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## **Suspending Prisoners' Social Security Benefits: Yet Another Blow to Financially Vulnerable African American and Hispanic Families**

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John B. Mitchell\*

With the adoption of the Social Security Act in 1935, those housed in state, local, and federal jails and prisons received monthly Social Security retirement benefits if they were otherwise eligible. Much later, when disability benefits became available, those too were provided to those incarcerated. Then, in 1980, Congress amended the Social Security Act so that incarcerated- peoples' disability benefits were suspended until their release. Three years later, incarcerated- peoples' retirement benefits were similarly suspended. Both amendments suspending benefits were merged into 42 U.S.C. § 402(x). This article, after an introductory section discussing the unique cultural context and subsequent litigation history of § 402(x), is divided into two parts. The first part is a traditional law review article; the second an essay.

The Section following the Introduction explores two legal attacks on the 1980 and 1983 amendments. However, it must be kept in mind that 42 U.S.C. § 402(x) has been found constitutional in dozens of cases in which a wide range of well-founded challenges have been rejected. It is not imaginable that any court would now reach a different result. Rather, my purpose in this

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Section is to soften the way for repeal, my belief being that showing the legal weaknesses of the statute will enhance receptivity to my analysis of harm in the second Section.

The first of these legal attacks has never before been raised and speaks to the harm suffered by all incarcerated people affected by the suspension of their retirement benefits. Using literature from the Sociology of Retirement, I demonstrate that the 1983 Congress’s assumption that “retirement” in 1935, when the Social Security Act was passed, was the same concept as “retirement” in 1983—an assumption necessary to support Congress’s rationale for the amendment—and was so incorrect as to be irrational. The second legal attack expands on the argument raised in numerous cases that the punitive foundation of § 402(x) runs afoul of the Constitutional prohibition against Bills of Attainder.

The second Section makes the case for repeal by explaining how 42 U.S.C. § 402(x) affirmatively harms communities of color by withdrawing needed economic assets from already impoverished families and, in particular, children. The article uses data from the United States Government and private research institutes concerning Black and Hispanic workers and families to describe the pervasive poverty within that cohort, as well as the importance of Social Security benefits, the dramatic rise in multigenerational family housing (12 million African Americans and 15 million Hispanics live in such housing), and the mass incarceration of Black and Hispanic people. When combined, this set of data exposes a path directly connecting 42 U.S.C. § 402(x) with harms to African American and Hispanic families.

## I. INTRODUCTION

Throughout 2019, 45.1 million retired workers in America received monthly Social Security Retirement Benefits,<sup>1</sup> while 8.4 million workers

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<sup>1</sup> See SOC. SEC. ADMIN., RESEARCH, STATISTICS & POLICY ANALYSIS, ANNUAL STATISTICAL SUPPLEMENT 2020: HIGHLIGHTS AND TRENDS 2 (2021),

received Social Security Disability benefits.<sup>2</sup> That same year, 17,885 other retired workers<sup>3</sup> and 39,766 other workers with disabilities<sup>4</sup> had their benefits suspended. This latter group of retired and disabled workers fulfilled the same requirements to receive their benefits as the other combined 53.5 million, with one exception. They are incarcerated, convicted persons whose benefits reverted back to the general Social Security Trust Fund.<sup>5</sup>

For the forty-eight years following adoption of the Social Security Act in 1935, incarcerated people in jails and prisons who otherwise qualified received their monthly benefit check.<sup>6</sup> That came to a screeching halt in 1980 when Congress passed 42 USC § 423(f)(1).<sup>7</sup> Under that statute, anyone in prison, or in jail for more than thirty days, was denied their disability benefits

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<https://www.ssa.gov/policy/docs/statcomps/supplement/2020/highlights.pdf>  
[<https://perma.cc/F4XN-S3PB>] [hereinafter HIGHLIGHTS AND TRENDS].

<sup>2</sup> *Id.*

<sup>3</sup> See SOC. SEC. ADMIN., RESEARCH, STATISTICS & POLICY ANALYSIS, ANNUAL STATISTICAL SUPPLEMENT, 2020, at tbl.6.E4 (2020), <https://www.ssa.gov/policy/docs/statcomps/supplement/2020/6e.html#table6.e4> [<https://perma.cc/CY8T-5R96>].

<sup>4</sup> SOC. SEC. ADMIN., ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, 2019, at 136 tbl.48 (2020) [https://www.ssa.gov/policy/docs/statcomps/di\\_asr/2019/di\\_asr19.pdf](https://www.ssa.gov/policy/docs/statcomps/di_asr/2019/di_asr19.pdf) [<https://perma.cc/WUU7-S9N2>] [hereinafter SSDI 2019].

<sup>5</sup> As such, suspension of prisoner retirement benefits is unrelated to subsidizing state, local, and federal prisons and jails for the costs of maintaining the prisoner. See Jennifer D. Oliva, *Son of Sam, Service-Connected Entitlements and Disabled Veteran Prisoners*, 25 GEO. MASON L. REV. 302, 334–35 (2018).

<sup>6</sup> See *Davis v. Bowen*, 825 F.2d 799, 800 (4th Cir. 1987) (“Prior to 1980, an otherwise qualified prisoner was eligible for social security disability and retirement benefits.”). See also *Receipt of Social Security Benefits by Persons Incarcerated in Penal Institutions: Hearing Before the Subcomm. on Soc. Sec. of the Comm. on Ways and Means*, 96th Cong. 36 (1980) (statement of Lawrence H. Thompson, Assoc. Comm’r for Pol’y, Soc. Sec. Admin.) (“Imprisonment has never been a basis for nonpayment of social security benefits.”) [hereinafter *1980 Hearing*]; David Koitz, Educ. & Pub. Welfare Div., IB81163, *Social Security Benefits for Prisoners 1* (1980) (prior to the 1980 Amendment, the fact that a retired worker was “convicted of a crime and w[as] incarcerated . . . did not interfere with their rights to benefits.”).

<sup>7</sup> See Michael B. Mushlin, *Social Security and Veterans Benefits*, in RIGHTS OF PRISONERS § 16:17 (5th ed. 2020).

until (if ever) they were released from custody.<sup>8</sup> Three years later, § 423(f)(1) was repealed<sup>9</sup> and then incorporated into 42 U.S.C. § 402(x), which added the suspension of retirement benefits to the already existing suspension of disability benefits.<sup>10</sup>

To fully understand § 402(x), however, you have to go back three years to the initial passage of 42 U.S.C. § 423(f)(1). That 1980 statute denying Social Security Disability benefits to incarcerated people was passed in the midst of a “perfect storm.” The force of that 1980 storm lingered when, three years later, 42 U.S.C. § 402(x) was passed with barely a comment.

#### *A. 1980 and the “Perfect Storm”*

With the possible exception of Bonnie and Clyde, individuals who have committed violent crimes have never been particularly popular with the American public. In the atmosphere surrounding the passage of 42 U.S.C. § 423(f)(1), that feeling was at a high point. Only a few years earlier, fear of crime was the number one public concern and would be again before the 1980s were over.<sup>11</sup> The year prior to the passage of 42 U.S.C. § 402(x), Ronald Reagan declared The War on Drugs.<sup>12</sup> Yet all of that anti-crime animus was only rough waters; it was nowhere near a storm, let alone a storm

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<sup>8</sup> See *id.*

<sup>9</sup> 42 U.S.C. § 423(f), 402(x). § 423(f) was subsequently repealed and incorporated into § 402(x): “In 1983, Congress repealed subsection (f) and amended Section 202 of the Social Security Act, adding subsection (x), suspending both disability and retirement benefits using the same language” as in 423(f); Davis, 825 F.2d at 800.

<sup>10</sup> 42 U.S.C. § 402(x) provides: “Limitation on payments to prisoners . . . (1)(A) Not withstanding any other provision of this subchapter, no monthly [Social Security] benefits shall be paid under this section . . . to any individual for any month ending with or during or beginning with or during a period of more than 30 days . . .”

<sup>11</sup> See John B. Mitchell, *The Ethics of the Criminal Defense Attorney: New Answers for Old Questions*, 32 STAN. L. REV. 293, 294 nn. 6, 7 (1980) (fear of crime topped the polls); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* 69 (10th Anniversary ed. 2020) (public concern with crime was significant at the end of the 1980s).

<sup>12</sup> See ALEXANDER, *supra* note 11, at 6.

swirling around Social Security benefits. That took two nearly simultaneous events.

First, in early 1980 it came out that the serial killer who had terrorized New York City, David Berkowitz, the “Son of Sam,” was receiving substantial Social Security Disability Benefits.<sup>13</sup> The public reaction was predictable.

At the very beginning of the hearing on the bill, which would subsequently be enacted by Congress as 42 U.S.C. § 423(f)(1), the Chairman of the Subcommittee on Social Security, J. J. Pickle of Texas, set the tone: “[P]ress reports that perpetrators of heinous crimes can receive social security benefits while in prison have outraged many reasonable people, both in and out of Congress.”<sup>14</sup>

Second, at the same time, there were media reports expressing concern about the future solvency of the Social Security system. During the week leading up to the hearings on the 1980 Amendment, *The Washington Post* (in a front-page article), *The New York Times*, and *The Washington Star* all raised the possibility that Social Security might not have sufficient funds to meet its obligations in the near future.<sup>15</sup>

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<sup>13</sup> Oliva, *supra* note 5, at 325 n.153. David Berkowitz, a twenty-four-year-old postal worker, terrorized New York City for a year, murdering five young women and one young man, and attempting to murder seven more young people. *Id.* at 322 n.135.

<sup>14</sup> 1980 Hearing, *supra* note 6, at 2; see also Koitz, *supra* note 6, at 2 (“Congressional concern was stimulated by a number of press accounts, originally appearing in newspapers in Trenton, N.J. and New York City, suggesting that a large number of prisoners, perhaps 30,000 nationwide, were receiving some \$60 million in social security disability insurance benefits annually.”).

<sup>15</sup> 1980 Hearing, *supra* note 6 at 15–16, 83, 85. This concern about solvency of the Social Security system did not suddenly appear the day of the 1980 Hearing, though those newspaper reports no doubt brought a powerful emotional immediacy to the issue. By 1981, two years before § 402(x) was put into law, Ronald Reagan established the National Commission on Social Security Affairs. The Commission “was convened in an atmosphere of crisis. Since at least the last year of the Carter administration, it had been apparent to Social Security experts and a growing number of policy experts that the Social Security system was drifting into deep trouble.” Kathryn L. Moore, *Raising the Social Security Ages: Weighing the Costs and Benefits*, 33 ARIZ. L. REV. 543, 555 (2001).

So, a mass murderer, the “Son of Sam,” was dipping into Social Security benefits<sup>16</sup> at the very time when there were serious questions about whether benefits even would be available to anyone in the future.<sup>17</sup> U.S. Senator Malcolm Wallop of Wyoming capably summarized the national sentiment:

Mr. Chairman, I am in complete agreement with your recent public statement regarding this issue of prisoners receiving Social Security benefits that: “It is a matter which easily outrages any reasonable person.” And, like you, Mr. Chairman, I, too, agree that it is ridiculous for someone like David Berkowitz, New York City’s ‘Son of Sam’, mass murderer to be allowed to collect several hundred dollars each month in social security benefits because of some asinine qualification procedure. For what possible reason can there be for paying an animal like this from our country’s already strained social security fund? What must the families of this creature’s victims think? Have our laws become so inflexible that our social security administrators must bend over backwards to make sure that parasites are added to suck the life out of the social security host? I hope to God they are not. And I cannot help but wonder how many other mass murderers are on the rolls of social security who are shielded from public scrutiny by privacy laws.<sup>18</sup>

Not a big surprise that 42 U.S.C. § 423(f)(1) flew through the Congressional process. Equally unsurprising was that a slew of constitutional challenges quickly followed the passage of the statute.

*B. Legal Response to 42 U.S.C. § 423(f)(1) and 42 U.S.C. § 402(x)*

Throughout most of the 1980s, the suspension of inmates’ Social Security Disability and Retirement benefits led to legal attacks spanning the constitutional spectrum: Due Process (Fifth Amendment); Equal Protection (Fourteenth Amendment); Cruel and Unusual Punishment (Eighth

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<sup>16</sup> See Oliva, *supra* note 5, at 326 n.154 (author provides extensive list of witnesses at the 1980 Hearing who mentioned the Son of Sam in their presentation).

<sup>17</sup> *Id.* at 325 n.152 (author provides extensive list of witnesses at the 1980 Hearing who mentioned the solvency of Social Security in their presentation).

<sup>18</sup> 1980 Hearing, *supra* note 6, at 8.

Amendment); Double Jeopardy (Fifth Amendment); Ex Post Facto (Article I §9);<sup>19</sup> and Bill of Attainder (Article I §9).<sup>20</sup>

All of these appeals to the courts were denied,<sup>21</sup> and they were denied on the same analytic basis. Each court considering the issue found that there was a reasonable, non-punitive rationale for the legislation.<sup>22</sup> The finding of a “reasonable” rationale dealt with Due Process<sup>23</sup> and Equal Protection<sup>24</sup> claims. The finding of a “non-punitive” rationale dealt with Cruel and Unusual Punishment,<sup>25</sup> Double Jeopardy,<sup>26</sup> Ex Post Facto,<sup>27</sup> and Bill of Attainder<sup>28</sup> claims.

The two specific rationales the courts attributed to Congress in upholding § 423(f)(1)—and later § 402(x)—were:

<sup>19</sup> Ex Post Facto refers to a retroactive law changing the legal consequences of actions committed prior to its enactment. *See Jensen v. Heckler*, 766 F.2d 383, 385 (8th Cir. 1985).

<sup>20</sup> A Bill of Attainder is legislation declaring a person, or a group of persons, guilty of a crime, and punishing them without trial. *See id.* at 386.

<sup>21</sup> *See* Gregory G. Sarno, Annotation, *Validity, Construction, and Effect of §202(x) of Soc. Sec. Act (42 U.S.C.A. § 402(x)), Mandating Suspension of Old-Age, Survivors, and Disability Insurance Benefits for Incarcerated Felons*, 86 A.L.R. FED. 748 § 2 (1988); David Z. Nisnewitz, *Suspension of Social Security Benefits to Incarcerated Felons*, 11 J. NAT'L ASS'N ADMIN. L. JUDGES 105, 107 (1991).

<sup>22</sup> *See* Sarno, *supra* note 21.

<sup>23</sup> *See, e.g., Zipkin v. Heckler*, 790 F.2d 16, 18 (2nd Cir. 1986); *Jensen v. Heckler*, 766 F.2d 383, 385 (8th Cir. 1985); *Pace v. United States*, 585 F. Supp. 399, 402–03 (S.D. Tex. 1984).

<sup>24</sup> *See, e.g., Zipkin*, 790 F.2d at 18 (incarcerated felons “not a suspect classification”, so “rational relation” test applies); *Washington v. Sec’y of Health & Hum. Servs.*, 718 F.2d 608, 611 (3rd Cir. 1983); *Graham v. Bowen*, 648 F. Supp. 298, 301–302 (S.D. Tex. 1986).

<sup>25</sup> *See, e.g., Sulie v. Bowen*, 653 F. Supp. 849, 852 (N.D. Ind. 1987), *aff’d* 836 F.2d 552 (7th Cir. 1987); *Pace*, 585 F. Supp. at 402.

<sup>26</sup> *See, e.g., Jones v. Heckler*, 774 F.2d 997, 998 (10th Cir. 1985).

<sup>27</sup> *See, e.g., Peeler v. Heckler*, 781 F.2d 649, 651–52 (8th Cir. 1986); *Jones*, 774 F.2d at 998.

<sup>28</sup> *See, e.g., Hopper v. Schweiker*, 596 F. Supp. 689, 693 (M.D. Tenn. 1984), *aff’d* 780 F.2d 1021; *Jones*, 774 F.2d at 998; *Andujar v. Bowen*, 802 F.2d 404, 405 (11th Cir. 1986); *Graham*, 648 F. Supp. at 303.



(1) “[T]here is no need to use scarce benefit funds for persons whose basic needs are met by the prison.”<sup>29</sup>

(2) “[R]elatively large amounts of money in the hands of prisoners could cause discipline problems.”<sup>30</sup>

In contrast to the extensive hearings for the 1980 bill, no hearings preceded the passage of 42 U.S.C. § 402(x) in 1983.<sup>31</sup> All the documentation of the 1983 Amendment that could be located consists of a comparatively meager legislative history stating little more than that the Social Security Administration wanted the extra money it could obtain by suspending inmates’ retirement benefits.<sup>32</sup> In fact, § 402(x) was only a tiny, insignificant

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<sup>29</sup> See *Davel v. Sullivan*, 902 F.2d 559, 562 (7th Cir. 1990). See also S. Rep. No 96-987, at 8 (1980), as reprinted in U.S.C.C.A.N. 4787, 4794; Mushlin, *supra* note 7, at 1.

<sup>30</sup> Mushlin, *supra* note 7, at 1. No court ever took Rationale #2 seriously. Most courts did not even mention Rationale #2. And those which did merely listed it along with Rationale #1—saving money from the Social Security Trust Fund—without ever mentioning the prison discipline rationale again, let alone using it in any analysis. See *Jensen v. Heckler*, 766 F.2d 383, 383 (8th Cir. 1985); *Graham v. Bowen*, 648 F. Supp. 298, 301 (S.D. Tex. 1986); *Pace v. United States*, 585 F. Supp. 399, 399 (S.D. Tex. 1984). One can reasonably infer that the courts quickly realized that Rationale #2 confused cause and effect. Monies to inmates from Social Security benefits were only coincidentally linked with problems of prison discipline. Prisoners have many sources for money and goods. The consequent issue is not one of regulating Social Security benefits, but of prison and jail regulations controlling inmates’ access to goods and cash. Actually, the court in *Graham v. Bowen*, 648 F. Supp. 298, 302 (S.D. Tex. 1986) apparently recognized the cause-effect issue when it said: “The nature of the government’s interest in reducing money-related discipline problems is not reached, but it appears to be considerably less substantial than the fiscal grounds, and is completely extraneous to the context of the Social Security Act.”

<sup>31</sup> This lack of the type of hearing which preceded suspending SSDI benefits for prisoners in 1980 is all the more surprising given that serious doubt was raised at the 1980 Hearing about the propriety of also suspending retirement benefits. See *1980 Hearing*, *supra* note 6, at 34–35.

<sup>32</sup> See *Koitz*, *supra* note 6, at 5 (“as part of the major legislation designed to solve social security’s financing problems, the Senate Financing Committee on Mar. 10, 1983, recommended a provision to eliminate all benefits (including retirement and survivor benefits) to convicted felons during incarceration.”) See also 1983 Legislative History, 1 Legislative History of Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1983), at 157. (“L. Limitation on Prisoners Benefits” Note: the only information in this short section is that in “Conference Agreement” between the Senate and House, it was agreed that suspension of prisoners’ old age and survivors’ benefits will be the only other benefits added to already existing suspension of prisoner disability

blip buried in a massive piece of legislation primarily concerned with the solvency of Social Security.<sup>33</sup>

When the suspension of retirement benefits was eventually challenged in court, the previous litigation over the suspension of disability benefits was found dispositive of the challenges to the constitutionality of suspending retirement benefits.<sup>34</sup> No further analysis was required. As the court in *Zipkin v. Heckler*<sup>35</sup> noted:

The mere fact that Congress did not expressly restate these [two] rationales in enacting 402(x) is of no moment. Both the retirement benefit suspension disputed here and the disability benefit suspension are part of a comprehensive scheme designed to provide income to certain members of the workforce who cannot generate their own incomes, and to conserve the Social Security fisc when the essential purposes of that income is provided through a different public mechanism—a prison.<sup>36</sup>

## II. ATTACKS ON THE LEGAL FOUNDATION OF 42 U.S.C. § 402(x)

If it were the early 80s and this legislation had been recently passed, it would have been an easy decision to bring either of the following legal attacks into a court of law. But it is now nearly forty years later, and dozens and dozens of courts have sustained the constitutionality of 42 U.S.C. § 402(x) without even a hint of a dissenting thought. No court in this land now would do otherwise than summarily deny any attempt at appealing the 1980 or 1983 amendments.

So, why take the time to go through this legal analysis, even if one of the offered two grounds have never yet been raised? The answer is that this analysis is integral to the argument for repeal. § 402(x) is petty, unfair, and

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benefits). *Id.* at 73. (“Limitation on Payments to Prisoners.” Note: This section only provides the language of the proposed amendment).

<sup>33</sup> See 1983 Legislative History of Social Security Amendments of 1983, *supra* note 32.

<sup>34</sup> See *Zipkin v. Heckler*, 790 F.2d 16, 16–18 (2nd Cir. 1986).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

harmful to members of communities of color, and legislative repeal is more likely if its legal failings are initially highlighted.

*A. The Transformation of the Concept of “Retirement” Between 1935 and the 1983 Legislation was so Dramatic as to Render 402(x) as Being “Utterly Lacking in Rational Justification”<sup>37</sup>*

The 1935 understanding of “retirement” had completely transformed to the concept of “modern retirement” by the time of the 1983 legislation. As such, there was little equivalency between what the 1935 benefits were intended to pay for—i.e., basic subsistence “needs,” reflected by what an inmate is provided in prison—and the objects for which retirement benefits were intended in 1983.

### **1. The 1935 Understanding of Retirement**

The goal of retirement benefits has changed since the 1935 Social Security Act. Retirement benefits still are a buffer against old age destitution, but they have evolved to become something far different than the 1935 concept of being too old to work and possibly being unable to support one’s own subsistence. As the Court in *Helvering v. Davis* stated when upholding the initial Social Security Act, “[w]hat is critical or urgent changes with the times.”<sup>38</sup> So have the times completely transformed the concept of “retirement.”

Neither the Congress, which passed § 402(x) in 1983, nor the courts, which subsequently rejected all constitutional challenges to the legislation, appreciated this change and its significance on their analyses. In 1935, Congress did not equate retirement benefits with the foundation supporting what this article refers to as “modern retirement.” In fact, it would not have been possible for Congress to have done so since the cultural notion of modern retirement did not even begin to exist for another twenty-five years.

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<sup>37</sup> *Flemming v. Nestor*, 363 U.S. 603, 611 (1960).

<sup>38</sup> *Helvering v. Davis*, 301 U.S. 619, 641 (1937).

The 1935 Social Security Act<sup>39</sup> was made law in the midst of the Great Depression,<sup>40</sup> which everyone has had a serious taste of throughout the COVID-19 Pandemic. In 1933, the average hourly wage for all union trades was \$1.062.<sup>41</sup> Fifty percent of senior citizens were living in poverty.<sup>42</sup> The unemployment rate was 24.9% (compared to 14.7% during the worst of the pandemic),<sup>43</sup> with an estimated 12,830,000<sup>44</sup> to 15,000,000<sup>45</sup> unemployed workers. The entire population was around 127,000,000,<sup>46</sup> which included little children, newborns, and octogenarians. It was hard times.<sup>47</sup> In the original Act, the age to begin receiving retirement benefits was sixty-five.<sup>48</sup>

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<sup>39</sup> Social Security Act, ch. 531, 49 Stat. 620 (1935).

<sup>40</sup> See *Smith v. Berryhill*, 139 S. Ct. 1765, 1771 n.1 (2019) (the 1935 Social Security Act was “responding to the crisis of the Great Depression.”). See also, FRANK S. BLOCH, *SOCIAL SECURITY LAW AND PRACTICE* 13 (2002).

<sup>41</sup> See U.S. DEP’T OF COM., BUREAU OF FOREIGN AND DOMESTIC COM., 57<sup>TH</sup> ANNUAL ABSTRACT OF THE UNITED STATES 325 tbl.359 (1933), <https://www2.census.gov/library/publications/1935/compendia/statab/57ed/1935-pdf> [<https://perma.cc/GH5L-MEH3>].

<sup>42</sup> See Sarah Carrier, *From Paper to Electronic: Food Stamps, Social Security, and the Changing Functionality of Government Benefits*, 24 GEO. L. REV. POVERTY L. & POL’Y 139, 141 (2016).

<sup>43</sup> See Heather Long & Andrew Van Dam, *U.S. Unemployment Rate Soars to 14.7 Percent, the Worst Since the Depression Era*, WASH. POST (May 8, 2020), <https://www.washingtonpost.com/business/2020/05/08/april-2020-jobs-report/> [<https://perma.cc/62JZ-T87A>].

<sup>44</sup> See *Great Depression Facts*, FDR LIBR. & MUSEUM, <https://www.fdrlibrary.org/great-depression-facts> [<https://perma.cc/D29Q-8U5V>].

<sup>45</sup> See *Great Depression History*, HIST., <https://www.history.com/topics/great-depression/great-depression-history> [<https://perma.cc/DW6P-3V5J>] (last updated Feb. 28, 2020).

<sup>46</sup> *Id.*

<sup>47</sup> See generally, DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945* (Oxford Univ. Press 1999).

<sup>48</sup> Social Security Act, Pub. L. No. 74-271, § 202(a), 49 Stat. 620, 623 (1935). At first glance, the sixty-five-age requirement seems to turn the Act into a cruel joke. In 1935, the life expectancy was fifty-eight for men and sixty-two for women. But that is misleading. Life expectancy figures in the early decades of the twentieth century were low, due to high infant mortality. Looking at “life expectancy after attainment of adulthood” provides a dramatically different picture. For example, “almost 54% of . . . [men] could expect to live to 65 if they survived to 21, and men who attained age 65 could expect to collect Social Security benefits for almost 13 years (and the numbers are even higher for women) . . .

Explaining the purpose of the Act, Justice Cardozo, writing for the majority in *Helvering v. Davis*,<sup>49</sup> stated:

[There is no difference if] men are thrown out of work because there is no longer work to do, or because the disabilities of age make them incapable of doing it . . . The hope behind this statute is to save men and women from the rigors of the poor house, as well as from the haunting fear that such a lot awaits them when journey's end is near.<sup>50</sup>

Combining this quote with the initial Social Security age of sixty-five provides two insights into the significant differences between the initial understanding of the role of retirement benefits and the current one. The first is that this Act was created to protect retired workers from extreme poverty, expressed in the Dickensian image of the “poor house.”<sup>51</sup> In this regard, the *Helvering* Court noted that three out of four former workers over sixty-five “probably were depending wholly or partially on others for support.”<sup>52</sup> That is hardly surprising. This was a massive economic collapse. By and large, all workers had when they stopped working were any savings left from a lifetime of work,<sup>53</sup> and even much of that was lost when nearly half the banks in America failed in 1933.<sup>54</sup>

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Also, it should be noted that there were already 7.8 million Americans age 65 or older in 1935.” *Social Security History: Life Expectancy for Social Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/lifeexpect.html> [<https://perma.cc/9T2J-4QYU>].

<sup>49</sup> *Helvering v. Davis*, 301 U.S. 619 (1937).

<sup>50</sup> *Id.* at 641.

<sup>51</sup> “Dickensian” refers to the 19<sup>th</sup> century author, Charles Dickens, who often wrote about impoverished young heroes like the protagonist in *Oliver Twist* (1838).

<sup>52</sup> *Helvering*, 301 U.S. at 643.

<sup>53</sup> Cf. Barbara A. Butrica, Howard M. Iams, & Karen E. Smith, *The Changing Impact of Social Security on Retirement Income in the United States*, 65 SOC. SEC. BULL. No.3 (2003/2004)

<https://www.ssa.gov/policy/docs/ssb/v65n3/v65n3p1.html> [<https://perma.cc/3ESM-R793>] (as such, in 1935, “an individual’s retirement benefits were based entirely on his or her own career earnings.”).

<sup>54</sup> See *Great Depression History*, HISTORY, <https://www.history.com/topics/great-depression/great-depression-history> [<https://perma.cc/DW6P-3V5J>].

This theme of looming destitution, however, proved resilient. Twenty-five years later, the Supreme Court in *Flemming v. Nestor*<sup>55</sup> stated that social security benefits are “payments to the retired . . . who might be destitute or nearly so.”<sup>56</sup> Even as late as 1965, courts viewed retirement benefits solely from the world of 1935, a world where workers were insured against loss of income from labor “when they are too old to labor.”<sup>57</sup>

The second insight—which likely would be subject to ridicule by current baby boomers,<sup>58</sup> with their exercise equipment, anti-aging creams, and healthy food regimens<sup>59</sup>—is that in 1935, sixty-five was perceived as so old that it likely carried disabilities which made one unable to work.<sup>60</sup>

But in the 1935 world, a sixty-five-year-old worker generally was an old person. This was a world of exhausted, broken bodies. This was a lifetime of backbreaking labor where, after ceasing to work, most just wanted to sit quietly on the front porch and watch the world go by. At sixty-five, they were old; the work made them old. The change in work since 1970 was discussed by Andrew Saul, the former Director of Social Security, stating: “We had a workforce 50 years ago [*i.e.*, 1970] that was very different than it is today:

<sup>55</sup> *Flemming v. Nestor*, 363 U.S. 603 (1960).

<sup>56</sup> *Id.* at 612. See also James P. Lewis, *Property Interests in Social Security Benefits*, 21 MD. L. REV. 331, 337 (1961) (noting that the *Helvering* court “relied on Congress’s power to spend money in aid of general welfare, and concedes that Congress had discretion to wield this power, *citing the desperate plight of the aged in times of [economic] depression.*”) (emphasis added).

<sup>57</sup> *Delno v. Celebreza*, 347 F.2d 159, 159 (9th Cir. 1965).

<sup>58</sup> The baby boomer cohort was born between 1946 and 1964. See Butrica et al., *supra* note 53, at 1. As a reasonable generalization, it could be said that unlike previous generations, they do not think their active life ends at their sixty-fifth birthday party; they are not ready to abandon work or leisure activities. See *Who Are the Elderly? Aging in Society*, LUMEN, <https://courses.lumenlearning.com/sociology/chapter/who-are-the-elderly-aging-in-society/> [<https://perma.cc/HXC8-XXFN>].

<sup>59</sup> Another generalization which seems on point is that because boomers do not want to grow old like their grandparents, there is a wide range of products to ward off the effects, or at least the signs, of aging. See *Who Are the Elderly? Aging in Society*, *supra* note 58.

<sup>60</sup> Steven Ruggles, *Multigenerational Families in Nineteenth-Century America*, 18 CONTINUITY & CHANGE 139, 139–41 (2003).

many more manual tasks, much more hard labor, for example, much more mining jobs, much more manufacturing. Today, it's much more office work."<sup>61</sup>

Keep in mind that the then-Director was talking about the nature of work fifty years before, in 1970. The Social Security Act was passed thirty-five years before that when work was hardly less physical. Loggers felled trees with axes and huge two-man hand saws. Miners went into the shaft with shovels and pickaxes. The toll on the laborer's body, making older workers less valuable in jobs requiring hard physical labor, largely explains why even when businesses hired during the Depression, they did not hire sixty-five-year-old men.<sup>62</sup> A 1930 survey cited in *Helvering v. Davis*, found that of 224 American factories, seventy-one of the factories had mandatory maximum hiring ages of forty, forty-one, or forty-six.<sup>63</sup> The remaining 153 factories had no mandatory maximums, but in practice, "few were hired if they were over 50 years of age."<sup>64</sup> Therefore, the fate of those sixty-five years and older who lost their job was "little less than desperate."<sup>65</sup>

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<sup>61</sup> Kenneth Terrel, *New Social Security Commissioner to Tackle Customer Service and Scams*, AARP (Feb. 6, 2020), <https://www.aarp.org/retirement/social-security/info-2020/andrew-saul-interview.html> [<https://perma.cc/FE3Y-CYKU>].

<sup>62</sup> Today, this likely would constitute age discrimination under the Federal Age Discrimination in Employment Act (ADEA), which protects employees who are forty years old and older. See 29 U.S.C. §§ 621–34.

<sup>63</sup> *Helvering v. Davis*, 301 U.S. 619, 643 (1937).

<sup>64</sup> *Id.* at 642–43.

<sup>65</sup> *Id.* at 643. An interesting theory about the motivation underlying the creation of retirement benefits was proposed by Oregon attorney Elmer F. Wollenberg: "The program was conceived under circumstances of widespread unemployment. It was hoped the act would encourage the aged to retire at 65." Elmer F. Wollenberg, *Vested Rights in Social Security Benefits*, 37 OR. L. REV 299, 342 (1958). So, it seems that in Wollenberg's view there were too many workers over sixty-five, and akin to buy-outs of senior law faculty, it was necessary to move them out so that younger, unemployed workers could take their places. Interestingly, a similar concept arose in 1939 with the so-called Townsend Plan. Under proposed legislation, the Townsend Plan would give \$200 a month to every person over sixty (who is not a felon) who agrees to retire. This would both add money to the economy and provide jobs to younger unemployed workers. See *Economic Security Act: Hearings Before the Comm. on Ways and Means on H.R. 4120*, 74th Cong. (1935). The proposed statute was roundly rejected in the House. See 84 Cong. Rec. 6524–6525 (1939).

Even in 1935, however, retirement benefits were not perceived as the worker's private cookie jar. "[The] original Social Security Program was designed for the typical family, which included a working husband, a stay-at-home mother, and their children."<sup>66</sup> Relatively few women were in the workplace.<sup>67</sup> So, from the start, Social Security retirement benefits envisioned a post-retirement world beyond one limited to the subsistence needs of the retired worker.

Nevertheless, it is fair to say that if Congress in 1935 had added something akin to § 402(x), while it would have been harsh on the remaining family, it would have been reasonable. The incarcerated retired worker would not need to fear the "poor house" while in prison. But the world of the American worker has drastically changed since then. Retirement is no longer merely moving towards a line separating working from not working, where the specter of poverty and destitution awaits on the other side of the line.

Certainly, the ability to meet basic needs is assumed within the concept of modern retirement, but modern retirement encompasses far, far more. Modern retirement is a full, coherent phase of life, which is substantially supported by retirement benefits. This full phase of the lifecycle cannot be traded off for a subsistence existence in which food, clothing, and shelter are provided. They are not equivalent; the 1935 benefits and the modern retirement benefits are directed at very different things.

## **2. The Modern Understanding of the "Retirement" Aspect of Retirement Benefits**

The central premise in this part of the argument is that there is no equivalency between the concept of retirement in 1935 and, at the time of the passage of 42 U.S.C. § 402 (x), in 1983. The following supports that premise. In 1976, the sociologist Robert C. Atchley wrote:

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<sup>66</sup> See Butrica et al., *supra* note 53, at 2.

<sup>67</sup> *Id.* at 3.



The most essential characteristic of retirement as a social institution is that the norms of society allow an individual, by virtue of the work he performs on the job, to establish a right to an income without holding a job. And this income in turn gives this individual the opportunity to play the role of retired person.<sup>68</sup>

That modern notion of retirement did not exist in 1935, though, as the following discussion will show, it plainly did forty-eight years later when Congress enacted § 402(x). In 1935, people left their jobs because they had no choice. Social Security benefits were perceived not as providing the economic foundation for a new phase of life but as an earned subsistence for the years left until death.<sup>69</sup>

None of that had really changed as the 1950s rolled around.<sup>70</sup> For example, in a 1951 study which focused on the attitudes of steel workers towards the legitimacy of retirement, workers felt that retirement was only justified if the individual was physically unable to work.<sup>71</sup> Over the course of that decade, however, the modern understanding of retirement had gained legitimacy. Accordingly, by 1960 “retirement [by steel workers] was being justified as a reward for a lifetime of work.”<sup>72</sup> Thus, the concept changed from something to be avoided to a sought-after reward.<sup>73</sup>

Steelworkers, however, were not unique. The impetus towards the modern conception of retirement continued to increase throughout the ‘60s: “The

<sup>68</sup> ROBERT C. ATCHLEY, *THE SOCIOLOGY OF RETIREMENT* 2 (1976).

<sup>69</sup> See *Helvering v. Davis*, 301 U.S. 619, 641–43 (1937).

<sup>70</sup> In fact, nearly all research on retirement has taken place since 1950. See ATCHLEY, *supra* note 68, at 3.

<sup>71</sup> *Id.* at 28–29.

<sup>72</sup> *Id.* at 29.

<sup>73</sup> In 1961, Congress lowered the minimum age to begin receiving retirement benefits from sixty-five to sixty-two. Social Security Amendment of 1961, Pub. L. No. 87-64, 75 Stat. 131. The minimum age of sixty-two had been applied to women five years previously. See Moore, *supra* note 15, at 552–53. The subsequent behavior of those who could avail themselves of “early retirement” strongly suggests how desirable retirement had become. Though early retirement carried an economic cost to the retiree in significant reduction of their benefits compared to what they would have received if they waited to retire until they were sixty-five, nonetheless half the workers eligible retired at sixty-two. *Id.* at 573.

cohorts who were retiring in 1970 were much more favorably disposed toward retirement than those who retired in 1960.”<sup>74</sup> A 1969 study of autoworkers found that “[w]orkers favor earlier retirement . . . insofar . . . they will be receiving enough retirement income.”<sup>75</sup> By 1974, nine years prior to the passage of § 402(x), a study found that the modern concept of retirement was an “overwhelmingly favorable concept” throughout society.<sup>76</sup>

Well before 1983, “[b]eing a retired person . . . [was] a definite position in American society. . . .”<sup>77</sup> As part of this position, it was expected that “the retired person will assume responsibility for managing his own life.”<sup>78</sup> That life, of course, included expenses, and by 1958, as the modern conception of retirement was forming, society already recognized that Social Security benefits would provide the “foundation of retirement.”<sup>79</sup>

In 2018, 60% of the aging population depended upon their benefits for at least half their income,<sup>80</sup> while for one-third of that 60% (*i.e.*, 20%), social security accounted for 90–100% of their income.<sup>81</sup> In 2004, it was projected

<sup>74</sup> ATCHLEY, *supra* note 68, at 30.

<sup>75</sup> *Id.* at 28.

<sup>76</sup> *Id.* at 4.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 61.

<sup>79</sup> Wollenberg, *supra* note 65, at 299. *See also* Butrica et al., *supra* note 53, at 2, 8 (“Historically, social insurance in the form of Social Security benefits has played a major role of income support for elderly in the United States . . . Social Security is the most important income source for all retirees.”); ATCHLEY, *supra* note 68, at 127 (“By the year 2000, everyone reaching retirement age in the United States will have been born into a social world in which retirement and Social Security are taken for granted.”).

<sup>80</sup> *See* Sean Williams, *What Is Means-Testing, and How Could It Affect Social Security?*, MOTLEY FOOL (Aug. 16, 2018, 7:21 AM), <https://www.fool.com/retirement/2018/08/16/what-is-means-testing-and-how-could-it-affect-soci.aspx> [<https://perma.cc/GXR4-SERV>].

<sup>81</sup> *Id.* There was some variance among ethnic groups as to percentage of persons over sixty-five totally relying on Social Security for their income: Hispanic (40%); African American (33%); Asian and Pacific Islanders (26%); white (18%). *The Role of Benefits in Income and Poverty*, NAT’L ACAD. OF SOC. INS., <https://www.nasi.org/learn/socialsecurity/benefits-role> [<https://perma.cc/4QYV-LA28>]. Gender and marital status also played a part as 20% of unmarried women total income consisted of their retirement benefits. *Id.*

that, as of 2020, Social Security retirement benefits would provide 40% of the income of baby boomers<sup>82</sup> (born 1946–1964)<sup>83</sup> and would be received by almost all of that cohort.<sup>84</sup>

For many who have nestled into this phase of life, retirement is “busy, and certainly it may have exciting moments, but for the most part it is predictable and satisfying.”<sup>85</sup> On the other hand, as with any other phase of life, retirement is not a joyful time for all. Poverty,<sup>86</sup> sickness, and lack of leisure skills leaving the retired person bored out of their mind,<sup>87</sup> can diminish this life chapter. But good or bad, starting in the late 1950s and well before 1983, retirement had become a recognizable and coherent phase of the normal

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<sup>82</sup> See Butrica et al., *supra* note 53, at 1.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> ATCHLEY, *supra* note 68, at 36.

<sup>86</sup> For example, in 1976 Atchley observed that “the majority of working-class Americans face real poverty in retirement.” *Id.* at 31. However, one author described Social Security as “arguably the Nation’s most successful poverty program.” Moore, *supra* note 15, at 592. According to Professor Moore, while 10% of aged Social Security beneficiaries received total income below the poverty line, without Social Security, 49% would be below the poverty line. *Id.*

<sup>87</sup> ATCHLEY, *supra* note 68, at 31.

lifecycle.<sup>88</sup> This reality is reflected in books,<sup>89</sup> magazines,<sup>90</sup> and websites<sup>91</sup> marketed to modern retirees, as well as adults-only retirement communities throughout the country and elaborate urban senior centers.

Again, the life that the retired person is “responsible for managing” envisions a phase of life which is a reward for a lifetime of work. Bare subsistence existence plainly does not conjure anyone’s notion of a reward. Many no doubt share in the belief that those in prison forfeit any claim to a “reward,” but this belief is misguided. All those convicted of a crime do not lose their retirement benefits. § 402(x) is not based on some theory of forfeiture. The benefits are suspended on the theory that prison provides the incarcerated person with the equivalency of what could be bought with retirement benefits. But that completely fails to comprehend the vast difference between “retirement” in the 1935 sense and “modern retirement.” This modern concept of retirement is far richer and much broader than merely surviving as a biological entity (even though sadly that is the best some will do in this phase).

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<sup>88</sup> Even before 1983 when § 402(x) was passed, there were those over sixty-five who continued to spend some of their time working. A 1971 study found that “total withdrawal from the labor force was by no means universal in any age group, yet the number of weeks employed seldom averaged more than 18 weeks for any subgroup of American Social Security pensioners age sixty-five or over.” *Id.* at 19. The number of those drawing retirement benefits while still working full or part-time may now be larger since “Social Security program rules encourage beneficiaries to work by allowing unlimited earnings for those at or above the full retirement age (rising from age 65 to age 67 for the late baby-boom cohort.)” Butrica et al., *supra* note 53, at 8.

<sup>89</sup> See *Retirement Books Guide*, AM. LIBR. ASSOC., <https://libguides.ala.org/finraore/personalfinance/retirement-one> [<https://perma.cc/8NM9-RTJJ>]; Best Selling Book List in Retirement Planning, AMAZON, <https://www.amazon.com/Best-Sellers-Books-Retirement-Planning/zgbs/books/2731> [<https://perma.cc/T5VD-M39S>]; *Retirement Books*, GOODREADS, <https://www.goodreads.com/shelf/show/retirement> [<https://perma.cc/39HB-XPYP>].

<sup>90</sup> See *18 Best Magazines for Retirement, Seniors & People Over 60*, CAKE (Aug. 5, 2020), <https://www.joincake.com/blog/retired-magazines/> [<https://perma.cc/W9DK-G7YQ>].

<sup>91</sup> See *Retirement Websites Guide*, AM. LIBR. ASSOC., <https://libguides.ala.org/finraore/personalfinance/retirement-two> [<https://perma.cc/T2KY-8B5Q>] (last updated May 20, 2021, 9:35 AM).

If the retired individual goes to prison, they do not just leave their bed, refrigerator, and clothes closet. Economically, they leave a world which continues to exist even when they are incarcerated. But that world outside prison, which encompasses their retirement, is unlikely to survive if Social Security retirement benefits—representing 40%, 50%, or 90–100% of their total income<sup>92</sup>—are taken from them.

Modern retirement is comprised of interrelated economic and social relationships. The economic dimension of retirement includes possessions and financial obligations. The consumer economy in 1935 was fundamentally a cash economy, with the exception of bank loans and stores sometimes giving credit to locals. By 1983, we lived in a credit economy, credit cards at the ready. In modern retirement, there are credit card payments to be made on houses or condos (which constitute the primary assets for retired people, assets that can be taken away in foreclosure if the individual lacks the money to make monthly payments), payments on appliances, payments on insurance, payments on recreational equipment, payments on cars, and a wide range of other material aspects of a life. All of those debts require payment, whether or not the retired person is in prison. They were incurred based on the retired person's projected retirement income, not on half or none of it.

Within the interpersonal dimension, the retired person often constructs their retired life to intertwine with those of other family members. The retired person's income may be the sole support of a partner. Family members may rely on the retired person's possessions for which the retired person is still making payments (like a car). A grandchild might try to save money by staying with their grandparents during college, or a grown child might move back—so-called “boomeranging”<sup>93</sup>—while dealing with a divorce or

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<sup>92</sup> See Williams, *supra* note 80.

<sup>93</sup> Boomeranging refers to the phenomenon of adult children who return to live with their parents again. “. . . [A] 2009 Pew research survey found that among 22-29-year-olds, one-in-eight say that, because of the recession, they have boomeranged back to live with their

struggling to find a position in the job market. This requires the retired person to maintain payments on their residence. Or the retired person may already have made a commitment to pitch in on the costs of an older child's or grandchild's education. Such a common offer by parents or grandparents can be central to the child's or grandchild's entire educational planning.

Some may say that all this handwringing over senior citizens losing their benefits as result of § 402(x) is, in reality, a strawman. After all, isn't it unlikely that someone over sixty-two who has a sufficient work history to obtain benefits and who was enjoying the rewards of modern retirement will suddenly be snatched away into the criminal justice system and incarcerated? Is it not far more likely, these critics will say, that most of those denied retirement benefits as a result of § 402(x) were sentenced to long terms in prison when they were in their forties or fifties, by which time they had amassed a sufficient work history for benefits? Then, one day in the course of their thirty-year sentence, they reached sixty-two and applied for benefits. But they had never constructed or experienced any form of retirement, let alone a modern one.

While this position merits a response, the point is vastly overstated. For example, consider data presenting the number of retirement age persons admitted into state and federal prison in the single year of 2009.<sup>94</sup> In state systems, 7,105 persons sixty-one to seventy;<sup>95</sup> 1,073 persons seventy-one to

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parents." *The Return of the Multi-Generational Family Household*, PEW RSCH. CTR. 1, 7 (2010) [hereinafter RETURN OF MULTIGENERATIONAL], <https://www.pewresearch.org/wp-content/uploads/sites/3/2010/10/752-multi-generational-families.pdf> [<https://perma.cc/R666-97S6>]. For a sophisticated analysis of the boomerang phenomenon and its future implications, see KATHERINE S. NEWMAN, *THE ACCORDION FAMILY: BOOMERANG KIDS, ANXIOUS PARENTS, AND THE PRIVATE TOLL OF GLOBAL COMPETITION* (2012).

<sup>94</sup> I could not find any data on this issue for subsequent years; however, I cannot think of anything which has transpired in the interim which would in any way affect the premises of this article.

<sup>95</sup> *Old Behind Bars—The Aging Prison Population in the United States*, HUM. RIGHTS WATCH, tbl.2 (Jan. 27, 2012), <https://www.hrw.org/report/2012/01/27/old-behind-bars/aging-prison-population-united-states#> [<https://perma.cc/55PR-UBQW>].

eighty;<sup>96</sup> and ninety-three persons eighty and older<sup>97</sup> were admitted into state prison. In the federal system, 1,308 persons sixty-one to seventy;<sup>98</sup> 158 persons seventy-one to eighty;<sup>99</sup> and fifteen persons eighty and older<sup>100</sup> were admitted into the federal prison system. And that does not include those sentenced to serve time in jail. The data set does not show how many of these 9,652 persons had a sufficient work history to qualify for social security benefits. But the point is that substantial numbers of retirement age senior citizens are being put in prison and separated from whatever retirement world they may have had.<sup>101</sup> To the extent that world depended on monthly retirement benefits to continue to exist while the person was in prison, that world was likely lost.

The significance of retirement benefits as the economic foundation of modern retirement has only intensified with the dramatic return of multigenerational family housing.<sup>102</sup> Homes which included multiple

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at tbl.A-7.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Again, many current prisoners are at the age to qualify for full retirement benefits. Between 2007–2010, “. . . the number of sentenced state and federal prisoners age 65 or older increased 63 percent . . .” HUM. RIGHTS WATCH, *supra* note 95 (as of 2012, there were 26,200 prisoners sixty-five and older). It is likely that all too many of these older prisoners have been caught in a cycle of repeated reincarceration, *see* Oliva, *supra* note 5, at 347 n.277 (former prisoners face considerable obstacles to successful reintegration, and many return to prison).

<sup>102</sup> Multigenerational family households come in a variety of configurations such as parents and adult children, adults with older parents, parents with their children and their children’s grandparents, and grandparents with their grandchildren. *See generally* RETURN OF MULTIGENERATIONAL, *supra* note 93; *Multigenerational Households*, GENERATIONS UNITED [hereinafter GENERATIONS UNITED] <https://www.gu.org/explore-our-topics/multigenerational-households> [<https://perma.cc/5XMH-L862>]; D’Vera Cohn & Jeffrey S. Passel, *A Record 64 Million Americans Live in Multigenerational Households*, PEW RSCH. CTR. (Apr. 5, 2018), <https://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/> [<https://perma.cc/C8D2-Z6NY>]; Christine Romero, *All in the Family: Multigenerational Housing Makes a Comeback*, REALTOR (Aug. 2, 2017),

generations—parents and their parents, older children and their children—were commonplace during the mid-nineteenth century agricultural period of our history.<sup>103</sup> However, wage labor and the move of work to the cities<sup>104</sup> combined with the diminishing importance of agricultural and occupational inheritance<sup>105</sup> led to a sharp decline in multiple generational living.

Following World War II (WWII),<sup>106</sup> the percentage of the population living in multigenerational households dropped from 21% in 1950<sup>107</sup> to just 12% in 1980.<sup>108</sup> This was the era of nuclear families—father, mother, two kids—and the growth of the suburbs.<sup>109</sup>

That dramatically changed. Since 1990, multigenerational housing increased 70%.<sup>110</sup> And it just kept growing. In 2000, 42 million people lived in multigenerational housing.<sup>111</sup> By 2016, 64 million Americans<sup>112</sup>—one in four—were living in multigenerational housing.<sup>113</sup> Currently, Hispanic

<https://www.realtor.com/news/trends/multigenerational-housing-rising/>  
[<https://perma.cc/Z8FY-2DUZ>].

<sup>103</sup> See Ruggles, *supra* note 60, at 141. Interestingly, family historians and sociologists beginning in the 1960s had come to the revisionist theory that people in mid-19th century America lived in nuclear families, bringing back elder parents only if they were too poor to live on their own. *Id.* at 140. Ruggles, however, uses “new methods and sources” to establish that the earlier theory of multigenerational households was correct. *Id.* at 140–41.

<sup>104</sup> *Id.* at 141–42.

<sup>105</sup> *Id.* at 160–62.

<sup>106</sup> See RETURN OF MULTIGENERATIONAL, *supra* note 93, at 4 (“Starting right after World War II, the extended family household fell out of favor with the American public.”).

<sup>107</sup> See Cohn & Passel, *supra* note 102, at 2.

<sup>108</sup> *Id.*

<sup>109</sup> See RETURN OF MULTIGENERATIONAL, *supra* note 93, at 4 (“A range of demographic factors likely contributed to this decline [in multigenerational housing], among them the rapid growth of the nuclear-family-centered suburbs . . .”).

<sup>110</sup> CTR. FOR GLOB. POL’Y SOLS., MORE CHILDREN IN MULTIGENERATIONAL FAMILIES BENEFIT FROM SOCIAL SECURITY 1 (2016) [hereinafter CHILDREN BENEFIT FROM SOCIAL SECURITY], <http://globalpolicysolutions.org/wp-content/uploads/2016/08/Multigen-families-and-Social-Security.pdf> [<https://perma.cc/F2P2-T3E7>].

<sup>111</sup> See RETURN OF MULTIGENERATIONAL, *supra* note 93, at 1.

<sup>112</sup> See Cohn & Passel, *supra* note 102, at 1.

<sup>113</sup> The resurgence of multigenerational housing is attributable to a number of social and economic factors. The Great Recession of 2007–2009 resulted in widespread



people (27%), Black people (26%), and Asian people (29%) are much more likely to live in multigenerational family household than white people (16%).<sup>114</sup> Given the predicted demographics that “by 2043, our nation will consist predominantly of families of color, with the largest demographic shift occurring in the number of native-born Latino and incoming Asian families,”<sup>115</sup> the current trend towards multigenerational housing is likely to keep growing.<sup>116</sup>

In fact, this recent data may be undercounting the extent of the increase in multigenerational housing. The concept of multigenerational encompasses a lineage of grandparents, parents, older children, and grandchildren. However,

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unemployment and a wave of twenty-five to thirty-four-year-olds moving back home with their parents. See RETURN OF MULTIGENERATIONAL, *supra* note 93, at 4–5. The sharp spike in multigenerational family housing “slowed a little [following the recession] but has remained much more rapid than the growth before the recession.” Cohn & Passel, *supra* note 102, at 2. Perhaps the continued appeal of multigenerational living is in part a reflection of the advantages of that mode of shared living, for example: shared income; shared responsibilities; the sharing of cultural and cross-generational values; and greater role models for younger children. “Another factor [in the continued increase] has been the big wave of immigration, dominated by Latin Americans and Asians, that began in 1970. Like their European counterparts from earlier centuries, these modern immigrants are far more inclined than native-born Americans to live in multi-generational family households.” See RETURN OF MULTIGENERATIONAL, *supra* note 93, at 5. Finally, the surge in multigenerational households is also a function of “. . . the change in median age of first marriage. The typical man marries for the first time at age twenty-eight and the typical woman at age twenty-six. For both genders, this is about five years older than it was in 1970. One byproduct of this cultural shift is that there are more unmarried twenty-somethings in the population, many of whom consider their childhood home to be an attractive living situation, especially when a bad economy makes it difficult for them to find jobs or launch careers.” *Id.*

<sup>114</sup> See Cohn & Passel, *supra* note 102, at 4–5.

<sup>115</sup> See CHILDREN BENEFIT FROM SOCIAL SECURITY, *supra* note 110, at 1.

<sup>116</sup> Predictably, multigenerational housing has been added to the housing stock. See, e.g., Dawn Kirkpatrick & Chris Kirkpatrick, *Multigenerational Homes: The New American Dream*, ACTIVE RAIN (Sept. 17, 2017, 11:00 AM), <https://activerain.com/blogview/5113577/multi-generational-homes—the-new-american-dream> [<https://perma.cc/U355-248R>] (“As we look into the economic future of households in America the trend of multi-generational homes may become a normalcy rather than a fleeting memory. *Households are looking at the many benefits and homebuilders are listening to the demand.*”) (emphasis added).

for purposes of this article, the concept can also incorporate aunts and uncles and their parents and their grandchildren, or mixes of blood relatives and long-term friends living in neighboring proximity, who share economic (such as when the family located next door needs to buy a new refrigerator) and household responsibilities (such as childcare).

This returns us to prisoner retirement benefits. In multigenerational households, retired grandparents play a number of roles, including providing childcare and offering elder wisdom.<sup>117</sup> They also add their retirement benefits to the multigenerational family economy. Of course, not every grandparent is sixty-two or older or would qualify for social security benefits. Furthermore, everyone who is sixty-two years or older is not a grandparent. Nevertheless, considering that there currently are 45.1 million seniors receiving retirement benefits,<sup>118</sup> it seems reasonable to infer that there must be a significant number of grandparents in the wider society who are eligible for retirement benefits.

For children living in the home, the grandparent's retirement benefits are considered indirect Social Security benefits, benefits which help raise the children living in these homes out of poverty.<sup>119</sup> In 2014, 3.2 million children

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<sup>117</sup> Having grandparents living with their own children and their grandchildren allows for the type of respect for elders typical in the multigenerational homes of the 19th century: "In the late 1800s and early 1900s, many U.S. households were home to multigenerational families, and the experience and wisdom of elders was respected. They offered wisdom and support to their children and often helped raise their grandchildren." Dorian Apple Sweetser, *Love and Work: Intergenerational Household Composition in the U.S. in 1900* 46 J. MARRIAGE & FAM. 289 (1984).

<sup>118</sup> See HIGHLIGHTS AND TRENDS, *supra* note 1, at 2.

<sup>119</sup> See CHILDREN BENEFIT FROM SOCIAL SECURITY, *supra* note 110, at 1. Additionally, 3.2 million children also received direct social security benefits as dependents of deceased, disabled, or retired family members. *Id.* Indirect benefits (of which retirement benefits comprise a meaningful portion) and direct benefits historically have combined to keep children of color out of poverty. *Id.* at 2. In 2000, "[t]he National Urban League found that Social Security lifts four times as many African American children as White children out of poverty." *Id.* Further, "[a]ccording to the Center on Budget and Policy Priorities, Social Security kept 200,000 Latino children above the poverty line in 2009." *Id.* That is why it has been said that "Social Security is among the Nation's largest antipoverty programs for children." *Id.* at 1.

benefited from such indirect benefits as a result of living in a multigenerational house where someone received benefits.<sup>120</sup> Moreover, two-thirds of children benefiting from indirect benefits lived in multigenerational homes consisting of three generations—which often includes grandparents—or lived in so-called “skipped generation” homes where there are only grandparents and grandchildren.<sup>121</sup>

It is fair to infer that the economic contributions of grandparents who are living their retirement in multigenerational households are significant, particularly for children who reside in the household. There are 7.8 million children who live in households headed by grandparents or other relatives.<sup>122</sup> There are 2.5 million grandparents who are responsible for their grandchildren’s needs.<sup>123</sup> In one-third of these grandparent-funded homes, neither parent is present.<sup>124</sup> If you take away what is 40% to 100%<sup>125</sup> of those grandparents’ total income by suspending their retirement benefits if they are incarcerated, it is not difficult to envision that the grandparents’ retirement world, which is situated in a multigenerational household, would collapse, perhaps along with the entire household.<sup>126</sup>

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<sup>120</sup> *Id.* at 1.

<sup>121</sup> *Id.* 13% of Black multigenerational households are skipped generation households. See RETURN OF MULTIGENERATIONAL, *supra* note 93, at 6.

<sup>122</sup> See *Grandfamilies*, GENERATIONS UNITED, <https://www.gu.org/explore-our-topics/grandfamilies> [<https://perma.cc/D99T-CPCT>].

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See ATCHLEY, *supra* note 68.

<sup>126</sup> Of course, part of the multigenerational household economy may include “derivative benefits” from the now incarcerated retired worker. Those derivative benefits are not suspended by § 402(x)—see 42 U.S.C. § 402(x)(2) (“Benefits which would be payable to any individual [other than the incarcerated individual] . . . on the basis of the wages and self-employment income of such confined individual . . . shall be payable as though such confined individual were receiving such benefits under this section . . .”). Such derivative benefits could include benefits for a current spouse, see *What is the Eligibility for Social Security Spousal Benefits?*, SOC. SEC. ADMIN., (MAY 14, 2021), <https://faq.ssa.gov/en-us/Topic/article/KA-02011> [<https://perma.cc/6W9H-ESAR>]; benefits for an ex-spouse, see *id.*; child benefits, see *Benefits for Children*, SOC. SEC. ADMIN. (2018), <https://www.ssa.gov/pubs/EN-05-10085.pdf> [<https://perma.cc/4D2M-3R4X>]; benefits for

Congress in 1983 and the subsequent courts who rejected the constitutional attacks on § 402(x) obviously were not aware of the coming explosion of multigenerational family housing which was to begin in earnest in 1990. They nevertheless were fully aware of the modern concept of retirement and the essential role of retirement benefits in making that modern retirement possible. In spite of this, the courts and Congress alike chose to rely upon a conception of retirement based on the world as it existed in 1935, even though that conception ceased to be salient well before § 402(x) was passed. As such, the idea that there was a significant equivalency between providing the necessities for human subsistence and providing the income source necessary for modern retirement was hopelessly misguided from the start.

Look again at the rationale which has insulated § 402(x) from constitutional attack: “The restriction [of suspending benefits] ‘promotes the legitimate . . . congressional policy of conserving scarce Social Security resources where a prisoner’s basic economic needs are provided from other public sources.’”<sup>127</sup>

In this view, common throughout all the cases and literature concerning § 402(x), retirement benefits equate with the necessary resources to maintain a basic subsistence existence. However, as discussed in this section, retirement benefits are not about subsistence but about the foundation piece in our modern concept of *retirement*. The notion that a state-supported prison existence at all equates with providing retirement benefits is completely wrong. As such, the rationale cannot support § 402(x). Without this rationale

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grandchildren (both parents must be deceased or disabled, or the grandparent or step-grandparent legally adopts the grandchild), see Devin Carroll, *Social Security Benefits for Grandchildren*, SOC. SEC. INTEL., <https://www.socialsecurityintelligence.com/social-security-benefits-for-grandchildren/> [<https://perma.cc/2AEQ-GXAT>]. Again, while the derivative benefits are not removed from the economy of the multigenerational or extended family economy when the source of those derivative benefits is imprisoned, all of the retired worker’s own benefits are lost to the household.

<sup>127</sup> Mushlin, *supra* note 7, at § 16:17.

as support, § 402(x) is “a patently arbitrary classification, utterly lacking in rational justification”<sup>128</sup> and therefore offends the Due Process Clause.<sup>129</sup>

Of course, that is not entirely correct. There remains one rational justification, though I find it ignorant and unkind: These are prisoners, and they just don’t deserve their benefits and whatever their benefits could purchase, whether that is to cobble together savings for when they get out of prison, or to purchase a color television to watch in their cell, or to make house payments. That, however, though perhaps rational, would make § 402(x) a Bill of Attainder,<sup>130</sup> which is exactly what it is.

#### *B. 42 USC § 402(x) is a Bill of Attainder*

Even assuming *arguendo* that, contrary to the above analysis, free food, clothing, and shelter in prison corresponds to being provided with retirement benefits, the question still remains why this small cohort was selected to be the subject to this cost-savings project. One need not take the analysis too deeply to discern that both the 1980 and 1983 amendments were studies in knee-jerk reactions to the Son of Sam’s disability benefits and general pettiness. In 1980, there were approximately 4,300 people in prison receiving disability benefits at a total cost of 16.6 million dollars.<sup>131</sup> In 1980, there were approximately 1,214 individuals in prison receiving retirement benefits at a total cost of 3.5 million dollars a year.<sup>132</sup>

In short, the selection of such a small group for such relatively small savings must raise at least some suspicion about the real intent of § 402(x). After all, Congress possessed far more effective ways to deal with money concerns, as demonstrated by the fact that in subsequent years Congress

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<sup>128</sup> *Flemming*, 363 U.S. at 611.

<sup>129</sup> *Id.*

<sup>130</sup> *See Jensen v. Heckler*, 766 F.2d 383, 386 (8th Cir. 1985).

<sup>131</sup> *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO/HRD-82-43, PRISONERS RECEIVING SOCIAL SECURITY AND OTHER FEDERAL RETIREMENT, DISABILITY, AND EDUCATION BENEFITS 20 (1982).

<sup>132</sup> *Id.*

passed legislation advancing the age when maximum benefits can be obtained,<sup>133</sup> reducing benefits for early retirement,<sup>134</sup> increasing the payroll and/or self-employment tax rate,<sup>135</sup> and taxing the benefits.<sup>136</sup>

That suspicion is not lessened when reviewing the testimony at the 1980 Hearing on the bill to suspend prisoner's disability benefits:

"[T]hese payments are unfair to the general public, which prefers to believe that once a convict is behind bars, he will be punished for his crime. People are rightfully outraged when they discover that prisoners can build substantial personal savings at the expense of the Social Security system."<sup>137</sup>

<sup>133</sup> In 1983, Congress amended the Act to gradually raise the age for full benefits from sixty-five to sixty-seven. 128 Cong. Rec. 4156 (1982). For a detailed analysis of this change in the Social Security system, see Moore, *supra* note 15, at 557 et seq.

<sup>134</sup> See Butrica et al., *supra* note 53, at 12.

<sup>135</sup> See Social Security Amendments of 1983, Pub. L. No. 98-21, §§ 123-24, 97 Stat. 65, 87-91. This amendment was fleshed out in Patricia E. Dilley, *Breaking the Glass Slipper: Reflections on the Self-Employment Tax*, 54 TAX LAW 65, 104 (2000):

The 1977 Amendments set scheduled tax increases in 1982 to 13.4 percent, in 1985 to 14.1 percent, in 1986 to 14.3 percent, and 15.3 percent in 1990, for a final increase. The major financing changes made the 1983 Social Security Act Amendments include acceleration of part of the payroll tax increases that had been enacted in 1977. As a result, part of an increase scheduled to take place in 1985 (which would have raised the combined FICA rate from 13.4 percent to 14.1 percent) was moved to 1984 (raising the rate in 1984 to 14 percent); similarly, the rate was scheduled to increase from the 1986 rate of 14.5 percent to its final rate of 15.3 percent in 1990, but the 1983 legislation inserted an interim increase from 14.5 percent to 15.02 percent in 1988. At the time of the amendments, a total of \$39.4 billion for the period 1983 to 1989 was estimated to be raised by accelerating the scheduled tax increases for FICA, and \$18.5 billion for the same period was estimated to be raised by increasing SECA tax rates.

<sup>136</sup> See 1983 Legislative History, *supra* note 32, at 17 ("Taxation of Social Security and Tier 1 Railroad Retirement Benefits"). See also *Few Understand that Social Security is Already Means-Tested*, DALLAS MORNING NEWS (Jan. 12, 2013, 4:57 PM), <https://www.dallasnews.com/business/2013/01/12/few-understand-that-social-security-is-already-means-tested/> [<https://perma.cc/V236-S9QW>] ("... an estimated 30 percent of all retirees now pay some amount of tax on their benefits.")

<sup>137</sup> 1980 Hearing, *supra* note 6, at 24.

“Moreover, it is incredible that the vast number of social security beneficiaries are forced to accept a lower standard of living while prisoners live high on the hog in their rent-free cells.”<sup>138</sup>

“With all their needs met, what do inmates use their social security checks for? They buy luxuries such as stereos, electronic games, color televisions, tape recorders, and athletic equipment.”<sup>139</sup>

“However, Berkowitz is only the most glaring example of bureaucratic bumbling and twisting the intent of Congress. There are many more vicious prisoners serving sentences in institutions across America on convictions ranging from child molestation to murder who are also receiving Social Security disability benefits.”<sup>140</sup>

In fact, several of the courts that heard constitutional challenges to § 402(x) specifically noted that “[the] legislative history of § 402(x) reveals some hostility to the idea that criminals could receive these benefits.”<sup>141</sup> As the above quotes reveal, that is a bit of understatement. Nevertheless, these courts then went on to dismiss the significance of such legislative history in constitutional litigation,<sup>142</sup> relying upon a line of doctrine espousing that “[j]udicial inquiry into Congressional motives are at best a hazardous matter, and when the inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed.”<sup>143</sup>

No court of which I am aware, however, has ever said that legislative history is irrelevant to constitutional analysis. Legislative history certainly counts as evidence. The history just is not sufficient to carry the constitutional

<sup>138</sup> *Id.* at 25.

<sup>139</sup> *Id.* at 68.

<sup>140</sup> *Id.* at 86.

<sup>141</sup> *Graham v. Bowen*, 648 F. Supp. 298, 302 (S.D. Tex. 1986). *See also Jensen*, 766 F.2d at 386 (8th Cir. 1985); *Jensen v. Schweiker*, 709 F.2d 1227, 1230 (8th Cir. 1983); *Pace v. United States*, 585 F. Supp. 399, 401 n.4 (S.D. Tex. 1984).

<sup>142</sup> *See Flemming*, 363 U.S. at 617–19; *United States v. O’Brien*, 391 U.S. 367, 383 (1968) (“Inquiries into congressional motives or purposes are a hazardous matter.”); *Graham*, 648 F. Supp. at 302.

<sup>143</sup> *Flemming*, 363 U.S. at 617.

claim. Here, one does not need to go “behind objective manifestations.” It is the very “objective manifestations” revealed by Congress’s abdication of the central philosophy of the Social Security Act, which along with the legislative history establishes that the statute is intended as punitive.

Over and over courts have consistently focused on prison meeting the inmates’ basic “needs.”<sup>144</sup> That is why prisoners do not get their retirement or disability benefits under § 402(x). But the concept of “need” is foreign to the approach of the entire Social Security Act towards retirement and disability benefits. The core principle guiding the Social Security Act’s approach to these benefits is that they are not “means-tested.”<sup>145</sup> “Need” is irrelevant.<sup>146</sup> Bill Gates can receive retirement benefits or disability benefits. He plainly does not “need” the benefits, but that is not the point.<sup>147</sup> The

<sup>144</sup> See generally Mushlin, *supra* note 7, § 1:1.

<sup>145</sup> See *Bowen v. Galbreath*, 485 U.S. 74, 75 (1988); *Hopper v. Schweiker*, 596 F. Supp. 689, 692 (M.D. Tenn. 1984); See also *Oliva, supra* note 5, at 327–28; *1980 Hearing, supra* note 6, at 96 (statement of Peter W. Hughes, Legislative Counsel, National Retired Teachers Association and American Association of Retired Persons: “Such a theory [that benefits can be denied because a prisoner does not need them], however, is inconsistent with the philosophy behind social security. Social Security has not, and never has been, a system based on need. It is an earned right based on individual contributions.”).

<sup>146</sup> The only court which even mentions the argument that social security retirement benefits are not need based and therefore cannot be offset by subsidizing basic needs responds by citing other provisions in the Act curtailing benefits “when the recipient’s status changes irrespective of actual need, like marriage and divorce of children and spouses.” *Graham*, 648 F. Supp. at 302. This attempted analogy, however, is misguided. The examples upon which the Court relies for its analysis are based on a “change in status” in relation to the retired worker through whom the children’s and spouse’s benefits are derivative. They have not earned their benefits by contributing to the work economy or to the social security program through payment of payroll taxes. It is solely through their status vis a vis the primary beneficiary, the retired worker. When the status that granted them benefits no longer exists, likewise, their entitlement to derivative benefits no longer exists. On the other hand, here, the retired worker’s status has not changed; he is the person who earned the retirement benefits whether or not he is currently incarcerated or on vacation in the Bahamas.

<sup>147</sup> Some have suggested saving scarce social security resources by means-testing higher-income recipients of Social Security and reducing or totally eliminating their benefits. See Sean Williams, *What Is Means-Testing, And How Could It Affect Social Security?* THE MOTLEY FOOL (Aug. 16, 2018), <https://www.fool.com/retirement/2018/08/16/what-is-means-testing-and-how-could-it-affect-soci.aspx> [<https://perma.cc/8UGS-L4UT>]. On the



benefits are not a hand-out to Bill Gates; they have been earned through contributing to the national economy and paying payroll taxes into the system<sup>148</sup> or made available because of some disability.

The radical nature of § 402(x) is made clear in the testimony at the 1980 Hearing on suspending prisoner's SSDI benefits, presented by Lawrence H. Thompson, Associate Commissioner for Policy in the Social Security Administration. Associate Commissioner Thompson began with stating that "[i]mprisonment by itself has never been a basis for nonpayment of social security benefits."<sup>149</sup> He then went on with the soothing overture to the Committee that the Social Security Administration was aware of the sentiments underlying the proposed bill saying "they are understandable";<sup>150</sup> but from there, he starkly presented the Social Security Administration's position:

With rare exception, a person's eligibility for social security benefits is based upon work in employment covered by social security, and without regard to individual need or circumstances. One prominent argument for restricting social security benefits is that prisoners do not need the benefits. *However, such a restriction would represent a major departure in program philosophy.* (Emphasis added).<sup>151</sup>

In the abstract, it is reasonable for Congress to try not to waste Social Security Trust funds. Here, however, Congress chose to focus on a small cohort of aging people in prison—who have worked and contributed payroll

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other hand, an article in the Dallas News suggests that social security retirement is already means-tested as to more affluent retired persons in the form of taxes and in the fact that lower income workers' tax dollars buy up to six times the benefits than do the tax dollars of affluent retired workers. *See Few Understand That Social Security is Already Means Tested, supra* note 136.

<sup>148</sup> "The 'right' to Social Security benefits is in a sense 'earned' for the entire scheme rests upon the legislative judgment that those who in their productive years were functioning members of the economy may justly call upon that economy, in their later years, for protection from the rigors of poverty." *See Bloch, supra* note 40, § 1.1.

<sup>149</sup> *1980 Hearing, supra* note 6, at 36.

<sup>150</sup> *Id.* at 36.

<sup>151</sup> *Id.* at 36–37.

taxes in the exact same manner as the now 45.1 million retired workers who receive their retirement benefits<sup>152</sup> or qualified for the same disability benefits provided to 8.4 million disabled workers.<sup>153</sup> And in order to make this choice, Congress changed the rules of the game, trampling upon the core principle that retirement benefits are not means tested, and on top of that, changed the rules *only* for the members of this small cohort. The only reasonable inference is that in spite of all the prior court decisions to the contrary—and admittedly, they are numerous—the endeavor is punitive, and therefore a forbidden Bill of Attainder.

### III. ESSAY—42 U.S.C. § 402(X) HARMS FAMILIES OF COLOR: THE CASE FOR REPEAL

I want to be clear—I am not writing about rectifying the poverty<sup>154</sup> and dramatic economic disparity suffered by communities of color. If I were, I would delve into a search for reasons and causes. I would explore the

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<sup>152</sup> See HIGHLIGHTS AND TRENDS, *supra* note 1.

<sup>153</sup> *Id.*

<sup>154</sup> My own sense of living in poverty imagines a daily life consumed with the struggle to obtain the basic resources needed to survive. In this article, however, poverty statistics are a product of the Census Bureau (following the Office of Management and Budget's Statistical Policy Directive 14) defining poverty as income (of an individual or entire household) that falls below one of forty-eight "poverty thresholds." These thresholds are developed by using, among other things, family size and age of members. See *How the U.S. Census Bureau Measures Poverty*, U.S. CENSUS BUREAU (2020), [https://www.census.gov/content/dam/Census/library/visualizations/2017/demo/poverty\\_measure-how.pdf](https://www.census.gov/content/dam/Census/library/visualizations/2017/demo/poverty_measure-how.pdf) [<https://perma.cc/5GF9-8V8P>].

literature framing the poverty of Black<sup>155</sup> and Hispanic people<sup>156</sup> in terms of historic racial bias and structural racism.<sup>157</sup> I would include the emergence of

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<sup>155</sup> Philip Bump, *The Source of Black Poverty Isn't Black Culture, It's American Culture*, ATLANTIC (Apr. 1, 2014), <https://www.theatlantic.com/politics/archive/2014/04/the-source-of-black-poverty-isnt-black-culture-its-american-culture/359937/> [<https://perma.cc/7WBK-XL37>] (“It’s not that life [in the first part of the 20th Century] was particularly good for white workers, but that [B]lack [people] faced additional challenges, from the denial of formal political rights to social exclusion and widespread, state-sanctioned violence. If they lived in cities, blacks were relegated to the least sanitary neighborhoods with the most substandard housing; if they had a skill or knew a craft, they were excluded from the guilds and unions that would have given them a path to employment; if they possessed a formal education, they were barred from most middle-class professions...By the time we reach the New Deal era, the racial differentiation of capitalist inequality—divided labor markets, wide racial disparities in employment, income, and education—was part of the pattern of American life, even in the midst of the depression.”).

*Id.* See also Charles H. Wesley, *Negro Labor In The United States, 1850-1925: A Study In American Economic History* (1927); Emily Badger, Claire Cain Miller, Adam Pearce, & Kevin Quealy, *Extensive Data Shows Punishing Reach of Racism for Black Boys*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/interactive/2018/03/19/upshot/race-class-white-and-black-men.html> [<https://perma.cc/6XDG-ATHR>] (“White boys who grow up rich are likely to remain that way. Black boys who are raised at the top, however, are more likely to become poor than to stay wealthy in their own adult households.”).

<sup>156</sup> According to a PEW research poll, Latino people are the 2nd most discriminated against ethnic group after African-Americans. See Russell Heimlich, *Hispanics: Targets of Discrimination*, PEW RSCH. CTR. (May 11, 2010), <https://www.pewresearch.org/fact-tank/2010/05/11/hispanics-targets-of-discrimination/> [<https://perma.cc/NSSZ-6RNC>]. See also Mark D. Ramirez, *Structural Racism Against Latinos is Part of American History*, MEDIUM (July 10, 2020), <https://medium.com/3streams/structural-racism-against-latinos-is-part-of-american-history-b261082aa5d1> [<https://perma.cc/QNG7-FZNM>] (Professor Ramirez discusses his new book co-authored with Professor David A.M. Peterson, *Ignored Racism: White Animus Towards Latinos* (2020)).

<sup>157</sup> As so well-articulated by Amelia Costigan et al.:

Many of the disparities between black and white communities are an outgrowth of a long history of discriminatory and dehumanizing laws and policies that have created and exacerbated inequality in almost every sphere of life. These laws and policies are built into the fundamental structures of our societies—our systems of labor, housing, education, voting, healthcare and justice. They are deeply entrenched, intertwined, and insidious, and they form the foundation for structural racism.

Amelia Costigan et al., *The Impact of Structural Racism on Black Americans*, CATALYST (Sept. 30, 2020), <https://www.catalyst.org/research/structural-racism-black-americans/> [<https://perma.cc/9ETG-9SQX>]. See also, for a rich immersion into the world of structural

economic-depressing dysfunctions in these communities, which are themselves the result of historic and structural racism.<sup>158</sup> I also would go further and use these concepts to explain why deaths of Black people from COVID-19<sup>159</sup> are 1.8 times higher than their share of the population would

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racism, IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* (2016).

<sup>158</sup> “In the late 1960s and early 1970s . . . [c]onservatives argued that poverty was caused not by structural factors related by race and class but by culture—particularly black culture. This view received support from Daniel Patrick Moynihan’s [at that time, Senator from New York] now infamous report on the black family, which attributed black poverty to a black ‘subculture’ and the ‘tangle of pathology’ that characterized it.” ALEXANDER, *supra* note 11, at 57.

The relatively recent scholarship on structural racism, however, has not pushed the cultural argument aside. See Costigan, *supra* note 157. In fact, it has led to a very sophisticated debate. See Bump, *supra* note 155. I agree with Jonathan Chait that the cultural and structural explanations are not mutually exclusive:

The argument is that structural conditions shape culture, and culture, in turn, can take on a life of its own independent of the forces that created it. It would be bizarre to imagine that centuries of slavery, followed by systematic terrorism, segregation, a legacy wealth gap, and so on did not leave a cultural residue that itself became an impediment to success.

Jonathan Chait, *Barack Obama, Ta-Nehisi Coates, Poverty, and Culture*, N.Y. MAG.: INTELLIGENCER (Mar. 19, 2014), <https://nymag.com/intelligencer/2014/03/obama-ta-nehisi-coates-poverty-and-culture.html> [<https://perma.cc/DU2A-3UEB>]. Chait soon after wrote that the above quote is too simplistic. See Jonathan Chait, *Barack Obama v. the Culture of Poverty*, N.Y. MAG.: INTELLIGENCER (March 28, 2014), <https://nymag.com/intelligencer/2014/03/barack-obama-vs-the-culture-of-poverty.html> [<https://perma.cc/BW3J-EQZH>]. I nevertheless believe that there is much truth in what Chait wrote. Perhaps it is safest for me to agree with Jamelle Bouie that, while both culture and structural racism play a part in the current circumstances of Black Americans, culture plays a distant second. See Jamelle Bouie, *How Much Does ‘Culture’ Matter for ‘Inner-City’ Poverty?*, DAILY BEAST (Apr. 14, 2017, 4:29 PM), <https://www.thedailybeast.com/how-much-does-culture-matter-for-inner-city-poverty> [<https://perma.cc/2DK8-SWLL>].

<sup>159</sup> “Persistent racial disparities in health status, access to health care, wealth, employment, income, and poverty all contribute to greater susceptibility to the virus—both economically and physically.” ELISE GOULD & VALERIE WILSON, ECON. POL’Y INST., *BLACK WORKERS FACE TWO OF THE MOST LETHAL PREEXISTING CONDITIONS FOR CORONAVIRUS—RACISM AND ECONOMIC INEQUALITY* 1 (2020), <https://files.epi.org/pdf/193246.pdf> [<https://perma.cc/H9NF-MYVK>].

suggest they would be<sup>160</sup> and why Black people sixty-five and older died at a rate three-times higher than the overall death rate from the virus.<sup>161</sup> At the same time, I would also question why, although Hispanic people make up 18% of the population,<sup>162</sup> they represent 29% of the COVID-19 cases<sup>163</sup> and why Hispanic people sixty-five and older were twice as likely to die from the virus than sixty-five or older non-Hispanic white people.<sup>164</sup>

But I am not trying to accomplish anything in this article beyond the repeal of 42 U.S.C. § 402(x). This article thus does not explore the “whys” of how things are as they are but only what they are. None of the four pieces upon which I construct my argument consist of revolutionary new theories or groundbreaking historical discoveries. All four pieces are already just lying about in the open. It is just that when you put them together side by side, they

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<sup>160</sup> See *id.* See also Jamelle Bouie, *Why Coronavirus is Killing African-Americans More than Others*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/opinion/sunday/coronavirus-racism-african-americans.html> [<https://perma.cc/6JWH-6EMJ>]. (“To give just a few examples [why African Americans are more vulnerable to the virus], [B]lack Americans are more likely to work in service sector jobs, least likely to own a car and least likely to own their own homes. They are therefore more likely to be in close contact with other people, from the ways they travel to the kind of work they do to the conditions in which they live. Today’s disparities in wealth flow directly from yesterday’s disparities of wealth and opportunity. That African-Americans are overrepresented in service-sector jobs reflects a history of racially segmented labor markets that kept them at the bottom of the economic ladder; that they are less likely to own their own homes reflects a history of stark housing discrimination, government-sanctioned and government-sponsored. If [B]lack Americans are more likely to suffer the comorbidities that make coronavirus more deadly, it’s because those ailments are tied to segregation and concentrated poverty that still mark their community.”).

<sup>161</sup> See Maria Elena Fernandez, *Hispanics Are Paying the Price for Being “Essential” During the Pandemic*, AM. HEART ASS’N NEWS (Oct. 9, 2020), <https://www.heart.org/en/news/2020/10/09/hispanics-are-paying-the-price-for-being-essential-during-the-pandemic> [<https://perma.cc/LT45-JFPF>].

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* For a source of estimates that Hispanics constitute 33% of the coronavirus cases, see *Structural Racism Puts Latinos at Risk for Covid-19*, COVID HEALTH (July 30, 2020), <https://www.covidhealth.com/article/structural-racism-puts-latinos-at-risk-covid19> [<https://perma.cc/EV4Q-JFA4>].

<sup>164</sup> See Fernandez, *supra* note 161.

result in a straight path which ends in further harm to already vulnerable families of color.

The initial piece forming the straight line is the ever-present poverty in communities of color and the jaw dropping disparities in economic well-being between those who live in these communities and non-Hispanic white Americans. (From this point on, I will use the term “white” for non-Hispanic white people.) The next piece in our straight line combines the significance of Social Security benefits in keeping members of Black and Hispanic families out of poverty with the emergence of multigenerational housing in these communities (Section II (A)(2)(b)). Here, I consider the receipt of Social Security benefits of family members in these multigenerational households and the role of these benefits in both supporting the general family economy and raising children living in these multigenerational homes out of poverty.

The next piece forming the straight line is the mass incarceration of Black and Hispanic people, which removes family members from the household, including those who had Social Security benefits. The final piece at the end of the line is 42 U.S.C. § 402(x). This statutory provision suspends the benefits of all the household members who are incarcerated until they are released and immediately results in the multigenerational household economy losing the entire value of the incarcerated household member’s retirement or disability.

#### *A. Economic Realities of African American and Hispanic Individuals and Families*

“African American workers more than most other Americans, are concentrated in low-wage jobs that typically lack pension coverage, experience higher poverty and unemployment rates, and have less ability to save and invest for retirement.”<sup>165</sup>

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<sup>165</sup> See *African Americans and Social Security*, NAT’L COMM. TO PRESERVE SOC. SEC. & MEDICARE,

Black children are three times more likely to live in poverty than white children.<sup>166</sup> The Black poverty rate is 2.5 times the white poverty rate,<sup>167</sup> with one in five Black individuals living in poverty.<sup>168</sup> A Black boy from a wealthy Black family “is as likely to become poor in adulthood as to remain prosperous.”<sup>169</sup> Black households earn fifty-nine cents for every white dollar.<sup>170</sup> In 2018, the median household income of white families was 70% higher than Black families.<sup>171</sup> In 2016, Black men earned between seventy-one and seventy-three cents on the white dollar,<sup>172</sup> Black women sixty-four cents.<sup>173</sup> The pay gap persists even when controlled for education.<sup>174</sup> Over a lifetime of work, the Black worker earns \$1.8 million to the white worker’s \$2.7 million.<sup>175</sup> But raw statistics do not offer the full picture. “The poverty that poor African Americans experience is often different than the poverty of poor whites. It’s more isolating and concentrated. It extends out the door of a family’s home and occupies the entire neighborhood around it, touching the streets, the schools, the grocery stores.”<sup>176</sup>

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<https://www.ncpssm.org/our-issues/social-security/african-americans-and-social-security/> [<https://perma.cc/68YP-M8XHJ>].

<sup>166</sup> See DON BEYER, U.S. CONG. JOINT ECON. COMM., *THE ECONOMIC STATE OF BLACK AMERICA IN 2020* 2 (2020), [https://www.jec.senate.gov/public/\\_cache/files/ccf4dbe2-810a-44f8-b3e7-14f7e5143ba6/economic-state-of-black-america-2020.pdf](https://www.jec.senate.gov/public/_cache/files/ccf4dbe2-810a-44f8-b3e7-14f7e5143ba6/economic-state-of-black-america-2020.pdf) [<https://perma.cc/6ZZ2-YGV8>].

<sup>167</sup> See GOULD & WILSON, *supra* note 159. See also Bump, *supra* note 155 (“In 2012, 35 percent of blacks lived in poverty, compared with 13% of whites.”).

<sup>168</sup> See GOULD & WILSON, *supra* note 159.

<sup>169</sup> Badger et. al., *supra* note 155.

<sup>170</sup> See Beyer, *supra* note 166.

<sup>171</sup> See GOULD & WILSON, *supra* note 159.

<sup>172</sup> See *id.* For an article that places the rate for male Black workers at eighty-three cents and female Black workers at sixty-two cents for every white dollar, see Derrick Johnson, *Viewing Social Security Through the Civil Rights Lens*, NAACP (Aug. 14, 2020), <https://naacp.org/articles/viewing-social-security-through-civil-rights-lens> [<https://perma.cc/BX4Q-BL8F>].

<sup>173</sup> See GOULD & WILSON, *supra* note 159.

<sup>174</sup> *Id.*

<sup>175</sup> See *African Americans and Social Security*, *supra* note 165.

<sup>176</sup> Badger et. al., *supra* note 155.

The median and mean family wealth, respectively, in 2019 was \$188,200/\$983,400 for white families and \$24,100/\$142,500 for African American families.<sup>177</sup> Another source pegs the median wealth of Black families at \$17,000,<sup>178</sup> which is *one-tenth* of that of white families at \$171,000.<sup>179</sup> 42%–46% of Black families own homes,<sup>180</sup> while 73%–76% of white families own homes.<sup>181</sup> “The typical White household aged forty-seven to sixty-four years old has housing wealth of \$67,000; the typical household of color in this age group has zero home equity.”<sup>182</sup>

The rate of unemployment among Black people has consistently remained twice that of white people (6% vs. 3.1%).<sup>183</sup> The unemployment rates cannot be explained by differences in education.<sup>184</sup> Unemployment among Black people is higher at every educational level, including those with college and graduate degrees.<sup>185</sup> When a Black person loses a job, it takes them five weeks longer to find another job than a similarly situated white candidate.<sup>186</sup>

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<sup>177</sup> Rodney Brooks, *The Retirement Crisis Facing Black Americans*, U.S. NEWS (Dec. 11, 2020, 9:32 AM), <https://money.usnews.com/money/retirement/aging/articles/the-retirement-crisis-facing-black-americans> (last visited Dec. 14, 2021).

<sup>178</sup> See Beyer, *supra* note 166.

<sup>179</sup> *Id.* See also Brooks, *supra* note 177 (“By their 60s, [white families] have over \$1 million more in wealth than African Americans (11 times as much).”).

<sup>180</sup> See Beyer, *supra* note 166 (42%); Brooks, *supra* note 177 (46%).

<sup>181</sup> See Beyer, *supra* note 166 (73%); Brooks, *supra* note 177 (76%).

<sup>182</sup> See Brooks, *supra* note 177.

<sup>183</sup> See Beyer, *supra* note 166. See also Bump, *supra* note 155 (“... the black unemployment rate has always been at least 50 percent higher than white unemployment.”). *Id.* (“a 2003 study found that job applicants ‘with white sounding names are 50% more likely to get called or an initial interview than applicants with African-American-sounding names.’”).

<sup>184</sup> Ryan Derosseau, *A Few Ways Systematic Racism Suppresses Black Retirement Wealth*, FORBES (June 10, 2020, 10:14am), <https://www.forbes.com/sites/ryanderousseau/2020/06/10/systemic-racism-suppresses-black-retirement-wealth/?sh=1cb98c7348ce> [<https://perma.cc/V2BM-YGZD>].

<sup>185</sup> See GOULD & WILSON, *supra* note 159 (“This difference [in unemployment rate] cannot be explained away by differences in educational attainment . . . [A]t every level of education, the black unemployment rate is significantly higher than the white unemployment rate, even for those workers with college or advanced degrees.”).

<sup>186</sup> See Derosseau, *supra* note 184.



Looking at liquid assets (pockets of wealth which you can relatively quickly convert to cash if needed, such as checking and savings accounts, prepaid cards, directly held stocks, bonds, and mutual funds), a white family has five times the amount of liquid assets as does a typical Black family.<sup>187</sup> Looking at retirement accounts (401ks, IRAs, 403bs), the racially determined disparity continues. The average white family has \$130,000 in the various retirement accounts, while the average Black family has \$19,000.<sup>188</sup> Evidence shows that 26% of Black people over sixty-five, compared to 55% of white people of the same age group, do get some income from private pensions and annuities to which they contributed,<sup>189</sup> though as we will see in the next section, half of Black retirees would be relegated to a life of poverty without social security.

Finally, white people are also five times as likely as Black people to get large gifts or inheritances, and when Black people do get such monies, the amount tends to be much smaller.<sup>190</sup> With lower individual and family income and wealth, Black people are unable to generate much intergenerational wealth.<sup>191</sup> Black people “are starting at ground zero every generation.”<sup>192</sup> The situation is not much different for Hispanic people. “Today’s Latinx workers are concentrated in low-wage jobs that typically lack pension coverage. Latinx experience high poverty and unemployment

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<sup>187</sup> See *African Americans and Social Security*, *supra* note 165.

<sup>188</sup> Brooks, *supra* note 177 (“... only 44% of Black Americans have a retirement account, with a typical balance of \$20,000, compared to 65% of white Americans, who have an average balance of \$50,000 according to the Federal Reserve.”).

<sup>189</sup> *African Americans and Social Security*, *supra* note 165.

<sup>190</sup> Brooks, *supra* note 177.

<sup>191</sup> *Id.* (“It’s difficult to leave money to your children when you don’t have enough for your own retirement. ‘We do not have generational wealth,’ [Nicholas] Abrams [certified financial planner and CEO of AJW Financial Partners in the Baltimore area] says.”).

<sup>192</sup> *Id.*

and have less ability to save and invest for retirement than most other Americans.”<sup>193</sup>

Poverty among Hispanic people rivals that among Black Americans. 18.3% of Hispanic people live in poverty,<sup>194</sup> with Hispanic people making up 27.2% of the entire national population of those in poverty.<sup>195</sup> Hispanic individuals sixty-five and older comprise 21.8%<sup>196</sup> of those in poverty. In 2010, six million Hispanic children lived in poverty,<sup>197</sup> two-thirds of whom were from immigrant families.<sup>198</sup>

The poverty statistics soar to 31.1% for households headed by a Hispanic woman.<sup>199</sup> Latinas are three times as likely to live in poverty than white women,<sup>200</sup> with 25% of Latinas over sixty-five<sup>201</sup> and 28% of Latinas under eighteen living in poverty.<sup>202</sup> Data show that 16.8% of Hispanic children compared to 10.4% of white youth lack nutritious food.<sup>203</sup> Latinas make fifty-

<sup>193</sup> *Latinx and Social Security*, NAT'L COMM. TO PRES. SOC. SEC. & MEDICARE (June 2020), <https://www.ncpssm.org/our-issues/social-security/latinx-and-social-security/> [https://perma.cc/T3SB-U2KZ].

<sup>194</sup> See Ashley Edwards, *Hispanic Poverty Rate Hit All-Time Low in 2017*, U.S. CENSUS BUREAU (Feb. 27, 2019), <https://www.census.gov/library/stories/2019/02/hispanic-poverty-rate-hit-an-all-time-low-in-2017.html> [https://perma.cc/BD6T-35EA].

<sup>195</sup> *Id.*

<sup>196</sup> See *Latinos and Social Security: What's at Stake?*, LEAGUE UNITED LATIN AM. CITIZENS, [https://lulac.org/advocacy/issues/ss\\_whats\\_at\\_stake/](https://lulac.org/advocacy/issues/ss_whats_at_stake/) [https://perma.cc/FH2Y-NMJ2].

<sup>197</sup> See PEW RSCH. CTR., CHILDHOOD POVERTY AMONG HISPANICS SET RECORDS, LEADS NATION (2011), <https://www.pewresearch.org/hispanic/2011/09/28/childhood-poverty-among-hispanics-sets-record-leads-nation/> [https://perma.cc/45JX-TNY2].

<sup>198</sup> *Id.*

<sup>199</sup> See BREAD FOR WORLD, HUNGER AND POVERTY IN THE LATINO COMMUNITY (2019), <https://www.bread.org/sites/default/files/downloads/hunger-poverty-latino-community-september-2019.pdf> [https://perma.cc/FF32-C472].

<sup>200</sup> See *Latinos and Social Security: What's at Stake?*, *supra* note 196.

<sup>201</sup> *Id.*

<sup>202</sup> See *The Hispanic Population in the United States: 2019*, U.S. CENSUS BUREAU, at tbl.22 (Apr. 29, 2020), <https://www.census.gov/data/tables/2019/demo/hispanic-origin/2019-cps.html> [https://perma.cc/53QB-EDUY].

<sup>203</sup> See BREAD FOR THE WORLD, *supra* note 199.

four cents on the white dollar,<sup>204</sup> accounting for the loss of almost \$24,000 a year in potential income.<sup>205</sup> Only 33% of Latinas have retirement income from saving or assets.<sup>206</sup>

In 2019, the median income of Hispanic households was \$51,450, while it was \$70,642 for the average white household.<sup>207</sup> Compared to the \$2.7 million the average white male earns in a lifetime, Hispanic males earn \$2.0 million.<sup>208</sup> In 2016, a white family had an average of six times the liquid retirement savings of a comparable Hispanic family.<sup>209</sup>

### *B. The Role of Social Security<sup>210</sup> and Multigenerational Housing in the Lives of People and Families of Color*

In 2014, Social Security made up half or more of the incomes of 69.4% of African Americans sixty-five and older,<sup>211</sup> lifting 1.3 million out of

<sup>204</sup> See *Closing the Wage Gap is Especially Important for Women of Color in Difficult Times*, NAT'L WOMEN'S L. CTR. (Apr. 11, 2011), [https://www.nwlc.org/sites/default/files/pdfs/4.11.11\\_closing\\_the\\_wage\\_gap\\_for\\_women\\_of\\_color\\_6.pdf](https://www.nwlc.org/sites/default/files/pdfs/4.11.11_closing_the_wage_gap_for_women_of_color_6.pdf) [https://perma.cc/S25C-EH92].

<sup>205</sup> *Id.*

<sup>206</sup> See *Latinos and Social Security: What's at Stake?*, *supra* note 196.

<sup>207</sup> See BREAD FOR THE WORLD, *supra* note 199.

<sup>208</sup> See *Latinx and Social Security*, *supra* note 193.

<sup>209</sup> *Id.*

<sup>210</sup> The 1935 Social Security Act excluded agricultural and domestic workers nationally, two-thirds of whom were Black, with an even higher percentage in the South. See Brad Plumer, *A Second Look at Social Security's Racist Origins*, WASH. POST (June 3, 2013, 10:45 AM), <https://www.washingtonpost.com/news/wonk/wp/2013/06/03/a-second-look-at-social-securitys-racist-origins/> [https://perma.cc/768U-TXQ]. At the Hearing on the Act, Charles Hamilton Houston, the architect of the legal challenge to "separate but equal," spoke on behalf of the NAACP objecting to this portion of the bill. See Johnson, *supra* note 172. In his book, *The New Deal and the Origins of Our Time* (2013), author Ira Katznelson contends the exclusion of the majority of Black people from Social Security was a bargain which was needed to get Southern Senators who wanted the exclusion to vote for the Act. But, Larry DeWitt, Public Historian for the Social Security Administration disagrees. According to DeWitt, the Southern Senators were indifferent to the provision, and it was members of affected industries like the American Farm Bureau who pushed the provision to avoid what they perceived as heavily burdensome taxes. See Plumer, *supra* note 210.

<sup>211</sup> SOC. SEC. ADMIN., INCOME OF THE POPULATION 55 AND OLDER, 2014, at 289 tbl.9.A3 (2016),

poverty.<sup>212</sup> Without Social Security retirement benefits, the poverty rate for those Black seniors over sixty-five would have gone from 19.4% to 50.7%.<sup>213</sup> In 2017, 35% of elderly Black couples and 58% of elderly Black individuals relied on Social Security for 90% or more of their income.<sup>214</sup>

One in six Latinx households get Social Security benefits.<sup>215</sup> In 2017, 37%–40% of elderly married Hispanic couples and 61%–62% of elderly Hispanic individuals received 90% or more of their income from Social Security.<sup>216</sup> Data show that 18% of all Hispanic seniors live in poverty<sup>217</sup> (compared to 7.2% of white seniors).<sup>218</sup> However, without Social Security, the number of elderly Hispanic people in poverty would be closer to 47.2%,<sup>219</sup> and without Social Security Retirement or Survivors benefits, 60% of Latinas sixty-five or older would live in poverty.<sup>220</sup>

Black people and Hispanic people also receive Social Security Disability Insurance benefits (SSDI).<sup>221</sup> In 2009, Black people made up 13% of the

[https://www.ssa.gov/policy/docs/statcomps/income\\_pop55/2014/sect09.pdf](https://www.ssa.gov/policy/docs/statcomps/income_pop55/2014/sect09.pdf)  
[<https://perma.cc/P4EK-L8W6>].

<sup>212</sup> *Id.*

<sup>213</sup> *Social Security Works for the United States*, SOC. SEC. WORKS (Aug. 2016) <https://socialsecurityworks.org/wp-content/uploads/2019/08/United-States.pdf> [https://perma.cc/3E6U-J9SW].

<sup>214</sup> See *African Americans and Social Security*, *supra* note 165. Accord Johnson, *supra* note 172.

<sup>215</sup> See *Social Security and Its Impact on Hispanic Older Adults*, NAT'L HISP. COUNCIL ON AGING (Oct. 6, 2016), <https://nhcoa.org/social-security-and-its-impact-on-hispanic-older-adults/> [https://perma.cc/UL29-LLZ6].

<sup>216</sup> See *Latinx and Social Security*, *supra* note 193.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*; see also *Social Security and Its Impact on Hispanic Older Adults*, *supra* note 215 (without Social Security, 50% of Hispanic seniors would fall below the poverty line).

<sup>220</sup> See *Latinx and Social Security*, *supra* note 193.

<sup>221</sup> For a detailed history documenting the changes over time in Social Security Disability benefits [SSDI], see *In-Depth Research: A History of the Social Security Disability Programs*, SOC. SEC. ADMIN. (1986), <https://www.ssa.gov/history/1986dibhistory.html> [https://perma.cc/Z54E-BCBY].

population but were 17% of those receiving benefits.<sup>222</sup> Hispanic people likewise have a higher disability rate than the general population and received disability benefits accordingly.<sup>223</sup>

I have already discussed multigenerational housing, the strong appeal for that mode of housing in both African American and Hispanic communities, and the role of retirement benefits both in the general economy of such households and in keeping children in the household out of poverty [Section III(A)(2)(b)]. Because I was dealing with retirement and retirement benefits in that section, I did not include in my analysis disability benefits belonging to any of the family members. Within the present context, however, I can see no difference between disability benefits which go into the multigenerational family household economy and the retirement benefits I considered in the previous section of this article. Money is money. And all is well—at least when contrasted to living in absolute poverty—so long as the money remains in the multigenerational household economy. But thanks to mass incarceration and 42 U.S.C. § 402(x), the money will not remain.

### C. *Mass Incarceration*

In 1980, there were a total of approximately 1,214 people in prison receiving retirement benefits<sup>224</sup> and 4,300 receiving disability benefits.<sup>225</sup> Under the 1980 and 1983 amendments, both of these groups would be denied their benefits. For the analysis in this article, these 1980s statistics therefore will be considered denials. As of 2020, that 1,214 (which are being treated as denials) has ballooned to 17,885 incarcerated persons<sup>226</sup> while the number

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<sup>222</sup> See *In Their Own Words: Why Social Security is Important to African Americans*, SOC. SEC. WORKS (Feb. 23, 2017), [https://socialsecurityworks.org/wp-content/uploads/2017/02/Social-Security-Works-for-African-Americans\\_Updates-for-Black-History-Month\\_Final.pdf](https://socialsecurityworks.org/wp-content/uploads/2017/02/Social-Security-Works-for-African-Americans_Updates-for-Black-History-Month_Final.pdf) [<https://perma.cc/UHE9-UXTL>]; see also *Latinos and Social Security: What's at Stake?*, *supra* note 196.

<sup>223</sup> See *Latinx and Social Security*, *supra* note 193.

<sup>224</sup> See U.S. GOV'T ACCOUNTABILITY, *supra* note 131.

<sup>225</sup> *Id.*

<sup>226</sup> See SSDI 2019, *supra* note 4.

being denied disability benefits has grown from 4,300 in 1980 (which are being treated as denials) to 39,766.<sup>227</sup> Admittedly, some of this increase is probably attributable to increased administrative efficiency as the Social Security Administration had to gradually contact and educate entire penal systems throughout the country and create procedures for receiving information about an inmate's social security number, general identifying information, and status within the penal system.<sup>228</sup> Also, the initial estimate may have understated the numbers.

But, increased administrative efficiency and low initial estimates cannot account for a *fifteenfold* increase from 1980 to 2020 in the number of those being denied retirement benefits and a *tenfold* increase from 1980 to 2020 in the number being denied disability benefits. Something else was going on, and it is plain what it was. This extraordinary increase in the number of incarcerated persons whose retirement and disability benefits have been suspended parallels the arc of so-called mass incarceration from 1980–2008.<sup>229</sup> In 1980, between 300 and 500 thousand people were incarcerated.<sup>230</sup>

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<sup>227</sup> *Id.*

<sup>228</sup> In fact, 42 U.S.C § 402(x) §(3)(A) and §(3)(B)(i) creates what is in effect a monetary bounty program under which state penal institutions are rewarded for providing this type of information to the Social Security Administration.

<sup>229</sup> See ALEXANDER, *supra* note 11, at xxix, 77. See also JOHN SCHMITT ET. AL., CTR. FOR ECON. & POL'Y RESEARCH, *The High Budgetary Cost of Incarceration* 7 (2010), <https://www.cepr.net/documents/publications/incarceration-2010-06.pdf>

[<https://perma.cc/EB5J-NYDB>] (“The standard measure of incarceration—inmates per 100,000 people in the resident population—masks the strong concentration of men (particularly young men of color) in prison and jail.”). For a detailed analysis of the interrelated factors that resulted in mass incarceration in Washington State prisons, see Jennifer Smith and Jeremiah Bourgeois, *The Retroactive Application of Justice: Using Prosecutorial Discretion to Correct Sentences That No Longer Serve a Valid Purpose*, 19 SEATTLE J. SOC. JUSTICE 409, 422–29 (2021).

<sup>230</sup> In her book, Michelle Alexander estimates that between 1980 and 2000, the number of people incarcerated in America exploded from 300,000 to 2.3 million—by far the highest rate of incarceration of any country in the world. ALEXANDER, *supra* note 11, at xxix, 77. The data presented by SCHMITT ET AL., *supra* note 229, differs slightly from that of Ms. Alexander. They find the number of inmates in jail and prison to have been 503,586 in 1980; 1,937,482 in 2000; and 2,304,115 in 2008. *Id.* at 13. Still, this is a massive increase in incarceration by anyone's calculations. It is also worth noting that all of this took place

By 2008, that number had reached 2.3 million,<sup>231</sup> resulting in the largest imprisoned population of any country on earth.<sup>232</sup> It is a population disproportionately made up of Brown<sup>233</sup> and Black people.<sup>234</sup> This was not about a tsunami of crime by non-white people. This was the result of the “law and order, get tough on crime” politics of the ‘80s and ‘90s,<sup>235</sup> and “The War on Drugs”<sup>236</sup> which, as the analysis in the 10th Anniversary edition of *The*

within a timeframe when the population only increased 33%. *Id.* at 12. Currently, there are reasons to hope that the worst of the impetus towards mass incarceration has subsided. See E. ANN CARSON, BUREAU OF JUST. STATS., PRISONERS IN 2019, 1 (2020), <https://bjs.ojp.gov/content/pub/pdf/p19.pdf> [<https://perma.cc/QJF5-JDEH>] (“Since 2009, the imprisonment rate—the portion of U.S. residents who are in custody—has dropped 17% overall, including 29% among black residents, 24% among Hispanic residents and 12% among white residents.”).

<sup>231</sup> ALEXANDER, *supra* note 11, at xxix, 77; SCHMITT ET AL., *supra* note 229, at 13.

<sup>232</sup> *Id.*

<sup>233</sup> “. . . [A]s of 2012, Latino men were incarcerated at a rate nearly 40% higher than whites . . . In all, one in three persons held in federal prisons is Latino, and Latinos are four times as likely as whites to end up in prison.” Aaron Cantú, *Latinos and Mass Incarceration: The Dust Under the Rug*, LATINO REBELS (Jan. 7, 2014, 10:41 AM), <https://www.latinorebels.com/2014/01/07/latinos-and-mass-incarceration-the-dust-under-the-rug/> [<https://perma.cc/7PH7-B4Y6>].

<sup>234</sup> See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (2020), <https://www.prisonpolicy.org/reports/pie2020.html#:~:text=This%20report%20provides%20a%20detailed,even%20the%20most%20minor%20offenses> [<https://perma.cc/ZS46-45CU>] (Black people make up 13% of the United States population and 40% of those incarcerated).

<sup>235</sup> The use of “law and order imagery” as a tool of political success spanned the Nixon years (“During the [1968] presidential election, both the Republican candidate, Richard Nixon, and the independent segregationist candidate, George Wallace, made ‘law and order’ the central theme of their campaigns, and together collected 57% of the vote.”) ALEXANDER, *supra* note 11, at 59, and the Clinton presidency (where, “in 1992, then presidential candidate ‘vowed that he would never permit any Republican to be perceived as tougher on crime than he.’”) *Id.* at 71. Clinton was good as his word. His administration’s tough on crime policies resulted in the largest increases in federal and state inmate populations of any president in American history. See Justice Policy Institute, *Clinton Crime Agenda Ignores Proven Methods for Reducing Crime*, NOV. COAL. (Apr. 14, 2008), <https://november.org/stayinfo/breaking08/ClintonCrime.html> [<https://perma.cc/VS4K-XZV6>].

<sup>236</sup> See generally ALEXANDER, *supra* note 11.

*New Jim Crow*<sup>237</sup> convincingly demonstrates, was a racially skewed program intentionally calculated to drive people of color back into the low societal caste from which they had begun to transcend during the Civil Rights Movement.<sup>238</sup>

It seems a reasonable inference that among those swept up in mass incarceration were people of color whose retirement and disability benefits contributed to the economy of multigenerational households and to lifting children in those households out of poverty.<sup>239</sup>

*D. The Suspension of Social Security Retirement and Disability Benefits as a Result of 42 U.S.C. § 402(x)*

The 1980 and 1983 amendments to the Social Security Act, as embodied in § 402(x), effectively made the income from the retirement and disability benefits of now incarcerated members of multigenerational households vanish from the household economy. The questions are inevitable:

How much did that subtract from the income of multigenerational households of color? How much was left to support the household? How did this alter the lives of those remaining in the household? Did the children who the benefits had taken out of poverty now have food security issues? Would a younger member of a household who had been destined for a successful career now have to leave school to work and support the remaining family? Were they now destined for a low-paying job for which they would pay little in taxes? Or would the result be the economic collapse of the entire household, leaving no viable adult support? Would this be a lure to crime for household members and further demand taxpayer resources for the criminal justice system? Or would the result be that the remaining members would now have to look to various state and federal poverty programs for support,

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<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 50–73

<sup>239</sup> *See* sources cited *supra* notes 117–21.



thereby offsetting any governmental savings achieved by suspending the former household member's Social Security benefits?

All are good questions and I wish I could answer each and every one. However, I am aware of the distinction between the reasonable, plausible possibilities I could put forth and definitive data. I lack the latter.

So, let us try to think about what we do know. The first piece we looked at to construct our straight line demonstrated that African American and Hispanic communities are widely impoverished and exist within a system of major economic inequality. What do you think would be the result of subtracting \$1,503 (the average monthly retirement benefit)<sup>240</sup> or \$1,358 (the average monthly disability benefit)<sup>241</sup> from a likely already economically vulnerable multigenerational household?

How many households? We know 46.8 million African Americans live in the United States,<sup>242</sup> 26% in multigenerational housing.<sup>243</sup> We also know that 60.6 million Hispanic people live in the United States,<sup>244</sup> 27% in multigenerational housing.<sup>245</sup> Rounding out the numbers, that means that approximately 12 million African Americans and 15 million Hispanics live in multigenerational housing. How many of these households get Social Security benefits? I don't know, but if you consider *B. The Role of Social Security and Multigenerational Housing in Communities of Color*, *supra*, and you contemplate that we are dealing with a total of 27 million people, the numbers have to be significant. How many of those with benefits now have

<sup>240</sup> HIGHLIGHTS AND TRENDS, *supra* note 1.

<sup>241</sup> *Id.*

<sup>242</sup> See Christine Tamir, Abby Budiman, Luis Noe-Bustamante, & Lauren Mora, *Facts About the U.S. Black Population*, PEW RSCH. CTR. (Jan. 7, 2021), <https://www.pewresearch.org/social-trends/fact-sheet/facts-about-the-us-black-population/> [https://perma.cc/TG6Y-UGYK].

<sup>243</sup> See *id.*

<sup>244</sup> See Luis Noe-Bustamante, Mark Hugo Lopez, & Jens Manuel Krogstad, *U.S. Hispanic Population Surpassed 60 Million in 2019, but Growth Has Slowed*, PEW RSCH. CTR. (July 7, 2020), <https://www.pewresearch.org/fact-tank/2020/07/07/u-s-hispanic-population-surpassed-60-million-in-2019-but-growth-has-slowed/> [https://perma.cc/Q6U4-99UD].

<sup>245</sup> See *id.*

their benefits suspended because they are incarcerated? The Social Security Administration does not collect data showing the racial/ethnic background of those whose retirement or disability benefits have been suspended under § 402(x),<sup>246</sup> but if you look at *C. Mass Incarceration, supra*, it is again reasonable to infer that the numbers are significant. A Ph.D. in economics is not required to conclude that 42 U.S.C. § 402(x) seriously harms many members of communities of color.<sup>247</sup>

So, what does our government gain from this economic and social devastation? Supposedly, the original intent was to save money in the Social Security Trust Fund from being wasted. It was peanuts in 1980 and 1983.<sup>248</sup> How much are we talking about now? Compared to the \$738 billion<sup>249</sup> provided to 45.1 million retired workers,<sup>250</sup> the amount saved by denying 17,885 seniors who are prisoners<sup>251</sup> their earned retirement benefits is approximately 0.0004% of the funds actually paid out for retired workers.<sup>252</sup> Compared to the \$136 billion<sup>253</sup> paid to 8.4 million disabled workers in 2019,<sup>254</sup> the amount saved by denying 39,766 disabled workers<sup>255</sup> their

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<sup>246</sup> Email from Neil Veenis, Pol’y Analyst, Soc. Sec. Admin. Off. of Research, Evaluation, & Stats., to John Mitchell, author (May 20, 2021, 12:01 AM PST) (on file with author).

<sup>247</sup> If the prisoner who has his or her retirement benefits suspended did not contribute that money to a multigenerational household prior to incarceration, then they are in the same situation described in Section II (A)(2)(b) where those portions of their “modern retirement” existing outside prison may well collapse.

<sup>248</sup> See *supra* Section II (A)(2)(b)

<sup>249</sup> See SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN 2020, OLD-AGE SURVIVORS AND DISABILITY INSURANCE tbl.4.A5 (2021), <https://www.ssa.gov/policy/docs/statcomps/supplement/2020/4a.pdf> [<https://perma.cc/9HSZ-2485>] [hereinafter 2020 Statistical Supplement].

<sup>250</sup> See HIGHLIGHTS AND TRENDS, *supra* note 1.

<sup>251</sup> See SOC. SEC. ADMIN., *supra* note 3.

<sup>252</sup> I arrived at this figure by multiplying 17,885 (the number of incarcerated persons being denied retirement benefits) by 1,503 (the average monthly retirement check) times 12 (months in a year) divided by 738 billion (the total yearly amount paid in retirement benefits).

<sup>253</sup> See *Disability Insurance Benefit Payments 1957-2019*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/STATS/table4a6.html> [<https://perma.cc/4LZ3-TKMF>].

<sup>254</sup> See HIGHLIGHTS AND TRENDS, *supra* note 1.

<sup>255</sup> See SSDI 2019, *supra* note 4.

disability benefits that same year is approximately 0.004% of the funds actually paid out for disability.<sup>256</sup> Small potatoes. Within the context of a national economy, equivalent to the change you take out of your pocket at the end of the day and lay down on your nightstand—a fraction of the private wealth of single individuals like Jeff Bezos and Bill Gates. That is the trivial reward our country gets for adding to the economic suffering which already clouds the daily lives of so many families of color

#### IV. CONCLUSION

In *Helvering v. Davis*<sup>257</sup> (the decision which upheld the constitutionality of the 1935 Social Security Act), Judge Cardozo pronounced: “Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not wisdom.”<sup>258</sup>

42 U.S.C. § 402(x) fails on both counts. The statute is beyond the power of Congress to enact (Section II), is deeply unwise, and is in fact cruel in its consequences to already economically vulnerable African American and Hispanic families, individuals, and communities (Section III). It should be repealed.

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<sup>256</sup> I arrived at this figure by multiplying 39,766 (the number of disabled prisoners denied disability benefits) by 1,258 (the amount of a monthly disability check) times 12 (months a year) divided by 136 billion (the total yearly amount paid in disability insurance benefits).

<sup>257</sup> *Helvering v. Davis*, 301 U.S. at 674.

<sup>258</sup> *Id.* at 644.