BOLSTERING BENEFITS BEHIND BARS: REEVALUATING EARNED INCOME TAX CREDIT AND SOCIAL SECURITY BENEFITS DENIALS TO INMATES

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This Note describes how the tax system treats inmates, an intersection that has been relatively understudied by both tax and criminal justice scholars. The Note provides a detailed account of how inmates earn income through prison labor (what goes in) and the benefits denied to inmates (what comes out, or rather what often does not come out). The Note then asks why the tax system denies inmates Earned Income Tax Credit (EITC) and Social Security benefits. Traditional tax principles of equity, efficiency, and administrability do not justify the denials. This Note argues that the underlying culprit is that the tax system is being used to levy additional punishment on inmates. This has particularly insidious effects on communities of color given the connections between mass incarceration, poverty, and race. The Note proposes statutory repeal of the benefits exclusions and mandatory filing for inmates as a way of making the tax system better reflect the economic and social realities that inmates face, while simultaneously moving the system closer to fundamental tax principles.

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1 This Note uses the term “inmates” to refer to individuals in carceral or penal institutions and maintain consistency with the referenced sections of the Internal Revenue Code. Where possible, this Note uses “incarcerated person” to prioritize people-first language.
INTRODUCTION

The tax system's differential treatment of inmates has significant consequences. Today, nearly two million Americans are incarcerated and nearly forty-five percent of American adults have an immediate family member who is currently or was previously incarcerated. Despite what some pundits claim, receiving three meals a day and a bed to sleep on in prison does not mean that incarcerated people do not need money. Incarcerated people often need money to purchase additional basic goods and services at prison commissaries. While incarcerated people earn an average minimum daily wage of $0.86,

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3 See, e.g., Maine Inmates Received Hundreds of Thousands of Dollars in Unemployment Benefits, WGME (May 20, 2020), https://fox23maine.com/news/coronavirus/maine-inmates-received-hundreds-of-thousands-of-dollars-in-unemployment-benefits [https://perma.cc/4RTY-SFL6] (arguing that Maine prisoners should not be entitled to unemployment benefits because “[a]t the Maine Department of Corrections, we provide for all their needs. . . . We provide for their housing and food and medication.”) (statement of Randy Liberty, Commissioner for the Maine Department of Corrections).

4 See, e.g., Natalie, Why Does an Inmate Need Money?, Prison Insight, https://prisoninsights.com/why-does-an-inmate-need-money [https://perma.cc/C9BM-MRF5] (“If you do not have [money] . . . [y]ou will be forced to always eat at the chow hall, your clothes will be ill-fitting and uncomfortable, you will never be able to make phone calls or write home, and you will never get clean.”).

the price of basic goods and services often exceeds their wages. For example, aspirin costs $1.36 in some states, while the average fifteen-minute phone call costs $5.74. In addition, family members often shoulder extra financial burdens such as the court fees, fines, and restitution payments involved in the incarceration process. On average, the extra financial burdens cost over $13,000. Sixty-five percent of families reported financial hardship as a result of the loss of income and costs associated with a family member’s conviction and incarceration.

Financial hardship and the criminal justice system are intertwined. Not only do the majority of inmates come from low-income backgrounds, but incarceration jeopardizes both the individual’s present economic situation and, upon release, the stigma of incarceration reduces their future earnings and employment prospects.

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9 Id.
10 Id. at 17–18; see also Rose Smith, Roger Grimshaw, Renee Romeo & Martin Knapp, Ctr. for Crime & Just. Studies, Poverty and Disadvantage Among Prisoners’ Families 19 (2007), https://www.crimenandjustice.org.uk/sites/crimenandjustice.org.uk/files/poverty-disadvantage-2007.pdf (describing how half of the surveyed families were subsidizing the incarcerated member).
11 See Reuben Jonathan Miller, Race, Hyper-Incarceration, and U.S. Poverty Policy in Historic Perspective, 7 Socio. Compass 573, 583 (2013) (noting scholarly consensus that the bulk of inmates come from low-income backgrounds); Bernadette Rabuy & Daniel Kopf, Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned, Prison Pol’y Initiative (July 9, 2015), https://www.prisonpolicy.org/reports/income.html (finding that prior to incarceration, incarcerated people earned “41% less than nonincarcerated people of similar ages.”).
only are family members burdened by the cost of visitation travel or providing commissary funds to the incarcerated individual, but incarceration also deprives families of a potential wage-earner, breaks up the family structure, and induces emotional distress.\textsuperscript{13}

Attempts at counteracting poverty have been largely piecemeal,\textsuperscript{14} and since the 1980s, the federal government has been simultaneously contracting welfare programs and shifting the burden of poverty alleviation onto the tax system.\textsuperscript{15} For instance, the tax system is responsible for administering the Earned Income Tax Credit (EITC), which contributes to lifting over five million Americans above the poverty line.\textsuperscript{16} Federal employment taxes fund and determine eligibility for Social Security benefits,\textsuperscript{17} which lift over twenty-two million


\textsuperscript{14} See \textsc{Sarah Minton} & \textsc{Linda Giannarelli}, \textit{Urb. Inst., Five Things You May Not Know About the U.S. Social Safety Net} 1 (2019), https://www.urban.org/sites/default/files/publication/99674/five_things_you_may_not_know_about_the_us_social_safety_net_1.pdf [https://perma.cc/XAG6-VEV3] (explaining how the U.S. social safety net is not a singular program, but rather a variety of programs, some of which operate at the federal level, while others operate at the state level); Martha R. Burt, Nancy Pindus & Jeffrey Capizzano, \textit{The Social Safety Net at the Beginning of Federal Welfare Reform, in Assessing the New Federalism} 8–9 tbl. 2 (Urban Inst., Occasional Paper No. 34, 2000), https://www.urban.org/sites/default/files/publication/43746/309309-oecca34.pdf [https://perma.cc/RY56-5VJX] (listing a variety of social service programs administered at the state level that provide assistance to low-income households).

\textsuperscript{15} See Burt et al., \textit{supra} note 14, at 1–2 (describing how the Reagan administration streamlined the social safety net so that by 1996, Aid to Families with Dependent Children (AFDC), which operated as an open-ended entitlement, was replaced by Temporary Assistance to Needy Families (TANF) block grants); Dennis J. Ventry Jr., \textit{The Collision of Tax & Welfare Politics: The Political History of the Earned Income Tax Credit, 1969–99}, 53 \textit{NAT’L. Tax J.} 983 (2000) (detailing the history of utilizing tax reform to develop a social welfare system conditioned on working).


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Americans out of poverty.\textsuperscript{18} However, inmates are currently ineligible for the EITC and Social Security benefits.\textsuperscript{19}

When the tax system bars incarcerated people from receiving the EITC and Social Security benefits while imprisoned, it entrenches some of the poorest segments of the population deeper in poverty.

The tax code’s disparate treatment of incarcerated people is not an artifact of the past. In March 2020, in response to the devastating effects of COVID-19, Congress passed the Coronavirus Aid Relief and Economic Stabilization (CARES) Act, which used the tax system to grant $1,200 Economic Impact Payments to individuals.\textsuperscript{20} Section (d) of the CARES Act explicitly defines who qualifies for the stimulus payments: “eligible individual” means any individual other than “non-resident alien[s],” dependents, or “an estate or trust.”\textsuperscript{21} The statute does not explicitly mention incarcerated individuals. However, on May 6, 2020, the IRS clarified that incarcerated individuals were ineligible to receive the payments.\textsuperscript{22} Prisons started seizing stimulus checks and returning them to the IRS.\textsuperscript{23} When asked for the legal rationale underpinning the confiscation, IRS spokesman Eric Smith said, “I can’t give you the legal basis” for excluding prisoners.\textsuperscript{24} To this date, the IRS has never provided a justification for its position.\textsuperscript{25} Around $2


\textsuperscript{21} See 26 U.S.C. § 6428(d). The credit is also reduced by adjusted gross income. See 26 U.S.C. § 6428(c).


\textsuperscript{24} Id.

\textsuperscript{25} See Leslie Book, \textit{Tax Administration and Racial Justice: The Illegal Denial of Tax-Based Pandemic Relief to the Nation’s Incarcerated Population}, 72 S.C. L. Rev. 667, 698
billion was at stake after the first round of payments.\textsuperscript{26} Eventually, the Northern District of California overturned the IRS’s position in \textit{Scholl v. Mnuchin}.\textsuperscript{27}

The IRS’s sudden decision prompted tax scholars to reexamine the tax treatment of incarcerated individuals.\textsuperscript{28} This Note contributes to the discussion by examining the denials of EITC and Social Security benefits to incarcerated individuals. The increased complexity of EITC and Social Security and their longer history—when compared to the COVID Economic Impact Payments—makes it less obvious that these denials are punitive in nature and thus puts their policy rationales in a grey zone.

This Note proceeds as follows. Part I describes how incarcerated people interact with the tax system. It considers the aspects of an incarcerated person’s income that are collected into the tax base (what goes in), and what benefits are available to incarcerated people (what comes out). In terms of benefits, this Note focuses on eligibility for the two largest anti-poverty programs, the EITC and Social Security benefits. Part II explores potential justifications behind denying incarcerated people the EITC and Social Security benefits. Part II demonstrates that the core tax principles of equity, efficiency, and administrability do not provide a satisfying reason for the denials.

\textsuperscript{n.131} (2021). In \textit{Scholl v. Mnuchin}, the district court held that the IRS’s policy change to exclude incarcerated individuals from receiving Economic Impact Payments was arbitrary and capricious because it did not give a reason for doing so. See \textit{id.} at 696; \textit{Scholl v. Mnuchin}, 494 F. Supp. 3d 661, 692–93 (N.D. Cal. 2020).

\textsuperscript{26} The rest of this footnote describes how this estimate was calculated. See Chandra Bozelko, \textit{Prisoners Don’t Need COVID Stimulus Checks}, \textit{Wall St. J.} (Oct. 21, 2020), https://www.wsj.com/articles/prisoners-dont-need-covid-stimulus-checks-11603217111 [https://perma.cc/EZD3-FZ2D] (estimating the prison population at 1.5 million times $1,200 from the first round of payments from the CARES Act leads to $1.8 billion). Since the IRS was forced to reverse its position after \textit{Scholl v. Mnuchin}, see IRS FAQ Q A7, \textsuperscript{supra} note 22, inmates would be eligible for the second stimulus payment of $600, see \textit{Questions and Answers About the Second Economic Impact Payment}, \textit{Internal Revenue Serv.} (Sept. 27, 2021), https://www.irs.gov/coronavirus/second-cip-faqs [https://perma.cc/FT9J-DDYR], and the third stimulus payment of $1,400, see \textit{Third Economic Impact Payment}, \textit{Internal Revenue Serv.} (May 17, 2021), https://www.irs.gov/coronavirus/third-economic-impact-payment [https://perma.cc/7QVB-4KK6]. Using these figures, the amount of money at stake would be $4.8 billion.


\textsuperscript{28} See, e.g., Book, \textit{supra} note 25, at 699 (arguing that the IRS should be more transparent about policies affecting incarcerated individuals since denying Economic Impact Payments disproportionately burdens communities of color, whose interests are already underrepresented in tax administration); Mitchell Caminer, Comment, \textit{Enjoined and Incarcerated: Complications for Incarcerated People Seeking Economic Relief Under the CARES Act}, 2021 U. Chi. Legal F. 297, 318–20 (2021) (arguing that incarcerated individuals should be eligible to receive Economic Impact Payments and claiming that the denials reflect the tax system being inappropriately used to silently levy additional punishment).
Furthermore, Part II shows how non-punitive policy justifications, such as carceral institutions being separate from the traditional tax market and incarcerated people having no use for the benefits, are also unconvincing. Part II concludes that the most compelling justification for the benefits denials is a punitive one: a way for the tax system to punish incarcerated people. Normatively, the Note argues that tax policy serving as a form of punishment is problematic because tax operates on the family level. Moreover, tax policy can silently reshape how incarcerated people are treated economically and has been used to entrench communities of color in vicious cycles of poverty. Part III proposes policy changes such as imposing a mandatory inmate filing regime and statutory repeal of the benefits denials. By implementing these changes, this Note argues that the tax system can stop serving a punitive role.

Tax is typically not at the forefront of prison reform discussions. The costs and benefits of changing the tax treatment to any incarcerated individual may seem relatively small compared to changes in sentencing length or solitary confinement. Although these changes may be relatively small, they are important. “[T]axes are not just a method of payment for government and public services: They are also the most important instrument by which the political system puts into practice a conception of economic or distributive justice.” Symbolically, the tax treatment of incarcerated people reflects whether society views them as being worthy of economic and distributive justice. Practically, tax treatment can have immediate and lasting ramifications on the well-being of incarcerated people’s families and the effectiveness of rehabilitation.

I

HOW THE TAX SYSTEM TREATS INCARCERATED PEOPLE

The tax system embodies how the government should collect and spend money. At the federal level, the U.S. government collects the bulk of its money via the federal income tax. This Part has two purposes. First, it identifies how the tax system treats inmates’ income

31 See JOSEPH BANKMAN, DANIEL SHAVIRO, KIRK STARK & EDWARD KLEINBAARD, FEDERAL INCOME TAXATION 1–2 (18th ed. 2019).
32 Id. at 3.
(what goes in). Second, it describes inmate eligibility for EITC and Social Security benefits, the two largest government antipoverty programs (what comes out).

A. What Goes In

To understand what is included in the tax base—or “what goes in” to the tax base—we first need to understand how inmates generate income through prison labor. Federal law mandates that “[s]entenced inmates are required to work if they are medically able” and “[i]nmates earn 12 cents to 40 cents per hour for these work assignments.” In 2004, almost all federal prisoners and nearly half of state prisoners had work assignments. Tasks range from building furniture and staffing call centers for private companies on the penitentiary premises to doing laundry or serving meals for other inmates. Incarcerated people may also temporarily leave the prison to perform work through work release programs. Not all work is mandatory. For example, the Prison Industry Enhancement Certification Program (PIECP) is a federal program that pays inmates local wages and simulates private sector jobs by encouraging private companies to partner with state prisons.

For federal income tax purposes, wages earned for prison labor are includable in gross income. Incarcerated people are not excluded from paying taxes. However, if a filer’s income is below a certain

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34 Id.
36 See Zatz, supra note 29 at 868–71; see also Kara Goad, Note, Columbia University and Incarcerated Worker Labor Unions Under the National Labor Relations Act, 103 Cornell L. Rev. 177, 183 (2017) (describing how Escrod, a company that was contracting with IBM, set up a manufacturing facility in a South Carolina prison so that it could employ inmates to make electrical parts).
threshold, the filer does not have to file a federal income tax return. If an incarcerated person’s only source of income is through a prison job, that person will typically not have to file a return, as prison jobs pay too little to encounter the income thresholds. However, incarcerated people who are on temporary work release may need to file federal income taxes because their earnings exceed the threshold amounts. Inmates earning prevailing local wages via PIECP programs may also exceed the threshold and be required to file a return. Additionally, if an inmate files jointly with a spouse outside prison, has non-wage income, or was incarcerated mid-way through the year and earned income prior to incarceration, that inmate may need to file a federal income tax return.

B. What Comes Out

Tax benefits—or, “what comes out” of the tax base—could provide for critical cash needs for incarcerated persons and their families. Some people argue that incarcerated people do not need money and should be excluded from government benefits because prisons already

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41 Single filers under sixty-five years old with adjusted gross income (AGI) above $12,550 must file; married filing jointly with AGI above $25,100 must file. Filers who do not have to file based on AGI thresholds may still file if they qualify for certain credits. Internal Revenue Serv., Cat. No. 15000U, Dependent, Standard Deduction, and Filing Information (2022).

42 The single filer threshold is $12,550 per year. Id. If an inmate were paid the maximum hourly state wage of $4.90, see Sawyer, supra note 5, assuming that the inmate works forty hours a week for fifty-two weeks, the inmate would only make $10,400 per year, which is still below the threshold.


44 See BJS: PIECP, supra note 38, at 2 (noting that since the program’s inception in 1979 “PIECP workers have contributed approximately . . . $103 million in taxes.”).

45 See Brody et al., supra note 40, at 52. Additional assets that generate income outside prisons could also force inmates to file tax returns while they serve their sentences. For example, in 1999, Michael Mathie—an otherwise normal inmate who was serving out a manslaughter conviction—reported $889,969 in adjusted gross income which was primarily derived from profitable long-term stock sales. See Tina Kelley, The Stock Market Has Made Inmate 90T1282 a Rich Man, N.Y. Times (Feb. 6, 2001), https://www.nytimes.com/2001/02/06/nyregion/the-stock-market-has-made-inmate-90t1282-a-rich-man.html [https://perma.cc/7B6Q-7X7Y]. Martin Shkreli was still running his businesses while incarcerated. See Rob Copeland & Bradley Hope, Martin Shkreli Steers His Old Company from Prison—with Contraband Cellphone, Wall St. J. (Mar. 7, 2019), https://www.wsj.com/articles/martin-shkreli-steers-his-old-company-from-prison-with-contraband-cellphone-11551973574 [https://perma.cc/2F7L-PXSE].
provide for their basic needs. The premise that incarcerated people do not need money because prisons cover their basic needs is false. Prisoners must pay many burdensome costs while in prison, yet do not earn enough income to cover them. Basic goods like toilet paper and antihistamines cost money inside and outside of prison. If incarcerated people become ill, they pay out of pocket to visit the prison doctor. But low prison wages, on average $0.86 a day, mean that an incarcerated individual would have to work for at least three days to see the doctor. Some prisons charge inmates for the length of their stay, which can range from ten to fifty-six dollars per day, and then settle the bill when the incarcerated person leaves prison.

As a result, sometimes the families of prisoners must step in to cover these costs, but this can also be extremely burdensome. The family unit outside the prison suffers large economic repercussions from supporting their incarcerated loved ones. “One-third of families [with an incarcerated family member] . . . said they went into debt

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46 See Bozelko, supra note 26 (arguing that money will be used to facilitate prison black markets and stating that from the author’s own experience, “prisons do provide for inmates’ basic needs”).

47 See Sharon Dolovich, The Failed Regulation and Oversight of American Prisons, 5 ANN. REV. CRIMINOLOGY 153, 154 (2022) (describing how the government has failed to “ensure even minimally decent carceral conditions”).


50 Sawyer, supra note 5.


52 See Feldschreiber, supra note 37, at 250 (“Macomb County and Oakland County charge prisoners between twelve and fifty-six dollars a day and ten and thirty dollars a day, respectively.”).

53 See id. at 212 (“The prisoner is given an itemized bill at the end of his confinement and works out a payment schedule upon his release.”).

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to pay for visitation or phone calls.”\textsuperscript{55} Kae Boone had her car repossessed to generate one-hundred dollars a month so that her incarcerated boyfriend could buy soap.\textsuperscript{56} Moreover, these support payments are considered gifts and are not tax deductible.\textsuperscript{57} Households cannot claim incarcerated family members as dependents.\textsuperscript{58} Incarceration takes away a household income source and adds additional costs to the household budget.\textsuperscript{59} Typically, the federal government provides antipoverty benefits for people struggling to meet basic needs through SSI and the EITC, but this does not apply to prisoners. Given the financial need of households with incarcerated family members, a natural question would be whether the two largest antipoverty programs, the EITC and Social Security, can aid incarcerated people—and why they currently do not.

1. Earned Income Tax Credit

Inmates are ineligible for the Earned Income Tax Credit. The EITC was originally implemented to encourage single mothers to return to the workforce\textsuperscript{60} by “mak[ing] work pay.”\textsuperscript{61} Though initially limited in size, over time it has expanded into the largest federal program that helps the working poor.\textsuperscript{62} The EITC operates via a refundable tax credit. Specifically, EITC refunds are given to people who are working, but who earn less than $57,414.\textsuperscript{63} The EITC lifted nearly 5.6


\textsuperscript{58} Id.

\textsuperscript{59} See SMITH ET AL., supra note 10 and accompanying text.


\textsuperscript{62} SCOTT & CRANDALL-HOLLICK, supra note 60, at 1.

million people above the poverty threshold in 2018.\footnote{64 Policy Basics: The Earned Income Tax Credit, CTR, BUDGET \& POL’Y PRIORITIES (Dec. 10, 2019), https://www.cbpp.org/research/federal-tax/the-earned-income-tax-credit [https://perma.cc/3Q4A-U5MU].} Upon filing their federal tax returns, individuals earning within the target EITC band are given a refund amount.\footnote{65 SCOTT \& CRANDALL-HOLICK, supra note 60, at 3.}

Before 1994, there were no explicit specifications on inmate eligibility for the EITC.\footnote{66 See Earned Income Tax Credit: Hearing Before the Subcomm. on Oversight \& the Subcomm. on Hum. Res. of the Comm. on Ways \& Means, 104th Cong. 33–34 (1995) (statement of Leslie B. Samuels, Assistant Sec. of Dep’t of Treasury).} The EITC was perceived as a fairly limited program, and in order to receive EITC benefits, parents had to reside with their children for at least six months.\footnote{67 Id. at 34.} Most incarcerated people failed this prong.\footnote{68 Id.} In 1994, Congress expanded the EITC to include a small credit for people without children.\footnote{69 Id.} However, simultaneously, Congress cabined eligible recipients by disqualifying nonresident aliens from receiving the EITC and statutorily barring inmate labor from counting as qualified earnings towards the EITC.\footnote{70 Uruguay Round Agreements Act, Pub. L. No. 103-465, §§ 722–23, 108 Stat. 4809, 5002–03 (1994).}

Although many inmates have argued that certain forms of inmate labor should qualify as earned income, courts have routinely rejected these arguments because of the text of the EITC statute.\footnote{71 26 U.S.C. § 32(c)(2)(B)(iv) (“[N]o amount received for services provided by an individual while the individual is an inmate at a penal institution shall be taken into account.”).} In 1994, Gary James Taylor earned $5,054.10 working as a telemarketer while incarcerated in state prison.\footnote{72 Taylor v. Comm’r, 76 T.C.M. (CCH) 808, at 2 (1998).} He filed his federal tax return and claimed a $300 earned income credit.\footnote{73 Id.} Pointing to 32(c)(2)(B)(iv), the provision of the Internal Revenue Code that excludes income earned via inmate labor from EITC calculations, the Tax Court held that Mr. Taylor was not entitled to the deduction as he had earned the wages while incarcerated.\footnote{74 Id. at 2–3.} In 1998, Edward Falls Tramble-Bey argued that 32(c)(2)(B)(iv) should not apply to wages earned via a private employer outside the prison premises.\footnote{75 Tramble-Bey v. Comm’r, T.C. Summ. Op. 2001–23, 2001 WL 1922017, at *3 (2001).} The Tax Court held that “a taxpayer is incarcerated even when the taxpayer is outside the prison walls . . . for the entire period of the taxpayer’s prison sentence or
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until paroled.” The Tax Court reaffirmed the blanket exclusion disqualifying inmate labor in Rogers v. Commissioner. In 1998, DeLinda ViAnne Rogers earned $1,658.48 working for Unicor-Federal Industries as an inmate and claimed an EITC credit of $128. Ms. Rogers asserted that “her wages should not be subject to section 32(c)(2)(B)(iv) because she performed most of her services at a location outside of the penal institution and that her employment was voluntary and not mandated by the terms of her sentence.” Not only did the Tax Court assert that the location of the services was not a factor affecting the EITC exclusion, it also emphasized that whether the work was “voluntary or compulsory” did not make a difference.

The common holding of these cases is that wages earned while one is incarcerated do not count towards the EITC. It does not matter whether the work was voluntary, by a private employer, or on prison premises. But, as discussed earlier, if prison labor involves voluntary work for a private employer outside the prison walls, it becomes hard to distinguish the actual work being performed from what is conceived of as regular work. The exclusion of benefits to inmates is not justified by the work being fundamentally different, but rather tied to their status as incarcerated people. Normatively, conditioning benefits from a program designed to encourage low-income people to work on one’s status is problematic. Part II provides a more nuanced argument explaining this normative stake.

2. Social Security Benefits

In addition to not being able to receive EITC benefits, inmates also cannot receive Social Security benefits, even if they have already earned them via contributions made throughout their lifetime. Congress established the Social Security program in the 1930s to “provide economic security for the nation’s workers” by collecting payroll taxes while workers are in the workforce and paying out benefits upon retirement. There are two types of payroll taxes: Federal Insurance Contributions Act (FICA) taxes, which are paid in part by the employer and in part by the employee, and Self-Employment Contributions Act (SECA) taxes, which are paid by self-employed

76 Id. at 5.
78 Id. at 4.
79 Id. at 5.
80 See Feldschreiber, supra note 37 and accompanying text; Zatz, supra note 29, at 874 (“[A]n employment relationship may exist when an inmate works for a private firm as part of a work release program.”).
81 BARRY F. HUSTON, CONG. RSCH. SERV., R42035, SOCIAL SECURITY PRIMER 1–2 (2022).
individuals. Workers over the age of sixty-two are eligible for retirement benefits if they have accumulated forty earnings credits, which translates roughly to ten years of contributions via payroll taxes. The benefit payment amount depends upon the retirement age, the amount paid in, and the amount collected by other household beneficiaries. In certain circumstances, such as a worker dying, family members may also be eligible for Social Security benefits.

Incarcerated people can interact with the Social Security system either as beneficiaries or payors. Originally, incarcerated people were entitled to receive Social Security benefits. In 1980, concerns over depletion of the Social Security Trust Fund and news articles highlighting how prisoners were gaming the system using “bogus mental illness” led Congress to pass Public Law 96-473, which denied disability benefits to inmates. In 1983, Congress passed Public Law 98-21, which denied inmates from receiving retired worker benefits. Further cementing the exclusion of incarcerated people, President Obama signed the No Social Security Benefits for Prisoners Act of 2009.

Following the suspension of their benefits, several incarcerated people filed lawsuits against the Social Security Administration. In Washington v. Secretary of Health and Human Services, an incarcerated New Jersey individual argued that the termination of his Social Security benefits constituted a deprivation “of property without due
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The Third Circuit acknowledged that Social Security is “an earned program and not a welfare program for the benefit of needy persons.” Nevertheless, it emphasized that the earned program nature in itself does not preclude Congress from attaching eligibility limitations, and “participation in the social security system is a noncontractual benefit . . . because the amount a worker or his dependents may be entitled to receive is not in any true sense dependent upon the degree to which he was called upon to support the system by taxation.” The court deferred to Congress’s discretion to deny benefits to inmates.

Focusing on the uncertain nature of payouts, however, does not address the earned right nature of Social Security benefits. As noted in Congressional debates at the time, “[s]uch a sweeping denial of benefits [was] unprecedented” as “Social Security is not a handout; it is not charity; it is not relief. It is an earned right based upon the contributions and earnings of the individual.” By holding that incarcerated people are ineligible to receive benefits they had previously earned, the court effectively denied recourse to a group of people who were deprived a benefit stream for work they had already performed. The Fourteenth Amendment prohibits deprivation of property without due process, and, in principle, the government cannot raid inmates’ bank accounts simply due to their carceral status.

In addition to the benefit denials, it is unlikely that the work people perform while incarcerated will count towards their future Social Security credits. Whether incarcerated people can earn credits towards Social Security benefits for their prison work depends on

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93 Id. at 610.
94 Id.
95 Id. at 610–11.
97 Id. at 93 (quoting Sen. George, Chairman, Fin. Comm.).
98 U.S. CONST. amend. XIV.
99 See, e.g., Hopkins v. Smith, 592 S.W.3d 319, 323 (Ky. Ct. App. 2019) (holding that even though the Department of Corrections could temporarily restrict access to the funds, “[t]he money in his outside bank account remains his, as do the funds in his inmate account.”); see generally Catherine E. McCaw, Asset Forfeiture as a Form of Punishment: A Case for Integrating Asset Forfeiture into Criminal Sentencing, 38 Am. J. Crim. L. 181, 186–87 (2011) (explaining that in confiscating property under asset forfeiture doctrines for criminal cases, the government needs to demonstrate that the property to be confiscated is related to the criminal offense and that confiscation of the property does not violate the Eighth Amendment prohibition against excessive fines).
whether their employer must pay FICA tax for a given period.\textsuperscript{100} For FICA purposes, wages are defined in the Internal Revenue Code section 31.3121 as “all remuneration for employment” unless specifically exempted.\textsuperscript{101} Wages paid to incarcerated people are not subject to a specific carveout provision, but there are two reasons why an employer may not have to pay FICA taxes for incarcerated people. First, the inmate-work relationship may not have the nature of an employer-employee relationship.\textsuperscript{102} In Revenue Ruling 75-325, the IRS considered whether wages paid to prison inmates were exempted from payroll taxes.\textsuperscript{103} The IRS concluded that since the nature of the relationship between the inmate and the corporation arose from the inmate’s incarcerated status and the corporation was providing rehabilitative labor, the relationship could not be characterized as an employer-employee relationship.\textsuperscript{104} Second, work performed by incarcerated persons in the employ of state or federal government is exempt from FICA taxes.\textsuperscript{105} Since the vast majority of incarcerated people are in carceral institutions run by the government,\textsuperscript{106} it is highly unlikely that incarcerated people performing tasks for the prison will earn Social Security credits for their work. Between these two reasons, it is very unlikely that incarcerated people will build towards Social Security benefit eligibility while they are in prison. This is especially problematic as a greater number of formerly incarcerated individuals with inadequate retirement savings are released and enter old age.\textsuperscript{107}

To recap, while prison wages are includable in the tax base, inmates are ineligible to receive Social Security benefits, and their earnings while incarcerated are disqualified from the EITC. The EITC treats all prison labor the same, even though some forms of prison labor are voluntary and otherwise virtually indistinguishable from the work a nonincarcerated individual would be performing. Inmates are also denied Social Security benefits for work they have already performed prior to incarceration.

\textsuperscript{101} Id. at 1–2.
\textsuperscript{102} Rev. Rul. 75-325, 1975 C.B. 415.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} I.R.S. Chief Couns. Mem. 200526018 (July 1, 2005) (citing I.R.C. § 3121(b)(7)(F)(ii)).
II
RATIONALES FOR EXCLUDING INCARCERATED PEOPLE FROM RECEIVING THE EITC AND SOCIAL SECURITY BENEFITS

The previous Part explained the nuances of prison labor and how incarcerated individuals are denied EITC and Social Security benefits. This Part explores why the tax system denies incarcerated people these benefits. It starts by asking whether the traditional tax principles of equity, efficiency, and administrability justify the exclusions, and concludes that they do not. If tax principles do not explain the denials, then there must be a policy rationale underlying the decision. This Part proceeds to examine the non-punitive policy rationales, but also concludes that these rationales are unsatisfactory. The most persuasive explanation for benefits denials is that the tax system is punishing incarcerated people, which this Note normatively argues should not be a function of the tax system.

A. Analysis Under Traditional Tax Principles

This Section examines whether the three traditional tax principles of equity, efficiency, and administrability justify denying benefits to incarcerated people.\(^{108}\)

1. Equity

In the tax context, equity refers to economic equity,\(^{109}\) which means that the tax system primarily uses income to determine household treatment. There are two types of economic equity: horizontal and vertical.

   a. Horizontal Equity

   Horizontal equity stands for the principle that “[s]imilarly situated individuals [should] face similar tax burdens.”\(^{110}\) If two taxpayers have the same gross income, the first taxpayer should not owe more

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\(^{108}\) See, e.g., Reuven S. Avi-Yonah, The Three Goals of Taxation, 60 N.Y.U. TAX L. REV. 1, 1 (2006); Anthony C. Infanti, Tax Equity, 55 BUFF. L. REV. 1191, 1191 (2008); Alex Raskolnikov, Accepting the Limits of Tax Law and Economics, 98 CORNELL L. REV. 524, 524 (2013) (“And just about every tax professor in the country introduces her students to the world of tax by articulating the goals of equity, administrability, and—you guessed it—efficiency.”).

\(^{109}\) Infanti, supra note 108, at 1195 (“[T]ax equity is solely concerned with the fair treatment of individuals who either have the same or different incomes. This represents a normative choice to consider economic differences—and only economic differences—in determining the fairness of a tax . . . . ”).

taxes than the second simply because he is six feet tall while the second taxpayer is five feet tall.\footnote{See N. Gregory Mankiw & Matthew Weinzierl, The Optimal Taxation of Height: A Case Study of Utilitarian Income Redistribution 13 (Nat’l Bureau of Econ. Rsch., Working Paper No. 14976, 2009) (discussing how a utilitarian model would seemingly support taxing individuals differently based on their height, thus prompting the possibility that the model “fails to incorporate any role for horizontal equity”).} Such non-arbitrary treatment is crucial for the legitimacy of the tax code as it promotes a sense of fairness within society even though people may disagree on distributive principles.\footnote{See Elkins, supra note 110, at 43–44 (“Violation of horizontal equity, while not necessarily fatal, is nevertheless considered a serious flaw in any proposed tax arrangement.”); Ira K. Lindsay, Tax Fairness by Convention: A Defense of Horizontal Equity, 19 FLA. TAX REV. 79, 79 (2016) (arguing “that horizontal equity is best understood as a compromise principle for people who disagree about deeper principles of distributive justice.”).}

On one hand, denying inmate labor from qualifying for the EITC violates horizontal equity. When an incarcerated and non-incarcerated person earn the same wage, the non-incarcerated person is eligible to receive an EITC credit, while the incarcerated person is not. On the other hand, one might argue that denying inmates the EITC does not violate horizontal equity. While horizontal equity tells us similar people should be treated alike, it does not tell us who should be considered similar\footnote{See Paul R. McDaniel & James R. Repetti, Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange, 1 FLA. TAX REV. 607, 608 (1993) (describing Musgrave’s criticism that horizontal equity is meaningless without a way of determining who is equal).} and, if inmates and non-inmates are fundamentally too dissimilar, then differential treatment would not violate horizontal equity.

This latter conception is unsatisfying. First, simply stating that EITC policy views incarceration as an important difference is unsatisfying without explaining why carceral status should matter for tax policy. This point is explored in depth in Section II.C. Second, even if incarcerated individuals are unworthy of equal treatment with ordinary taxpayers, it is much more challenging to elucidate why horizontal equity violations across households where one partner is incarcerated should be accepted. Imagine a married couple with one child where each spouse earns $5,000 and neither is incarcerated. Total household income is $10,000, and the couple would receive a $3,400 Earned Income Credit. Now imagine the same household where each spouse performs the same job, but one spouse earns the $5,000 while incarcerated. Only $5,000 would qualify, leading to a $1,700 credit. The household with an incarcerated member is disadvantaged compared to a household earning the same income where neither partner is incarcerated. This harms members of the household...
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with no culpability for the crimes of the incarcerated earner. It is unclear why tax policy should disfavor households with incarcerated people, especially considering government policies and funding initiatives targeted at alleviating the detrimental repercussions of incarceration on the children, spouses, and communities of incarcerated individuals.\footnote{See, e.g., Isabel Coronado, A New Federal Grant to Ensure That Children of Incarcerated Parents Flourish, \textit{Next100} (Mar. 1, 2021), https://thenext100.org/a-new-federal-grant-to-ensure-that-children-of-incarcerated-parents-flourish [https://perma.cc/Z55N-SMZA] (proposing a $500 million federal grant to support children with incarcerated parents).}

Denying Social Security benefits payments to incarcerated people who have already earned them further violates horizontal equity. As with the EITC, some claim that given a limited and shrinking pool of funds, tax policy is justified in deprioritizing incarcerated individuals since they are not equal to non-incarcerated individuals.\footnote{See Social Security Hearing June 20, 1980, supra note 96, at 5 (statement of Sen. Malcolm Wallop) ("Faced with the decision of raising social security taxes, reducing benefits, or eliminating benefits to prisoners, to shore up the financial condition of the trust funds, the choice seems clear.").} But such an explanation falls short in explaining why carceral status should matter. Furthermore, carceral status does not preclude retired government employees from receiving public pensions,\footnote{See also Paul von Zielbauer, Go Directly to Jail, and Collect Your Pension; Sentiment Rises as Public Officials, Convicted of Crimes like Bribery, Reap Benefits, \textit{N.Y. Times} (Dec. 7, 2003), https://www.nytimes.com/2003/12/07/nyregion/go-directly-jail-collect-your-pension-sentiment-rises-public-officials.html [https://perma.cc/6SJF-LEHX] (describing an incarcerated judge receiving $88,000 a year in state pension benefits, as well as other New York state employees receiving pensions while serving sentences for bribery).} which are similarly drawn out of a limited and shrinking fund pool. During the eleven years Nebraska State Patrol Major Billy Hobbs was incarcerated for child sexual assault, he collected a government pension of at least $1,800 per month.\footnote{Nancy Hicks, You Can Commit a Crime and Still Collect a Public Pension in Many States, \textit{Lincoln J. Star} (Dec. 17, 2017), https://journalstar.com/news/state-and-regional/govt-and-politics/you.%20.%20ion-in-many-states/article_1e68235c-4453-5cc6-b1fa-21a4dce1d37.html [https://perma.cc/KC4W-E7JJ] (describing Section 218 agreements governing government pension benefits).}

Had Mr. Hobbs been a private sector employee, he would have been prevented from collecting Social Security benefits during his incarceration. Horizontal equity between private and public sector employees could be preserved by denying incarcerated government employees their pensions, but garnishing pensions is legally and politically complicated since pensions are sometimes characterized as...
compensation.\textsuperscript{118} This underscores the broader concern of conditioning something one has already earned on carceral status. Even if one believes that incarcerated people should pay for their incarceration costs, it is critical to ask whether the costs they are being asked to pay are proportionate to their upkeep costs or embody some other punitive function. It is one thing to ask inmates to pay for direct costs like food, which scholars have found cost slightly more than three dollars per inmate per day.\textsuperscript{119} It is another to ask inmates to also pay for indirect costs like overhead costs, which together can total approximately $120 per inmate per day.\textsuperscript{120} Unlike with the EITC, in banning Social Security benefits, Congress seemed to be more aware of maintaining household horizontal equity. Congress explicitly created a carveout allowing incarcerated people’s spouses and dependents to keep collecting those Social Security benefits.\textsuperscript{121}

Even if incarcerated people are viewed as having a lower status, the policies are not consistent. The negative impact on the family unit is considered within the current structure of Social Security benefits, but not within the EITC. An inmate and a non-inmate can perform the exact same job, and while the non-inmate can receive EITC benefits, the inmate cannot. Public sector pensions and Social Security benefits are both forms of retirement savings, and while inmates still retain the right to receive public sector pensions, they cannot receive Social Security benefits. If incarcerated and nonincarcerated people are normatively viewed as equals, denying benefits to incarcerated people violates horizontal equity. If they are normatively unequal, horizontal equity is not violated, but tax policy should justify why carceral status matters. With the EITC, excluding incarcerated individuals’ labor disadvantages their families, which is inconsistent with other government programs targeted at improving the lives of families and communities impacted by incarceration.


\textsuperscript{119} Shayda A. Collins & Sharon H. Thompson, What Are We Feeding Our Inmates?, 18 J. CORR. HEALTH CARE 210, 210, 212 (2012) (describing how meals nationally average slightly more than three dollars per day and average about 2,600 calories per prisoner).

\textsuperscript{120} Annual Determination of Average Cost of Incarceration Fee (COIF), 86 Fed. Reg. 49060, 49060 (Sept. 1, 2021) (finding the cost of incarceration of a federal inmate in 2020 to be $120.59 per day on average).

\textsuperscript{121} See SOC. SEC. ADMIN., WHAT PRISONERS NEED TO KNOW 2 (2021), https://www.ssa.gov/pubs/EN-05-10133.pdf [https://perma.cc/CW3N-ZGF7] (“While you’re incarcerated, benefits to your spouse or children will continue as long as they remain eligible.”).
b. Vertical Equity

Vertical equity refers to the idea that those who can pay more should pay more because as income increases, the marginal utility of an additional dollar decreases. From a distributional perspective, excluding incarcerated people from qualifying for the EITC violates vertical equity since incarcerated people, on average, earn less than non-incarcerated people before their incarceration. At first, this may not seem like a problem since the EITC itself already violates vertical equity. The EITC is not targeted at the poorest of the poor (jobless people) but rather at bringing up the take-home income of those who are already working. But the fact the EITC already violates vertical equity does not justify excluding benefits to incarcerated people and thus further violating vertical equity. A common counter-claim is that the EITC need not apply to incarcerated people because the purpose of the EITC is to incentivize people to work and the government can already mandate that incarcerated people work. However, this overly reductive viewpoint ignores the significant economic contributions made from voluntary prison labor. The EITC is designed to reward significant economic contributions at lower income levels, and no clear argument exists to exclude otherwise productive voluntary labor from this program.

However, as with horizontal equity, vertical equity does not explain why carceral status justifies disparate treatment. Since vertical equity focuses on progressivity across households rather than individuals, it is important to understand how incarcerated people fit into tax

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122 See Bankman et al., supra note 31, at 51.
125 See S. Rep. No. 103-412, at 148 (1994). The Senate Finance Committee Report justified the EITC exclusion by stating that “[b]ecause of the compulsory nature of much of the work performed by prison inmates, it does not further the objectives of the EITC to include in earned income for EITC calculations any amounts paid for inmates’ services.” Id.; see also Work Programs, supra note 33 (“Sentenced inmates are required to work if they are medically able.”).
households. Approximately fifty-three percent of incarcerated people have children, and incarceration imposes large financial burdens on these families. Households with an incarcerated father are more likely to face residential instability, neighborhood socioeconomic disadvantages, and to rely on public assistance than those without. Excluding incarcerated people from receiving EITC and Social Security benefits may be forcing incarcerated people to rely more on their families and adding more pressure to households that already bear the burdens of incarceration. Rather than allocate money to households where the marginal utility would be high, the exclusions cut off transfer mechanisms and violate vertical equity. In conclusion, neither horizontal nor vertical equity adequately justifies denying incarcerated people from receiving benefits.

2. Efficiency

Since equity does not provide a compelling justification, this Note next considers the second tax principle: efficiency. Economically efficient taxes minimize distortions to ex-ante individual behavior. People cannot change their behavior to escape an economically efficient tax. For example, a tax where everyone must pay one thousand dollars would be economically efficient because people cannot escape the tax by altering their behavior. In contrast, sin taxes, such as a twenty-five percent tax on alcohol, would be economically inefficient because people could change their behavior to avoid the tax. I

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129 See Christine Leibbrand, Erin Carll, Angela Bruns & Hedwig Lee, Barring Progress: The Influence of Paternal Incarceration on Families’ Neighborhood Attainment, 84 SOC. SCI. RSCH. 1, 8 (2019).


131 See BANKMAN ET AL., supra note 31, at 54–56 for an explanation of economic efficiency and its effect upon individual behavior.

132 See id. at 54 (discussing the perfect efficiency of head taxes).

133 See id. at 54–55 (discussing the substitution effect, or behavior change, in the context of consumption taxes).
argue that economic efficiency does not justify excluding benefits to incarcerated individuals. Tax policy traditionally considers economic efficiency in conjunction with allocative effects, which refer to how government policies influence societal behavior and the distribution of resources. Economic efficiency does not justify denying EITC benefits to inmates. Mandatory inmate labor should not be affected by the EITC because inmates cannot choose to alter the number of hours they work. Allowing voluntary inmate labor to qualify for the EITC may generate economic inefficiencies in the technical sense, but it is unclear why these distortions would be more pronounced for incarcerated people than non-incarcerated people. The distortionary effects of the EITC on work near phaseout thresholds has been heavily discussed in scholarship, but since even voluntary work pays incarcerated people so little, it is highly unlikely that incarcerated people will encounter these distortions.

From an allocative effects perspective, the purpose of the EITC is to induce low-income workers to work. Therefore, it would make sense to deny EITC benefits to mandatory inmate labor. However, allowing voluntary inmate labor to qualify for the EITC may lead to a more socially efficient allocation of prison labor. California is currently facing a shortage of voluntary firefighters. Allowing voluntary inmate labor to qualify for the EITC could be a way to incentivize inmates towards important jobs such as firefighting. Theoretically, higher wages could be used to incentivize inmates to choose more socially efficient jobs. Economic efficiency does not justify excluding inmates from receiving the EITC, and allocative effects may instead suggest including voluntary inmate labor.

134 See id. at 56.
Economic efficiency also does not convincingly justify cutting off previously earned Social Security benefits. Since the benefits were earned for work already performed, there is no ability to adjust behavior and thus no economic inefficiency. Public pensions and Social Security benefits are treated differently, but it seems highly improbable that eligibility of payments once incarcerated is an ex-ante factor one considers when deciding between public and private sector employment. This seems like a truth so obvious it does not need to be stated, but it is important because it illustrates that there is no criminal deterrent effect in denying Social Security benefits to incarcerated people. When someone considers committing a crime, it is highly unlikely that they think about potential future non-eligibility for Social Security benefits.

Allocative effects are the strongest explanation for denying Social Security benefits to inmates. The legislative records behind the benefits repeal repeatedly emphasize the shrinking size of the Social Security Trust Fund. If the tax system views inmates as less worthy than ordinary citizens, then allocative efficiency and distributive concerns may justify denying benefits. But again, simply stating support for allocative efficiency, without justifying why incarcerated individuals should be viewed as less worthy, does not explain the denials. While legislative debates use the language of allocative efficiency, it would be misleading to conclude that this was the entire story. The legislative debates also focus on both the moral unworthiness of incarcerated people and how incarcerated people have no need for money. On the latter point, as previously emphasized, incarcerated people do need money. From a redistributive point of view, denying incarcerated people who are overwhelmingly low-income and low-wealth from the EITC and Social Security benefits does not make much sense, especially when the burden of financially providing for incarcerated people consequentially falls onto their families who are also disproportionately low-income.

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138 See supra notes 116–18 and accompanying text.
140 See Social Security Hearing June 20, 1980, supra note 96, at 5 (“We were alerted just yesterday . . . that interfund borrowing is going to be necessary . . . ”).
141 See id. (“Faced with the decision of raising social security taxes, reducing benefits, or eliminating benefits to prisoners . . . the choice seems clear.”).
142 See, e.g., id. at 8 (statement of G. William Whitehurst) (“Have our laws become so inflexible that our social security administrators must bend over backwards to make sure that another parasite is added to suck the life out of the social security host?”); see also Dolovich, supra note 47 and accompanying text.
143 See supra notes 47–53 and accompanying text.
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While we can keep tossing money at prisons and piecemeal programs in the name of social welfare, we should also consider whether it may be more efficient to simply not block the channels of our existing systems. To recap, economic efficiency does not justify denying incarcerated people the EITC and Social Security benefits, and allocative efficiency can provide additional reasons why we should allow incarcerated people to qualify.

3. Administrability

Since the first two tax principles of equity and efficiency are unsatisfying, I look to the third tenet of the tax code, administrability, which refers to the feasibility of implementation. A tax code that perfectly captures one’s ability to pay may be too invasive or complex to be administrable. Economist Eugene Steuerle argues administrability also encompasses creating a system that taxpayers trust. Fear of fraud is one of the core cited motivations for excluding incarcerated people from receiving the EITC and Social Security benefits.

In 1993, Congress significantly expanded the EITC, and following this change was increased public awareness of and Congressional focus on EITC fraud. In a subcommittee hearing discussing EITC reform, Representative E. Clay Shaw quoted a Senate hearing witness declaring that “the EITC should stand for ‘Easy Income for Tax Cheats.’” Consequently, Congress decided that income earned while in a penal institution did not qualify as earned income. The

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144 JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, CTR. FOR ECON. & POL’Y RSCH., THE HIGH BUDGETARY COST OF INCARCERATION 10 (2010) ("In 2008, federal, state, and local governments spent about $75 billion on corrections.").


146 See To Examine Tax Fraud Committed by Prison Inmates: Hearing Before the Subcomm. on Oversight of the Comm. on Ways & Means, 109th Cong. 6 (2005) (statement of Rep. Jim Ramstad) [hereinafter: Prison Fraud Hearing June 29, 2005], https://www.govinfo.gov/content/pkg/CHRG-109hhrg24905/html/CHRG-109hhrg24905.htm [https://perma.cc/9BG7-GCLQ] ("Tax fraud in any form is unacceptable and illegal, but it is particularly outrageous when it is committed by prison inmates while still behind bars."); STAFF OF COMM. ON WAYS & MEANS, 96th CONG., SOCIAL SECURITY BENEFITS FOR PRISONERS 3 (Comm. Print 1980) ("[T]he subcommittee would be extremely concerned if convicts or other persons are being awarded benefits on the basis of feigned mental illnesses.").

147 See Scott & Crandall-Hollick, supra note 60, at 26 (describing the 1997 emphasis on fraud reduction).


149 See Earned Income Tax Credit: Hearing Before the Comm. on Finance, 104th Cong. 141 (1995) ("The implementing legislation for the General Agreement on Tariffs and Trade enacted in 1994 made four modifications to the EITC. First, it removed from the definition..."
Joint Committee on Taxation estimated that denying incarcerated people the EITC would save $14 million over four years.\footnote{Joint Committee on Taxation, JCX-22-94, Financing Provisions for the Uruguay Round Agreement of the General Agreement on Tariffs and Trade (GATT) 1 (1994). For perspective, the elimination of EITC benefits to nonresident aliens—combined with modifications to the benefits of overseas military personnel—would save $246 million in outlays over the same period (from 1995–1999). \textit{Id.}}

Denying Social Security benefits to prisoners was also grounded in fraud prevention. In the 1980 House Ways and Means Subcommittee Meeting on Social Security Benefits, Senator Malcolm Wallop acknowledged that “[n]o prohibition was written into the law to make inmates of penal institutions ineligible for benefits.”\footnote{Social Security Hearing June 20, 1980, \textit{supra} note 96, at 5 (statement of Sen. Malcolm Wallop).} Despite this, after hearing accounts of mass murderers such as “Son of Sam” . . . collect[ing] several hundred dollars each month in social security benefits because of some asinine qualification procedure” and testimony on how incarcerated people abused the Social Security system,\footnote{Id. at 8 (statement by Rep. G. William Whitehurst). The committee also heard testimony from Michigan Corrections Officer James R. Trout, who witnessed an inmate use benefits money to purchase seven television sets, and Edna Hall, who testified that her incarcerated husband was receiving disability benefits via a faked injury. \textit{Id.} at 61, 71–73.} in 1980, Congress barred inmates from receiving Social Security Disability.\footnote{Social Security Act Amendments, Pub. L. No. 96-473, 94 Stat. 2263, 2265 (1980).} In 1983, Congress went a step further and barred “incarcerated felons from receiving social security benefits of any kind.”\footnote{Koitz, \textit{supra} note 86, at 1.}

Preventing tax fraud may justify the statutory denial of benefits to incarcerated people. In 2015, the IRS identified 24,000 fraudulent tax returns filed under the Social Security numbers of incarcerated people totaling more than $1.3 billion in claimed refunds.\footnote{Treasury Inspector Gen. for Tax Admin., Actions Need to Be Taken to Ensure Compliance with Prisoner Reporting Requirements and Improve Identification of Prisoner Returns 1 (2017) [hereinafter TIGTA 2017].} A method by which incarcerated people commit tax fraud is by filing fraudulent returns using their fellow inmates’ identities.\footnote{See \textit{id.} at 14–15.} Testifying before a House subcommittee, an inmate at a South Carolina prison recounted how he fraudulently filed over six hundred returns worth nearly $3.5 million in the names of fellow inmates.\footnote{Prison Fraud Hearing June 29, 2005, \textit{supra} note 146, at 15 (statement of John Doe).} Ninety percent of his returns were successful.\footnote{Id.} Rather than consume limited IRS or
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Social Security Administration resources filtering bogus claims from valid ones, statutorily prohibiting all inmate claims serves as a cost-saving heuristic. The denial errs on the side of preserving public perception of the integrity of the EITC and Social Security benefits at the expense of denying possibly legitimate inmate claims.

Although fraud prevention is a possible justification for denying benefits, it does not seem to provide a complete rationale. The General Accounting Office’s Report in 1982 notes that denying Social Security Disability benefits to incarcerated people “could be viewed as strictly penal, and unrelated to the purposes of the Social Security program.”¹⁵⁹ Undermining fears of rampant fraud, the report also found that the proportion of inmates in a Texas prison who were receiving disability benefits but were no longer disabled was similar to the proportion within the general population.¹⁶⁰ Furthermore, statutory denials have not eliminated EITC or Social Security benefits fraud.¹⁶¹ Unless Congress can establish that benefits eligibility leads to significant Social Security fraud, or that prisoners have no need for Social Security benefit payments because prisons cover their basic needs, fraud prevention as a rationale rings hollow. In Part III, this Note proposes a solution that can reduce fraud while also accounting for legitimate claims.

B. Non-Punitive Policy Rationales

As demonstrated above, the traditional tax rationales of equity, efficiency, and administrability do not provide compelling justifications for denying EITC and Social Security benefits to incarcerated people. Since the fundamental tax principles fail to explain the exclusions, there must be a policy rationale justifying the decision. Therefore, in this next Section, this Note considers two non-punitive policy rationales. First, that incarcerated people labor in a separate universe from ordinary taxpayers,¹⁶² and second, that incarcerated people have no use for these benefits.


¹⁶⁰ Id. at 10.


¹⁶² See Zatz, supra note 29, at 882–84 and accompanying text (describing how courts typically deemed inmate labor noneconomic under an “exclusive market” view of
The separate spheres justification posits that incarcerated people operate in a separate private sphere where the prison provides non-economic benefits. Carceral institutions are spheres in two senses. First, they are spheres because they operate their own closed economy. Second, they are spheres because they operate independently of the outside market economy. The tax system typically ignores transfers within a private sphere, such as a family. The idea that prisons are a closed universe operating in the periphery of the traditional market economy, and thus a separate sphere, while attractive at first, ultimately does not make sense from a tax perspective.

Traditionally, labor law has framed inmate labor through the ideas of control and economic benefit to the employer. Control refers to who can compel the worker to work, and economic benefit refers to whether the employer receives value from the employee’s work. The separate spheres idea is meant to address the following problem: Courts do not want to acknowledge that prison labor constitutes an employment relationship. But when private companies contract prisoners to voluntarily work outside the prison, as in PIECP programs, the prisoner exerts a degree of control and provides an economic benefit to the employer in a way that resembles a traditional employment relationship.

As a constructive solution, courts emphasize that prison labor has a nonpecuniary “penological purpose.” Providing nonpecuniary benefits means that prisoners and their employers no longer bargain at arm’s length, and the noneconomic benefits of prison work—punishment, maintaining order, preventing recidivism, changing attitudes employment, as inmates are connected to carceral institutions through nonmarket relationships).

163 The economy is equated with the market, and realms of labor which fall outside the latter (such as care between family members) may be treated like separate spheres. See id. at 864 (“Like the more familiar housework and caregiving performed by family members at home, prisoners’ labor is located outside the economy on conventional maps of social spheres drawn by lawyers, demographers, and economists.”).

164 Id. at 917–18 (explaining that, like family housework, “prison housework yields goods and services consumed within the institution and substitutes for what otherwise might have been purchased in ordinary markets”).

165 See id. at 864 (“The prison and the family both are sites of nonmarket work.”).

166 See Zatz, supra note 29, at 862–64.

167 See id. at 871, 892.

168 See id. at 908 (“[P]risoners are not employees,” Judge Posner explained recently, simple as that. No matter what else one might say about inmate work, ‘[t]he prisoner is still a prisoner.’”)

169 Id. at 893 (noting most courts classify inmates as employees under the circumstances described).

170 Id. at 891.
or personality traits linked to offending behavior”\textsuperscript{172}—make it such that “[a]ny payments from the prison are gifts, even if occasioned by inmate labor.”\textsuperscript{173} Intentionally provocative, Professor Noah Zatz points out that by analogizing inmate labor to work within the private family sphere, one can conclude that inmate labor should not be viewed as employment, while simultaneously acknowledging the economic benefit of prison work.\textsuperscript{174}

For tax law purposes, treating incarcerated people and carceral institutions like families, and hence ignoring transfers between the two, does not make sense. The tax system exempts transfers within the family because of the difficulty of discerning when transactions are at arm’s length and because of the invasiveness required for the government to peer into all aspects of family private life and make this determination.\textsuperscript{175} Unlike the family, prison labor is highly organized via “large, bureaucratic institutions in forms quite similar to conventional employment,” and inmate pay is tied directly to work performed.\textsuperscript{176} The presence of a large institutional form thereby addresses administrability concerns. Furthermore, privacy concerns are less applicable to prisoners since their lives are already actively monitored.\textsuperscript{177} The family analogy does not work for inmates because the family model involves a common pool of household resources. When a couple goes out to dinner, they may charge from a joint bank account. Incarcerated people and prisons do not share a joint account. For all these reasons, we reject rationalizing the denials under the non-punitive rationale that prisons are a separate private sphere.

An alternative non-punitive rationale for denying Social Security benefits to incarcerated people is that the government already provides free housing and meals. This claim argues that once one imputes the economic value of the housing and meals, incarcerated people are in a better economic position than nonincarcerated people.\textsuperscript{178} However, this Note argues that prison meals and housing are inadequate substitutes for Social Security benefits. The standard “convenience of

\textsuperscript{172} Id. at 892.
\textsuperscript{173} Id. at 890.
\textsuperscript{174} See id. at 863–64 (“I offer a provocation by way of illustration: prisons are like families.”).
\textsuperscript{175} See Bankman et al., supra note 31, at 134, 142–44.
\textsuperscript{176} Zatz, supra note 29, at 865.
\textsuperscript{177} See, e.g., Hudson v. Palmer, 468 U.S. 517, 525–28 (1984) (holding that a prisoner has no reasonable expectation of privacy protecting him from unreasonable searches and seizures of his cell under the Fourth Amendment).
\textsuperscript{178} See Social Security Hearing June 20, 1980, supra note 96, at 6 (statement of Sen. Malcom Wallop) (“Also, unlike people on the outside who must use their social security checks to provide food, clothing and shelter, prisoners and other inmates have all of these necessities provided for them by the State or Federal Government.”).
the employer” test can help illustrate why providing housing and meals should not necessarily be valued as an imputed improvement. In Benaglia v. Commissioner, the tax court held that a hotel manager’s lodgings at a luxury hotel should not be included in net income because the lodging was necessary for the manager to do his job, and therefore was for the convenience of the employer. Although incarcerated people are not in employer-employee relationships with the government, the net-benefit/net-detriment concept can clarify how we should impute value to the lodging and meals incarcerated people receive.

In demarcating whether a provision should be imputed income, we ask whether the provision is a net-benefit or a net-detrimend. Employees may accept salary reductions for a net-benefit, like a penthouse apartment. Employees may demand salary increases for net-detriments, like being forced to live inside a bank building. Generally, prison living conditions and meals are subpar, and would be considered a net-detrimend. The net-detrimend nature invalidates justifying Social Security benefit denials to prisoners on the grounds that they already receive care.

C. The Punitive Rationale

I. Explaining the Punitive Rationale

This Note rejects two non-punitive policy justifications explaining the benefits exclusions. The three core tax principles also do not seem to provide a persuasive justification for the exclusions. However, there is one obvious policy rationale which has not been examined yet: that the exclusions serve a punitive purpose.

\(^{179}\) See Erik M. Jensen, Food for Thought and Thoughts about Food: Can Meals and Lodging Provided to Domestic Servants be for the Convenience of the Employer?, 65 Ind. L.J. 639, 639 (1990).

\(^{180}\) Benaglia v. Commissioner, 36 B.T.A. 838, 839–40 (1937) (explaining that, if the “convenience to the employer” test is satisfied, meals and lodging are not taxable income).

\(^{181}\) This “net-benefit/net-detrimend” concept is a framework of Professor Mitchell Kane’s from his Spring 2020 class at NYU School of Law on federal income taxation.

\(^{182}\) Id.

\(^{183}\) Id.

\(^{184}\) See Tennant v. Smith, 3 T.C. 158, 158 (1892) (holding that the mandatory lodging of a manager in the bank in which he worked is not income for the purpose of an abatement).

\(^{185}\) See, e.g., Alexi Jones, Cruel and Unusual Punishment: When States Don’t Provide Air Conditioning in Prison, Prison Policy Initiative (June 18, 2019), https://www.prisonpolicy.org/blog/2019/06/18/air-conditioning [https://perma.cc/L6AP-Y497] (describing inmates suffering from heat stroke in Southern states); Collins & Thompson, supra note 119, at 212 (describing how meals cost less than three dollars a day and averaged about 2,600 calories per prisoner at one detention center in 2009).
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It is important to note that not all benefit denials are punitive. After all, the tax code bestows benefits to certain groups for certain behaviors, which creates de facto exclusions. For example, to be eligible for the Child Tax Credit, households need to have children. It would be difficult to argue that households without children are thus being punished. This would lead to a recasting of every decision on benefit eligibility as being unduly punitive to those denied benefits. To be clear, the usage of the word “punitive” here does not refer to the disincentive of not having a benefit, but rather the moral judgment and resulting consequences that stem from the taxpayer’s status as an incarcerated person. Similar to how Professor Francine Lipman uses an immigration lens to understand the EITC and Social Security benefits exclusions to undocumented immigrants, here we use a criminal justice perspective to understand the exclusions to incarcerated people.

Denying incarcerated people benefits may be justified on retributive grounds as the tax system levying an additional form of punishment. Incarcerated people are fundamentally different from ordinary taxpayers because they are serving out a punishment. Similar to how prisoners are stripped of voting rights during incarceration for retributive reasons, retribution would justify stripping prisoners of tax benefits they would otherwise be entitled to as ordinary citizens. In other words, a potential policy justification for treating incarcerated people differently under the tax system is that the criminal justice system has already decided that they are guilty and worthy of punishment.

The punitive rationale is not merely an explanation of last resort. Rather, there is explicit evidence for it. The legislative history behind these benefits denials is laced with punitive rhetoric. In introducing a bill cutting off Social Security benefits to incarcerated people, Representative Bill Archer of Texas argued that “we also do not want to see our society bestow its largess on those who would do it damage.” Representative G. William Whitehurst of Virginia characterized incarcerated persons who received Social Security benefits as “parasitic members of society who are drawn to it like moths to a

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186 See Lipman, supra note 130, at 52–53.
187 While criminal law has multiple purposes, such as incapacitation and rehabilitation, discussing all the purposes exceeds the scope of this Note.
188 See generally Richard L. Lippke, The Disenfranchisement of Felons, 20 LAW & PHIL. 553 (2001) (describing how the disenfranchisement of people convicted of felonies has been justified).
flame.”\textsuperscript{190} Lawrence Thompson, the Social Security Administration’s Associate Commissioner for Policy, explicitly raised the concern that conditioning Social Security benefits on imprisonment status could have an inappropriate punitive effect,\textsuperscript{191} and that, historically, incarceration was not a basis for denying Social Security benefits.\textsuperscript{192} Commissioner Thompson noted that denying Social Security benefits to all prisoners was overinclusive, could raise legal due process and equal treatment concerns, and violated the earned nature of benefits payments, since prisoners had paid their taxes but could not reap the benefits.\textsuperscript{193}

The natural normative question, then, is whether the tax system should be used to enact retributive criminal justice punishment. Tax policy is generally justified on utilitarian and rehabilitative principles.\textsuperscript{194} Although the tax system has been used to incentivize and deter certain activities, which could broadly be viewed as punishment, the underlying rationale is utilitarian.\textsuperscript{195} H.L.A. Hart argues that while both tax and criminal law try to change people’s behavior, the major difference is that criminal law punishes because it announces to society that certain actions are bad and not to be done.\textsuperscript{196} Criminal law needs to be overt to fulfill one of its primary purposes, which is to set standards of behavior and protect the moral order.\textsuperscript{197} Taxes can discourage activities, but it would be a stretch to claim that tax law’s primary, overt purpose is to punish murderers.

Furthermore, unlike retribution in criminal law, which is limited to the offender for a given offense, retributing against prisoners by denying the EITC and Social Security benefits harms the entire tax household and is more closely related to the inmate’s incarcerated status than the actual crime committed. As H.L.A. Hart emphasizes, the criminal justice system is very hesitant to punish an offender’s

\textsuperscript{190} Id. at 11 (statement of Rep. G. William Whitehurst).

\textsuperscript{191} Id. at 40 (statement of Lawrence Thomas, Associate Comm’r for Policy, Social Security Administration).

\textsuperscript{192} Id. at 36–37.

\textsuperscript{193} See id. at 36–38 (“With rare exception, a person’s eligibility for social security is based upon work in employment covered by social security, and without regard to individual need or circumstances.”).


\textsuperscript{195} Id.; see also LON L. FULLER, THE MORALITY OF LAW 57–60 (1969) (drawing analogies between tax law and criminal law).


\textsuperscript{197} Id. at 8.
family members. Even if punishment justifies deprioritizing inmates in terms of vertical equity, it does not justify the additional harm it imposes on the household. The tax system’s focus on household filers makes it a poor fit for administering punishment.

2. Why the Punitive Rationale Is Problematic

As shown above, the desire to punish incarcerated people best explains why the tax system denies them the EITC and Social Security benefits. This is normatively problematic as the tax system should not be used to silently levy additional punishment. Even if one disagrees with the normative claim, new understandings of the relationship between racism, mass incarceration, and the social safety net should at least prompt us to ask if these statutory benefits denials are appropriate today.

The denial of benefits to incarcerated people did not operate in a silo. In 1964, President Lyndon B. Johnson declared his War on Poverty. While simultaneously acknowledging that racism led to a vicious cycle of poverty for Black people, President Johnson held Black people morally accountable by attributing their poverty to the “breakdown of the Negro family structure.” This commenced an “anti-welfare, pro-work sentiment [that] pervaded the national culture.” As women entered the workforce en masse, and women of color migrated to the North, the racial composition of welfare changed such that “[a]lthough the majority of welfare recipients had always been white, almost half were people of color after 1958.”

During the 1970s, President Richard Nixon advocated replacing welfare programs such as the Aid to Families with Dependent Children (AFDC) with programs conditional on work. In the 1980s, President Ronald Reagan racialized welfare by drawing on caricatures of welfare queens and “slash[ing] federal and state welfare expenditures.”

Congress shifted the burden of anti-poverty measures onto

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198 See id. at 11. See also Max Stier, Note, Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter, 44 Stan. L. Rev. 727, 728 (1992) (describing how the Constitution prohibits corruption of blood, meaning punishing other family members for one family member’s crimes).


200 Id. at 153.

201 Ventry, supra note 15, at 985.


203 Ventry, supra note 15, at 989 (discussing the political debates surrounding the aid programs and the support for work incentives).

204 See KOHLER-HAUSMANN, supra note 202, at 163–65.

205 Ventry, supra note 15, at 1002 (describing the Reagan-era cut to AFDC funding).
the EITC, which was perceived as rewarding the working, deserving poor.\textsuperscript{206} As the EITC grew, “the nation’s social safety net—as it was traditionally conceived—started to shrink.”\textsuperscript{207}

Coinciding with the shift away from welfare was an increase in mass incarceration. “In 1980, the United States spent three times more money on food stamps and welfare grants than on corrections. By 1996, the balance had reversed, with the nation devoting billions more to corrections than the two principal programs for the poor.”\textsuperscript{208} The United States currently has both the most incarcerated people and the highest incarceration rate in the world.\textsuperscript{209} Mass incarceration is not race neutral. People of color make up 37% of the U.S. population but 67% of the prison population,\textsuperscript{210} while “Black men are six times as likely to be incarcerated as white men.”\textsuperscript{211} Incarceration harms not just the individual being confined, but also the individual’s family and the wider community.\textsuperscript{212}

Evaluating the racial consequences of tax code provisions is a difficult task because the Internal Revenue Code does not contain any explicit racial provisions other than those involving Native Americans.\textsuperscript{213} Since tax returns do not ask for race, it is very difficult for scholars to gather empirical evidence.\textsuperscript{214} However, “historical racism and contemporary patterns of racial discrimination and bias deeply affect a household’s income, types of income, saving, and consumption,” which are then exacerbated by preferences ingrained in

\textsuperscript{206} See id. at 1003–04 (describing how the EITC was chosen as the next vehicle to provide aid as wages fell and inequality sharpened).

\textsuperscript{207} Id. at 1008 (explaining how work-based assistance came to replace traditional programs as the bulwark against poverty for millions).

\textsuperscript{208} KOHLER-HAUSMANN, supra note 202, at 1–2.


\textsuperscript{211} See Criminal Justice Facts, supra note 209.


\textsuperscript{214} See Jeremy Bearer-Friend, Should the IRS Know Your Race? The Challenge of Colorblind Tax Data, 73 Tax L. Rev. 1, 2–7 (2019).
the tax code. Scholars have uncovered startlingly disparate racial impacts on seemingly race-neutral provisions.

Barring an incarcerated person’s labor from qualifying for the EITC may explain racial disparities in EITC recipiency rates and in turn perpetuates racial inequality. A popularly held—but unsupported—belief is that the EITC disproportionately benefits the Black community because the EITC benefits the poor. Moreover, since the EITC predominantly benefits single mothers, and the percentage of Black single mothers is much higher than that of white single mothers, the idea is that Black people benefit more. Using empirical analysis, Professor Dorothy Brown debunks these beliefs: “Whites are twice as likely as Blacks to be eligible for the EITC, and . . . the percentage of the EITC-eligible population that is White exceeds the combined percentages of Black and Hispanic eligibles.”

This is because many Black people lack the earned income needed to qualify for the EITC. However, Professor Brown fails to address a key question: Why are Black people not earning this income? One answer could be that because Black people are incarcerated at a disproportionately high rate, those individuals working while incarcerated are not earning EITC-qualifying income.

Beyond EITC, denying Social Security benefits to incarcerated people further perpetuates racial inequality. Black people heavily rely

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216 See, e.g., BARADARAN, supra note 199, at 253–54 (highlighting how seemingly race-neutral mortgage interest deductions actually disadvantage Black people).

217 See Dorothy A. Brown, The Tax Treatment of Children: Separate but Unequal, 54 EMORY L.J. 755, 801–02 (2005) (noting that “[a]cademics describing the racial implications of the EITC uniformly agree that Blacks disproportionately benefit” but arguing that there is only “weak empirical support found in the existing literature” for the hypothesized factors that lead Black people to disproportionately benefit).

218 See Bruce D. Meyer, The Effects of the Earned Income Tax Credit and Recent Reforms, 24 TAX POL’Y & ECON. 153, 156 (2010) (“On the basis of data for 2007, the table suggests that nearly 50% of EITC dollars go to single mothers.”).

219 Brown, supra note 217, at 808.

220 Id. at 764.

221 See id. at 825 (showing that between 1990 and 1994, over 35% of potential Black taxpayers with children were ineligible for the EITC because they had no earned income, compared with between 7% and 9% of potential white taxpayers).

on Social Security benefits for retirement.\textsuperscript{223} Though Black people and white people save at similar rates, the wealth gap between Blacks and whites persists.\textsuperscript{224} Black people tend to have less in traditional retirement savings vehicles such as 401(k) and IRA accounts.\textsuperscript{225} If incarcerated people, who are disproportionately Black, cannot earn Social Security credits for work while institutionalized, they may be permanently set back in saving for retirement.\textsuperscript{226} Financial instability is highly correlated with recidivism.\textsuperscript{227} As the number of released older inmates increases and states consider implementing compassionate release policies, it is important to consider the resources available to older inmates.\textsuperscript{228}

In conclusion, disqualifying incarcerated people from the EITC and receiving Social Security benefits, especially when considered alongside the history of welfare reform and the rise in mass incarceration, has led to deleterious effects on the Black community. New understandings of how these harms are interwoven should push us to reexamine the denials.


\textsuperscript{224} Baradaran, supra note 199, at 249, 253 (noting that despite comparable savings rates between Black people and white people—11% and 10%, respectively—the average net wealth of Black families is $11,000 compared to $141,900 for white families).

\textsuperscript{225} Spriggs \& Furman, supra note 223, at 4 (“While 43 percent of white households have retirement savings accounts (IRAs or 401(k)s), only 18 percent of African American and Hispanic households do.”).

\textsuperscript{226} Maria Ines Zamudio, Poll: Older Ex-Cons Have Fewer Sources of Retirement Income, AP News (May 4, 2017), https://apnews.com/article/095721d078a4f078a18eb45ca2121f2 [https://perma.cc/G4N7-WYAT] (“69 percent of older Americans who reported having been incarcerated felt anxious about the amount of money they have saved for retirement, compared with 52 percent of those who didn’t serve time.”).


III

HOW TO ADDRESS THE PROBLEM

“We must remember that Congress made the law, and Congress can change the law.”

—U.S. Representative Toby Roth, 1980

As discussed in Part II, the clearest reason why incarcerated people are excluded from receiving benefits is because the tax system is punishing them. Non-punitive policy justifications feel incomplete, and the only semi-plausible tax principle is the desire to avoid fraud. This Note normatively claims that the tax system should not be used to punish incarcerated people. Furthermore, new understandings of the rampant racism underlying mass incarceration and changes to the welfare state should prompt us to reevaluate the statutory denials of benefits. This Part proposes two policy changes to fix the problem: repeal the statutory exclusions and mandate all inmates file tax returns.

A. Repeal Statutory Exclusions

This Note proposes a repeal of the statutory provisions excluding incarcerated people from qualifying for the EITC and from receiving Social Security benefits, in tandem with imposing mandatory inmate filing. These statutory provisions should be repealed for cost-benefit and equity reasons.

First, repealing statutory benefit denials will not be inordinately expensive. If prison wages stay at their current level, incarcerated people will only receive small EITC benefits. Using data from the Survey of Inmates, I calculate that median yearly inmate earnings are $312, corresponding to a $24 EITC credit.\textsuperscript{230} Even though $24 seems

\textsuperscript{229} Social Security Hearing June 20, 1980, supra note 96, at 25 (arguing for changing the law to deny Social Security Benefits to prisoners).

\textsuperscript{230} Using the state level dataset, first, earnings were estimated by multiplying the reported amount an inmate is paid (V2489) by the appropriate pay period (V2490). There are four values for pay period—hours, day, week, and month. For hourly pay, the variable V2471 corresponds to the number of hours the inmate worked the previous week. To estimate yearly pay for inmates reporting on an hourly level, hourly pay was multiplied by the number of hours the inmate worked per week and by 52. To estimate the yearly pay for inmates who reported pay on a daily level, the pay was multiplied by 365. To estimate yearly pay for inmates who reported pay on a weekly level, this was multiplied by 52. This would most likely overestimate yearly pay. The top 5\% of outcomes were windsorized to correct for outliers and then calculated the median at $312. See Bureau of Just. Stat., Survey of Inmates in State and Federal Correctional Facilities, [United States], 2004 (ICPSR 4572) (2019), https://doi.org/10.3886/ICPSR04572.v6 [https://perma.cc/WK9U-QVBW] [hereinafter Survey of Inmates]. The 7.65\% rate for a filer with zero children is then multiplied by the $312 to arrive at a credit of approximately $24.
small, given the distortion of prison prices, it may have an outsized effect. Using the same survey data, I find that less than seven percent of inmates report receiving Social Security benefits payments prior to incarceration.\footnote{231}{Using the state level dataset and the variable SES_INCOMESOCSECMTH, the percentage of inmates who reported having social security benefits the month prior to incarceration was calculated at 6.1%. \cite{See Survey of Inmates, supra note 230.}} One fear could be that the exclusions are currently deterring inmates from claiming false benefits. It is practically impossible to estimate the magnitude of the deterrent effect using existing data. But the ensuing mandatory inmate filing could check fraud concerns by providing a benchmark for the general inmate population.

In the absence of express statutory language excluding incarcerated people from receiving benefits, judges have acknowledged the unique financial hardships incarcerated individuals and their families face. In response to the IRS’s guidance in blocking incarcerated people from receiving stimulus checks, a class action lawsuit was filed on behalf of persons “who are or were incarcerated, otherwise met the criteria to receive an EIP [stimulus check] under the CARES Act, but did not receive an EIP.”\footnote{232}{See Scholl v. Mnuchin, 489 F. Supp. 3d 1008, 1020 (N.D. Cal. 2020).} The plaintiffs sought a preliminary injunction enjoining the IRS from withholding Economic Impact Payments.\footnote{233}{Id. at 1023.} In analyzing the irreparable harm that would result to plaintiffs, Judge Phyllis J. Hamilton noted that incarcerated people tend to come from economically disadvantaged backgrounds and independently lack resources to afford basic necessities such as food, hygiene products, and communication.\footnote{234}{See id. at 1040–41.} COVID-19 both constrained in person visits and added financial hardship to families who traditionally support incarcerated people.\footnote{235}{Id. at 1039–40.} Fundamentally, “the economic downturn affecting Americans outside of prison also impacts those inside prison.”\footnote{236}{Id. at 1039. Consequently, Judge Hamilton granted a preliminary injunction enjoining the government “from withholding benefits pursuant to 26 U.S.C. § 6428 . . . on the sole basis of . . . incarcerated status.” Id. at 1047. The IRS appealed to the district to stay the preliminary injunction, but the district court denied the motion, and the Ninth Circuit dismissed the appeal of the stay denial. Scholl v. Mnuchin, 494 F. Supp. 3d 661, 692}
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Statutory repeal of benefit denials to incarcerated people may be particularly promising at this time because both Congress and political movements have acknowledged the undue financial burdens incarcerated people and their families face. After Judge Hamilton’s ruling, Senators Tom Cotton, Bill Cassidy, and Ted Cruz introduced a bill to exclude incarcerated people from receiving the third economic impact payments, but the bill was voted down.\textsuperscript{237} In explaining why incarcerated people should not be denied benefits, Senator Dick Durbin emphasized that denying stimulus payments would cause harm to their families and reiterated the pervasive harm such denials have on Black communities.\textsuperscript{238} The high costs of inmate communications have also attracted political attention: In August 2020, Senators Amy Klobuchar, Tammy Duckworth, Cory Booker, and Brian Schatz sent a letter to Senate leaders urging Congress to address the burden that high interstate telephone call rates to incarcerated people place on women.\textsuperscript{239}

However, not everyone is in favor of improving incarcerated people’s financial situations. Senator Tom Cotton expressed his opinion that incarcerated people should not receive stimulus checks as “[t]hey haven’t lost their jobs, they aren’t worried about paying rent or buying groceries.”\textsuperscript{240} In Missouri, state senator Tony Luetkemeyer proposed legislation redirecting incarcerated peoples’ stimulus payments to their victims.\textsuperscript{241}


\textsuperscript{238} See \textit{167 Cong. Rec. S}1257 (daily ed. Mar. 5, 2021) (statement of Sen. Durbin) (“Children should not be forced to go hungry because a parent is incarcerated.”).

\textsuperscript{239} See Letter from Amy Klobuchar, Tammy Duckworth, Cory A. Booker & Brian Schatz, United States Sens., to Mitch McConnell, Majority Leader, United States Senate, and Charles Schumer, Minority Leader, United States Senate (Aug. 6, 2020), https://www.klobuchar.senate.gov/public/_cache/files/0/1/0/1e71bd8-3fbb-4de1-86c5-9908141f4e1c/B49AD31A72DFC628F81CB72EC1E09373.0806220letter.pdf [https://perma.cc/9WJ5-JWKR] (noting that women paid eighty-seven percent of the cost of staying connected with incarcerated persons).

\textsuperscript{240} Tom Cotton (@SenTomCotton), \textsc{Twitter} (Mar. 6, 2021, 10:35 AM), https://twitter.com/sentomcotton/status/1368223859990280199 [https://perma.cc/C7V9-MTV5].

have recently implied that not barring all inmates from receiving benefits is the equivalent to personally bestowing benefits upon inmates who have committed the most atrocious crimes. But the overwhelming majority of incarcerated individuals are not murderers. Rather than allowing incendiary rhetoric concerning a few to drive policy, we should make principled decisions based on the aggregate impact the policy will have on millions of incarcerated people, their families, and their surrounding communities.

B. Mandatory Inmate Filing

Mandatory filing would effectively address inmates committing tax fraud. The IRS proactively identifies potentially fraudulent tax returns by spotting multiple refunds filed under the same Social Security number. Because most incarcerated people do not file tax returns, the incarcerated population is susceptible to tax fraud through identity theft. Mandatory filing for all incarcerated people would account for each incarcerated individual and consequently make fraud easier to detect. Prisons could issue 1099-MISC forms to incarcerated people, which are already required for those earning above six hundred dollars. Existing resources such as the IRS-sponsored Volunteer Income Tax Assistance Program, could ease the practical burden of mandatory filing.

It is hard to compare the costs of mandatory filing against the current prison tax fraud deterrence mechanisms. The IRS relies on compliance by prison officials to detect tax fraud.
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requires the “head of the Federal Bureau of Prisons and the head of any State agency charged with the responsibility for administration of prisons” to provide biographical information, incarceration information, and a taxpayer identification number for each inmate.249 Even with this requirement, the quality of the list of incarcerated people reported to the IRS remains suspect. In 2017, the data provided to the IRS failed to account for four million prisoners as identified by the Social Security Administration.250 Had these four million prisoners been accounted for, the IRS would have been able to identify thirteen thousand suspicious returns corresponding to forty-one million dollars in refunds.251 The IRS has also implemented voluntary compliance measures such as the Blue Bag program where “[p]articipating prisons monitor and intercept outgoing and incoming tax-related correspondence,” which is then forwarded to an IRS review center.252 Given the understandable lack of disclosure surrounding the IRS’s fraud detection procedures, it is hard to conduct a robust cost-benefit analysis comparing the current tax fraud measures with a mandatory filing system. The cost of mandatory filing could be more expensive overall due to increased processing volume. However, one clear benefit of mandatory filing is that it avoids the cat-and-mouse-game of the current procedures which allocates scarce IRS resources towards increased screening measures.253

Mandatory filing has the additional benefit of increasing financial transparency surrounding prison conditions. Prison labor reform advocates criticize the lack of uniform data on prison wages, prison costs, and commissary costs.254 The multifaceted operation of the criminal justice system means a lot of the data around incarcerated

Identification of Prisoner Returns (July 24, 2017), https://www.treasury.gov/tigta/press/press_tigta-2017-15.htm [https://perma.cc/E4JS-7DZ4] (“[T]he Federal Bureau of Prisons and State Departments of Corrections are required to provide the IRS with an electronic list of all the prisoners incarcerated . . . [which becomes] the cornerstone . . . to identify and prevent the issuance of fraudulent refunds to individuals filing false tax returns using a prisoner SSN.”).

250 TIGTA 2017, supra note 155, at 8.
251 Id.
254 See Sawyer, supra note 5 (noting the difficulty of compiling a comprehensive wage list across state prison jobs); Raher, supra note 48 (“Understanding commissary systems can be daunting. Prisons are unusual retail settings, data are hard to find, and it’s hard to say how commissaries ‘should’ ideally operate.”).
people is highly fragmented. Reformers call for increasing transparency. Arguably, the IRS is the best agency at collecting wage information. The IRS is well experienced in homogenizing data from all employers, including self-employed individuals. Prisons often cloak large segments of a vulnerable population from economic accounting metrics. Indeed, excluding incarcerated people from the labor force paints a distorted picture of the nation’s overall well-being. Mandating incarcerated people file federal tax returns provides additional benefits by addressing this shortfall of measurable data.

CONCLUSION

With the racial tension permeating our nation and the ongoing COVID-19 pandemic comes a heightened awareness of the mess that is mass incarceration. This could be a pivotal moment to improve the treatment of incarcerated people by allowing them access to our largest antipoverty programs. The denials of the EITC and Social Security benefits to incarcerated people are not well justified by fundamental tax principles or non-punitive rationales. To understand the law as it currently stands, we need to acknowledge the punitive intent underpinning the original denials. If we can move beyond using the tax system to punish incarcerated people—by mandating that prisoners file tax returns and by repealing the existing statutory exclusions for EITC and Social Security—we can take a long-overdue step towards correcting our broken corrections system.

255 See id.; see generally Data Toolbox, Prison Pol’y Initiative, https://www.prisonpolicy.org/data [https://perma.cc/T93C-3JGH] (compiling “previously unavailable or incompatible data” from a wide range of national and state sources).


257 See Western, supra note 12, at 87 (“In many cases, prison and jail inmates are not counted in government measures of economic activity, joblessness, or poverty.”).