DO BLACK TAXPAYERS MATTER? A CRITICAL TAX ANALYSIS OF IRS AUDIT PRACTICES

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The Earned Income Tax Credit, a federal anti-poverty program administered through the tax system, provides a total of about $65 billion a year in "refundable credits" (a payment in excess of tax liability) to more than 25 million working low-income taxpayers, who receive an average of about $2000 (the precise amount depends on their number of dependents). Its complex eligibility rules produce persistently high error rates, which are in turn used to justify high audit rates and a grossly disproportionate share of IRS enforcement activity. Because of the small dollar amounts involved, EITC audits are not lucrative, although they are also not terribly costly (as most are conducted by correspondence and not contested). EITC audits are pre-refund, forcing poor taxpayers to wait months even for the undisputed portion of what they claim. Those who are audited are deterred from claiming it again; some mistakes can disqualify taxpayers from receiving it in future years. Given all this, perhaps it is not surprising that the EITC is underclaimed (about 20% of the eligible do not claim it).

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Making matters worse, despite the formal race-neutrality of the Internal Revenue Code and all IRS policies and practices, EITC audit practices have grossly racially disparate effects. America's poorest, Blackest counties are audited at some of the very highest rates. Black EITC claimants, and especially Black single fathers claiming the EITC, are the likeliest taxpayers in America to be audited. Recent work by economists has confirmed what many critical tax law scholars have long suspected: that the same systematic racial inequities long identified and decried in the allegedly race-blind criminal justice system afflict the tax enforcement system as well.

This Article breaks new ground by using critical theory, the work of Michel Foucault, Critical Race Theory, and intersectional analysis to help understand and interpret empirical data about the EITC and IRS EITC audit practices that otherwise defy explanation - not only do the complex and punitive features of the EITC produce racially disparate impacts, but also expend scarce IRS resources on pointless EITC enforcement. This analysis unearths the role played in tax policy and tax enforcement by the very same persistent anti-Black stereotypes that have distorted both criminal justice and American welfare policy: myths about Black laziness, criminality, promiscuity, and family dysfunction. The Article also reveals the inadequacy of tax law casebook coverage of this issue, which generally either ignores it or, worse, perpetuates the same damaging stereotypes.

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I. INTRODUCTION

The Earned Income Tax Credit is a half-century-old anti-poverty program administered through the federal tax system. It currently provides low-income taxpayers with a "refundable credit" (a payment in excess of tax liability) of up to $560 for taxpayers with no dependents, and a maximum of nearly $7000 for those with three or more dependents. Its complex eligibility rules produce persistently high error rates, which are in turn used to justify high audit rates. Because of the small dollar amounts involved, EITC audits are not lucrative for the IRS, although they are also not terribly costly (as most are conducted by correspondence and not contested). EITC audits are pre-refund, forcing poor taxpayers to wait months even for the undisputed portion of what they claim. Those who are audited are deterred from claiming it again; some mistakes can disqualify taxpayers from receiving it in future years. Given all this, perhaps it is not surprising that the EITC is underclaimed (about 20% of the eligible do not claim it).

This state of affairs provokes many questions. Why is the EITC still so complicated that it generates such a high error rate? Why are the uncontested portion of refunds withheld from poor taxpayers, who unquestionably need and are entitled to the money? Why does a government cash "giveaway" have only an 80% uptake rate? Why does the IRS devote greater resources to policing alleged overclaims at the bottom of the tax table, where there is little to be gained for the fisc, instead of at the top, where billions go uncollected?

The answer to these questions may come from an unexpected direction. For decades, civil rights scholars have drawn attention to the anti-Black racism of the American criminal justice system, from police and prosecutors to the mass incarceration of young men of color, especially Black men. What has only lately begun to draw significant scholarly attention, however, is the persistence of racially disparate treatment by an entirely different arm of the government: the Internal Revenue Service.

Recent painstaking empirical work by economists has confirmed what many antidiscrimination and intersectional tax law scholars have long suspected: IRS audit practices, especially of EITC claimants, affect Black taxpayers in profoundly racially disparate ways. The Blackest counties in the United States are among the most heavily audited, despite being among the poorest; poor Black EITC claimants are audited at rates far in excess of any other group in America; single poor Black working fathers are audited at the *very highest rates* of all - despite the fact that the IRS does not collect race-based information about taxpayers. In sum, what this research has revealed is that the same systematic racial disparities long identified and decried in the allegedly race-blind *criminal* justice system also afflict the *tax* enforcement system.

This Article uses insights from Michel Foucault, Critical Race Theory, and intersectionality to help understand and interpret empirical data about the EITC and IRS EITC audit practices that otherwise defy explanation. With an intersectional approach that encompasses not just race, but also gender and class, the Article demonstrates that the best explanation for the unfair and punitive treatment of poor Black taxpayers by the IRS lies in the very same persistent anti-Black stereotypes that have distorted both criminal justice and American welfare policy: myths about Black laziness, criminality, violence, promiscuity, and family dysfunction. The pernicious influence these deeply rooted, mutually reinforcing, and profoundly biased ideas have exerted on formally race-neutral tax law and tax enforcement policy can hardly be overstated.

Making matters worse, most tax law casebooks do little to improve, critique, or even reveal this situation. This may be because they generally devote so little space to the EITC or audit policy, a couple of paragraphs or perhaps a few pages at most. At best, these findings appear in the supplementary Teacher's Manual; at worst, the casebook traffics in the very same stereotypes that contribute to the problem. Whatever prior justifications may have been offered for giving this topic such short shrift are no longer acceptable. Tax law enforcement and tax law casebooks must recognize that the lives of poor Black taxpayers matter.

Part I introduces the Earned Income Tax Credit, including its history, statutory basis, and statistics important for understanding this benefit. Part II presents information and data about audits, including of EITC claimants, together with recent empirical findings about racial disparities in audit practices. Part III contains the critical tax analysis of EITC overaudits, including an explanation drawn primarily from Critical Race Theory and its analysis of anti-Black stereotypes, that enables us to better understand the otherwise-inexplicable racially disparate audit practices of a formally race-neutral agency enforcing formally race-neutral tax laws. Part III also demonstrates that even the best of several leading tax law casebooks come up importantly short in their coverage of these issues, while the worst perpetuate the very same stereotypes that have contributed to this ongoing injustice in tax administration. Part IV draws conclusions and makes recommendations.

II. THE EARNED INCOME TAX CREDIT (EITC)

A. Historical Background

The Earned Income Tax Credit (EITC)[1] began in 1975 as a Republican policy aimed at encouraging the poorest Americans to continue working rather than receive welfare.[2] It has been amended numerous times in the years since then and has been the subject of a great deal of economic and legal scholarship.[3] The

1 I.R.C. § 32. Section 32 is called "Earned income." The tax credit is variously referred to as the "Earned Income Tax Credit" (EITC) and the "Earned Income Credit" (EIC). As it is the preferred term used by the IRS, I will generally use the former abbreviation, except when a quoted source uses the latter. IRS, *EITC Fast Facts*, EARNED INCOME TAX CREDIT, https://perma.cc/SQW5-6E6D.

2 MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., R44825, THE EARNED INCOME TAX CREDIT (EITC): LEGISLATIVE HISTORY (2022), https://perma.cc/G794-EZ6V [hereinafter EITC Legislative History].

3 At the time of writing, a search, a simple WestLaw search for law review articles from 1985 onward with "Earned Income Tax Credit" or "Earned Income Credit" (or abbreviations thereof) in their titles produces over 70 results and many more articles address the EITC internally.

program is large: "More than 25 million people claim the EITC per year, generating more than $63 billion each year to people in need."[4] In fact, "the Earned Income Tax Credit (EITC) has replaced welfare as the largest cash-based safety net program in the United States."[5]

From the beginning, the EITC was intended to reduce reliance on what was then called Aid to Families with Dependent Children (AFDC), and to encourage parents, especially mothers, to continue or return to work.[6] Rather than functioning purely as an entitlement, the benefit required earned income and increases as earned income increases (up to a point). It began in 1975 with a benefit set at 10% of the taxpayer's first $4,000 in earnings, and phased out between $4,000 and $8,000 depending on family size.[7] The poverty level threshold for a nonfarm family of four in that year was $5,500.[8]

The United States economy was facing serious challenges at that time. The median family income in the U.S. was $13,720, a slight decline from the prior year.[9] The median income for Black families was dramatically lower: $8,780.[10] Between 1974 and 1975, the number of people living in poverty *increased* by 2.5 million, the largest-ever single-year increase since 1959, when data collection began.[11] Although the percentage of the White population living in poverty grew more in that year, as of 1975, fully 31% of the Black population was below the poverty level.[12] For purposes of comparison, the 2019 (pre-COVID) poverty rate for Black people in the U.S. was a historic low, 18.8%.[13]

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4 Sunita Lough, *IRS Audit Rates Significantly Increase As Income Rises*, INTERNAL REVENUE SERVICE (Oct. 20, 2020), https://perma.cc/949Z-GVSY.

5 Hadi Elzayn, Evelyn Smith, Thomas Hertz, Arun Ramesh, Robin Fisher, Daniel E. Ho, & Jacob Goldin, *Measuring and Mitigating Racial Disparities in Tax Audits* 2 (Jan. 30, 2023) (Working Paper) (on file with Stanford Inst. for Econ. & Pol'y Rsch.) https://perma.cc/TD92-BTR7.

6 EITC Legislative History, *supra* note 2, at 2.

7 *Id.* at 3.

8 U.S. DEP'T OF COMMERCE BUREAU OF THE CENSUS, CURRENT POPULATION REPORT, SERIES P-60, NO. 106, CHARACTERISTICS OF THE POPULATION BELOW THE POVERTY LEVEL: 1975 1 (1977), https://perma.cc/XNB7-SRAA [hereinafter Census Current Population Report No. 106].

9 U.S. DEP'T OF COMMERCE BUREAU OF THE CENSUS, CURRENT POPULATION REPORT, SERIES P-60, NO. 105, MONEY INCOME IN 1975 OF FAMILIES OF PERSONS IN THE UNITED STATES 1 (1977), https://perma.cc/8JAZ-A6CU.

10 *Id.*

11 Census Current Population Report No. 106, *supra* note 8, at 1.

12 U.S. DEP'T OF COMMERCE BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SPECIAL STUDIES, SERIES P-23, NO. 54, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES 41 (1974), https://perma.cc/HKE6-KTWZ.

13 John Creamer, *Inequalities Persist Despite Decline in Poverty For All Major Race and Hispanic Origin Groups*, U.S. BUREAU OF THE CENSUS (Sept. 15, 2020), https://perma.cc/PBV9-8AEX.; *but see* MICHELLE ALEXANDER, THE NEW JIM CROW 229 (2010) (pointing out that "poverty and unemployment statistics do not include people who are behind bars"); John Gramlich, *Black imprisonment rate in the U.S. has fallen by a third since 2006*, PEW RSCH. (May 6, 2020), https://perma.cc/SM7W-5XMH (explaining that Black

Since its inception, the EITC has been modified by legislation numerous times.[14] These changes have primarily increased the amount of the credit and broadened and refined eligibility for it.[15] "As a result of legislation enacted in 2001, the EITC phases out at higher income levels for married couples than for single individuals. That threshold was increased as part of the American Recovery and Reinvestment Act of 2009 (ARRA). The same act increased the maximum EITC for workers with at least three children. The American Taxpayer Relief Act of 2012 made the 2001 EITC changes permanent (a $3,000 higher (indexed) phaseout threshold for married couple than for singles) but extended the ARRA changes (a $5,000 higher (indexed) phaseout threshold for married couple than for singles, and higher credit maximum for workers with at least three children) through the end of 2017. The Protecting Americans from Tax Hikes Act of 2015 made these changes permanent. The Tax Cuts and Jobs Act, enacted in 2017, adopted a more conservative measure of inflation to be used in the federal income tax system beginning in 2018. As a result, the EITC will grow more slowly over time."[16]

B. The Current EITC

Today, the EITC pays out a total of approximately $68 billion a year.[17] Nearly 26 million U.S. taxpayers claimed the credit in 2021, out of a total of about 160 million individual tax returns filed.[18] It is "the largest source of cash (as opposed to in-kind) transfers to the working poor."[19] In 2021, the average amount of EITC received was a bit more than $2,000.[20]

The EITC is currently found at Section 32 of Title 26.[21] Although it has been modified many times, its basic structure has remained the same for many years:

Americans are overrepresented in American prisons); *Criminal Justice Fact Sheet*, NAACP, https://perma.cc/54UU-Z9DP (showing that in 2014, approximately 2.3 million Black Americans were incarcerated).

14 EITC Legislative History, *supra* note 2, at 2-14 and Appendix B.

15 *Id.* at Appendix B.

16 *Briefing Book: Key Elements of the U.S. Tax System,* URBAN INST. & BROOKINGS INST. TAX POL'Y CTR. (May 2021), https://perma.cc/YC2E-GQ9A.

17 TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, IMPROPER PAYMENT RATES FOR REFUNDABLE TAX CREDITS REMAIN HIGH, RPT. NO. 2021-40-036 3 (2021), https://perma.cc/4Q4J-3Q7Z. ("The IRS estimates 24 percent ($16.0 billion) of the total EITC payments of $68.2 billion [in 2020] were improper").

18 TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, RESULTS OF THE 2021 FILING SEASON, RPT. NO. 2022-40-024 5 (2022), https://perma.cc/HZQ3-6UHN.

19 JOSEPH BANKMAN, DANIEL SHAVIRO, KIRK STARK & EDWARD KLEINBARD, FEDERAL INCOME TAXATION 614 (18th ed. 2018).

20 *Statistics for Tax Returns with the Earned Income Tax Credit (EITC)*, IRS, https://perma.cc/737D-WLGU.

21 I.R.C. § 32. The entire Internal Revenue Code section is found at Appendix A.

the benefit is determined by a formula that takes into account the taxpayer's income,[22] number of dependents,[23] and marital status.[24] The maximum benefit for tax year 2023 will be $7,430, for taxpayers with three (or more) dependents and an income no greater than about $25,000, gradually phasing out for higher earners.[25] The EITC phases out completely (no credit is available) for those with incomes above about $50,000 (much lower for those with fewer or no dependents).[26]

The EITC has asymmetrical "phase-in" and "phase-out" features, which give it its distinctive irregular trapezoidal shape. The phase-in is steep; in the lower income range, "the taxpayer can substantially increase her EITC payment by increasing her earned income,"[27] at a rate up to 45 cents for each additional earned dollar. The phase-out is much more gradual, diminishing by between 16 and 21 cents for each dollar earned in excess of the peak amount. (See Fig. 1, *infra*.)

An essential factor in determining a taxpayer's precise grant is the number of "qualifying children" that taxpayer can claim.[28] A qualifying child must meet an age criterion (any age if disabled, otherwise generally under age 19 unless the person is a full-time student); a relationship criterion (son, daughter, stepchild, adopted child, sibling, including half- and step-siblings, grandchild, niece, or nephew); and a residency criterion (living with the taxpayer for more than half the year).[29] There are further nuances: for example, the child must be younger than the taxpayer or their spouse (relevant in some adult adoption or step-parent situations), and cannot be married or claimed by another taxpayer.[30] There is also no benefit to claiming more than three qualifying children.[31]

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22 *Who Qualifies for the Earned Income Tax Credit (EITC)*, IRS, https://perma.cc/4N7R-TFTM (showing that the benefit is based on "adjusted gross income" (AGI), but also has a disqualification for taxpayers who earn more than about $10,000 in "investment income.").

23 *See Income Limits and Range of Earned Income Tax Credit (EITC)*, IRS, https://perma.cc/3UJJ-BE97 (showing that the benefit is different for those with zero, one, two, or "three or more" children. Those with more than three children receive the same benefit as those with three).

24 *See id.*

25 *Earned Income and Earned Income Tax Credit (EITC) Tables*, IRS, https://perma.cc/FY8S-SFFT; *Income Limits and Range of EITC*, *supra* note 23.

26 Robert Bellafiore, *The Earned Income Tax Credit (EITC): A Primer*, TAX FOUNDATION (May 21, 2019), https://perma.cc/7J4A-L2TW; *Income Limits and Range of EITC*, *supra* note 23.

27 BANKMAN ET AL., *supra* note 19, at 615.

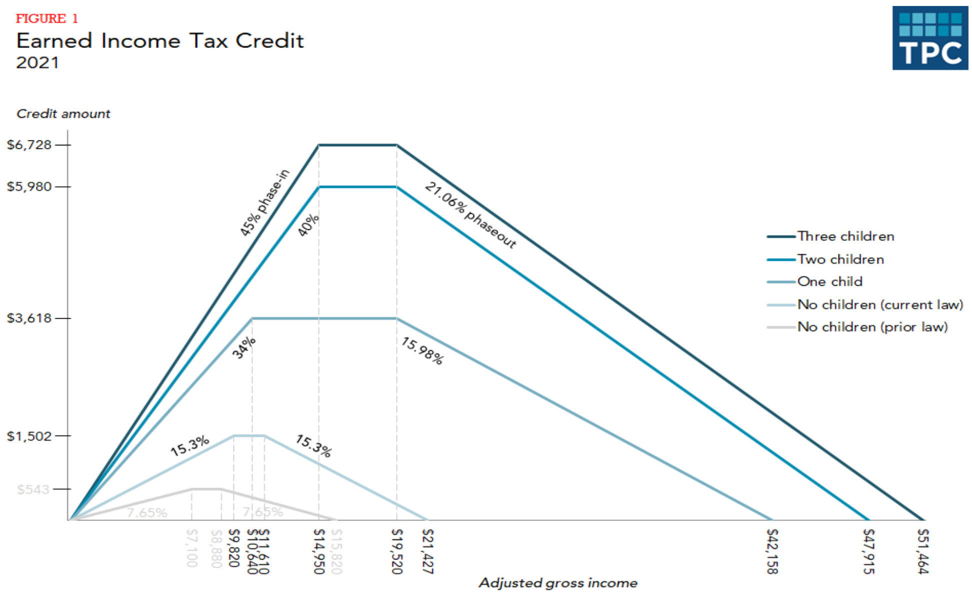
28 *Qualifying Child Rules*, IRS, https://perma.cc/JQN5-QYTB.

29 *Id.*; *see also* Elzayn et al., *supra* note 5, at 10.

30 *Qualifying Child Rules*, *supra* note 28.

31 *See Income Limits and Range of EITC*, *supra* note 23 (noting that the benefit is different for those with zero, one, two, or "three or more" children. Those with more than three children receive the same benefit as those with three).

Figure 1.



Source: Urban-Brookings Tax Policy Center (2021); Internal Revenue Procedure 2020-45, Internal Revenue Service; and H.R. 1319, "American Rescue Plan Act of 2021," 117th Cong. (2021.)
Notes: Assumes all income comes from earnings. Amounts are for taxpayers filing a single or head-of-household tax return. For married couples filing a joint tax return, the credit begins to phase out at income $5,940 higher than shown, or $5,950 if the couple has children.

Briefing Book: Key Elements of the U.S. Tax System, URBAN INST. & BROOKINGS INST. TAX POL'Y CTR. (May 2021), https://perma.cc/YC2E-GQ9A.

Paradoxically, the EITC contains both a marriage penalty and a marriage bonus, depending on the details of the taxpayers' situations. Two single taxpayers with three children apiece (the "Brady Bunch" example used by Bankman et al.) might be eligible for the maximum EITC individually if their income is in the "plateau" range.[32] If that couple married, they would receive considerably less, because the EITC provides no additional benefit for more than three children, and their combined income would put them on the phase-out leg of the EITC table. By contrast, consider a non-employed parent of three children who marries a childless taxpayer. Premaritally, neither might qualify, because the parent has no income and the non-parent has too much. But married, they might then be entitled to the credit.[33]

A sense of the EITC's complexity may be conveyed by reading all of its 2700 words (at Appendix A, *infra*), or by reflecting on the extraordinarily high error rate found on returns claiming the credit - as high as 50%, according to the IRS.[34] The

32 BANKMAN ET AL., *supra* note 19, at 616.
33 *Id*. at 617.
34 Lough, *supra* note 4.

rate is also high for paid preparers.[35] For 2020, "[t]he IRS estimates [that] 24 percent ($16.0 billion) of the total EITC payments of $68.2 billion were improper."[36] To put this in perspective, the lowest estimated "tax gap" (uncollected taxes) is $175 billion annually, and other estimates are as high as $630 billion or even $1 trillion.[37] IRS studies have reported an "improper payment rate" of 22-26% of EITC payments, and an "over-claim rate" of 29-39% of all dollars claimed.[38] However, some data suggests that *unclaimed* EITC payments may be as great as overclaims, resulting in no net loss due to overclaims.[39] Other IRS data indicates that "average discrepancies between taxes owed and taxes paid are smaller on EITC returns than on all returns."[40] In other words, errors may be statistically *frequent* without being especially large in dollar amounts, either individually or in the aggregate.

As already noted, the EITC is underclaimed; only about 80% of those eligible for it receive it, and about 15% of available funds go unpaid.[41] The EITC participation rate has hovered between 75% and 80% since at least 2005.[42] By contrast, Social Security, a benefit currently paid to approximately 66 million Americans per month and costing over $1 trillion per year, reaches well over 95% of the eligible.[43]

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35 *See, e.g.*, *Paid Preparers Have Highest Rate of EITC Claims in Error*, CTR. ON BUDGET & POL'Y PRIORITIES (Sept. 15, 2015), https://perma.cc/H6WA-DV7J; *Paid Tax Return Preparers: In a Limited Study, Preparers Made Significant Errors*, U.S. GOV'T ACCOUNTABILITY OFF. (Apr. 8, 2014), https://perma.cc/B639-N75B.

36 IMPROPER PAYMENT RATES FOR REFUNDABLE TAX CREDITS REMAIN HIGH (May 10, 2021), *supra* note 17; *see, e.g.*, Lough, *supra* note 4 (showing elsewhere, the improper payment total has been estimated at $17 billion).

37 John Guyton, Patrick Langetieg, Daniel Reck, Max Risch, and Gabriel Zucman, *Tax Evasion at the Top of the Income Distribution: Theory and Evidence*, at 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28542, 2021); FRANCINE J. LIPMAN, TAX AUDITS, ECONOMICS, AND RACISM 1-2, OXFORD RSCH. ENCYCLOPEDIA OF ECON. & FIN. (June 20, 2022); Natasha Sarin, *The Case for a Robust Attack on the Tax Gap*, U.S DEPT. OF THE TREASURY (Sept. 7, 2021), https://perma.cc/U5BH-EZV8; *but see* Daniel J. Pilla, *The Tax-Gap Myth*, NAT'L REV. (Sept. 19, 2021), https://perma.cc/M6TW-RFUW.

38 *Briefing Book: What are error rates for refundable credits and what causes them?*, URBAN INST. & BROOKINGS INST. TAX POL'Y CTR., https://perma.cc/6MEB-TGSY [hereinafter *Briefing Book*: *Error Rates for Refundable Credits*].

39 Lipman, *supra* note 37, at 10 (*citing* Maggie R. Jones & James P. Ziliak, *The Antipoverty Impact of the EITC: New Estimates from Survey and Administrative Tax Records* (U.S. Census Bureau, Working Paper No. CES 19-14, 2019)).

40 *Briefing Book: How do IRS audits affect low-income families?*, URBAN INST. & BROOKINGS INST. TAX POL'Y CTR., https://perma.cc/U9NF-CX2M.

41 *Briefing Book: Do all people eligible for the EITC participate?*, URBAN INST. & BROOKINGS INST. TAX POL'Y CTR., https://perma.cc/V7WF-8R8L (showing a discrepancy due to the fact that those entitled to larger credits are likelier to claim it).

42 Steve Holt, *Ten Years of the EITC Movement: Making Work Pay Then and Now*, METROPOLITAN POL'Y PROGRAM AT BROOKINGS 7 (Apr. 2011), https://perma.cc/77LJ-EKTB; *EITC Participation Rate by States Tax Years 2013 through 2020*, IRS, https://perma.cc/45VN-6R8P.

43 *Social Security Fact Sheet*, SOC. SEC. ADMINISTRATION (2023), https://perma.cc/7LNR-XND5; Kevin Whitman, et al., *Who Never Receives Social Security*

This disparity is especially notable because Social Security has no income-related "phase-out," meaning that even people wealthy enough not to need it still participate. Some other federal poverty-relief benefit programs have participation rates similar to the EITC; for example, the nationwide participation rate for the Supplemental Nutrition Assistance Program (SNAP) is 82%, although it is much higher in some states.[44]

C. Schedule EIC (Form 1040)

Of course, most taxpayers will not read (or perhaps ever see) section 32 of the Internal Revenue Code. Instead, they will rely on the considerably simpler 2-page form provided by the IRS for claiming this credit. This form is reproduced in the Appendix below at Figure 3.

Note the multiple "Caution" statements included on the form, including, at the top of page 1, "If you take the EIC even though you are not eligible, you may not be allowed to take the credit for up to 10 years."[45] A more complete version of this warning, based on 26 U.S.C. 32(k), appears on page 2. It reads,

> **Taking the EIC when not eligible.** If you take the EIC even though you are not eligible and it is determined that your error is due to reckless or intentional disregard of the EIC rules, you will not be allowed to take the credit for 2 years even if you are otherwise eligible to do so. If you fraudulently take the EIC, you will not be allowed to take the credit for 10 years. You may also have to pay penalties.[46]

Although the statement on this form is legally accurate (the page 2 version more than the page 1 version), for those not familiar with legal terms and concepts like "recklessness" or even "fraud," these "Cautions" may seem less like helpful advice and more like *in terrorem* deterrents to even trying to claim the benefit. Other "Schedules" (forms added to the basic income tax return form) do not contain "Cautions" that read as threats about errors or noncompliance.[47] The penalty of ineligibility is also unique to the EITC.[48] In general, the punishment for under-reporting income or overclaiming deductions is a penalty calculated as a percentage

Benefits?, 71 SOC. SEC. BULL. 17, 18 tbl.1 (2011).

44 *SNAP Participation Rates by State, All Eligible People (FY 2018)*, U.S. DEP'T OF AGRICULTURE FOOD & NUTRITION SERV., https://perma.cc/HZP4-ATS2.

45 INTERNAL REVENUE SERVICE, U.S DEP'T OF TREASURY, FORM 1040, EARNED INCOME CREDIT (2022).

46 *Id*.

47 *See, e.g.*, INTERNAL REVENUE SERVICE, U.S DEP'T OF TREASURY, FORM 1040 (2022), ITEMIZED DEDUCTIONS (including two "Cautions": "Your mortgage interest deduction may be limited. See instructions." and in the Charitable Deduction section, "If you made a gift and got a benefit for it, see instructions.").

48 INTERNAL REVENUE SERVICE, U.S DEP'T OF TREASURY, FORM 8936, QUALIFIED PLUG-IN ELECTRIC DRIVE MOTOR VEHICLE CREDIT (Jan. 2023); 26 I.R.C. § 30D (comparing the "Qualified Plug-in Electric Drive Motor Vehicle Credit," a (nonrefundable) credit of up to $7500, which has an income cut-off but no such penalty).

of the tax due (and added to that tax). For example, the penalty for "substantial underpayment" is "20% of the portion of the underpayment of tax that was understated on the return,"[49] while the civil fraud penalty is 75% of the portion of the underpayment in addition to the tax due.[50] Because EITC claimants generally owe no or very little tax, a percentage of tax due penalty might not amount to very much, and might well be uncollectible against EITC claimants. Nevertheless, the distinctiveness of this sanction is worth noting. Ordinary taxpayers, even those subjected to these potentially heavy penalties, are not punished by being rendered ineligible to receive refunds or credits in future years - or threatened on their tax forms.

III. AUDITS AND THE EITC

A. IRS Audit Rates

An examination (colloquially referred to as an "audit") by the IRS is a primary preliminary mechanism for enforcement of the tax laws.[51] However, very few taxpayers actually get audited in any given year. IRS audit rates were low before the Trump Administration,[52] and fell dramatically further during that time.[53] For the fiscal year 2018, "the IRS audited 1.1 million of the almost 196 million returns filed."[54] The current rate is about 4.1 per 1000 returns,[55] meaning that the IRS audited about 650,000 of the 161 million individual tax returns filed in 2021.[56] In 2021, about 85% - all but about 100,000 - were "correspondence" (letter) audits, rather than the dreaded audit conducted in an IRS office ("office audits"[57]) or at the

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49 *Accuracy-Related Penalty*, IRS, https://perma.cc/8JSW-8Y6T.

50 26 I.R.C. § 6663.

51 Elzayn et al. *supra* note 5, at 8; *see also* IRS, U.S DEP'T OF TREASURY, PUB. NO. 1, YOUR RIGHTS AS A TAXPAYER; INTERNAL REVENUE SERVICE, U.S DEP'T OF TREASURY, PUB. NO. 556, EXAMINATION OF RETURNS, APPEAL RIGHTS, AND CLAIMS FOR REFUND 1-2 (Sep. 2013).

52 Aimee Picchi, *Your chance of getting audited is lower than ever*, CBS NEWS (Jan. 7, 2020, 3:53 PM EST), https://perma.cc/7FRJ-67DY.

53 Ashlea Ebeling, *IRS Tax Return Audit Rates Plummet*, FORBES, (May 18, 2022, 5:46 PM EDT), https://perma.cc/6XU5-LRHA; *but see SOI Tax Stats - Examination Coverage and Recommended Additional Tax After Examination, by Type and Size of Return - IRS Data Book Table 17*, IRS (Oct. 24, 2023), https://perma.cc/P5SZ-FCQQ.

54 *Briefing Book: How do IRS audits affect low-income families?, supra* note 40.

55 *IRS Audits Poorest Families at Five Times the Rate for Everyone Else*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE SYRACUSE UNIV. (Mar. 8, 2022), https://perma.cc/BM9Z-2VME [hereinafter TRAC 2022]

56 *Returns Filed, Taxes Collected, and Refunds Issued*, IRS, https://perma.cc/3CUW-PZUY.

57 EVERYTHING EVERYWHERE ALL AT ONCE (AGBO 2022) (depicting an office audit that triggers the events of the Oscar-winning film).

taxpayer's place of business ("field audits").[58] Historically, the correspondence audit rate has been closer to 70%.[59]

Contrary to what some casebooks imply, audits are not a random "lottery."[60] But describing the IRS algorithm for audit as "a secret computer formula" is not much more helpful.[61] The IRS has priorities, even if they are not disclosed. The IRS has created and nurtured the idea that IRS audit rates rise with income. In fact, an IRS webpage is headlined, "Audit rates significantly increase as income rises," with the subheading, "Higher-income taxpayers face greater chance of audit."[62]

But these headlines are misleading; the IRS webpage itself presents data showing the higher rates for audits of low or no-income taxpayers.[63] Since 2010, the IRS has shifted enforcement attention and resources away "from high-income taxpayers towards low- and middle-income EITC taxpayers."[64] For example, in 2013, taxpayers with "no positive income" were audited at the highest rate of all taxpayers, 12.68%,[65] while the lowest audit rate in 2013 applied to returns reporting between $50,000 to $75,000 in income.[66] For 2013, only those reporting more than $500,000 in income were audited at a rate as high as that applied to those under $25,000; above $500,000, the audit rate rose.[67] For 2014 and 2015, the overall picture was similar, although some details were slightly different. The audit rate for the no/negative income group was exceeded only by taxpayers reporting more than $10,000,000, a group less than 3% as large.[68] The very largest group of taxpayers, those reporting positive income less than $25,000, were audited at a higher rate than any subgroup between $25,000 and $500,000.[69] In 2014, the lowest rate was for those between $75,000 and $100,000; and in 2015, it was those between $25,000 and $50,000.[70] In absolute terms, these differences are slight: all groups under $500,00 but with positive income have an audit rate below 1% for all years.[71] But they are significant in relative terms.

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58 TRAC 2022, *supra* note 55.

59 Elzayn et al., *supra* note 5, at 8.

60 JOHN A. MILLER & JEFFREY A. MAINE, FUNDAMENTALS OF FEDERAL TAXATION: PROBLEMS AND MATERIALS 669 (6th ed. 2023) ("Returns submitted by the taxpayer to the IRS may or may not be audited").

61 LAURIE L. MALMAN, LINDA F. SUGIN & CLINTON G. WALLACE, THE INDIVIDUAL TAX BASE: CASES, PROBLEMS, AND POLICIES IN FEDERAL TAXATION 34 (3rd ed. 2019).

62 Lough, *supra* note 4.

63 *Id*.

64 Kim Bloomquist, *Regional Bias in IRS Tax Audit Selection*, TAX NOTES (Mar. 4, 2019), https://perma.cc/57ZV-JYQJ; Brentin Mock, *IRS Audits Target the Wealth-Depleted Southern Black Belt*, BLOOMBERG (Apr. 3, 2019), https://perma.cc/TVL5-QRSG.

65 Lough, *supra* note 4.

66 *Id*.

67 *Id*.

68 *Id*.

69 *Id*.

70 *Id*.

71 *Id*.

Yet the most widely-used tax law casebook in the United States, Stephen Lind, Daniel Lathrope, and Heather Field, *Fundamentals of Federal Income Taxation*, now in its 20th edition, coyly refuses to share even what is well-known about what (and who) attracts the attention of auditors.

> How will [a taxpayer's return] be so selected [for audit]? We cannot be certain. It is the government's policy, perhaps analogous to that behind the unmarked patrol car, to keep taxpayers somewhat in the dark in this respect. The *in terrorem* effect is doubtless a boost to taxpayer integrity. Generally, it is more profitable for the government to audit returns reporting large amounts of income, because errors found there may produce much larger amounts of revenue. However, sufficient numbers of very small returns are subjected to scrutiny so that each taxpayer must wonder whether he or she is next.[72]

To put it charitably, the casebook's coverage of who is audited by reported income level implies a logic- and efficiency-driven approach the IRS does not in fact follow.

B. EITC Audit Rates, Practices, and Consequences

As described above, taxpayers with "no positive income" as well as those with incomes up to $25,000 have historically been audited at higher rates (though still low in absolute terms) compared to other groups other than the very highest income taxpayers. Currently, at least one-third of individual taxpayer audits involve returns that claim the EITC.[73] Notwithstanding these low overall audit rates, EITC claimants - not poor taxpayers more generally[74] - were audited at a rate *five times higher* than all other taxpayers.[75] The Teacher's Manual to Joel Newman, Dorothy Brown, and Bridget Crawford's *Federal Income Taxation: Cases, Problems, and Materials* casebook (though not the text proper) accurately describes the EITC as "a huge audit trigger," while noting that "[m]any instructors choose to omit detailed analysis and study of the EITC in § 32, even though it is perhaps the most important anti-poverty program in the country."[76]

Almost half of all FY 2021 audits (306,944 of 659,003) were audits of EITC claimants, and nearly all of these were correspondence audits.[77] This is typical. "The vast majority (94% in 2014) of audits of EITC claimants are correspondence

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72 STEPHEN LIND, DANIEL LATHROPE & HEATHER FIELD, FUNDAMENTALS OF FEDERAL INCOME TAXATION 969-70 (20th ed. 2022).

73 Elzayn et al., *supra* note 5, at 11.

74 TRAC 2022, *supra* note 55 (figure 1 caption) ("Internal Revenue Service [t]argets [l]owest [i]ncome [w]age [e]arners with [a]nti-[p]overty [e]arned [i]ncome audit at 5 [t]imes [r]ate for [e]veryone [e]lse, FY 2021.").

75 *Id*.

76 JOEL S. NEWMAN, DOROTHY A. BROWN & BRIDGET J. CRAWFORD, TEACHER'S MANUAL TO FEDERAL INCOME TAXATION: CASES, PROBLEMS, AND MATERIALS 189 (7th ed. 2019).

77 TRAC 2022, *supra* note 55.

examinations and approximately two-thirds occur pre-refund."[78] Although correspondence audits are inexpensive for the IRS, "correspondence audits can be particularly burdensome for lower-income households, who may face additional barriers understanding the audit notice, acquiring the required documents, or obtaining expert assistance."[79] The number of such audits actually *increased* during the pandemic. As the Transactional Records Access Clearinghouse (TRAC) reported in March of 2022,

> A large increase in federal income tax audits targeting the poorest wage earners allowed the Internal Revenue Service to keep overall audit numbers from further declines for Americans as a whole during FY 2021. That resulted in these low-income wage earners with less than $25,000 in total gross receipts being audited at a rate five times higher than for everyone else.[80]

Taxpayers who file early (well before April) can expect a refund quickly; overall, the IRS reports that it issues "more than 9 out of 10 refunds in less than 21 days."[81] But not EITC claimants. The IRS imposes further hardship on those least able to bear it in two ways. First, refunds *cannot* be issued to EITC claimants until February 15 at the soonest,[82] and currently, the IRS tells taxpayers not to expect them until February 28.[83]

Second, if a taxpayer is audited, the IRS places a "freeze" on their *entire refund*, even the part not in dispute (typically, withheld taxes), until the resolution of the audit.[84] This approach raises significant policy and fairness concerns, given that "tax audits…can exacerbate financial strain for the lowest income taxpayers – whose tax refunds are typically frozen while an audit is in place – and can dissuade individuals from participating in safety net programs for which they qualify."[85]

Making matters worse, up to 80% of recipients of correspondence audits fail to respond sufficiently and in time,[86] and those taxpayers lose not only their EITC but any claimed refund, including undisputed overpaid taxes, regardless of why they failed to respond.[87] Of those who do respond, "The IRS only confirms ineligibility of 13–15% of EITC audited claims, full eligibility of 6% or 7%, and partial

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78 Elzayn et al., *supra* note 5, at 11; *cf*. Lipman, *supra* note 37, at 11 (finding that 99% of EITC audits are correspondence audits).

79 Elzayn et al., *supra* note 5, at 8.

80 TRAC 2022, *supra* note 55.

81 *What to Expect for Refunds This Year*, IRS (Dec. 21, 2023), https://perma.cc/699J-34K7

82 *Held or Stopped Refunds*, IRS: TAXPAYER ADVOCATE SERVICE, https://perma.cc/98RY-42VM.

83 URB. INST. & BROOKINGS INST., TAX POL'Y CTR. BRIEFING BOOK 256 (May 2022), https://perma.cc/6SAN-R46N ("[T]he Protecting Americans from Tax Hikes Act of 2015 require[d] the IRS to delay tax refunds for taxpayers who claim an EITC until at least February 15"); *When to expect your refund*, IRS, https://perma.cc/MH4A-UBWL.

84 *Held or Stopped Refunds*, *supra* note 82.

85 Elzayn et al., *supra* note 5, at 2.

86 Lipman, *supra* note 37, at 12.

87 Elzayn et al., *supra* note 5, at 11.

eligibility of 2% of these claims."[88] Thus, most EITC claimants who are audited are denied their benefits without the IRS ever "affirmatively determining that the families do not qualify."[89]

C. EITC Audits and Race

The IRS does not collect race data, which makes it challenging to identify "differences in audit rates by race."[90] Researchers have been forced to use a variety of proxies for race, such as geography. A study of audits from 2012 to 2015 found that persons living in America's poorest, Blackest counties are audited at some of the very highest rates.[91] For example, while the overall national county-based audit rate during that time was 7.7 per 1000 returns filed, in Humphreys County, Mississippi, the rate was about 11.8.[92] In fact, "[t]he 10 counties with the highest IRS audit intensity are all found in the Black Belt, eight of them in Mississippi alone."[93] (The other two are in Louisiana and Alabama.)

Audit Intensity

1. Humphreys, Mississippi (71.51% Black)
2. Tunica, Mississippi (78.4% Black)
3. East Carroll, Louisiana (69.6% Black)
4. Coahoma, Mississippi (77.5% Black)
5. Noxubee, Mississippi (72.2% Black)
6. Holmes, Mississippi (84% Black)
7. Quitman, Mississippi (71.6% Black)
8. Sharkey, Mississippi (74% Black)
9. Claiborne, Mississippi (87.2% Black)
10. Greene, Alabama (79.6% Black)[94]

Although only 96 of the 3143 counties in the United States have Black majorities,[95] *all ten* of the most heavily audited counties are more than 70% Black. Only five counties in the entire U.S. are more than 80% Black - and *three* of those are on

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88 Lipman, *supra* note 37, at 12.

89 *Id*.

90 Elzayn et al., *supra* note 5, at 2.

91 Paul Kiel & Hannah Fresques, *Where in The U.S. Are You Most Likely to Be Audited by the IRS?*, PROPUBLICA (Apr. 1, 2019), https://perma.cc/4JJX-G5B6; Bloomquist, *supra* note 64.

92 Mock, *supra* note 64.

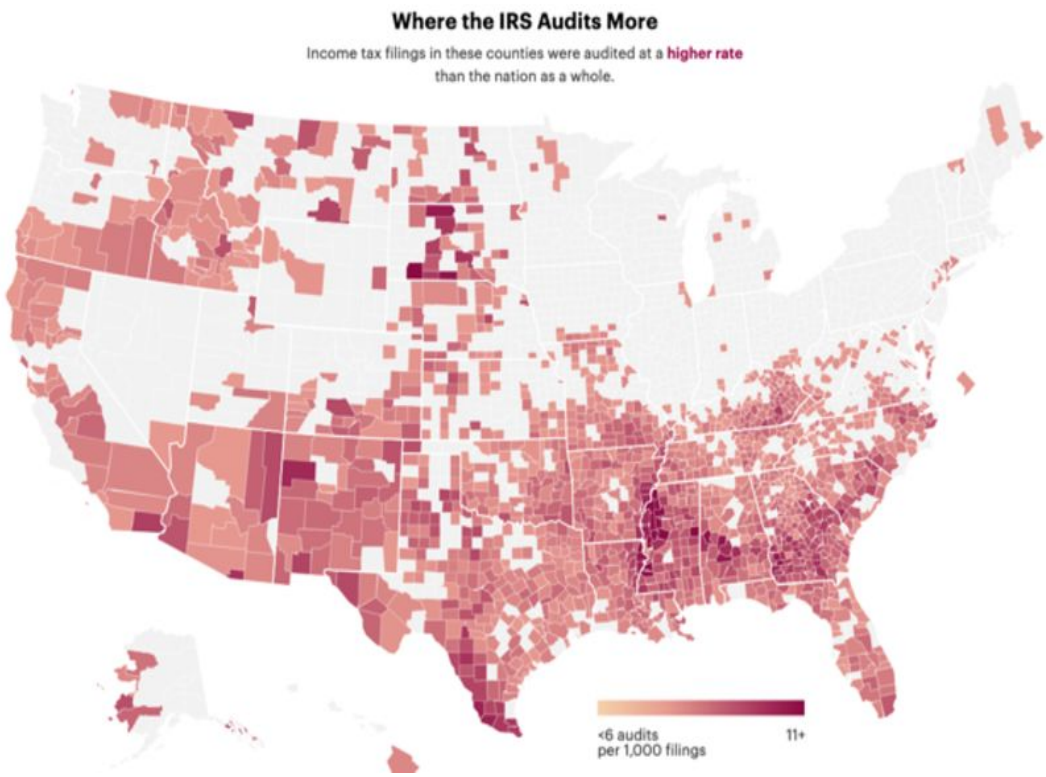
93 *Id*.

94 Aimee Picci, *Here are the counties where taxpayers are most likely to be audited*, CBS NEWS (Apr. 2, 2019), https://perma.cc/788L-FXF2.

95 Niraj Chokshi, *Diversity in America's counties, in 5 maps*, WASH. POST (June 30, 2014), https://perma.cc/NJY5-URMG.

the top-10 list for audit intensity.[96] More than sixty of the hundred most-audited counties in the country are in Mississippi, the poorest state in the U.S. by household income.[97] (Louisiana and Alabama are 47th and 46th by income.[98]) Meanwhile, seven of the ten *least*-audited counties are more than 90% non-Hispanic White, three are more than 96% White, and one is more than 98% White.[99]

Figure 2.



Paul Kiel & Hannah Fresques, *Where in The U.S. Are You Most Likely to Be Audited by the IRS?*, PROPUBLICA (April 1, 2019), https://perma.cc/WCN2-TH9J.

96 *Id*.

97 Ted C. Jones, *The Richest (and Poorest) States in America—Before and After Comparative Cost-of-Living Adjustments*, STEWART (May 15, 2021), https://perma.cc/8Q67-WB28.

98 *Id*.

99 Michael Harriot, *Racism by the numbers: How the Internal Revenue Service targets poor Black taxpayers,* THE ROOT (Apr. 11, 2019), https://perma.cc/P4HG-D7F9; Lipman, *supra* note 37, at 20.

These general patterns have existed since at least the mid-1990s.[100] Yet only one casebook has even partially acknowledged these findings, and only in the Teacher's Manual, which states, "Many of us find extremely disturbing the fact that the highest rates of income tax audits occur in the poorest counties in the country, as well as those counties that have large African-American populations."[101]

In late January 2023, the Stanford Institute for Economic Policy Research ("SIEPR") released a blockbuster study, "Measuring and Mitigating Racial Disparities in Tax Audits," that presented a number of deeply troubling findings about IRS audit practices.[102] The study was aptly described as a "must read,"[103] and has generated "calls for immediate action"[104] and broad responses throughout academia as well as tax practitioners.[105] The authors describe their project and its results this way:

> Government agencies around the world use data-driven algorithms to allocate enforcement resources. Even when such algorithms are formally neutral with respect to protected characteristics like race, there is widespread concern that they can disproportionately burden vulnerable groups. We study differences in Internal Revenue Service (IRS) audit rates between Black and non-Black taxpayers. Because neither we nor the IRS observe taxpayer race, we propose and employ a novel partial identification strategy to estimate these differences. Despite race-blind audit selection, we find that Black taxpayers are audited at 2.9 to 4.7 times the rate of non-Black taxpayers. The main source of the disparity is differing audit rates by race among taxpayers claiming the Earned Income Tax Credit (EITC). Using counterfactual audit selection models for EITC claimants, we find that maximizing the detection of underreported taxes would not lead to Black taxpayers being audited at higher rates. In contrast, in these models, certain policies tend to increase the audit rate of Black taxpayers: (1) designing

100 Lipman, *supra* note 37, at 19 (summarizing an Inspector General for Tax Administration report that found a racially disparate impact in EITC audits dating back to the mid-1990s in "southern states with higher populations of communities of color").

101 JOEL S. NEWMAN, DOROTHY A. BROWN, AND BRIDGET J. CRAWFORD, TEACHER'S MANUAL TO FEDERAL INCOME TAXATION: CASES, PROBLEMS, AND MATERIALS 6-7 (7th ed. 2019).

Teacher's Manual material included here by permission of Professor Bridget J. Crawford. E-mail from Diane Kemker to Professor Bridget J. Crawford (Oct. 30, 2022, 6:23AM) (on file with author). The first part of this statement is not quite correct – the *very* poorest counties do not experience high audit rates because they have very few taxpayers reporting income at all. This includes some counties with large correctional facilities and some counties with large indigenous populations. *Poorest Counties in the United States*, WORLD POP. REV., https://perma.cc/2TKB-HN32.

102 Elzayn et al., *supra* note 5.

103 Samantha Galvin, *January 2023 Digest*, TAX NOTES: PROCEDURALLY TAXING (Feb 1. 2023) https://perma.cc/TUW6-B4TQ.

104 Kathleen Bryant & Chiye-Ching Huang, *New Evidence on Racial Disparities in IRS Audit Selection Calls for Immediate Action* (Mar. 2, 2023) (Working Paper) (on file with the Tax Law Ctr., NYU Law) https://perma.cc/KBK9-EMZM.

105 Tim Shaw, *Analysis: How the Tax World Has Responded to Stanford's Study on Black Audit Rates*, REUTERS (Aug. 3, 2023), https://perma.cc/8CFJ-DYEB.

> audit selection algorithms to minimize the "no-change rate"; (2) targeting erroneously claimed refundable credits rather than total under-reporting; and (3) limiting the share of more complex EITC returns that can be selected for audit. Our results highlight how seemingly technocratic choices about algorithmic design can embed important policy values and trade-offs.[106]

The modest and dispassionate tone taken by the group of authors should not lead us to underestimate the magnitude of their accomplishment. Using sophisticated techniques of economic and data analysis,[107] they found ways to see through the formally race-blind procedures of the IRS to reveal policies reflecting deep-seated biases. Their counterfactual audit selection models, trained on a huge data set, go far beyond the alleged "audit lottery" or "secret computer formula" approach. They demonstrate that the actual audit rates cannot be the result of algorithms aimed at "maximizing the detection of underreported taxes," the goal one might imagine is the lodestar of *all* IRS enforcement. The data they analyze at least suggests (if it cannot yet be proved) the use of a model that "target[s] erroneously claimed refundable credits [including the EITC] rather than total under-reporting" including by high income taxpayers; in other words, the IRS prioritizes an erroneously claimed $1 of refundable credit over $10 or more of under-reported taxable income, that might net far more than $1 to the fisc.

Some of the researchers' specific findings were surprising - even to them. First, "[O]ur estimates imply that Black taxpayers are audited at between 2.9 to 4.7 times the rate of non-Black taxpayers."[108] "Second, we find that the difference in audit rates for Black and non-Black taxpayers is primarily driven by the difference in audit rates among taxpayers who claim the EITC"[109] - but *not*, as others have speculated, simply because Black taxpayers are likelier to claim the EITC, and EITC claimants are likelier to be audited.[110]

Among EITC claimants, "Black taxpayers claiming the EITC are between 2.9 and 4.4 times as likely to be audited as non-Black EITC claimants."[111] This is a staggering finding. As is the fact that no other non-racial feature accounts for it: "We find that the disparity cannot be fully explained by racial differences in income, family size, or household structure…the observed audit disparity remains large after conditioning on these characteristics."[112]

Finally, and as the study's authors put it, "More strikingly, the disparity cannot be fully explained even by accounting for group-level differences in tax under-reporting: we estimate that Black EITC claimants are audited at higher rates than

106 Elzayn et al. *supra* note 5, at 1.

107 *Id*. at 3 (describing the "partial identification strategy" employing first names, last names, and census tracts to estimate taxpayer race).

108 *Id*.

109 *Id*.

110 *Id*. at 3-4.

111 *Id*. at 4.

112 *Id*.

non-Black EITC claimants within each decile of under-reported taxes."[113] In other words, all else equal - *all* else, including EITC claiming, income, family size, household structure, and even *amount of under-reported tax* - Black taxpayers are more heavily audited than non-Black ones.

Relatedly, and although it is not their primary focus, "if it were possible to select audits in descending order of true under-reported tax liability, Black taxpayers would be audited at a *lower* rate than non-Black taxpayers."[114] Thus, their findings suggest that while Black taxpayers may under-report more *often*, they are responsible for *less* total under-reporting (in dollars) than non-Black groups, and yet are audited dramatically more frequently.

A number of their specific findings also reflect intersectional race/gender phenomena: "among unmarried men with children, Black EITC claimants are audited at more than twice the rate of their non-Black counterparts."[115] As they explain more fully, "Strikingly, among unmarried EITC claimants with dependents, the audit rate for Black men is over 4 percentage points larger than the audit rate for non-Black men, and both are an order of magnitude larger than the audit rate for the overall U.S. population."[116] For other groups (married couples filing jointly, single women, and single men not claiming dependents), the racial audit disparities are smaller, but still reveal heavier audit rates of Black taxpayers.[117] The bottom line: Black single fathers claiming the EITC are the likeliest taxpayers in America to be audited.[118]

By a letter dated May 15, 2023, the IRS confirmed these findings, though expressing them in the comparatively anodyne (and "lottery"-style) form that "our initial findings support the conclusion that Black taxpayers may be audited at higher rates than would be expected given their share of the population."[119] As described above, rational audit priorities would include return to the fisc, and ought to be driven at least in part by data related to either income itself or to underpayment of tax, rather than share of the population demographically considered. The IRS has expressed its intent "to quickly evaluate the extent to which IRS's exam priorities and automated processes, and the data available to the IRS for use in exam selection, contribute to this disparity."[120] The IRS has also acknowledged, albeit implicitly, at least a possible connection between racial bias and the economic inefficiency of the IRS "focus [] on EITC overclaims."[121]

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113 *Id*.

114 *Id*. (emphasis added).

115 *Id*.

116 *Id*. at 28-29.

117 *Id*. at 29.

118 *Id*.

119 Letter from Daniel I. Werfel, Comm'r, IRS, to Sen. Ron Wyden (May 15, 2023), https://perma.cc/8WRN-QKSU.

120 *Id*.

121 *Id*. ("As part of this work, we are evaluating the potential impact of methodological changes to case selection (e.g., optimizing on broader tax issues rather than focusing on EITC

IV. EITC OVERAUDITS EVALUATED USING CRITICAL TAX THEORY

Recall now the passage from the Lind, Lathrope, and Field casebook, analogizing audit policy "to that behind the unmarked patrol car," whose "*in terrorem* effect is doubtless a boost to taxpayer integrity…so that each taxpayer must wonder whether he or she is next."[122] Knowing what we now know about racial profiling in law enforcement,[123] and about EITC audits, perhaps this analogy to traffic stops, and the true target of their *in terrorem* effects, is unwittingly accurate. As Elzayn et al. have shown, not everyone needs to be equally worried about "whether he or she is next" as the target of IRS audit enforcement.

A basic and major premise of the analysis offered here is that the Internal Revenue Service, in its civil enforcement role, should solely be engaged in activities that lawfully enhance the internal revenue of the United States. A related minor premise imports basic efficiency preferences: it is more lucrative and thus preferable, all else equal, for the Service to spend $1 to raise $10 than to spend $1 to raise $1.01 (or just to spend $1 for nothing). As Elzayn et al. note, "Although a dollar of detected underreporting is worth the same whether it arises from underreported income or over-claimed credits, the agency may prioritize enforcement activity around the latter due to various policy or political considerations."[124] It "may," but *should* it?

As the Transactional Records Access Clearinghouse (TRAC) report asks (rhetorically, one hopes), "Does it make sense from either an equity or revenue standpoint to focus IRS's limited firepower on the poorest taxpayers among us - those with incomes so low they have filed returns claiming an anti-poverty earned income tax credit?"[125] Professor Francine Lipman answers with a resounding "no": "Every tax dollar that goes unpaid has the same effect on the U.S. Treasury as a dollar that is 'overpaid' by a government program."[126]

Elzayn et al. have shown, perhaps unsurprisingly, that if the audit algorithm looks for signs of "refundable credit over-claims," rather than simply seeking "total underreporting," it detects less total underreporting, "indicating that over-claims of refundable credits are not the only important source of underreporting even among EITC claimants. Even more striking is the difference between the models with respect to [racial] disparity: the model trained on refundable credits selects Black taxpayers at a higher rate for all audit budgets we consider."[127]

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overclaims).").

122 LIND ET AL., *supra* note 72, at 969-70 (footnotes omitted).

123 Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States*, 4 NAT. HUM. BEHAV. 736 (2020); KATHERYN RUSSELL-BROWN, THE COLOR OF CRIME 82-86 (3rd ed. 2021).

124 Elzayn et al., *supra* note 5, at 37.

125 TRAC 2022, *supra* note 55.

126 Lipman, *supra* note 37, at 16.

127 Elzayn et al., *supra* note 5, at 37-38.

A second major premise is that efficient revenue-raising activities, like all activities undertaken by the U.S. government, must comport with the rest of U.S. law, including especially Constitutional norms and federal laws mandating non-discrimination and Equal Protection. The IRS is expressly committed to this principle. The IRS Manual mandates the "Non-discriminatory treatment of taxpayers": "The Internal Revenue Service prohibits discrimination against taxpayers based on race, color, national origin (including limited English proficiency), sex, religion, disability and age in its programs, activities and services."[128] Non-discrimination functions as a limit or elaboration of what is meant by "all else *equal*" in the minor premise above. A highly lucrative, but racially (or otherwise impermissibly) discriminatory, enforcement method, is never to be preferred to a non-discriminatory enforcement method, even if the latter is either less efficient or less lucrative.

As Judge Shira Sheindlin famously stated in *Floyd v. City of New York*, the federal civil rights case that struck down the NYPD's racially discriminatory use of "stop and frisk," "This Court's mandate is solely to judge the *constitutionality* of police behavior, *not* its effectiveness as a law enforcement tool. Many police practices may be useful for fighting crime—preventive detention or coerced confessions, for example—but because they are unconstitutional they cannot be used, no matter how effective."[129] The same principle surely applies here: *no* enforcement method that violates anti-discrimination norms should *ever* be used, regardless of how lucrative it might be (or any other available justification). If it also proves not to be lucrative, it has no justification whatsoever.

A. An Analogy from Foucault, *Discipline & Punish*

The *status quo*, characterized by pointlessly complex EITC rules, error-riddled EITC returns, excessive pre-refund EITC audit rates, documented racially disparate audit practices of the IRS, and an annual tax gap at least ten times larger than the IRS's own estimates of EITC overpayments (without reduction for underpayments) - frustrates and violates virtually every known principle of tax enforcement. It is inefficient, it is unfair, it is irrational, it is unproductive. And yet, it persists.

In his 1975 masterpiece *Discipline & Punish: The Birth of the Prison*, Michel Foucault provided an analytical technique for understanding a large-scale governmental system - in his case, the prison - that is apparently failing at its stated aims yet nevertheless remains entrenched. Addressing the well-known failures of incarceration, Foucault suggested considering the hypothesis that it is *succeeding at something else*, something *other* than its stated goals.[130] As he explained,

> If the law is supposed to define offences, if the function of the penal apparatus is to reduce them and if the prison is the instrument of this repression, then failure has to be admitted….But perhaps one should reverse the problem and

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128 Internal Revenue Manual 1.20.4.2.1 (8-12-2020).

129 Floyd v. City of New York, 959 F.Supp.2d 540, 556 (S.D.N.Y. 2013).

130 MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 271-72, 277 (1975, Trans. 1977).

> ask oneself what is served by the failure of the prison.... For the observation that prison fails to eliminate crime, one should perhaps substitute the hypothesis that prison has succeeded extremely well in producing delinquency.... So successful has the prison been that, after a century and a half of 'failures', the prison still exists, producing the same results, and there is the greatest reluctance to dispense with it.[131]

Foucault's suggestion is that the production of "delinquency" itself (which might better be translated by "criminality," to remove the trivializing connotation of "juvenile delinquent" that it inevitably has in American English) served the larger social function of discipline and control in the emerging incarcerating cultures he analyzed.[132]

It is easy to identify what the EITC fails to do. Despite being described over and over as "lifting people out of poverty," it demonstrably does not do so (and quite obviously it *could* not do so - how could an annual payment of $2000 - or even $7000 - lift anyone "out of poverty"?). At best, it might ameliorate the most acute deprivations or take people (temporarily) across an artificial "poverty line." But as Bankman et al. report, the poverty rate has "remained remarkably constant over the years"[133] (since the 1990s), at about 13%, despite the continuous operation of the EITC. In addition, "poverty tends to be persistent, not just through an adult's life but through the life of his or her children."[134] And yet, just a few pages later, they too state that "The EITC appears to be extremely effective at helping individuals escape poverty,"[135] and they describe the EITC as "an extremely effective antipoverty program,"[136] claims squarely contradicted by the data they have just presented. Nor do audits achieve *their* stated goals of compliance or cost-savings or full participation; error, overpayment, and underclaim rates remain as constant as poverty rates do.

These shortcomings are frequently and reliably blamed on the EITC's complexity; yet it grows *more* rather than less complex with each "reform."[137] Here,

131 *Id*.

132 *Id*. at 271.

133 BANKMAN ET AL., *supra* note 19, at 611.

134 *Id*.

135 *Id*. at 617.

136 *Id*. at 618.

137 For example, the notes to the amendment of I.R.C. § 32 read:
(Added Pub. L. 94–12, title II, § 204(a), Mar. 29, 1975, 89 Stat. 30, § 43; amended Pub. L. 94–164, § 2(c), Dec. 23, 1975, 89 Stat. 971; Pub. L. 94–455, title IV, § 401(c)(1)(B), (2), Oct. 4, 1976, 90 Stat. 1557; Pub. L. 95–600, title I, §§ 104(a)–(e), 105(a), Nov. 6, 1978, 92 Stat. 2772, 2773; Pub. L. 95–615, § 202(g)(5), formerly § 202(f)(5), Nov. 8, 1978, 92 Stat. 3100, renumbered § 202(g)(5) and amended Pub. L. 96–222, title I, §§ 101(a)(1), (2)(E), 108(a)(1)(A), Apr. 1, 1980, 94 Stat. 194, 195, 223; Pub. L. 97–34, title I, §§ 111(b)(2), 112(b)(3), Aug. 13, 1981, 95 Stat. 194, 195; Pub. L. 98–21, title I, § 124(c)(4)(B), Apr. 20, 1983, 97 Stat. 91; renumbered § 32 and amended Pub. L. 98–369, div. A, title IV, §§ 423(c)(3), 471(c), title X, § 1042(a)–(d)(2), July 18, 1984, 98 Stat. 801, 826, 1043; Pub. L. 99–514, title I, §§ 104(b)(1)(B), 111(a)–(d)(1), title XII, § 1272(d)(4), title XIII, § 1301(j)(8), Oct. 22, 1986, 100 Stat. 2104, 2107, 2594, 2658; Pub. L. 100–647, title I, §§ 1001(c), 1007(g)(12), Nov. 10, 1988, 102 Stat. 3350,

too, Foucault has another lesson for us: to resist (or at least question) what he calls "utopian duplication." This is the impulse, upon seeing these failures, to seek to reform the institution in a way that only makes it more and more like itself, "the repetition of a 'reform' that is isomorphic, despite its 'idealism', with the disciplinary functioning of the" institution as it already exists.[138] Each "reform" that creates more numerous or more complicated eligibility criteria, or renders EITC enforcement more draconian in the hopes that only the deserving will claim or receive it, is of this type.[139] Yet the persistent high audit rate has not increased compliance or reduced the likelihood of error or recovered a large sum of money for the government. No data suggests that after many, many years of overaudits, either claimants or paid preparers have gotten any better at getting it right. And yet, the very failure of the IRS audit approach is used to justify its continuation or enhancement.

Instead, Foucault's methodology urges us to "reverse the problem and ask what is served by the failure" of the EITC and EITC overaudits. For the observation that EITC audits "fail to eliminate" the (alleged) harms of overclaiming, "one should perhaps substitute the hypothesis that [EITC audits have] succeeded extremely well" at something *else*. So much so that after half a century of failure, the EITC in its current form, including IRS EITC audit practices, like the prison, "still exists, producing the same results, and there is the greatest reluctance to dispense with it." What if it's not that the IRS must audit so many poor working people's

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3436; Pub. L. 101–508, title XI, §§ 11101(d)(1)(B), 11111(a), (b), (e), Nov. 5, 1990, 104 Stat. 1388–405, 1388–408, 1388–412, 1388–413; Pub. L. 103–66, title XIII, § 13131(a)–(d)(1), Aug. 10, 1993, 107 Stat. 433–435; Pub. L. 103–465, title VII, §§ 721(a), 722(a), 723(a), 742(a), Dec. 8, 1994, 108 Stat. 5002, 5003, 5010; Pub. L. 104–7, § 4(a), Apr. 11, 1995, 109 Stat. 95; Pub. L. 104–193, title IV, § 451(a), (b), title IX, §§ 909(a), (b), 910(a), (b), Aug. 22, 1996, 110 Stat. 2276, 2277, 2351, 2352; Pub. L. 105–34, title I, § 101(b), title III, § 312(d)(2), title X, § 1085(a)(1), (b)–(d), Aug. 5, 1997, 111 Stat. 798, 840, 955, 956; Pub. L. 105–206, title VI, §§ 6003(b), 6010(p)(1), (2), 6021(a), (b), July 22, 1998, 112 Stat. 791, 816, 817, 823, 824; Pub. L. 106–170, title IV, § 412(a), Dec. 17, 1999, 113 Stat. 1917; Pub. L. 107–16, title II, § 201(c)(3), title III, § 303(a)–(f), (h), June 7, 2001, 115 Stat. 47, 55–57; Pub. L. 107–147, title IV, § 416(a)(1), Mar. 9, 2002, 116 Stat. 55; Pub. L. 108–311, title I, § 104(b), title II, § 205, Oct. 4, 2004, 118 Stat. 1169, 1176; Pub. L. 109–135, title III, § 302(a), Dec. 21, 2005, 119 Stat. 2608; Pub. L. 109–432, div. A, title I, § 106(a), Dec. 20, 2006, 120 Stat. 2938; Pub. L. 110–234, title IV, § 4002(b)(1)(B), (2)(O), May 22, 2008, 122 Stat. 1096, 1097; Pub. L. 110–245, title I, § 102(a), June 17, 2008, 122 Stat. 1625; Pub. L. 110–246, § 4(a), title IV, § 4002(b)(1)(B), (2)(O), June 18, 2008, 122 Stat. 1664, 1857, 1858; Pub. L. 111–5, div. B, title I, § 1002(a), Feb. 17, 2009, 123 Stat. 312; Pub. L. 111–226, title II, § 219(a)(2), Aug. 10, 2010, 124 Stat. 2403; Pub. L. 111–312, title I, § 103(c), Dec. 17, 2010, 124 Stat. 3299; Pub. L. 112–240, title I, § 103(c), Jan. 2, 2013, 126 Stat. 2319; Pub. L. 113–295, div. A, title II, §§ 206(a), 221(a)(3), Dec. 19, 2014, 128 Stat. 4027, 4037; Pub. L. 114–113, div. Q, title I, § 103(a)–(c), title II, § 204(a), Dec. 18, 2015, 129 Stat. 3044, 3045, 3081; Pub. L. 115–97, title I, § 11002(d)(1)(D), Dec. 22, 2017, 131 Stat. 2060; Pub. L. 115–141, div. U, title I, § 101(a), title IV, § 401(b)(4), Mar. 23, 2018, 132 Stat. 1160, 1201; Pub. L. 117–2, title IX, §§ 9621(a), 9622(a), 9623(a), (b), 9624(a), (b), Mar. 11, 2021, 135 Stat. 152–154.)

138 FOUCAULT, *supra* note 130, at 271.

139 *E.g., Briefing Book*: *Error Rates for Refundable Credits, supra* note 38 (explaining that "the Protecting Americans from Tax Hikes Act of 201 . . . require[d] the IRS to delay tax refunds for taxpayers who claim an EITC. . .until at least February 15.").

tax returns *because* the EITC is so complicated and they make so many mistakes (as the IRS claims); but rather that each additional complication of the EITC, however intended, also predictably *produces* mistakes that in turn justify the heightened punishment and surveillance of the poorest Black working Americans? This hypothesis helps us begin to make sense of why this benefit is so much more mathematically complicated than others - so difficult that even paid tax preparers don't get it right most of the time - and yet why there seems to be so little will to simplify it.

B. Using Critical Race Theory to Understand EITC Audit Practices

To understand what interest is served by the current state of the EITC and IRS EITC audit practices we must understand more about race and law in America, and about anti-Black racism and tax law specifically. Bankman et al., who stand alone in devoting an entire chapter of their tax law casebook to "Tax and Poverty: The Earned Income Tax Credit," say not a single word about race *or* EITC audits.[140] Their very brief discussion of audits (in Chapter 1) mentions neither race nor the EITC, and only alludes vaguely to audits of returns "indicating a greater-than-average probability of error."[141] Well-meaning commentators who address audits but ignore race (perhaps because the IRS itself claims to do so) are left saying things like, the "IRS targets low-income taxpayers because they are simply easier to audit while those with higher incomes escape any examination,"[142] or describing IRS audit policies as demonstrating "regional bias."[143]

Unsurprisingly, the IRS's own explanations are equally unsatisfying, when they are not outright nonsense. For example, the outgoing IRS Deputy Commissioner for Services and Enforcement Sunita Lough "explained" the need for EITC audits by reference to the "improper payment rate," unironically bemoaning that, "despite significant guidance provided by the IRS and others, people (including tax preparers) simply misunderstand the complex EITC rules."[144] It couldn't be *the rules themselves*, apparently; tens of millions of taxpayers inexplicably "simply misunderstand" them, every year. Lough patronizingly addressed the underclaim rate the same way: "many, many people simply overlook claiming this important refundable credit that they are entitled to."[145] Nothing to see here, the government is just giving away free money to poor working taxpayers, with information right on the form the taxpayer is completing, yet somehow millions of them "simply overlook" it. Apart from its promised responses to the SIEPR study,[146] the best the IRS has offered to address this oversight are annual "EITC Awareness Day events

140 BANKMAN ET AL., *supra* note 19, at 611-618.
141 *Id*. at 29.
142 TRAC 2022, *supra* note 55.
143 Bloomquist, *supra* note 64.
144 Lough, *supra* note 4.
145 *Id*.
146 *See* Letter from Daniel I. Werfel to Sen. Ron Wyden, *supra* note 119.

throughout the country [as] an effort to increase participation by eligible people and enhance the rate of compliance."[147]

We must begin from a recognition that elements of the EITC and EITC audit enforcement are "discriminatory,"[148] and then go deeper if we wish to understand *how* and *why* this happens.

Professor Dorothy Brown's work in this area has made a huge contribution to explaining how numerous apparently race-neutral aspects of the Internal Revenue Code have racially disparate consequences.[149] As both Brown and Francine Lipman have shown, differences between Black and white families in America—like differences in marriage rates and labor force participation and differences in earnings resulting from historic patterns of discrimination in employment and housing—translate into differences in tax treatment that systematically favor white families.[150]

The 2023 Stanford Institute for Economic Policy Research study goes further than any prior work in helping to explain how certain race-blind audit algorithms can and do disproportionately select Black EITC returns for audit, with all the damaging sequelae that follow, including delays, denials, and future ineligibility. The model created by Elzayn et al. not only uncovers grossly racially disparate audit policies and practices, it strongly suggests that the alleged "tax cheat" IRS enforcement prioritizes is a poor, Black, working parent living in America's "Black Belt," rather than (say) a high-living (White) millionaire with offshore bank accounts and multiple unreported pass-through entities.[151]

What prior scholarship in this area has not addressed is the question of *why*. *Why* would the IRS employ such an inefficient, uneconomical, irrational audit algorithm? What interest is served by it?

Here, tax scholars can benefit greatly from the work of critical race theorists. For decades, scholars have studied racial disparities in the criminal justice system.[152] In *The New Jim Crow*, Michelle Alexander examined mass incarceration in the United States, which she persuasively characterized as "one of the most extraordinary systems of racialized social control the world has ever seen."[153] She set out to explain how mass incarceration was explained in race-neutral terms, despite the

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147 Lough, *supra* note 4.

148 Lipman, *supra* note 37, at 1, 19, 21.

149 DOROTHY BROWN, THE WHITENESS OF WEALTH (2021).

150 *Id.*; *see, e.g.*, Francine J. Lipman, *The Taxation of Undocumented Immigrants: Separate, Unequal, and Without Representation*, 9 HARV. LATINO L. REV. 1 (2006); Francine J. Lipman, *How to Design an Antiracist State and Local Tax System*, 52 SETON HALL L. REV. 1541 (2022); Francine J. Lipman, *(Anti)Poverty Measures Exposed*, 21 FLA. TAX REV. 389, 493-502 (2017).

151 *See generally* Lipman, *supra* note 37 (analyzing the complex causes and dimensions of the tax gap).

152 *See, e.g.*, Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982); Alfred Blumstein, *Racial Disproportionality of US Prison Populations Revisited*, 64 UNIV. COLO. L. REV. 743 (1993).

153 ALEXANDER, *supra* note 13, at 103.

fact that "[n]inety percent of those admitted to prison for drug offenses were black or Latino."[154] She rejected the idea that "[o]ld-fashioned racism" could be used to "explain the extraordinary racial disparities in our criminal justice system,"[155] because "[p]oliticians and law enforcement officials today rarely endorse racially biased practices,"[156] "most of them fiercely condemn racial discrimination of any kind,"[157] and there is widespread support for "colorblind norms."[158] She asked, "*how* exactly does a formally colorblind criminal justice system achieve such racially discriminatory results?"[159]

Although the answers she offered are specific to the criminal justice setting, the question posed by EITC enforcement is fundamentally the same. As in the criminal justice system, what Alexander calls "[o]ld-fashioned racism" is not present. The Internal Revenue Code makes no explicit mention of race ("colorblind norms"); the IRS does not collect race data on taxpayers; and the IRS "fiercely condemns racial discrimination of any kind." As Commissioner Werfel stated just a few months ago and in response to the SIEPR study, "Let me start by stressing that the IRS is committed to enforcing tax laws in a manner that is fair and impartial."[160] He continued, "We will work to identify any disparities across dimensions including age, gender, geography, race, and ethnicity as well as continually refining our approaches to compliance and enforcement to improve fairness in tax administration."[161]

Yet as Foucault reminds us, the audit patterns revealed by Elzayn et al., and the complex underlying structure of the EITC, persistent as they are, should be seen as doing *something* "extremely well." What? The answer requires placing the EITC and EITC audits into the larger system of economic White supremacy, where they perpetuate the economic exploitation and government-sponsored abuse and surveillance of Black families and Black economic activity. EITC overaudits should be viewed as a form of law enforcement, as a technology of racial subordination, and thus as a cost of the maintenance of White supremacy itself. Understanding how race-neutral tax laws and apparently color-blind tax enforcement function together in a racial discriminatory and subordinating way requires filling in some "missing links." The links offered here, drawn from critical race theory, are longstanding anti-Black tropes and stereotypes that elide the differences between poor Black taxpayers entitled to a public benefit and habitual criminals, fraudsters, and social deviants, (arguably) appropriately subjected to surveillance and punishment.

154 *Id*. at 58.
155 *Id*. at 100.
156 *Id*.
157 *Id*.
158 *Id*.
159 *Id*. at 103.
160 Letter from Daniel I. Werfel to Sen. Ron Wyden, *supra* note 119.
161 *Id*.

1. The role of stereotypes

A complex set of pre-existing racist and specifically anti-Black stereotypes haunts not only IRS EITC audit policy, but crucial features of the EITC itself. Many of these stereotypes derive from the economic and political institution of enslavement, which both relied on and perpetuated racist beliefs about men and women of African descent, their personal traits, attitudes towards work, and sexuality. Despite the connection to enslavement, these are stereotypes held and perpetuated by White people throughout the United States; they are not distinctive to the formerly slave-owning South.[162] As Katheryn Russell-Brown reminds us, "There are social costs to perpetuating inaccurate stereotypes, including exaggerated levels of race-based fear and greater levels of racial scapegoating."[163] Just as the myth of the "superpredator," built on stereotypes, was used to justify grossly disproportionate practices of policing and punishment,[164] these stereotypes fuse with already negative American attitudes about poor people more generally[165] to regard EITC claimants as undeserving and overaudits as appropriate or even necessary, rather than as wasteful, cruel, and discriminatory.

Should we doubt the current prevalence of this way of thinking, consider this passage, drawn from a tax law casebook:

> Given the potentially substantial tax benefits associated with identifying an individual as a dependent, taxpayers might very well conclude that the term *dependent* should be construed broadly and not limited so rigidly to the children they clothed, fed, and housed; random nieces and nephews might suddenly take on a "dependent" aura as tax season dawns, especially if one parent of the purported dependent is incarcerated and the other doesn't really hold what one would call a "job," at least not a stable one.[166]

In a single long and winding sentence dripping with condescension, the author has conjured up a whole host of anti-Black stereotypes and tropes. Without a single overt mention of race or gender, he invokes a stereotyped dysfunctional Black family, consisting of a criminal father (Black men are incarcerated at the highest rates of any group[167]), a lazy un- or underemployed mother (who "doesn't really hold what one would call a 'job'"), and the conniving dishonest uncle or auntie ready to claim these "random [?] nieces and nephews" as dependents, all to get an undeserved refund of a few thousand dollars.

Although these anti-Black stereotypes frequently appear in combination, it is worth disentangling them to examine how each specifically relates to the EITC and EITC audits. First among these is the stereotype of the inherent laziness of Black

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162 *See generally* DONALD YACOVONE, TEACHING WHITE SUPREMACY (2022).

163 RUSSELL-BROWN, *supra* note 123, at 94.

164 *See* State v. Belcher, 342 Conn. 1, 4 (2022).

165 *Just the Facts: Poverty Myths & Stereotypes*, JUST HARVEST (Jan. 2015), https://perma.cc/9SUY-AGQG.

166 BOBBY L. DEXTER, FEDERAL INCOME TAXATION IN FOCUS 183 (2nd ed. 2022).

167 *Imprisonment rate of sentenced prisoners U.S. 2021*, STATISTA (June 2, 2023), https://perma.cc/G2PN-PG3V.

people.[168] Historically, this was one of the primary justifications offered by slaveholders for the brutality of their labor practices, but it was shared by Northerners and even some abolitionists and propagated by authoritative sources well into the 20th century. Despite the fact that the vast effort of rendering much of North America livable and productive for people of White European descent was largely accomplished with Black labor, this stereotype persists. It can be found in the work of Louis Agassiz, the 19th century Harvard "naturalist," who characterized "the Negro race" as, *inter alia*, "indolent"[169]; of Woodrow Wilson (President of the United States from 1913 to 1921), who in 1893 described enslaved persons as "kept from overwork both by their own laziness and by the slack discipline to which they were subjected"[170]; of John Fiske, Harvard-educated historian and Darwinist, whose 1895 text *A History of the United States for Schools* uncritically reported that in the South, "everybody took it for granted that negroes would not work except as slaves";[171] of Hilary Herbert, whose 1912 *The Abolition Crusade and Its Consequences* described Black people as "slothful"[172]; of John McMaster, whose *School History of the United States*, in print (and in use) from 1897 until 1930, uncritically justified the Black Codes in the Southern states on the basis that "ignorant negroes would refuse to work" without them.[173] Still other influential "scholars" and educators in the early 20th century described freedmen during Reconstruction as "idle," "vicious," "lazy," and "living in idleness."[174]

Moral concerns about the alleged laziness of the poor, masquerading as economic concerns about creating proper "incentives" for work, and amplified by this stereotype about Black people specifically, are foundational to the EITC itself, and to the use of the tax system for a welfare benefit that *requires* its recipient to *earn income* in order to qualify, and that gives a larger benefit (up to a point) to someone who has earned *more* and arguably therefore needs it less.[175] Democratic Senator Russell Long of Louisiana, head of the Senate Finance Committee when the EITC was adopted, expressed the concern that it should not provide its largest benefit "to those *without* earnings," as compared to the income-earning poor.[176] Instead, according to Long, it was a more "dignified way" to help the poor working American,

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168 ALEXANDER, *supra* note 13, at 28.

169 YACOVONE, *supra* note 162, at 39.

170 *Id*. at 200.

171 *Id*. at 170, 172.

172 *Id*. at 194.

173 *Id*. at 195, 197.

174 *Id*. at 209, 210.

175 For a close analysis of the rhetorical construction of the poor in U.S. Supreme Court cases, not primarily focused on race, *see* Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499 (June 1991); *id*. at 1507 ("the welfare mother with a Cadillac"); *id*. at 1518 (describing the perception of AFDC, a predecessor to the EITC, as "a program for black welfare mothers who, in the harshest of the stereotypical imageries, procreate irresponsibly and have no aspirations beyond maximizing their take from the public trough.").

176 EITC Legislative History, *supra* note 2, at 2.

"whereby the more he [sic] works the more he gets."[177] This ambivalence about the relationship between need and desert has deep historical roots, even apart from race.

But the view that Black people, specifically, are not deserving of the support offered other poor or needy people also runs deep. It dates at least back to the antebellum period, when emancipated or other formerly enslaved people began to settle in non-slave states. Very early in the 19th century, states and territories such as Ohio responded by passing laws imposing burdensome bond requirements on persons of African descent seeking to settle there.[178] By the late 1840s, Indiana, Illinois, Iowa, and Michigan had enacted similar laws.[179]

As Professor Khiara Bridges explains,

> [T]hroughout history, the categories of the deserving and undeserving poor have been racialized—and, frequently, racist. To be precise, it has been difficult for people of color—black people, particularly—to access the ranks of the deserving poor. The historical tendency has been to attribute black people's poverty to their personal shortcomings. . . . [I]f poor racial minorities—who have figured within the cultural imaginary as the embodiment of undeservingness—are (or are imagined to be) [a program's] primary beneficiaries, . . . these programs will then be understood as benefitting the undeserving poor.[180]

Since at least the 1990s, Americans have tended to dramatically overestimate the percentage of poor people who are Black,[181] and those who do are especially likely to blame the poor for their economic circumstances and oppose "welfare" programs, which may include the EITC.[182] It might seem that EITC recipients who defy this stereotype would thus exempt from this characterization, given that they are the *working* poor, who have "earned" their benefit and should qualify as "deserving" it. The statutes creating the EITC literally *define* who "deserves" it through its entitlement criteria. Yet the grip of these stereotypes is stronger than any data or law. The reality of these taxpayers' earned income does not displace the racist imaginary in which they were and remain "lazy."

A second stereotype of special relevance, one which undergirded many aspects of the slavery law system, attributed an inherent and habitual criminality to Black people.[183] In her 1988 book *The Color of Crime*, Kathryn Russell explored

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177 *Id*.

178 GREGORY MAY, A MADMAN'S WILL 212-13 (2023).

179 *Id*. at 215.

180 Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1052-1053 (2017).

181 *What are the realities versus the myths of poverty?*, CONFRONTING POVERTY, HTTPS://PERMA.CC/4E8A-V3JN.

182 *See* Martin Gilens, *Race and Poverty in America: Public Perceptions and the News Media*, 60 PUB. OP. Q. 515, 516-518 (1996).

183 This stereotype can be found in the statements of Edward Everett, who served both in the U.S. Congress and as the President of Harvard University in the early nineteenth century. YACOVONE, *supra* note 162, at 26. James Shepard Pike, author of a hugely influential anti-Emancipationist 1874 book about Reconstruction, *The Prostrate State: South Carolina Under Negro Government*, claimed that Black people "take naturally to stealing, for [they] are used

the deep roots of the connection between Blackness and criminality, and especially the way "crime and young Black men have become synonymous in the American mind."[184] She further articulated this stereotype into "a menacing caricature"[185] she called the "criminalblackman."[186] One function this gendered stereotype historically served and continues to serve is to cast Black people as criminals rather than victims of crime, individually and as a group, on a massive scale.[187] People inside and outside of law enforcement " are more likely to associate Black people with crime" than other groups,[188] and to overestimate the incidence of crimes committed by Black people, and to underestimate the rate at which they are crime victims. "Many Americans wrongly believe that Blacks are responsible for committing the majority of crime."[189]

A third stereotype, related to but sometimes phrased in a way distinct from criminality, is inherent dishonesty. Henry Alexander White, in his 1906 book *The Making of South Carolina*, described "the people of the South…doing all that they could to help the negroes to be honest and truthful."[190] The attitude is shockingly persistent, down to the present. Carol Ivy, the mayor of Belzoni in Humphreys County, Mississippi, the most heavily audited county in the United States, told *Mississippi Today* that "she chalks up Humphreys County's high audit rate to tax fraud in the area. 'It's everywhere. . . The people are not truthful with their income tax. They're not,' Ivy said."[191]

For people like Ivy and others, these stereotypes of inherent criminality and dishonesty, an expectation of fraud, may seem to "justify" high audit rates, refund delays regardless of audits, and refund freezes of the entire refund if the EITC is contested, a form of punishment before conviction (and as Lipman has shown, in most cases an actual error is *never* proved[192]).

A fourth group of stereotypes relevant here relates to the sexuality of Black people, including hypersexuality/hyperfertility and associated pathologies related to the family, including neglectful parenting and financial irresponsibility. These stereotypes, of the "Black buck" whose sexuality threatens White women,[193] and the "Jezebel," whose sexuality makes her promiscuous, sexually available to White

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to it. YACOVONE, *supra* note 162, at 164, 167.

184 RUSSELL-BROWN, *supra* note 123, at 100.

185 *Id*. at 102.

186 *Id*. at 47, 73, 100, 102, 114, 135, 136.

187 *Id*. at 33.

188 *Id*. at 26.

189 *Id*. at 47.

190 YACOVONE, *supra* note 162, at 206, 207.

191 Anna Wolfe, '*They're easiest to step on': The real reason why families in the Delta, one of the nation's poorest regions, are also the most audited by the IRS*, MISS. TODAY (Sept. 28, 2020), https://perma.cc/U3BU-NQ66.

192 Lipman, *supra* note 37, at 2.

193 RUSSELL-BROWN, *supra* note 123, at 55.

men, and un-rapeable,[194] are obviously strongly gendered.[195] For both men and women, however, the exploitation of Black sexuality had very significant consequences during the reproductive economy of enslavement. Fears of Black male sexuality in particular played a prominent role in practices of lynching,[196] while stereotypes about Black female sexuality and fertility undergirded the depraved use of Black women's bodies for the production of enslaved progeny. These stereotypes have very deep historical roots.[197]

For our purposes here, the most important dimension of sexual stereotypes is the pathologizing of Black family structures and their treatment as deviant, rather than simply different or rational adaptations to circumstances including structural racism itself. As Elzayn et al. note, "the rules governing credit eligibility. . . may contribute to more mistakes among Black taxpayers due to racial differences in family structure"[198] - that is, differences from the white norm assumed (and favored) by lawmakers. For example, "rates for Black nonmarriage births, female-headed households, unemployment, and poverty are more than twice the White rates."[199] But statistics like this are susceptible to different interpretations even among anti-racists who do not seek to pathologize the conduct.

Because of the EITC's marriage penalty,[200] single Black working people with low incomes must choose between adhering to conventional sexual morality (marriage and children, in that order), and receiving a public benefit that may enable them to better provide for those very children. The EITC is properly available to assist family members other than parents who provide significant financial support and practical childcare to assist a working parent or one unable to work, including when a father has been involuntarily separated from his children due to the extraordinarily high rates of incarceration experienced by young Black men. The idea of intergenerational families coming together to raise children in challenging situations presents a very different picture than the one painted by Professor Dexter, when he describes aunts and uncles making claims on behalf of "random nieces and

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194 *See id*. at 56 ("slave women were viewed as naturally promiscuous, making forced sex a legal impossibility").

195 PATRICIA H. COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 77-78 (1990); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 570 (1989); Brianna Banks, *The (De)Valuation of Black Women's Bodies*, 44 HARV. J. L. & GENDER 329, 338 (2021).

196 *See* Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J. L. & FEMINISM 31, 33 (1996); RUSSELL-BROWN, *supra* note 123, at 62, 96-97 ("White fear of the Black brute sexually violating the White female was the purported rationale behind the lynch laws"); *id*. at 106 (describing the phenomenon of rape hoaxes).

197 *See* MAY, *supra* note 178, at 217 ("their only produce is children").

198 Elzayn et al., *supra* note 5, at 40.

199 RUSSELL-BROWN, *supra* note 123, at 76-77.

200 *See* discussion *supra* Section I.B.

nephews . . . [with] one parent . . . incarcerated and the other [who] doesn't really hold what one would call a 'job,' at least not a stable one."[201]

Two contemporary characters emerge from the combination of stereotypes of laziness and criminality with the sexually deviant "Jezebel" and "Black buck": the "welfare queen" and the "superpredator." In the late 1960s and early 1970s, conservative political forces created the figures of "Black 'welfare cheats' and their dangerous offspring [who] emerged, for the first time, in the political discourse and media imagery,"[202] just in time to lurk in the background of all conversations about the EITC (first enacted in 1975) and enforcement of eligibility. As a candidate for president in 1980, "one of [Ronald] Reagan's favorite and most-often-repeated anecdotes was the story of a Chicago 'welfare queen' with '8 names, 30 addresses, 12 Social Security cards,' . . . The term 'welfare queen' became a not-so-subtle code for 'lazy, greedy, black ghetto mother.'"[203]

Recall that the calculation of the EITC depends crucially upon the number of children the claimant has and whether the claimant is the custodial parent of those children. When we do not distinguish between the taxpaying EITC claimant and the mythical "welfare queen," cutting benefits off at three children may seem like a justified response to a woman's irresponsible and excessive reproduction with men unable or unwilling to provide for their offspring. It looks quite different when we consider a working taxpayer like William Ayers, a Black married father of five who also has taken care of many foster children.[204] Other EITC claimants may have four or more qualifying children dependent on them because they have generously opened their homes to foster children, stepchildren, grandchildren, or younger siblings.

The male counterpart of the "welfare queen," her "dangerous offspring," is the "superpredator," a frightening but mythical creature who entered the American imagination in the mid-1990s.[205] As Katheryn Russell-Brown has noted, "[t]he onslaught and disproportionality of criminal images of Black men cause many of us to *in*correctly conclude that most Black men are criminals."[206] But the "superpredator" theory goes even further. "The term 'superpredator' was coined by Princeton academic John DiIulio . . . DiIulio preached that youths, particularly those of color in urban areas, 'were so morally corrupt that rehabilitation was useless.' DiIulio . . . did not view these individuals as children but instead as 'fatherless, Godless, and

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201 DEXTER, *supra* note 166.

202 ALEXANDER, *supra* note 13, at 57.

203 ALEXANDER, *supra* note 13, at 62.

204 Wolfe, *supra* note 191.

205 *See, e.g.*, John J. DiIulio, Jr., *Arresting Ideas*, HOOVER INST. POL'Y REV. (Sept. 1, 1995), https://perma.cc/UZ4X-9B8G; John J. DiIulio, Jr., *Moral Poverty: The Coming of the Super-Predators Should Scare Us Into Wanting to Get to the Root Causes of Crime a Lot Faster*, CHI. TRIB., Dec. 15, 1995, at D31; PETER ELIKANN, SUPERPREDATORS: THE DEMONIZATION OF OUR CHILDREN (1999); Joseph Landau, *Broken Records: Reconceptualizing Rational Basis Review to Address "Alternative Facts" in the Legislative Process*, 73 VAND. L. REV. 425, 437-42 (2020).

206 RUSSELL-BROWN, *supra* note 123, at 47 (emphasis in original).

jobless' superpredators."[207] The influence of this mythical creation on policy was swift and severe: "[b]etween 1992 and 1999, forty-five states adopted laws expanding their courts' jurisdictions over juveniles, and forty-eight states increased sanctions for violent juvenile offenders," in some cases imposing *harsher* sentences on juveniles than adults.[208]

DiIulio himself later retracted many of these ideas, but the stereotype has only very lately begun to loosen its grip.[209] In 2022, the Supreme Court of Connecticut in *State v. Belcher* struck down a sixty-year sentence imposed on a juvenile offender decades earlier, because it was based on "the materially false superpredator myth."[210] In striking down this sentence, the Connecticut Supreme Court made the vital connection between stereotypes, possibly held unconsciously, and decision-making that affects real people. The Court found that "a review of the superpredator theory and its history demonstrates that the theory constituted materially false and unreliable information."[211] "Extensive research data and empirical analysis quickly demonstrated that the superpredator theory was baseless"[212] "when it originally was espoused and [it] has since been thoroughly debunked and universally rejected as a myth."[213] Significantly, the court recognized that the "superpredator" theory was not simply "discredited,"[214] but "invoked racial stereotypes. . . . The superpredator theory tapped into and amplified racial stereotypes that date back to the founding of our nation."[215] These include "the dehumanization of Black children"[216] and "portraying Black people as animals."[217]

> In summary, by invoking the superpredator theory to sentence the young, Black male defendant in the present case, the sentencing court, perhaps even without realizing it, relied on materially false, racial stereotypes that perpetuate systemic inequities—demanding harsher sentences—that date back to the founding of our nation. . . . Although we do not mean to suggest that the sentencing judge intended to perpetuate a race based stereotype, we cannot overlook the fact that the superpredator myth is precisely the type of materially false information that courts should not rely on in making sentencing decisions. Whether used wittingly or unwittingly, reliance on such a baseless, illegitimate theory calls into

207 Landau, *supra* note 205, at 438.

208 *Id.* at 439-40 (internal citations omitted).

209 *The Superpredator Myth, 25 Years Later*, EQUAL JUSTICE INITIATIVE (Apr. 7, 2014), https://perma.cc/W7QC-J5Z7; Alex S. Vitale, *The New 'Superpredator' Myth*, N.Y. TIMES (Mar. 23, 2018), https://perma.cc/96EZ-RHKT.

210 State v. Belcher, 342 Conn. 1, 3, 16 (2022); *see also* ALEXANDER, *supra* note 13, at 52.

211 *Belcher*, 342 Conn. at 13.

212 *Id.* at 14.

213 *Id.* at 16.

214 *Id.* at 11.

215 *Id.* at 16-17.

216 *Id.* at 17.

217 *Id.* at 19.

question the legitimacy of the sentencing procedure and the sentence.[218]

This type of re-thinking is called for with respect to the EITC and its enforcement as well, because when EITC recipients are imagined in these highly stereotyped ways - as not merely poor, an already-despised status in America, but as Black and poor, as members of the "undeserving" poor, who are inherently criminal, lazy, greedy, promiscuous, and neglectful of their family responsibilities, a great deal about the EITC and EITC audit practices suddenly makes sense. Stereotypes that operate, in effect, to criminalize *all* Black EITC claimants *in advance*, and to cast them as undeserving of the benefit they need and to which they are entitled by law, make the punitive enforcement machinery appear justified, even if it is costly. But reliance on such stereotypes in fact calls into question the legitimacy of these statutory structures and IRS enforcement practices related to them.

The steep phase-in structure of the EITC reflects the idea that poor Black people must be forced to work, a stereotype as old as slavery. The EITC phase-out ensures that the U.S. government is not somehow too generous to Black families of five or more living on $20,000 to $50,000 a year, while millionaires go on collecting Social Security, a program with no income phase-out (and a peak benefit, in 2023, of $4555 per *month*[219]). The EITC's complexity no longer looks like an unfortunate accident: its complexity serves the positive purpose of deterring or even tripping up claimants already seen as fundamentally undeserving. A statute as complex as literacy tests of old is placed before people many of whom have been educationally shortchanged; the government then professes mystification at the high error rate, and uses that inevitable outcome as a pretextual justification for further punitive intervention, harassment, and surveillance of the intimate family lives and economic activities of this already-targeted group. Refund delays, excessive audits, likely present and future denials of the benefit all seem appropriate punishments for undeserving fraudsters.

A law enforcement/criminal justice mindset, triggered primarily by the race, class, and gender of the claimants, also explains the willingness of the IRS to expend resources on audits of the poorest group of taxpayers, and to treat them like criminals to be caught and punished instead of taxpayers to be served. If auditing hundreds of thousands of poor people over small sums of money is seen as law enforcement directed against young Black men (and women), rather than as a collections activity that must be justified in purely economic terms, it will not be expected to pay for itself. Sustaining White supremacy in this way does not make money; it costs money.

Finally, this approach also casts underclaiming in a considerably different light. Viewed as Foucault suggests we view it, overdeterrence of EITC claims is arguably another "success" achieved by the complexity of the EITC and EITC overaudits. Economically, it may actually offset the "overpayment" produced by

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218 *Id*. at 23.

219 *What is the Maximum Social Security Retirement Benefit Payable?*, SOC. SEC. ADMIN.: FAQS (Apr. 20, 2023), https://perma.cc/8KRN-VTBT (referring to the maximum benefit for a person retiring in 2023 at age 70 or over.)

undiscovered overclaims. But underclaiming need not be intended by anyone. Regardless of intent, after all these years of overaudits, the claim rate (according to the IRS) continues to hover below 80%. Perhaps some taxpayers do not claim the benefit because they are concerned both about being audited, and about the delay in receipt of uncontested (and urgently needed) refunds if their return is audited. This is surely as plausible a hypothesis about why millions of people entitled to the EITC do not even *try* to claim it as the Deputy Commissioner's suggestion that taxpayers "simply overlook" a benefit that has been in the Code for nearly fifty years.

Non-claiming should be analyzed as analogous to underutilization of other government benefits and services by persons rationally concerned about greater government surveillance in their homes and lives. Two well-researched examples of this phenomenon are Black female victims of intimate partner violence, who realistically fear that reporting this conduct will lead to the incarceration of Black men and the loss of their other contributions to the family;[220] and underreporting of crime by undocumented persons, who fear that any interaction with law enforcement will result in deportation of themselves or other family members, creating more disruption and harm than the crime itself.[221] Rather than seeing these non-reporters as ignorant or misguided, they can be seen as responding rationally to the existing incentive structure and making an all-things-considered judgment about whether the benefits of seeking government assistance outweigh the costs. So, too, the eligible EITC non-claimant.

When persons entitled by law to government aid decline to seek it, that should be seen as a failing *by the government*, not by the individuals. Those entitled to the EITC should be getting it. The goal of the Congress that continues to reauthorize it, and the IRS that enforces the Code, should be to dismantle whatever obstacles people are encountering, not place more of them in taxpayers' paths and then blame them for failing to hurdle them.

V. CONCLUSIONS AND RECOMMENDATIONS

Because of the enforcement patterns identified above, and their deep causes, it is not enough simply to recommend that the IRS or IRS enforcement be fully funded or given different priorities. Or, as Commissioner Werfel states, that the IRS be "laser focused" on "evaluat[ing] ways to address any bias that exists within

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220 *See, e.g.*, Johnny Rice II et al., *The Intersectionality of Intimate Partner Violence in the Black Community*, *in* R. Geffner et al. (eds.), HANDBOOK OF INTERPERSONAL VIOLENCE ACROSS THE LIFESPAN at 21 (Robert Geffner et al. eds., June 27, 2020).

221 *See, e.g.*, Stefano Comino et al., *Silence of the Innocents: Undocumented Immigrants' Underreporting of Crime and their Victimization*, 39 J. OF POL'Y ANALYSIS & MGMT. 1214 (2020); *but see* Min Xie & Eric Baumer, *Neighborhood Immigrant Concentration and Violent Crime Reporting to the Police: A Multilevel Analysis of Data from the National Crime Victimization Survey*, 57 CRIMINOLOGY 237, 254 (2019) (finding that legal and cultural barriers to accessing the police more significantly contributes to decreased rates of crime reporting).

our audit program."[222] Rather, we must start to understand how an allegedly race-neutral regime became racially discriminatory in the first place. [223] Until we confront these causes, greater funding for IRS enforcement is no guarantee that those resources will not be used for even more punitive "enforcement" against Black EITC recipients, just as increased criminal justice funding has exacerbated, not ameliorated, racial disparities. Elzayn et al. do provide a number of approaches that would yield more for the IRS and simultaneously reduce audit rates of Black taxpayers; for example, "The random forest regressor model detects roughly twice as much underreporting as the status quo at the same audit rate; in so doing it audits Black taxpayers at a lower rate than non-Black taxpayers."[224]

But sophisticated changes like this are not yet in the practical conversation. In 2022, former Secretary of the Treasury Janet Yellen directed that "any additional resources—including any new personnel or auditors that are hired—shall not be used to *increase* the share of small business or households below the $400,000 threshold that are audited relative to historical levels."[225] Instead, Phillip Swagel of the Congressional Budget Office wrote, "enforcement resources will focus on . . . high-end noncompliance."[226] If adopted, this would simply maintain EITC audits at current, unacceptable levels. However, the Senate rejected an amendment to the proposed IRS funding bill that provided that "[n]one of the funds appropriated under subsection (a)(1) may be used to audit taxpayers with taxable incomes below $400,000."[227] According to the Congressional Budget Office, "the change would have imposed restrictions on the use of appropriations by the IRS, which would have caused the agency to shift to less productive enforcement activities and to incur increased administrative costs."[228]

The claim that auditing high-income taxpayers is "less productive" is squarely contradicted by other research, including by the Department of Treasury itself, whose Deputy Assistant Secretary for Economic Policy, Natasha Sarin, has recommended a "robust attack on the tax gap."[229] A much more dramatic commitment needs to be made than that proposed by the defeated amendment. Although it may not be politically viable, what is needed, as has been recommended by so many analysts, is an intensive focus on the "tax gap" and the returns of taxpayers most likely to be responsible for it.[230] A commitment to audit 100% of all millionaire tax

222 *See* Letter from Daniel I. Werfel to Sen. Ron Wyden, *supra* note 119.

223 Elzayn et al., *supra* note 5, at 35.

224 *Id*.

225 *See* Letter from Janet L. Yellen, Sec'y Treas., to Charles P. Rettig, Comm'r, IRS (Aug. 10, 2022), https://perma.cc/D5J6-ZFM3 (emphasis added).

226 Letter from Phillip Swagel, Dir., Cong. Budget Off. to Cong., (Aug. 25, 2022), https://perma.cc/GN2L-WSLQ.

227 *Id*.

228 *Id*.

229 Sarin, *supra* note 37.

230 Lipman, *supra* note 37, at 2.

returns would not only "pay for itself," but could significantly reduce uncollected taxes.

Meanwhile, the IRS ought simply to cease auditing EITC claimant returns unless there are affirmative indicia of fraud (not mere mistake). This change would cost the fisc very little and would significantly improve the lives and material circumstances of millions of poor working Americans. This change would end audits that inflict real economic hardship despite being economically inconsequential to the government, end the harms caused by refund "freezes," and perhaps better carry out the purpose of the EITC by increasing claim rates. As important as any of this, it would begin to change the IRS and its enforcement activities into an instrument of racial tax justice, instead of exacerbating economic inequality and furthering economic White supremacy.

APPENDIX A

26 USC 32, "Earned income."

(a) Allowance of credit

(1) In general

In the case of an eligible individual, there shall be allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to the credit percentage of so much of the taxpayer's earned income for the taxable year as does not exceed the earned income amount.

(2) Limitation

The amount of the credit allowable to a taxpayer under paragraph (1) for any taxable year shall not exceed the excess (if any) of—

(A)the credit percentage of the earned income amount, over

(B)the phaseout percentage of so much of the adjusted gross income (or, if greater, the earned income) of the taxpayer for the taxable year as exceeds the phaseout amount.

(b) Percentages and amounts

For purposes of subsection (a)—

(1) Percentages

The credit percentage and the phaseout percentage shall be determined as follows:

In the case of an eligible individual with:	The credit percentage is:	The phaseout percentage is:
1 qualifying child	34	15.98
2 qualifying children	40	21.06
3 or more qualifying children	45	21.06
No qualifying children	7.65	7.65

(2) Amounts

(A)In general

Subject to subparagraph (B), the earned income amount and the phaseout amount shall be determined as follows:

In the case of an eligible individual with:	The earned income amount is:	The phaseout amount is:
1 qualifying child	$6,330	$11,610

2 or more qualifying children	$8,890	$11,610
No qualifying children	$4,220	$5,280

(B) Joint returns

In the case of a joint return filed by an eligible individual and such individual's spouse, the phaseout amount determined under subparagraph (A) shall be increased by $5,000.

(c) Definitions and special rules

For purposes of this section—

(1) Eligible individual

(A)In general

The term "eligible individual" means—

(i) any individual who has a qualifying child for the taxable year, or

(ii) any other individual who does not have a qualifying child for the taxable year, if—

(I) such individual's principal place of abode is in the United States for more than one-half of such taxable year,

(II) such individual (or, if the individual is married, either the individual or the individual's spouse) has attained age 25 but not attained age 65 before the close of the taxable year, and

(III) such individual is not a dependent for whom a deduction is allowable under section 151 to another taxpayer for any taxable year beginning in the same calendar year as such taxable year.

For purposes of the preceding sentence, marital status shall be determined under section 7703.

(B)Qualifying child ineligible

If an individual is the qualifying child of a taxpayer for any taxable year of such taxpayer beginning in a calendar year, such individual shall not be treated as an eligible individual for any taxable year of such individual beginning in such calendar year.

(C) Exception for individual claiming benefits under section 911

The term "eligible individual" does not include any individual who claims the benefits of section 911 (relating to citizens or residents living abroad) for the taxable year.

(D) Limitation on eligibility of nonresident aliens

The term "eligible individual" shall not include any individual who is a nonresident alien individual for any portion of the taxable year unless such individual is treated for such taxable year as a resident of the United States for purposes of this chapter by reason of an election under subsection (g) or (h) of section 6013.

(E) Identification number requirement

No credit shall be allowed under this section to an eligible individual who does not include on the return of tax for the taxable year—

(i) such individual's taxpayer identification number, and

(ii) if the individual is married (within the meaning of section 7703), the taxpayer identification number of such individual's spouse.

(F) Individuals who do not include TIN, etc., of any qualifying child

No credit shall be allowed under this section to any eligible individual who has one or more qualifying children if no qualifying child of such individual is taken into account under subsection (b) by reason of paragraph (3)(D).

(2) Earned income

(A) The term "earned income" means—

(i) wages, salaries, tips, and other employee compensation, but only if such amounts are includible in gross income for the taxable year, plus

(ii) the amount of the taxpayer's net earnings from self-employment for the taxable year (within the meaning of section 1402(a)), but such net earnings shall be determined with regard to the deduction allowed to the taxpayer by section 164(f).

(B) For purposes of subparagraph (A)—

(i) the earned income of an individual shall be computed without regard to any community property laws,

(ii) no amount received as a pension or annuity shall be taken into account,

(iii) no amount to which section 871(a) applies (relating to income of nonresident alien individuals not connected with United States business) shall be taken into account,

(iv) no amount received for services provided by an individual while the individual is an inmate at a penal institution shall be taken into account,

(v) no amount described in subparagraph (A) received for service performed in work activities as defined in paragraph (4) or (7) of section 407(d) of the Social Security Act to which the taxpayer is assigned under any State program under part A of title IV of such Act shall be taken into account, but only to the extent such amount is subsidized under such State program, and

(vi) a taxpayer may elect to treat amounts excluded from gross income by reason of section 112 as earned income.

(3) Qualifying child

(A)In general

The term "qualifying child" means a qualifying child of the taxpayer (as defined in section 152(c), determined without regard to paragraph (1)(D) thereof and section 152(e)).

(B)Married individual

The term "qualifying child" shall not include an individual who is married as of the close of the taxpayer's taxable year unless the taxpayer is entitled to a deduction under section 151 for such taxable year with respect to such individual (or would be so entitled but for section 152(e)).

(C)Place of abode

For purposes of subparagraph (A), the requirements of section 152(c)(1)(B) shall be met only if the principal place of abode is in the United States.

(D)Identification requirements

(i) In general

A qualifying child shall not be taken into account under subsection (b) unless the taxpayer includes the name, age, and TIN of the qualifying child on the return of tax for the taxable year.

(ii) Other methods

The Secretary may prescribe other methods for providing the information described in clause (i).

(4) Treatment of military personnel stationed outside the United States

For purposes of paragraphs (1)(A)(ii)(I) and (3)(C), the principal place of abode of a member of the Armed Forces of the United States shall be treated as in the United States during any period during which such member is stationed outside the United States while serving on extended active duty with the Armed Forces of the United States. For purposes of the preceding sentence, the term "extended active duty" means any period of active duty pursuant to a call or order to such duty for a period in excess of 90 days or for an indefinite period.

(d) Married individuals

In the case of an individual who is married (within the meaning of section 7703), this section shall apply only if a joint return is filed for the taxable year under section 6013.

(e) Taxable year must be full taxable year

Except in the case of a taxable year closed by reason of the death of the taxpayer, no credit shall be allowable under this section in the case of a taxable year covering a period of less than 12 months.

(f) Amount of credit to be determined under tables

(1) In general

The amount of the credit allowed by this section shall be determined under tables prescribed by the Secretary.

(2) Requirements for tables

The tables prescribed under paragraph (1) shall reflect the provisions of subsections (a) and (b) and shall have income brackets of not greater than $50 each—

(A) for earned income between $0 and the amount of earned income at which the credit is phased out under subsection (b), and

(B) for adjusted gross income between the dollar amount at which the phaseout begins under subsection (b) and the amount of adjusted gross income at which the credit is phased out under subsection (b).

[(g) Repealed. Pub. L. 111–226, title II, § 219(a)(2), Aug. 10, 2010, 124 Stat. 2403]

[(h) Repealed. Pub. L. 107–16, title III, § 303(c), June 7, 2001, 115 Stat. 55]

(i) Denial of credit for individuals having excessive investment income

(1) In general

No credit shall be allowed under subsection (a) for the taxable year if the aggregate amount of disqualified income of the taxpayer for the taxable year exceeds $2,200.

(2) Disqualified income

For purposes of paragraph (1), the term "disqualified income" means—

(A) interest or dividends to the extent includible in gross income for the taxable year,

(B) interest received or accrued during the taxable year which is exempt from tax imposed by this chapter,

(C) the excess (if any) of—

(i) gross income from rents or royalties not derived in the ordinary course of a trade or business, over

(ii) the sum of—

(I) the deductions (other than interest) which are clearly and directly allocable to such gross income, plus

(II) interest deductions properly allocable to such gross income,

(D) the capital gain net income (as defined in section 1222) of the taxpayer for such taxable year, and

(E) the excess (if any) of—

(i) the aggregate income from all passive activities for the taxable year (determined without regard to any amount included in earned income under subsection (c)(2) or described in a preceding subparagraph), over

(ii) the aggregate losses from all passive activities for the taxable year (as so determined).

For purposes of subparagraph (E), the term "passive activity" has the meaning given such term by section 469.

(j) Inflation adjustments

(1) In general

In the case of any taxable year beginning after 2015, each of the dollar amounts in subsections (b)(2) and (i)(1) shall be increased by an amount equal to—

(A)such dollar amount, multiplied by

(B)the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting in subparagraph (A)(ii) thereof—

(i) in the case of amounts in subsections (b)(2)(A) and (i)(1), "calendar year 1995" for "calendar year 2016", and

(ii) in the case of the $5,000 amount in subsection (b)(2)(B), "calendar year 2008" for "calendar year 2016".

(2) Rounding

(A)In general

If any dollar amount in subsection (b)(2)(A) (after being increased under subparagraph (B) thereof), after being increased under paragraph (1), is not a multiple of $10, such dollar amount shall be rounded to the nearest multiple of $10.

(B)Disqualified income threshold amount

If the dollar amount in subsection (i)(1), after being increased under paragraph (1), is not a multiple of $50, such amount shall be rounded to the next lowest multiple of $50.

(k) Restrictions on taxpayers who improperly claimed credit in prior year

(1) Taxpayers making prior fraudulent or reckless claims

(A)In general

No credit shall be allowed under this section for any taxable year in the disallowance period.

(B)Disallowance period

For purposes of paragraph (1), the disallowance period is—

(i) the period of 10 taxable years after the most recent taxable year for which there was a final determination that the taxpayer's claim of credit under this section was due to fraud, and

(ii) the period of 2 taxable years after the most recent taxable year for which there was a final determination that the taxpayer's claim of credit under this section was due to reckless or intentional disregard of rules and regulations (but not due to fraud).

(2) Taxpayers making improper prior claims

In the case of a taxpayer who is denied credit under this section for any taxable year as a result of the deficiency procedures under subchapter B of chapter 63, no credit shall be allowed under this section for any subsequent taxable year unless the taxpayer provides such information as the Secretary may require to demonstrate eligibility for such credit.

(l) Coordination with certain means-tested programs

For purposes of—

(1) the United States Housing Act of 1937,
(2) title V of the Housing Act of 1949,
(3) section 101 of the Housing and Urban Development Act of 1965,
(4) sections 221(d)(3), 235, and 236 of the National Housing Act, and
(5) the Food and Nutrition Act of 2008,

any refund made to an individual (or the spouse of an individual) by reason of this section shall not be treated as income (and shall not be taken into account in determining resources for the month of its receipt and the following month).

(m) Identification numbers

Solely for purposes of subsections (c)(1)(E) and (c)(3)(D), a taxpayer identification number means a social security number issued to an individual by the Social Security Administration (other than a social security number issued pursuant to clause (II) (or that portion of clause (III) that relates to clause (II)) of section 205(c)(2)(B)(i) of the Social Security Act) on or before the due date for filing the return for the taxable year.

(n)Special rules for individuals without qualifying children

In the case of any taxable year beginning after December 31, 2020, and before January 1, 2022—

(1)Decrease in minimum age for credit

(A)In general

Subsection (c)(1)(A)(ii)(II) shall be applied by substituting "the applicable minimum age" for "age 25".

(B)Applicable minimum age

For purposes of this paragraph, the term "applicable minimum age" means—

(i) except as otherwise provided in this subparagraph, age 19,

(ii) in the case of a specified student (other than a qualified former foster youth or a qualified homeless youth), age 24, and

(iii) in the case of a qualified former foster youth or a qualified homeless youth, age 18.

(C) Specified student

For purposes of this paragraph, the term "specified student" means, with respect to any taxable year, an individual who is an eligible student (as defined in section 25A(b)(3)) during at least 5 calendar months during the taxable year.

(D) Qualified former foster youth

For purposes of this paragraph, the term "qualified former foster youth" means an individual who—

(i)on or after the date that such individual attained age 14, was in foster care provided under the supervision or administration of an entity administering (or eligible to administer) a plan under part B or part E of title IV of the Social Security Act (without regard to whether Federal assistance was provided with respect to such child under such part E), and

(ii)provides (in such manner as the Secretary may provide) consent for entities which administer a plan under part B or part E of title IV of the Social Security Act to disclose to the Secretary information related to the status of such individual as a qualified former foster youth.

(E) Qualified homeless youth

For purposes of this paragraph, the term “qualified homeless youth“ means, with respect to any taxable year, an individual who certifies, in a manner as provided by the Secretary, that such individual is either an unaccompanied youth who is a homeless child or youth, or is unaccompanied, at risk of homelessness, and self-supporting.

(2) Elimination of maximum age for credit

Subsection (c)(1)(A)(ii)(II) shall be applied without regard to the phrase “but not attained age 65”.

(3) Increase in credit and phaseout percentages

The table contained in subsection (b)(1) shall be applied by substituting “15.3” for “7.65” each place it appears therein.

(4) Increase in earned income and phaseout amounts

(A)In general

The table contained in subsection (b)(2)(A) shall be applied—

(i) by substituting “$9,820” for “$4,220”, and

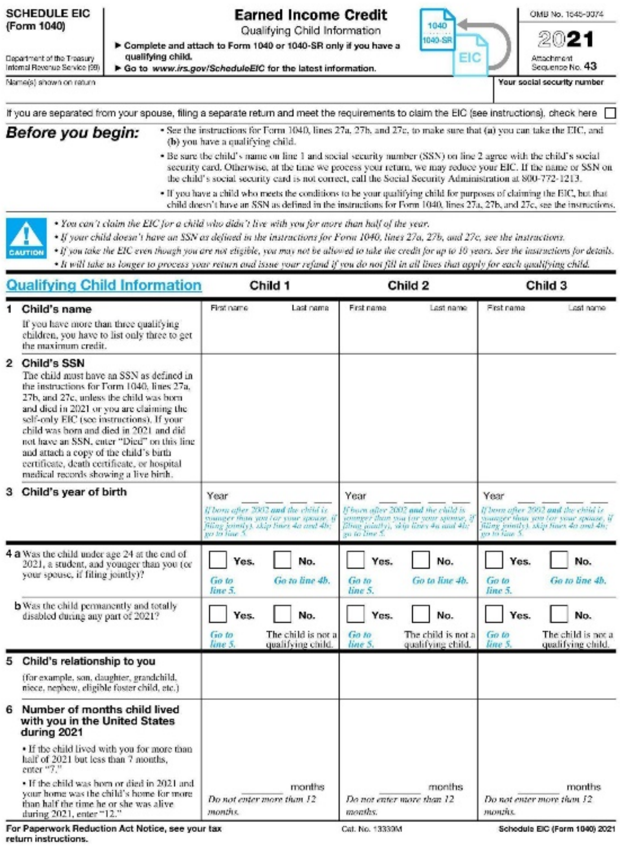
(ii) by substituting “$11,610” for “$5,280”.

(B)Coordination with inflation adjustment

Subsection (j) shall not apply to any dollar amount specified in this paragraph.

(Added Pub. L. 94–12, title II, § 204(a), Mar. 29, 1975, 89 Stat. 30, § 43; amended Pub. L. 94–164, § 2(c), Dec. 23, 1975, 89 Stat. 971; Pub. L. 94–455, title IV, § 401(c)(1)(B), (2), Oct. 4, 1976, 90 Stat. 1557; Pub. L. 95–600, title I, §§ 104(a)–(e), 105(a), Nov. 6, 1978, 92 Stat. 2772, 2773; Pub. L. 95–615, § 202(g)(5), formerly § 202(f)(5), Nov. 8, 1978, 92 Stat. 3100, renumbered § 202(g)(5) and amended Pub. L. 96–222, title I, §§ 101(a)(1), (2)(E), 108(a)(1)(A), Apr. 1, 1980, 94 Stat. 194, 195, 223; Pub. L. 97–34, title I, §§ 111(b)(2), 112(b)(3), Aug. 13, 1981, 95 Stat. 194, 195; Pub. L. 98–21, title I, § 124(c)(4)(B), Apr. 20, 1983, 97 Stat. 91; renumbered § 32 and amended Pub. L. 98–369, div. A, title IV, §§ 423(c)(3), 471(c), title X, § 1042(a)–(d)(2), July 18, 1984, 98 Stat. 801, 826, 1043; Pub. L. 99–514, title I, §§ 104(b)(1)(B), 111(a)–(d)(1), title XII, § 1272(d)(4), title XIII, § 1301(j)(8), Oct. 22, 1986, 100 Stat. 2104, 2107, 2594, 2658; Pub. L. 100–647, title I, §§ 1001(c), 1007(g)(12), Nov. 10, 1988, 102 Stat. 3350, 3436; Pub. L. 101–508, title XI, §§ 11101(d)(1)(B), 11111(a), (b), (e), Nov. 5, 1990, 104 Stat. 1388–405, 1388–408, 1388–412, 1388–413; Pub. L. 103–66, title XIII, § 13131(a)–(d)(1), Aug. 10, 1993, 107 Stat. 433–435; Pub. L. 103–465, title VII, §§ 721(a), 722(a), 723(a), 742(a), Dec. 8, 1994, 108 Stat. 5002, 5003, 5010; Pub. L. 104–7, § 4(a), Apr. 11, 1995, 109 Stat. 95; Pub. L. 104–193, title IV, § 451(a), (b), title IX, §§ 909(a), (b), 910(a), (b), Aug. 22, 1996, 110 Stat. 2276, 2277, 2351, 2352; Pub. L. 105–34, title I, § 101(b), title III, § 312(d)(2), title X, § 1085(a)(1), (b)–(d), Aug. 5, 1997, 111 Stat. 798, 840, 955, 956; Pub. L. 105–206, title VI, §§ 6003(b), 6010(p)(1), (2), 6021(a), (b), July 22, 1998, 112 Stat. 791, 816, 817, 823, 824; Pub. L. 106–170, title IV, § 412(a), Dec. 17, 1999, 113 Stat. 1917; Pub. L. 107–16, title II, § 201(c)(3), title III, § 303(a)–(f), (h), June 7, 2001, 115 Stat. 47, 55–57; Pub. L. 107–147, title IV, § 416(a)(1), Mar. 9, 2002, 116 Stat. 55; Pub. L. 108–311, title I, § 104(b), title II, § 205, Oct. 4, 2004, 118 Stat. 1169, 1176; Pub. L. 109–135, title III, § 302(a), Dec. 21, 2005, 119 Stat. 2608; Pub. L. 109–432, div. A, title I, § 106(a), Dec. 20, 2006, 120 Stat. 2938; Pub. L. 110–234, title IV, § 4002(b)(1)(B), (2)(O), May 22, 2008, 122 Stat. 1096, 1097; Pub. L. 110–245, title I, § 102(a), June 17, 2008, 122 Stat. 1625; Pub. L. 110–246, § 4(a), title IV, § 4002(b)(1)(B), (2)(O), June 18, 2008, 122 Stat. 1664, 1857, 1858; Pub. L. 111–5, div. B, title I, § 1002(a), Feb. 17, 2009, 123 Stat. 312; Pub. L. 111–226, title II, § 219(a)(2), Aug. 10, 2010, 124 Stat. 2403; Pub. L. 111–312, title I, § 103(c), Dec. 17, 2010, 124 Stat. 3299; Pub. L. 112–240, title I, § 103(c), Jan. 2, 2013, 126 Stat. 2319; Pub. L. 113–295, div. A, title II, §§ 206(a), 221(a)(3), Dec. 19, 2014, 128 Stat. 4027, 4037; Pub. L. 114–113, div. Q, title I, § 103(a)–(c), title II, § 204(a), Dec. 18, 2015, 129 Stat. 3044, 3045, 3081; Pub. L. 115–97, title I, § 11002(d)(1)(D), Dec. 22, 2017, 131 Stat. 2060; Pub. L. 115–141, div. U, title I, § 101(a), title IV, § 401(b)(4), Mar. 23, 2018, 132 Stat. 1160, 1201; Pub. L. 117–2, title IX, §§ 9621(a), 9622(a), 9623(a), (b), 9624(a), (b), Mar. 11, 2021, 135 Stat. 152–154.)

Figure 3. Schedule EIC (Form 1040) (2021)



SCHEDULE EIC
(Form 1040)

Department of the Treasury
Internal Revenue Service (99)

Earned Income Credit

Qualifying Child Information

▶ **Complete and attach to Form 1040 or 1040-SR only if you have a qualifying child.**

▶ **Go to *www.irs.gov/ScheduleEIC* for the latest information.**

1040
1040-SR
EIC

OMB No. 1545-0074

2021

Attachment Sequence No. **43**

Name(s) shown on return

Your social security number

If you are separated from your spouse, filing a separate return and meet the requirements to claim the EIC (see instructions), check here ☐

Before you begin:

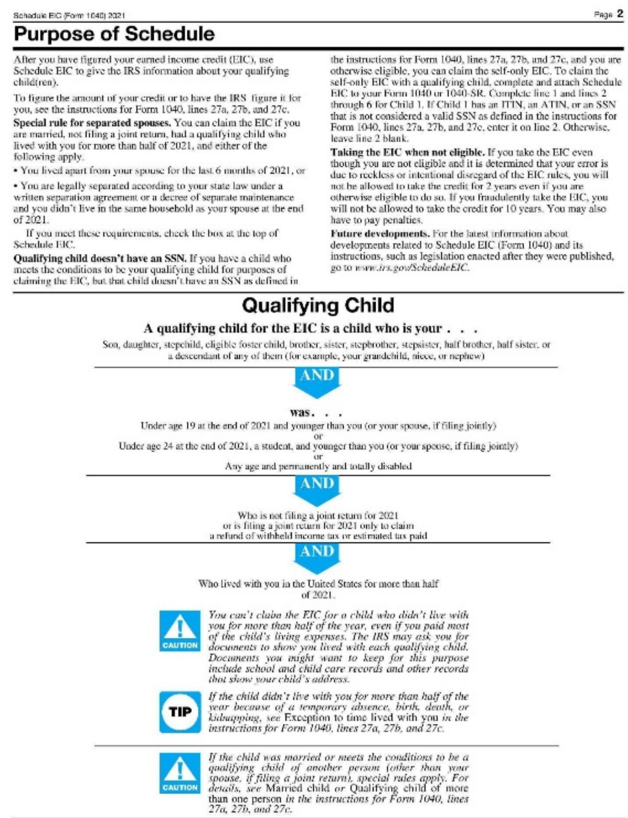
- See the instructions for Form 1040, lines 27a, 27b, and 27c, to make sure that **(a)** you can take the EIC, and **(b)** you have a qualifying child.
- Be sure the child's name on line 1 and social security number (SSN) on line 2 agree with the child's social security card. Otherwise, at the time we process your return, we may reduce your EIC. If the name or SSN on the child's social security card is not correct, call the Social Security Administration at 800-772-1213.
- If you have a child who meets the conditions to be your qualifying child for purposes of claiming the EIC, but that child doesn't have an SSN as defined in the instructions for Form 1040, lines 27a, 27b, and 27c, see the instructions.

CAUTION

- *You can't claim the EIC for a child who didn't live with you for more than half of the year.*
- *If your child doesn't have an SSN as defined in the instructions for Form 1040, lines 27a, 27b, and 27c, see the instructions.*
- *If you take the EIC even though you are not eligible, you may not be allowed to take the credit for up to 10 years. See the instructions for details.*
- *It will take us longer to process your return and issue your refund if you do not fill in all lines that apply for each qualifying child.*

Qualifying Child Information	**Child 1**	**Child 2**	**Child 3**
1 Child's name If you have more than three qualifying children, you have to list only three to get the maximum credit.	First name Last name	First name Last name	First name Last name
2 Child's SSN The child must have an SSN as defined in the instructions for Form 1040, lines 27a, 27b, and 27c, unless the child was born and died in 2021 or you are claiming the self-only EIC (see instructions). If your child was born and died in 2021 and did not have an SSN, enter "Died" on this line and attach a copy of the child's birth certificate, death certificate, or hospital medical records showing a live birth.			
3 Child's year of birth	Year ___ ___ ___ ___ *If born after 2002 **and** the child is younger than you (or your spouse, if filing jointly), skip lines 4a and 4b; go to line 5.*	Year ___ ___ ___ ___ *If born after 2002 **and** the child is younger than you (or your spouse, if filing jointly), skip lines 4a and 4b; go to line 5.*	Year ___ ___ ___ ___ *If born after 2002 **and** the child is younger than you (or your spouse, if filing jointly), skip lines 4a and 4b; go to line 5.*
4 a Was the child under age 24 at the end of 2021, a student, and younger than you (or your spouse, if filing jointly)?	☐ **Yes.** *Go to line 5.* ☐ **No.** *Go to line 4b.*	☐ **Yes.** *Go to line 5.* ☐ **No.** *Go to line 4b.*	☐ **Yes.** *Go to line 5.* ☐ **No.** *Go to line 4b.*
b Was the child permanently and totally disabled during any part of 2021?	☐ **Yes.** *Go to line 5.* ☐ **No.** The child is not a qualifying child.	☐ **Yes.** *Go to line 5.* ☐ **No.** The child is not a qualifying child.	☐ **Yes.** *Go to line 5.* ☐ **No.** The child is not a qualifying child.
5 Child's relationship to you (for example, son, daughter, grandchild, niece, nephew, eligible foster child, etc.)			
6 Number of months child lived with you in the United States during 2021 • If the child lived with you for more than half of 2021 but less than 7 months, enter "7." • If the child was born or died in 2021 and your home was the child's home for more than half the time he or she was alive during 2021, enter "12."	______ months *Do not enter more than 12 months.*	______ months *Do not enter more than 12 months.*	______ months *Do not enter more than 12 months.*

For Paperwork Reduction Act Notice, see your tax return instructions. Cat. No. 13339M **Schedule EIC (Form 1040) 2021**



Schedule EIC (Form 1040) 2021 Page **2**

Purpose of Schedule

After you have figured your earned income credit (EIC), use Schedule EIC to give the IRS information about your qualifying child(ren).

To figure the amount of your credit or to have the IRS figure it for you, see the instructions for Form 1040, lines 27a, 27b, and 27c.

Special rule for separated spouses. You can claim the EIC if you are married, not filing a joint return, had a qualifying child who lived with you for more than half of 2021, and either of the following apply.

- You lived apart from your spouse for the last 6 months of 2021, or
- You are legally separated according to your state law under a written separation agreement or a decree of separate maintenance and you didn't live in the same household as your spouse at the end of 2021.

If you meet these requirements, check the box at the top of Schedule EIC.

Qualifying child doesn't have an SSN. If you have a child who meets the conditions to be your qualifying child for purposes of claiming the EIC, but that child doesn't have an SSN as defined in the instructions for Form 1040, lines 27a, 27b, and 27c, and you are otherwise eligible, you can claim the self-only EIC. To claim the self-only EIC with a qualifying child, complete and attach Schedule EIC to your Form 1040 or 1040-SR. Complete line 1 and lines 2 through 6 for Child 1. If Child 1 has an ITIN, an ATIN, or an SSN that is not considered a valid SSN as defined in the instructions for Form 1040, lines 27a, 27b, and 27c, enter it on line 2. Otherwise, leave line 2 blank.

Taking the EIC when not eligible. If you take the EIC even though you are not eligible and it is determined that your error is due to reckless or intentional disregard of the EIC rules, you will not be allowed to take the credit for 2 years even if you are otherwise eligible to do so. If you fraudulently take the EIC, you will not be allowed to take the credit for 10 years. You may also have to pay penalties.

Future developments. For the latest information about developments related to Schedule EIC (Form 1040) and its instructions, such as legislation enacted after they were published, go to *www.irs.gov/ScheduleEIC.*

Qualifying Child

A qualifying child for the EIC is a child who is your . . .

Son, daughter, stepchild, eligible foster child, brother, sister, stepbrother, stepsister, half brother, half sister, or a descendant of any of them (for example, your grandchild, niece, or nephew)

AND

was . . .

Under age 19 at the end of 2021 and younger than you (or your spouse, if filing jointly)

or

Under age 24 at the end of 2021, a student, and younger than you (or your spouse, if filing jointly)

or

Any age and permanently and totally disabled

AND

Who is not filing a joint return for 2021
or is filing a joint return for 2021 only to claim
a refund of withheld income tax or estimated tax paid

AND

Who lived with you in the United States for more than half of 2021.

CAUTION *You can't claim the EIC for a child who didn't live with you for more than half of the year, even if you paid most of the child's living expenses. The IRS may ask you for documents to show you lived with each qualifying child. Documents you might want to keep for this purpose include school and child care records and other records that show your child's address.*

TIP *If the child didn't live with you for more than half of the year because of a temporary absence, birth, death, or kidnapping, see* Exception to time lived with you *in the instructions for Form 1040, lines 27a, 27b, and 27c.*

CAUTION *If the child was married or meets the conditions to be a qualifying child of another person (other than your spouse, if filing a joint return), special rules apply. For details, see* Married child *or* Qualifying child of more than one person *in the instructions for Form 1040, lines 27a, 27b, and 27c.*