

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

BELINDA LEE*

This Note describes how the tax system treats inmates,¹ 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.

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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.² Despite what some pundits claim,³ 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.⁴ While incarcerated people earn an average minimum daily wage of \$0.86,⁵

² Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POLY INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [<https://perma.cc/MJ4T-MTCS>] (reporting 113 million American adults “[h]ave an immediate family member who has ever been to prison or jail”); Stella U. Ogunwole, Megan A. Rabe, Andrew W. Roberts & Zoe Caplan, *Population Under Age 18 Declined Last Decade*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html> [<https://perma.cc/Y293-HDSZ>] (reporting 258.3 million adults in the 2020 census).

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://prisoninsight.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.”).

⁵ Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POLY INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages> [<https://perma.cc/7FLR-VAG7>].

the price of basic goods and services often exceeds their wages. For example, aspirin costs \$1.36 in some states,⁶ while the average fifteen-minute phone call costs \$5.74.⁷ In addition, family members often shoulder extra financial burdens such as the court fees, fines, and restitution payments involved in the incarceration process.⁸ On average, the extra financial burdens cost over \$13,000.⁹ 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.¹⁰

Financial hardship and the criminal justice system are intertwined. Not only do the majority of inmates come from low-income backgrounds,¹¹ but incarceration jeopardizes both the individual's present economic situation and, upon release, the stigma of incarceration reduces their future earnings and employment prospects.¹² Not

⁶ *Canteen Services*, COLO. CORR. INDUS., <https://www.doccanteen.com/index.html#printable> [<https://perma.cc/2KKX-ZM89>].

⁷ Press Release, Peter Wagner & Alexi Jones, Prison Pol'y Initiative, State of Phone Justice: Local Jails, State Prisons, and Private Phone Providers, (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html [<https://perma.cc/3WXU-KAN8>].

⁸ See SANETA DE VUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS & AZADEH ZOHRABI, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 13 (2015) (discussing how court fines, fees, restitution payments, and other costs burden incarcerated individuals' families).

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.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/poverty-disadvantage-2007.pdf> [<https://perma.cc/M954-PJP8>] (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> [<https://perma.cc/37X3-XC77>] (finding that prior to incarceration, incarcerated people earned “41% less than nonincarcerated people of similar ages.”).

¹² See AMES C. GRAWERT, CAMERON KIMBLE & JACK FIELDING, BRENNAN CTR. FOR JUST., POVERTY AND MASS INCARCERATION IN NEW YORK: AN AGENDA FOR CHANGE 7 (2021), <https://www.brennancenter.org/our-work/policy-solutions/poverty-and-mass-incarceration-new-york-agenda-change> [<https://perma.cc/8DSN-ZY4V>] (demonstrating that formerly imprisoned people earn on average \$484,000 less during their life than similarly situated non-imprisoned people); Justin Stabley, *People Leaving Prison Have a Hard Time Getting Jobs. The Pandemic Has Made Things Worse*, PBS NEWSHOUR (Mar. 31, 2021, 5:55 PM), <https://www.pbs.org/newshour/economy/people-leaving-prison-have-a-hard-time-getting-jobs-the-pandemic-has-made-things-worse> [<https://perma.cc/8HVW-CP8H>] (describing how formerly incarcerated people have a higher unemployment rate than the general population); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 85–107 (2006) (stating that the obstacles to job seeking are a long-run effect of incarceration).

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.¹³

Attempts at counteracting poverty have been largely piecemeal,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.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.¹⁶ Federal employment taxes fund and determine eligibility for Social Security benefits,¹⁷ which lift over twenty-two million

¹³ See Michael McLaughlin, Carrie Pettus-Davis, Derek Brown, Chris Veeh & Tanya Renn, *The Economic Burden of Incarceration in the United States* (Inst. for Just. Rsch. and Dev., Working Paper No. IJRD-072016, 2016), https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication_pdfs/Economic_Burden_of_Incarceration_IJRD072016_0_0.pdf [<https://perma.cc/S6PE-G6RC>] (assigning monetary values to various consequences of incarceration and estimating visitation costs alone at \$800 million per year).

¹⁴ See SARAH MINTON & LINDA GIANNARELLI, 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, *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-occa34.pdf> [<https://perma.cc/RYS6-5VJX>] (listing a variety of social service programs administered at the state level that provide assistance to low-income households).

¹⁵ See Burt et al., *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., *The Collision of Tax & Welfare Politics: The Political History of the Earned Income Tax Credit, 1969–99*, 53 NAT'L TAX J. 983 (2000) (detailing the history of utilizing tax reform to develop a social welfare system conditioned on working).

¹⁶ Chuck Marr, Kris Cox, Stephanie Hingten, Kate Windham & Arloc Sherman, *House COVID Relief Bill Includes Critical Expansions of Child Tax Credit and EITC*, CTR. BUDGET & POL'Y PRIORITIES 1 (2021), <https://www.cbpp.org/research/federal-tax/house-covid-relief-bill-includes-critical-expansions-of-child-tax-credit-and> [<https://perma.cc/9NTC-M6JA>].

¹⁷ See *How Is Social Security Financed?*, SOC. SEC. ADMIN., <https://www.ssa.gov/news/press/factsheets/HowAreSocialSecurity.htm> [<https://perma.cc/5ZP2-EMX3>] (explaining how payroll taxes fund Social Security benefits); *Social Security Credits*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/retirement/planner/credits.html> [<https://perma.cc/38Z6-KAFL>] (“You must earn at least 40 Social Security credits to qualify for Social Security benefits. You earn credits when you work and pay Social Security taxes.”).

Americans out of poverty.¹⁸ However, inmates are currently ineligible for the EITC and Social Security benefits.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.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."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.²² Prisons started seizing stimulus checks and returning them to the IRS.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.²⁴ To this date, the IRS has never provided a justification for its position.²⁵ Around \$2

¹⁸ Kathleen Romig, *Social Security Lifts More Americans Above Poverty Than Any Other Program*, CTR. BUDGET & POL'Y PRIORITIES 1 (2022), <https://www.cbpp.org/research/social-security/social-security-lifts-more-people-above-the-poverty-line-than-any-other> [<https://perma.cc/XZ6R-WXKC>].

¹⁹ 26 U.S.C. § 32(c)(2)(B)(iv); Nonpayment of Benefits to Prisoners, 20 C.F.R. § 404.468 (2021).

²⁰ 2020 Recovery Rebates for Individuals, 26 U.S.C. § 6428; Coronavirus Aid Relief and Economic Stabilization (CARES Act), 15 U.S.C. §§ 9001–9013, 9021–9034, 9041–9063. Eventually, Congress authorized three rounds of Economic Impact Payments. See *SOI Tax Stats—Coronavirus Aid, Relief, and Economic Security Act (CARES Act) Statistics*, INTERNAL REVENUE SERV., <https://www.irs.gov/statistics/soi-tax-stats-coronavirus-aid-relief-and-economic-security-act-cares-act-statistics> [<https://perma.cc/KR62-Y6RY>].

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

²² See *Scholl v. Mnuchin*, 489 F. Supp. 3d 1008, 1022 (N.D. Cal. 2020) (describing an archived version of Question 15 on the IRS "Frequently Asked Questions" page stating that incarcerated people are ineligible for Economic Impact Payments). For an updated version, see *Questions and Answers about the First Economic Impact Payment—Topic A: Eligibility*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/economic-impact-payment-information-center-topic-a-eip-eligibility-and-general-information> [<https://perma.cc/Y5MZ-F56S>] [hereinafter IRS FAQ Q A7].

²³ See Rebecca Boone, *Inmates Got Coronavirus Stimulus Checks, and the IRS Wants Them Back*, A.P. NEWS (June 24, 2020, 10:32 AM), <https://apnews.com/article/0810bb67199c9cef34d4d39ada645a92> [<https://perma.cc/83R7-R84E>] (describing how prisons in Utah, Vermont, Pennsylvania, and Oregon intercepted IRS checks to prisoners).

²⁴ *Id.*

²⁵ See Leslie Book, *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.²⁶ Eventually, the Northern District of California overturned the IRS's position in *Scholl v. Mnuchin*.²⁷

The IRS's sudden decision prompted tax scholars to reexamine the tax treatment of incarcerated individuals.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.

n.131 (2021). In *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 id.* at 696; *Scholl v. Mnuchin*, 494 F. Supp. 3d 661, 692–93 (N.D. Cal. 2020).

²⁶ The rest of this footnote describes how this estimate was calculated. *See* Chandra Bozelko, *Prisoners Don't Need COVID Stimulus Checks*, 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 *Scholl v. Mnuchin*, *see* IRS FAQ Q A7, *supra* note 22, inmates would be eligible for the second stimulus payment of \$600, *see Questions and Answers About the Second Economic Impact Payment*, INTERNAL REVENUE SERV. (Sept. 27, 2021), <https://www.irs.gov/coronavirus/second-eip-faqs> [<https://perma.cc/FT9J-DDYR>], and the third stimulus payment of \$1,400, *see Third Economic Impact Payment*, 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.

²⁷ *Scholl v. Mnuchin*, 494 F. Supp. 3d 661, 692–93 (N.D. Cal. 2020).

²⁸ *See, e.g.*, Book, *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, *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 market²⁹ 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.”³⁰ 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.³¹ At the federal level, the U.S. government collects the bulk of its money via the federal income tax.³² This Part has two purposes. First, it identifies how the tax system treats inmates’ income

²⁹ See Noah Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 864 (2008) (describing sociological conventions demarcating the classical market economy sphere and the private family non-market sphere).

³⁰ LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 3 (2004).

³¹ See JOSEPH BANKMAN, DANIEL SHAVIRO, KIRK STARK & EDWARD KLEINBARD, *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”³³ and “[i]nmates earn 12 cents to 40 cents per hour for these work assignments.”³⁴ In 2004, almost all federal prisoners and nearly half of state prisoners had work assignments.³⁵ 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.³⁶ Incarcerated people may also temporarily leave the prison to perform work through work release programs.³⁷ 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.³⁸

For federal income tax purposes, wages earned for prison labor are includable in gross income.³⁹ Incarcerated people are not excluded from paying taxes.⁴⁰ However, if a filer’s income is below a certain

³³ See *Work Programs*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp [<https://perma.cc/N4GD-UAE2>].

³⁴ *Id.*

³⁵ See AMY L. SOLOMON, KELLEY DEDEL JOHNSON, JEREMY TRAVIS & ELIZABETH C. MCBRIDE, URBAN INST., *FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF REENTRY* 16 (2004), https://webarchive.urban.org/UploadedPDF/411097_From_Prison_to_Work.pdf [<https://perma.cc/ZT5X-GFE6>].

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 Escod, 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).

³⁷ See, e.g., Sara Feldschreiber, Note, *Fee at Last? Work Release Participation Fees and the Takings Clause*, 72 FORDHAM L. REV. 207, 207 (2003) (describing an inmate who served as a paralegal as part of a work-release program).

³⁸ BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUST., PROGRAM BRIEF: PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM 3 (2018) [hereinafter BJS: PIECP], https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/PIECP-Program-Brief_2018.pdf [<https://perma.cc/N4GD-UAE2>].

³⁹ 26 U.S.C. § 61 of the Internal Revenue Code defines gross income as “income from whatever source derived.”

⁴⁰ Richard G. Brody, Shihong Li & Ruth Ann Castellano-Piatt, *Preparing Tax Returns for Inmates: Considering Practitioners’ Perspectives*, 90 CPA J. 52, 52 (2020).

threshold, the filer does not have to file a federal income tax return.⁴¹ 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.⁴² However, incarcerated people who are on temporary work release may need to file federal income taxes because their earnings exceed the threshold amounts.⁴³ Inmates earning prevailing local wages via PIECP programs may also exceed the threshold and be required to file a return.⁴⁴ 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.⁴⁵

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

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, DEPENDENTS, 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.

⁴³ N.Y. STATE CORR. & CMTY. SUPERVISION, TEMPORARY RELEASE ANNUAL REPORT 8 (2016), <https://doccs.ny.gov/system/files/documents/2019/09/TempReleaseProgram2016.pdf> [<https://perma.cc/C7TB-KLL2>] (“In 2016, 1,073 Work Release inmates earned a net income of \$2,669,081.12. They also paid \$788,777.44 in Federal, State, and local taxes.”).

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-company-from-prisonwith-contraband-cellphone-11551973574> [<https://perma.cc/2F7L-PX8E>].

provide for their basic needs.⁴⁶ The premise that incarcerated people do not need money because prisons cover their basic needs is false.⁴⁷ 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.⁴⁸ If incarcerated people become ill, they pay out of pocket to visit the prison doctor.⁴⁹ But low prison wages, on average \$0.86 a day,⁵⁰ mean that an incarcerated individual would have to work for at least three days to see the doctor.⁵¹ Some prisons charge inmates for the length of their stay, which can range from ten to fifty-six dollars per day,⁵² and then settle the bill when the incarcerated person leaves prison.⁵³

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.⁵⁴ “One-third of families [with an incarcerated family member] . . . said they went into debt

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”).

⁴⁸ Stephen Raheer, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL’Y INITIATIVE (May 2018), <https://www.prisonpolicy.org/reports/commissary.html> [<https://perma.cc/NN9C-HSHL>] (describing the operation of prison commissaries).

⁴⁹ Wendy Sawyer, *The Steep Cost of Medical Co-Pays in Prison Puts Health at Risk*, PRISON POL’Y INITIATIVE (Apr. 19, 2017), <https://www.prisonpolicy.org/blog/2017/04/19/copays> [<https://perma.cc/6BAQ-82X7>] (providing a detailed explanation of inmate medical costs).

⁵⁰ Sawyer, *supra* note 5.

⁵¹ Sawyer, *supra* note 49 (calculating a nationwide average of 25.09 hours worked to afford one co-pay). From the perspective of a non-incarcerated person, a two-to-five-dollar medical co-pay may seem cheap, compared to the average non-incarcerated co-pay of twenty-four dollars. See *2015 Employer Health Benefits Survey*, KAISER FAM. FOUND. (Sep. 22, 2015), <https://www.kff.org/report-section/ehbs-2015-summary-of-findings> [<https://perma.cc/HW6L-CN7A>].

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.”).

⁵⁴ U.S. COMM’N ON CIV. RTS., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 9 (2019), <https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf> [<https://perma.cc/GFT8-6Y6T>].

to pay for visitation or phone calls.”⁵⁵ Kae Boone had her car repossessed to generate one-hundred dollars a month so that her incarcerated boyfriend could buy soap.⁵⁶ Moreover, these support payments are considered gifts and are not tax deductible.⁵⁷ Households cannot claim incarcerated family members as dependents.⁵⁸ Incarceration takes away a household income source and adds additional costs to the household budget.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 workforce⁶⁰ by “mak[ing] work pay.”⁶¹ Though initially limited in size, over time it has expanded into the largest federal program that helps the working poor.⁶² The EITC operates via a refundable tax credit. Specifically, EITC refunds are given to people who are working, but who earn less than \$57,414.⁶³ The EITC lifted nearly 5.6

⁵⁵ Alana Semuels, *What Incarceration Costs American Families*, ATLANTIC (Sept. 15, 2015), <https://www.theatlantic.com/business/archive/2015/09/the-true-costs-of-mass-incarceration/405412> [<https://perma.cc/7A8Y-F4A7>].

⁵⁶ See Nicole Lewis & Beatrix Lockwood, *How Families Cope with the Hidden Cost of Incarceration for the Holidays*, N.Y. TIMES (Dec. 20, 2019), <https://www.nytimes.com/2019/12/17/us/incarceration-holidays-family-costs.html> [<https://perma.cc/U2NZ-SE4E>].

⁵⁷ *Can You Claim Someone in Prison on Your Taxes?*, PRISON INSIGHT, <https://prisoninsight.com/can-you-claim-someone-in-prison-on-your-taxes> [<https://perma.cc/JCU8-DWZK>].

⁵⁸ *Id.*

⁵⁹ See SMITH ET AL., *supra* note 10 and accompanying text.

⁶⁰ See CHRISTINE SCOTT & MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., RL31768, THE EARNED INCOME TAX CREDIT (EITC): AN OVERVIEW 14–15 (2014) (noting the EITC’s effect on labor force participation rates among single mothers).

⁶¹ *Id.* (quoting Memorandum from President William J. Clinton on the Earned-Income Tax Credit to all Cabinet Secretaries and Agency Heads (Mar. 9, 1994), <https://www.govinfo.gov/content/pkg/PPP-1994-book1/pdf/PPP-1994-book1-doc-pg413.pdf> [<https://perma.cc/GQ5V-Q985>]).

⁶² SCOTT & CRANDALL-HOLLICK, *supra* note 60, at 1.

⁶³ *Who Qualifies for the Earned Income Tax Credit (EITC)*, INTERNAL REVENUE SERV. (Aug. 31, 2022), <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/who-qualifies-for-the-earned-income-tax-credit-eitc> [<https://perma.cc/P3MG-5AJY>].

million people above the poverty threshold in 2018.⁶⁴ Upon filing their federal tax returns, individuals earning within the target EITC band are given a refund amount.⁶⁵

Before 1994, there were no explicit specifications on inmate eligibility for the EITC.⁶⁶ 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.⁶⁷ Most incarcerated people failed this prong.⁶⁸ In 1994, Congress expanded the EITC to include a small credit for people without children.⁶⁹ 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.⁷⁰

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.⁷¹ In 1994, Gary James Taylor earned \$5,054.10 working as a telemarketer while incarcerated in state prison.⁷² He filed his federal tax return and claimed a \$300 earned income credit.⁷³ 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.⁷⁴ 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.⁷⁵ 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

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>].

⁶⁵ SCOTT & CRANDALL-HOLLICK, *supra* note 60, at 3.

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).

⁶⁷ *Id.* at 34.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Uruguay Round Agreements Act, Pub. L. No. 103-465, §§ 722–23, 108 Stat. 4809, 5002–03 (1994).

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.”).

⁷² *Taylor v. Comm’r*, 76 T.C.M. (CCH) 808, at 2 (1998).

⁷³ *Id.*

⁷⁴ *Id.* at 2–3.

⁷⁵ *Tramble-Bey v. Comm’r*, T.C. Summ. Op. 2001–23, 2001 WL 1922017, at *3 (2001).

until paroled.”⁷⁶ 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 \$128.⁷⁷ 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.”⁷⁸ 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.⁷⁹

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.⁸⁰ 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.⁸¹ 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.

⁷⁷ *Rogers v. Comm’r*, 88 T.C.M. (CCH) 392, at 2 (2004).

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.⁸² 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.⁸³ The benefit payment amount depends upon the retirement age, the amount paid in, and the amount collected by other household beneficiaries.⁸⁴ In certain circumstances, such as a worker dying, family members may also be eligible for Social Security benefits.⁸⁵

Incarcerated people can interact with the Social Security system either as beneficiaries or payors. Originally, incarcerated people were entitled to receive Social Security benefits.⁸⁶ 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.⁸⁷ In 1983, Congress passed Public Law 98-21, which denied inmates from receiving retired worker benefits.⁸⁸ Further cementing the exclusion of incarcerated people, President Obama signed the No Social Security Benefits for Prisoners Act of 2009.⁸⁹ In its current form, 42 U.S.C. § 402(x) states that “no monthly benefits shall be paid . . . to any individual for any month . . . during a period of more than 30 days throughout all of which such individual—is confined in a jail, prison or other penal institution or correctional facility pursuant to his conviction of a criminal offense.”⁹⁰

Following the suspension of their benefits, several incarcerated people filed lawsuits against the Social Security Administration.⁹¹ 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

⁸² *Id.* at 3.

⁸³ *Id.* at 8.

⁸⁴ *Id.* at 8–13 (calculating the “average monthly benefit” payment for retired workers at \$1,509).

⁸⁵ *Id.* at 10–11, 13–14.

⁸⁶ DAVID KOITZ, CONG. RSCH. SERV., IB81163, SOCIAL SECURITY BENEFITS FOR PRISONERS 1 (1980).

⁸⁷ *Id.* at 2.

⁸⁸ *Summary of P.L. 98-21, (H.R. 1900) Social Security Amendments of 1983-Signed on April 20, 1983*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/1983amend.html> [<https://perma.cc/45Z8-37Z4>] (describing excluding inmates from OASI funds); *Old-Age & Survivors Insurance Trust Fund*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/progdata/describeoasi.html> [<https://perma.cc/ECB3-H2MC>] (stating that OASI funds are the source of retired worker benefits).

⁸⁹ No Social Security Benefits for Prisoners Act of 2009, Pub. L. No. 111-115, §§ 1–2 (2009).

⁹⁰ 42 U.S.C. § 402(x).

⁹¹ *See, e.g., Butler v. Apfel*, 144 F.3d 622 (9th Cir. 1998); *Zipkin v. Heckler*, 790 F.2d 16 (2d Cir. 1986).

process of law.”⁹² The Third Circuit acknowledged that Social Security is “an earned program and not a welfare program for the benefit of needy persons.”⁹³ 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.”⁹⁴ The court deferred to Congress’s discretion to deny benefits to inmates.⁹⁵

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”⁹⁶ 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.”⁹⁷ 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,⁹⁸ and, in principle, the government cannot raid inmates’ bank accounts simply due to their carceral status.⁹⁹

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

⁹² *Washington v. Sec’y of Health & Hum. Servs.*, 718 F.2d 608, 610 (3d Cir. 1983).

⁹³ *Id.* at 610.

⁹⁴ *Id.*

⁹⁵ *Id.* at 610–11.

⁹⁶ *Receipt of Social Security Benefits by Persons Incarcerated in Penal Institutions: Hearing Before the Subcomm. on Soc. Sec. of the Comm. on Ways & Means*, 96th Cong. 92 (1980) (statement of the Lawyers’ Committee for Civil Rights Under Law) [hereinafter *Social Security Hearing June 20, 1980*].

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.¹⁰⁰ For FICA purposes, wages are defined in the Internal Revenue Code section 31.3121 as “all remuneration for employment” unless specifically exempted.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.¹⁰² In Revenue Ruling 75-325, the IRS considered whether wages paid to prison inmates were exempted from payroll taxes.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.¹⁰⁴ Second, work performed by incarcerated persons in the employ of state or federal government is exempt from FICA taxes.¹⁰⁵ Since the vast majority of incarcerated people are in carceral institutions run by the government,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.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.

¹⁰⁰ I.R.S. Priv. Ltr. Rul. 2012-0016, at 2 (Jan. 31, 2012).

¹⁰¹ *Id.* at 1–2.

¹⁰² Rev. Rul. 75-325, 1975 C.B. 415.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ I.R.S. Chief Couns. Mem. 200526018 (July 1, 2005) (citing I.R.C. § 3121(b)(7)(F)(ii)).

¹⁰⁶ Mackenzie Buday & Ashley Nellis, *Private Prisons in the United States*, SENT’G PROJECT (Mar. 3, 2021), <https://www.sentencingproject.org/publications/private-prisons-united-states> [<https://perma.cc/4L28-8UY3>] (demonstrating that in 2019, private prisons incarcerated 8% of the total state and federal prison population).

¹⁰⁷ See Ngina Chiteji, *Looming Retirement Shortfalls for Formerly Incarcerated Men*, SCHOLARS STRATEGY NETWORK (Feb. 13, 2017), <https://scholars.org/brief/looming-retirement-shortfalls-formerly-incarcerated-men> [<https://perma.cc/8HWX-8MA2>].

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

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 . . .”).

¹¹⁰ David Elkins, *Horizontal Equity as a Principal of Tax Theory*, 24 YALE L. & POL’Y REV. 43, 43 (2006).

taxes than the second simply because he is six feet tall while the second taxpayer is five feet tall.¹¹¹ 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.¹¹²

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 similar¹¹³ 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

¹¹¹ 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").

¹¹² 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.").

¹¹³ 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).

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.¹¹⁴

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.¹¹⁵ 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,¹¹⁶ 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.¹¹⁷ 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

¹¹⁴ See, e.g., Isabel Coronado, *A New Federal Grant to Ensure That Children of Incarcerated Parents Flourish*, 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).

¹¹⁵ See *Social Security Hearing June 20, 1980*, *supra* note 96, at 5 (statement of Sen. Malcom 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.”).

¹¹⁶ For more information on public pensions, see *How State and Local Government Employees Are Covered by Social Security and Medicare*, SOC. SEC. ADMIN., <https://www.ssa.gov/pubs/EN-05-10051.pdf> [<https://perma.cc/535N-LW4J>] (describing Section 218 agreements governing government pension benefits).

¹¹⁷ Nancy Hicks, *You Can Commit a Crime and Still Collect a Public Pension in Many States*, LINCOLN J. STAR (Dec. 17, 2017), https://journalstar.com/news/state-and-regional/govt-and-politics/you.%20.%20ion-in-many-states/article_1c68235c-4453-5cc6-b1fa-21a4dce7d37.html [<https://perma.cc/KC4W-E7JJ>]. See also Paul von Zielbauer, *Go Directly to Jail, and Collect Your Pension; Resentment Rises as Public Officials, Convicted of Crimes like Bribery, Reap Benefits*, N.Y. TIMES (Dec. 7, 2003), <https://www.nytimes.com/2003/12/07/nyregion/go-directly-jail-collect-your-pension-resentment-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).

compensation.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.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.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.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.

¹¹⁸ See Ryan Frost, *What Happens to Taxpayer-Funded Pensions when Public Officials Are Convicted of Crimes?*, REASON FOUND. (July 30, 2020), <https://reason.org/data-visualization/what-happens-to-taxpayer-funded-pensions-when-public-officials-are-convicted-of-crimes> [<https://perma.cc/K77Q-VUK7>] (describing state pension garnishment laws and policy concerns).

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).

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).

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>] (“[W]hile 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.¹²² 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.¹²³ 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.¹²⁴ 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 counterclaim 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.¹²⁵ However, this overly reductive viewpoint ignores the significant economic contributions made from voluntary prison labor.¹²⁶ 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

¹²² See BANKMAN ET AL., *supra* note 31, at 51.

¹²³ See *supra* note 11 and accompanying text; see also Dylan Matthews, *Want to Stay Out of Prison? Choose Rich Parents*, VOX (Mar. 14, 2018, 2:00 PM), <https://www.vox.com/identities/2018/3/14/17114226/incarceration-family-income-parents-study-brookings-rich-kid-poor-kid> [<https://perma.cc/3X89-X5LF>] (describing how post-incarceration wage and employment rates are relatively similar to pre-incarceration rates).

¹²⁴ See U.S. GOV'T ACCOUNTABILITY OFF., GAO-93-145, TAX POLICY: EARNED INCOME TAX CREDIT: DESIGN AND ADMINISTRATION COULD BE IMPROVED 14 (1993) ("The benefits are calculated primarily on the basis of earnings rather than on total income").

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.").

¹²⁶ See *Prison Workers like California's Inmate Firefighters Are 'Uniquely Vulnerable,' ACLU Lawyer Says*, NPR HERE & NOW (Aug. 15, 2018), <https://www.wbur.org/hereandnow/2018/08/14/california-inmate-firefighters-wildfire> [<https://perma.cc/4AHJ-4UKD>] (describing how voluntary inmate firefighters have saved the state of California \$100 million per year).

households. Approximately fifty-three percent of incarcerated people have children,¹²⁷ and incarceration imposes large financial burdens on these families.¹²⁸ Households with an incarcerated father are more likely to face residential instability, neighborhood socioeconomic disadvantages, and to rely on public assistance than those without.¹²⁹ 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.¹³⁰ 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.¹³¹ 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.¹³² 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.¹³³ I

¹²⁷ Daniel M. Leeds, Juliana Pearson, Simone Robers & Leslie Scott, U.S. PROGRAM FOR THE INTERN. ASSESSMENT OF ADULT COMPETENCIES, *Incarcerated Adults with Dependent Children* 1 (2020), http://piaacgateway.com/s/2020_CNA_Incarcerated_Adults_Dependent_Children.pdf [<https://perma.cc/TF6N-XWB9>].

¹²⁸ Creasia Finney Hairston, *Prisoners and Families: Parenting Issues During Incarceration* 4–5 (Urb. Inst. “From Prison to Home” Conference Working Paper, 2002), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/42341/Hairston.pdf [<https://perma.cc/BJ7D-Q9HB>] (describing the financial strains caused by the loss of a wage earner, expenses incurred by grandparents or other relatives taking in a child, and costs generated by maintaining contact with prisoners either via expensive phone calls or in-person visits).

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).

¹³⁰ Cf. Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1 (2006) (describing how barring undocumented immigrants from receiving the EITC places a large financial burden on their families who are already socioeconomically disadvantaged).

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.¹³⁴ For example, if the government's purpose is to reduce alcohol consumption, a tax on alcohol, while economically inefficient, may achieve the desired allocative effects.

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.¹³⁵ 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,¹³⁶ 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.¹³⁷ 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.

¹³⁵ See *Work Programs*, *supra* note 33 and accompanying text; Harvey G. Lappin, U.S. Dep't of Just. Fed. Bureau of Prisons, Implementing Instructions on the Inmate Work and Performance Pay Program 5 (Oct. 1, 2008), https://www.bop.gov/policy/progstat/5251_006.pdf [<https://perma.cc/3JWL-88NC>] (explaining that inmates must work for a minimum of seven hours).

¹³⁶ See, e.g., Nada Eissa & Hilary W. Hoynes, *Behavioral Responses to Taxes: Lessons Learned from the EITC and Labor Supply*, 20 TAX POL'Y & ECON. 73, 78–105 (2006) (describing how various categories of taxpayers may alter their work schedules near phaseout periods to take advantage of EITC).

¹³⁷ See Thomas Fuller, *Coronavirus Limits California's Efforts to Fight Fires with Prison Labor*, N.Y. TIMES (Aug. 24, 2020), <https://www.nytimes.com/2020/08/22/us/california-wildfires-prisoners.html> [<https://perma.cc/55E5-XX8N>] (“Cal Fire . . . is pleading for more personnel.”).

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,¹³⁸ 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.¹³⁹ 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.¹⁴⁰ 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,¹⁴¹ 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.¹⁴² On the latter point, as previously emphasized, incarcerated people do need money.¹⁴³ 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.

¹³⁸ See *supra* notes 116–18 and accompanying text.

¹³⁹ Cf. A. Mitchell Polinsky, *Prison Work Programs in a Model of Deterrence* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23026, 2017) (discussing the deterrent effect of mandatory prison work without pay).

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.

While we can keep tossing money at prisons¹⁴⁴ 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.¹⁴⁵ Fear of fraud is one of the core cited motivations for excluding incarcerated people from receiving the EITC and Social Security benefits.¹⁴⁶

In 1993, Congress significantly expanded the EITC, and following this change was increased public awareness of and Congressional focus on EITC fraud.¹⁴⁷ 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.’”¹⁴⁸ Consequently, Congress decided that income earned while in a penal institution did not qualify as earned income.¹⁴⁹ The

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.”).

¹⁴⁵ C. Eugene Steuerle, *Eight Lessons on How to Design Tax Reform*, TAX POL'Y CTR. (Oct. 13, 2017), <https://www.taxpolicycenter.org/taxvox/eight-lessons-how-design-tax-reform> [<https://perma.cc/MX49-NLBX>].

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-109hhr24905/html/CHRG-109hhr24905.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).

¹⁴⁸ *Hearing Before the Subcomm. on Oversight and the Subcomm. on Hum. Res. of the Comm. on Ways & Means*, 104th Cong. 11 (1995) (statement of Rep. E. Clay Shaw).

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.¹⁵⁰

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.”¹⁵¹ 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,¹⁵² in 1980, Congress barred inmates from receiving Social Security Disability.¹⁵³ In 1983, Congress went a step further and barred “incarcerated felons from receiving social security benefits of any kind.”¹⁵⁴

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.¹⁵⁵ A method by which incarcerated people commit tax fraud is by filing fraudulent returns using their fellow inmates’ identities.¹⁵⁶ 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.¹⁵⁷ Ninety percent of his returns were successful.¹⁵⁸ Rather than consume limited IRS or

of earned income in Code sec. 32(c)(2) any amount received for services provided by an inmate to a penal institution.”).

¹⁵⁰ JOINT COMM. ON TAX’N, 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). *Id.*

¹⁵¹ *Social Security Hearing June 20, 1980, supra* note 96, at 5 (statement of Sen. Malcolm Wallop).

¹⁵² *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. *Id.* at 61, 71–73.

¹⁵³ Social Security Act Amendments, Pub. L. No. 96-473, 94 Stat. 2263, 2265 (1980).

¹⁵⁴ KOITZ, *supra* note 86, at 1.

¹⁵⁵ 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].

¹⁵⁶ *See id.* at 14–15.

¹⁵⁷ *Prison Fraud Hearing June 29, 2005, supra* note 146, at 15 (statement of John Doe).

¹⁵⁸ *Id.*

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.

¹⁵⁹ CHARLES A. BOWSER, U.S. GEN. OFF. OF ACCT., REPORT TO THE CONGRESS OF THE UNITED STATES: PRISONERS RECEIVING SOCIAL SECURITY AND OTHER FEDERAL RETIREMENT, DISABILITY, AND EDUCATION BENEFITS 5 (1982) (explaining why a rational basis for differentiating treatment of incarcerated people is important).

¹⁶⁰ *Id.* at 10.

¹⁶¹ See, e.g., *Oklahoma Man Sentenced for Filing False Tax Returns for Prison Inmates*, DEP'T OF JUST. (Sept. 29, 2017), <https://www.justice.gov/usao-edca/pr/oklahoma-man-sentenced-filing-false-tax-returns-prison-inmates> [<https://perma.cc/S7VP-VYXC>] (describing how Donald Loyde Harned and other incarcerated accomplices filed false tax returns under the identities of fellow inmates).

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.¹⁶³ Carceral institutions are spheres in two senses. First, they are spheres because they operate their own closed economy.¹⁶⁴ Second, they are spheres because they operate independently of the outside market economy.¹⁶⁵ The tax system typically ignores transfers within a private sphere, such as a family.¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸ The separate spheres idea is meant to address the following problem: Courts do not want to acknowledge that prison labor constitutes an employment relationship.¹⁶⁹ 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.¹⁷⁰

As a constructive solution, courts emphasize that prison labor has a nonpecuniary "penological purpose."¹⁷¹ 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 *Id.* at 864 ("The prison and the family both are sites of nonmarket work.").

¹⁶⁶ *See* BANKMAN ET AL., *supra* note 31, at 133.

¹⁶⁷ Zatz, *supra* note 29, at 862–64.

¹⁶⁸ *See id.* at 871, 892.

¹⁶⁹ *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.'").

¹⁷⁰ *See id.* at 893 (noting most courts classify inmates as employees under the circumstances described).

¹⁷¹ *Id.* at 891.

or personality traits linked to offending behavior”¹⁷²—make it such that “[a]ny payments from the prison are gifts, even if occasioned by inmate labor.”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.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.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.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.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.¹⁷⁸ However, this Note argues that prison meals and housing are inadequate substitutes for Social Security benefits. The standard “convenience of

¹⁷² *Id.* at 892.

¹⁷³ *Id.* at 890.

¹⁷⁴ *See id.* at 863–64 (“I offer a provocation by way of illustration: prisons are like families.”).

¹⁷⁵ *See* BANKMAN ET AL., *supra* note 31, at 134, 142–44.

¹⁷⁶ Zatz, *supra* note 29, at 865.

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).

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.¹⁷⁹ 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.¹⁸⁰ 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.¹⁸¹

In demarcating whether a provision should be imputed income, we ask whether the provision is a net-benefit or a net-detriment.¹⁸² Employees may accept salary reductions for a net-benefit, like a penthouse apartment.¹⁸³ Employees may demand salary increases for net-detriments, like being forced to live inside a bank building.¹⁸⁴ Generally, prison living conditions and meals are subpar,¹⁸⁵ and would be considered a net-detriment. The net-detriment nature invalidates justifying Social Security benefit denials to prisoners on the grounds that they already receive care.

C. *The Punitive Rationale*

1. *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-detriment” 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 POL’Y 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).

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,¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸ 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.”¹⁸⁹ 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

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).

¹⁸⁹ *Social Security Hearing June 20, 1980*, *supra* note 96, at 3 (statement of Rep. Bill Archer).

flame.”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,¹⁹¹ and that, historically, incarceration was not a basis for denying Social Security benefits.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.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.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.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.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.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

¹⁹⁰ *Id.* at 11 (statement of Rep. G. William Whitehurst).

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

¹⁹² *Id.* at 36–37.

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.”).

¹⁹⁴ *See* Chester N. Mitchell, *Taxation, Retribution, and Justice*, 38 U. TORONTO L.J. 151, 153 (1988).

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

¹⁹⁶ H.L.A. Hart, *The Presidential Address: Prolegomenon to the Principles of Punishment*, 60 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, 1959–1960, at 6.

¹⁹⁷ *Id.* at 8.

family members.¹⁹⁸ 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.¹⁹⁹ 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.”²⁰⁰ This commenced an “anti-welfare, pro-work sentiment [that] pervaded the national culture.”²⁰¹ 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.”²⁰² 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.²⁰³ In the 1980s, President Ronald Reagan racialized welfare by drawing on caricatures of welfare queens²⁰⁴ and “slash[ing] federal and state welfare expenditures.”²⁰⁵ Congress shifted the burden of anti-poverty measures onto

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).

¹⁹⁹ MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 151 (2017).

²⁰⁰ *Id.* at 153.

²⁰¹ Ventry, *supra* note 15, at 985.

²⁰² JULILLY KOHLER-HAUSMANN, *GETTING TOUGH: WELFARE AND IMPRISONMENT IN 1970S AMERICA* 129–30 (2017).

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.²⁰⁶ As the EITC grew, “the nation’s social safety net—as it was traditionally conceived—started to shrink.”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.”²⁰⁸ The United States currently has both the most incarcerated people and the highest incarceration rate in the world.²⁰⁹ Mass incarceration is not race neutral. People of color make up 37% of the U.S. population but 67% of the prison population,²¹⁰ while “Black men are six times as likely to be incarcerated as white men.”²¹¹ Incarceration harms not just the individual being confined, but also the individual’s family and the wider community.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.²¹³ Since tax returns do not ask for race, it is very difficult for scholars to gather empirical evidence.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

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).

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

²⁰⁸ KOHLER-HAUSMANN, *supra* note 202, at 1–2.

²⁰⁹ *Countries with the Largest Number of Prisoners as of July 2021*, STATISTA (Aug. 5, 2021), <https://www.statista.com/statistics/262961/countries-with-the-most-prisoners> [<https://perma.cc/AUT8-7DLR>]; *Criminal Justice Facts*, THE SENT’G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts> [<https://perma.cc/79XU-YDS9>].

²¹⁰ Kara Gotsch, *Families and Mass Incarceration*, THE SENT’G PROJECT (Apr. 24, 2018), <https://www.sentencingproject.org/policy-brief/families-and-mass-incarceration> [<https://perma.cc/W7YV-25P9>].

²¹¹ See *Criminal Justice Facts*, *supra* note 209.

²¹² See generally *Community Impact*, PRISON POL’Y INITIATIVE, https://www.prisonpolicy.org/research/community_impact [<https://perma.cc/VF34-QH5K>] (listing publications on different types of community harms caused by mass incarceration).

²¹³ Lawrence A. Zelenak, *Examining the Internal Revenue Code for Disparate Racial Impacts*, TAX NOTES (Sept. 7, 2020), <https://www.taxnotes.com/special-reports/capital-gains-and-losses/examining-internal-revenue-code-disparate-racial-impacts/2020/09/04/2cx24> [<https://perma.cc/WC86-GSSX?type=Image>] (discussing efforts in examining the nexus between tax and race).

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.²¹⁵ Scholars have uncovered startlingly disparate racial impacts on seemingly race-neutral provisions.²¹⁶

Barring an incarcerated person's labor from qualifying for the EITC may explain racial disparities in EITC reciprocity 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.²¹⁷ Moreover, since the EITC predominantly benefits single mothers,²¹⁸ and the percentage of Black single mothers is much higher than that of white single mothers, the idea is that Black people benefit more.²¹⁹ 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.”²²⁰ This is because many Black people lack the earned income needed to qualify for the EITC.²²¹ 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,²²² 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

²¹⁵ CHYE-CHING HUANG & RODERICK TAYLOR, CTR. ON BUDGET AND POL'Y PRIORITIES, *HOW THE FEDERAL TAX CODE CAN BETTER ADVANCE RACIAL EQUITY* 4 (2019), <https://www.cbpp.org/sites/default/files/atoms/files/7-25-19tax.pdf> [<https://perma.cc/73TJ-U37Y>].

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).

²²² See ASHLEY NELLIS, THE SENT'G PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITIES IN STATE PRISONS* 18 (2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons> [<https://perma.cc/HHS3-MXB2>] (“African Americans are incarcerated in state prisons at nearly five times the rate of whites.”).

on Social Security benefits for retirement.²²³ Though Black people and white people save at similar rates, the wealth gap between Blacks and whites persists.²²⁴ Black people tend to have less in traditional retirement savings vehicles such as 401(k) and IRA accounts.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.²²⁶ Financial instability is highly correlated with recidivism.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.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.

²²³ See WILLIAM SPRIGGS & JASON FURMAN, CTR. ON BUDGET AND POL'Y PRIORITIES, AFRICAN AMERICANS AND SOCIAL SECURITY: THE IMPLICATIONS OF REFORM PROPOSALS 14 (2006), <https://www.cbpp.org/sites/default/files/atoms/files/1-18-06socsec.pdf> [<https://perma.cc/XH2X-NEUM>] (noting that African Americans “rely on Social Security more in old age than do other groups”).

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).

²²⁵ SPRIGGS & FURMAN, *supra* note 223, at 4 (“[W]hile 43 percent of white households have retirement savings accounts (IRAs or 401(k)s), only 18 percent of African American and Hispanic households do.”).

²²⁶ Maria Ines Zamudio, *Poll: Older Ex-Cons Have Fewer Sources of Retirement Income*, AP NEWS (May 4, 2017), <https://apnews.com/article/095721d078ad4ff78a18cb45ca2121f8> [<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.”).

²²⁷ See, e.g., Kristy Holtfreter, Michael D. Reisig & Merry Morash, *Poverty, State Capital, and Recidivism Among Women Offenders*, 3 CRIMINOLOGY & PUB. POL'Y 185, 198 (2004) (describing a finding that “poverty status increases the odds of rearrest by a factor of 4.6”); Amanda Y. Agan & Michael D. Makowsky, *The Minimum Wage, EITC, and Criminal Recidivism* 14–15 (Nat’l Bureau of Econ. Rsch., Working Paper No. 25116, 2018), <https://www.nber.org/papers/w25116> [<https://perma.cc/5HD4-8LNE>] (increasing minimum wage by \$0.50 is correlated with a 2.8% decrease in the one-year recidivism rate).

²²⁸ For a discussion of the aging prison population and compassionate release policies, see generally REBECCA SILBER, ALISON SHAMES & KELSEY REID, VERA INST. OF JUST., AGING OUT: USING COMPASSIONATE RELEASE TO ADDRESS THE GROWTH OF AGING AND INFIRM PRISON POPULATIONS 6–10 (2017), <https://www.vera.org/downloads/publications/Using-Compassionate-Release-to-Address-the-Growth-of-Aging-and-Infirmary-Prison-Populations%E2%80%9494Full-Report.pdf> [<https://perma.cc/9RP6-9CC2>].

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, 1980²²⁹

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.²³⁰ Even though \$24 seems

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

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 winsorized 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.²³¹ 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."²³² The plaintiffs sought a preliminary injunction enjoining the IRS from withholding Economic Impact Payments.²³³ 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.²³⁴ COVID-19 both constrained in person visits and added financial hardship to families who traditionally support incarcerated people.²³⁵ Fundamentally, "the economic downturn affecting Americans outside of prison also impacts those inside prison."²³⁶

See MARGOT L. CRANDALL-HOLLICK, GENE FALK & CONNOR F. BOYLE, CONG. RSCH. SERV., R43805, THE EARNED INCOME TAX CREDIT (EITC): HOW IT WORKS AND WHO RECEIVES IT 5–6 (2020). The most appropriate EITC credit rate to apply is that for filers with zero children. Even though around 62% of inmates report having at least one child, it is highly unlikely that any of these children will meet the residency requirement and count as qualifying children. *Id.* at 3–4 ("[T]he child must share a *residence* with the taxpayer for more than half the year in the United States.").

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%. See SURVEY OF INMATES, *supra* note 230.

²³² See *Scholl v. Mnuchin*, 489 F. Supp. 3d 1008, 1020 (N.D. Cal. 2020).

²³³ *Id.* at 1023.

²³⁴ See *id.* at 1040–41.

²³⁵ *Id.* at 1039–40.

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

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.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.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.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."²⁴⁰ In Missouri, state senator Tony Luetkemeyer proposed legislation redirecting incarcerated peoples' stimulus payments to their victims.²⁴¹ To justify punishing all inmates, politicians

(N.D. Cal.), *appeal of stay denial dismissed*, No. 20-16915, 2020 WL 9073361, at *1 (9th Cir. Nov. 20, 2020).

²³⁷ See Press Release, Sen. Bill Cassidy, Democrats Block Cassidy, Cotton, Cruz Amendment to Target COVID Relief Spending, Stop Stimulus Checks to Prisoners (Mar. 6, 2021), <https://www.cassidy.senate.gov/newsroom/press-releases/democrats-block-cassidy-cotton-cruz-amendment-to-target-covid-relief-spending-stop-stimulus-checks-to-prisoners> [<https://perma.cc/G9AR-CWVX>].

²³⁸ See 167 CONG. REC. S1257 (daily ed. Mar. 5, 2021) (statement of Sen. Durbin) ("Children should not be forced to go hungry because a parent is incarcerated.").

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/0/1/01e71bd8-3fbb-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).

²⁴⁰ Tom Cotton (@SenTomCotton), TWITTER (Mar. 6, 2021, 10:35 AM), <https://twitter.com/sentomcotton/status/1368223839990280199> [<https://perma.cc/C7V9-MTV5>].

²⁴¹ Press Release, Sen. Tony Luetkemeyer, Sen. Tony Luetkemeyer's Legislation Redirects Inmate Stimulus Checks to Victims (Mar. 22, 2021), <https://www.senate.mo.gov/21web/senator-tony-luetkemeyers-legislation-redirects-inmate-stimulus-checks-to-victims> [<https://perma.cc/D2VU-4KK8>] ("My legislation will ensure murderers, rapists, child sex offenders and other dangerous felons do not profit Allowing prisoners to benefit from these programs . . . is wrong.").

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.²⁴² But the overwhelming majority of incarcerated individuals are not murderers.²⁴³ 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.²⁴⁴ Because most incarcerated people do not file tax returns, the incarcerated population is susceptible to tax fraud through identity theft.²⁴⁵ 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.²⁴⁶ Existing resources such as the IRS-sponsored Volunteer Income Tax Assistance Program, could ease the practical burden of mandatory filing.²⁴⁷

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.²⁴⁸ 26 U.S.C. § 6116

²⁴² See, e.g., Tom Cotton (@TomCottonAR), TWITTER (Mar. 6, 2021, 2:39 PM), <https://twitter.com/TomCottonAR/status/1368285244416262145> [<https://perma.cc/5KGG9-9SL3>] (“Dzhokhar Tsarnaev, the Boston Bomber, murdered three people and terrorized a city. He’ll be getting a \$1,400 stimulus check as part of the Democrats’ ‘COVID relief’ bill.”).

²⁴³ See Sawyer & Wagner, *supra* note 2 (demonstrating that only a small percentage of the almost two million incarcerated individuals are convicted of murder).

²⁴⁴ See *IRS Identity Theft Victim Assistance: How It Works*, INTERNAL REVENUE SERV., <https://www.irs.gov/individuals/how-irs-id-theft-victim-assistance-works> [<https://perma.cc/RH29-W6H6>]; see also INTERNAL REVENUE SERV., IDENTITY THEFT INFORMATION FOR TAXPAYERS (REV. 5-2018), <https://www.irs.gov/pub/irs-pdf/p5027.pdf> [<https://perma.cc/6PBE-BELM>] (explaining that the IRS may contact filers if the same Social Security number is used for multiple tax returns).

²⁴⁵ See Brody et al., *supra* note 40, at 54 (“The IRS identified more than 24,000 fraudulent tax returns that used a prisoner’s Social Security number in 2015.”).

²⁴⁶ See Craig Harris, *Arizona Inmates Working Prison Jobs Might Owe Uncle Sam for the First Time*, AZ CENT. (Feb. 3, 2017, 6:05 PM), <https://www.azcentral.com/story/news/local/arizona-investigations/2017/02/03/arizona-inmates-working-prison-jobs-might-owe-uncle-sam-first-time/97414206> [<https://perma.cc/VV5C-63VF>] (reporting that nineteen percent of the inmate population in Arizona received 1099-MISC forms in 2017).

²⁴⁷ See Brody et al., *supra* note 40, at 52.

²⁴⁸ See Press Release, Treasury Inspector Gen. for Tax Admin., *Actions Need to Be Taken to Ensure Compliance with Prisoner Reporting Requirements and Improve*

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.”).

²⁴⁹ 26 U.S.C. § 6116.

²⁵⁰ TIGTA 2017, *supra* note 155, at 8.

²⁵¹ *Id.*

²⁵² INTERNAL REVENUE SERV., FACT SHEET: IRS BLUE BAG PROGRAM, https://www.irs.gov/pub/irs-utl/Blue_Bag_Program.pdf [<https://perma.cc/7LJL-JREJ>].

²⁵³ *See, e.g.*, TREASURY INSPECTOR GEN. FOR TAX ADMIN., RESULTS OF THE 2019 FILING SEASON 30 (2020) <https://www.treasury.gov/tigta/auditreports/2020reports/202044007fr.pdf> [<https://perma.cc/4CSZ-R2AW>] (describing how 2019 saw a forty-four percent increase in returns identified for screening compared with the previous year).

²⁵⁴ *See* Sawyer, *supra* note 5 (noting the difficulty of compiling a comprehensive wage list across state prison jobs); Raheer, *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.²⁵⁵ Reformers call for increasing transparency.²⁵⁶ 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.²⁵⁷ 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).

²⁵⁶ See, e.g., Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 *STAN. L. & POL'Y REV.* 455 (2011).

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.”).