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THE FAULTY FOUNDATIONS OF THE TAX CODE:

Gender and Racial Bias in Our Tax Laws

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ABSTRACT

This report examines the outdated assumptions and gender and racial biases embedded in the U.S. tax code. It highlights tax code provisions that reflect and exacerbate gender disparities, with particular attention to those that disadvantage low-income women, women of color, members of the LGBTQ community, people with disabilities, and immigrants.

Examined policies include the joint filing of spousal income, treatment of informal caregiving, incentives for business formation and wealth accumulation, and IRS enforcement patterns. Although perhaps facially neutral, many of the policies examined herein likely provide disproportionate benefit to men, may heighten pressure for women to leave the formal labor market, and reflect biased assumptions about gender, race, and family structure.

Raising awareness of these underlying biases is a vital first step on the path to equitable tax reform, but awareness alone is not enough. Ensuring a democratic, mindful policymaking process matters as well. To that end, rather than proposing specific tax code revisions, this report offers recommendations for better data and analysis so that policymakers, advocates, and the public can fully understand the impact of the current tax code and proposed tax policies. Proposals include to improve tax data and enforcement data by considering outcomes by gender, race, and other characteristics; inclusive budgeting; and equity impact statements for legislative proposals. Access to this data and impact analysis will provide policymakers with better tools – and the public with more information – to design a tax code that is more equitable, accountable, and inclusive.

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ABOUT THE NATIONAL WOMEN'S LAW CENTER

The National Women's Law Center fights for gender justice — in the courts, in public policy, and in our society — working across the issues that are central to the lives of women and girls.

We use the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us — especially those who face multiple forms of discrimination. For more than 45 years, we have been on the leading edge of every major legal and policy victory for women.

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DISCLAIMER

Text, citations, and data are current as of the date of publication. This report does not constitute legal or tax advice; individuals and organizations should consult with counsel related to specific tax matters.

**Inclusion in the acknowledgement section does not indicate endorsement of the content in this report.*

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NOTE ON TERMINOLOGY

This report analyzes data from multiple sources that use varying terms when referring to different racial groups. Throughout this report, we use the terms "Black women" or "Black men" when the data refers to women or men who are Black or African American. We use the terms "Latinx women" or "Latinx men" to refer to women or men who are Hispanic or Latino. Due to slight differences in how white women and men are defined in the sources throughout this report, we use the term "white" to refer to them. Please reference the individual sources cited for further detail on race categories.

INTRODUCTION

The tax code's primary purpose is to collect revenue, which, in turn, supports public investments in our shared national priorities. And yet, the power of the tax code goes much further: it rewards and incentivizes behavior by individuals, families, businesses, and government systems. It favors certain lifestyles and household structures. The rules it sets can mitigate or exacerbate economic and political inequality. In short, the tax code reflects and enshrines a vision of society.

Like any system of law, the tax code is a social and political document. Shaped by a small number of powerful elites, who have been largely white, male, and wealthy throughout our nation's history, the tax code unsurprisingly reflects their worldviews, values, biases, and experiences. For example, the tax code and Treasury regulations use male gender pronouns by default, and more often only use female pronouns when using both pronouns, as in, "he or she" and then typically in the context of joint (married) filing issues.[1] The primary "family" tax filing unit is based on the predominant family structure for white, upper-class men in the beginning of the 20th century when the modern tax code was first enacted: a married, heterosexual couple with children, and a male breadwinner. The worker whose income was taxed was assumed to have a wife (or domestic worker) at home whose unpaid or hardly paid labor ensured the care of children and other family members. The small business owner compensated in the tax code for their entrepreneurial spirit and willingness to risk capital and forego safer opportunities was, likewise, imagined to be a white man. The tax code's structuring of incentives to save and build assets through homeownership, investments, and retirement nest eggs envisioned middle- and upper-class workers whose incomes predictably increased over the course of their careers. It did not contemplate workers whose educational and career opportunities and earnings would be constricted by multiple forms of systemic discrimination.

While the Progressive movement of the early 20th century mobilized to create an income tax system whose redistributive impact is now well-accepted, that movement failed to grapple with the legacy of slavery and the subjugation of women and people of color. As a result, the modern tax code enacted in 1939 failed to reflect the reality of the lives of women, people of color, and others who experienced ongoing discrimination, whose labor was unrecognized and undervalued, and who faced barriers to economic security and opportunity. Eighty years on, people in this country are more diverse and less likely to be married; more women, including women with children, are in the paid workforce; people are more likely to be immigrants or refugees than in prior decades; and families take vastly more forms than that of a married man and woman with 2.5 children. Yet, the realities of our lives are not reflected in the tax code, which has continued to be written largely by and for white men.

As just one example of how white men have largely been responsible for writing tax laws, a female senator did not sit on the U.S. Senate Committee on Finance (the committee with tax-writing responsibilities) until 1995. As recently as 1999–2000 (the first session of the 107th Congress), moreover, the Committee was composed entirely of male senators.

U.S. Senate Committee on Finance, Membership of the Committee (By Congress and Session), https://www.finance.senate.gov/download/committee-on-finance-membership-by-congress.

The tax code overall is progressive, and its revenue-raising function plays a critical role in supporting investments that increase economic security for low- and moderate-income women and families. Moreover, Congress has enacted tax policies – including refundable tax credits like the Earned Income Tax Credit and the Child Tax Credit – that directly reduce gender and racial inequality. Yet many of the problematic assumptions and gender, racial, and other biases embedded in provisions of the tax code remain. The result is a tax code that does not fulfill its potential to advance economic, gender, and racial equity. This failure has real economic impacts for families and individuals, the realities of whose lives are not reflected in the code's misbegotten archetypes.

For example, provisions of the tax code:

- Impose a higher tax cost on the incomes of secondary-earner spouses, who are more likely to be women;
- Offer less preferential tax treatment to expenses borne disproportionately by women workers, like caregiving;
- Reward those who have accumulated wealth, while failing to support and incentivize those who are struggling to do so – with women and people of color disproportionately represented in the latter group; and
- Reward risk-taking behavior with investment and business tax incentives, which tends to benefit men over women.

In addition, groups of low-income tax filers – in which women and people of color are overrepresented – have been shown to be disproportionately likely to be subject to IRS enforcement actions, while at the same time audits on the wealthiest filers, who are disproportionately likely to be white, have plummeted.

Where there is data on the distribution of tax expenditures by race, gender, and other historically disadvantaged and excluded populations, it suggests that women and people of color are left out of many tax preferences that could derive to their economic benefit. Instead, as discussed in an accompanying report, "A Tax Code for the Rest of Us," wealthy and white households who least need these benefits have received an unfair share.[a] And to the extent that these regressive tax breaks and rate cuts that make the distribution of income and wealth more unequal also hinder revenue collection, the public investments needed for broadly shared priorities are undermined. As a result, low- and moderate-income families who use public benefits programs to meet a basic standard of living are harmed. Because women supporting families on their own, people of color, people with disabilities, LGBTQ people, and immigrants are disproportionately represented among households struggling to make ends meet, they are more likely to be hurt by spending cuts justified by lack of adequate revenue and to be left further behind when tax cuts for the wealthy increase inequality. They are also hurt by the absence of substantial public investments in areas like child care and paid leave akin to those made by many other developed countries.

[a] *A Tax Code for the Rest of Us: A Framework & Recommendations for Advancing Gender & Racial Equity Through Tax Credits* describes how low-income families, women, and people of color are underserved by both direct spending programs and existing tax subsidies and argues that the tax code can and should do more to advance equity, economic mobility, and opportunity for all.

In this way, women, people of color, and other underrepresented groups are doubly disadvantaged by the tax code, and both the tax code and the public investments it supports do less than they could to reduce income and wealth inequality.

This report represents an effort to demonstrate that the tax code is not race- or gender-neutral. It explores a number of tax policies that evince biases or stereotypes, in the categories of women's incomes, women's expenses, women's futures, and women's taxpaying. Where evidence is available, the report highlights the extent to which those policies disadvantage women and people of color. (It does not, however, offer a comprehensive review of the elements of the tax code that have racial and gender biases or impacts.) The report then makes recommendations to help policymakers address the faulty foundations of the tax code. Rather than proposing specific tax code revisions, however, we focus on the tax law-making process. As a first step, we propose making better data and policy tools available to policymakers, to further the creation of more equitable tax policy. The report concludes by discussing ways to determine the extent to which tax administration and enforcement likewise reflects bias and how inequitable tax administration could be corrected.

While the report highlights inequities, biases, and inequitable impacts by gender, race, and other characteristics, it expresses a preference for policy solutions that prioritize the needs of low- and moderate-income people and families, amongst whom women (especially women supporting families on their own) and people of color are overrepresented. While there are certainly women and people of color in higher income brackets who face income and wealth disparities, it is our view that, in a world of limited resources, the highest priority should be given to policy solutions for those who are most in need. Indeed, tax preferences benefitting privileged populations over historically disadvantaged populations not only exacerbate existing inequality, but also reduce tax revenue. Less tax revenue, in turn, means fewer resources available to fund our shared priorities. Instead, this report argues that policymakers must rewrite the tax code as a whole to be more equitable and inclusive and to support an economy that works for all of us.

WOMEN'S INCOME

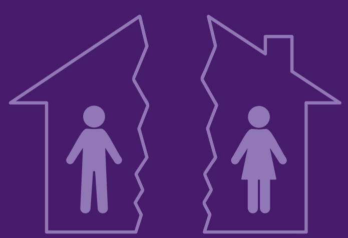
This section describes features of the tax code that reward specific types of families, thereby picking winners and excluding disfavored household structures. It also describes provisions that create incentives for married women to abandon market work and instead stay home to provide informal labor. This tax architecture, much of which Congress enacted over 70 years ago, was designed to serve a nation whose families looked very different than they do today. By describing gendered incentives and tradeoffs embedded in the tax code, this section seeks to raise awareness and to better inform policymakers and advocates working to craft tax policies that reflect and support today's families.

Before describing the inequitable taxation of women's income, it is important to acknowledge the exceptional role of the Earned Income Tax Credit (EITC) and Additional Child Tax Credit (ACTC, the refundable portion of the Child Tax Credit) in supporting low-income women and families. By providing tax refunds to working households, these tax credits lift the incomes of millions of people above the poverty line each year.[2] The credits are particularly important to women, and women of color especially, who are overrepresented in the low-wage workforce and who experience pay and other forms of discrimination, disproportionate responsibility for caregiving, a greater likelihood of working part time, and other factors that exacerbate economic insecurity throughout their lives. In contrast to the tax policies described below, the EITC has boosted labor force participation among single mothers.[3] Although conditioning tax transfers on formal labor force participation creates issues of its own[4] – and although the EITC remains woefully inadequate to support childless workers[5] – these credits have hugely benefitted recipient households, improving income security, infant and maternal health, and educational and economic outcomes into the second generation.[6] Moreover, although they benefit a larger number of white households compared to other racial or ethnic groups, they benefit a larger proportion of Black, Latinx, and Native American women.[7] As a result, the EITC and ACTC advance gender and racial equity, in contrast to the other tax provisions described below. Boosting these provisions of the tax code in targeted ways would be a further opportunity to make them stronger in that regard.

JOINT FILING AND THE MARRIAGE BONUS

Congress adopted the income-splitting joint return in 1948 as a legislative fix to Supreme Court precedent that caused unequal treatment of married couples in community-property versus non-community-property states.[8] By choosing a joint-filing regime that splits income between the two spouses, Congress created a marriage bonus for primary-earner married couples in most income brackets. The decision reflects the special social and political status of the sole-breadwinner, married-couple family in the United States. Now, 70 years on, the tax code continues to reward an increasingly outdated household structure.[b]

Indeed, according to 2017 data, today nearly 70 percent of mothers work in the formal labor market, compared to only 56 percent in 1976.[9] Further, the United States is an outlier with regard to joint filing, being one of only a handful of high-income nations that continues to use joint tax return filing.[10] The result of this policy decision is that those who do not hew to the preferred structure – for example, dual-earner or unmarried families – are excluded from such rewards.



THE MAJORITY OF STATES ARE "COMMON LAW" MARITAL PROPERTY STATES. THIS MEANS THAT PROPERTY ACQUIRED DURING A MARRIAGE IS OWNED BY THE PERSON IN THE MARRIAGE WHO ACQUIRED IT (ALTHOUGH PROPERTY WILL, GENERALLY, BE EQUITABLY DISTRIBUTED AT DIVORCE).

In "community property" states (like Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Wisconsin), marital property belongs equally to both spouses. In *Poe v. Seaborn*, the Supreme Court in 1930 held that married couples in community property states could split household income for tax purposes, reducing their total tax due, while those in common law states could not. Many states responded by adopting community property regimes, which prompted Congress to enact federal joint tax return filing with income splitting. However, as law professor Carolyn Jones notes, many common-law marital property states declined to adopt community property laws prior to the federal government's decision to institute joint filing, suggesting that state legislators were disinclined to give women the more robust rights of property ownership and control that generally apply in community property regimes. Perhaps more telling, some of those states that had adopted community property regimes abandoned them shortly after the enactment of joint filing.

Legal scholars have pointed to other gender dynamics at play in the history and continued existence of joint filing. For example, Marjorie Kornhauser argues that the importance of the "traditional" family in American culture has been a driving factor in the maintenance of joint filing in the United States, even as some countries have moved from joint to (at least partial) individual filing.

[b] Married couples can also choose to file as married filing separately. Generally, however, separate filing results in a higher tax burden for the couple, because of the lack of marriage bonus as well as denial of various deductions. See IRS, Publication 504 at 5 (2019), https://www.irs.gov/pub/irs-pdf/p504.pdf

TABLE 1: Marriage Bonus for a Primary Breadwinner Couple, 2019 Rates

	PERSON 1	PERSON 2	TOTAL
Gross Income	$60,000	$15,000	$75,000
Taxable Income	$47,800	$2,800	$50,600
Unmarried/Single, Income Tax	$6,375	$280	$6,655
Married Filing Jointly, Income Tax			$5,684
		MARRIAGE BONUS	**$971**

Joint filing for married couples means that spouses' incomes are combined when calculating the tax owed. If a couple faces a lower tax rate when married compared to if they were unmarried, they receive a marriage bonus. Single-earner or unequal-earner couples, in which one spouse makes significantly more than the other, receive a marriage bonus under the tax code. The bonus occurs because the married-filing-jointly tax brackets are much wider than the single tax brackets, which causes much of the couple's income to fall into lower-taxed brackets, despite the fact that is it largely earned by one spouse. The result is a reduced tax amount compared to their combined tax amount if they both filed as single. Table 1 illustrates how the marriage bonus works, using a hypothetical unequal-earner couple.

The demographics of modern marriage highlight the biased assumptions underlying the marriage bonus. Generally speaking, people are less likely to get married and marry at a later age now than in the past.[11] Thus, the marriage bonus benefits fewer households now compared to the past. Those who do benefit are more likely to be white, heterosexual households with a male breadwinner.[12] Dual-earner couples, as well as unmarried individuals and those in civil unions or domestic partnerships, will be excluded from the marriage bonus. Many women in same-sex married couples are especially disadvantaged, as they are more likely to be dual-earner couples with equal incomes.[13] Further, compared to people of other racial or ethnic groups, Black women and men are less likely to marry, those who do marry are more likely to divorce, and those who divorce are less likely to remarry.[14] Additionally, because Black women have always participated in the paid labor force at a higher rate than white women, a sole-earner benefit has likely always been less available to Black families.[15] Women without a college degree are also more likely to cohabitate rather than marry and are more likely to divorce among those who do marry.[16] These groups will all derive less benefit from the marriage bonus. The marriage bonus thus rewards family structures attributable to a narrow subgroup of the population and may compound existing race- and education-related disparities.

Marriage penalties are also possible. A marriage penalty is the reverse of a marriage bonus – a higher tax rate imposed on the married couple compared to a similarly situated unmarried couple. Although marriage penalties have existed at various income levels depending on the bracket structure in place at the time, under current law most families outside of the highest income bracket do not face a marriage penalty.[17] The notable exception to this is low-income married couples. These families face a marriage penalty because combining two incomes is more likely to push the couple into the phase-out range of the EITC.[18] Women in same-sex couples are once again more likely to be affected compared to other demographic groups, because they are more likely to fall in the phase-out range when their incomes are combined.[19] Of course, while this structure penalizes certain married EITC claimants (compared to either less costly structures that deliver less EITC help to such couples, or much more expensive structures that deliver more EITC benefits to dual earner married couples higher up in the current EITC range), these households are still likely better off on balance because they receive EITC benefits.

This system of rewards and penalties is complex and involves many tradeoffs. **See, for example, Box 1, which explains the classic "Marriage Tax Trilemma."** For instance, eliminating marriage bonuses would deliver more resources to upper-income families than to low- and moderate-income families. Given limited resources and political constraints on taxing and spending, these foregone resources could come at the cost of doing more for lower-income women, either on the tax or spending side. **See Box 2 on the "Iron Triangle" for a depiction of this classic policy dilemma.** Thus, marriage incentives, while important, may be tangential to the broader distributional goal of supporting low-income women and families. As such, this report does not advocate a specific policy change with regard to marriage incentives. In describing them, the report seeks to promote better understanding of such incentives and their historical origins among advocates and policymakers, to inform more mindful budgeting and fiscal advocacy.

BOX 1: THE MARRIAGE TAX TRILEMMA

A tax system cannot simultaneously achieve all three of the following goals:

1. Neither encourage nor penalize marriage (marriage neutrality);
2. Tax all similarly situated married couples equally (couples neutrality); and
3. Impose progressive tax rates that increase as income increases.

A system can only achieve two of the three at any one time. Along with progressive rates, Congress has chosen to prioritize equal taxation of similarly situated married couples. Most other wealthy nations have instead chosen to avoid marriage penalties and bonuses, eschewing equal taxation of similarly situated married couples.

JOINT FILING AND LABOR MARKET INCENTIVES

In addition to promoting a biased model of the ideal American family, joint filing imposes a higher tax cost on secondary earners, creating incentives for them to stay home to care for children. When joint filing was enacted in the late 1940s, such incentives would have been less controversial than they are today due to social norms at the time.

A tax code that encouraged women to stay home would create more space in the labor market for soldiers who were recently back from the World War II battlefront and eager to begin careers.

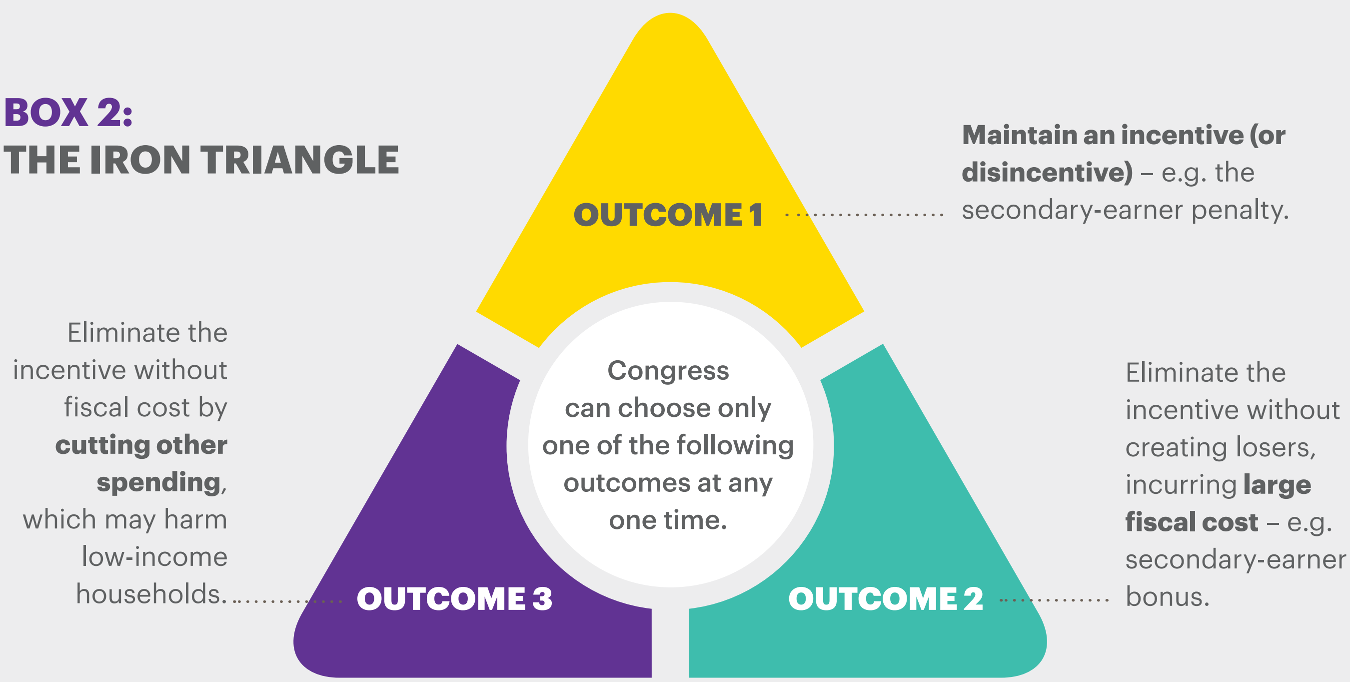
Even at the time, this view of the tax code ignored the fact that Black women were very often both working and caring for families. Today, these incentives affect a broader swath of women and families that already face difficult tradeoffs when deciding between formal work and caring for small children. This discussion does not mean to signal a preference for formal labor, acknowledging that such a possible preference is a fraught topic in feminist discourse, and that both informal and formal labor should be valued and supported. Rather, this report hopes to highlight how the tax code complicates these decisions in both directions.

In particular, joint filing creates incentives for the secondary earner – who is more likely to be the wife in a straight couple – to leave her job and stay home to care for small children.[20] This is because the first dollar of the secondary earner's income is taxed at the top marginal rate applied to the primary earner's income. Consider the couple in Table 1, a married couple in which one spouse makes $60,000 and the other makes $15,000. Were they unmarried, her first $12,000 of earnings would be income-tax free, with only a small portion subject to a top rate of 10 percent. However, because the taxpayers are married and file jointly, the first dollar of the spouse's income will be taxed at the other spouse's top marginal rate, which is 12 percent. Each dollar is thus worth less after taxes, compared to its value if the taxpayer were unmarried. Because women in opposite-sex couples often are paid less than their male spouses,[21] wives are more likely to face this higher tax rate on their earnings. Given child care costs and social pressure for women to care for their children, couples will need to consider whether the secondary earner's more expensive market income is worthwhile. Empirical research suggests that, for some, it is not, causing them to stay out of the formal labor market.[22]

For couples at the bottom of the income distribution, the phase-out of the EITC imposes an even higher marginal tax rate on secondary earners. To the extent that secondary-earner EITC recipients choose to stay home to care for children, they may do so in part because a larger EITC is more worthwhile than their additional labor earnings. Importantly, and distinct from the secondary-earner penalties faced by other households, these secondary earners receive the benefit of the larger EITC alongside their in-home labor. Further, despite these incentives, the EITC continues to have an overall positive effect on labor force participation among recipients.[23]

Admittedly, joint filing involves complex tradeoffs that cut in multiple directions; simple policy reforms are not forthcoming. While marriage bonuses benefit sole-breadwinner couples, abandoning them in favor of individual filing would, all else equal, provide the largest benefits to higher-income, dual-earner couples and reduce revenue available for progressive spending. Subsidizing secondary earners would also provide greater benefit to relatively higher-income households. Moreover, the cost of doing so could mean reducing the resources available to support lower-income women and families, which is contrary to the policy priorities of this report. **See Box 2 on the Iron Triangle.** Given such tradeoffs, this report does not endorse a specific policy reform with regard to joint filing. Rather, to lay a foundation for better-informed policies, it is a reminder of how gender biases played a role in where we are today, and advocates an improved policymaking process going forward. As explained in Section VI, this process should be more mindful of tax laws' effects on women, particularly low-income women and those from historically disadvantaged groups.

BOX 2: THE IRON TRIANGLE



NONRECOGNITION OF INFORMAL LABOR

The tax code recognizes and taxes market labor while ignoring work in the home and informal caregiving, the majority of which is done by women.[24] This nontaxation of in-home labor creates incentives for one spouse to stay home to provide tax-free labor, exacerbating the incentives created by the joint filing of spousal income.[25] Once again, the stay-at-home spouse is more likely to be a woman, for socio-cultural and economic reasons. For more detail on the general significance of this nontaxation, **see Box 3 on "Imputed Income."**

BOX 3: IMPUTED INCOME

Imputed income is the untaxed personal consumption value that a taxpayer receives from self-provided labor or self-owned property.

For example, imagine two families that each make $50,000 per year after taxes. Both spouses in Family A work full time, so they pay $10,000 for child care. Family A has $40,000 to consume after taxes and child care costs.

In Family B, one spouse stays home and cares for the children, providing labor worth $10,000. Family B has $50,000 to consume after taxes, making them better off than Family A by $10,000. Family B therefore has $10,000 of untaxed imputed labor income.

The nontaxation of in-home labor is a complex issue that cuts in various ways. At the very least, however, it is clear that distributional issues are at stake. Specifically, nontaxation of stay-at-home spouses is a tax benefit more likely to accrue to wealthier households, as these couples are better able to forego a second income. Note that this is an added tax benefit to traditional breadwinner couples, on top of the marriage bonus conferred by joint tax return filing. Long-standing and continuing differences in labor market participation by race means that racial disparities occur as well. Specifically, Black women have always worked in the formal labor market at higher rates than white women.[26] This is true regardless of age, marital status, or presence of children.[27] Because Black women are less likely to be stay-at-home mothers, they are less likely to receive this benefit.[28]

Perhaps counterintuitively, nonrecognition of informal labor may also harm the stay-at-home spouse or caregiver. While couples benefit financially from tax-free labor, the stay-at-home spouse risks financial insecurity by not participating in the paid workforce.[29] In the aggregate, research shows that women's informal labor contributes significantly to the gender wage gap, reducing women's average earnings over time compared to men.[30] The fact that stay-at-home spouses likely have less education than formally employed spouses may exacerbate their personal financial insecurity.[31] Other harms are more tangible and more immediate, especially for low-income single women. For one, nonrecognition of informal labor results in the denial of Social Security retirement and disability credits. Additionally, the nonrecognition of such labor may bar them from EITC benefits.[c] Notably, informal caregiving is more common among communities of color,[32] although Latinx and Asian caregivers are more likely to have worked while caregiving compared to white and Black caregivers.[33]

[c] If informal caregivers do not earn any income, they cannot claim the EITC. In 2015, four out of ten informal caregivers did not work in the formal labor market at some point during the year. See Nat'l Alliance for Caregiving, *Caregiving in the United States* 55-56 (2015), https://www.aarp.org/content/dam/aarp/ppi/2015/caregiving-in-the-united-states-2015-report-revised.pdf However, for low-income married couples who fall in the pha se-out range of the EITC, the nonrecognition of such informal work will make them better able to claim the EITC. The same is true for low-income informal caregivers who work part time in the formal labor market.

Additionally, women tend to provide informal caregiving for family members with disabilities.[34] Persons with disabilities, in turn, are paid less and are more likely to live in poverty compared to those without a disability,[35] due in part to employment discrimination.[36] Further, if and when caregivers return to work, they often continue to face reduced wages.[37] Of course, they may then qualify for the EITC, which will ameliorate some of these harms. Absent the EITC, however, and alongside the denial of tax and Social Security benefits, these financial hardships squeeze such households from all sides, harming informal caregivers and their families.

As this discussion demonstrates, the nontaxation of informal labor involves complicated tradeoffs. Certainly, this report does not advocate taxation of imputed in-home labor, a policy that would raise serious administrative and fairness concerns. Indeed, an obvious policy solution does not exist. Reevaluating the biases and assumptions underlying our tax code's foundational architecture is a necessary first step toward inclusive tax reform.

DISPARATE TREATMENT OF WORK-RELATED LOSS COMPENSATION

The tax code provides an income exclusion for certain legal awards but taxes others, leading to potentially disparate outcomes. Specifically, workers' compensation and damages received as compensation for physical injuries are excluded from taxation.[38] Meanwhile, damages received for workplace discrimination are included as taxable income. This distinction between physical injury and discrimination awards codifies the notion that a physical harm causes a tangible, measurable loss, while discrimination, whether based on gender, race, or disability status, does not.[39]

While perhaps facially neutral, this distinct tax treatment may result in disparate outcomes by gender based on who is more likely to file each type of claim. Notably, men are significantly more likely to file worker's compensation[d] claims as well as work-related claims for physical injuries.[40] This suggests that men are more likely to receive tax-exempt injury awards related to work. Meanwhile, data suggest that women, people of color, and individuals with disabilities are more likely to file awards for workplace discrimination. For example, among all claims filed with the Equal Employment Opportunity Commission in the past two decades, over two-thirds involve charges based on race or sex discrimination.[41] The proportion rises to 90 percent if charges based on disability status are included.[42] Awards received for such claims are fully taxable.

Thus, among those seeking redress for workplace losses, women, especially women from historically disadvantaged groups, are more likely to be taxed on such awards.[e]

[d] It is notable that § 104 refers to worker's compensation as "*workmen's*" compensation.

[e] These problems may be compounded by the recently added provision in the Tax Cuts and Jobs Act of 2017, which denies employers a deduction for sexual harassment settlements covered by nondisclosure agreements. IRC § 162(q). The provision also disallows employers' deduction of attorney's fees for such settlements. Although perhaps well-meaning, the provision is overbroad and poorly drafted. For example, it was initially unclear whether plaintiffs could still deduct attorney's fees in such cases. (They can. *See* Internal Revenue Service, Section 162(q) FAQ (June 28, 2019), https://www.irs.gov/newsroom/section-162q-faq.) It is also unclear how the provision applies where multiple claims are involved, some of which do not implicate sexual harassment. Such vagueness could ultimately harm victims of sexual harassment, for example, by discouraging or reducing settlements altogether.

WOMEN'S EXPENSES

Household budgets must account for both income and spending. In addition to enshrining preferences that disadvantage women's income, some provisions of the tax code also offer less preferential treatment for spending borne disproportionately by women. For example, the tax code provides less support for child care and other expenses essential to women's, children's, and families' well-being relative to other expenses.

Meanwhile, business tax deductions have historically been generous and deferential to (more often male) business-owners' judgment, offering preferential treatment to expenses with questionable economic and social value – such as luxury office furnishings and golf club memberships.[f] Worse, when women do start their own businesses, they are likely to be excluded from business tax benefits that target male-dominated industries. And the assumptions underlying the medical expense deduction are deeply problematic in terms of gender. Moreover, because women working full-time full-year, on average, make less than their male counterparts, these higher expenses impose an even greater proportionate burden on women than men. Taken together, this lack of support reflects biased assumptions about how our economy is and ought to be organized.

BUSINESS PROVISIONS AND UNEQUAL BENEFITS

Code § 162 allows business owners to deduct business expenses, many of which overlap significantly with personal consumption. Although allowing business deductions is sensible policy, where the expense provides personal consumption – as with certain meals, travel, luxury office furnishings, and so forth – the taxpayer reaps personal enjoyment tax-free.[43] As a result, such a taxpayer may be comparatively undertaxed. Despite this, courts tend to defer to business-owners' judgment in determining whether something is a qualified business expense, even where personal consumption is patently obvious.[44] For example, courts have allowed business deductions for golf club memberships and extravagant second offices located near vacation homes[45] – although the Tax Cuts and Jobs Act curbed the deductibility of club dues and other entertainment expenses.[46] Notably, men are significantly more likely than women to own their own businesses.[47] To the extent that men have greater control over such

[f] However, the Tax Cuts and Jobs Act made golf club dues and certain other entertainment expenses nondeductible. IRC § 274(a)(3).

hybrid expenses via their role as business owners, they are better able to enjoy such tax-free personal consumption. Moreover, high-income men – and, to some extent, their families – will reap even greater rewards due to the upside-down nature of deductions. Thus, low-income women in particular will be excluded from such special treatment.[g]

Additionally, various tax provisions – some old and some enacted in 2017 – allow immediate expensing of certain capital investments such as machinery.[48] Instead of deducting the cost of a capital purchase over time via depreciation, these provisions allow the taxpayer to deduct the full cost as soon as the item is placed into service. Unsurprisingly, expensing of capital assets rewards capital-intensive businesses and provides significantly less benefit to service firms. The majority of women-owned businesses are service firms, like consulting firms, doctor's offices, or hair salons.[49] Service-based companies rely on human labor and invest less in capital assets, which means they will derive less benefit from capital-expensing provisions.[50]

Meanwhile, men are more likely to own capital-intensive businesses, such as construction or manufacturing companies. Such statistics suggest that capital expensing may provide disproportionate support to male-owned enterprises and relatively less support to women-owned firms. Moreover, tax breaks like these undermine the ability of the tax code to raise adequate revenue to support low- and moderate-income families, among whom women and people of color are overrepresented.

BOX 4:
QUESTIONABLE BUSINESS DEDUCTIONS

Businesses can and have deducted (or expensed) the following items:

- Private jets;
- High-end hotel accommodations;
- Luxury office furnishings and decorations, including artwork;
- Legal costs for defending against criminal activity, including bribery and fraud; and
- Personal security costs, including personal bodyguards.

FLAWED AND INSUFFICIENT CHILD CARE SUPPORT

While business deductions are more likely to benefit male-dominated activities, child care expenses are never deductible as a business expense – despite the fact that they are often necessary to enable mothers to work.[51] In the 1930s, when the Board of Tax Appeals denied the deduction of child care as a business expense, working mothers were "a new phenomenon."[52] This assessment was inaccurate at the time, given the experience of women of color, but is even more so today. Nonetheless, this 80-year-old case law based on antiquated reasoning still governs. Moreover, child care costs are a significant and necessary part of working families' budgets, ranging from nearly $3,000 to over $20,000 per year per child in 2018, depending on the age of the child, the type of care, and where the family lives.[53]

Yet, the tax code has failed to keep step with these child care needs, continuing to underinvest in working parents, as it has for nearly a century. Alongside the EITC and ACTC, which provide tax refunds to low-income families with children but do not directly target child care expenses, there are two tax code provisions intended to address families' child care costs. As explained below, these provisions are inadequate and skewed toward wealthier

[g] Note, this is particularly true for low-wage workers classified as employees. Employees have always been limited in their ability to deduct work-related expenses, and under the new tax law are entirely precluded from doing so until 2026. See IRC § 67(g) (suspending miscellaneous itemized deductions).

households.[54] This insufficient support for child care in the tax code contradicts the alleged policy of supporting work-related expenses and further squeezes women's and families' finances. It also exacerbates existing pressure for married women to leave work to care for children, as described in Section I.

Low-income households receive less support from child care tax provisions relative to wealthier households. The first provision is the child and dependent care tax credit (CDCTC), Code § 21. The CDCTC is a tax credit theoretically worth up to $1,050 for one child or dependent ($2,100 for two or more children or dependents). Qualifying care expenses that can be claimed for the credit are limited (to $3,000 for one child or dependent and $6,000 for two or more), and the CDCTC amount represents only a percentage of those expenses.[h] Because the credit is not refundable, most low-income families receive little or no benefit from it.[55] Even when families do benefit from the CDCTC, they do not receive those benefits until the taxpayer files her return, which is many months after she incurs the expenses. This assistance is thus ill-suited to help families with low and moderate incomes, among whom women supporting families of their own and people of color are overrepresented, afford work-enabling expenses as they arise. Rather than supporting households who are more likely to live paycheck to paycheck, the CDCTC rewards families who are already able to pay these expenses out of pocket.

LEGISLATIVE DEBATES AROUND PROPOSALS TO PROVIDE A FEDERAL INCOME TAX DEDUCTION FOR CHILD CARE COSTS IN THE MID-1950S (THE PREDECESSOR TO THE CHILD AND DEPENDENT CARE TAX CREDIT) EVINCED CONCERNS THAT MIDDLE- AND UPPER-MIDDLE CLASS MARRIED MOTHERS WOULD ENTER THE WORKFORCE, LEAVING SOMEONE ELSE TO CARE FOR THEIR CHILDREN.

In comparison, lawmakers endorsed this tax assistance for lower-income and working-class women (and, necessarily, women of color) to encourage them to enter the workforce as an alternative to "welfare dependency or idleness." As legal scholar Mary Louise Fellows has written, "[P]olicymakers believed that [a] tax deduction [for child care expenses] would promote the welfare of [children from poor and working-class backgrounds] and reduce delinquency by allowing their mothers to obtain adequate child supervision. . . . For [a working-class woman] not to enter the work force was an act of laziness. The assumption underlying this view of the working class woman, of course, was that she was not a good mother. That itself produced its own incongruity because some of these working class mothers found employment caring for the children of upper and middle class families. This apparent contradiction was easily explained away by the fact that the child care services were being provided under the supervision of a good mother. In the end, we are left with the ironic conclusion that one of the major pieces of federal legislation recognizing the child care issues faced by all mothers in the waged work force was enacted in a manner that sustained the celebration of middle class domesticity and reinforced the inferiority of working class mothers." Mary Louise Fellows, *Seeking Tax Justice for Child Care Workers*, The Community Tax Law Report (Oct. 1997) (on file with authors).

[h] The average benefit from the CDCTC was an estimated $555 for tax year 2017. U.S. Dep't of Treasury, Off. Of Tax Analysis, *Child Care Tax Benefits in 2016* at Tbl.5, https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-112.pdf The average benefit amounts for the lowest income families is significantly lower, at $61. *Id.* Note, further, that this is just amongst families who received some benefit.

The tax code's second child care provision is the exclusion of up to $5,000 of employer-provided child care assistance from taxable income, under § 129. The most common form of this benefit allows employees to use pre-tax dollars to pay child or dependent care expenses through a Dependent Care Flexible Spending Account (FSA). Unlike the CDCTC, this tax benefit allows for real-time reimbursement of child or dependent care expenses. However, because it applies to employer-provided assistance, the provision is far more likely to be available to higher-income taxpayers.[56] For example, according to data from the Bureau of Labor Statistics, only 4 percent of workers in the bottom quartile of average wages have access to employer-provided child care, compared to 20 percent among those in the top quartile.[57]

Additionally, low- and moderate-income families are less likely to be able to spare the income to contribute to a dependent care FSA (especially because *they will lose* any contributions not used to reimburse child or dependent care expenses during the year). Moreover, the form of the tax benefit – exclusion from taxable income – may not offer a meaningful incentive to lower-income families. It is therefore unsurprising that the Treasury Office of Tax Analysis found in 2016 that families with gross income below $75,000 received only 10 percent of total tax benefits distributed via child and dependent care FSAs.[58] Given the underrepresentation of women of color in higher-income quintiles,[59] racial disparities are inevitable here as well. Thus, white families and wealthier families with less need are more likely to receive these real-time tax benefits. These wealthier families also derive greater economic benefit from them, both because they can save more income and because they exclude such income at a higher marginal tax rate.

Nontax benefits also fail to adequately serve the low- and moderate-income families in need of assistance meeting child care expenses. For example, the Child Care and Development Block Grant, which offsets expenses incurred throughout the year, only serves 15 percent of eligible children.[60] (A companion report, "A Tax Code for the Rest of Us," discusses both tax and direct spending supports for child care in more detail.)

Taken together, the tax provisions targeting child care expenses are insufficient and poorly designed to assist low- and moderate-income families. Further, the lack of adequate support makes women's participation in the labor force yet more expensive, exacerbating gender workplace disparities alongside the other provisions described above.

PROBLEMATIC ASSUMPTIONS UNDERLYING MEDICAL EXPENSE DEDUCTIONS

Deductible medical expenses for pregnancy, fertility, and gender-affirmation procedures are based on unexamined assumptions of traditional gender characteristics and roles. For example, the Tax Court in *Magdalin v. Commissioner* held that same-sex male couples cannot deduct assisted reproductive technology (ART) expenses because they are not deemed "medically necessary."[61] One implication of this holding is that only a woman can find ART medically necessary, and then only if she has had difficulty becoming pregnant.

This interpretation of the statute reinforces women's presumed role as mothers and bearers of children. It also results in the denial of the deduction to same-sex or transgender couples, whether gay or lesbian, because ART will not be found medically necessary in such cases. It is also worth noting that the medical expense deduction is only available to those who itemize their deductions, which tends to restrict such benefits to higher-income households.[62]

WOMEN'S FUTURES

While women's income and expenses reflect the daily struggles of household budgeting, saving is essential to economic mobility. Lower pay, discrimination and harassment, concentration in low-wage jobs, and other historical and systemic factors have contributed to a world in which women have less economic power than men and thus less ability to save.

Rather than seeking to rectify past inequities, certain provisions of the tax code reward and perpetuate them by providing preferential tax treatment to activities historically and currently pursued predominantly by men. These preferences not only exacerbate inequality, but they once again undermine revenue collection, reducing the resources available to support women and families struggling against financial insecurity and thus limiting the tax code's potential to advance equity through investment in shared priorities.

UNEQUAL BENEFITS OF SAVINGS INCENTIVES

Various tax provisions offer tax breaks for savings in the form of preferential tax treatment for investments. These include the preferential rate for capital gains, tax-preferred savings accounts, the realization requirement, stepped-up property basis at death, and a diverse host of incentives for certain investment sectors, such as real estate.[63] Most of these provisions in some way reduce the tax on income from investments, for example, by applying a lower rate or allowing deferral of tax. While facially neutral, tax breaks for savings offer disparate benefits by gender, race, and other characteristics because of disparities in income and wealth.[64]

Men hold more wealth, are paid more, and are better positioned to save and invest compared to women.[65] Thus, the majority of tax-based savings incentives will accrue to men. Men are also more likely to run and work for hedge funds and tech companies,[66] both of which pay founders and employees significant compensation via preferentially taxed stock growth.[67] Such investment tax breaks once again favor men, for all the reasons explained above. Women in same-sex partnerships will typically face a double penalty compared to straight married couples. Because both members of the household, on average, suffer from the gender pay gap, they will have less ability to save and accrue wealth over time.[68]

Growing research on the racial wealth gap highlights how historical barriers to earning and saving have led to vastly unequal wealth distribution,[69] which will result in unequal distribution of tax benefits that preference income from wealth. For example, 2015 research from the Asset Funders Network found that median wealth for single Latinx women is $100, and single Black women is $200,[i] compared to $15,640 for single white women, and $28,900 for single white men.[70] Data from the Insight Center for Community and Economic Development showed that in 2007 nearly half of all single Black and Latinx women had zero or negative wealth.[71] Given these persistent wealth inequities, tax benefits that target existing wealth will provide very little support to low-income women of color and less support to women generally compared to men.

Congress enacted the tax code's saving and investment tax breaks over the past century against a backdrop of serious gender, racial, and other biases that undermine equitable distribution of wealth. Presenting tax savings incentives as neutral ignores historic and current barriers to saving, and treats investing as an equally available choice rather than a reflection of deeply rooted inequities multiplied over time.

UNEQUAL HOMEOWNERSHIP BENEFITS

The tax code supports homeownership via the mortgage interest deduction and exclusion of capital gains upon sale of a primary residence.[72] Enacted over 60 years ago, these tax subsidies reflect an increasingly unobtainable vision of the American Dream, which is not only stratified by income, but by gender, race, LGBTQ status, and disability. Even more than other forms of wealth, the distribution of homeownership reflects the legacy of racist housing barriers such as redlining, along with discriminatory lending practices that continue to this day.[73]

Women, and particularly low-income women of color, face barriers to homeownership that curtail the benefits they derive from these tax subsidies.[74] Generally speaking, tax deductions provide greater benefit to wealthier taxpayers, because they are worth more to taxpayers with higher marginal tax rates. This is true of homeowner tax subsidies. The mortgage interest deduction is also only available to those who itemize their deductions, which tend to be higher-income households.[75] Further, those who are able to save more wealth via homeownership – either because they are better able to buy a home or because they buy more expensive homes – will benefit more from such tax provisions. Notably, research shows that men's homes tend to be worth 17 percent more and appreciate more in value compared to women's homes.[76] This downstream consequence of the gender pay gap[77] means that single male homeowners, on average, derive greater homeowner tax subsidies than single women homeowners. Women in same-sex partnerships typically face double disadvantage because both partners, on average, suffer from the gender pay gap.[78] That is, both members of the household likely are paid less and therefore save less, causing them to purchase a less-expensive home and therefore receive less benefit from the mortgage interest deduction and capital gain exclusion.

Women of color, particularly low-income women of color, face special barriers to homeownership that further limit their homeownership tax subsidies.

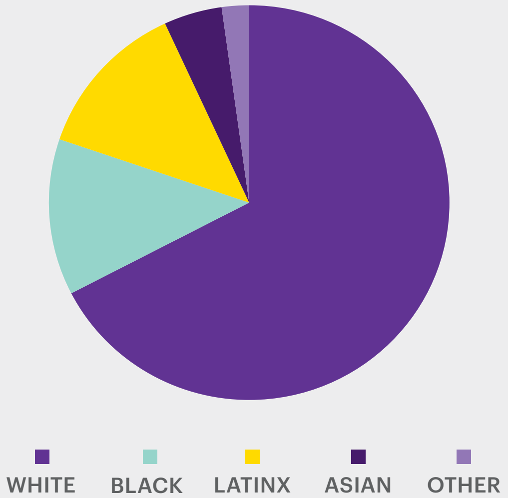
Research from the Insight Center finds that only 33 percent of single Black women and 28 percent of single Latinx women own homes, compared to 57 percent of single white women.[79] The homes of Black and Latinx women also gain value more slowly, compared to those of white

[i] Although this report focuses on women's economic outlook, the wealth gap for Black and Latinx men is also dire. The same data reported median wealth of $300 for single Black men and $950 for single Latinx men. Mariko Chang, *Women and Wealth: Insights for Grantmakers* 6 (2015), https://assetfunders.org/wp-content/uploads/Women_Wealth_-Insights_Grantmakers_brief_15.pdf.

homeowners.[80] The result is less homeownership tax support in the aggregate flowing to women of color. According to one estimate, which is not broken down by gender, white families comprise 67 percent of households but accrue 78 percent of the mortgage interest deduction, while Black and Latinx families comprise about 26 percent of all households, but receive only 13 percent of mortgage interest deduction benefits.[81] Other marginalized groups face similar disadvantage. For example, the homeownership rate among single mothers is less than half of the national average.[82] Single mothers will therefore receive far less tax support for homeownership as a group, compared to the rest of the population.

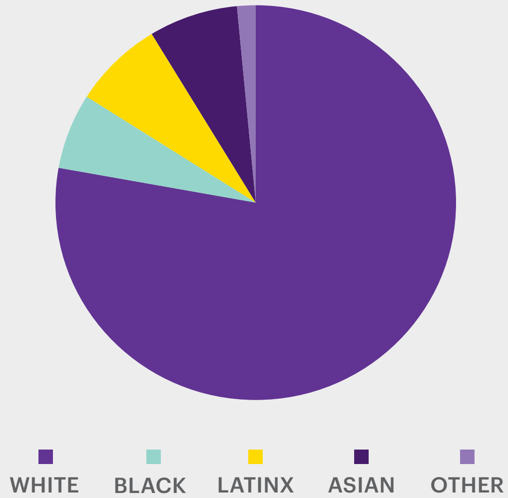
Tax subsidies for homeownership ignore historical barriers to homeownership and reward entrenched wealth disparities faced by women and people of color. A companion report, "A Tax Code for the Rest of Us," also examines tax subsidies for homeownership, along with housing assistance through direct spending programs.

Percentage of Households Receiving Mortgage Interest Deduction
by Race/Ethnicity, 2015



Source: Inst. on Assets & Soc. Pol'y & Nat'l Low Income Housing Coal.., *Misdirected Investments: How the Mortgage Interest Deduction Drives Inequality and the Racial Wealth Gap*, Tbl. 1 (2017).

Distribution of Overall Mortgage Interest Deduction
by Race/Ethnicity, 2015



WOMEN'S TAXPAYING

Low-income women may face greater risk of audit due to their higher likelihood of claiming the EITC, which attracts a disproportionate share of tax auditors' resources. Because the IRS fails to track outcomes by gender, however, any enforcement disparities remain hidden.

BIASED ENFORCEMENT PRIORITIES

The IRS is significantly more likely to audit EITC recipients compared to non-EITC claimants. This is true despite the fact that improper EITC payments comprise only five percent of the tax gap, while over 60 percent of the tax gap[j] is attributable to misreporting by taxpayers in the top income decile.[83] EITC recipients, in turn, are more likely to be women than men.[84] It is thus likely that women face greater risk of audit among low-income taxpayers.[k] Regarding race, according to recent estimates about half of EITC claimants are white and about 40 percent are Black and Latinx.[85]

In 2019, according to analysis by the Center on Budget and Policy Priorities, the EITC boosted the incomes of 9 million women of color, and the refundable CTC boosted the incomes of 7.25 million women of color.[86] Because the IRS does not track enforcement data by race, it is impossible to know whether EITC audits are proportionately distributed between different racial groups.

It is important to consider the effect of amplified EITC scrutiny on the redistributive effect of the credit. The EITC intends to, and does, increase resources of women and people of color struggling at the bottom of the income distribution, engendering many positive downstream effects. The EITC is shown to improve infant and maternal health, boost children's education outcomes and college enrollment, increase work and earnings of the next generation, and increase Social Security retirement benefits by incentivizing work among recipients.[87] However, the complexity of the credit[88] and aggressive EITC auditing patterns mean that these positive redistributive outcomes are not as strong as they could be. In fact, recent research finds that EITC audits reduce the likelihood that a person will continue to claim the EITC in subsequent years, even if she continues to be eligible.[89] The study found that audits reduced the likelihood of claiming the credit among likely EITC-eligible households by 30 to 40 percentage points, an effect that

[j] The tax gap is a measure of unpaid taxes. It is the difference between total taxes owed and taxes paid on time.

[k] It is possible that men who claim the EITC are more likely to be audited compared to women who claim the EITC. Even if that is true, however, it is still possible that low-income women are more likely to be audited compared to low-income men, since they are more likely to claim the credit.

persisted for several years.[90] Because people failed to file returns, they also relinquished other tax benefits as well as refunds of withheld taxes.[91]

Meanwhile, high-income filers and large corporations face steeply declining IRS scrutiny as budget cuts steadily reduce enforcement resources.

Funding of IRS enforcement has dropped 25 percent since 2010, with enforcement personnel down 31 percent.[92] As a result, overall audit rates have dropped 40 percent, with most of the decline applying to large corporations and the highest-income filers.[93] The audit rate of low-income taxpayers has also dropped but much less steeply, causing them to rise as a proportion of total audits from 34 percent in 2010 to 39 percent in 2018.[94] In light of the fact that the highest-income taxpayers are responsible for 61 percent of the tax gap, this allocation of resources is highly questionable. Moreover, as noted in a companion report, "Reckoning With the Hidden Rules of Gender in the Tax Code," corporations and wealthy individuals already benefit from enormous tax preferences that shape their behavior in ways that exacerbate inequality.[I] Reduced IRS scrutiny of taxes that they should by law pay but do not is a further boon to such households. Even worse, prioritizing enforcement against low-income rather than high-income taxpayers raises less revenue, which undermines progressive spending.

Importantly, because the IRS does not track administrative outcomes by gender or race, we simply do not know and cannot identify whether the IRS is treating certain taxpayers differently. For example, we do not know whether women are more likely to be audited overall or what outcomes they face upon audit. Aside from audit, other procedures are implicated as well. For example, we cannot identify whether the IRS is more or less likely to accept an offer in compromise submitted by a woman or a person of color than a white man. Given the expectations raised in this report, the likely distribution of tax benefits, and the disparate outcomes highlighted by existing research, such a lack of data is troubling and should be remedied.

[I] *Reckoning With the Hidden Rules of Gender in the Tax Code: How Low Taxes on Corporations and the Wealthy Impact Women's Economic Opportunity and Security* outlines how the tax code treats capital and investment income more preferentially than income from work, and thus incentivizes corporations to indulge in stock buybacks and dividends to further enrich their shareholders, rather improving workers' pay or making productive investments in the economy (disproportionately hurting women and people of color who comprise the majority of the low-paid labor force).

WHY DOES THIS MATTER?

As the foregoing discussion demonstrates, while the tax code is an important tool to fight inequality, it is plagued with provisions that reflect outdated and, in some cases, biased, assumptions about family structures, marriage, participation in the paid workforce, caregiving, and wealth. As such, it conveys who is valued by policymakers and who is not.[95]

Many argue that the tax code's treatment of taxpayers is neutral (although not by income), because it does not explicitly address demographic characteristics like race and gender. But the tax code's impact is not race- or gender-neutral, and this reality has far-reaching and important consequences for women's economic security, especially low-income women and women of color. Patterns of IRS enforcement that may disproportionately affect such women exacerbate these inequities. Furthermore, as discussed in a companion report, "Reckoning With the Hidden Rules of Gender in the Tax Code," certain tax provisions enable the wealthy and those who already hold the lion's share of political and social power to further consolidate that power and worsen economic, social, and political inequality. In doing so, they reinforce the narrative that financial insecurity can be attributed to bad individual choices or a refusal to "follow the rules,"[96] resulting in stigma for women and people of color who disproportionately struggle to make ends meet in today's economy.

This is not just a theoretical problem: research and analysis has demonstrated that a number of these tax policies impact women and people of color differently.[97] And, as a result of the tax expenditures and preferences awarded to the wealthy and large corporations,[98] the tax code fails to raise sufficient revenues to support programs that expand economic opportunity for low- and moderate-income families,[99] among whom women raising families on their own, people of color, and other historically marginalized communities are overrepresented, as well as the essential public services – roads and transportation systems, public education, health care, and countless more – on which we as a society rely.[100] Importantly, the imperative of providing adequate revenues to fund our collective priorities means that additional tax cuts alone will not make our fiscal system more equitable, more inclusive, and more supportive of low- and moderate-income families. Instead, a wholesale re-envisioning of the tax code is needed, one that reckons with centuries of systemic discrimination and oppression on the basis of gender, race, and other historically marginalized identities.

We believe that the tax code can live up to its promise as a progressive economic system and serve as a tool for equity, providing economic support and access to opportunity for all of us – rather than a wealth-building mechanism for the privileged few. As law professor Anthony Infanti recently put it, "The time has come to break this cycle of using the tax code to produce and reproduce privilege and to right the relationship between our tax laws and the hopes and aspirations that we have for American society."[101]

It is incumbent upon us as advocates for gender justice and racial justice, and all of us who make up our economy and society, to harness the full potential of the tax code to advance equity.

TOWARD A MORE EQUITABLE TAX CODE

Revising the tax code with an intentional focus on racial and gender equity requires being able to assess whether existing tax provisions disadvantage different communities and whether proposed revisions increase equity. To that end, it is critical to have data about the impact of current, proposed, and future tax policies on different communities.

Yet overall, this data is lacking. Growing research has highlighted tax expenditures that are inequitably distributed by race and gender, but more comprehensive and consistent data by race, gender, and other characteristics is needed to inform the development of equitable tax policies. As described below, in some cases agencies could simply report additional demographic information that is already collected (through matching with existing data sets); in others, agencies could conduct additional surveys or solicit voluntary reporting of information.

Although federal agencies already publish tax expenditure budgets, those budgets fail to separately assess the distribution of expenditures among women, people of color, and other groups who have been historically disadvantaged by tax laws. Knowing the extent to which such marginalized groups benefit from current tax policies is key to designing policies intended to remedy distributional inequities. We also need to know the likely future impact of legislative proposals, to ensure that new tax policies decrease, rather than exacerbate, inequality. Policy tools that analyze the demographic distribution of tax expenditures and assess the likely impact of proposed tax legislation would provide policymakers with important insights and would challenge the assumed "neutrality" of tax policies, whether existing or proposed. Moreover, as this section describes, the United States need not forge a new path in this regard – such policy tools are commonly employed all over the world. Lastly, this section concludes by offering specific suggestions for ensuring equitable enforcement by the IRS.[m]

GETTING TAX EXPENDITURE DATA BY GENDER, RACE, AND OTHER DEMOGRAPHIC CHARACTERISTICS

Developing tax policy that is rooted in racial and gender equity requires data about how tax benefits are distributed among different populations and communities. Relevant tax benefit data would cover everything from tax credits to the mortgage interest deduction to different tax-favored savings accounts. The main sources of administrative tax data are the IRS and Department of the Treasury. At present, although tax data are provided in terms of income level and

[m] This section is highly indebted to scholarship by Jeremy Bearer-Friend, Dorothy Brown, and especially Nancy Knauer.

filing status, the IRS and the Department of the Treasury generally do not provide data about tax expenditures by gender,[n] race or ethnicity, or by other characteristics such as sexual orientation, disability, or being an immigrant.[102] It is important to note that collection of such data would have to be done in compliance with existing statutory protections of taxpayer privacy (including that information about individual taxpayers may generally not be shared between agencies).[103] This section argues that they can and should do so.

While individuals and families do not report these identifying characteristics on their tax returns, to produce aggregate anonymized data the IRS may be able to infer certain information or cross-match data with sources of administrative data that do contain information on characteristics such as gender and race. For example, some administrative data gathered, analyzed, and published by the IRS Statistics of Income (SOI) division have already been cross-matched against the Social Security databases for anonymized research releases. As a result, the IRS has been able to conduct some data analysis on the basis of gender.[104] Despite this, and despite releasing dozens of reports per year, SOI reports tax data by gender exceedingly rarely and inconsistently.[105] In addition, although the Social Security Administration does collect data by race and ethnicity, SOI has not reported tax data cross-tabulated by race. In the past 40 years, Treasury's Office of Tax Analysis has written at least one report that used Social Security data in an analysis of tax data that took race and ethnicity into account – although it does not normally do so.[106]

Government tax agencies have also compared tax data with demographic information from the U.S. Census Bureau to enable analysis by race and gender.[107] Moreover, the IRS and the Department of the Treasury do match some de-identified tax data with U.S. Census Bureau data.[108] External researchers have also used the Current Population Survey (CPS) to estimate the receipt of tax benefits by women and people of color by layering their representation in particular income quintiles onto distributional analyses of particular pieces of tax legislation.[109] Thus, diversifying available tax expenditure data seems entirely possible.

As an initial matter, the IRS, Department of the Treasury, and the Census Bureau could – and should – consistently report tax data by gender and race, using Social Security data, Census data, or both.[110] Aside from gender and race, Census data may offer other demographic information. For example, Census demographic surveys collect information related to same-sex couples[111] as well as individuals with disabilities,[112] such that some information about LGBTQ families and people with disabilities could be brought to bear on tax data. Alternatively, scholars have proposed allowing individuals to voluntarily report demographic information on their tax returns for the specific purpose of tracking administrative tax data by different demographic characteristics.[113] Analysis of these data could reveal, for example, whether one gender, or particular racial or ethnic group, receives a disproportionate share of benefits from certain business deductions, the estate tax exemption, or tax preferences for savings in 529 accounts.

In addition, researchers at the IRS or Department of the Treasury could apply other data to help paint a picture of the distribution of tax expenditures by gender, race and ethnicity, and potentially other characteristics as well. For example, the joint Census/Bureau of Labor Statistics CPS Annual Social and Economic Supplement asks respondents about receipt of refundable tax credits, providing tax data that can be disaggregated by gender and race.[114] The Federal Reserve's quadrennial Survey of Consumer Finances asks questions about assets including small business and home ownership that are relevant to the receipt of tax subsidies like the mortgage interest deduction, which may be cross-tabbed by gender and race.[115] The IRS and Department of the Treasury could combine this and other data with IRS data in their analysis and reports on tax expenditures.

While the process would likely be complicated and would clearly require special care to continue to assiduously safeguard taxpayer privacy, it seems eminently possible for the IRS and the Department of the Treasury to provide tax data according to gender, race, and other demographic characteristics. Such efforts are vital, both to provide essential information to policymakers and to enable all of us to hold those policymakers accountable for increasing equity in the tax code.

[n] Joint filing status creates an impediment to tracking tax benefits received by married women, incidentally.

TWO POLICY TOOLS THAT COULD ENSURE A MORE EQUITABLE TAX CODE

The following section discusses two policy tools that lawmakers could adopt in order to make our tax code more equitable: inclusive budgeting and equity impact assessments.[116] These policy tools aim to ensure a more equitable tax code by identifying its impacts on underrepresented communities. It is important to acknowledge that these policy tools are aspirational, but they are also not out of reach. Other countries (and some states) have already begun employing these tools, providing useful examples for U.S. policymakers.

INCLUSIVE BUDGETING

The concept of inclusive budgeting has its roots in "gender-sensitive" budgeting. Though relatively unknown in the United States, countries around the world with varying levels of economic development employ different forms of gender budgeting to improve gender equity.[117] South Korea, India, Rwanda, and Austria have used gender budgeting to improve women's labor force participation or increase girls' school attendance.[118] Gender budgeting targets the budgeting process.[119] According to Janet Stotsky, economist and former International Monetary Fund (IMF) Advisor, the economic rationale for gender budgeting is simple: government taxing and spending policies influence economic outcomes, which in turn leads to "economic output, growth, and equity."[120] This tool encompasses both legislative and administrative modifications that make taxing and spending more sensitive to societal inequities.[121] Gender budgeting could be easily broadened to encompass more communities and demographic characteristics.[122] Taking diverse communities into account when crafting budget and revenue legislation helps to spotlight disparities and thereby enable policymakers to craft more inclusive economic policies. Abundant economic research shows that societies benefit from policies that seek to reduce inequality and could benefit from tools to measure economic growth more equitably.[123]

APPLYING INCLUSIVE BUDGETING

Consider the following non-tax-related example: public transportation

Research shows that when women lack access to safe public transportation, society as a whole is negatively impacted.[124] Women, just like men, rely on public transportation to get to work and school and to actively participate in their communities.[125] However, when women feel unsafe or uncomfortable taking public transportation for fear of sexual harassment or assault, they likely will not travel at all.[126] Without access to work or school, women's opportunities are severely limited. Gender budgeting accounts for such research, encouraging governments to invest in safety improvements to make public transportation available to all.[127]

On the tax side, tax expenditures and revenues – just like budget allocations – have a significant impact on economic outcomes.[128] (Notably, most peer countries in the Organisation for Economic Co-operation and Development (OECD), including Canada, the United Kingdom, and Australia raise more tax revenue as a percentage of gross domestic product (GDP) than the United States does.[129] And other OECD countries spend more on social programs in general, and on child care and other benefits for families in particular, as a share of GDP than the United States.)[130] Indeed, the federal government's choice to forego revenue through the provision of exclusions, deductions, and credits[131] is equivalent to spending allocations through the budget process.[132] Independent researchers have identified particular tax policies that have resulted in disparate distribution of tax benefits to women.[o] For example, a recent study has shown that women small business owners may not be receiving business tax benefits equal to their male counterparts.[133] In addition, as discussed above, wealth-based tax policies, such as the mortgage interest deduction and tax-based savings incentives, target certain economic activities that reflect significant economic inequality for women and people of color.[134] (Specifically, the mortgage interest deduction subsidizes home ownership, thereby rewarding wealthier individuals and disadvantaging women, people of color, and other marginalized groups. Similarly, tax-based savings incentives tend to benefit men, who have more income and thus are more likely to accrue wealth, as compared to women or people of color). Inclusive budgeting focused on tax expenditures would highlight and seek to reduce these, and other, disparate effects.

Since 1974, the president's annual budget must include a list, prepared by the Treasury Department,[135] of all tax expenditures.[136] The Joint Committee on Taxation (JCT), composed of the House Ways and Means Committee and the Senate Committee on Finance, also compiles a tax expenditure budget.[137] However, these tax expenditure budgets do not identify the share of expenditures received by women or people of color, or other marginalized communities. An inclusive tax expenditure budget would add critically important information to the JCT's existing tax expenditure budget, illuminating whether tax expenditures across the tax code are equitably distributed. Having such a budget would help policymakers and advocates assess the extent to which the tax code increases, or reduces, inequality on the basis of gender, race, and other characteristics. This supplement to existing tax expenditure budgets could be undertaken by JCT, and potentially the Congressional Budget Office (CBO)[138] and the Office of Tax Analysis of the Department of the Treasury. (It would be particularly important for the agencies conducting this analysis to be nonpartisan, given assertions about who does or does not receive, or deserve, tax benefits.)

And though an inclusive analysis of the tax expenditure budget is clearly relevant, applying inclusive budgeting to the entirety of the tax system should also be considered. Although tax expenditures are surely important, other tax provisions and systemic features would benefit from gender and inclusivity analysis as well. For example, the joint filing provisions described above can produce a disincentive for married women to enter or reenter the workforce. Other countries have recognized this and have taken steps to address gender bias by reforming tax rates and brackets.[139] In 1993, Ireland transitioned from joint filing to an option that allows the "wife" to be listed as the primary taxpayer.[140] South Africa provides another particularly egregious example, but one that highlights the importance of an equitable tax code. Before 1995, South Africa applied a higher tax rate to single individuals and married women than to married men. In 1995, it transitioned to a unified schedule.[141] These examples highlight the importance of rates and bracket structures to gender equity, something that comprehensive, inclusive tax code analysis in the United States would likely reveal. Other structural features should receive additional attention as well. An accompanying report, "Reckoning With the Hidden Rules of Gender in the Tax Code," examines how historically low marginal tax rates for high-earners and preferential treatment of capital over labor has resulted in gender inequities.

The federal government should implement an inclusive budgeting approach to tax expenditures, and potentially to our tax system as a whole, to highlight existing disparities in the distribution of tax benefits and burdens and to inform future policymaking to address them. Based on the reasoning herein, disparities likely abound. Examples from other countries, as well as from our own, show us that the failure to recognize the downstream effects of deeply rooted inequalities can lead to unintended and undesirable consequences. While this tool is not currently employed in the United States, it is well-accepted around the world. As they frequently do with corporate tax rates,[142] U.S. policymakers should look to what other countries are doing with regard to gender and inclusive budgeting (including learning from challenges they have faced, and overcome, in implementing it). Needless to say, policymakers could also learn from steps other countries have taken in addition to inclusive budgeting in order to ensure a more equitable and inclusive tax system.

[o] The United States' joint filing system is an impediment to assessing tax expenditures received by women, which makes gender budgeting of tax expenditures more difficult than in other countries with individual filing. However, it is important to emphasize that inclusive budgeting would still be possible with the U.S.'s joint-filing tax system.

EQUITY IMPACT STATEMENTS

In addition to inclusive budgeting, equity impact statements or assessments for specific legislative proposals could highlight the tax code's impact by gender, race, and other demographic characteristics. While this policy tool certainly would not eliminate the potential that embedded racial or gender biases impact tax policy proposals, such assessments could help policymakers minimize the risk of enacting new tax proposals that increase inequality for any of those communities.[143] Policymakers could use such tools to course-correct and strengthen proposals to better reach marginalized groups, and similarly, the public could use them as a tool to hold policymakers accountable. Currently, several legislative entities analyze the economic impact of tax legislation, whether in terms of revenue, distribution of benefits by income level,[144] or economic impacts.[145] Analysis of tax legislation's impact on women, people of color, and other historically disadvantaged groups would provide much-needed additional information.[146]

Analogous to environmental impact statements,[147] racial and gender impact assessments are designed to determine whether a policy or legislative proposal will have a disparate impact on particular communities.[148] For example, a number of states and localities provide for racial impact assessments of criminal justice legislation, in order to evaluate whether the proposal would have a disparate impact upon communities of color.[149] In addition, a number of other countries require an assessment of proposed regulations' impact on gender equality.[150] Some countries require a broad determination, while others highlight specific elements for which the impact on gender equality is relevant.[151]

In addition to impact assessments that focus exclusively on race or gender, models exist for impact assessments that consider more than one characteristic.[152] Given that many people face multiple forms of oppression, policymakers should consider employing an intersectional model for impact assessment of tax legislation, like that proposed by Nancy Knauer, which would describe the demographic impact of the proposed policies and any disproportionate impact on designated populations.[153] These assessments could be conducted by, or in conjunction with, the Congressional Budget Office, Joint Committee on Taxation, or the relevant congressional committee.

In combination, inclusive budgeting (which focuses on existing tax expenditures) and equity impact statements (which focus on legislative proposals) would allow us to hold policymakers accountable for ensuring that our tax code lives up to its potential and furthers equity for women, people of color, and other marginalized groups.

ENSURING MORE EQUITABLE ENFORCEMENT BY THE IRS

In addition to inequities in tax policy there is reason to be concerned with inequities in tax administration.

Specifically, it is important to assess whether IRS enforcement also has a disproportionate impact on people who have historically been left out of our tax laws. As described earlier, it is well-established that low-income tax filers are disproportionately likely to be subject to an IRS audit, in part because of the complexity of the requirements for claiming the EITC and in part because of reduced dedication of IRS enforcement resources toward ensuring tax compliance among higher-income taxpayers.[154] Recently, researchers have also found that counties with high concentrations of residents who are racial minorities face especially high levels of IRS enforcement.[155] Moreover, it is an open question as to whether some EITC audit "red flags," such as nontraditional family arrangements or custody arrangements that do not follow expected gender norms,[156] may affect women, people of color, or LGBTQ individuals differently. Other IRS enforcement actions, such as tax collection or responses to IRS correspondence, may also reflect such disparities.

In addition, research suggests that IRS practices and culture exacerbate challenges for tax filers during the audit process. For example, the IRS assigns employees with lower levels of responsibility and experience to EITC audits, fails to ensure that the same employees are consistently assigned to work with particular taxpayers, and takes an "enforcement" rather than a "compliance" approach to the EITC audit process.[157] These administrative factors undermine the effectiveness and efficiency of the audit process, with taxpayers bearing the negative outcomes that result. It is worth exploring whether female, racial or ethnic minority, LGBTQ, disabled, or non-citizen tax filers may also experience disparate treatment on the basis of their identities in the course of an audit, whether because of the reasons described above or others, including implicit biases. Tax filers' qualitative experience during an audit is particularly important because a negative experience may discourage them from claiming the EITC,[158] and presumably other tax benefits, in future years. For tax filers who would not otherwise meet the required tax filing threshold, a bad audit experience may prevent them from filing a tax return at all.

Just as it does not track tax expenditures by gender, race, or other characteristics, the IRS does not track enforcement outcomes by these indicia of identity.[159] The IRS likely has some information about the demographic characteristics of individuals who are audited, since it employs an automatic system that flags particular tax returns for potential enforcement action, although that information is not public.

As with the distribution of tax benefits, it is critical to have data about taxpayers who are subject to audit. Obviously, it would be imperative for the IRS to guard taxpayers' privacy and shield identifying information in any publicly released demographic analysis of audits. In addition to the IRS obtaining demographic information about taxpayers subject to audit, whether through cross-referencing Social Security databases or Census data, the Taxpayer Advocate Service could also conduct surveys of audited taxpayers in order to ask about their race, gender, sexual orientation, disability, and immigration status, as well as their perceptions of their treatment during the audit process. These survey data, along with data on disparities about selection for, and outcomes of, enforcement actions, could support a recommendation to the IRS' Office of Equity, Diversity and Inclusion to require diversity or other training for IRS agents, to ensure that implicit bias was not at the root of disparate enforcement rates or of inequitable treatment during the audit process. It is also possible that, if funding for the IRS were increased, the likelihood of audit for lower-income tax filers, with its concomitant potential for inequitable targeting, would decrease vis-à-vis higher-income tax filers, which could mitigate some disparities.

CONCLUSION

Nowhere in today's tax code does it explicitly say that women shall be treated differently than men, or families of color treated differently than white families. But while the language of our tax laws may be neutral on its face, when applied, in many instances, its impact disadvantages women and people of color. The faulty foundations of the tax code undermine its ability to support critical investments, its progressivity, its inclusivity, and its potential to advance racial, gender, and economic equity.

The time has come for us, as gender justice advocates, to hold policymakers to account. It is time for us to ensure that the tax code lives up to its full potential to create greater economic opportunity for all – by reforming our tax laws with an intentional focus on race and gender equity. When our approach to tax policy centers gender and racial equity, the tax code will support a strong, healthy economy for all of us.

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100 *See, e.g.*, Infanti, *supra* note 1, at 7–8.

101 *Id.* at 17-20.

102 *See, e.g.*, Nancy J. Knauer, *Critical Tax Policy: A Pathway to Reform?* 9 Nw. J. L. & Soc. Pol'y 206, 247 (2014), http://scholarlycommons.law.northwestern.edu/njlsp/vol9/iss2/2 (arguing that critical lens applicable to tax policy should include race, gender, disability, and sexual orientation and gender identity).

103 *See, e.g.*, IRS, *Disclosure Laws*, https://www.irs.gov/government-entities/federal-state-local-governments/disclosure-laws (last visited Aug. 15, 2019) (stating that "the law protects your tax return information from disclosure to other parties by the Internal Revenue Service. IRC Section 6103 generally prohibits the release of tax information by an IRS employee" and enumerating limited exceptions regarding state agencies responsible for tax administration, permitted disclosure pursuant to court order, etc.).

104 *See* Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Color Blind Tax Data, 73 Tax Law Review*, forthcoming 1, 17–18 (on file with authors). Examples compiled in Jeremy Bearer-Friend's article include the following: Off. Tax Analysis, *Tax Expenditures for Exclusion of Capital Gains at Death* at 3, 11 tbl.3, 12 tbl.4,https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/Step-Up-Basis-2014.pdf; Internal Revenue Serv. Stat. Income Div., *Taxpayers with IRA Plans* (last updated May 18, 2018), https://www.irs.gov/statistics/soi-tax-stats-individual-statistical-tables-by-filing-status; Internal Revenue Serv. Stat. Sec., Income Tax Unit, *Statistics of Income for 1934* at 64 tbl.4 (1936), https://www.irs.gov/pub/irs-soi/34soirepppt1ar.pdf (IRS account ownership) (1934 data book publication that included sex). Other Treasury offices, like the Office of Tax Analysis, likely have access to this data as well.

105 *See* Bearer-Friend, *supra*.

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106 *See id.* at n. 119 (citing C. Eugene Steuerle, et al., Off. Tax Analysis, *Working Paper No. 24: Income Averaging: Evidence on Benefits and Utilization* (1977)).

107 *See* Bearer-Friend, *supra* note 104, at n. 119 (citing Jim Cilke, Off. Tax Analysis, *Working Paper No. 78: A Profile of Non-Filers* at 1 (July 1998) ("In October, 1996 the Office of Tax Analysis (OTA) received the CPS-IRS exact match data file produced by the Bureau of the Census. To produce this file, the Bureau of the Census tried to exactly match information from 1990 Federal tax returns to every person on the March 1991 Current Population Survey (CPS))").

108 For example, Bearer-Friend cites to a paper presented at the American Statistical Association specifically about the use of IRS administrative data to create population estimates that are cross-validated against Census data that looked to multiple demographic details (age, sex) yet excluded race and ethnicity. Peter Sailer & Michael Weber, SOI, *The IRS Population Count: An Update* (1998), https://www.irs.gov/pub/irs-soi/indpopct.pdf.

109 *See, e.g.*, Nat'l Women's Law Ctr., *The Republican Tax Plan: What's at Stake for Women and Families* (2017), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/11/GOP-Tax-Plan-Whats-at-Stake-for-Women-and-Families-FINAL.pdf (using calculations based on U.S. Census Bureau, *2016 Current Population Survey*, table HINC-05, https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-hinc.html to conclude that female-headed households were underrepresented among households receiving the bulk of tax benefits under the Republican tax plan); Hamilton & Linden, *supra* note 97, at 3 (using 2016 Current Population Survey to conclude that "The richest Americans are the disproportionate beneficiaries of the Trump tax law, and the richest Americans are also disproportionately white."); Huang & Taylor, *supra* note 7.

110 *See e.g.*, Knauer, *supra* note 102, at 248; Bearer-Friend, *supra* note 104, at 62–63. Because of taxpayer privacy concerns, this cross-reference must be conducted by the IRS, the Department of Treasury, or by contractors with clearance to review these databases.

111 U.S. Census Bureau, *Same-Sex Couples*, https://www.census.gov/topics/families/same-sex-couples/about.html (last visited July 30, 2019).

112 U.S. Census Bureau, *Disability*, https://www.census.gov/topics/health/disability.html (last visited July 30, 2019) ("The Census Bureau collects data on disability primarily through the American Community Survey (ACS) and the Survey of Income and Program Participation (SIPP).").

113 *See e.g.*, Knauer, *supra* note 102, at 248; Bearer-Friend, *supra* note 104, at 61.

114 *See, e.g.*, Kathleen Short, Dennis Donahue, & George Lynch, *EITC Estimates in the ASEC Simulations of After-Tax Income, Hispanic Population*, U.S. Census Bureau (2012), https://www.census.gov/content/dam/Census/library/working-papers/2012/demo/sehsd2012-19.pdf.

115 *See* Board of Governors of the Fed. Res. Sys., *Survey of Consumer Finances (SCF)*, https://www.federalreserve.gov/econres/scfindex.htm (last visited July 30, 2019).

116 The term "diversity" budget and impact assessment is meant to indicate that the policy tool should take different characteristics into consideration, rather than just (for example) gender or race. This term was employed by legal scholar Nancy J. Knauer. *See* Knauer, *supra* note 102, at 254. Economists and critical tax theorists who have advocated for these mechanisms have come up with a wide variety of labels for these equity tools, including "equality" budgets, "demographic" budgets, etc.

117 While some focus on budgetary allocations – referred to in the United States as the appropriations process – others focus on expenditure tracking and monitoring. Janet G. Stotsky, *Gender Budgeting: Fiscal Context and Current Outcomes*, Int'l Monetary Fund 1, 4 (2016), https://www.imf.org/external/pubs/ft/wp/2016/wp16149.pdf.

118 Economist, *What is gender budgeting?* Mar. 3, 2017, https://www.economist.com/the-economist-explains/2017/03/03/what-is-gender-budgeting.

119 Stotsky, *supra* note 117. Additionally, for a more robust discussion of how a gender budgeting analysis is, and can be, implemented on an international scale and in accordance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) guidelines, *see also* Diane Elson, Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW, U.N. Development Fund for Women (2006), https://www2.unwomen.org/-/media/files/un%20women/grb/resources/budgeting%20for%20womens%20rights%20monitoring%20government%20budgets%20for%20compliance%20with%20cedaw.pdf?vs=4836.

120 Stotsky, *supra* note 117.

121 *Id.*

122 Knauer, *supra* note 102, at 255.

123 *See* Austin Clemens & Heather Boushey, *What If We Took Equity Into Account When Measuring Economic Growth?* Wash. Ctr. Equitable Growth (2017), https://equitablegrowth.org/what-if-we-took-equity-into-account-when-measuring-economic-growth/, for an exploratory discussion of evaluating economic growth, and the success of the economy more generally, by taking income inequality into account. *See also* Somin Park, *Why It's Important to Pay Attention to Distributional Consequences of Economic Policies*, Wash. Ctr. Equitable Growth (2019), https://equitablegrowth.org/why-its-important-to-pay-attention-to-distributional-consequences-of-economic-policies/.

124 Yasemin Irvin-Erickson, *Why women's access to safe public transportation is key to sustainable development*, Urban Inst.: Urban Wire (Mar. 7, 2016), https://www.urban.org/urban-wire/why-womens-access-safe-public-transportation-key-sustainable-development.

125 *Id.*

126 *Id.*

127 *Id.; see also* Yingling Fan, *Why Transit Policy Should Consider Riders' Gender*, U. of Minn.: The Gender Policy Report (2018), https://genderpolicyreport.umn.edu/why-transit-policy-should-consider-riders-gender/.

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128 Moreover, the international community is aware of how such tax structures can exacerbate gender inequities. The United Nations Development Programme, in a 2010 issue brief, encouraged policymakers to be aware of the extent to which tax policies reinforce or break down gender inequalities. *See also* Knauer, *supra* note 102, at 210.

129 *See, e.g.*, Org. for Econ. Co-operation and Dev., *Revenue Statistics 2018: Tax Revenue Trends in the OECD* 6 (2018), https://www.oecd.org/tax/tax-policy/revenue-statistics-highlights-brochure.pdf.

130 *See, e.g.*, Org. for Econ. Co-operation and Dev., *Social Expenditure Update 2016: Social Spending Stays at Historically High Levels in Many OECD Countries* Fig. 1 (2016) (showing the United States spending less on public social spending, overall, than 21 out of 34 OECD countries), http://www.oecd.org/els/soc/OECD2016-Social-Expenditure-Update.pdf; Org. for Econ. Co-operation and Dev., Social Policy Division, Directorate of Employment, Labour and Social Affairs, *Public Spending on Childcare and Early Education* (2019), https://www.oecd.org/els/soc/PF3_1_Public_spending_on_childcare_and_early_education.pdf; Org. for Econ. Co-operation and Dev., *Data: Family Benefits Public Spending*, https://data.oecd.org/socialexp/family-benefits-public-spending.htm (last visited Sept. 10, 2019).

131 A tax expenditure is defined by the Congressional Budget and Impoundment Control Act of 1974 as "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." Congressional Budget and Impoundment Control Act of 1974 (Pub. L. No. 93-344), sec. 3(3).

132 Knauer, *supra* note 102, at 212

133 *See* Bruckner, *supra* note 49.

134 *See* text accompanying notes 65-82, *infra*; *see also* Beverly J. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 Wisc. L. Rev. 751.

135 U.S. Dep't of Treasury Off. Tax Analysis, *Tax Expenditures* (2018), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2020.pdf.

136 Knauer, *supra* note 102.

137 The Joint Committee on Taxation, U.S. Congress, *Estimates of Federal Tax Expenditures for Fiscal Years 2018-2022* 1, 13, https://www.jct.gov/publications.html?id=5148&func=startdown.

138 *See id.*

139 Caren Grown & Imraan Valodia, CRDI & IRDC, *Taxation and Gender Equity : A comparative analysis of direct and indirect taxes in developing and developed countries* (2010), *available at* https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/43684/IDL-43684.pdf?sequence=1&isAllowed=y.

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142 Danielle Kurtzleben, *Fact Check: Does The U.S. Have The Highest Corporate Tax Rate In The World?*, NPR, Aug. 7, 2017, https://www.npr.org/2017/08/07/541797699/fact-check-does-the-u-s-have-the-highest-corporate-tax-rate-in-the-world.

143 *See also* Greg Leiserson, *Assessing the Economic Effects of the Tax Cuts and Jobs Act,* Wash. Ctr. Equitable Growth (2018) (highlighting the importance of assessing tax legislation through a direct examination of how it affects different people and groups), https://equitablegrowth.org/assessing-the-economic-effects-of-the-tax-cuts-and-jobs-act/.

144 The Joint Committee on Taxation also prepares analyses of the distribution of tax benefits under particular legislative proposals. *See, e.g.,* Jt. Comm. On Taxation, *Distributional Effects Of The Conference Agreement For H.R.1, The "Tax Cuts And Jobs Act"* (Dec. 18, 2017), https://www.jct.gov/publications.html?func=startdown&id=5054.

145 The Congressional Budget Office (CBO), a nonpartisan, independent agency, produces cost estimates of tax legislation, including effects on the federal budget and macroeconomic effects. *See, e.g.,* Cong. Budget Off., *Cost Estimate: H.R. 1, The Tax Cuts and Jobs Act* (Nov. 17, 2017), https://www.cbo.gov/publication/53312; Cong. Budget Off., *Cost Estimate for the Conference Agreement on H.R. 1* (Dec. 17, 2017), https://www.cbo.gov/publication/53415. The Joint Committee on Taxation (JCT), a nonpartisan committee of the United States Congress, prepares revenue estimates and other analysis of tax legislation, including of macroeconomic effects. *See, e.g.,* Jt. Comm. On Taxation, *Macroeconomic Analysis Of The "Tax Cuts And Jobs Act" As Passed By The House Of Representatives On November 16, 2017* (Dec. 11, 2017), https://www.jct.gov/publications.html?func=startdown&id=5050; Jt. Comm. On Taxation, *Macroeconomic Analysis Of The "Tax Cut And Jobs Act" As Ordered Reported By The Senate Committee On Finance On November 16, 2017* (Nov. 30, 2017), https://www.jct.gov/publications.html?func=startdown&id=5045.

146 Researchers have estimated racial and gender impacts for specific pieces of tax legislation. *See, e.g.,* Ctr. on Budget and Pol'y Priorities, *Working Families Tax Relief Act Would Help 46 Million Families, Cut Poverty and Deep Poverty* (April 10, 2019), https://www.cbpp.org/research/federal-tax/working-families-tax-relief-act-would-help-46-million-households-cut-poverty ("Taking its EITC and CTC expansions together, the Working Families Tax Relief Act would boost the after-tax incomes of an estimated 114 million people in 46 million households, including 24 million white families, 9 million Latino families, 8 million Black families, and 2 million Asian American families."). However, requiring legislative entities like the CBO, JCT, or congressional committees of jurisdiction to systematically assess the impact of tax legislation on a broader array of communities would dramatically improve the information available to policymakers and the public in the course of legislative debates on tax policy.

147 *See, e.g.,* Knauer, *supra* note 102, at 258-59 (describing Environmental Impact Statements (EIS) as enumerating "(1) the environmental impacts of the proposed action; (2) any adverse environmental impacts that cannot be avoided should the proposal be implemented; (3) the reasonable alternatives to the proposed action; (4) the relationship between local short-term uses of environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented.") (citations omitted).

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148 *See generally* Leah Sakala, *Can Racial and Ethnic Impact Statements Address Inequity in Criminal Justice Policy?* The Urban Inst. (2018), https://www.urban.org/urban-wire/can-racial-and-ethnic-impact-statements-address-inequity-criminal-justice-policy; Shannon Hing, William Kennedy, & Gillian Sonnad, *Pursuing Racial Justice in the 21st Century*, 47 J. of Poverty L. & Pol'y 5-6 (2013), https://www.law.berkeley.edu/files/thcsj/PuttingRaceBackOnTheTable_.pdf (citing examples of racial and ethnic impact statements in civil law contexts, including school district reorganization, federal agency programs that are required to comply with antidiscrimination laws, community development projects, etc.).

149 *See, e.g.,* Knauer, *supra* note 102, at 260–61 (describing Iowa legislation requiring "minority impact statement" for legislative proposals implicating crime, criminal sentencing or parole procedures). For other state and local examples of racial and ethnic impact assessments in the context of criminal justice reform proposals, *see* Sakala, *supra* note 148.

150 *See, e.g.,* Knauer, *supra* note 102, at 261; Eur. Inst. for Gender Equal., *Gender Impact Assessment*, https://eige.europa.eu/gender-mainstreaming/toolkits/gender-impact-assessment/what-gender-impact-assessment (last visited July 11, 2019) (citing examples of Austria, Belgium, Denmark, Finland, and Sweden); *see also* Overseas Dev. Inst., *Gender impact assessment: framework for gender mainstreaming*, https://www.odi.org/publications/7263-gender-impact-assessment-framework-gender-mainstreaming (last visited July 11, 2019) (toolkit for developing countries); WECF Int'l, *#women2030, The gender impact assessment and monitoring tool*, https://www.women2030.org/the-gender-impact-assessment-and-monitoring-tool/ (last visited July 11, 2019).

151 For example, the European Institute for Gender Equality states that Austria requires an assessment of gender impact across the dimensions of "benefits, employment, income, education, unpaid work, decision-making and health," while Belgium requires an assessment of the impact of proposed regulations on women and men, as part of an overall regulatory impact analysis. Eur. Inst. for Gender Equal., *Gender Impact Assessment*, https://eige.europa.eu/gender-mainstreaming/toolkits/gender-impact-assessment/what-gender-impact-assessment (last visited July 11, 2019).

152 *See, e.g.,* Minn. Sentencing Guidelines Comm'n, *Demographic Impact Statement Policy* (2017), http://mn.gov/msgc-stat/documents/racial-impact-statements/DemographicImpactStatementPolicy_2.pdf ("Because statistical data available to the MSGC includes not only race, but also other statistically reliable data, such as gender, the MSGC should prepare a demographic impact statement that examines reasonably reliable and available statistical data such as race and gender."); Swedish Secretariat for Gender Res., *Gender Mainstreaming with an Intersectional Perspective* (2015), https://www.includegender.org/wp-content/uploads/2015/06/Gender-Mainstreaming-with-an-Intersectional-Perspective-pdf.pdf; *see also* Univ. of Glasgow, Equal. and Diversity Unit, *Equality Impact Assessment Policy and Guidance* (2014), https://www.gla.ac.uk/media/media_222888_en.pdf.

153 Knauer, *supra* note 102, at 257–262.

154 *See, e.g.,* Paul Kiel, *You Don't Earn Much and You're Being Audited by the IRS. Now What?*, ProPublica, Oct. 4, 2018, https://www.propublica.org/getinvolved/irs-audit-earned-income-tax-credit-refund-help; Eisinger & Kiel, *supra* note 85.

155 *See* Bearer-Friend, *supra* note 104, at 54–55 (citing Thomas M. Evans, IRS Enforcement's Impact on Minority Communities (2010) and press coverage of Evan's report); *see also* Hannah Fresques & Paul Kiel, ProPublica, *Where in the U.S. Are You Most Likely to Be Audited by the IRS?* (Apr. 1, 2019), https://projects.propublica.org/graphics/eitc-audit (finding that counties with the highest audit rates tended to have disproportionately high levels of Black residents and that, conversely, counties with low audit levels had predominantly white, middle-class residents).

156 *See* Bearer-Friend, *supra* note 104, at 54–55.

157 *See, e.g.,* Taxpayer Advocate Serv., *IRS Earned Income Credit Audits – A Challenge to Taxpayers* (2007), https://taxpayeradvocate.irs.gov/Media/Default/Documents/ResearchStudies/eitc_audits_challenge_tps_ra_dec2007.pdf; Taxpayer Advocate Serv., *Study of Tax Court Cases In Which the IRS Conceded the Taxpayer was Entitled to Earned Income Tax Credit (EITC)* (2012), https://taxpayeradvocate.irs.gov/Media/Default/Documents/ResearchStudies/ARC12_research_studies_taxpayer_entitled_eitc.pdf (surmising that examiners fail to adequately explain documentary requirements, rejected documents later found by tax courts to be sufficient to prove the tax filer's claim, and in about 5 percent of cases, misapplied the law).

158 *See, e.g.,* Nat'l Taxpayer Advocate, *An Analysis of the IRS Examination Strategy: Suggestions to Maximize Compliance, Improve Credibility, and Respect Taxpayer Rights* (2011), https://taxpayeradvocate.irs.gov/Media/Default/Documents/ResearchStudies/arc11_arc_vol2_exam_strategy.pdf; John Guyton, Kara Leibel, Day Manoli, Ankur Patel, Mark Payne, Brenda Shafer, *Working paper No. w24465: The Effects of EITC Correspondence Audits on Low-Income Earners*, Nat'l Bureau of Econ. Research (2018), https://www.nber.org/papers/w24465.

159 *See, e.g.,* Internal Revenue Serv., Res., Analysis & Stat., *Compliance Estimates for the EITC Claimed on 2006-2008 Returns* (2014), https://www.irs.gov/pub/irs-soi/EITCComplianceStudyTY2006-2008.pdf.