
THE TAX-INVISIBLE LABOR PROBLEM: CARE WORK, KINSHIP, AND INCOME SECURITY PROGRAMS IN THE INTERNAL REVENUE CODE

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ABSTRACT

Since the mid-1990s, American financial assistance programs have increasingly shifted to require evidence of labor-market participation as a criterion for eligibility. This shift signaled a change from previous public financial assistance programs that were principally distributed based on unmet material need.

The shift from need-based to income-tested financial assistance programs has been lauded for increasing labor force participation. But, in this shift, income security programs have failed to account for the labor of nonmarket care workers. These care workers, whose household production contributes actual value, experience both economic insolvency and tax invisibility in the face of assistance systems that do not recognize care work as eligible labor. Because care work disproportionately falls to women in American homes, income-tested financial assistance programs place an outsized strain on women's economic lives.

In this Article, I argue that income security programs that fail to recognize nonmarket care labor undermine women's economic autonomy by constraining their personal labor choices. In addition, by locating income security programs in the income tax system, policymakers increase the gendered impact of racial capitalism.

I propose that if financial assistance programs continue to require evidence of labor, then those programs should account for nonmarket labor as having equal status with market-based labor.

* Assistant Professor of Tax Law, University of Wisconsin Law School. For many helpful conversations and comments at various stages of this project, I thank Alice Abreu, Anne Alstott, Jennifer Bird-Pollan, Dorothy Brown, Steven Dean, Hilary Escajeda, Anthony Infanti, Mitchell Kane, Akunna Olumba, Portia Pedro, Katherine Pratt, Blaine Saito, Susannah Tahk, and Sophia Yan. I am also grateful for the many comments and suggestions I received at the 2022 Association of American Law Schools New Voices in Tax Workshop, the Lutie A. Lytle Black Women Law Faculty Writing Workshop, the Law and Society Conference, and the Fall 2022 Loyola Law School Tax Policy Colloquium. Many thanks to Jennine Vasquez and the staff of the *Boston University Law Review* for their excellent editorial assistance.

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INTRODUCTION

In the United States, women perform an average of 5.7 hours of unpaid care work per day, nearly forty hours per week.¹ In 2019, that labor—if valued at the federal minimum wage of \$7.25 per hour—would have been worth an estimated \$1.5 trillion.² This unpaid labor, which includes activities centered around care for the home and its inhabitants, may save the recipient of the labor from seeking out those services at cost in the market. But, on the other hand, in the United States uncompensated labor *costs* care workers money over their lifetimes in the following ways: (1) when care workers do not receive consideration for their labor, they are vulnerable to the immediate repercussions of lacking capital in a capitalist system; and (2) when public support systems fail to recognize the value contribution of uncompensated care labor, care workers cannot access any support regardless of need.

The failure to recognize unpaid care work in tax-based income security programs undermines women’s economic autonomy in two important ways. First, although the input of care work produces measurable value, that value production is not matched with an output that the care worker can trade elsewhere in the market.³ This first issue is not endemic to the tax system and might not be as significant of a problem if not for the second issue: government financial security programs embedded in the tax system explicitly distribute benefits using market production as the test of deserving financial assistance.⁴ Locating financial assistance programs in the tax system has a disproportionately negative effect on women engaged in home production who

¹ CYNTHIA HESS, TANIMA AHMED & JEFF HAYES, INST. FOR WOMEN’S POL’Y RSCH., PROVIDING UNPAID HOUSEHOLD AND CARE WORK IN THE UNITED STATES: UNCOVERING INEQUALITY 2 (2020), <https://iwpr.org/wp-content/uploads/2020/01/IWPR-Providing-Unpaid-Household-and-Care-Work-in-the-United-States-Uncovering-Inequality.pdf> [<https://perma.cc/QP5T-H772>].

² See Gus Wezerek & Kristen R. Ghodsee, Opinion, *Women’s Unpaid Labor Is Worth \$10,900,000,000,000*, N.Y. TIMES (Mar. 5, 2020), <https://www.nytimes.com/interactive/2020/03/04/opinion/women-unpaid-labor.html> (discussing 2020 study by Oxfam International on unpaid and underpaid care work and global inequality). The median wage for a paid care worker is roughly \$12 per hour—more than the federal minimum wage of \$7.25 per hour—signifying that \$1.5 trillion, an estimate based on the minimum wage, undervalues the actual market worth of unpaid care labor today. See JULIA WOLFE, JORI KANDRA, LORA ENGBAHL & HEIDI SHIERHOLZ, ECON. POL’Y INST., DOMESTIC WORKERS CHARTBOOK 1 (2020), <https://files.epi.org/pdf/194214.pdf> [<https://perma.cc/GQF3-PG38>]; *Minimum Wage*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/topic/wages/minimumwage> [<https://perma.cc/Q4WW-EE4D>] (last visited Dec. 7, 2022).

³ See J. Steven Landefeld & Stephanie H. McCulla, *Accounting for Nonmarket Household Production Within a National Accounts Framework*, 46 REV. INCOME & WEALTH 289, 292, 305 (2000) (“While it is clear that households do produce goods and services, this production is not typically traded in the market, and has therefore been excluded from . . . [national income and product] accounts.”).

⁴ See MARGOT L. CRANDALL-HOLICK, CONG. RSCH. SERV., R44825, THE EARNED INCOME TAX CREDIT (EITC): LEGISLATIVE HISTORY 1-3, 18 (2022).

neither earn a wage they can spend in the market nor have access to essential income security programs they can use as a buffer for gaps in their income.

This Article engages the tax discourse on using the tax system as the mechanism for delivering income-security benefits.⁵ I argue that considering only the income-specific consequences of means-tested financial assistance programs when evaluating them as antipoverty policy is a mistake.⁶ Scholarship on this subject is primarily limited to the reach,⁷ effectiveness,⁸ and efficiency⁹ of tax-based financial assistance. It has not engaged sufficiently with the complex racial and gendered sociohistorical landscape in which these programs were enacted.¹⁰ In this Article, I offer a descriptive account of the relationship between that social history and tax-based financial assistance. I examine how income-tested financial assistance programs ignore the value of nonmarket care labor in a way that exacerbates the stress of low-income status, especially for women and people of color.¹¹ The invisibility of nonmarket care work to the tax

⁵ In 1970, Stanley Surrey asserted that tax incentives should not replace direct spending to advance public policy objectives. Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 711 (1970) (defining “tax incentive” as “tax expenditure which induces certain activities or behavior in response to the monetary benefit available”). Surrey argued that advancing nontax policy objectives through the tax system would make the tax system more regressive, distort choices in the market, and constrict the tax base. *Id.* at 719-26. Many of the tax expenditures Surrey criticized are designed to influence business entities and high-bracket individuals to privately take on certain prosocial activities that might otherwise require government intervention through spending or regulation. *Id.* at 706-12. In this sense, tax incentives aimed at wealthier taxpayers increase their level of agency vis-à-vis their tax obligation.

⁶ See Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2028 (1996).

⁷ See generally Ariel Jurow Kleiman, *Low-End Regressivity*, 72 TAX L. REV. 1 (2018) (contesting tax credit system undermines redistribution goals by favoring working families over more impoverished households).

⁸ See Anne L. Alstott, *Why the EITC Doesn't Make Work Pay*, LAW & CONTEMP. PROBS., Winter 2010, at 285, 289 (contending that Earned Income Tax Credit (“EITC”) does not meaningfully reduce poverty or promote other social goals). For further discussion on the ineffectiveness of the EITC, see generally Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995).

⁹ See generally Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23 (2006) (arguing design of tax incentive system is inefficient).

¹⁰ In the context of tax equity, Anthony Infanti observes that when tax scholars “consider economic differences—and *only* economic differences—in determining the fairness of a tax” they “effectively foreclose[] consideration of non-economic forms of difference (e.g., of race, ethnicity, gender, sexual orientation, or physical ability) when determining the appropriate allocation of societal burdens.” Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191, 1195-96 (2008).

¹¹ See Josephine Kalipeni, *Black Women and Their Labor Are Still Underpaid and Undervalued*, Ms. (Sept. 20, 2022), <https://msmagazine.com/2022/09/20/black-women->

system drives up demand for care labor that must be filled either with paid care work or with uncompensated kin labor.

Policymakers routinely fail to account for unpaid care work in developing social welfare policy even though the U.S. government has funded time-use surveys tracking the incidence of nonmarket household labor since the mid-1960s.¹² Data from the U.S. Bureau of Economic Analysis show that women—regardless of employment status—spend more time on household production activities than men.¹³ Women also do a greater variety of tasks¹⁴ and take on more of the mental load related to maintaining the household.¹⁵ Altogether, the complex physical and mental tasks associated with household production *should* mean that it has the same status in public discourse as nondomestic market employment. But instead, it is systematically left out of public discourse, consequently rendering the toll of household production labor invisible. Social policy that fails to take nonmarket care work into account codifies the cultural value system that ranks external labor over home production, predominantly white industries over industries dominated by people of color, and men’s labor over women’s.

workers-equal-pay [<https://perma.cc/TL8Q-G7G4>] (summarizing market discrimination that underlies Black women’s economic inequality and serves as significant source of emotional stress in their daily lives); *see also* Kathryn Edin & Laura Lein, *Work, Welfare, and Single Mothers’ Economic Survival Strategies*, 61 AM. SOCIO. REV. 253, 254 (1996) (“Data drawn from multiple intensive interviews with 379 low-income single mothers in four U.S. cities between 1988 and 1992 show[ing] that family economics is the primary problem mothers face as they try to move from [cash-based] welfare to work.”).

¹² *See* Muriel Egerton, Kimberly Fisher & Jonathan Gershuny, *American Time Use 1965-2003: The Construction of a Historical Comparative File, and Consideration of Its Usefulness in the Construction of Extended National Accounts for the USA* 5-6 (Inst. for Soc. & Econ. Rsch., Working Paper No. 2005-28, 2005), <https://www.timeuse.org/sites/default/files/2020-09/AHTUS-FinalReport.pdf> [<https://perma.cc/3JQP-5YDJ>] (describing time-use datasets from surveys conducted between 1965 and 2003); Daniel S. Hamermesh, Harley Frazis & Jay Stewart, *Data Watch: The American Time Use Survey*, J. ECON. PERSPS., Winter 2005, at 221, 222-23 (describing history of first time-use survey conducted by “part of the federal statistical system”).

¹³ Benjamin Bridgman, Andrew Craig & Danit Kanal, *Accounting for Household Production in the National Accounts: An Update 1965-2020*, J.U.S. BUREAU ECON. ANALYSIS, Feb. 2022, at 1, 5, <https://apps.bea.gov/scb/2022/02-february/pdf/0222-household-production.pdf> [<https://perma.cc/JJ6M-5SET>].

¹⁴ *Id.* at 6-8 (showing that women spend more time on childcare, cooking, domestic travel, housework, and shopping whereas men spend more time on gardening and odd jobs).

¹⁵ A 2019 Boston Consulting Group report describes the “mental load” as the psychological toll of “managing the incessant responsibilities of household and family care: what needs to be done, who needs to be where, how to make it all happen at once.” JENNIFER GARCIA-ALONSO, MATT KRENTZ, DEBORAH LOVICH, STUART QUICKENDEN & FRANCES BROOKS TAPLETT, BOS. CONSULTING GRP., *LIGHTENING THE MENTAL LOAD THAT HOLDS WOMEN BACK* 1 (2019), https://web-assets.bcg.com/img-src/BCG-Lightening-the-Mental-Load-That-Holds-Women-Back-Apr-2019_tcm9-217471.pdf [<https://perma.cc/87Z8-SMJ3>]. Heightened mental load at home has a measurable impact on women’s ability to advance in the formal labor market. *Id.* at 3.

This Article examines the impact of gendered cultural norms in the home on women in the workforce. I aim to advance the discourse on how income-tested financial assistance policies are part of the feedback mechanism that undermines women's economic progress. First, I argue that uncompensated care work is foundational to American economic life. Second, I assert that excluding care workers from public support *because* they do not earn a market wage reproduces racial and gendered economic prejudice in tax administration. When the tax system adopts market production as a requirement for value generation in determining eligibility for income support programs, it legitimizes market devaluation of care work and perpetuates women's experiences of financial precarity.

Culturally, care work is gendered as women's work because of its association with women's domesticity in the heteropatriarchal marital family.¹⁶ In that context, a woman's invisible domestic labor supports a man's visible market labor, allowing men to generate an income to support the material needs of their families. In this framework, married women rely materially on their wage-earning spouses. Market sexism artificially diminishes the value of work that women perform *because* the workers are women; joint taxation amplifies the cost of market sexism by pitting spouses' wages against each other.¹⁷

When public support programs fail to recognize care labor, those programs can also cost the provider of the labor money in foregone benefits. The women who perform uncompensated care labor cannot count it toward social security retirement contributions or income security tax credits because the labor does not generate a market wage.¹⁸ The invisibility of unpaid care work to income support programs is a direct consequence of locating those programs in the tax code rather than administering them separately. Because only labor that generates a wage counts as labor for the purpose of administering these programs, the billions of hours of unpaid care labor—valued at trillions of dollars—remain hidden from many of the most significant public social insurance programs.¹⁹

Whether care work formally counts as work in the tax framework is essential to the question of how to remedy economic marginality. One answer would be to make the tax system account for uncompensated care work in annual calculations of contributed value for determining distributions from income support programs (e.g., Earned Income Tax Credit ("EITC") or Social Security

¹⁶ See Marjorie E. Kornhauser, *Wedded to the Joint Return: Culture and the Persistence of the Marital Unit in the American Income Tax*, 11 THEORETICAL INQUIRIES L. 631, 634-35 (2010).

¹⁷ See *infra* note 33 and accompanying text.

¹⁸ See Jordyn Fleisher, Note, *Expanding the Social Security Act to Reduce Old-Age Poverty: Creating Child Care Social Security Benefits*, 31 B.U. PUB. INT. L.J. 113, 114-15 (2022) ("[F]ull-time caregivers are not directly covered by Social Security; they may receive coverage only indirectly through spousal and survivorship benefits.").

¹⁹ See *id.*

Insurance).²⁰ This view accepts that tax-based financial support programs are fixtures of financial policy. It aims to make the tax system recognize uncompensated care work as a way to grant care workers increased access to public support.

Income security programs in the tax system are ostensibly designed to reward market labor.²¹ The tax system is considered a good administrator of those programs because it is explicitly designed to measure income.²² But when income is the measure of the value that a person contributes to their nation, uncompensated labor is made invisible, as if it has no value. Moreover, when these programs adopt income as a measure, they reproduce the economic racism and sexism that determines market values of labor predominantly performed by women and Black, brown, Asian American/Pacific Islander, and indigenous people (collectively “women of color”).²³ Paid care work, for example, is predominantly performed by women (91.5%), more than half of whom are women of color.²⁴ Domestic workers earning the median wage are paid almost

²⁰ As a matter of policy design, the annual value of a taxpayer’s nonmarket care work could be calculated as part of their income that *would be* subject to reporting *but for* an explicit exclusion of that income from the taxpayer’s gross income tax base. The tax statute’s treatment of combat pay can provide the basic model for this policy. Under § 112(a) of the Internal Revenue Code (“I.R.C.”),

gross income does not include compensation received for active service as a member below the grade of commissioned officer in the Armed Forces of the United States for any month during any part of which such member (1) served in a combat zone, or (2) was hospitalized as a result of wounds . . . incurred while serving in a combat zone.

I.R.C. § 112(a). Under this rule, policymakers first acknowledge that service members have received compensation that would otherwise be subject to tax according to I.R.C. § 61. The § 112 rule then explicitly excepts combat pay from the general § 61 rule, distinguishing it as a particular kind of income that policymakers decided should not be taxed. I.R.C. § 112(a)(1). In addition, I.R.C. § 32(c) establishes that this excluded combat pay may qualify—at the taxpayer’s election—as “earned income” for the purpose of determining eligibility to receive the EITC. I.R.C. § 32(c)(2)(B)(vi). The nonmarket care worker is distinct from the military service member who receives compensation in exchange for their labor. But, if time-use data provides sufficient information to estimate the annual value of nonmarket care work, the tax system can similarly *exclude* that value from gross income and give taxpayers the option to *include* it in their calculation of income to determine EITC eligibility.

²¹ See CTR. ON BUDGET & POL’Y PRIORITIES, POLICY BASICS: THE EARNED INCOME TAX CREDIT 2 (2019) [hereinafter POLICY BASICS: THE EARNED INCOME TAX CREDIT], <https://www.cbpp.org/sites/default/files/atoms/files/policybasics-eitc.pdf> [<https://perma.cc/4JVE-F4NA>].

²² See David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 995-96 (2004) (arguing that locating financial assistance programs in tax system is justified by high “coordination benefits” and low “specialization benefits” of operating them as separate programs).

²³ See Angela Garbes, *The Devaluation of Care Work Is by Design*, ATLANTIC (May 13, 2022), <https://www.theatlantic.com/family/archive/2022/05/unpaid-domestic-labor-essential-work/629839>.

²⁴ WOLFE ET AL., *supra* note 2, at 1.

40% less than nondomestic workers.²⁵ The discrepancy in wages between domestic workers and nondomestic workers reflects a pervasive attitude that “domestic work is women’s work, natural and good, done with no expectation of compensation: a labor of love.”²⁶ Because of racism and sexism in the market, even if the tax system were to account for unpaid care work, it would simply reproduce market devaluation of that labor in the social welfare system.

The double burden of financial precarity and exclusion from work-based income-security programs falls especially hard on Black women. A confluence of factors that suppress Black women’s ability to establish and maintain economic stability as a class includes the racial and gendered disparities in wealth, wages, and labor.²⁷ Black women experience gendered racism in the market that combines anti-Black racism and misogyny.²⁸

Federal income taxation, for example, categorizes taxpayers according to their marital status and imposes different rate schedules on married families and unmarried people.²⁹ An underlying assumption of this system is that married people order their lives to share resources in a way that unmarried people do not. But that assumption does not reflect the reality that Americans arrange their social and economic lives in a broad variety of ways.³⁰ Tax and family law scholars have called the centrality of marriage in the tax code into question for the ways that it prioritizes one kind of private social ordering over all others.³¹ They have also criticized the ways that jointly taxing married couples’ income disadvantages women, who—across the racial spectrum—earn just a fraction of

²⁵ *Id.* at 18.

²⁶ Garbes, *supra* note 23.

²⁷ See WOLFE ET AL., *supra* note 2, at 7 (“Black and Hispanic workers make up a disproportionate share of domestic workers.”); Justyce Watson & Ofronama Biu, *You Can’t Improve Black Women’s Economic Well-Being Without Addressing Both Wealth and Income Gaps*, URB. INST. (July 1, 2022), <https://www.urban.org/urban-wire/you-cant-improve-black-womens-economic-well-being-without-addressing-both-wealth-and> [https://perma.cc/4P58-PASQ].

²⁸ See Adia Harvey Wingfield, *Women Are Advancing in the Workplace, but Women of Color Still Lag Behind*, BROOKINGS (Oct. 2020), <https://www.brookings.edu/essay/women-are-advancing-in-the-workplace-but-women-of-color-still-lag-behind/> [https://perma.cc/CA7C-LFMT] (“[R]ace and racism create specific, unique challenges for women of color . . .”).

²⁹ I.R.C. § 1(j) (listing federal income tax brackets for tax years 2018 through 2025).

³⁰ See Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 67, 93 (1993).

³¹ See Patricia A. Cain, *Taxation of Unmarried Partners*, 99 WASH. U. L. REV. 1931, 1931-32 (2022) [hereinafter Cain, *Taxation of Unmarried Partners*]; Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 806-31 (2008) [hereinafter Cain, *Taxing Families Fairly*]; Mylinh Uy, *Tax and Race: The Impact on Asian Americans*, 11 ASIAN L.J. 117, 127-28 (2004) (discussing tax penalties and bonuses for marriage); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1571 (1996) (“Many features of the Federal Income Tax Code reflect the assumption that our society is composed of heterosexual married couples, with men occupying the ‘public’ sphere and women occupying the ‘private’ domestic sphere.”).

the income that men earn, especially toward the higher end of the income scale.³² A married woman may face pressure as the “second-income” earner to leave the workforce because her income combined with her spouse’s increases the couple’s tax rate to a higher income bracket than her spouse’s alone.³³ The potential tax savings from her leaving the workforce combined with economic savings from her performing uncompensated labor for the household is then framed as a noble sacrifice.³⁴

When considered in concert with employment status, marital status plays an outsized role in determining access to income security resources. Even if taxpayers cohabit as part of a committed social and economic relationship that is similar to marriage, they are still taxed as separate individuals unless they are formally married in the state where they live.³⁵

Black Kinship Networks (“BKNs”) include married and unmarried kin members who share resources and services for mutual survival.³⁶ Within this context, Black women may engage in alternative social arrangements, including unmarried cohabitation with romantic partners³⁷ and interhousehold extended networks of kin who support each other through reciprocal, informal exchanges of support services.³⁸ BKNs are sites of essential social support that provide the kinds of care support that are expected from women in nuclear families or in the market labor of paid care workers.³⁹ The care work that takes place within BKNs

³² Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 787 (1997).

³³ See *id.* at 790.

³⁴ See, e.g., Gerren Keith Gaynor, *Dad’s Viral Post Praising Stay-at-Home Wife’s ‘Sacrifices’ Sparks Debate*, FOX NEWS (Nov. 11, 2019, 5:00 AM), <https://www.foxnews.com/lifestyle/facebook-post-stay-at-home-wife> [<https://perma.cc/ZV5P-NP48>].

³⁵ See Kornhauser, *supra* note 30, at 69.

³⁶ See Herbert J. Foster, *African Patterns in the Afro-American Family*, 14 J. BLACK STUD. 201, 225-26 (1983) (describing historically greater emphasis that Blacks have placed on extended-family kinship networks); CHRISHANA M. LLOYD, MARTA ALVIRA-HAMMOND, JULIANNA CARLSON & DEJA LOGAN, FAMILY, ECONOMIC, AND GEOGRAPHIC CHARACTERISTICS OF BLACK FAMILIES WITH CHILDREN 2-3 (2021), https://www.childtrends.org/wp-content/uploads/2021/02/FamilyEconomicGeographicCharacteristics_ChildTrends_March2021.pdf [<https://perma.cc/9R93-GYDB>] (discussing role of extended family and kinship networks within Black communities and lower levels of marriage among Black women).

³⁷ See Tonya L. Brito, *Complex Kinship Networks in Fragile Families*, 85 FORDHAM L. REV. 2567, 2569-70 (2017) (“Cohabitation, whether as an alternative or prelude to marriage, has increased dramatically and is widely utilized and accepted in American society.”).

³⁸ See K. SUE JEWELL, SURVIVAL OF THE BLACK FAMILY: THE INSTITUTIONAL IMPACT OF U.S. SOCIAL POLICY 35 (1988) (“The black family’s ability to make positive contributions to society and to successfully socialize its offspring, while confronted with social barriers, has necessitated its dependence on sources outside the two-parent family unit.”).

³⁹ See, e.g., *id.* at 36-39 (discussing origins, composition, and commodities of Black mutual aid networks); Christina J. Cross, Ann W. Nguyen, Linda M. Chatters & Robert Joseph Taylor, *Instrumental Social Support Exchanges in African American Extended Families*, 39

has value beyond the market value of the labor performed: exchanges of “[p]ositive instrumental support ha[ve] been shown to reduce mortality risks and stress and anxiety, to improve individuals’ standard of living, and to assist with prisoner reintegration.”⁴⁰ Exchanges of support in BKNs are both reflective of and responsive to Black women’s shared experiences of exclusion from conventional market resources that provide financial stability to individuals and families.⁴¹

I. UNRECOGNIZED UNCOMPENSATED CARE WORK

Uncompensated care workers are economically vulnerable because their labor—classified in economics literature as “household production”⁴²—is excluded from national economic accounts.⁴³ When care work is not recognized, the value it produces is omitted from estimates of national value production like the Gross Domestic Product (“GDP”).⁴⁴ This exclusion of unpaid care work from GDP “leads to misestimating households’ material well-being and societies’ wealth.”⁴⁵ In the United States, part of the problem is that existing information about the amount and value of unpaid care work *is* measured by a government agency, but that information is “not used in the design of economic policies.”⁴⁶ Policymakers’ failure to use unpaid home production data to craft

J. FAM. ISSUES 3535, 3536 (2018) (examining “types and levels of instrumental support that individuals exchange (give and receive) with family members” including “transportation assistance, help with chores, financial assistance, and help during illness”).

⁴⁰ See Cross et al., *supra* note 39, at 3536.

⁴¹ See JEWELL, *supra* note 38, at 38 (“The systematic exclusion of blacks from major societal institutions has limited the resources that the members of black mutual-aid networks have to exchange.”).

⁴² Landefeld & McCulla, *supra* note 3, at 289; see Bridgman et al., *supra* note 13, at 2 (“There are seven categories of household production: cooking, housework, odd jobs, gardening, shopping, child care, and domestic travel.”). The terms “unpaid” and “nonmarket” are used throughout this Article in conjunction with “household production,” “care work,” “care labor,” and “domestic work” to refer to the broad category of “work done, primarily by women, to care for family members: cooking, cleaning, and shopping, as well as care of children, the sick, and the elderly.” Nancy Folbre, *Measuring Care: Gender, Empowerment, and the Care Economy*, 7 J. HUM. DEV. 183, 186 (2006).

⁴³ See Landefeld & McCulla, *supra* note 3, at 290.

⁴⁴ *Id.* (“Since GDP is generally limited to market transactions, the usefulness of GDP as a measure of economic activity and growth is reduced.”).

⁴⁵ GAËLLE FERRANT, LUCA MARIA PESANDO & KEIKO NOWACKA, OECD DEV. CTR., UNPAID CARE WORK: THE MISSING LINK IN THE ANALYSIS OF GENDER GAPS IN LABOUR OUTCOMES 11 (2014), https://www.oecd.org/dev/development-gender/Unpaid_care_work.pdf [<https://perma.cc/8EBG-TP4A>].

⁴⁶ Diane Elson, *Recognize, Reduce, and Redistribute Unpaid Care Work: How To Close the Gender Gap*, 26 NEW LAB. F. 52, 55 (2017).

fiscal policy has a disproportionate impact on women, who perform disproportionately more unpaid care labor than men.⁴⁷

In this Part, I examine how the centrality of market labor in tax-based financial assistance programs reproduces discrimination against women and people of color and reinforces the invisibility of market-based care labor.

A. *Care Labor and Economic Security*

Care work is labor that has historically been associated with maintaining the home and supporting its inhabitants.⁴⁸ More specifically, care work includes household activities like cooking, cleaning, and caring for children and the ill.⁴⁹ The activities that make up uncompensated care work are essential to a functioning economy. But access to the stability that tax-based financial support programs offer is limited by whether the system accounts for the value of the labor performed. Tying access to benefits to formal recognition of labor creates a strong preference in the public support system for labor that generates a taxable income. Under this rule, uncompensated care work is not acknowledged as eligible labor, despite the value it creates. The failure to acknowledge uncompensated care labor denies care workers access to stabilizing support and exacerbates the conditions of financial precarity that cause them to seek that support in the first instance.

The relationship between nonmarket labor and the tax system has frequently been framed with respect to the division of labor in a, usually heterosexual, marital household. The heteropatriarchal narrative establishes that household production is women's domain, while external market production is men's.⁵⁰ While cultural values that enforce strict gendered labor division in the marital home have shifted since the 1960s, women still take on a dominant proportion of nonmarket household production.⁵¹ This is true despite the increase in women's market labor since the 1960s.⁵² Time-use data reveal that "men spend more time in paid work than women and the converse is true for unpaid work."⁵³

⁴⁷ See Janelle Jones & Sarah Jane Glynn, *The Kids (and the Adults) Aren't All Right: Job Losses in the Care Sector Extend Beyond Child Care*, U.S. DEP'T OF LAB. BLOG (Jan. 11, 2022), <https://blog.dol.gov/2022/01/11/the-kids-and-the-adults-arent-all-right> [https://perma.cc/WJ23-F4Z8] (examining how collapse of care infrastructure during pandemic resulted in disproportionate burden on women).

⁴⁸ See *supra* note 42 and accompanying text.

⁴⁹ See *supra* note 42 and accompanying text.

⁵⁰ See Fleisher, *supra* note 18, at 118 (discussing breadwinning model popular until mid-twentieth-century whereby husbands were "dominant earners" and wives caregivers).

⁵¹ See Wezerek & Ghodsee, *supra* note 2 ("[W]omen still perform a disproportionate amount of unpaid work . . .").

⁵² See Benjamin Bridgman, *Home Productivity*, 71 J. ECON. DYNAMICS & CONTROL 60, 60 (2016).

⁵³ JOSEPH E. STIGLITZ, AMARTYA SEN & JEAN-PAUL FITOUSSI, REPORT BY THE COMMISSION ON THE MEASUREMENT OF ECONOMIC PERFORMANCE AND SOCIAL PROGRESS 128 (2009),

One 2020 study found that “women perform unpaid household and care work amounting, on average, to 5.7 hours per day compared with 3.6 hours for men.”⁵⁴ The same study observed that “women who are in the paid labor force full-time . . . spend an average of 4.9 hours per day on unpaid household and care work, compared with 3.8 hours for their male counterparts.”⁵⁵ More starkly, unemployed women looking for work spend an average of 8.2 hours on care work compared with 2.9 hours for similarly situated men.⁵⁶

Economists principally use one of two models to value self-produced care work: opportunity cost or replacement cost. Under one view, unpaid care work can have value relative to its opportunity costs, or the market wage rate of the family member that carries out the household production.⁵⁷ Opportunity cost is measured by “the earning foregone by the household member due to the fact that he or she produces services at home rather than offering labor services on the labor market.”⁵⁸ Opportunity cost might measure, for example, the resulting cost of one spouse’s lost income when leaving the labor market to reduce the household tax burden.⁵⁹ Under the competing view, economists may determine the value of unpaid household production by evaluating it with respect to its replacement cost, which is “the market wage of a domestic worker if the household hired an external person.”⁶⁰

Both views uncritically bind the value of nonmarket household production to market figures. Economists run a significant risk of reproducing market devaluations of women’s work whichever metric they use to establish the value of women’s unpaid labor. Economists also risk embedding gendered and racial devaluation of household work into their models.⁶¹ Still, the opportunity cost and replacement cost models provide a helpful starting point to determine the

<https://ec.europa.eu/eurostat/documents/8131721/8131772/Stiglitz-Sen-Fitoussi-Commission-report.pdf> [<https://perma.cc/TC9M-UG2C>].

⁵⁴ HESS ET AL., *supra* note 1, at 2.

⁵⁵ *Id.* at 4.

⁵⁶ *Id.* at 4, 6 tbl.1.

⁵⁷ Paul Schreyer & W. Erwin Diewert, *Household Production, Leisure, and Living Standards*, in 72 NAT’L BUREAU ECON. RSCH., MEASURING ECONOMIC SUSTAINABILITY AND PROGRESS 89, 90 (Dale W. Jorgenson, J. Steven Landefeld & Paul Schreyer eds., 2014) (distinguishing household work as production input and inherent source of utility).

⁵⁸ *Id.*

⁵⁹ Michelle Harding, Grace Perez-Navarro & Hannah Simon, OECD Ctr. for Tax Pol’y & Admin., *In Tax, Gender Blind Is Not Gender Neutral: Why Tax Policy Responses to COVID-19 Must Consider Women*, ECOSCOPE (June 1, 2020), <https://oecdecoscope.blog/2020/06/01/in-tax-gender-blind-is-not-gender-neutral-why-tax-policy-responses-to-covid-19-must-consider-women/> [<https://perma.cc/46T9-CE74>].

⁶⁰ FERRANT ET AL., *supra* note 45, at 11.

⁶¹ See Michelle Holder, *Addressing the ‘Double Gap’ Faced by Black Women in the U.S. Economy*, WASH. CTR. FOR EQUITABLE GROWTH (Nov. 30, 2021), <https://equitablegrowth.org/addressing-the-double-gap-faced-by-black-women-in-the-u-s-economy> [<https://perma.cc/HY2G-VLJG>] (citing 2020 data published by U.S. Bureau of Labor Statistics).

value of labor that is not captured in determining women's eligibility for income security programs.

Both the market devaluation of women's labor and women's exit from the formal labor market deflate women's potential lifetime earnings. Consider a hypothetical example:

Three people—a Black woman, a white woman, and a white man—begin working at a widget factory when they are eighteen years old. They all do identical tasks five days a week for forty hours per week. All three retire from the factory at sixty-five. Each person's wage remains the same throughout their tenure at the factory⁶²: the Black woman earns \$7.00 per hour; the white woman earns \$8.30 per hour; and the white man earns \$10 per hour.⁶³

If the U.S. government decided to compensate workers for the full value of their nonmarket household labor through cash distributions and if it used earnings to measure each distribution, the government would reproduce market inequality. Under the opportunity cost model to determine the value for nonmarket household production, the Black woman's nonmarket labor would always only be worth 70% of the value of the same labor performed by the white man. The white woman's nonmarket labor would only be worth 83% of the white man's. Measuring the value of labor according to opportunity cost—how much the person would have earned if they had worked in the labor market—reproduces market discrimination that significantly reduces women's lifetime earnings. After forty-seven years of doing identical work, the Black woman will have missed out on 30% of her possible total lifetime earnings relative to the white man.⁶⁴ The white woman would have lost 17% of her potential earnings.

The replacement value model would produce the improved result that all three workers would receive the same distribution because it would be based on the market value of household production labor. Unfortunately, domestic labor is worth significantly less in the labor market than nondomestic labor. A 2020 economic policy study estimated that domestic workers are “paid \$12.01 per hour, including overtime, tips, and commissions—39.8% less than the typical nondomestic worker, who is paid \$19.97.”⁶⁵ In the above hypothetical, the nondomestic worker's wages average roughly \$8.43 per hour. So, if domestic

⁶² The hypothetical wages in this example approximate reality: the ratios of Black woman and white woman wages to white man wages in this example are about the same as the corresponding ratios calculated using 2020 data for average salaries reported according to race and gender. *See id.*

⁶³ The workers' hourly wages reflect the present day wage distribution.

⁶⁴ Evaluating Black women's wage-gap-related income losses, the National Women's Law Center estimates that Black women who work full time lose over \$900,000 over a forty-year working career. JASMINE TUCKER, NAT'L WOMEN'S L. CTR., IT'S TIME TO PAY BLACK WOMEN WHAT THEY'RE OWED 1 (2022), <https://nwlc.org/wp-content/uploads/2022/09/BWEPD-9.14.22-v2.pdf> [<https://perma.cc/N5Z2-24TW>]. That figure represents lost opportunities to access goods and services required to meet basic needs.

⁶⁵ WOLFE ET AL., *supra* note 2, at 18.

labor is valued at 60.2% of that amount, the replacement cost for unpaid household production would be roughly \$5.07 per hour. If the U.S. government were to distribute the value of lost wages from unpaid household labor according to the replacement cost, it would erase the discriminatory impact of the wage distribution between the three workers. But the replacement cost model still represents a deflated value for unpaid care work because domestic work is typically less compensated than nondomestic work in the labor market.

The above hypothetical highlights some dilemmas that women face interacting with the labor market: (1) if they are employed in an industry that is characterized as feminine—e.g., domestic work—they experience wages that are deflated relative to all other work; and (2) if they are employed in an industry that is gendered male—e.g., nondomestic work—they experience wage deflation relative to men in similar positions. The effect of the wage discrimination that women experience in the formal market is exacerbated by women's relatively higher participation in unpaid household production.⁶⁶ When financial assistance programs are income-tested and do not account for the value of care work, they undermine women's ability to exercise full control over how they distribute their labor.

B. *Tax Treatment of Care Work and Stability*

1. Economic Security

Exchanges within BKNs take two principal forms: private financial transfers ("PFT") and transfers of service.⁶⁷ Of these, the PFT is the only one that is immediately cognizable to our tax system. PFTs are a kind of market transaction that both augments financial solvency for the recipient and, depending on the magnitude of the transfer, may be visible to the tax system. The Internal Revenue Code ("I.R.C."), for example, characterizes transfers of property⁶⁸ in many ways, including as wages,⁶⁹ gifts,⁷⁰ and loans.⁷¹ Each of these characterizations goes to the central question in tax of what kinds of transfers constitute taxable income and what may be excludable, deductible, or eligible for a tax credit.

⁶⁶ See HESS ET AL., *supra* note 1, at 2.

⁶⁷ See Cross et al., *supra* note 39, at 3536.

⁶⁸ The federal income tax system includes exchanges of cash alongside exchanges of noncash property in its definition of property, so I do the same here. When I refer to property, I include exchanges of cash from one person to another.

⁶⁹ See I.R.C. § 61.

⁷⁰ See, e.g., I.R.C. § 102(a) (excluding value of gifted property from gross income); I.R.C. § 170 (allowing tax deductions for charitable contributions); I.R.C. § 2523(a) (describing "deduction in computing taxable gifts" for property transfer among spouses).

⁷¹ See, e.g., I.R.C. § 163 (allowing deduction for interest paid or accrued within taxable year on indebtedness).

Table 1. Transfer of Property Characterizations.⁷²

	Accounting	Gift	Wage
X	- \$1	Taxable Income (§ 61)	Deductible (§ 162)
Y	+ \$1	Excludable (§ 102)	Taxable Income (§ 61)
Net	\$0	\$1 taxed to X	\$1 taxed to Y

Consider the transaction in Table 1: When a person, *X*, gives another person, *Y*, a one-way PFT of \$1, that transfer can be recorded for both financial accounting purposes and tax purposes. For financial accounting purposes, “the two sides of the accounts are expected to balance out,”⁷³ and here they do: *X* is \$1 poorer and *Y* is \$1 richer. For tax purposes, setting aside the de minimis rules for gifts, § 102 would capture the transaction as a gift in which *X* is taxed on the \$1 as wage income (they were taxed when they earned it) and *Y* can exclude the \$1 from their calculation of taxable income.⁷⁴ If *X* were not a family member but an employer instead, the \$1 would be a deductible wage paid to *Y*, who would be required to include it in their taxable income calculation.⁷⁵ Whenever possible, the income tax system attempts to tax transactions at least once, and attempts to avoid double taxation of the same \$1.⁷⁶ Both the § 102 gift and the § 61 wage tax rules accomplish this by identifying either the recipient or the donor as the taxable party to the transaction. A single-level tax on these forms of income acknowledges that value has not been created; it has only changed hands from one party to another—matching the accounting story of the transaction.

The tax system’s orientation to PFTs is an example of how economic solvency and tax visibility work in concert. To determine the fairest way to levy income tax, the tax system is keyed into the characteristics of transfers of property, including the relationship between the transferor and transferee. Economic solvency is important because it allows for a person to engage in market transfers; the receipt of cash in the form of a gift or a wage enables a person to pay for goods and services in the market that they want or need.

2. Tax Visibility

Tax visibility is important only where financial assistance programs are governed through the tax system. In the United States, tax visibility is determined, in part, by whether a person’s labor is recognized by the

⁷² The \$0 figure in the row labeled “Net” represents a balanced account.

⁷³ STIGLITZ ET AL., *supra* note 53, at 274 n.12.

⁷⁴ See I.R.C. § 102(a) (“Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.”).

⁷⁵ See I.R.C. §§ 61, 162.

⁷⁶ *But see* I.R.C. §§ 170, 501 (making gifts to charitable organizations deductible to donor and excludable to recipient); I.R.C. §§ 11, 61(a)(7) (taxing corporations for income earned and taxing shareholders when receiving such income as dividends).

administering system.⁷⁷ It has, therefore, become increasingly important for low-income people to gain access to market labor, which generates the kind of taxable income that would make them eligible for an income security program like the EITC.

Income security programs that depend on evidence of market employment began to gain prominence in the early 1990s and have grown significantly relative to direct cash transfers in federal and state income security programs.⁷⁸ This Article focuses on the example of the EITC, codified at I.R.C. § 32, which is a refundable credit on a taxpayer's earned income.⁷⁹ It has existed in various forms since 1975 but was expanded by the Clinton Administration as part of the Personal Responsibility and Work Opportunity Reconciliation Act in 1996 as a way to increase low-income families' after-tax earnings and incentivize low-income people to work.⁸⁰ The EITC incentivizes "low-wage workers to increase their work hours" by making the benefit a worker receives dependent on their reported earnings.⁸¹

The rise of the EITC, and the relative decline of direct cash assistance programs, demonstrated the importance of tax visibility through reported earnings in accessing certain federal and state safety net programs.⁸² The central problem of this framework, and the issue at the heart of this Article, is that a significant number of people who experience the kind of economic precarity that would probably make them eligible for state assistance perform much labor over their lifetimes but *do not work in the formal labor market*. This means that they face a double penalty: they experience economic precarity characterized by a lack of a wage that can be exchanged for goods and services, and they are also ineligible for assistance because they are invisible in the tax system.

⁷⁷ See I.R.C. § 32.

⁷⁸ See CRANDALL-HOLICK, *supra* note 4, at 2-15 (detailing income security programs open to working families from 1975 to 2021).

⁷⁹ See *id.* at 3.

⁸⁰ *Id.* In the same legislation, Congress converted the Aid to Families with Dependent Children ("AFDC") federal cash assistance program to state block grants through Temporary Assistance for Needy Families ("TANF"). *Id.* at 2. For more on the impact of the shift from AFDC to TANF, see CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: TEMPORARY ASSISTANCE FOR NEEDY FAMILIES 6 (2022) [hereinafter POLICY BASICS: TEMPORARY ASSISTANCE FOR NEEDY FAMILIES], <https://www.cbpp.org/sites/default/files/atoms/files/7-22-10tanf2.pdf> [<https://perma.cc/9NUN-ZJ22>] (characterizing TANF as "greatly weakened safety net that does far less than AFDC to alleviate poverty and hardship" in part because its enactment led to "unprecedented declines in the number of families receiving cash assistance").

⁸¹ POLICY BASICS: THE EARNED INCOME TAX CREDIT, *supra* note 21, at 2.

⁸² POLICY BASICS: TEMPORARY ASSISTANCE FOR NEEDY FAMILIES, *supra* note 80, at 8 (explaining correlation between social programs and employment barriers).

C. *Denying Unpaid Care Workers Access to Aid*

To illustrate the relationship between economic solvency and tax visibility, consider three women—Aleah, Ciara, and Ebony—who all provide care work, and the three beneficiaries of their work—Bridget, Damon, and Farah, respectively.

Aleah is one of the 2.2 million domestic workers in the United States.⁸³ Aleah is a market-based care worker (“MCW”) who earns a reportable wage of \$100. For the purpose of this hypothetical, Aleah’s earnings place her in the threshold for EITC eligibility. Aleah is a single filer for federal income tax purposes. Aleah’s sole client, Bridget, earns \$400 from her market employment and pays Aleah out of those earnings.

Ciara is a married nonmarket care worker (“NMCW”) who performs \$100 worth of labor for her household. Her spouse, Damon, is a market laborer who earns \$400. It is unclear how much access Ciara has to Damon’s earnings.

Ebony is an NMCW who helps her niece Farah with childcare and other household tasks. Ebony also performs \$100 worth of labor. Farah cannot afford to pay Ebony for her time but often reciprocates by helping Ebony with miscellaneous tasks (value uncertain). Farah, a single mother, also earns \$400 from market labor.

1. Economic Solvency

The following table offers one possible accounting for the value exchange that Aleah, Ciara, and Ebony participate in when they provide care work.

Table 2. Value Exchange Possibility.

	Aleah	Ciara	Ebony
Labor Input	(\$100)	(\$100)	(\$100)
Consideration Received	\$100 cash	variable	\$0
Input + Consideration	\$0	variable	(\$100)

In providing \$100 of labor and receiving \$100 of income in return, Aleah, as a market-based care worker, has the only balanced economic account of the three women. Because we do not know how much access Ciara has to her husband’s earnings, it is unclear how much value she receives in exchange for her \$100 of labor.⁸⁴ Ebony provides \$100 worth of service in exchange for an indeterminate

⁸³ WOLFE ET AL., *supra* note 2, at 1.

⁸⁴ There is no one way to characterize the distribution of financial resources within a marriage. Data show that women in heterosexual married relationships have less access than their partners to financial resources. See HESS ET AL., *supra* note 1, at 2. As a result, assessing Ciara’s position in relation to the positions of Aleah and Farah would require additional information about Ciara’s access to family funds. If her husband does not allow her access to finances, the return for her labor might be accounted for as \$0—because her direct access to

amount of service. Because no tangible financial resources are exchanged as part of the transaction between Ebony and Farah, from an economic security standpoint, Ebony appears to be \$100 in the red. Although Ebony provided \$100 worth of labor,⁸⁵ she neither has the \$100⁸⁶ as wages she can spend, nor (potential) shared marital finances to fall back on. In the Black Kinship exchange model,⁸⁷ the service-for-service exchange between Ebony and Farah is an exchange of value; however, neither Farah nor Ebony can translate the value of services they perform for each other into material goods elsewhere in the market. So, relative to Aleah and Ciara, Ebony experiences heightened vulnerability for having neither exchangeable compensation nor access to income-tested financial assistance.

2. Tax Visibility

Means-tested income security programs exacerbate economic precarity. Even though we know that Aleah, Ciara, and Ebony all create the same amount of value with their labor, programs like the EITC regard Ciara and Ebony as though they did not contribute to the public good.⁸⁸ The discrepancy between the value women create and the value our tax system recognizes places pressure on them to also pursue market labor opportunities that may not otherwise reduce their workload in the home.⁸⁹ At the same time, “the high cost of paid care makes it unaffordable for many families” in a way that imposes pressure on families to cut back on work hours, in order to avoid hiring someone to perform household tasks.⁹⁰

the financial resources is so restricted that she does not have the same liberty as Aleah to go out and purchase goods and services. However, it is also possible that Ciara could have full access to all \$400 of Damon’s earnings. If she has no access and no control, she ends up \$100 in the red, but if she has full access and unrestricted control of spending, her account is a positive \$300—as if Damon paid her \$400 for \$100 worth of care work.

⁸⁵ Using the replacement cost value of Aleah’s \$100 income from market labor as the estimate of the value of labor provided.

⁸⁶ Ebony experiences a replacement cost valued at \$100: she put in \$100 worth of effort and time for no consideration.

⁸⁷ See Carol B. Stack, *All Our Kin: Strategies for Survival in a Black Community* 54 (1974).

⁸⁸ See HESS ET AL., *supra* note 1, at 2.

⁸⁹ *Id.* at 4.

⁹⁰ *Id.* at 7.

Table 3. Aleah.

	Provider	Recipient
	Aleah	Bridget
Income	\$100	\$400
Costs	(\$100) Labor Input	(\$100) Pmt for Labor
Income + Costs	\$0	\$300
Taxable Income	\$100	\$400
Tax Liability	\$2.5	\$35

In Table 3, Aleah—the MCW—realizes an income of \$100 under § 61(a)(1). Bridget realizes an income of \$400, despite having spent \$100 to hire Aleah. The tax system treats Bridget’s payment of Aleah as an act of voluntary consumption that does not reduce the overall amount of her taxable income under § 61. So, even though only \$400 existed at the beginning and end of the transaction, the total amount of taxable income realized between Aleah and Bridget is \$500.⁹¹

Table 4. Ciara.

NMCW + Joint Taxation		
	Ciara	Ciara & Damon
Income	-	\$400
Costs	(\$100) Labor Input	+\$100 Imputed Income
Income + Costs	(\$100)	\$500
Taxable Income	-	\$400
Tax Liability	-	\$35

In Table 4, Ciara independently realizes \$0 in taxable income. However, because she is jointly taxed with Damon, she is deemed to be part of the unit that earned \$400. A Haig-Simons assessment⁹² of the marital unit’s accretion to value might also add the \$100 of value that Ciara contributed to the household. But because the current income tax system only measures realized accretions to

⁹¹ Bridget cannot deduct her payment to Aleah as an I.R.C. § 162(a)(1) “salar[y] or other compensation for personal services actually rendered” because I.R.C. § 262(a) prohibits deductions “for personal, living, or family expenses,” including housekeeping services. *See* I.R.C. §§ 162, 262.

⁹² The formulation of the Haig-Simons test, as explained by Henry Simons, is that “[p]ersonal income may be defined as the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and the end of the period in question.” Jeff Strnad, *Tax Timing and the Haig-Simons Ideal: A Rejoinder to Professor Popkin*, 62 IND. L.J. 73, 75 (1986) (quoting HENRY SIMONS, *PERSONAL INCOME TAXATION* 50 (1938)).

value in the sale or exchange of property,⁹³ Ciara and Damon as a unit's taxable income is \$400, not \$500.

The difficulty inherent in treating Ciara and Damon as a single unit is that Ciara is not able to develop a profile of her contributions in the same way that Damon is. That is, Damon's employment records determine how much he has earned in the labor market, but without a formal accounting for uncompensated labor, the value of Ciara's nonmarket labor diminishes over time.

Table 5. Ebony.

NMCW + Kin Network Service		
	Ebony	Farah
Income	-	\$400
Costs	(\$100) Labor Input	+\$100 Imputed income
Income + Costs	(\$100)	\$500
Taxable Income	-	\$400
Tax Liability	-	\$35

Lastly, in Table 5, because Ebony and Farah constitute separate taxable households for income tax purposes, the \$100 accretion to value that Ebony produces only accrues to Farah. By contrast, Ebony experiences a loss that can be characterized as \$100 worth of uncompensated labor input. If we assume that Farah would pay for Ebony's services if she could afford it, then the service exchange between Ebony and Farah in Table 5 represents how, when care labor is produced outside of the marital home—where its value is ostensibly recaptured as market income produced by one spouse—its value falls out of the system completely. Ebony and Farah's kin relationship falls outside of heteronormative conventions and thus the value produced by one kin member in support of the other is completely lost.

If we accounted for Ciara and Damon as individuals, their profiles would look like Ebony and Farah's. The assumption that Ciara derives sufficient value from being married to Damon would be more difficult to support if the tax system recognized that when only one person in a married couple earns a market income, only that person experiences the accretion to value that the nonmarket care worker spouse produces. Additional evidence is needed to show that any amount of consideration was arranged between the spouses to account for the uncompensated care worker's labor. Instead, our systems take for granted that the marriage itself is sufficient consideration.

II. HETERONORMATIVITY, KINSHIP, AND ACCESS TO PUBLIC RESOURCES

Unpaid care labor is often performed in the context of support for family. In her 1974 book, *All Our Kin*, Carol Stack introduced the concept of BKNs to the

⁹³ I.R.C. § 1001.

sociological lexicon.⁹⁴ In that work, Stack examined how the relationships between family members in a Chicago neighborhood were the basis for social and financial support.⁹⁵ Stack concluded that BKNs were crucial for filling gaps in public and private support in the Black Chicago neighborhood that she studied.⁹⁶

Stack's work laid the foundation for this project's analysis of how the tax system may impact Black Americans adversely. One aspect of tax administration that seems relatively innocuous on its face is how the I.R.C. defines what a family is. But by asserting a position about what *counts* as family, the federal income tax system also stakes a normative claim that ends up being a mechanism of both social and cultural authority.⁹⁷ Stefan Timmermans and Pamela Prickett argue that "[t]he moral tradeoff of standardization . . . is not intrinsic to standards but depends on the interaction between the specificity of the administrative standard, the implementation process, and the actions available to the parties affected by standardization."⁹⁸ "[T]he family standard used by government officials" implementing the federal income tax imposes a high cost on those subject to its purview who do not conform to "the bureaucratic family standard."⁹⁹ Wherever the I.R.C. articulates its administrative standard for what family is, it impresses "*social* authority" on citizens subject to taxation that "compel[s] individuals to comply or else risk exclusion from governance."¹⁰⁰ The bureaucratic family "also embod[ies] *cultural* authority" that enables the government to use the tax system to "create a population that closely matches its administrative grid."¹⁰¹ By defining family in a particular way, the tax system becomes part of an iterative process that impacts the behavior of the society it governs. The I.R.C. both delineates differences between different kinds of filers based on marital status and number of children *and* increases complexity of filing depending on the type of filer.

This Part considers how standardizing the heteronormative marital family in the tax system helps to obscure nonmarket care work. In the marital family framework, the market laborer absorbs the nonmarket care worker's labor as part of their effort to perform their external labor well. Outside of the marital context, when nonmarket care work is performed within extended kinship networks as a survival method, the care worker's labor is still absorbed into the market laborer's effort. However, because they are not married, they are not considered

⁹⁴ STACK, *supra* note 87, at 54 (exposing how Black communities have created support systems as means of survival).

⁹⁵ *See id.*

⁹⁶ *See id.* at 113.

⁹⁷ *See* Stefan Timmermans & Pamela J. Prickett, *Who Counts as Family? How Standards Stratify Lives*, 87 AM. SOCIO. REV. 504, 507 (2022).

⁹⁸ *Id.* at 505.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 507.

¹⁰¹ *Id.* at 507-08.

part of a single economic unit and the care worker is rendered totally invisible to the tax system.

A. *Defining Kinship*

1. Marriage

For married women, joint taxation makes their labor outside the home hyper visible but obscures their domestic care labor. Joint taxation of the marital couple as a single taxable unit relies on the assumption that, in general, the private marital family organizes its time, labor, and property equitably between the spouses. However, social science research demonstrates that married women in heterosexual couples rarely have equal access to marital financial assets even though they take on a significant proportion of unpaid labor in the home, often on top of full- or part-time external employment.¹⁰²

In extended kin groups that include married and unmarried taxpayers, unpaid care labor that may be necessary for the economic survival of the recipient may increase the economic stress of the provider. Care workers who provide unpaid services outside the marital family context may have neither the cover of shared income, nor the tax recognition necessary to access tax-based income security programs.¹⁰³ At the same time, the persistence of kinship care exchanges signifies ongoing community-wide economic instability. That is, extended kinship care networks persist as a sign that the atomistic nuclear family is as much a marker of class stability as a signifier of alignment with heteropatriarchal norms. Because extended kinship care exchanges both signify and aim to correct economic marginality, it would not be reasonable to propose that recipients of care work in these networks begin to pay providers. Kinship care exchanges reflect gaps in public care infrastructure, which forces marginalized people to use their own limited resources to fill in those gaps. The appropriate solution must include reframing public institutions so that they diminish, rather than exacerbate, that burden.

Tax recognition of the nuclear marital unit is the foundation for the failure to acknowledge uncompensated care labor because: (1) it obscures care labor within the marital home, which (2) undermines the visibility of care labor that happens between households.

Characterizing nonmarket care work as imputed income to the marital household implies that the household (including the care worker) is a beneficiary

¹⁰² See HESS ET AL., *supra* note 1, at 2.

¹⁰³ Tax recognition of state-sanctioned marriage creates the internal inconsistency of treating long-term committed partners as separate taxpayers even if they arrange their financial lives in similar ways to married couples. If joint taxation is justified by the assumption of shared resources, then the single-filer taxation of unmarried cohabiting couples, for example, demonstrates an internal inconsistency in that justification. See Cain, *Taxation of Unmarried Partners*, *supra* note 31, at 1932-33. For simplicity, any unmarried care worker used in an example is not part of a marriage-like committed partnership from which she can receive hypothetical economic support.

of free labor it would otherwise have to pay for. But the ramification of the actual distribution of care work in the home “is that women provide household services but other members of the household benefit.”¹⁰⁴ If the distribution of care work in the home is so unidirectional, it becomes less clear whether NMCWs in the home are actually beneficiaries of “imputed income” from their own uncompensated labor to the extent that their market laborer spouses are.¹⁰⁵ When economic and tax analysis regards married people as a single economic unit, the actual internal distribution of uncompensated labor relative to other household finances becomes more difficult to assess.¹⁰⁶

This kind of nonmarket care work has a direct market corollary—that is, a family could spend some of their earnings to hire a worker to perform these duties. Notwithstanding the astonishingly low wages that market-based care workers (“MCWs”) receive,¹⁰⁷ the fact that a market-based corollary exists means that the household labor being performed has a recognized value in market economics terms.¹⁰⁸ Given the low value that is assigned to MCWs in American society, this number probably vastly underestimates the actual worth of care work to U.S. households and the U.S. economy.¹⁰⁹

Importantly, figures around the value of care work demonstrate that the labor nonmarket care workers (“NMCWs”) perform is significantly undervalued in the economy. This presents a threshold issue of economic solvency for women in the home. Women who earn a wage in the formal labor market and perform nonmarket care work in the home are being undercompensated for their time, but at the very least, they still receive *their own* income, which can be used to purchase goods and services in the market. NMCWs who are not otherwise employed in the formal labor market do not receive their own individual wage, leaving them in the economically precarious position of being fully dependent on their spouse for access to financial resources.

The economic and tax justification for devaluing an NMCW’s work, based on her lack of earnings, is that she benefits from being in the same economic unit as her market-laborer spouse. This rationale assumes that the economic arrangement in the marital home gives the NMCW equal access to the financial

¹⁰⁴ STIGLITZ ET AL., *supra* note 53, at 128.

¹⁰⁵ *Id.* at 114.

¹⁰⁶ *See id.* at 128 (discussing how collection of tax data for married couples becomes skewed).

¹⁰⁷ *See* WOLFE ET AL., *supra* note 2, at 7.

¹⁰⁸ *See* Elson, *supra* note 46, at 54.

¹⁰⁹ Diane Elson observes that variance as to unpaid care work as a proportion of GDP in 2008 among the United States (18%), Denmark (31%), and Sweden (25%), “reflect[s] differences between countries in the amount of unpaid work done, and in the wages used to value this.” *Id.* A historical example from Iceland demonstrates the value of nonmarket care work to national economies. *See* Wezerek & Ghodsee, *supra* note 2 (“On Oct. 24, 1975, 90 percent of Icelandic women refused to cook, clean or look after children for a day. It brought the whole nation to a standstill. Men across the country scrambled to fill in, taking their children to work and overwhelming restaurants.”).

resources that her spouse earns. The federal income tax system reflects this belief; joint taxation of married couples is the default rule, and separate taxation of spouses is the administratively cumbersome exception.¹¹⁰ Three important criticisms of joint taxation in tax discourse are: (1) it privileges single-earner households over dual-earner households;¹¹¹ (2) it disincentivizes wives from working in the formal labor market because of the tax cost of their labor to the household;¹¹² and (3) the presumption that earnings are shared equally in the marital household are not borne out by empirical observations.¹¹³

The uncertainty surrounding the benefits of joint taxation for married women brings us back to the issues of economic solvency and tax visibility. Viewed on an individual level, married NMCWs experience economic precarity relative to both their spouses *and* relative to MCWs. Their lack of a wage, despite contributing value to the household through their labor, also makes them invisible to the tax system. As a result, married NMCWs are completely dependent on private arrangements in their household for financial security.¹¹⁴ If their spouse does not share resources at all, they have limited recourse to petition for a greater share of distribution, no personal income to fall back on, and no access to public sources of financial assistance because their labor is not reported. Even in arrangements where the distribution of financial resources between a wage-earning spouse and an NMCW is greater than zero, a fundamental issue continues to exist with respect to the levels of control that the wage earner exercises over their earnings and any valuable property they own. Economic precarity and tax invisibility reflect *both* the NMCW's private relationship with her spouse *and* her relationship with public institutions that offer financial assistance to low-income people.

Joint taxation superimposes assumptions about the private ordering of married life onto a public system of income taxation that only offers public income security benefits based on a reported wage. An NMCW can be married to a high-earning spouse, placing them both above the income threshold for the EITC, but not have any material control over financial assets. On the other hand,

¹¹⁰ I.R.C. § 1(a). By contrast, default joint taxation has been abolished in Canada, the United Kingdom, and most of the European Union since the 1970s on the grounds that individual taxation promotes gender equity and access to resources. See Lee Burns & Richard Krever, *Individual Income Tax*, in 2 TAX LAW DESIGN AND DRAFTING 495, 539-40 (Victor Thuronyi ed., 1998).

¹¹¹ See Brown, *supra* note 32, at 788-89.

¹¹² See Harding et al., *supra* note 59.

¹¹³ See Kornhauser, *supra* note 30, at 80.

¹¹⁴ Family law bears this out in the concept of alimony, the maintenance payments that a higher-earning spouse is obligated to make to their former spouse after the dissolution of marriage to keep the former spouse off the state welfare rolls. For more on the construction of the marital family as a tool of private social insurance, see Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL'Y REV. 3, 3 (2010). Alstott argues that "family law should implement individuals' intentions—and should not redistribute risk and resources according to some public ideal." *Id.* ("[F]amily law rests on an exaggerated distinction between private and public."); see also Elson, *supra* note 46, at 54.

a public social safety system that is *not* premised on earnings from market labor, and views her separately, would regard her as having a low enough personal income that she qualifies for state assistance. Alternatively, the system might not provide her public assistance because of her association with a high-earner, but it could still account for the value of labor that she is performing for the household, as a way to ensure that her lack of a direct income does not make her contributions invisible.¹¹⁵

By establishing the heteropatriarchal nuclear family as the administrative standard, the federal income tax amplifies the heterosexism of uncompensated care work within the marital home. Joint taxation promotes excluding women from the formal labor market and justifies rendering intrahousehold care labor invisible.¹¹⁶ In the process, it further marginalizes interhousehold care work and those who perform it.¹¹⁷

2. Black Kinship Networks

In the United States, devaluing care work within the marital home also has ramifications for nonmarital care workers. The marital family justifies noncompensation by claiming that care labor in the home is a woman's natural role because it allows her to support her husband's compensated external market labor. The presumption that external income is shared within the family is the cornerstone of taxing the marital unit jointly. This means that in single-income marital households, eligibility for tax-based income security programs is wholly dependent on the wage earner because the uncompensated labor of the care worker is not accounted for. Her economic fate is inextricably tied to his, not because she does not contribute anything of value, but because value in our social welfare system is determined by participation in the market economy—her labor is thus subsumed into his, and her economic stability with it.

If women's uncompensated care work *within* the heteropatriarchal marital home renders them vulnerable to their husbands' financial choices, then uncompensated care work performed by care workers *between* households fosters a dual crisis: nonpayment diminishes economic stability because there is no patriarchal alternative source of income and nonacknowledgment cuts off access to key income-security tools. Extended kinship networks have been a tool for communal social and economic support in the United States since the colonial period.¹¹⁸ But legal institutions in the United States have struggled to

¹¹⁵ See Elson, *supra* note 46, at 54.

¹¹⁶ See Garbes, *supra* note 23.

¹¹⁷ See *id.*

¹¹⁸ See David Brooks, *The Nuclear Family Was a Mistake*, ATLANTIC (Mar. 2020), <https://www.theatlantic.com/magazine/archive/2020/03/the-nuclear-family-was-a-mistake/605536> (describing evolution of “the family,” and how it previously centered around community and collectivist ideals); see also STACK, *supra* note 94, at 63; JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY, FROM SLAVERY TO THE PRESENT* 95-96, 191 (rev. ed. 2010); William W. Dressler, *Extended Family*

incorporate extended kinship networks in their conception of legal family units.¹¹⁹ When institutions that govern family life fail to recognize extended kin networks as legitimate sociocultural alternatives (or supplements) to the nuclear family, they further marginalize communities that must rely on extended networks for social and economic support.¹²⁰

This Article aims to bridge family law and tax discourse on tensions between legal moralizing about the marital family on one hand, and marginalized peoples' dependence on broader extended families as a form of survival on the other. In family law, scholars have noted the harm that the state causes when it fails to recognize nonnuclear family types.¹²¹ In tax, scholars unpack how presenting family as a dichotomy between the marital household and unmarried individuals reinforces the marginalization of low-income communities of color.¹²² The marital family standard exacerbates inequality by forcing unmarried people whose lives are organized around extended family networks to continually prove that they deserve recognition by legal systems and access to public accommodations notwithstanding their marital status.

3. The Tax-Standardized Nuclear Family

By asserting a stake in the area of family composition, the tax system establishes a feedback loop that recreates and reinforces the structural foundations of inequity in American society.¹²³ Stefan Timmermans and Pamela Prickett propose that it matters when and in what manner a government identifies a "standard family."¹²⁴ For example, they note that "when the state relies on institutionalized standards to separate people and imbues the classification with both symbolic and monetary capital, administrative standards reify boundaries

Relationships, Social Support, and Mental Health in a Southern Black Community, 26 J. HEALTH & SOC. BEHAV. 39, 41 (1985).

¹¹⁹ See C. Quince Hopkins, *The Supreme Court's Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J.L. & PUB. POL'Y 431, 491-95 (2004).

¹²⁰ See Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 386-90 (2008) (discussing disjointed legal framework governing extended family networks and advocating for more inclusive legal concept of family); see also Jane E. Cross, Nan Palmer & Charlene L. Smith, *Families Redefined: Kinship Groups That Deserve Benefits*, 78 MISS. L.J. 791, 792 (2009) (arguing that prevalence of extended kin group support justifies increased tools for public support of families beyond traditional nuclear family framework).

¹²¹ Timmermans & Prickett, *supra* note 97, at 510 (explaining how "standardization" of familial unit may be beneficial in some ways, but also does irreparable damage to families that fall outside of standard).

¹²² See Mary Wood, *Marriage-Penalty Tax Hurts Black Families More, Brown Says*, UNIV. VA. SCH. L.: NEWS & MEDIA (Feb. 2, 2004), https://www.law.virginia.edu/news/2004_spr/brown_tax.htm [<https://perma.cc/KE5N-ETJV>].

¹²³ See Timmermans & Prickett, *supra* note 97, at 524.

¹²⁴ *Id.* at 506, 509 ("Administrative standards . . . affect . . . basically every area of life subject to formal governance.").

between the worthy and unworthy.”¹²⁵ The standard family they identify conforms to “state bureaucratic or administrative standards,” which are defined by “formal . . . rules used to construct uniformities across time and space.”¹²⁶ The formal rules establishing who counts as family are defined in the first section of Chapter A of the I.R.C., the federal income tax statute.¹²⁷ That statute establishes two tiers of taxable economic units: (1) the marital unit and (2) the single filer.¹²⁸ Including the marital unit as a distinct taxable economic unit is a conscious choice that “imbues the classification [of marital status] with both symbolic and monetary capital.”¹²⁹ Importantly, joint taxation is the default filing status for eligible married people, which means that all of the systems that operate in concert with income tax, including those involving employers, private lenders, and social welfare programs, must also note the marital status of applicants and implement policies with that status in mind.¹³⁰ While married people may opt out of joint taxation by filing separately using the married-filing-separately tax designation, that process is administratively messy for filers, who must, for example, decide how to navigate deductions and distribute dependents for tax purposes.¹³¹

While nowhere in the tax code does it state explicitly that the option to file jointly exists to imbue marriage with cultural authority, various revisions over time reflect how assumptions about the centrality of marriage in American family life had to be revisited as cultural norms evolved.¹³² For example, the Head of Household (“HOH”) filing status is responsive to the idea that children can be dependents of unmarried people.¹³³ The core assumption of joint taxation is that married adults tend to function as “an economic unit” and support their

¹²⁵ *Id.* at 506.

¹²⁶ *Id.* at 507.

¹²⁷ I.R.C. § 1.

¹²⁸ *Id.* An additional economic unit, the Head of Household (“HOH”), is a single filer with qualified dependents who is taxed at lower progressive tax rates than the single filer. I.R.C. § 1(b). The HOH tax status was added to the income tax as a separate economic unit to acknowledge the economic and tax disparity between unmarried taxpayers with dependents and married taxpayers with dependents. See Jacob Goldin & Zachary Liscow, *Beyond Head of Household: Rethinking the Taxation of Single Parents*, 71 TAX L. REV. 367, 371 (2018).

¹²⁹ Timmermans & Prickett, *supra* note 97, at 506.

¹³⁰ See Goldin & Liscow, *supra* note 128, at 375-76; Kornhauser, *supra* note 30, at 100 (noting “taxability of transfers” and “fringe benefits,” like healthcare, depend on marital status).

¹³¹ The Internal Revenue Service (“IRS”) provides guidance on rules and procedures for spouses to file separate tax returns. See DEP’T OF THE TREASURY; INTERNAL REVENUE SERV., PUBLICATION 504: DIVORCED OR SEPARATED INDIVIDUALS 4-6 (2022), <https://www.irs.gov/pub/irs-pdf/p504.pdf> [<https://perma.cc/PQ5Q-NRZH>].

¹³² See Kornhauser, *supra* note 30, at 66-67 (noting that changing demographics, including several-fold increase in nontraditional, nonmarital households, “call[] into question assumptions about sharing resources” and what it means to be a family).

¹³³ See Chau Le, *Analysis of the Head of Household Filing Status*, 7 CONTEMP. TAX J. 6, 11 (2018).

marital children through a combination of their market labor.¹³⁴ It is not evident that joint taxation was included *because* drafters thought federal income tax would be a factor in Americans' decision to get married.¹³⁵ However, the tacit assumption that children are born into two-parent marital homes is likely part of the justification for joint taxation.¹³⁶ This is part of the broader conception of the nuclear family as coextensive with policies that encourage nondependence on government resources.¹³⁷

The HOH amendment to I.R.C. § 1 helps to reveal how joint taxation mirrors patriarchal, racist, heterosexist, and classist social ordering in American society. More specifically, in an effort to establish uniform rules for economic family composition, the tax code “run[s] into the ethnomethodological dilemma of rule specification: no standard is able to capture the full spectrum of lived variation, and too rigid standardization becomes counterproductive.”¹³⁸ For example, joint taxation reflects sexist assumptions about the division of labor and resources in the home. Research on married couples' market labor shows that married women experience an employment penalty under the joint taxation scheme if their income, which is usually the lower income between spouses, increases the household tax costs such that “their household income increases less for every dollar earned.”¹³⁹ This is one reason that women may drop out of the formal workforce and choose instead to engage principally in nonmarket care labor in the home.¹⁴⁰ Joint taxation acts as a feedback mechanism, perpetuating the devaluation of women's labor with real economic consequences. Sexism in markets causes women to systemically earn lower wages than men, leading a married woman in a two-earner couple to be perceived as the tax-expensive “second-earner” and therefore the most logical member of the couple to drop out of the workforce.¹⁴¹ As a result, the married woman leaves the formal labor market and faces limited options for employment other than nonmarket care work.¹⁴² The tax system, which previously combined her income from market labor with her husband's, now does not recognize the value she adds to the household at all and instead counts it as imputed income—an untaxed benefit to

¹³⁴ See Kornhauser, *supra* note 30, at 96.

¹³⁵ Cain, *Taxing Families Fairly*, *supra* note 31, at 817 (concluding joint taxation was adopted “solely” as response to “political outburst,” and not because Congress held any reasoned or moral opinions about family units or marriage).

¹³⁶ See Kornhauser, *supra* note 30, at 98; see also Cain, *Taxing Families Fairly*, *supra* note 31, at 817.

¹³⁷ See, e.g., CRANDALL-HOLLOCK, *supra* note 4, at 3.

¹³⁸ Timmermans & Prickett, *supra* note 97, at 508 (citation omitted).

¹³⁹ Harding et al., *supra* note 59; see also Alison Burke, *10 Facts About American Women in the Workforce*, BROOKINGS: BROOKINGS NOW (Dec. 5, 2017), <https://www.brookings.edu/blog/brookings-now/2017/12/05/10-facts-about-american-women-in-the-workforce> [<https://perma.cc/Q6K6-LDMP>].

¹⁴⁰ See Harding et al., *supra* note 59.

¹⁴¹ See *id.*

¹⁴² See *id.*

the marital unit as a whole.¹⁴³ Because the savings that the married woman's family nets from her staying home do not materialize as tangible income, her invisibility to the tax system and lack of independent income make her dependent upon her spouse's market earnings to access subsidies in the tax system, including credits for homeowners and parents.¹⁴⁴

More recently, an amendment to the tax code to adjust the joint tax rate for dual-earner married couples reflects an attempt to correct for the historical tax bias in favor of families with a single earner in the formal market and a nonmarket laborer in the home.¹⁴⁵ This amendment follows research by scholars like Dorothy Brown, who found that the seemingly race-blind tax system fails to acknowledge the lived economic reality of married Black Americans.¹⁴⁶ Brown examines the impact of the tax code in the context of Black economic history and shows that wage and employment discrimination often necessitate that Black married couples both earn wages in the formal labor market.¹⁴⁷ A history of discrimination that laid the foundation for present-day wealth inequality between Black and white Americans caused Black Americans to have less money in savings than their white peers.¹⁴⁸ As a result, Black Americans have much less access to certain tax benefits available to people who own appreciable property. These benefits allow property owners to defer taxation on property while it remains in their hands and step up their basis in property when it is bequeathed at death.¹⁴⁹ Additionally, because Black families have not been able to establish the level of economic prosperity and independence that white families were subsidized to build during the twentieth century, Brown observes

¹⁴³ See Kornhauser, *supra* note 30, at 99 n.111.

¹⁴⁴ See Goldin & Liscow, *supra* note 128, at 375-81. For further discussion of the patriarchal bias and the lack of evidence for the claim that joint taxation reflects equally shared resources in the married home, see Kornhauser, *supra* note 30, at 101, 104-06.

¹⁴⁵ I.R.S. News Release IR-2021-219 (Nov. 10, 2021).

¹⁴⁶ See Brown, *supra* note 32, at 792-98.

¹⁴⁷ *Id.* at 792-97.

¹⁴⁸ Kriston McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-White Wealth Gap*, BROOKINGS: UP FRONT (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap> [<https://perma.cc/7UAZ-SRZS>] (stating that range of historical discriminatory policies, from "Black Codes" to GI Bill to redlining, contributed to today's persistent inequalities, causing disparate inheritance of generational wealth).

¹⁴⁹ OFF. OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT FISCAL YEAR 2023, at 188 (2022), <https://www.govinfo.gov/content/pkg/BUDGET-2023-PER/pdf/BUDGET-2023-PER.pdf> [<https://perma.cc/K2YH-4J4U>] (describing "step-up basis of capital gains at death" as exempting "unrealized capital gains . . . when assets are transferred at death" by adjusting "cost basis of the appreciated assets . . . to the market value at the owner's date of death," and because "[i]ncome is taxable only when it is realized in exchange[,] . . . the deferral of tax on unrealized capital gains is not regarded as a tax expenditure"). The expenditure from lost capital gains revenues related to the step-up basis at death from 2022-2031 is projected to be over \$575 billion. *Id.* at 177.

that tax disparities between Black and white married couples reveal one way that the tax system's patriarchal bias for single-earner nuclear families further translates into a racial bias against Black families.¹⁵⁰

This Article focuses on BKNs as one subgenre of extended kin group formation. BKNs encompass both blood relationships and kinship ties among nongenetically related friends, providing support through material goods and interpersonal service. Family law scholars have written about how the legal default of the heterosexual, two-parent, nuclear family both misrepresents the diverse spectrum of family composition in the United States and makes it harder for families that do not fit within the patriarchal nuclear family paradigm to access public resources.¹⁵¹

For example, Tonya Brito "examines the complex kinship networks in families that experience multi-partner fertility" within the context of family law and policy.¹⁵² She examines "fragile families"—those in which the parents of a child are unmarried when the child is born—as they relate to the shifting patterns in marriage, cohabitation, and child rearing that have occurred over approximately the past fifty years.¹⁵³ The fragility that she identifies relates to the decreasing staying power of the heterosexual marital household as the dominant family form and the increasingly "diverse and evolving array of family forms" that children and parents experience today.¹⁵⁴ Brito finds "significant class-based differences in these [family formation] trends, with better-educated,

¹⁵⁰ Brown, *supra* note 32, at 791-92. The puzzle is why the United States has retained joint taxation when it is an unnecessary barrier to increased tax equity between Black and white families. Several member-states of the Organization for Economic Cooperation and Development have either dispensed with default joint taxation, or merely retained it as one option that couples can select. See Burns & Krever, *supra* note 110, at 539 & n.153 (noting "move[] toward compulsory or optional separate unit taxation," and particularly "hybrid systems" in Belgium and the Netherlands, where couples file separately but receive benefits for their married status). Rather than increase the complexity of the tax system further by adding a new provision to specifically address the inequity of joint taxation for dual-earner couples, policymakers ought to have recognized that the inequities baked into default joint taxation itself cannot be revised away in piecemeal fashion. See Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 32-39 (1980) (arguing in support of marriage-neutral income tax); Harvey S. Rosen, *Is It Time To Abandon Joint Filing?*, 30 NAT'L TAX J. 423, 423-25 (1977) (arguing in favor of individual taxation over joint taxation of marital unit). But see Stephanie Hunter McMahon, *To Have and To Hold: What Does Love (of Money) Have To Do with Joint Tax Filing?*, 11 NEV. L.J. 718, 746-52 (2011) (arguing that preserving income tax base under personnel-stressed IRS administration mitigates in favor of joint taxation).

¹⁵¹ Timmermans & Prickett, *supra* note 97, at 510.

¹⁵² Brito, *supra* note 37, at 2569; see also Cross et al., *supra* note 120, at 818-29 (examining different methods to expand family law protections to extended kinship networks that do not reflect traditional nuclear family paradigm).

¹⁵³ Brito, *supra* note 37, at 2567, 2569-70; see Sara McLanahan, Irwin Garfinkel, Ronald B. Mincy & Elisabeth Donahue, *Introducing the Issue*, 20 FUTURE CHILD. 3, 5 (2010) (defining "fragile family").

¹⁵⁴ Brito, *supra* note 37, at 2570.

higher-income couples having the most stable unions of all subgroups in the United States.”¹⁵⁵ Brito’s examination of complex kinship networks is an important one for a tax policy that assigns value to marriage as a social institution throughout the portion of the income tax system that affects the lives of most Americans.

4. Community-Wide Precarity

A common connector in extended kinship networks is the specter of economic precarity. That is, BKNs reflect the failure of policy shifts during the Civil Rights Era, aimed at greater inclusion of Black Americans into integrated society, to address and correct for the effects of historical economic exclusion on members of Black communities.¹⁵⁶ Wealth is temporal: today’s middle- and upper-class wealth was consolidated in the past, some established through federal policy, which allowed certain families to build wealth through access to higher education and property ownership (in housing) never available to them before.¹⁵⁷ But the policies establishing greater access for white families explicitly excluded Black families and even stipulated that the presence of a Black family in a neighborhood could threaten the property values of all nearby properties.¹⁵⁸ Today, homeownership is a significant source of wealth for American families, but Black families who were excluded from initiatives fifty years ago are fifty years behind in accruing levels of wealth relative to their white peers.¹⁵⁹ Moreover, Black families, who have only recently begun to gain access to the housing market, continue to face social and political barriers, which threaten to make their homes pits of debt rather than sources of wealth.¹⁶⁰ Today,

¹⁵⁵ *Id.* at 2571.

¹⁵⁶ See McIntosh et al., *supra* note 148 (noting present-day effects of discriminatory policies implemented throughout twentieth century, which prevented Black communities from obtaining and accruing wealth); see also KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 93-94 (2019) (quoting President Richard Nixon’s 1968 call to abandon funding social programs in aftermath of Civil Rights Movement because they only produced “an ugly harvest of frustration, violence and failure across the land”).

¹⁵⁷ David Callahan, *How the GI Bill Left Out African Americans*, DEMOS (Nov. 11, 2013), <https://www.demos.org/blog/how-gi-bill-left-out-african-americans> [<https://perma.cc/84GB-KP9Q>]; see MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 69-70 (2017) (discussing how “parallel and inferior economy” of new Black communities in North in early twentieth century “had profound effects on African American economic advancement for the next century”); McIntosh et al., *supra* note 148 (mentioning GI Bill and other policies that disadvantaged Black Americans).

¹⁵⁸ TAYLOR, *supra* note 156, at 32 (discussing how Federal Housing Administration policies used to marginalized Black prospective homeowners were based on “racial pseudoscience” and belief that Black families moving into neighborhood would depress property values).

¹⁵⁹ See *id.* at 259 (noting rate of white homeownership is 70% compared to only 43% for Black homeownership).

¹⁶⁰ See *id.* at 257.

Black Americans hold roughly one-tenth of the wealth of white Americans.¹⁶¹ Even when broken down by class, at every level, Black Americans lag behind similarly situated white peers.¹⁶²

Wealth disparities tell only part of the story of why BKNs remain such a prevalent source of social and economic support more than a century after white agricultural “corporate families” began to decline in favor of more isolated nuclear families.¹⁶³ While the nuclear family has become the standard state definition of family, it is a very recent innovation in American history. In the United States, the cultural ideal of the middle-class nuclear family is an early twentieth-century invention.¹⁶⁴ David Brooks attests that the dominant family model in the 1800s was the “big, sprawling household[]” comprised of “‘corporate families’—social units organized around a family business.”¹⁶⁵ In that era, businesses, farms, or other small enterprises “needed a lot of labor,” which meant slave labor in southern farms as well as extended family labor in those farms and businesses that did not use slave labor throughout the United States.¹⁶⁶ In 1800, for example, Brooks estimates that “three-quarters of American workers were farmers.”¹⁶⁷ He argues that “[a]s factories opened in the big U.S. cities, in the late 19th and early 20th centuries, young men and women left their extended families [and farm life] to chase the American dream.”¹⁶⁸ Because “[t]he families they started were nuclear families,” the United States saw a decline in large, white “multigenerational cohabiting families” in a trend that “exactly mirrors the decline in farm employment.”¹⁶⁹

The shift from rural agricultural life to urban industrial life marked the transition from extended-family social ordering to siloed-nuclear ordering for white families and accompanied federal income taxation. Yet, even though the cooperative extended family has been replaced in the American imagination with socially and economically segmented nuclear families as the norm, many groups have continued to arrange their lives according to collaborative extended kin networks. Low-income, queer, immigrant, and racial minority communities are among the groups in which economic circumstances may not permit social

¹⁶¹ McIntosh et al., *supra* note 148.

¹⁶² See WILLIAM A. DARITY JR. & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE TWENTY-FIRST CENTURY 33-34 (2020).

¹⁶³ See Brooks, *supra* note 118.

¹⁶⁴ See *id.* (highlighting similar rise in industrialization with emergence of nuclear family).

¹⁶⁵ *Id.* The story that Brooks tells appears to be a predominantly white colonial story. The extent to which the trends he discusses include free Black families and other nonwhite groups in the 19th and 20th century is unclear. For the purpose of this Article and later discussion, I will proceed as though Brooks’s argument principally pertains to trends in white families.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

ordering into siloed-nuclear families.¹⁷⁰ Rather than disconnecting individuals from their broader kin networks, marriage in historically excluded communities becomes a responsive component of broader extended kin networks.¹⁷¹

Given that extended kinship family structures did not disappear as the more isolated nuclear family rose in prominence, how did so much of tax policy develop based around the nuclear family? The framework that bifurcates the taxable economic unit into married and unmarried expresses an outright normative preference for the marital unit as a distinct economic unit, compared to other choices it may have made to make space for “extended family (certain individuals related by blood, marriage, or adoption), or the household family (all individuals sharing the same living quarters).”¹⁷² The policy choice to center the patriarchal nuclear family excludes other methods of social organization, which has two key implications for economic solvency and tax (in)visibility among members of extended kin networks. First, the tax classification of nonmarket care work *within* the family as imputed income for that family does not extend to nonmarket care work that takes place between separate taxable households. That is, while the benefits of imputed income accrue to one household in the extended kin network service exchange, the other household experiences both economic loss (measured by time input) and tax invisibility. Second, the tax system’s failure to recognize the economic value of nonmarket care work exacerbates economic insecurity by delimiting the access that extended kin care workers have to tax-based income security programs. In BKNs, where a significant proportion of the nonmarket care work is conducted by women, the tax bias for the patriarchal nuclear family also exacerbates the intersectional economic impact that Black women experience in wage and labor bias.¹⁷³

For our purposes, the other part of economic precarity this Article will focus on is labor and wage disparities. In 2020, the Economic Policy Institute reported that the median Black-white wage gap in 2019 was roughly 24.4%, up from 20.8% in 2000.¹⁷⁴ Elise Gould, the report’s author, clarifies that the gap is widest at the top of the income scale and narrowest toward the bottom, “where the

¹⁷⁰ See *id.* (exploring economic, cultural, and institutional changes affecting modern-day family structure).

¹⁷¹ See, e.g., Christopher T. Stout, Kelsy Kretschmer & Leah Ruppanner, *Gender Linked Fate, Race/Ethnicity, and the Marriage Gap in American Politics*, 70 POL. RSCH. Q. 509, 511 (2017) (finding that “[m]arried black women . . . tend to rely on broader kinship networks compared with married white women,” who “are more likely to rely solely on their husband”).

¹⁷² Kornhauser, *supra* note 30, at 93.

¹⁷³ See NAT’L P’SHIP FOR WOMEN & FAMS., FACT SHEET: BLACK WOMEN AND THE WAGE GAP 3 (2022), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/african-american-women-wage-gap.pdf> [<https://perma.cc/854J-53QM>]; see also Nina Banks, *Black Women in the United States and Unpaid Collective Work: Theorizing the Community as a Site of Production*, 47 REV. BLACK POL. ECON. 343, 356 (2020).

¹⁷⁴ Elise Gould, *Black-White Wage Gaps Are Worse Today than in 2000*, ECON. POL’Y INST.: WORKING ECON. BLOG (Feb. 27, 2020, 5:34 PM), <https://www.epi.org/blog/black-white-wage-gaps-are-worse-today-than-in-2000> [<https://perma.cc/WKV2-EGNY>].

minimum wage serves as a wage floor.”¹⁷⁵ Still, Gould finds that the wage gap between Black and white Americans persists even when controlling for education, with the widest gap in wages among college graduates.¹⁷⁶

The intersectional effects of the wage gap on Black women are even starker. Intersectionality, a theory established by Kimberlé Crenshaw in the context of violence against women of color, is an answer to “practices [that] expound identity [of women] . . . of color as an either/or proposition” through feminist theory that centers white womanhood and racial theory that centers Black patriarchy.¹⁷⁷ Intersectionality is a theory of multiple hegemonically subordinated identities converging in a way that “define[s] as well as confine[s] the interests of the entire group.”¹⁷⁸

Under this theory, Black women experience racialized sexism and gendered racism when they encounter economic discrimination. This theory bears out in data on the wage gap with respect to racial and gendered discrimination. In 2020, Black men’s annual earnings (\$43,000) were a fraction of both white men’s (74%) and white women’s earnings (89%).¹⁷⁹ White women’s earnings are higher than both Black men’s and Black women’s (\$40,500), but they earn a fraction of white men’s annual wages.¹⁸⁰ The findings for Black men and white women suggest that race and gender are independent factors in wage discrimination. But the findings for Black women are not a simple average of the wage differentials between Black men and white women. Rather, they represent a distinct compounding gendered racism that Black women experience in the labor market. In 2020, Black women earned roughly 70% of what white men earned.¹⁸¹ But Black women *also* earned a fraction of the salaries of both Black men and white women in a way that cannot be cleanly explained by adding up the impact of race and gender.¹⁸²

Additionally, Black women are experiencing the effects of intersectional economic distress in the ongoing COVID-19 pandemic. In February 2022, the U.S. Department of Labor published a post reporting that “Black women’s unemployment rate is 1.8 times their white counterparts, is the highest among women and men by race and ethnicity (5.8%), and is still a full percentage point above its pre-pandemic level.”¹⁸³ The authors of that post, Sarah Jane Glynn and Mark DeWolf, note that during recessions, “Black and Hispanic workers are

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

¹⁷⁸ *Id.* at 1252.

¹⁷⁹ Holder, *supra* note 61.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Sarah Jane Glynn & Mark DeWolf, *Black Women’s Economic Recovery Continues To Lag*, U.S. DEP’T OF LAB. BLOG (Feb. 9, 2022), <https://blog.dol.gov/2022/02/09/black-womens-economic-recovery-continues-to-lag> [<https://perma.cc/MU2B-L2CS>].

more vulnerable to losing their jobs” and Black and Hispanic women take longer to recover from job loss.¹⁸⁴ In addition, “Black women were disproportionately likely to be employed in some of the hardest hit sectors” when COVID-19 began.¹⁸⁵ Relatedly, Glynn and DeWolf note that “Black women also are overrepresented in the care economy” which has been slow to recover in a way that disproportionately impacts Black women.¹⁸⁶

Overall, the intersecting impact of disparities in wealth, wages, and employment means that Black women face a significant, persistent barrier to day-to-day stability, let alone multigenerational upward mobility.

B. *Labor, Property, and Income*

BKNs “constitute a kind of mutual insurance society for persons living near subsistence for whom any interruption of income (normally from public assistance) threatens physical survival.”¹⁸⁷ Discussing Stack’s theory on BKNs, Robert Burns explains that “[p]ersons in the network readily share [resources], and any unexpected windfall is viewed as common property.”¹⁸⁸ Stack’s ethnography highlights examples of interhousehold childcare as a component of social support in BKNs, noting that children might regard a larger group of women than just their biological mothers as maternal figures.¹⁸⁹ At the same time “[a] woman who intermittently raises a sister’s or a niece’s or a cousin’s child regards their offspring as much her grandchildren as children born to her own son and daughter.”¹⁹⁰ In this way, in BKNs, “households are linked together as cooperating units of a larger extended family system”¹⁹¹ that participate in exchanges of both material goods and instrumental social support.

For the purpose of the tax system acknowledging the work of kin network exchanges, transfers of money and property are significantly more visible than transfers of labor. The federal income tax system is better equipped to recognize the interpersonal transfers of material goods than exchanges of service. The current tax system classifies interpersonal transfers of money or property according to: (1) the kind of transfer; (2) the relationship between the people making the transfer including employer-employee, spouses, parent-child, or strangers; and (3) the context of the transfer.¹⁹²

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Robert P. Burns, *Rawls and the Principles of Welfare Law*, 83 NW. U. L. REV. 184, 235 (1989).

¹⁸⁸ *Id.*

¹⁸⁹ See STACK, *supra* note 94, at 63.

¹⁹⁰ *Id.* at 64.

¹⁹¹ Dressler, *supra* note 118, at 40.

¹⁹² See I.R.C. §§ 102, 170, 2523.

Two transfers may be subject to different levels of tax liability depending on type of transfer, relationship of the parties, and context.¹⁹³ For income tax purposes, the core question is whether money or property constitutes gross income under I.R.C. § 61.¹⁹⁴ I.R.C. § 61(a) states that “gross income means all income from whatever source derived” and includes a list of fourteen items that qualify. Importantly, wage income¹⁹⁵ is taxed through withholding, so that employees’ monthly take-home pay includes only their after-tax income.¹⁹⁶ This means that it is much harder to avoid paying a personal income tax on wages than it is to avoid paying a tax on other forms of income (e.g., the gain realized on property that has appreciated in value over a long period of time, or artwork with an difficult-to-ascertain market value).¹⁹⁷

Certain transfers fall outside of § 61 as exclusions to the general rule of gross income or as deductible from taxable income. The transfer of gifts is governed under several different provisions. In general, “[g]ross income does not include the value of property acquired by gift, bequest, devise, or inheritance”¹⁹⁸ with exceptions for gifts of property that generates income,¹⁹⁹ gifts of income from property,²⁰⁰ and gifts from employers to their employees.²⁰¹ Some other tax provisions govern the transfer of gifts to tax-exempt organizations,²⁰² gifts between spouses,²⁰³ and large gifts exceeding \$10,000.²⁰⁴ The general rule for gifts aligns with the principle that income should not be taxed twice. Therefore, under § 102(a), a gift of property or money from one person to another is deemed to be made out of the after-tax income of the donor and the recipient may exclude that value from their calculation of gross income.²⁰⁵

When the tax system sees service, it predominantly sees it in the context of labor that is performed in exchange for cash or property consideration.²⁰⁶ For

¹⁹³ *See id.*

¹⁹⁴ The rate schedule in the I.R.C. triggers tax liability based on “taxable income.” *See, e.g.,* I.R.C. § 1(a). “Taxable income” is defined as “gross income minus the deductions allowed by this chapter.” I.R.C. § 63. I.R.C. § 61 defines “gross income” for the purpose of calculating total tax liability according to § 1 and § 63.

¹⁹⁵ I.R.C. § 61(a)(1).

¹⁹⁶ I.R.C. § 31(a).

¹⁹⁷ *See* I.R.C. § 1001.

¹⁹⁸ I.R.C. § 102(a).

¹⁹⁹ I.R.C. § 102(b)(1).

²⁰⁰ I.R.C. § 102(b)(2).

²⁰¹ I.R.C. § 102(c)(1).

²⁰² I.R.C. § 170.

²⁰³ I.R.C. § 2523.

²⁰⁴ I.R.C. § 2503.

²⁰⁵ The I.R.C. § 102(a) rule is one that contravenes the Haig-Simons principle that income should include accretions to value. Even though a gift represents an accretion to value to the recipient under this theory, it is not taxable under current law unless it exceeds a high threshold. *See id.*

²⁰⁶ *See, e.g.,* I.R.C. §§ 61, 170, 351.

example, gross income under § 61 includes wages paid for services.²⁰⁷ The different treatment of property and service also exists in the context of charitable donations. Under I.R.C. § 170(c), an individual who donates cash or property to a tax-exempt organization may deduct the value of that cash or property, up to a statutory percentage of their adjusted gross income.²⁰⁸ While the value of service performed for a charitable organization is not deductible to the donor, the donor may deduct “unreimbursed expenditures made incident to the rendition of services” to an eligible tax-exempt organization.²⁰⁹

Finally, the Code treats contributions of property differently from contributions of service in Subchapter C, which governs the taxation of corporate income. Under § 351, contributions of property and cash solely in exchange for the stock of a newly formed corporation generally do not trigger a taxable event for the contributor.²¹⁰ But contributions of service to a newly formed corporation solely in exchange for stock *are* immediately taxable to the contributor because “stock issued for . . . services . . . shall not be considered as issued in return for property.”²¹¹ These rules make services visible to the tax system on a very limited basis: when the value of consideration offered for the service is sufficiently tangible (actual wages or stock) to treat the consideration as income to the taxpayer immediately.²¹² Where valuation may prove a greater obstacle, as in the case of donating services to charity, the tax system ignores the actual service but makes visible the expenses related to performing the service.²¹³

This Article does not aim to explore the practical implications of ascertaining the value of services for the purpose of charitable contributions. Nor does it cover capitalizing the value of contributions of service into a taxpayer’s basis in their stock at corporate formation. I make no normative claim about either issue. But, for the purpose of judging whether service should be visible to the tax system or not, the difficulty of valuing service seems quite flimsy. After all, the I.R.C. has answers for how to tax difficult-to-value property like art and stock in closely held corporations.²¹⁴ The I.R.C. even has an answer for how to

²⁰⁷ I.R.C. § 61(a)(1).

²⁰⁸ I.R.C. § 170(a), (b)(1), (c).

²⁰⁹ Treas. Reg. § 1.170A-1(g) (2020).

²¹⁰ I.R.C. § 351(a). Instead, the value of the property is capitalized into the taxpayer’s basis in their stock and used to determine taxable gain or (potentially deductible) loss if the taxpayer ever sells the stock. I.R.C. §§ 358, 1001.

²¹¹ I.R.C. § 351(d).

²¹² See I.R.C. § 61(a).

²¹³ See Treas. Reg. § 1.170A-1(g).

²¹⁴ See, e.g., Jason Felch & Doug Smith, *Inflated Art Appraisals Cost U.S. Government Untold Millions*, L.A. TIMES (Mar. 2, 2008, 12:00 AM), <https://www.latimes.com/local/la-me-irs2mar02-story.html>; see also Rev. Rul. 59-60, 1959-1 C.B. 237 (listing eight factors that taxpayer with stock in closely held corporation may use to determine value of that stock for estate tax purposes).

evaluate executive compensation for tax purposes.²¹⁵ It may, instead, be a difference in quantum: relatively few taxpayers will own the kind of artwork or stock in closely held corporations or be a party to complicated executive compensation agreements that would make them of interest to tax administrators. By contrast, a much larger volume of people *could* donate quantifiable amounts of service to charitable organizations and deduct that amount from their adjusted gross income. Still, the central purpose of this Article is to consider the impact of tax invisibility on marginalized groups that perform extensive amounts of uncompensated service within extended kin networks. The kinds of services that people perform as acts of instrumental social support are services that have ascertainable market values. The question is not whether the tax system can determine the value of uncompensated child care, cooking, cleaning, transportation, or care for the ill. Rather, the relevant question is how to consider that information when evaluating a person's eligibility for tax-based income security programs.

III. RECOGNITION AS A GATEWAY TO ACCESS

By situating public income security measures in tax policy, policymakers make formal market labor a prerequisite for people living with financial precarity to access stabilizing resources. Part II discussed how care work is ghettoized in the market economy as having a low value because of its characterization as women's natural duty. Part III examines how tax-based income security programs undermine financial stability by restricting access to workers in the formal labor market. Through its purported commitment to supporting workers, the tax system reinforces gendered and racial labor-market segmentation. It fosters a fiscal policy environment that valorizes the gendered division of labor in the white heteropatriarchal marital family but also entrenches Black community financial precarity by tying income-security distributions to market contributions.

In the heteropatriarchal context, married women's unpaid care work is not seen as technically uncompensated because it allows men to generate an income that is used to stabilize the family. The joint taxation of married couples drives women out of the formal workforce by making women's income in the formal economy tax-expensive to the marital family unit.²¹⁶ When those women cease to earn an income in the formal market, they continue to produce value for their households by providing care labor that is prohibitively expensive for an increasing number of American families—but that labor is not recognized as labor because it takes place outside of the market context.²¹⁷ Joint taxation presumes that marriage is a source of financial stability, removes women from

²¹⁵ See STEVEN BALSAM, ECON. POL'Y INST., BRIEFING PAPER NO. 344: TAXES AND EXECUTIVE COMPENSATION 1-3 (2012), https://files.epi.org/2012/BP344_Taxes_and_Executive_Compensation.pdf [<https://perma.cc/6WEN-C79D>].

²¹⁶ See Brown, *supra* note 32, at 794.

²¹⁷ See *id.*

recognized formal labor that allows them to have financial independence, and grants them access to income security programs only through the market labor of their husbands.

Through joint taxation, the tax system normalizes heteropatriarchal attitudes toward gendered divisions of labor; but, as Dorothy Brown has observed, the heteropatriarchal ideal of a single-earner marital family is a white middle-class ideal that does not extend to low-income or nonwhite married couples.²¹⁸ Brown identifies that the economic privilege that stems from white identity is part of the mechanism that allows single-earner families to exist.²¹⁹ While market sexism drives married white women out of the workforce by making their income redundant to their husbands', market racism drives married Black women *into* the workforce by requiring that Black middle-class families establish dual-earner households to achieve the same economic status.²²⁰ The marriage penalty in tax is one way that racial capitalism manifests in the tax system: even Black families that closely align with white heteropatriarchal norms experience vastly different outcomes in their interaction with the tax system from their white peers because Black labor in the formal labor market is devalued.²²¹

The marriage penalty applies to Black families that *conform* to the defined marital family norm. But, as discussed in Part II, isolated nuclear families are not prominent in Black American communities requiring access to extended support networks to maintain a semblance of economic stability. Because the marital unit is taxed as a single economic unit, the economic value that unpaid care workers produce accrues to the marital family. That is, the family experiences an accretion to value through the unpaid care labor that the tax system does not consider in calculating the family's taxable income. But in extended kinship networks, when unpaid care work is distributed across taxable households, only the recipient of the labor experiences an accretion to value from the care worker's labor. The care worker, on the other hand, experiences a corresponding diminution to value.

In the Black community, unpaid care work for kin-group members is a response to the long-term impact of racism and sexism on Black American financial stability. By locating income security programs in the income tax system, policymakers increase the gendered impact of racial capitalism. Black women's market labor is devalued relative to white men's, Black men's, and white women's.²²² But, when the tax system only recognizes formal market labor as labor, it uses market values of labor to determine distribution to beneficiaries of the system. Black women in the labor market are thus embedded in a cycle of gendered racism that generates less income for Black women than

²¹⁸ *Id.* at 791-95.

²¹⁹ *See id.* at 796-98.

²²⁰ *See id.* at 792-94.

²²¹ *See* Gould, *supra* note 174.

²²² NAT'L P'SHIP FOR WOMEN & FAMS., *supra* note 173, at 1.

for non-Black-women peers and coerces them to stay in that same labor market to access short- and long-term income security options.

That coercion, on its own, is an intended consequence of situating income security programs in the tax system. Policymakers fixated on the false trope of the unwed Black mother taking advantage of public assistance—the “welfare queen”—to divest public funding from direct cash entitlement programs and direct it instead to work-for-welfare programs. The welfare queen trope publicly demonizes Black women for wanting unencumbered public income support so they can engage in more substantial amounts of care work for their own families. Racial capitalism thus creates a stark contrast in what is deemed an economic necessity for white and Black women: tax support for the single-earner marital family drives white women out of the formal labor market into the isolation of domestic labor for the benefit of their market-worker spouse; taxed-based financial assistance deliberately removes Black women from care roles in their homes by requiring them to enter the formal labor market. In both cases, failing to acknowledge unpaid care work marginalizes the women who perform that work. But, in contrast to the story of the tax system making white women more available to engage in care work, tax-based income security programs create a vacuum of available care in the households of Black women in the labor market. Black kinship care exchange steps into this vacuum as a community-based stabilizing mechanism. Care workers in BKNs are even further marginalized by the dual impact of nonpayment on the one hand and lack of acknowledgment by public support systems on the other. Thus, in the world of income security programs requiring labor for access to stabilizing resources, recognition of unpaid care labor is a fundamental first step toward demarginalizing care workers.²²³

CONCLUSION

Care work is indispensable to a functioning economy.²²⁴ Whether it is performed as a paid service in the formal labor market, for one’s own family in one’s own home, or across households as part of an extended family network, somebody has to do it. The dilemma of nonmarket care work exchanged within BKNs is that it both reflects and responds to anti-Black economic discrimination. Service exchange among kin in BKNs is necessary when those services in the marketplace are unaffordable. It is necessary when, during times of economic instability, government programs make market labor a prerequisite for everything from food subsidies to housing vouchers. It is necessary when decades of wage and employment discrimination, seemingly insurmountable student debt, and widening disparities in wealth limit access to essential resources after the age of retirement. Instrumental social support exchanges in BKNs are a lingering vestige of explicit public and private exclusion of Black

²²³ See Elson, *supra* note 46, at 54-56.

²²⁴ See, e.g., Kirstie Brewer, *The Day Iceland’s Women Went on Strike*, BBC NEWS (Oct. 23, 2015), <https://www.bbc.com/news/magazine-34602822> [<https://perma.cc/5YHH-N5HJ>].

Americans from spaces and resources that promote economic growth. Those exchanges represent an ideal of shared responsibility for the well-being of others around us that does not yet exist in financial assistance policy.

The federal income tax system's increasing role as the site of financial assistance reform since the mid-1990s instead places an impossible responsibility on the shoulders of the working poor—to reverse centuries of entrenched systemic failures through individual industry. Locating financial assistance entitlements in the tax system as a way to make work pay codifies the notion that poverty is a pathological, personal failing that could be overcome if people living in poverty would put in their share of effort. Shaping the financial assistance system around the idea that only the formally employed poor deserve assistance—and only to the extent of the market value of their labor—renders uncompensated care work invisible, no matter how much social or financial value it creates.

Moving forward, American financial assistance policies must develop a way to acknowledge and account for the central role that unpaid care work plays in sustaining social welfare and advancing economic growth. The most equitable way to accomplish that would be to make financial assistance entitlements accessible regardless of formal labor status. This could ostensibly be done using the tax system as a resource, as in the case of the distribution of stimulus checks in the early period of the recession surrounding the Coronavirus pandemic; however, it might be better accomplished by an agency separate from the tax system. Whatever the distribution mechanism, the entitlement should not depend on the market value of the recipient's labor. Any social welfare system should aim to interrupt entrenched patterns of race and gender discrimination in the labor market—here, that means using costs of living as the index to measure the distribution amount.