-2014/women-and-social-security-benefits.html> [<https://perma.cc/N343-549Y>] (answering a series of questions to explain the inequities, but also the importance, of Social Security for women).

199. PROCTOR ET AL., *supra* note 183, at 15 fig.6. Over 1.2 million men over the age of 65 live under the poverty line, and over 2.5 million women over the age of 65 live under the poverty line. See *id.*

200. 1.3 million women over the age of 75 live under the poverty line, as compared to 535,000 men over the age of 75. See POVERTY STATUS IN THE PAST 12 MONTHS, *supra* note 183.

family health reasons.²⁰¹ Additionally, women have longer life expectancies,²⁰² which make it more likely that either inflation will erode women's retirement income or they will outlive their assets during retirement.²⁰³

Race is another factor that impacts poverty rates among the elderly, with African Americans and Hispanics more likely to experience poverty in old age than whites.²⁰⁴ While 12 percent of whites over age 65 live in poverty, 22 percent of blacks and 21 percent of Hispanics over age 65 do.²⁰⁵ This can be explained by the fact that elderly people of color are less likely than whites to receive private retirement benefits and to have investment income.²⁰⁶ Therefore, elderly poverty disproportionately affects numerous groups which international human rights have traditionally supported, including women and people of color.²⁰⁷

VI. PROPOSALS TO INCREASE RETIREMENT SECURITY WITH A HUMAN RIGHTS FOCUS

A. *Need for Pension Reform*

Because the impact of poverty is especially devastating in old age when it is often no longer possible to work, social and economic policies should play a central role in helping workers to save adequate amounts for a dignified life in old age.²⁰⁸ This need is particularly compelling for those who cannot afford to save on their own. Therefore, efforts should be made to reform the existing retirement system to provide greater retirement security for workers in their old age, to correct structural inequalities in the private retirement system, and to meet internationally recognized human rights

201. ARIANE HEGEWISCH, EMILY ELLIS & HEIDI HARTMANN, *THE GENDER WAGE GAP: 2014 EARNINGS DIFFERENCES BY RACE AND ETHNICITY* 3 (2015), http://www.iwpr.org/publications/pubs/the-gender-wage-gap-2014-earnings-differences-by-race-and-ethnicity/at_download/file [https://perma.cc/FF4L-FKT3] (noting that women make 78.3 percent of men's median annual earnings).

202. In 2013, the average life expectancy for a female in the United States was 81.3 years, while the average life expectancy for a male in the United States was 76.5. *See Life Expectancy at Birth*, OECD DATA (2018), <https://data.oecd.org/healthstat/life-expectancy-at-birth.htm> [https://perma.cc/QCN9-6RAT].

203. *See generally* Paul H. Lee, *Early Retirement: Some Rules of the Road*, WEALTH ARCHITECTS (2008), <https://www.wealtharchitects.com/613201.pdf> [https://perma.cc/Y2W5-UCAD].

204. *See* CUBANSKI, ET AL., *supra* note 184, at 5–6. *But see* PROCTOR ET AL., note 183, at 13 tbl.3 (illustrating that the poverty rate for Asians was actually lower than for Whites at 11.4 percent for 2015).

205. CUBANSKI, ET AL., *supra* note 184, at 5–6.

206. *See* ARIEL EDUCATION INITIATIVE & AON HEWITT, *401(K) PLANS IN LIVING COLOR 2–4* (2008), http://www.aon.com/attachments/thought-leadership/arielhewitt_401k_study_results.pdf [https://perma.cc/X82A-3KGH].

207. *See* Murphy, *supra* note 16, at 8 (explaining that older persons face both the “accumulated effects” of discrimination experienced throughout their lives “and the additional discrimination of old age” and that older women, older minorities and older LGBT persons face “disproportionate challenges to enjoying their fundamental rights”).

208. *See also* discussion *infra* Part IV.B.

obligations for the elderly.²⁰⁹ The failure of policymakers to work towards achieving these goals speaks volumes about the United States' moral standing and its commitment to fundamental human rights principles.²¹⁰

Retirement security involves two critical components. One relates to adequacy and involves determining how much an individual needs to save, often referred to as the "replacement rate."²¹¹ As a general rule, the optimal goal is to at least save the amount necessary to sustain pre-retirement living standards.²¹² The other component of retirement security is far more complicated. It relates to the methods used to achieve the targeted amount and the available mechanisms for protecting saved amounts against losses prior to retirement.²¹³

While factors like life expectancy, health, inflation, market volatility, and employer solvency clearly play a large role, there is tremendous uncertainty about the accumulation and protection of adequate retirement savings. Consequently, some level of governmental oversight and assistance is appropriate and necessary, as the government is more capable than most individuals of providing protection against these types of uncertain events.²¹⁴ Moreover, because of economies of scale and risk pooling, it is more efficient for the government and employers to provide various forms

209. The U.S. is currently failing to do so. See ORG. FOR ECON. CO-OPERATION AND DEV., POVERTY RATE (2017), <https://data.oecd.org/inequality/poverty-rate.htm> [<https://perma.cc/MUH6-LREA>] (demonstrating that the U.S. currently has the sixth highest elderly poverty rate amongst 34 OECD countries).

210. See HOWARD JACOB KARGER & DAVID STOESZ, AMERICAN SOCIAL WELFARE POLICY: A PLURALIST APPROACH 4 (2012); see also *Human Rights in Tax Policy*, CTR. FOR ECON. & SOC. RTS., <http://www.cesr.org/human-rights-taxation> [<https://perma.cc/KG8L-5FWF>] (maintaining that some countries do not generate "sufficient revenue to fund public services essential for people to realize fundamental [human] rights . . . and an adequate standard of living."). In the U.S. this is in part due to the regressive nature of the tax system (as discussed above), which contributes to the U.S. being the fourth most economically unequal country amongst OECD nations. See *Fiscal Policy and Human Rights in the United States*, Presentation at the Sixth Consultation On the Situation on Economic, Social and Cultural Rights: United States and Canada: Fiscal Policy and Human Rights in the United States (Jan. 2016) http://archive.cesr.org/downloads/IACHR_ESCR_ConsultNAmerica_presentation_jan2016.pdf [<https://perma.cc/LFB4-BTBY>] ("At present, fiscal policies [in] America [] . . . are characterized by regressive tax policies with low revenue potential, widespread tax avoidance and highly inequitable spending patterns.").

211. Andrew G. Biggs & Glenn R. Springstead, *Alternate Measures of Replacement Rates for Social Security Benefits and Retirement Income*, 68 SOC. SEC. BULL., no. 2, 2008, at 1 (noting that replacement rates are "a rule of thumb designed to simplify the process of smoothing consumption over individuals' lifetimes").

212. The optimum replacement rate varies from individual to individual, and depends on factors, such as health, pre-retirement income, and geography. In most cases, except for the very poor, this amount should ensure sufficient savings to provide basic necessities in old age. See generally *id.*

213. NATIONAL RESEARCH COUNCIL, AGEING AND THE MACROECONOMY: LONG-TERM IMPLICATIONS OF AN OLDER POPULATION 129 (2012) (suggesting guaranteed annuities, if public policy were to incentivize their being more transparent and better understood, would be an attractive mode for the elderly to employ in order to protect their retirement savings).

214. *Id.* at 134, 145 (2012). Concerns about employer insolvency are relevant in the Defined Contribution aspect with plans that invest in employer securities such as stock bonus plans and employee stock ownership plans (ESOPs).

of assistance in an effort to achieve greater retirement security.²¹⁵ Presently, the private retirement system is not required to provide participants in 401(k) plans any assistance in accumulating or protecting their retirement savings.²¹⁶

In contrast, Social Security provides workers protection against all forms of risk associated with retirement savings. Moreover, it also has universal characteristics that achieve a more equitable distribution of benefits.²¹⁷ Accordingly, key human rights principles, universality and progressivity, are fundamental to the structure of the Social Security program.²¹⁸ Additionally, the Social Security program has lower fees and expenses than the private retirement system, which positively impacts the rate of investment return in the plan.²¹⁹ Plan fees and expenses are important considerations for retirement security because they negatively impact the rate of investment return in a plan.²²⁰

215. The government or employer is better at protecting themselves against risk, because they can spread the financial risks evenly among contributors to the employer-sponsored retirement account, a risk management tactic called risk pooling. See Leslie McClintock, *What is Risk Pooling in Insurance?*, ZACKS, <http://finance.zacks.com/risk-pooling-insurance-1890.html> [https://perma.cc/Z82D-3JM4]. Economies of scale occur in microeconomics when output can be increased with a decrease in input costs. This applies to retirement accounts because fees and premiums become smaller as the number of employees grows, allowing the company to pool the risk among the employees.

216. Michael Lind et al., *Expanded Social Security: A Plan To Increase Retirement Security for All Americans*, NEW AM. FOUND. 5–8 (2013), http://www.demos.org/sites/default/files/publications/LindHilHiltonsmithFreedman_ExpandedSocialSecurity_04_03_13.pdf [https://perma.cc/G8HU-EAUW] (providing an overview of the various risks regarding the private retirement system that has “shifted the risks and costs onto employees and have failed to provide sufficient support for retirees.”).

217. See Kathryn L. Moore, *The Future of Social Security: Principles to Guide Reform*, 41 JOHN MARSHALL L. REV. 1061, 1065 n.26 (2008) (“Indeed, the coverage under the current system exceeds [President Roosevelt’s original goal] because it covers the self-employed as well as the wages of the highly paid.”).

218. Cf. *id.* at 1063–71 (restating former Commissioner of Social Security Robert Ball’s “nine guiding principles of the Social Security system,” which are: (1) Universal Coverage, (2) Earned Right, (3) Wage Related, (4) Contributory and Self-financed, (5) Redistributive, (6) Not Means Tested, (7) Wage Indexed, (8) Inflation Protected, and (9) Compulsory) with *Human Rights Principles*, U.N. POPULATION FUND (2005), <http://www.unfpa.org/resources/human-rights-principles> [https://perma.cc/36PF-MTDF] (listing principles of human rights, which are: (1) Universality and Inalienability, (2) Indivisibility, (3) Interdependence and Interrelatedness, (4) Equality and non-discrimination, (5) Participation and Inclusion, and (6) Accountability and Rule of Law); see also ICESCR at note 174 regarding progressivity.

219. The issue of reasonable fees and expenses related to 401(k) plans has drawn great attention by regulators, litigators, and the media in recent times. See Patrick Coughlin, *Is Everyone Paying Their Fair Share Of 401(K) Fees?*, XEROX BLOGS (Sept. 3, 2015), <http://hrinsights.blogs.xerox.com/2015/09/03/is-everyone-paying-their-share-of-401k-fees/#.Vgs4xbSDLKA>; John Wasik, *Five Reasons Why Social Security Retirement Program Needs To Live Long and Prosper*, FORBES (Aug. 14, 2013), <http://www.forbes.com/sites/johnwasik/2013/08/14/five-reasons-why-social-security-retirement-program-needs-to-live-long-and-prosper>. In fiscal year 2012, the OASI had administrative fees of 0.5 percent. *Id.* During the same period, annual fees for the average stock mutual fund, often used by retirement accounts, were 0.77 percent. See Karen Hub, *The Top 50 Annuities*, BARRON’S (June 23, 2014), <http://www.barrons.com/articles/barrons-top-50-annuities-140333975?tesla=y> [https://perma.cc/6FJ6-7EMT] (noting that average variable annuity fees range from 1.5 percent to 3.5 percent); see also 2015 INVESTMENT COMPANY FACTBOOK, *supra* note 137, at 95, fig.5.3.

220. See Pamela Hess & Valerie M. Kupferschmidt, *Doing Your Homework: Understanding 401(k) Fees and Making Every Basis Point Count*, BENEFITS Q., Fourth Quarter 2010, at 8, 13 (2010), <http://>

For these reasons, expanding and strengthening the Social Security program is the most equitable, effective, and efficient way of providing low- and middle-income workers greater financial security during old age, both from a pension policy and human rights perspective. However, to ensure adequate levels of retirement income for all workers across the income spectrum, a mandatory, universal retirement savings component that offers some protection against losses should be added to the private retirement system. The remaining portions of this Article contain proposals to accomplish both of these goals.

B. Structure of the Existing Social Security Program

Social Security benefits are funded by a mandatory, flat-rate, payroll tax on all wages.²²¹ This tax is set by statute and is paid by employers and employees in equal amounts.²²² The tax rate is currently 6.2 percent.²²³ The Old Age Survivors Insurance (OASI) portion of the Social Security program limits the amount of wages subject to the payroll tax to amounts less than or equal to the “contribution and benefit base,” which changes periodically according to the national average wage index.²²⁴ Thus, the contributions for a worker with wages greater than or equal to the 2017 wage base of \$127,200 consists of an annual payment of \$7,886.40 by both the employee and the employer, totaling \$15,772.80.²²⁵

The Social Security program provides a guaranteed benefit.²²⁶ This guarantee means that workers are assured of having some means of procuring basic needs and services in old age, regardless of the investment performance of the funds or the timing of their retirement. Additionally, because the normal form of payment in the Social Security program is a life annuity, Social Security effectively provides a guaranteed rate of return throughout

www.aon.com/attachments/thought-leadership/ben_quarterly_Q4_2010_401k.pdf [https://perma.cc/XND8-WAGH].

221. SOCIAL SECURITY ADMINISTRATION, *How is Social Security Financed*, <http://www.ssa.gov/news/press/factsheets/HowAreSocialSecurity.htm> [https://perma.cc/66NZ-3MUL].

222. I.R.C. §§ 3101, 3111.

223. *Id.*; Cost-of-Living Increase and Other Determinations for 2016, 80 Fed. Reg. 963 (Oct. 30, 2015); see also SOCIAL SECURITY ADMINISTRATION, CONTRIBUTION AND BENEFIT BASE, <https://www.ssa.gov/oact/cola/cbb.html> [https://perma.cc/N8FJ-F9WK].

224. CONTRIBUTION AND BENEFIT BASE, *supra* note 223.

225. For Medicare’s Hospital Insurance (HI), the taxable maximum was the same as that of OASI from 1966–1990. However, separate HI taxable maximums of \$125,000, \$130,200, and \$135,000 were applicable in 1991–93. After 1993, the wage limit was removed for HI. The tax rates under the HI program are 1.45 percent for employees and employers, each, and 2.9 percent for self-employed persons. CONTRIBUTION AND BENEFIT BASE, *supra* note 223.

226. See ALISON M. SHELTON, CONGRESSIONAL RESEARCH SERVICE, R41518, SOCIAL SECURITY: THE MINIMUM BENEFIT PROVISION 1 (2012) (“The goal of the Special Minimum PIA is to provide a minimum benefit for those who work in covered employment for many years but at low earnings.”). *Cf.* Human Rights Council, *supra* note 28 (recognizing that universality is an important consideration in human rights issues).

retirement.²²⁷ This feature protects workers from the risk of outliving their assets, a form of protection increasingly difficult to find in the private retirement system, which now offers fewer defined benefit plans.²²⁸

Social Security old age benefits are especially important for minorities, who generally have less opportunity to save in employer provided plans.²²⁹ Among individuals age 65 and older, Social Security represents 90 percent or more of income for 41.1 percent of Asians, 45.2 percent of African Americans, and 52.2 percent of Hispanics, as compared to 31.7 percent of whites.²³⁰ Social Security benefits are also particularly important to women because, as explained above, they typically receive smaller employer provided retirement benefits, have lower wages, and spend more time out of the paid workforce.²³¹ Furthermore, the fact that women live longer than men makes Social Security's inflation protection a valuable feature for female workers.²³²

Although Social Security is an important source of retirement income—and for many the only source—the program's benefits are relatively modest by international standards.²³³ As of May 2017, the average Social Security retired worker's benefit was nearly \$1,368 per month, or approximately \$16,400 per year.²³⁴ Represented as a percentage of median earnings, the replacement rate of the United States Social Security program ranks 31 among a list of 34 developed countries' public retirement systems.²³⁵ Social Security benefits in the United States average only 41 percent of the earnings of a middle-income worker, as compared to about 90 percent in the

227. A general "annuity is a series of specified income payments, payable over a specified period"; whereas "[a] promise to pay benefits for the remainder of the lifetime of the covered participant is called a life annuity." See *Annuities*, Benefits Guide § 4:180 (2017).

228. Brendan McFarland, *Retirement in Transition for the Fortune 500: 1998 to 2013*, 24 *TOWERS WATSON INSIDER*, no. 9, Sept. 2014, at 1 (noting that only 118 Defined Benefit plans were offered in 2013, down from 299 plans in 1998).

229. See LAURA SULLIVAN, ET AL., *THE RACIAL WEALTH GAP: WHY POLICY MATTERS* 7 (2015), http://www.demos.org/sites/default/files/publications/RacialWealthGap_1.pdf [<https://perma.cc/K3Y8-BRNY>] (finding that "a typical white family owns \$15.63 for every \$1 owned by a typical Black family, and \$13.33 for every \$1 owned by a typical Latino family").

230. SOCIAL SECURITY ADMINISTRATION, SSA PUB. NO. 13-11871, *INCOME OF THE POPULATION 55 OR OLDER*, 2014, at 289 tbl.9.A3 (2016), https://www.ssa.gov/policy/docs/statcomps/income_pop55/2014/incpop14.pdf [<https://perma.cc/N85N-CGZK>].

231. See HEGEWISCH, ET AL., *supra* note 201; see also accompanying text.

232. See TOP TEN FACTS ABOUT SOCIAL SECURITY, *supra* note 85, at 8–9. Further, women benefit from the progressive benefit calculation formula because they have lower earnings, as well as the spousal and survivor's benefits. *Id.*

233. Social Security benefits represent 41 percent of the earnings of a median worker in the United States, compared to 90 percent in the Netherlands, and a 58 percent average of other OECD countries. See Kathy Ruffing, *Social Security Benefits Are Modest by International Standards*, *CTR. ON BUDGET & POL'Y PRIORITIES* (2013), <http://www.cbpp.org/blog/social-security-benefits-are-modest-by-international-standards> [<https://perma.cc/C5BL-63MD>].

234. SOCIAL SECURITY ADMINISTRATION, *MONTHLY STATISTICAL SNAPSHOT*, at tbl.2 (2017), https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/2017-05.pdf [<https://perma.cc/2ER4-ASUJ>].

235. See TOP TEN FACTS ABOUT SOCIAL SECURITY, *supra* note 85, at 4–5.

Netherlands, and to an overall average of 57.9 percent for all OECD countries.²³⁶

While the Social Security program has remained fundamentally the same since its inception in 1935, it has undergone numerous non-structural changes and adjustments over time. One such change was the introduction of a minimum benefit in 1972, referred to as the “Special Minimum Primary Insurance Amount” or the “Special Minimum PIA.”²³⁷ The Special Minimum PIA is an alternative benefit that increases payments to workers who have low earnings.²³⁸ Unlike the benefit formula for the standard Social Security benefit, the benefit formula for the Special Minimum PIA is based on the number of years worked rather than on average lifetime earnings.²³⁹ In other words, the Special Minimum PIA is designed to restrict payment to workers “who work in covered employment for many years but at low earnings,”²⁴⁰ without providing windfalls for workers with only a few years of covered employment.²⁴¹ Therefore, workers with low lifetime average earnings resulting from sporadic attachments to the workforce are ineligible; whereas, workers with extended work histories of low wages are eligible.²⁴²

Eligibility for the current Special Minimum PIA requires workers to have over 10 years of Social Security-covered employment.²⁴³ The Special Minimum PIA is payable only when it is higher than the benefit calculated under the standard Social Security benefit formula.²⁴⁴ Under the present design, very few workers receive the Special Minimum PIA and even fewer are likely to receive it in the future.²⁴⁵ As of December 2001, approximately 134,000 workers, including dependents and survivors, were entitled to receive the Special Minimum PIA.²⁴⁶ Of that population, only 79,000 had a higher benefit under the Special Minimum PIA calculation than under the regular benefit calculation.²⁴⁷ The remaining 55,000 individuals were con-

236. See *id.* Lower average benefits in the United States are also attributable to the fact that there is a higher retirement age and lower benefits for workers who retire early. *Id.*

237. Robert M. Ball, *Social Security Amendments of 1972: Summary and Legislative History*, 36 SOC. SEC. BULL., no. 3, 1973, at 16–17.

238. *Id.* at 16.

239. See NOAH P. MEYERSON, CONGRESSIONAL RESEARCH SERVICE, R43615, SOCIAL SECURITY: MINIMUM BENEFITS 1 (2014) <https://fas.org/sgp/crs/misc/R43615.pdf> [<https://perma.cc/G6Y3-ZHZY>].

240. See SHELTON, *supra* note 226, at 1.

241. See Kelly A. Olsen & Don Hoffmeyer, *Social Security's Minimum Benefit*, 64 SOC. SEC. BULL., no.2, 2002, at 5.

242. *Id.* at 1, 5.

243. Social Security Act § 215(a)(1)(C)(1), 42 U.S.C. § 415(a)(1)(C)(1); see SHELTON, *supra* note 226, at 12.

244. Olsen & Hoffmeyer, *supra* note 241, at 1.

245. See SHELTON, *supra* note 226, at 12 (noting that the number of beneficiaries of the Special Minimum PIA has steadily decreased since 2000).

246. Olsen & Hoffmeyer, *supra* note 241, at 8.

247. *Id.*

sidered “dually entitled,” meaning they were also eligible to receive other types of Social Security benefits that were higher in amount.²⁴⁸

Under its current design, the Special Minimum PIA has begun effectively to phase-out for workers reaching age 62 by 2017 or later.²⁴⁹ This is because the Special Minimum PIA is indexed to price inflation,²⁵⁰ whereas regular Social Security benefits are indexed to average wage increases.²⁵¹ Wage increases historically have grown faster than price inflation.²⁵² Therefore, due to the cumulative effect of indexing, by the end of 2017 most beneficiaries will have larger benefits under the regular benefit than under the Special Minimum PIA calculation.²⁵³

As discussed above, a significant percentage of the elderly population relies on Social Security as the primary source of retirement income.²⁵⁴ Because the Special Minimum PIA is so low, it does not prevent its recipients from living in or falling into poverty, even when individuals have significant work histories.²⁵⁵ The greatest amount that can currently be received as a Special Minimum PIA benefit is 90 percent of the poverty level.²⁵⁶ When the Special Minimum PIA was established in 1972, the maximum payment was 96 percent of the poverty level.²⁵⁷ This difference represents an 11 percent decline in the real value of the minimum benefit.²⁵⁸ Low-wage workers who retired between 1982 and 2000 with 30 years of earnings received annual benefits that ranged from 3.9 to 20.0 percent below

248. *Id.* at 2–3; see also SHELTON, *supra* note 226, at 1, 4.

249. See SHELTON, *supra* note 226, at 12.

250. MEYERSON, *supra* note 239, at 3 (noting that the Special Minimum PIA is indexed to price inflation as compared to Social Security benefits, which are indexed to wage inflation).

251. See Olsen & Hoffmeyer, *supra* note 241, at 2.

252. Between 1994 and 2014, average wage growth was 95.68%, compared to price inflation of just 60.19%. Even between 2013 and 2014, average wage growth jumped 3.55%, as compared to price inflation of 1.55%. See SOCIAL SECURITY ADMINISTRATION, *Average Wage Index (AWI)*, <https://www.ssa.gov/oact/COLA/awidevelop.html> [<https://perma.cc/RJC4-CZ5Y>]; cf. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *CPI DETAILED REPORT: DATA FOR OCTOBER 2015*, at 90, tbl.27 (Malik Crawford et al. eds., 2015), <http://www.bls.gov/cpi/cpid1510.pdf> [<https://perma.cc/GB9N-4GKY>].

253. SHELTON, *supra* note 226, at Summary.

254. See INCOME OF THE POPULATION 55 OR OLDER, *supra* note 230, at 287 tbl.9.A1 (noting that Social Security makes up the majority of income for 61 percent of the elderly, 90 percent of income for 33 percent of the elderly, and 100 percent of income for nearly 20 percent of the elderly).

255. SHELTON, *supra* note 226, at 12–13.

256. See SOCIAL SECURITY ADMINISTRATION, 2017 SOCIAL SECURITY/SSI/MEDICARE INFORMATION 1 (2017), <https://www.ssa.gov/legislation/2017%20Fact%20Sheet.pdf> [<https://perma.cc/6LED-UFBS>]. The current yearly Special Minimum PIA is \$10,176 and the current poverty threshold is \$11,756; SOCIAL SECURITY ADMINISTRATION, SPECIAL MINIMUM BENEFITS (2018), <https://www.ssa.gov/cgi-bin/smt.cgi> [<https://perma.cc/2LUL-NYUJ>]; U.S. CENSUS BUREAU, POVERTY THRESHOLDS (2017), <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html> [<https://perma.cc/NC4X-SKUN>].

257. The maximum benefit amount under the Special Minimum PIA in 1972 was \$2,040, and the poverty threshold in 1972 was \$2,109. Social Security Amendments of 1972 § 101(a)(2), Pub. L. No. 92-603, 86 Stat. 1329, 1333; Kelly A Olsen and Don Hoffmeyer, *Social Security's Special Minimum Benefit*, 64 SOC. SECURITY BULL., 1, 2 (2001/2002).

258. Olsen & Hoffmeyer, *supra* note 241, at 10.

the poverty level.²⁵⁹ Low-wage workers with 40 years of earnings received annual benefits ranging from 3.9 percent to 15.3 percent below the poverty level.²⁶⁰ These results are incompatible with the objectives of both the Social Security program in general and the Special Minimum PIA in particular—namely, to provide economic security to American workers.²⁶¹

Social Security benefits in the United States should be upwardly adjusted to ensure that they provide amounts sufficient to prevent workers with significant work histories from living in poverty in old age. This Article proposes methods of expanding and restructuring Social Security to achieve this goal. The key elements of each proposal are discussed below.

C. Redesigning the Social Security Minimum Benefit

To ensure that the Special Minimum PIA remains effective, the benefit should be redesigned. There are two variables involved in this process. One deals with the benefit level; the other focuses on the coverage requirement.²⁶²

The level of benefit should be increased to 125 percent of the poverty level. Thereafter, the benefit should be indexed for inflation using the price index for older persons discussed below, which more accurately reflects the consumption patterns of the elderly population.²⁶³ Under the proposed approach, the Special Minimum PIA benefit for 2017 for individuals with 30 years of covered earnings would increase to 1.25 times \$12,060, the poverty threshold, or \$15,075 per year, and thereafter would be indexed for inflation.²⁶⁴ Presently, the 2017 maximum Special Minimum PIA for a worker with 30 years of covered earnings is \$10,176.²⁶⁵

Consistent with the existing structure of the Special Minimum PIA, the new minimum benefit should continue to target workers who have significant work histories. Thus, in order to prevent windfalls for workers with sporadic work histories, the coverage requirement should be retained for the

259. *Id.* at 11.

260. *Id.*

261. The purpose of the Social Security Act was to “provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons.” See H.R. Rep. No. 74-615, at 1 (1935), <https://www.ssa.gov/history/pdf/Downey%20PDFs/Social%20Security%20Act%20of%201935%20Vol%201.pdf> [<https://perma.cc/V4AQ-TYJH>].

262. See SHELTON, *supra* note 226, at 15–16.

263. See discussion *infra* Part V.B. Alternatively, as a means of maintaining a constant ratio to average living standards, as recommended by some proposals, the Minimum Benefit should be linked to wage inflation rather than to price inflation. See generally SHELTON, *supra* note 226, at 16; see generally PRESIDENT’S COMMISSION TO STRENGTHEN SOCIAL SECURITY, STRENGTHENING SOCIAL SECURITY AND CREATING PERSONAL WEALTH FOR ALL AMERICANS (2001), http://govinfo.library.unt.edu/csss/reports/Final_report.pdf [<https://perma.cc/9VF4-YAV4>].

264. Annual Update of the HHS Poverty Guidelines, *supra* note 182, at 8832. The multiplication was done by author.

265. SPECIAL MINIMUM BENEFITS (2018), *supra* note 256.

increased minimum benefit.²⁶⁶ The minimum benefit would be expressed as 125 percent of the poverty threshold for workers with 30 years of covered earnings.²⁶⁷ Workers with fewer than 30 years but more than 10 would receive a prorated benefit.²⁶⁸

Redesigning the Special Minimum PIA to provide higher benefits in this manner would ensure that no elderly person with a long-term attachment to the workforce lived in poverty.²⁶⁹ Furthermore, raising the Social Security minimum benefit in this manner is equitable and appropriate because it targets populations that disproportionately comprise the elderly poor.²⁷⁰ This result can be seen in the case of many older, single women who under the current structure do not qualify for the Social Security survivors' benefit for widows because they either never married or divorced before becoming entitled to such benefits.²⁷¹ This population should be taken into consideration in reform efforts because, as discussed above, women are disproportionately represented among the elderly population living in poverty.²⁷²

Additionally, individuals with histories of low earnings are more likely to suffer from poor health, leading to premature deaths.²⁷³ Therefore, higher minimum benefits for low-earning workers allows this population to receive a greater portion of the benefits to which they are entitled in their lifetimes. In other words, increasing the Special Minimum PIA would partially offset the reduction in benefits that low-income workers receive under the current structure, due to shorter life spans. Moreover, because poor workers are less likely to have other sources of income during retirement, increased minimum benefits would help to address rising economic inequalities among the elderly population.²⁷⁴ Equally important, however, is ensuring that all workers have adequate resources to live above the poverty level in their old age. This recognizes the contributions and value of the elderly to society, protects their right to live in dignity, and affirms the

266. SHELTON, *supra* note 226, at 16–18.

267. *Id.* at 19–20.

268. *Id.*

269. *Id.* at 14 (“[R]estructuring the Social Security minimum could be more effective in alleviating poverty” and “a way to reward long-term, low-wage work”).

270. *Id.* at 14 (explaining that research shows restricting the Minimum Benefit is an effective way of reducing poverty).

271. *Id.* at 15 (2012) (noting that a person does not qualify for spousal benefits if they have never been married or if they divorced before they were married for 10 years).

272. *See supra* notes 99–104 and accompanying text. *See also* SHELTON, *supra* note 226, at 14; *supra* note 200 and accompanying text.

273. Steven H. Woolf et al., *How are Income and Wealth Linked to Health and Longevity?*, URBAN INST. 1 (Apr. 2015) (“Studies show that Americans at all income levels are less healthy than those with incomes higher than their own.”).

274. There are also racial dimensions in these considerations because African-Americans have shorter life expectancies than do whites. *See* Teresa Ghilarducci, *Senior Class: America's Unequal Retirement*, 26 AM. PROSPECT no.1, at 46, 49 (2015).

government's obligation to support and protect human rights in the United States.²⁷⁵

D. Proposal to Restructure the Inflation Index

Social Security retirement benefits are paid as life annuities that guarantee monthly payments for the life of the worker.²⁷⁶ These benefits are automatically adjusted in order to prevent a decline in purchasing power due to inflation.²⁷⁷ Currently, this adjustment is based on changes in the Consumer Price Index (CPI), the benchmark measure of inflation produced by the Bureau of Labor Statistics.²⁷⁸ Some policymakers and other commentators maintain that the CPI does not accurately estimate the change in the cost of living for seniors because it fails to take into account the different spending patterns of the elderly.²⁷⁹ Accordingly, these critics argue that Social Security benefits should be adjusted using a price index that more accurately reflects the spending patterns of older Americans, which would produce higher benefits.²⁸⁰

275. See SHELTON, *supra* note 226, at 14–15. Numerous proposals have recommended the use of different methods to increase the Special Minimum PIA and expand its coverage to benefit more workers. See generally U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO-10-101R, SOCIAL SECURITY: OPTIONS TO PROTECT BENEFITS FOR VULNERABLE GROUPS WHEN ADDRESSING PROGRAM SOLVENCY (2009); PRESIDENT'S COMMISSION TO STRENGTHEN SOCIAL SECURITY, *supra* note 263; MELISSA M. FAVREAU, A NEW MINIMUM BENEFIT FOR LOW LIFETIME EARNERS (2009), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411853-A-New-Minimum-Benefit-for-Low-Lifetime-Earners.PDF> [<https://perma.cc/ZAH2-AN9L>].

276. Security retirement benefits also include a survivor benefit for the spouse. See SOCIAL SECURITY ADMINISTRATION, SURVIVORS BENEFITS, SSA PUB. NO. 05-10084 (2015), at 1–3, <http://www.ssa.gov/pubs/EN-05-10084.pdf> [<https://perma.cc/UXB9-XZYS>].

277. See COST OF LIVING ADJUSTMENT, *supra* note 88.

278. Bart Hobijn & David Lagakos, *Social Security and the Consumer Price Index for the Elderly*, 9 FED. RESERVE BANK OF N.Y.: CURRENT ISSUES IN ECON. & FIN. no. 5, at 1 (2003).

279. See Senator Elizabeth Warren, Floor Speech, United States Senate, The Retirement Crisis (Nov. 18, 2013), <http://www.warren.senate.gov/files/documents/Speech%20on%20the%20Retirement%20Crisis%20-%20Senator%20Warren.pdf> [<https://perma.cc/C7W6-X8ZX>]; see also Michael McAuliff, *Bernie Sanders: Obama Won't Propose Chained CPI to Cut Entitlements*, HUFF. POST (Jan. 16, 2015), https://www.huffingtonpost.com/2015/01/16/bernie-sanders-says-obama_n_6487770.html [<https://perma.cc/2PK8-94YX>]. The elderly spend the bulk of their income on housing and medical expenses. See Ann C. Foster, *A closer look at spending patterns of older Americans*, Bureau of Labor Statistics (2016), <https://www.bls.gov/opub/btn/volume-5/pdf/spending-patterns-of-older-americans.pdf> [<https://perma.cc/3XVK-LBBB>].

280. See Warren, *supra* note 279; see also Hobijn & Lagakos, *supra* note 278, at 1; see generally Press Release, National Committee to Preserve Social Security and Medicare, The CPI-E – A Better Option for Calculating Social Security COLAs (Mar. 2016), <http://www.ncpssm.org/PressRoom/NewsReleases/Release/ArticleID/1159/The-CPI-E-%E2%80%93-A-Better-Option-for-Calculating-Social-Security-COLAs> [<https://perma.cc/4SCD-MN2S>]; see also Representative Mike Honda & Richard Fiesta, *CPI for Elderly Is Most Accurate Measure for Calculating Social Security COLAs*, THE HILL (Oct. 20, 2015) (“The truth is that the consumption patterns of seniors are very different from those of younger people. The CPI does not adequately take into account the expenditures of retirees, most glaringly healthcare and housing costs.”); David Blanchett, *How Social Security Unfairly Calculates the Cost of Living for Retirees*, WALL ST. J.: THE EXPERTS (Oct. 20, 2015), <https://blogs.wsj.com/experts/2015/10/20/how-social-security-unfairly-calculates-the-cost-of-living-for-retirees/> [<https://perma.cc/NG42-7N5J>] (arguing that the methodology as currently structured does not adequately account for seniors' higher cost of living); Kenneth J. Stewart, *The Experimental Consumer Price Index for Elderly Americans (CPI-E): 1982-2007*,

The Bureau of Labor Statistics began calculating an age-based index in the early 1980s.²⁸¹ This special index, called the Experimental Price Index for the Elderly (CPI-E), is based on the spending patterns of Americans age 62 and over.²⁸² The study associated with the CPI-E showed that older Americans experience a higher overall inflation rate compared to the official CPI population.²⁸³ This result is primarily due to increased health care expenses.²⁸⁴ During the experimental study period, medical care prices rose more than twice as much as the average rate for all other items considered.²⁸⁵ Experts have determined that if the CPI-E had been adopted in 1984, retirement benefits in 2001 would have been almost 4 percent higher, or approximately \$408 more per year, per worker.²⁸⁶

The CPI-E, or another similar index, should be used to adjust all Social Security old age benefits in order to more effectively counteract the impact of inflation. Without such a correction, the purchasing power of the retirement benefits will erode over time and those who rely on Social Security as their principle lifeline will inevitably slip into poverty.

Although numerous legislative bills have been introduced calling for the use of the CPI-E, the experimental index has never been used to adjust Social Security benefits.²⁸⁷ Critics of the use of the CPI-E have expressed concern that it is not reliable enough to use for adjusting Social Security benefits and could produce undesirable outcomes.²⁸⁸ Therefore, to ensure

MONTHLY LAB. REV., 19, 22–24 (Apr. 2008) (arguing that the CPI-E should be used to adjust Social Security benefits).

281. Hobbijn & Lagakos, *supra* note 278, at 1.

282. *Id.*

283. Stewart, *supra* note 280 (“From December 1982 to December 2007, the experimental CPI-E rose 126.5 percent, compared with increases . . . [just] 110.0 percent for the [current] CPI[.]”).

284. Increased health care expenses continue to outpace normal economic inflation. *See generally* Stephen Miller, *Rising Health Benefit Costs Still Outpace Overall Inflation*, SOC’Y FOR HUM. RESOURCE MGMT. (May 12, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/health-benefit-cost-projections.aspx> [<https://perma.cc/2264-VA7E>]; *see also* John R. Graham, *CPI: Medical Care Prices Rose 10 Times more than non-medical prices in August*, NAT’L CTR. FOR POL’Y ANALYSIS: HEALTH POL’Y BLOG (Sept. 16, 2016), <http://healthblog.ncpa.org/cpi-medical-care-prices-rose-10-times-more-than-non-medical-prices-in-august/#sthash.n1V0R9aD.dpbs> [<https://perma.cc/667B-UH2W>].

285. Stewart, *supra* note 280, at 20 (“[O]lder Americans devote a substantially larger share of their total budgets to medical care.”). Also reflected are higher home heating costs and food consumption at home, amongst other increased costs seniors experience. *See* SOCIAL SECURITY ADMINISTRATION, CONSUMER PRICE INDEX FOR THE ELDERLY 313, 314, <https://www.ssa.gov/history/pdf/80chap15.pdf> [<https://perma.cc/QL4S-4TCM>].

286. Hobbijn & Lagakos, *supra* note 278, at 2 (“[W]e estimate that . . . the average benefit in 2001 would [have been] 3.84 percent higher.”).

287. These bills include the following: The CPI-E Act of 2017, H.R. 1251, 115th Cong. (2017) (sponsored by Rep. John Garamendi); Social Security Expansion Act, S. 731, 114th Cong. (2015) (sponsored by Sen. Bernie Sanders); Social Security 2100 Act, H.R. 1391, 114th Cong. (2015) (sponsored by Rep. John Larson); Strengthening Social Security Act of 2013, S. 567, 113th Cong. (2013) (sponsored by Sen. Brian Schatz); Protecting and Preserving Social Security Act, H.R. 649, 113th Cong. (2013) (sponsored by Rep. Theodore Deutch); Fair Adjustment and Income Revenue for Social Security Act, H.R. 1984, 114th Cong. (2015) (sponsored by Rep. Peter DeFazio); *see also* Hobbijn & Lagakos, *supra* note 278, at 1.

288. NOAH MEYERSON, CONGRESSIONAL BUDGET OFFICE, USING A DIFFERENT MEASURE OF INFLATION FOR INDEXING FEDERAL PROGRAMS AND THE TAX CODE 7 (2013) (stating that the CPI-E over-

that its use does not adversely impact workers, annual adjustments could be determined by using the greater of the regular CPI or the CPI-E for a given year.

E. Proposal to Restructure Tax by Removing the Wage Cap

The Social Security program is presently experiencing a significant funding shortfall,²⁸⁹ primarily because of changing demographics.²⁹⁰ The number of workers age 65 and over compared to the number of workers between the ages of 20 and 64 has dramatically changed since the inception of the Social Security program.²⁹¹ This relationship, referred to as the “worker to beneficiary ratio,” was 16.5 to 1 during the 1950s; today it is only 2.8 to 1.²⁹² Although the ratio was expected to change gradually as death rates declined, a sudden spike occurred after 2010 when the Baby Boomer population began to reach retirement age.²⁹³ At that point, there was a rapid decline in the number of current workers paying employment taxes relative to the number of retirees in payment status. This trend can be expected to continue over the next 20 years as the Baby Boomer population continues to move from working age to retirement age. Moreover, the combination of

states inflation); see also Martin Neil Baily & Glenn Hubbard, *A Bipartisan Case for Chained CPI*, BROOKINGS INST. (May 9, 2013), <https://www.brookings.edu/opinions/a-bipartisan-case-for-chained-cpi> [<https://perma.cc/7D5Q-JGYK>] (noting that the CPI-E “was intended to provide a more accurate measure of inflation for seniors, [but] has several methodological flaws that overstate inflation, including underestimating the rate of improvement in healthcare.”).

289. See discussion *infra*, at notes 6–12 and accompanying text. The windfall in benefits the first generation of Social Security recipients received contributes to the shortfall the U.S. currently is experiencing. See, e.g., SPECIAL COMM. ON AGING U.S. SENATE, SOCIAL SECURITY MODERNIZATION: OPTIONS TO ADDRESS SOLVENCY AND BENEFIT ADEQUACY, S. REP. 111–187, 30 (2010) (“In initial years of Social Security, retirees received benefits that far exceeded the value of [their] contributions . . . [which] created a deficit . . . or “legacy cost”. . . estimated [at] roughly \$13 trillion.”) (alteration to original), <https://www.aging.senate.gov/imo/media/doc/letters/ssreport2010.pdf> [<https://perma.cc/7T93-SBDC>]; see also C. Eugene Steuerle & John M. Bakija, *Retooling Social Security for the 21st Century*, 60 SOC. SEC. BULL., No. 2 40–42 (1997); Alicia H. Munnell, *The Problem with Social Security Lies in Its History*, WASH. POST: IN THEORY (Oct. 6, 2016) https://www.washingtonpost.com/news/in-theory/wp/2016/10/06/the-problem-with-social-security-lies-in-its-history/?utm_term=.5a455c73d0a4 [<https://perma.cc/WUS9-A3KU>]; see also Tami Luhby, *Social Security: Many Pay More in Taxes Than They'll Get Back*, CNN MONEY: AMERICA'S DEBT & THE ECON. (Apr. 14, 2013), <http://money.cnn.com/2013/04/14/news/economy/social-security-benefits/index.html> [<https://perma.cc/Z6H9-QRYE>].

290. DAWN NUSCHLER, CONGRESSIONAL RESEARCH SERVICE, R42035, SOCIAL SECURITY PRIMER 5 (2017) (“Social Security’s projected long-range funding shortfall is attributed primarily to demographic factors”); see also Jacob S. Hacker, *Restoring Retirement Security: The Market Crisis, the “Great Risk Shift,” and the Challenge for Our Nation*, 19 ELDER L.J. 1, 6–10 (2011) (arguing that while the erosion of retirement savings security rests on policy changes, it is “rooted in deep demographic and economic trends.” *Id.* at 4).

291. The relationship is also referred to as the “aged dependency.” *Social Security Testimony Before Congress: Stephen C. Goss, Chief Actuary, Soc. Sec. Admin., Testimony Before the Subcomm. on Social Sec., Pensions, and Family Pol’y of the S. Comm. on Fin. 113th Cong.* (May 21, 2014), http://www.ssa.gov/legislation/testimony_052114.html [<https://perma.cc/THH3-NJDX>].

292. See THE 2017 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS 13, TBL.IV.B3 (Jul. 2017), <https://www.ssa.gov/oact/tr/2017/tr2017.pdf> [<https://perma.cc/3M32-E6W5>].

293. Goss, *supra* note 291.

longer life expectancies and lower birth rates will likely exacerbate the funding deficit in upcoming years.²⁹⁴

The funding shortfall is unsustainable. Official projections show that if payments and benefits are held constant, in approximately 25 years the system will no longer be able to pay expected benefits in full.²⁹⁵ In response to the funding deficiency, the Social Security program has undergone numerous reforms, including adjustments to the basic benefit formula, increased eligibility ages, and higher payroll taxes.²⁹⁶ Notwithstanding these adjustments, a significant shortfall still exists, and questions about the program's long-term viability persist.²⁹⁷

In order to strengthen the financial position of the Social Security program and infuse additional funding into the system to help pay for the proposed benefit increases discussed above, the payroll cap on wages subject to the Social Security payroll tax should be eliminated. The cap is indexed for inflation, and typically increases every year.²⁹⁸ Presently, the payroll tax covers approximately 87.3 percent of total earnings.²⁹⁹ Eliminating the cap would subject 100 percent of earnings to the payroll tax. Estimates show that the new revenue generated by removing the cap would be sufficient to eliminate as much as 89 percent of the funding deficiency.³⁰⁰ A part of the new revenue also could be used to fund some portion of the proposed benefit increases.³⁰¹

Furthermore, eliminating the wage cap would result in a more progressive payroll tax structure than the existing one.³⁰² Currently, a worker with

294. *Id.*

295. THE 2015 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS, H.R. DOC. NO. 114-51, at 3 (2015) (noting that the Social Security trust fund reserves will become depleted by 2034).

296. See Martin & Weaver, *supra* note 72, at 8–10.

297. See SOCIAL SECURITY ADMINISTRATION & MEDICARE BOARDS OF TRUSTEES, STATUS OF THE SOCIAL SECURITY AND MEDICARE PROGRAMS: A SUMMARY OF THE 2016 ANNUAL REPORTS 3 (2016), <https://www.ssa.gov/oact/TRSUM/tr16summary.pdf> [<https://perma.cc/H2VB-7DC3>]; see also Jefferson, *Privatization*, *supra* note 78, at 1292.

298. See Kevin Whitman & Dave Shoffner, *The Evolution of Social Security's Taxable Maximum*, SOC. SEC. ADMIN. POL'Y BRIEF NO. 2011-02, at 1–2 (2011), <http://www.ssa.gov/policy/docs/policybriefs/pb2011-02.pdf> [<https://perma.cc/7QFM-XRXM>]. For 2017, the payroll tax applies to earnings up to \$127,200; CONTRIBUTION AND BENEFIT BASE, *supra* note 223.

299. FAST FACTS & FIGURES ABOUT SOCIAL SECURITY, *supra* 81.

300. See WAYNE LIQU, CONGRESSIONAL RESEARCH SERVICE, RL32896, SOCIAL SECURITY: RAISING OR ELIMINATING THE TAXABLE EARNING BASE 14 tbl.3 (2017) (“If all earnings [above the wage cap] were subject to the payroll tax . . . the Social Security Trust Funds would remain solvent for the next 60 year.”) (alteration to original).

301. Determining the exact portion to be allocated to fund the increases is beyond the scope of this paper.

302. While the benefits of the Social Security program are thought to be progressive, as discussed above, the tax structure is regressive because lower average rates apply as wages increase. See *supra* notes 169–174 and accompanying text. It has been argued that the regressive effect of the tax is offset by the progressive effect of the benefit. See, e.g., Scott Greenberg, *Options for Broadening the U.S. Tax Base*, TAX FOUND. (Nov. 24, 2015), <https://taxfoundation.org/options-broadening-us-tax-base> [<https://perma.cc/L3NV-Y7US>] (“The cap on the Social Security payroll tax treats one class of income (earnings over [\$127,200]) more favorably than other income, thus deviating from an ideal consumption base. So,

earnings in excess of the wage cap pays a lower average tax rate than a worker with lower wages. For example, in 2017, an individual with wages of \$127,200 would pay an average payroll tax rate of 6.2 percent; an individual with wages of \$254,400 would pay an average rate of 3.1 percent.³⁰³ Although removing the cap would significantly increase revenue, the change would affect a relatively low number of workers. Only 6 percent of U.S. workers earn wages in excess of the current cap.³⁰⁴ Removing the cap would mean that all workers would pay the same rate of taxes on total wages. In exchange for the additional payment, there could be a proportionate increase in the benefits of high-wage workers.³⁰⁵

The above-described proposals to expand and restructure Social Security are offered in order to ensure that low-wage workers are not forced to live in poverty in their old age. These adjustments alone, however, are not sufficient to provide adequate income replacement for most workers. In order to ensure retirement security for workers across the income spectrum, a mandatory, universal program that provides some level of protection against plan losses should be established in conjunction with these proposals.

F. *Proposal of a Universal Retirement Savings Program with Minimum Guaranteed Benefits*

Traditional defined benefit plan coverage has declined in recent years and 401(k) plans now dominate new plan offerings.³⁰⁶ As discussed above, the use of 401(k) plans as primary retirement savings has not increased the

eliminating the cap on the Social Security payroll tax would broaden the federal tax base and increase overall revenue.”); see also Kathleen Romig, *Increasing Payroll Taxes Would Strengthen Social Security*, *CTR. ON BUDGET & POL’Y PRIORITIES* 13 (Sept. 27, 2016), <https://www.cbpp.org/sites/default/files/atoms/files/9-27-16socsec.pdf> [<https://perma.cc/ST69-EF75>] (“Social Security’s payroll tax is regressive, because of its flat rate and its cap, so low- and moderate-income taxpayers pay more of their incomes in payroll tax than do high-income people, on average.”); see generally *Are Social Security Taxes Regressive?: A Common Argument Debunked*, *THE ECONOMIST* (Apr. 14, 2009), http://www.economist.com/blogs/freeexchange/2009/04/are_payroll_taxes_regressive.

303. The above result occurs because a zero percent tax rate applies to earnings above the \$127,200 cap. SOCIAL SECURITY ADMINISTRATION, *FACT SHEET: 2017 SOCIAL SECURITY CHANGES 1* (2017), <https://www.ssa.gov/news/press/factsheets/colafacts2017.pdf> [<https://perma.cc/5L3B-3RU3>].

304. SOCIAL SECURITY ADMINISTRATION, OFFICE OF RETIREMENT POLICY, *POPULATION PROFILES* (Mar. 2015), <https://www.ssa.gov/retirementpolicy/fact-sheets/tax-max-earners.pdf> [<https://perma.cc/Y4VH-5UEN>].

305. See Romig, *supra* note 302, at 1 (stating that the increase depends on how policymakers choose to treat the newly taxed earnings).

306. TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, *Ref. No. 2010-10-097, STATISTICAL TRENDS IN RETIREMENT PLANS*, at 7 (2010), <http://www.treasury.gov/tigra/auditreports/2010reports/201010097f.pdf> [<https://perma.cc/9XA5-HR7F>] (stating that from 1977–2007, active participants in defined benefit plans dropped from 28.1 million to 19.4 million, and active participants in defined contribution plans rose from 14.6 million to 66.9 million). *But see* ALICIA H. MUNNELL, JEAN-PIERRE AUBRY & CAROLINE V. CRAWFORD, *HOW HAS SHIFT TO DEFINED CONTRIBUTION PLANS AFFECTED SAVING?* *CTR. FOR RETIREMENT RES.*, No.15–16 (Sept. 2015) (arguing that the change from defined benefit plans to defined contribution plans has not affected the retirement security or accumulation of retirement benefits of the population).

overall coverage rate in the private retirement system, while it has allocated all of the funding burdens and risks to the worker.³⁰⁷ Furthermore, the optional contribution feature of these plans has proven problematic for low- and middle-income workers, whose retirement savings are grossly inadequate.³⁰⁸ Thus, it is critically important to explore ways of ensuring that all workers, especially those who are low and middle-income, have sources of retirement income other than Social Security on which to rely in old age, when they are no longer able to work.³⁰⁹ In order to accomplish this goal, the remainder of this Article proposes a new level of retirement savings that combines a mandatory, universal retirement system with a defined contribution insurance program that provides minimum guaranteed retirement benefits.

The proposed Universal Retirement Savings Program with Minimum Guaranteed Benefits is an individual account program that mandates coverage and participation for all workers to the extent of wages, up to a given limit.³¹⁰ The limit would be based on an existing threshold, such as the definition of a “highly compensated employee,” as defined in section 414(h), which currently is set at \$120,000.³¹¹

The proposed accounts would be jointly funded by the employer and the employee, each of whom would provide a contribution of 3 percent of wages up to a specified limit.³¹² The Mandatory Universal Pension System (MUPS) that was recommended in 1981 by the President’s Commission on Pension Policy had a similar objective, and required a 3 percent contribu-

307. See *supra* Part III.

308. See Jefferson, *Increasing Coverage*, *supra* note 99, at 475–78 (noting that a 2008 study showed that half of workers earning between \$20,000–\$40,000 saved less than \$5,000 yearly); see also Allison Christians, *Fair Taxation as a Basic Human Right* 4 (Univ. of Wisconsin Legal Studies Research Paper Series, Paper No. 1066, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1272446 [<https://perma.cc/7YR6-NBKX>]; Min, *supra* note 10.

309. See Regina Jefferson, RE-ENVISIONING RETIREMENT SECURITY CONFERENCE: INSURED DEFINED CONTRIBUTION PLAN SYSTEM, RETIREMENT USA (Oct. 21, 2009), <http://www.retirement-usa.org/re-envisioning-retirement-security-insured-defined-contribution-plan-system> [<https://perma.cc/3MSV-9Y64>] [hereinafter Jefferson, RE-ENVISIONING RETIREMENT SECURITY].

310. This proposal is based on previous work suggesting an optimal defined benefit contribution insurance program for private sector plans. See Jefferson, *Rethinking Risk*, *supra* note 102, at 649–69; see also Jefferson, *Redistribution*, *supra* note 2, at 311–17; Jefferson, RE-ENVISIONING RETIREMENT SECURITY, *supra* note 309.

311. See I.R.C. § 414(q) (2012); see, e.g., INTERNAL REVENUE SERVICE, 401(K) PLAN FIX-IT GUIDE – THE PLAN FAILED THE 401(K) ADP AND ACP NONDISCRIMINATION TESTS, <https://www.irs.gov/retirement-plans/401k-plan-fix-it-guide-the-plan-failed-the-401k-adp-and-acp-nondiscrimination-tests> [<https://perma.cc/3X89-3FGY>] (defining highly compensated employees as an employee who holds a 5 percent ownership in the current or prior year, was paid more than \$120,000 in the prior year, or who was in the prior year’s group of 20 percent top-paid employees); see also CONTRIBUTION AND BENEFIT BASE, *supra* note 223.

312. See Press Release, Internal Revenue Service, IRS Announces 2017 Pension Plan Limitations (Oct. 27, 2016) (“The contribution limit for employees who participate in 401(k) . . . plans . . . remains unchanged at \$18,000.”); see also Jefferson, *Redistribution*, *supra* note 2, at 313 (2010); see also PRESIDENT’S COMMISSION ON PENSION POLICY, COMING OF AGE: TOWARD A NATIONAL RETIREMENT INCOME POLICY 875 (1981).

tion.³¹³ Because 3 percent is unlikely to meet today's standards for adequacy, this proposal requires a total contribution level of 6 percent.³¹⁴

The contributions of low- and moderate-income wage earners would be publicly subsidized. The level of the subsidy would be determined by the worker's income and would gradually phase-out as compensation increased beyond a certain level. Employees desiring to contribute beyond the required amount would be permitted to do so at their own expense. Such contributions would be subject to a limit, such as the section 415 limit for defined contribution plans.³¹⁵

For administrative ease, contributions would be made to a clearinghouse established within either the Social Security Administration or another existing entity such as the Pension Benefit Guaranty Corporation (PBGC).³¹⁶ The clearinghouse would offer employers a limited choice of pooled investment options, with a default provision. The clearinghouse would also be used to maintain benefit records for the program.³¹⁷ In order to mitigate costs, the program would be phased-in over a period of time.³¹⁸ To avoid unduly burdening small employers, the employer contribution could be waived for employers with less than a specified number of employees.³¹⁹ Regardless of size, however, all employers would be required to facilitate government and employee contributions.³²⁰

The proposal aims to encourage adequate retirement savings and to provide protection against the risk of loss of those savings.³²¹ The proposal is innovative because of the minimum benefit guaranteed by the insurance program for individual account plans and the portfolio parameters that define the insured amounts.

The key features of the proposed insurance program are as follows. All required contributions made to the Universal Retirement Savings Program would be protected by a risk-based, government-sponsored insurance program. The program would protect the individual account balances by guar-

313. *Id.*

314. See Jefferson, *Redistribution*, *supra* note 2, at 313.

315. I.R.C. § 415(c) (2012).

316. For further discussion on the impact of this proposal on the PBGC, see Jefferson, *Rethinking Risk*, *supra* note 102, at 665–67.

317. See Jefferson, *Redistribution*, *supra* note 2, at 313.

318. See *id.* at 314.

319. *Id.*

320. The Department of Labor records pension statistics based on plans of either 1–100 participants or 100+ participants. See U.S. DEPARTMENT OF LABOR EMPLOYEE BENEFITS SECURITY ADMINISTRATION, PRIVATE PENSION PLAN BULLETIN HISTORICAL TABLES AND GRAPHS (2014), <http://www.dol.gov/ebsa/pdf/historicaltables.pdf> [<https://perma.cc/LG4H-4QQA>]. However, in 2012, 34.3 percent of U.S. employees were employed by firms with fewer than one hundred employees. See ANTHONY CARUSO, U.S. CENSUS BUREAU, G12-SUSB, STATISTICS OF U.S. BUSINESSES EMPLOYMENT AND PAYROLL SUMMARY: 2012, at 2 tbl.2 (2015), <http://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf> [<https://perma.cc/EJA6-2FXQ>]. Excluding employers with fewer than twenty employees would be more appropriate, as that would exempt employer contributions on behalf of only 17.6 percent of employees. *Id.*

321. Jefferson, RE-ENVISIONING RETIREMENT SECURITY, *supra* note 309.

anteeing a minimum retirement benefit based on average investment returns over a fixed period of prior years.³²² The proposed guaranteed minimum benefit is distinguishable from a guaranteed annual return on the account in that it would be based on a hypothetical return, measured over a worker's total years of participation in a plan. This proposal is specifically designed to protect participants against the negative effects of severe market contractions that occur close to retirement, when there is insufficient time to recover through market corrections or to accumulate additional personal savings. Accordingly, in the event of a sudden downturn in the market, such as the one that occurred in 2008 and caused individual account balances to decline precipitously, participants planning to retire within a short period would be assured of receiving a guaranteed minimum benefit, regardless of their actual account balances.³²³

The insurance portion of the proposal relies on the use of a "prescribed diversification standard" that is designed to approximate the average rate of return for individual accounts invested in average risk investments over the participants working life.³²⁴ In connection with the prescribed diversification standard, it would be necessary to develop an indexing system to evaluate all investment funds in order to determine the level of risk exposure for a given account.³²⁵ The actual risk exposure of a participant's investment allocation would be compared to the risk of the prescribed diversification standard in order to determine eligibility for the guaranteed benefit.³²⁶ The guaranteed benefit, as well as the insurance premiums, would be determined by the degree to which the account balance complied with the diversification standard.³²⁷ Thus, the diversification standard solves the moral hazard problem by placing limitations on the level of risk to which an insured account could be exposed.³²⁸

The insured benefit would be payable in the form of a single or joint life annuity, depending on the participant's marital status. To avoid leakage there would be no pre-retirement distributions, similar to the Social Secur-

322. See Teresa Ghilarducci, *Guaranteed Retirement Accounts: Towards Retirement Income Security 2-3* (Econ. Pol'y Inst., Briefing Paper No. 204, 2007).

323. Between 2007 and 2008, due to the economic collapse, the average retirement account balance declined 27 percent. See Jack VanDerhei, *The Impact of the Recent Financial Crisis on 401(k) Account Balances*, 326 EMP. BENEFIT RES. INST. ISSUE BRIEF 4 (Feb. 2009), https://www.ebri.org/pdf/briefspdf/EBRI_IB_2-2009_Crisis-Impct.pdf [<https://perma.cc/YG26-PAUQ>] (stating that the average balance declined from \$69,200 in 2007 to \$50,200 in 2008).

324. See Jefferson, RE-ENVISIONING RETIREMENT SECURITY, *supra* note 309.

325. Jefferson, *Rebinking Risk*, *supra* note 102, at 652.

326. See Jefferson, RE-ENVISIONING RETIREMENT SECURITY, *supra* note 309.

327. *Id.*

328. For purposes of defining moral hazard problems, it is important to distinguish between two types of risks: reactive and fixed. A reactive risk is one over which the insured has some control. For example, a car accident due to a controllable cause, such as speeding, is a reactive risk. A fixed risk is one over which the insured has zero control, such as damage from floods and other acts of God. "For a moral hazard problem to exist, there must be some element of reactive risk involved." In short, the insured must have some opportunity to exercise due care. See Daniel Keating, *Pension Insurance, Bankruptcy and Moral Hazard*, 1991 WIS. L. REV. 65, 68 (1991).

ity program.³²⁹ Survivor benefits would be structured consistently with those of other defined contribution plans regarding spousal and non-spousal benefits.³³⁰ Insured benefits would be paid only in the event of death, disability, or the attainment of the worker's Social Security full retirement age.³³¹ To discourage deferral of the use of the funds beyond retirement age, insured benefits would not be upwardly adjusted for post-retirement age contributions; however, to avoid penalties for postponement, there would be an actuarial adjustment to reflect a delayed annuity start date.

The concepts described in this proposal are based on the author's previous works that call for an optional defined contribution insurance program for private sector defined contribution plans.³³² These works provide additional details regarding the structure and design of the proposal.³³³

CONCLUSION

The retirement savings crisis in this country is a complex and difficult problem. Although the private retirement system continues to be an important source of retirement income for many workers, there are serious deficiencies in the system for the distribution of benefits to low- and middle-income workers. The confluence of demographic changes, a shift in the balance of individual and collective risks made manifest by the prevalence of 401(k) plans in the private sector, and the most recent economic downturn have made the current private retirement system incapable of providing retirement security across the income spectrum. This raises serious concerns about both pension policy goals and human rights obligations. Thus, as policymakers address the retirement savings crisis, they should think more broadly about the relationship between retirement security and human rights, the role of government, and the responsibility of community to individuals.

The proposals described above respond to the retirement savings crisis by ensuring that retirement benefits for individuals with regular work histories are over the poverty level and are not eroded by inflation. Providing an additional source of retirement income in the form of a Universal Retirement Savings System responds to the retirement savings crisis by providing

329. See Norman P. Stein & Patricia E. Dilley, *Leverage, Linkage, and Leakage: Problems with the Private Pension System and How They Should Inform the Social Security Reform Debate*, 58 WASH. & LEE. L. REV. 1369, 1371–72 (2001) (“By leakage, we refer to the idea that pension plans are intended to provide retirement income, and, therefore, plan assets should not leak out of the plan for non-retirement purposes.”). Social Security has age 62 early retirement but not hardship distributions or loans.

330. For the rules governing distributions in defined contribution plans, see 26 U.S.C. § 401(a)(9)(B), (D).

331. SOCIAL SECURITY ADMINISTRATION, SSA PUB. NO. 05-10035, RETIREMENT BENEFITS 1, 3–4 (2015). For example, the full retirement age for individuals born between 1943 and 1954 is 66.

332. See Jefferson, RE-ENVISIONING RETIREMENT SECURITY, *supra* note 309; see also Jefferson, *Rethinking Risk*, *supra* note 102 at 649–63.

333. See Jefferson, RE-ENVISIONING RETIREMENT SECURITY, *supra* note 309; see generally Jefferson, *Rethinking Risk*, *supra* note 102.

a meaningful level of benefits from the private retirement system to all workers. The subsidy for low- and middle-income workers in connection with the proposed Universal Retirement Savings System reflects the reality that low-wage workers are often not covered by employer sponsored plans or are unable to make elective contributions when employers offer 401(k) plans.³³⁴ The mandatory feature of the proposal forces workers who can afford to save to do so and thereby minimizes the risk that they will live in poverty in their old age.³³⁵ Equally important, however, these proposals are responsive to fundamental human rights principles, which should impact both national and international laws and policies. By ensuring that workers have adequate resources and protections in retirement, the proposals actualize the belief that all individuals across the income spectrum have the right to live with dignity and security in their old age.

As discussed above, there are three important human rights documents that directly apply to the elderly—the UDHR, the ICESCR, and the United Nations Principles for Older Persons.³³⁶ While all three documents promote the use of national resources to prevent poverty in old age, there are specific provisions in each that support the proposals for pension reform described above. For example, Article 25 of the UDHR provides that every individual has the right to an adequate standard of living “in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”³³⁷ Most retired workers will fit one or more of these descriptions in their lifetimes. Furthermore, Article 10 of the Principles for Older Persons provides that, “[o]lder people should benefit from family and community care and protection in accordance with each society’s system of cultural values.”³³⁸ Additionally, Article 17 of the same document further states that “[o]lder persons should be able to live in dignity and security”³³⁹ Thus, the failure to take affirmative measures to address the retirement savings crisis by providing adequate resources for workers to meet their basic needs in retirement is in direct opposition to many of these principles.

Although using a human rights analysis does not present a perfect solution to the retirement savings crisis, it does help to frame additional policy considerations and responses. Using a human rights approach to evaluate the United States retirement savings system suggests that strengthening and expanding Social Security along with introducing a new Universal Retirement Savings Program with Guaranteed Minimum Benefits would be an effective and equitable way of increasing retirement security for low- and middle-income workers.

334. See Copeland, *supra* note 136, at 30 n.35.

335. See discussion *supra* Part II.B.

336. See discussion *supra* Parts I.A.

337. UDHR, *supra* note 13.

338. U.N. Principles for Older Persons, *supra* note 16.

339. *Id.*