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Phoebe Weaver Williams

Marquette University Law School, phoebe.williams@marquette.edu

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Symposium on Diversity

Social Security Reform: Creating Transformative Opportunities for African Americans

The Social Security retirement income program provides important security to nearly all workers in the U.S. However, choices made at the program's creation exclude many African Americans, especially women, from coverage. Professor Williams reviews aspects of the Social Security system and proposes reforms in order to provide equitable protection.

This article is based on the author's presentation at the Annual Meeting of the Elder Law Section of the Association of American Law Schools in January, 2001 in San Francisco.

By Phoebe Weaver Williams

Reforming Social Security has been the subject of considerable public discussion. Considered the “third rail” of American politics, in the past, politicians assumed that “to so much as even touch [Social Security was] to risk instant political death.”¹ From 1950 to 1972, Congress approved amendments expanding the scope of the Social Security Act by overwhelming margins, with no President vetoing a Social Security bill.² Social Security has now lost the virtual immunity it once enjoyed from political critique. Reforming Social Security has emerged as a national priority, as critics voice concerns about its future financial stability and assault its efficacy. Supporters emphasize its successes, while some question the motives of the critics, characterizing their concerns as ideological animus rather than real concerns about the viability of Social Security.³ Despite the flurry of controversy

Phoebe Weaver Williams, Associate Professor of Law, Marquette University, teaches courses in labor and employment discrimination law. Before entering academe, she represented employers in labor and employment matters. Prior to entering the legal profession, she worked for the Social Security Administration for ten years. Professor Williams wishes to express her appreciation to her mother, a retired high school librarian, Judge Harvey L. McCormick, Professor Vada Waters Lindsey, and Attorney Leonard Martin for their helpful comments and suggestions regarding this article.

surrounding Social Security, one aspect of the discourse is relatively underdeveloped.

This essay considers the public discussion surrounding reforming Social Security from the historical, social, and economic perspectives of African Americans. It focuses on three areas where Social Security has perpetuated societal racial discrimination against African Americans. First, racial inequity surfaced when Congress decided to exclude certain occupations as covered employment under Social Security. During 1950, Congress addressed this inequity, extending coverage to agricultural and domestic workers. However, the enforcement of the reporting requirements for people working in those occupations has been relatively lax, effectively negating the coverage of those occupations. Second, Social Security benefit amounts were based on reported earnings in employment. To the extent that racial discrimination occurred in employment markets, Congress incorporated the effects of that discrimination against African Americans into the very program designed to ameliorate the economic devastation caused by old age, disability, or early death of the wage earner. Finally recent reports of bias in the adjudication of claims for disability benefits suggest that racial bias may disadvantage African Americans in the administration of the Social Security program. Undoubtedly, there are other areas where Social Security has disadvantaged African Americans. However, the purpose here is not to identify all of them, but rather to broaden the parameters of current reform discussions. Further, while the focus here will be on the impact of Social Security for African Americans, I acknowledge that in many instances the concerns raised apply to other historically disadvantaged groups as well.

To date, Social Security reform discussions have focused to a relatively limited extent on the advantages and disadvantages of various reform proposals for African Americans.⁴ Review of this discourse finds it lacking in a number of respects. Often discussions about Social Security reform neither accurately assess nor completely identify the structural inequities⁵ that exist within the policy, administration, and adjudication of the Social Security program entitlements. As a result, current reform recommendations have not addressed longstanding inequities within Social Security policy and administration.

Proponents of certain reform measures have attempted to bolster the acceptability of their proposals by asserting that they are in the best interests of African Americans. After years of relative neglect, attention to the interests of African Americans could

be viewed very positively. However, closer review of their arguments reveals that they are more likely framed to create political coalitions that include African Americans as supporters of their proposals.⁶

Social Security reform discourse tends to revolve around two opposing positions—privatization and anti-privatization proposals.⁷ Proponents of privatization argue that the better way to ensure that there are adequate resources available to support future generations during retirement is to encourage personal savings. If portions of the Social Security taxes are returned to wage earners and placed in individual retirement accounts—privatizing aspects of Social Security—African Americans will enjoy much better returns on their investments. Privatization proponents want to “fix” Social Security by channeling some of the tax payments to the private investment markets, thereby converting Social Security in part from a defined benefit to a defined contribution type of pension program.⁸

Opponents of privatization argue that continuing the guaranteed defined benefit structure under Social Security provides the best protection for African Americans.⁹ Advocates of this position want to “save” Social Security, retaining both its benefit and financing structures. In the words of one of the most vocal proponents of this position, Reverend Jesse Jackson, those opposed to privatization want to see the program saved, “not savaged, not sutured, not severed, not sliced up, but saved.”¹⁰

When critiqued in light of the history of Social Security, neither position unmasks the inequities within Social Security that disadvantage African Americans. Neither position fully identifies or exposes structural inequities in Social Security. Consequently, neither position articulates reform measures that address the interests of African Americans. If Social Security reform is to benefit African Americans, Congress should address certain inequities in the policy and administration of the Social Security program. Otherwise, the historical disadvantages along with the political compromises that have sacrificed the interests of African Americans in the past will continue.

Social Security Law: Perpetuating Societal Racial Discrimination

An Act with Its Genesis in Discrimination

Social Security was one of President Franklin Roosevelt's emergency initiatives designed to relieve

the “human distress” caused by the Great Depression of the 1930s. During the Depression, one-fourth of the nation’s workforce was unemployed and one-fifth subsisted on direct relief or work relief.¹¹ While “every major European country had already embraced the logic of social insurance,” it took the Great Depression to launch this idea in the United States.¹² Middle-class ideals of self-reliance and prudence conflicted with the idea that the government should act to combat the “‘three fears’ that plagued workers—unemployment, poverty in old age, and ill health.”¹³ However, the Depression convinced even many of the working elite that “economic misfortune was not always the consequence of individual irresponsibility or failure of character.”¹⁴

Roosevelt’s New Deal measures had several goals: “recovery, relief, and reconstruction.”¹⁵ Roosevelt believed that the government must not only meet the immediate needs of those suffering the effects of the Depression. It must also develop a “long-range program to protect the American people from the ill effects of unemployment and other personal economic hazards.”¹⁶ Just 14 months after Roosevelt expressed a general interest in developing a social insurance program, Congress passed the Social Security Act of 1935.¹⁷

The Social Security Act of 1935 contained eleven titles.¹⁸ Several are relevant to the discussion here, the purpose of which is not only to generally describe the history and concept of “Social Security,” but also to demonstrate how purposeful, intentional racial bias and discrimination influenced the structure of the program at its inception.¹⁹ Title I provided grants to the states to pay half the cost of old-age assistance programs.²⁰ Congress imposed only “general conditions” on the states for eligibility for the federal funds—how payments were to be made to the states and how the program was to be administered.²¹ Southern members of Congress resisted federal regulation fearing that significant federal oversight might represent the “entering wedge” for interfering with the “Negro question” in the south.²² Threatening opposition, they even insisted on removing a provision in the House bill that would have required the states provide sufficient assistance “compatible with decency and health.”²³ Edwin Witte, the Executive Director of the committee responsible for drafting the policies that would frame the legislation, concluded that “[t]he southern members did not want to give authority to anyone in Washington to deny aid to any state because it discriminated

against Negroes in the administration of old age assistance.”²⁴ During a hearing before the House, Representative Howard Smith of Virginia quoted from a newspaper editorial that expressed the sentiments of white southerners towards providing aid to African Americans, “The average Mississippian can’t imagine himself chipping in to pay pensions for able-bodied negroes to sit around in idleness on front galleries, supporting all their kinfolks on pensions, while cotton and corn crops are crying for workers to get them out of the grass.”²⁵

Title II of the Act originally only provided for old age benefits for retired workers at age 65. Several amendments extended and enlarged the categories of persons entitled to benefits.²⁶ Subsequently, all of the programs under Title II were referred to as “Social Security,” although they were technically named federal Old Age, Survivors, Disability, and Hospital Insurance (OASDHI).²⁷ Title II programs were entirely administered by the federal government. Structured as contributory insurance programs, only workers who paid taxes under the Federal Insurance Contribution Act (Title VII), and later certain of their dependents, were entitled to benefits. Remarks made by the chairman of the Senate Finance Committee convey the social and political sentiments towards structuring Title II of the Social Security Act as a contributory program. Old age insurance, he explained “comports better than any substitute we have discovered with the American concept that free men want to earn their security and not ask for doles—that what is due as a matter of earned right is far better than a gratuity. . . . Social Security is not a handout; it is not a charity; it is not relief.”²⁸ The “poor” aged, disabled, and their dependents along with surviving widows and children were excluded from Title II to avoid the stigma of it being considered “welfare.”²⁹

However, all working Americans would not have an equal opportunity to avail themselves of this right to earn their “security against the hazards and vicissitudes of life.”³⁰ When enacted in 1935, Title II covered only a “bare majority of the labor force, essentially all employees in the nonfarm private sector other than railroad employees who were covered under their own plan.”³¹ Congress omitted two occupational groups from coverage, agricultural and domestic workers, and, as a result, excluded from 3.5 million to 5.5 million African American workers.³² Members of Congress were well aware of the adverse effects of their decisions on African

Americans. There was testimony before the House Committee on Labor that “practically eighty-five percent of the Negroes in the South are agricultural workers.”³³

African American women suffered an even greater disadvantage. Between 1930 and 1940, “nine out of ten black women workers toiled as agricultural laborers or domestic servants.”³⁴ During the 1940s, women of European descent became clerical workers, working in employment covered by Social Security. By 1940, “one-third of all white, but only 1.3% of all black, working women had clerical jobs. On the other hand, sixty percent of black female workers were domestic servants; the figure for white women was only ten percent.”³⁵ By 1944, black women still occupied sixty percent of the domestic service jobs.³⁶ African American women were not necessarily overrepresented as domestic workers, because they lacked the training and education to pursue other occupational fields.³⁷ Highly educated African American women were excluded from many occupations open to European American women.³⁸ If unable to secure jobs as teachers in the southern segregated school system, highly educated African American women more likely worked in domestic rather than clerical occupations.³⁹

Just as Congress excluded agricultural and domestic workers from coverage under Social Security, Congress also excluded these two occupation groups from the protections of other recovery legislation: the National Industrial Recovery Act (1935) and the Fair Labor Standards Act 1938.⁴⁰ Consequently, only ten percent of gainfully employed African American women derived any direct benefits from federal policies designed to address the plight of workers after the Depression.⁴¹

The Social Security bill in its original form included coverage for agricultural and domestic workers. However, as Attorney Charles Hamilton Houston when representing the National Association for the Advancement of Colored People would aptly observe, southern congressmen were unlikely to vote for the bill “if Negroes are to benefit from it in any large measure.”⁴² By failing to provide coverage for agricultural and domestic occupations in a society that racially stratified occupational opportunities for African Americans, Congress embraced the discriminatory structure that limited African Americans’ work opportunities, and likewise offered limited opportunities for African Americans to enjoy the “security” offered by the 1935 Act.

The Act was eventually amended in 1950 with Congress granting coverage to people working in agricultural and domestic occupations.⁴³ However, there was relatively lax enforcement of reporting requirements for these occupational groups.⁴⁴ Only recently, through highly publicized embarrassing accounts of reporting violations by political nominees to high profile public positions, has this problem received public attention.⁴⁵

Title III of the Social Security Act of 1935 provided grants to states for unemployment compensation administration. There was considerable controversy over the “jurisdictional location”⁴⁶ of the Unemployment Insurance program. However, just as desires for autonomy to engage in racial discrimination assumed prominence for decisions about other Titles of the Act, “race relations and business control over the labor markets prevailed” when deciding this controversy. As a result, unemployment compensation insurance was administered at state and local levels so that the “programs failed to reach those most in need—employees of small firms, agricultural workers, women, African Americans, [and] migrants.”⁴⁷

Social Security: An Act that has Perpetuated Societal Racial Discrimination Against African Americans

The Social Security Administration (SSA) follows three major steps when computing an individual’s primary insurance amount (PIA).⁴⁸ SSA uses the PIA figure to determine almost all cash benefit amounts for workers, their dependents, and their survivors.⁴⁹ When calculating the PIA, SSA initially determines the individual’s Average Indexed Monthly Earnings (AIME).⁵⁰ The AIME represents an adjustment calculation designed to reduce the disparity between the benefit amounts payable only on the basis of recent earnings (for example to a younger disabled worker) and the benefit amounts payable to older individuals.⁵¹ The averaged earnings of older workers include the lower amounts that were subject to Social Security taxes during the earlier years of Social Security coverage.⁵² SSA then determines the appropriate benefit formula to use for the worker.⁵³ SSA benefit formulas will generally require the selection of a specified number of years that represent the insured worker’s highest reported earnings (thirty-five years for most retiring workers, fewer years for disabled or younger deceased workers).⁵⁴ Through the use of a progressive formula, one that considers increasingly lower percentages of the AIME as the

amount increases, the SSA calculates the PIA.⁵⁵ The PIA is then used to determine the worker's and any eligible beneficiary's benefit amount.⁵⁶ A relatively simple concept can be derived from the extraordinarily complex calculation processes used by SSA—Social Security benefits are tied to individual earnings reported on the records of the Social Security Administration.

The Social Security benefit formula results in persons with relatively low average earnings receiving benefit amounts that replace a higher relative fraction of their pre-entitlement earnings.⁵⁷ However, policy makers acknowledge that this feature has not made up for the effects of discrimination and other barriers that have depressed the earnings of minority group members.⁵⁸ As a result, the calculation of Social Security benefits perpetuates racial discrimination experienced by African Americans during their working years throughout their retirement or disability.⁵⁹ The same problem occurs if dependents receive benefits on the account of an African American wage earner, since their benefit amounts are based upon the wage earner's primary insurance amount (PIA).

During 1979, an advisory council to the House Ways and Means Committee noted the "deplorable" consequences of racial discrimination and recommended that changes to Social Security should be assessed for their impact on persons from racial and ethnic minority backgrounds.⁶⁰ Nevertheless, the advisory council concluded, "it would be neither appropriate nor desirable to try to use Social Security as a device for dealing with these problems."⁶¹ The advisory council reasoned that "the ultimate remedies for such discrimination will come through the Congress, the courts, the schools, the job market, and the political forum."⁶² However, this reasoning missed the point. It may have been too much to expect the Social Security program to address discrimination in markets for employment. However, it was not too much to expect Congress to address the perpetuation of that discrimination against African American families faced with the "economic hazards" of old age, disability, or death of a wage earner.

Congress was experienced and knew how to adjust Social Security benefits to address the economic disadvantages of societal employment discrimination. Under the 1935 Title II legislation, women were not afforded any special treatment—wages of employees were taxed at the same rate, and the formula for calculating benefits was gender neutral.⁶³ However,

shortly after enactment, Congress expanded the benefit categories to provide for gender specific benefits: wife's, widow's, mother's, and eventually divorced wife's benefits.⁶⁴ Men would not be entitled to similar spousal benefits until later amendments to the Act.⁶⁵ However, to qualify for these benefits, they had to prove financial dependency on their wives' earnings.⁶⁶ Further, Congress recognized that women experienced "severe job discrimination during economic downturns and tense labor disputes."⁶⁷ In response to this discrimination, during 1956, Congress enacted elaborate actuarial adjustments to the calculations of women's Social Security benefits. These remained in effect until 1972.⁶⁸ Eventually, the gender specific spousal benefit categories fell to constitutional challenges, with courts finding that such distinctions violated equal protection rights under the Fifth Amendment to the Constitution.⁶⁹ However, when confronted with a challenge to the actuarial adjustments that advantaged women, the Supreme Court rejected arguments that the sex differential calculations violated Fifth Amendment equal protection guarantees. The Court agreed that Congress had the right to remedy longstanding employment discrimination against women through adjustment of Social Security benefit calculations.⁷⁰ It reasoned that reducing the disparity in the economic conditions between men and women caused by a long history of discrimination against women was an important governmental objective.⁷¹ "Allowing women, who as such have been unfairly hindered from earning as much as men, to eliminate additional low-earning years from the calculation of their retirement benefits work[ed] directly to remedy some part of the effect of past discrimination."⁷²

Thus, a pattern emerged, with public officials responding to the discrimination faced by women, but basically ignoring the employment discrimination faced by African Americans and other historically disadvantaged groups.⁷³ When Congress addressed employment discrimination against women, it did not have women of color in mind as the primary beneficiaries. Considerably more responsive to charges of sexism against women than to charges of racism against African Americans, public officials convened a series of "blue ribbon panels" to discuss ways to eliminate discrimination against women.⁷⁴ Both groups have demanded redress of inequities in the policies and administration of Title II. Gender-specific benefits and adjustments to the calculations of benefits amounts, at least to a

limited extent, addressed societal discrimination that disadvantaged women. However, inequities and social practices that disadvantaged African Americans have received relatively "scant attention."⁷⁵ Responding to proposals that Congress adopt amendments to explicitly offset the effects of past racial and ethnic discrimination, the 1979 Advisory Council on Social Security concluded that such initiatives would "move the program too far away from its basic function of providing wage-related protection against long-term earnings loss."⁷⁶ The council was content to rely upon legislation enacted thirty years after the 1935 Social Security Act, Title VII of the 1964 Civil Rights Act, to eventually ameliorate the effects of race and ethnic discrimination on Social Security benefits.⁷⁷

Critiquing the Discourse that Surrounds Social Security Reform

Proponents of Privatization

In an essay addressing the implications of privatization for African Americans, Alvin Williams summarizes the major privatization reform positions.⁷⁸ He sets forth both the financial and moral justifications for allowing individuals the opportunity to place a portion of their Social Security taxes in private accounts and direct those funds to investment in the equity markets or other investment vehicles.⁷⁹ Citing studies by conservative institutions, proponents of privatization argue that Social Security is a poor investment that, at best, provides dismal returns of 6.3 percent per year if not actual "losses" for African Americans.⁸⁰ Under their calculations and analysis, African American workers will never recover the amounts paid in taxes under the Social Security program.⁸¹ African Americans have lower earnings, and African American males in particular have lower college attendance rates and longer work histories, coupled with shorter life spans.⁸² Therefore, Social Security represents an especially poor financial investment for this group of workers. To illustrate their point, privatization proponents offer, as an example, the situation of a single African American male in his twenties during 1996. They project that such individuals enjoy returns of only \$.88 for each \$1.00 paid in Social Security taxes. A comparable African American female would only earn a 1.2 percent return on the Social Security taxes she will have paid.⁸³

However, a critique that focuses solely on the returns on taxes invested ignores other systemic issues that confront African Americans. The same discriminatory effects of racial discrimination in employment markets that depress the Social Security earnings of African Americans will persist under privatization proposals. If privatization proponents desire to correct inequities in Social Security that disadvantage African Americans, their proposals should also address the historic disadvantage experienced by African Americans whose earnings have been depressed because of racial discrimination. I acknowledge that it is unlikely that Congress would support race-specific remedial measures similar to the gender specific measures used for almost two decades (from 1956 to 1972) to address discrimination against women.⁸⁴ However, there are neutral measures that could ameliorate the adverse effects of past and present racial discrimination.⁸⁵

Steps could be taken to encourage actual victims of discrimination or dependents of deceased victims to come forward and seek adjustments of the records of their earnings credited under Social Security. Social Security has special reporting procedures for properly crediting the earnings records of persons awarded back pay as the result of findings by a court or agency of discrimination, or court or agency approved settlements of discrimination claims (back pay awarded under a statute).⁸⁶ The Internal Revenue Service (IRS), for purposes of determining the taxation of back-pay awards, treats all the back pay as wages in the year that the award is *paid*.⁸⁷ In contrast, the SSA will credit a back-pay award as wages in the year(s) that the wages *should have been paid* if the award was made under a statute.⁸⁸ To ensure proper credit, the SSA requires that either the employee or the employer notify SSA. SSA has acknowledged the importance of properly reporting back-pay awards, "because wages not credited to the proper year may result in lower Social Security benefits or failure to meet the requirement for benefits."⁸⁹ Nevertheless, SSA acknowledges that the "law does not require that employers notify the SSA of the different period(s) involved in a back pay under statute case."⁹⁰ Here is where the problem surfaces, since it will be up to the individual to ensure that her earnings record represents a correct statement of her wages for Social Security purposes. Evolving and unresolved issues surround the subject of taxation of employment discrimination

recoveries. It is highly unlikely that individuals will be made aware of their right to correct the records of their earnings and, more importantly, appreciate the impact on their future retirement, disability, or survivors' income if they fail to do so.

During the past decade, the courts and the IRS have grappled with complex issues concerning the taxation of employment discrimination awards.⁹¹ The IRS has clarified some of the issues surrounding the taxation of recoveries under Title VII of the 1964 Civil Rights Act. Nevertheless, issues such as what aspects of the recovery are back pay or wages for withholding purposes, continue to pose complex questions.⁹² These difficult questions remain unresolved for even the most experienced practitioners.⁹³ Notably absent from discussions about taxation of employment discrimination recoveries is the recognition that proper allocations of back-pay earnings on an individual's Social Security earnings record is also an important concern. Thus, it is likely that, in the vast majority of settled or even judicially adjudicated cases, employees are unaware of their opportunities to correct their records of earnings under Social Security. There are likely numerous instances where African Americans, or their dependents or survivors, have probably received lower Social Security benefits due to unreported or incorrectly allocated back-pay earnings on Social Security records.

Opposing Privatization

Opponents of privatization represent another group whose members figure prominently in Social Security reform discussions. They assert that privatization reformers do not want to save Social Security. They really desire to dismantle one of the most important social insurance programs developed in the history of this country. The New Century Alliance for Social Security, a coalition of organizations representing the interests of organized labor, women, disabled individuals, African Americans, Latin Americans, and elderly and young Americans, has provided a forum for articulating these viewpoints.⁹⁴ The "save Social Security" proponents emphasize how it provides working people with a secure base for retirement, providing a lifetime of payments protected against inflation.⁹⁵ Emphasizing strong adequacy values⁹⁶ underlying Social Security, they focus on the progressive nature of Social Security that allows low-income earners to recover the highest percent-

age of their earnings, while ignoring its regressive tax structure.⁹⁷ They view Social Security as a vitally important safety net for elderly African Americans; an extremely effective means of keeping low-income and working-class elderly out of poverty.

Some of their discussions acknowledge certain racially structural inequities in Social Security. Both the Urban League and the NAACP have pointed out the racial inequities that stem from reforms that raised the retirement age for collecting unreduced Social Security retirement benefits to age sixty-seven. Because of shorter life spans, African Americans may collect ever fewer retirement benefits.⁹⁸ However, for the most part, the "save Social Security" proponents uncritically accept and ignore many other aspects of Social Security that disadvantage African Americans. On occasion, their arguments may deflect critical scrutiny of Social Security to larger issues, finding ways to raise the life expectancies of African Americans, for example.⁹⁹ However, focusing attention on improving life expectancy rates and infant mortality rates for African Americans, so that they are beyond those of persons living in third-world countries, does not require ignoring racial inequities within Social Security.

Stressing the importance of Social Security to African American women in particular, "save Social Security" proponents argue that "Social Security has been a guarantee for a decent life for African American women. Social Security is the main source of retirement income for many African American women, since fifty percent do not have personal retirement savings of any size. Thirty percent do not have workplace pensions and benefits."¹⁰⁰ However, the very fact that Social Security has been so important to members of the African American community should encourage, not discourage, critical examination to ensure, for example, fairness in the processing of claims for benefits.

For some individuals, establishing entitlement to Social Security benefits can be a complex and difficult process. For example, applicants for disability insurance benefits proceed through a five-step sequential evaluation process, until a determination of disability or no disability is reached.¹⁰¹ At the first step, Social Security field office personnel determine if the applicant meets the programs' nonmedical eligibility requirements—sufficient work to be considered insured for disability insurance benefits.¹⁰² During steps two through five, state disability

determination services (DDS) determine whether the individual's impairment is sufficiently disabling to qualify for benefits.¹⁰³ Individuals who are denied benefits may appeal to various levels for further review: first to the DDS for reconsideration; second for a hearing before one of approximately 850 Social Security administrative law judges (ALJ); third to the Bureau of Hearings and Appeals; and finally to the federal courts.

The difficulty of establishing entitlement to disability benefits is exacerbated if key decision makers bring racial prejudices to their decision-making process. Yet, a study of the adjudication of appeals of denial of claims for disability benefits suggests that racial biases influence the appeals process. SSA had observed disparities occurring "over the past thirty years under the Social Security Disability Insurance program (DI)" where "blacks have consistently been allowed benefits at lower rates than whites, with the magnitude of the difference ranging from between four and thirteen percentage points." Prompted by these and other disparities, the General Accounting Office (GAO) examined the 1988 disability determinations for evidence of racial discrimination.¹⁰⁴ The GAO found that at the initial decision level, the disparities in allowance rates were explained by non-racial factors: differences in the severity of impairments and age.¹⁰⁵ The exception to this finding was the racial differences for young (under age twenty-five) Supplemental Security Income applicants. Differences in the allowance rates for this group was "relatively large" and was not explained for the most part by demographic factors such as impairment severity and type. However, the largest racial differences occurred at the appeals level where ALJs conduct in-person hearings. At this level, the demographic factors did not explain the racial differences.¹⁰⁶ Further, the difference in ALJ allowance rates was not related to racial differences in the appeal rates or attorney representation at the hearings.¹⁰⁷ The allowance rates for ALJs were forty-two percent for African American appellants as compared to fifty-three percent for white appellants.¹⁰⁸ Further, the racial differences in allowance rates varied across regions with the New York and Chicago regions showing the largest racial differences.¹⁰⁹ The GAO concluded that the largely unexplained disparities in allowance rates at the ALJ level "calls into question the equity of treatment between black and white appellants."¹¹⁰ The

Commissioner of Social Security acknowledged that the GAO study "suggest[ed] the possibility that racial bias could be a factor in explaining why, in aggregate, a higher percentage of blacks are turned down for benefits than whites at this point in the adjudication process."¹¹¹

In response to the GAO Report, SSA made a number of commitments, one of which was to investigate the matter and issue a report by June of 1992. However, in response to a 1996 Freedom of Information Act request for a copy of the report of that investigation, SSA responded during 1997 that the report was not completed, and the matter had been assigned to its Office of Program and Integrity Reviews for further investigation.¹¹² In response to a second request made during 1999, SSA responded that while it had indicated that a report would be prepared on this subject, "no report was ever completed and there are not plans to complete such a report at this time."¹¹³ This failure to complete a report, however, does not mean that SSA did not take any actions to address the GAO Report.

During October of 1992, SSA instituted procedures for filing and investigation, if deemed necessary, of complaints of bias or misconduct against an ALJ.¹¹⁴ Under the complaint procedure, the Regional Chief ALJ, who conducts an initial inquiry to determine if the matter merits an investigation, initially reviews complaints. If an investigation is warranted, the Office of Hearings and Appeals Special Counsel conducts it. If that investigation supports a finding of bias, the Associate Commissioner for Hearings and Appeals determines, with consultation with the Chief ALJ, the necessary, appropriate administrative action.¹¹⁵ In addition, SSA undertook the following administrative procedures in response to the recommendations in the GAO report: (1) review of the regions with the largest racial differences; (2) design of a quality assurance system to review a sample of ALJ decisions; (3) review of the individual judges with the largest racial difference; (4) development of a training program for ALJs to recognize bias in decision making; (5) redesign of the management information systems; (6) "look into" the issues of racial differences in allowance rates of young Supplemental Security Income applicants; and (7) review of SSA's medical listings to insure no inherent racial bias in the criteria used to adjudicate impairments that occur more frequently in blacks.¹¹⁶ Yet, despite this straightforward commitment by SSA to address

the concerns of even the perception of bias among its ALJs, further investigation discloses that the problem has been considerably more complicated than the procedures would suggest.

ALJs have opposed critiques of the “quality or nature of their decisions,” on the grounds that such processes could become political weapons, interfering with their decisional independence.¹¹⁷ Further, Elaine Golin has pointed out other weaknesses in SSA’s program. While the procedures provide the ALJ with an opportunity to respond to the complaint, the complainant is not given the opportunity to respond to the ALJ’s testimony. The current procedure is tailored to address individual complaints, but does not address pattern or practice allegations of discrimination. These types of allegations have been the subject of class-action litigation. Filtering complaints through fellow ALJs renders the process vulnerable to criticism that ALJs will be distinctly unfavorably disposed towards complaints about their fellows.¹¹⁸ Thus, it does not appear that SSA is in a position to address concerns raised about ALJ biased decision making.

Conclusion: Finding Transforming Opportunities in the Social Security “Crisis”

African Americans and those interested in ensuring that Social Security does not disadvantage African Americans should consider this latest Social Security “crisis” as an opportunity to transform Social Security.¹¹⁹ For transformation to occur, reform discussions must identify and address racial inequities within the structure and administration of the Social Security program. Otherwise, the interests of African Americans will be sacrificed for political expediencies. While some commentary has suggested that African American interests may be advanced through litigation in the courts,¹²⁰ the real battleground for transforming Social Security is within the political debate that surrounds Social Security reform.¹²¹ During this discussion, I have deliberately avoided assuming a privatization or anti-privatization position. The goal here is to provide the opportunity and to encourage both camps to reassess and reframe their positions.

Endnotes

1. Morris D. Bernstein, *Social Security Reform and the Growth of Inequality*, 8 KAN. J. L. & PUB. POL’Y 57, 57 (1999).
2. W. ANDREW ASCHENBAUM, SOCIAL SECURITY: VISIONS AND REVISIONS 39 (1986).
3. Bernstein, *supra* note 1, at 57 (explaining that, while Social Security has “been the object of severe criticism from conservative policy elites,” he disagrees that there is any real “crisis”; rather he concludes that “[p]lans for radical restructuring stem more from ideological animus than a real concern for the viability of the system”). C.f. Daniel Mitchell, *Social Security’s Trustee’s Report Shows Bigger Long-Run Deficit* (Heritage Foundation, Executive Memorandum No. 666), <http://www.heritage.org/library/execmemo/em666.html> (Apr. 4, 2000) (reporting on distressing statistics and ominous forecasts about Social Security funding for future benefits).
4. For a detailed and informative critique of privatization proposals see, e.g., Dorothy A. Brown et al., *Social Security Reform: Risks, Returns, and Race*, 9 CORNELL J.L. & PUB. POL’Y 633 (2000); Kathryn L. Moore, *Partial Privatization of Social Security: Assessing Its Effect on Women, Minorities, and Lower-Income Workers*, 65 MO. L. REV. 342 (2000).
5. C.f. Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sustein & Tushnet’s Constitutional Law*, 89 COLUM. L. REV. 264, 276 (1989) (discussing “structural discrimination” against women in the Social Security System).
6. Bernstein, *supra* note 1, at 57 (noting the privatization strategy of Social Security ideological opponents as “The final element of the strategy must be to propose moving to a private Social Security system in such a way as to detach, or at least neutralize, segments of the coalition that supports the existing system.”) (citing CATO INSTITUTE, SOCIAL SECURITY: PROSPECTS FOR REAL REFORM 167 (Peter Ferrara ed., 1985)).
7. For a summary of the various proposals, see SOCIAL SECURITY REFORM: BEYOND THE BASICS (Richard C. Leone & Greg Anrig, Jr. eds., 1999); HENRY J. AARON & ROBERT D. REISHAUER, COUNTDOWN TO REFORM: THE GREAT SOCIAL SECURITY DEBATE (1998). The debate has coalesced around questions about whether to privatize all or part of the Social Security program.

8. Jacob M. Schlesinger, *Bush Plan to Privatize Social Security Will Face Host of Hurdles*, WALL ST. J., Dec. 18, 2000, at A-24 (explaining that defined benefit programs promise workers a certain payment when they retire; under defined contribution plans such as a 401(k) program, payments depend on the worker's investment choices and market trends).
9. Louis Uchitelle, *Economic View: A Retirement Plan That Wall Street Likes*, N.Y. TIMES, Nov. 12, 2000, at 3-6 (the trend among some politicians is to move Social Security towards the more "mecurial" 401(k) plan type of program; by contrast Social Security is a social insurance program that redistributes a pool of retirement money from those who die early to those who live long) (quoting Teresa Ghilarducci, an economist and pension expert at the University of Notre Dame).
10. The New Century Alliance for Social Security, *Institute for America's Future News Conference* <http://www.ourfuture.org/feature/nca/transcript.asp> (Dec. 3, 1998) [hereinafter New Century Alliance].
11. ARTHUR J. ALTMAYER, *THE FORMATIVE YEARS OF SOCIAL SECURITY* 9 (1968).
12. SOCIAL SECURITY: THE FIRST HALF-CENTURY 3 (Gerald D. Nash et al. eds., 1988) (by 1900, European governments had increasingly assumed responsibilities for social welfare functions; however the United States was a "latecomer" with the Social Security Act of 1935 launching the American welfare state).
13. ASCHENBAUM, *supra* note 2, at 13.
14. *Id.*
15. *Id.* at 19.
16. ALTMAYER, *supra* note 11, at 6, 7, 9.
17. Wilbur J. Cohen, *The New Deal and Its Legacy: The Development of the Social Security Act of 1935: Reflection Some Fifty Years Later*, 68 MINN. L. REV. 379, 379 (1983).
18. SOCIAL SECURITY: THE FIRST HALF-CENTURY, *supra* note 12, at 8-14 (Title I Old Age Assistance; Title II Old Age Insurance; Title III Unemployment Compensation Insurance; Title IV Aid to Dependent Children; Title V provides grants to states to promote the health of mothers and children, medical services for crippled children, and protection for homeless neglected children, and promotes vocational rehabilitation for disabled persons; Title VI provides grants to states to establish public health services; Title VII establishes a three-member Social Security Board to administer all of the programs; Title VIII specifies the taxes paid for Title II; Title IX specifies taxation for the administration of the Title III program; Title X provides aid to the needy blind; Title XI defines terms of the Act and deals with administrative details).
19. Acknowledging the influence of racism or the adverse impact of Congress' decisions on African Americans would not necessarily demonstrate that Congress' decisions about the coverage of domestic and agricultural workers was unconstitutional. *See Fisher v. Sec'y of Health Educ. & Welfare*, 522 F.2d 493, 501-03 (7th Cir. 1975) (refusing to invalidate special coverage requirements for domestic workers as unconstitutional because they adversely impacted black women). *See Geoffrey T. Holtz, Social Security Discrimination Against African-Americans: An Equal Protection Argument*, 48 HASTINGS L.J. 105, 120 (1996) (concluding that purposeful, invidious, race-based decision-making influenced the structure of the original Act).
20. *Id.* at 8.
21. *Id.*
22. EDWIN WITTE, *THE DEVELOPMENT OF THE SOCIAL SECURITY ACT* 143-44 (1962), *cited in Holtz, supra* note 19, at 116, n. 76.
23. SOCIAL SECURITY: THE FIRST HALF-CENTURY, *supra* note 12, at 8. *See also* Wilbur Cohen, *The New Deal and Its Legacy: The Development of the Social Security Act of 1935: Reflection Some Fifty Years Later*, 68 MINN. L. REV. 379, 386 (1983) (attributing the deletion of this aspect of Title I to the efforts of conservative Senator Harry F. Byrd, Sr. of Virginia; concluding that the change represented a fatal blow to effective nationwide quantitative standards in federal-state welfare that was not addressed until the OAA, ADC, AB programs were repealed and consolidated under the 1972 Supplemental Security Income program (SSI)); ALTMAYER, *supra* note 11, at 35-36 (noting that the House Ways and Means Committee had recommended that the states establish a merit system for the selection of employees engaged in the administration of the old age assistance, aid to dependent children, and maternal and child health programs; instead the language was changed to require that the states provide efficient methods of

- administration, “other than those related to tenure of office, and compensation of personnel”; Fred M. Vinson of Kentucky who would later become Chief Justice of the United States Supreme Court, a leading member of the committee, explained the reasons for the change: “No damned social workers are going to come into my State to tell our people whom they shall hire”).
24. WITTE, *supra* note 22, at 144 (concluding that “it had never occurred to any person connected with the Committee on Economic Security that the Negro question would come up in this connection”; after the first days of committee hearings it became apparent that the bill would not pass unless they “toned down” all clauses relating to supervisory control by the federal government), *cited in* Holtz, *supra* note 19, at 177 (structuring an equal protection argument based on the adverse impact of the retirement age under Social Security on African Americans and the purposeful discrimination associated with the passage of the legislation).
 25. Holtz, *supra* note 19, at 117.
 26. SOCIAL SECURITY: THE FIRST HALF-CENTURY, *supra* note 12, at 18, 285 (describing the expansion of benefit categories from retired workers age sixty-five only under the 1935 Act, to survivors and dependents under the 1939 Act, dependent husbands, widowers, mothers with children under eighteen under 1950 amendments, disabled workers in 1956, full-time students under the 1965 amendments, and benefits for divorced wives and widow in 1965).
 27. *Id.* at 7 (explaining that the term “Social Security” is problematic since it originally consisted of the eleven titles under the 1935 Act; however, for most contemporary Americans it is synonymous with old age pensions but it includes more—all the programs taxed under the Federal Insurance Contributory Act (FICA) including old age, survivors and dependents, and disability insurance plus Medicare).
 28. *Id.* at 115.
 29. JOEL F. HANDLER, *THE POVERTY OF WELFARE REFORM* 27 (1997) (noting that “the Roosevelt administration fought vigorously and successfully to compensate only workers who contributed and exclude the poor aged lest the program be considered ‘welfare’”).
 30. WITTE, *supra* note 22, at 6 (citing President Roosevelt, Special Message to Congress, 73d Cong., 2d Sess. (June 8, 1934), *in* H.R. Doc. No. 397 (1934) (developing his thesis for reconstruction and recovery)).
 31. SOCIAL SECURITY: THE FIRST HALF-CENTURY, *supra* note 12, at 17. *See also* WITTE, *supra* note 22, at 152–53 (describing the disagreements among the staff and the members of the Committee on Economic Security over exempting agriculture and domestic service from coverage; noting the objections of Treasury officials who urged that it would be administratively impossible to collect payroll taxes from agricultural and domestic servants; but concluding that he was influenced far less by difficulties with administration than by concerns that “farmers would object to being taxed for old age insurance protection for their employees”).
 32. Holtz, *supra* note 19, at 117 (citing *Economic Security Act: Hearings on S. 1130 Before the Senate Comm. on Finance*, 74th Cong., 1st Sess. 644 (1935) (statement of Charles H. Houston of the NAACP)).
 33. *Id.* at 117 (citing *Unemployment, Old Age and Social Insurance: Hearings on J.R. 2822 Before the House Comm. On Labor*, 74th Cong., 1st Sess. 147 (1935)). *But see*, Deroy Murdock, *How Social Security Shortchanges Black Americans*, <http://www.project21.org/NVSSMurdock1197.html> (last visited Mar. 8, 2001) (concluding that the “pristine motives” for establishing Social Security are outweighed by the negative disparate impact on minorities).
 34. JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN WORK AND THE FAMILY 199–200* (1985).
 35. *Id.* at 200.
 36. *Id.* at 237.
 37. U.S. Comm’n on Civil Rights, *The Economic Status of Black Women: An Exploratory Investigation*, at 43–44, <http://www.inofrm.umd.edu/EdRes/Topic/WomensStudies/GenderIssues/WomeninWorkforce/BlackEconStatus/fulltext> (last visited Mar. 8, 2001) (“[A]lmost one quarter of Black women with some post-high school education and even thirteen percent of black women with a college degree were employed as domestic servants. Similarly, the low educational attainment of black women was not the reason for their almost total absence from the field of clerical work. While forty percent of white

women with a twelfth grade education and thirty percent of white women with some post-high school education were employed as clerical workers, the comparable figures for black women were seven and six percent respectively.”).

38. JONES, *supra* note 34, at 44 (explaining that highly educated black women in the south became teachers in the segregated school systems; however, for those who did not gain employment as teachers, they “were more likely to be employed as domestic servants than as clerical workers, the second largest occupational category for white women with more than a high school education”).
39. *Id.*
40. *Id.* at 199 (citing census reports).
41. *Id.* at 199.
42. Holtz, *supra* note 19, at 117.
43. ASCHENBAUM, *supra* note 2, at 39 (explaining that the 1950 amendments extended coverage to regularly employed farm and domestic laborers, along with workers in Puerto Rico and the Virgin Islands, federal civilian employees not covered by the Civil Service Retirement system, local government workers without formal old age protections and employees other than ministers of nonprofit organizations; amendments in 1954 and 1956 extended coverage to self-employed farmers, most self-employed professionals, and all military personnel).
44. *Fisher v. Sec’y of Health Educ. & Welfare*, 522 F.2d 493, 496 (7th Cir. 1975) (citing complaint of plaintiff who alleged that the Treasury Dept. had failed to compel or attempt to compel the collection of the employment tax on the earnings of domestic workers). *See also*, Soc. Sec. Admin., *Paper Form W-2 Questions & Answers*, <http://www.ssa.gov/employer/paperq&a.htm> (last visited Mar. 10, 2001) (explaining the reporting requirements for household employees).
45. Dana Milbank & Thomas B. Edsall, *Labor Designee Pulls Out: Illegal Immigrant Is Chavez’s Downfall*, MILWAUKEE J. SENTINEL, Jan. 10, 2001, at 1A, 6A (also offering accounts of similar problems faced by political nominees or appointees Zoe Baird, Judge Kimba Wood, Supreme Court Justice Stephen Breyer, Christie Whitman, Ron Brown, Frederico Pena, Senator Diane Feinstein, Michale Huffinton, and Bobby Ray Inman).
46. HANDLER, *supra* note 29, at 27.
47. *Id.*
48. 20 C.F.R. § 404.210(b).
49. SOCIAL SECURITY HANDBOOK 117 (13th ed. 1997) [hereinafter HANDBOOK].
50. *Id.*
51. *Id.*
52. *Id.*
53. 20 C.F.R. § 404.210(b)(2).
54. HANDBOOK, *supra* note 49, at 119 (discussing the calculation of “elapsed years”).
55. *Id.* at 121.
56. Michael Tanner, *Privatizing Social Security: A Big Boost for the Poor* 2, <http://www.cato.org/pubs/ssps/ssp4.html> (July 26, 1996).
57. H.R. COMMITTEE ON WAYS AND MEANS, *Report of the 1979 Advisory Council on Social Security* 132 (Dec. 7, 1979).
58. *Id.*
59. *C.f.* Becker, *supra* note 5, at 279 (critiquing the policy linking benefits to wages because “earning high wages is a traditional male (breadwinner) role”).
60. H.R. COMMITTEE ON WAYS AND MEANS, *supra* note 57, at 126.
61. *Id.*
62. *Id.* at 126, 136. The advisory council rejected proposals to build into the program explicit racial classifications to offset the effect of past racial and ethnic discrimination.
63. ASCHENBAUM, *supra* note 2, at 126–27.
64. *Id.* at 126–29.
65. SOCIAL SECURITY: THE FIRST HALF-CENTURY, *supra* note 12, at 18 (summarizing the expansion of benefit categories under the Act: the 1939 Act added survivors and dependents benefits; the 1950 Act added dependent husbands and widowers;

wives benefits at any age if there were children under 18).

66. ASCHENBAUM, *supra* note 2, at 126–29.
67. *Id.* at 128.
68. Law of August 1, 1956, ch. 836, tit. 1, § 102(a), 70 Stat. 809 thereby changing the calculation under 42 U.S.C. § 415 (b)(3), *cited in* Califano v. Webster, 430 U.S. 313, 314–16 (1977). *See also* SOCIAL SECURITY: THE FIRST HALF-CENTURY, *supra* note 12, at 18 for another example of sex differentiation in Social Security benefit entitlement (noting that in 1956, women became entitled to actuarially reduced benefits at ages sixty-two through sixty-four; later in 1961, Congress reduced the eligibility age for men for reduced benefits).
69. Weinberger v. Wiesenfeld, 420 U.S. 636, 638–39 (1975) (father’s with deceased, disabled, or retired wives are entitled to benefits on the same basis as mother’s); Califano v. Goldfarb, 430 U.S. 199, 202 (1977) (eliminating the dependency requirement for aged husbands and widowers).
70. Califano v. Webster, 430 U.S. at 319 (citing legislative history that demonstrated that Congress purposely sought to remedy discrimination against women in the job market and concluding that the differences in calculating a woman’s benefits was not due to “the accidental byproduct of a traditional way of thinking about females”). With amendments to the Act in 1972, Congress equalized the treatment of men and women. *Id.*
71. *Id.* at 317–18. The Court further explained that the “challenged statute operated directly to compensate women for past economic discrimination. Retirement benefits under the Act are based on past earnings. But we have recognized: ‘Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs.’” *Id.*
72. *Id.* at 318.
73. Nevertheless, there remain strong equity challenges to Social Security’s treatment of women. *See* Brown et al., *supra* note 4, at 1217–18 (criticizing Social Security for subsidizing traditional one earner families and essentially discriminating against working women; failing to provide adequate protection for dependent women); Becker, *supra* note 5, at 280 (identifying as “structural discrimination” against women three features of Social Security: linking workers’ benefits to wages with women earning lower wages receiving lower benefits, failing to take into account uncompensated housework, and making benefits based on spousal status derivative, smaller, and contingent).
74. Gail Buchwalter King, *Social Security and the Changing Role of Women, in FIFTY YEARS OF SOCIAL SECURITY: PAST ACHIEVEMENTS AND FUTURE CHALLENGES: AN INFORMATIONAL PAPER PREPARED FOR USE BY THE SPECIAL COMMITTEE ON AGING UNITED STATES SENATE* 63–64 (Aug. 1985).
75. *Id.* (noting the “pressing needs of minorities received scant attention”).
76. H.R. COMMITTEE ON WAYS AND MEANS, *supra* note 57, at 136.
77. *Id.*
78. Alvin Williams, *Reforming Our Ailing Social Security System: The State of the Current System and Its Impact on African Americans*, 8 ELDER L. J. 221, 232 (2000) (concluding that privatization options that allow the investment of a percentage of one’s payroll taxes into a private pension account serve the best interests of African Americans).
79. *Id.* at 234 (explaining that privatization is more fair, provides individuals more freedom and security, decreases antagonism between generations, and fosters a greater sense of community).
80. William W. Beach, *Social Security’s Rate of Return, in A REPORT OF THE HERITAGE CENTER FOR DATA ANALYSIS* 1 (Jan. 15, 1998) (citing, as an example, an African American male age thirty-eight or younger will likely pay more into Social Security than he can ever expect to receive in benefits after inflation and taxes; estimating that staying under Social Security will cost this individual \$160,000 in lifetime income in 1997 dollars; African American males born after 1959 face a negative rate of return). Williams, *supra* note 78, at 231.
81. Williams, *supra* note 78, at 231.
82. *Id.* at 231.
83. *See also*, Mike Green, *How Personalizing Social Security Prevents the Government Hijacking of the*

Poor, http://www.urbancure.org/social/socsec_hijack.htm (last visited Mar. 8, 2001) (quoting Senator Rick Santorum as explaining a further disadvantage for African Americans is that they have high mortality rates but, upon their death, their survivors may not make claims of inheritance rights to accrued contributions or the wage earner's anticipated benefits).

84. *C.f. Holtz*, *supra* note 19, at 1223–25 (discussing the evolution of constitutional law since the Court's decision in *Califano v. Webster*, 430 U.S. 313 (1977) and suggesting that, under the strict scrutiny analysis announced in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), a race-based Congressional response designed to counteract discrimination's lingering effects could survive strict scrutiny).
85. That is not to exclude the possibility that a calculation adjustment of Social Security benefits could be based on a theory for reparations for African Americans. *See, e.g., HANDBOOK*, *supra* note 49, at 122–23 (when calculating the AME under the simplified Old Start Formula, “deemed wages”—an assumption that the individual had earnings for purposes of Social Security reporting—were granted to individuals interned in the United States after World War II). A discussion of adjusting Social Security under a reparation theory is beyond the scope of this article but clearly worthy of exploration.
86. Soc. Sec. Admin., *Employer's Guide to W-2 Wage Reports 10*, http://www.ssa.gov/employer_info/employer_guide.htm (last visited Dec. 30, 2000).
87. *Id.*
88. *Id.* *See also* *Social Security Board v. Nierotko*, 327 U.S. 358, 369–70 (1946) (concluding that back pay awarded to an individual under the National Labor Relations Act was wages that should be allocated to the periods when regular wages were not paid as usual); 42 U.S.C. § 403 (work deductions also applied to back pay earnings awarded under the Age Discrimination in Employment Act).
89. Soc. Sec. Admin., Pub. No. 957, *Reporting Back Pay to the Social Security Administration: What Is Back Pay?* 1, http://www.irs.gov/plain/forms_pubs/pubs/p95701.htm (last visited Feb. 10, 2001). The Social Security Administration offers the following example as an illustration of the differences between the reporting of back pay for IRS purposes and the reporting of earnings for Social Security purposes: “In 1997, Terry Morris earned wages of \$50,000. In the same year, she received \$100,000 in settlement of a back-pay case against her employer that covered the periods January 1992 through December 1996. Her employer properly reflected Social Security wages of \$65,400 and Medicare wages of \$150,000 on her 1997 Form W-2. However, if an employer did not include back-pay wages on a previously filed Form W-2 or magnetic media wage report, the employer should prepare a wage correction report, Form W-2c, Corrected Wage and Tax Statement . . . to add the back-pay award to the wages previously reported.”
90. *Id.*
91. *United States v. Burke*, 504 U.S. 229, 242 (1992) (prior to amendments to Title VII of the 1964 Civil Rights Act, back-pay settlements to victims of sex discrimination are not excludable from gross income as “damages received . . . on account of personal injuries” under Section 104(a)(2) of the Internal Revenue Code); Rev. Rule 72-341, 1971-2 C.B. 32 (payments by a corporation in settlement of Title VII suit must be included in the employees' gross income as payments “were based on compensation that they otherwise would have received”). *See also* Rev. Rul. 96-65, 1996-2 C.B. 6 (In light of *Burke*, and Amendments to Title VII in 1991, the IRS issued Rev. Rul. 93-88, 1993-2 C.B.61, “which holds that compensatory damages and back pay are excludable from gross income as damages for personal injury under former § 104(a)(2) when received for . . . racial discrimination under § 16 of the Civil Rights Act of 1870, 42 U.S.C. § 1981 and Title VII.” Subsequently, “in *Commissioner v. Schleier*, 515 U.S. 323 (1995), the Supreme Court held that back pay and liquidated damages received to settle a claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (ADEA), are not excludable from gross income under the former language of § 104(a)(2).” For the back pay and liquidated damages to be excludable from gross income they must be based on tort or tort-type of rights and must be received on account of personal injuries or sickness. The IRS suspended Rev. Rul. 93-88. Upon reconsideration of *Schleier* and amendment of Section 104 (a)(2) by the 1996 Act, the IRS issued Rev. Rul. 96-65. Under the current Section 104(a)(2) “back pay received in satisfaction of a claim for denial of a promotion due to disparate treatment employment discrimination under Title VII is not excludable from gross income under Sec. 104(a)(2). . . . Similarly, amounts

received for emotional distress in satisfaction of such a claim are not excludable from gross income under § 104(a)(2), except to the extent they are damages paid for medical care (as described in § 213(d)(1)(A) or (B)) attributable to emotional distress.”)). See also Robert W. Wood, *Tax Issues of Employment Litigation*, in *EMERGING ISSUES IN EMPLOYMENT LAW AND LITIGATION* 134–38 (Feb. 22, 2001).

92. This clarification has primarily addressed the question of income taxation of Title VII and ADEA awards, rather than also addressing the issue of reporting of Social Security earnings. See, e.g., Terri M. Solomon, *Federal Discrimination Statutes: The Tax Status of Settlements and Judgments*, in *CONTEMPORARY ISSUES IN LABOR AND EMPLOYMENT LAW: PROCEEDINGS OF NEW YORK UNIVERSITY 48TH ANNUAL NATIONAL CONFERENCE ON LABOR* 45 (Bruno Stein ed., 1995). To the extent that FICA holdings are addressed, the primary concern has been whether the employer should insist on deducting FICA taxes since the employer may be subject to a fine or penalty for not reporting Social Security earnings. See Wood, *supra* note 91, at 133.
93. Wood, *supra* note 91, at 138–39 (raising the following questions about taxable emotional distress damages that are included as income: “Will amounts that are now taxable (for example, where a recovery is for emotional distress attributable to race or gender discrimination) also be subject to income tax withholding by the employer? Will they be subject to Social Security tax payable by both employer and employee? If an amount is paid and the subject of a Form 1099 (with no withholding), will self-employment tax be imposed on the recipient?”).
94. New Century Alliance, *supra* note 10.
95. *Id.* (quoting Jesse Jackson).
96. *A Starting Point for Reform: Identifying the Goals of Social Security: Hearing Before the Special Committee on Aging*, 105th Cong., 2d Sess. (Feb. 10, 1998) (testimony of Jane L. Ross, Director for Income Security, U.S. General Accounting Office) (contrasting adequacy goals of Social Security, ensuring adequate retirement income, with individual equity goals, ensuring that benefits are at least somewhat higher for workers with higher lifetime earnings).
97. New Century Alliance, *supra* note 10 (quoting Hugh Price, President and CEO of the Urban League). C.f. Alexa A. Hendley & Natasha F. Bilimoria, *Minorities and Social Security: An Analysis of Racial and Ethnic Difference in the Current Program*, 62 SOC. SEC. BULL. 59 (1999) (acknowledging that “while the benefit formula is progressive, the Social Security payroll tax is regressive when it is compared with the earnings subject to the payroll tax”). Since the earnings of blacks are less than whites, black workers are more likely to have all of their earnings subjected to this tax. *Id.* The Earned Income Tax Credit (EITC) was designed to offset the regressive payroll tax for families with children. *Id.* But see Vada Waters Lindsey, *The Widening Gap under the Internal Revenue Code: The Need for Renewed Progressivity*, 5 FLA. TAX REV. (forthcoming 2001) (copy on file with author) (critiquing the EITC as a “superficial” method for countering the regressive nature of the Social Security tax since it fails to lift a significant percentage of taxpayers above the poverty level, and was unavailable to two-thirds of the poor during 1988).
98. New Century Alliance, *supra* note 10 (quoting Kweisi Mfume, President of the NAACP).
99. *Id.* (quoting Kweisi Mfume).
100. *Id.* (quoting Jane Smith, President of the National Council of Negro Women, an affiliation of organizations representing over three million African American women).
101. UNITED STATES GENERAL ACCOUNTING OFFICE REPORT TO THE RANKING MEMBER, SPECIAL SENATE COMMITTEE ON AGING SOCIAL SECURITY: RACIAL DIFFERENCE IN DISABILITY DECISION WARRANTS FURTHER INVESTIGATION, at 50 (Apr. 1992) [hereinafter GAO REPORT] (describing the sequential evaluation process). The Disability Insurance program under Title II provides monthly cash benefits to disabled people under age 65 who are insured for Social Security benefits. *Id.* at 10. The SSI program under Title XVI provides federal and state assistance to the blind or disabled whose income and resources fall below a certain level.)
102. *Id.* at 13.
103. *Id.* at 11.
104. *Id.* at 2.
105. *Id.* at 37.

106. *Id.* at 44 (noting that only a “small amount of the observed racial difference in ALJ allowance rates was due to the fact that proportionally more black appellants had initially been judged to have nonsevere impairments”), *also cited in* Elaine Golin, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532, 1547 (1995).
107. *Id.* at 45.
108. *Id.*
109. Nat’l Org. of Soc. Sec. Claimants’ Representatives, *Allegations of Racial Bias Left Unaddressed*, SOC. SEC. F., Apr. 2000, at 8 [hereinafter NOSSCR].
110. GAO REPORT, *supra* note 101, at 47.
111. *Id.* app. V at 74 (SSA expressed concerned about one aspect the methodology; the GAO, however, disagreed with the critique, noting that while the concerns expressed may have enhanced the analysis, they did not invalidate it).
112. NOSSCR, *supra* note 109, at 9.
113. *Id.*
114. *Social Security Administration Procedures Concerning Allegations of Bias or Misconduct by Administrative Law Judges*, 57 F.R. 49,186 (Oct. 30, 1992) (noting also that the ALJ will be informed of the complaint and provided an opportunity to respond).
115. *Id.*
116. *Racial Difference in Disability Decisions: Hearing Before the Subcommittee on Oversight of Government Management Committee on Governmental Affairs* (Sept. 22, 1992) (testimony of Lawrence H. Thompson, Assistant Comptroller, General Human Resources Division).
117. Golin, *supra* note 106, at 1551–55.
118. *Id.* Review of a recent decision in the Third Circuit, *Grant v. Comm’r, Soc. Sec. Admin.*, 111 F. Supp. 2d 556 (M.D. Pa. 2000), suggests that Golin’s observations about the deficiencies of SSA’s review process were prescient. A thorough critique is beyond the scope of this article.
119. *C.f.* Linda S. Greene, *Feminism, Law, and Social Change: Some Reflections on Unrealized Possibilities*, 87 NW. U. L. REV. 1260, 1260 (1993) (explaining that the potential for the law to create “empowerment and antistatutory norms” will depend in part upon our ability to identify and assess opportunities for “transformative moments”).
120. *See, e.g.*, *Fisher v. Sec’y Health, Educ. & Welfare*, 522 F.2d 493 (7th Cir. 1975) (holding that plaintiff had not established that qualified coverage of domestic workers was unconstitutional racial discrimination); *Doe v. Hodgson*, 344 F. Supp. 964 (S.D.N.Y. 1972) (rejecting arguments that exclusion of agricultural workers who were “overwhelmingly black and chicano” was racially discriminatory).
121. Schlesinger, *supra* note 8, at A-24.