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## ARTICLES

### COLORBLIND TAX ENFORCEMENT

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*The United States Internal Revenue Service (IRS) has repeatedly taken the position that because the IRS does not ask taxpayers to identify their race or ethnicity on submitted tax returns, IRS enforcement actions are not affected by taxpayers' race or ethnicity. This claim, which I call "colorblind tax enforcement," has been made by multiple IRS Commissioners serving in multiple administrations (both Democratic and Republican). This claim has been made to members of Congress and to members of the press.*

*In this Article, I refute the IRS position that racial bias cannot occur under current IRS practices. I do so by identifying the conditions under which race and ethnicity could determine tax enforcement outcomes under three separate models of racial bias: racial animus, implicit bias, and transmitted bias. I then demonstrate how such conditions can be present across seven distinct tax enforcement settings regardless of whether the IRS asks about race or ethnicity. The IRS enforcement settings ana-*

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lyzed include summonses, civil penalty assessments, collection due process hearings, innocent spouse relief, and Department of Justice (DOJ) referrals.

*By establishing that every major enforcement function of the IRS remains vulnerable to racial bias, this Article also challenges the IRS decision to omit race and ethnicity from the collection and analysis of tax data. The absence of publicly available data on IRS enforcement activities by race should not be interpreted as evidence that no racial disparities exist. I conclude by describing alternative approaches to preventing racial bias in tax enforcement other than the current IRS policy of purported colorblindness.*

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## INTRODUCTION

On June 30, 2020, IRS Commissioner Charles Rettig testified before the Senate Finance Committee that IRS audit rates do not dis-

proportionately impact Black and brown taxpayers.<sup>1</sup> His outright denial surprised many of the Senators attending the hearing, who were familiar with the widely reported disparate audit rates by race covered by ProPublica.<sup>2</sup> To clarify the IRS position, Senator Sherrod Brown submitted additional questions for the record on potential racial bias in tax enforcement, to which the IRS responded:

The IRS does not have, nor does it collect, any information or data related to the race and ethnicity of taxpayers. For example, the Form 1040 does not ask for the race or ethnicity of the taxpayer, and, therefore, the IRS cannot track any of this information.<sup>3</sup>

If the IRS does not track any information related to the race and ethnicity of taxpayers, how could the IRS Commissioner so confidently assert there was no disparate racial impact of IRS enforcement activity when answering questions from a United States Senator?

The answer is a *de facto* IRS policy that I dub “Colorblind Tax Enforcement.” Across multiple presidential administrations and in a variety of public and private fora, the IRS has repeatedly taken the position that, because it does not ask about race or ethnicity on its tax forms, it does not discriminate.<sup>4</sup> Restated as a formal “if A, then B” proposition, the position taken in this IRS statement is that, *if* the IRS does not ask about race or ethnicity, *then* the IRS does not base its actions on a taxpayer’s race or ethnicity. The IRS has persistently maintained this position even though it is unwilling to evaluate the racial impact of enforcement due to its decision not to collect such data.<sup>5</sup>

The accuracy of the IRS claim of colorblindness is an issue of urgent proportions. Over 150 million households file income tax returns each year.<sup>6</sup> Over three trillion dollars are remitted.<sup>7</sup> And while

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<sup>1</sup> *2020 Filing Season and IRS COVID-19 Recovery Before the S. Comm. on Fin.*, 116th Cong. 34 (2020) [hereinafter *2020 Filing Season*] (statement of Charles P. Rettig, Comm’r, IRS). The language of “black and brown” to denote specific racial identities is taken directly from Senator Brown’s questioning of Commissioner Rettig. *Id.*

<sup>2</sup> Paul Kiel & Hannah Fresques, *Where in the U.S. Are You Most Likely to Be Audited by the IRS?*, PROPUBLICA (Apr. 1, 2019), <https://projects.propublica.org/graphics/eitc-audit> [<https://perma.cc/RJC2-XG4H>] (reporting a study mapping counties across the United States where the IRS audited income tax files at a higher rate than the nation as a whole and finding significant racial disparities).

<sup>3</sup> *2020 Filing Season*, *supra* note 1, at 57.

<sup>4</sup> This reasoning is further elaborated in statements made by Commissioner Rettig and by Treasury’s Chief Diversity Officer, Valerie Gunter. For a full account of this position and related documentation, see *infra* Part I.

<sup>5</sup> See, e.g., *2020 Filing Season*, *supra* note 1, at 57 (“Because the IRS does not collect such data, the IRS cannot evaluate administrative actions with respect to race or ethnicity.”).

<sup>6</sup> INTERNAL REVENUE SERV., PUB. NO. 55-B, DATA BOOK 2020, at 5 (2021).

<sup>7</sup> *Id.* at 3.

the IRS is limited to only the enforcement activity required by Congress to implement the Internal Revenue Code, much of this work also entails discretion. The IRS settles disputes on tax debts, seizes assets, and both assesses and abates civil penalties.<sup>8</sup> The IRS can refer taxpayers to the DOJ for criminal investigation and prosecution, with some of its specialized staff even carrying firearms.<sup>9</sup> According to the DOJ's Justice Manual, "tax enforcement potentially affects more individuals than any other area of criminal enforcement."<sup>10</sup> As a poignant point of contrast, the DOJ includes race and ethnicity in its own public reporting of criminal tax enforcement, while the IRS does not.<sup>11</sup>

The lack of internal review and public reporting of IRS enforcement activity by race has taken on a new urgency as the Biden Administration has sought to double the size of the IRS and increase its funding by eighty billion dollars.<sup>12</sup> The Biden Administration hopes to secure an additional \$700 billion in tax revenue collections obtained through heightened enforcement.<sup>13</sup> Within this context, the IRS's colorblind tax enforcement approach deserves serious scrutiny.<sup>14</sup>

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<sup>8</sup> See *id.* at 33–68 (reporting on the IRS's compliance presence; collections activities, penalties and appeals; and the Chief Counsel division).

<sup>9</sup> See IRM 9.1.2.4.1 (Nov. 10, 2004) ("The authority to carry firearms is limited to the conduct of official duties in enforcing any of the criminal provisions of the Internal Revenue laws or other criminal provisions of laws relating to the Internal Revenue where the enforcement is the responsibility of the Secretary or his/her delegate."). The Internal Revenue Code includes some criminal provisions. See I.R.C. §§ 7201–7232 (criminalizing attempts to evade or defeat taxes, willful failures to collect or pay over taxes, and other related offenses). Criminal tax provisions parallel many civil provisions in the Internal Revenue Code, such as the delinquency penalties for fraud. See *id.* § 6663 (imposing tax penalty if any underpayment of tax is attributable to fraud). The DOJ can also pursue cases for fraudulent claims and conspiracy to defraud the government. See 18 U.S.C. §§ 286, 287, 371; see generally INTERNAL REVENUE SERV., CRIM. INVESTIGATIONS ANN. REP. (2021).

<sup>10</sup> U.S. Dep't of Just., Just. Manual § 6-4.010 (2020).

<sup>11</sup> See, e.g., U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., FEDERAL OFFENSES AND OFFENDERS: WHITE COLLAR CRIME 7 tbl.14 (1987) (presenting the "[c]haracteristics of persons arrested for [f]ederal crimes, 1984-85," which includes the racial demographics of persons arrested for tax fraud).

<sup>12</sup> See Brian Faler, *Biden Proposes Doubling IRS Workforce as Part of Plan to Snag Tax Cheats*, POLITICO (May 20, 2021, 3:04 PM), <https://www.politico.com/news/2021/05/20/irs-funding-boost-489830> [<https://perma.cc/6DQH-5GEQ>] (highlighting that President Biden proposed hiring 87,000 new IRS workers over the next decade).

<sup>13</sup> *Id.*; Jim Tankersley & Alan Rappeport, *Biden Seeks \$80 Billion to Beef Up I.R.S. Audits of High-Earners*, N.Y. TIMES (Apr. 27, 2021), <https://www.nytimes.com/2021/04/27/business/economy/biden-american-families-plan.html> [<https://perma.cc/9LUW-XDCK>].

<sup>14</sup> Even with incremental progress on race data occurring at Treasury, the IRS has maintained its distance from the process despite the fact that the IRS is the day-to-day enforcement bureau beneath the Treasury Department. See I.R.C. §§ 7801, 7803 (establishing the powers of the Secretary of the Treasury and the subordinate role of the Commissioner of Internal Revenue). Enforcement decisions are generally performed by IRS personnel, not Treasury personnel. For a discussion of the incremental progress on race data at Treasury and the current IRS procedures, see *infra* Part III.

In this Article, I identify the wide variety of ways that race and ethnicity could determine tax enforcement outcomes even when race and ethnicity are not asked about on IRS tax forms. I begin by describing the nature of the IRS colorblind enforcement position. I then present three conceptual models of racial bias that produce disparate tax enforcement by race even when race and ethnicity are not asked about on IRS forms. These models are racial animus, implicit bias, and transmitted bias from non-tax policies. I then demonstrate how all three models would predict racial bias in a variety of tax enforcement settings even without asking taxpayers to identify their race and ethnicity, affecting such tax enforcement outcomes as settlement amounts, civil penalty assessments, and DOJ referrals. While some areas of tax enforcement present fewer opportunities for racial bias, in no enforcement setting is the current policy sufficient to ensure the absence of racial bias.<sup>15</sup>

Providing a bird's eye view on the potential for racial bias in tax enforcement is a novel addition to tax scholarship on race. While there is a well-established body of work on the intersection of race and tax—a rich field that continues to grow—this scholarship has primarily focused on racial disparities embedded in the Internal Revenue Code itself.<sup>16</sup> Scholars have documented disparate tax treatment of housing,<sup>17</sup> marriage,<sup>18</sup> retirement,<sup>19</sup> estate planning,<sup>20</sup> and employment discrimination settlements.<sup>21</sup> Because it is the responsibility of

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<sup>15</sup> For additional discussion of types of tax enforcement settings and vulnerabilities to racial bias, see *infra* Part III.

<sup>16</sup> For an introduction to the history of the critical tax movement beginning in the 1990s and its early focus on “hidden biases” in the tax code, see Karen B. Brown, Mary Louise Fellows & Bridget J. Crawford, *The Past, Present, and Future of Critical Tax Theory: A Conversation*, 10 *PITT. TAX REV.* 59, 59–62 (2012). For a comprehensive account of the current state of the field, see generally DOROTHY A. BROWN, *THE WHITENESS OF WEALTH* (2021).

<sup>17</sup> See, e.g., Dorothy A. Brown, *Shades of the American Dream*, 87 *WASH. U. L. REV.* 329, 329 (2009) (identifying racial disparities in the distribution of tax benefits for homeownership).

<sup>18</sup> See, e.g., Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 *U. CIN. L. REV.* 787, 787–88 (1997) (identifying racial disparities in the distribution of marriage bonuses and penalties).

<sup>19</sup> See, e.g., Leo P. Martinez, *Latinos and the Internal Revenue Code: A Tax Policy Primer for the New Administration*, 20 *HARV. LATINX L. REV.* 101, 115 (2017) (identifying disparities in the distribution of tax preferences for retirement).

<sup>20</sup> See, e.g., Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 *WIS. L. REV.* 751, 771–72 (identifying racial disparities in the tax benefits of gifts and inheritances).

<sup>21</sup> See, e.g., Karen B. Brown, *Not Color- or Gender-Neutral: New Tax Treatment of Employment Discrimination Damages*, 7 *S. CAL. REV. L. & WOMEN'S STUD.* 223, 227 (1998) (identifying disparities in the tax treatment of damages for employment discrimination).

Congress to write and revise the Internal Revenue Code, the interventions that might address racial inequality in the Code have accordingly focused on legislative solutions.<sup>22</sup> But in the context of tax enforcement, new legislation is not required before the IRS can address racial bias. An additional contribution of this Article, then, is to identify areas where the IRS has sufficient discretion to remedy racial inequality on its own, provided institutional leadership has the willpower to do so.

The current ignorance over racial disparities in tax enforcement stands in stark contrast to what we know about law enforcement outside of tax. Criminal law scholars have long documented racial bias at nearly all stages of the criminal justice system, including profiling of suspects,<sup>23</sup> police use of force,<sup>24</sup> access to counsel,<sup>25</sup> grand juries,<sup>26</sup> trial juries,<sup>27</sup> and sentencing.<sup>28</sup> The research on racial bias in the enforcement of criminal law parallels research on racial bias in the design of criminal law.<sup>29</sup> This cumulative body of criminal law scholar-

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<sup>22</sup> The primary exception is the recommendation for the collection and analysis of race data, where the IRS is in a position to clarify the breadth of racial disparities across the Internal Revenue Code. See Dorothy A. Brown, *Split Personalities: Tax Law and Critical Race Theory*, 19 W. NEW ENG. L. REV. 89, 91–92 (1997) (calling for analysis of tax data by race); Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1, 2 (2019) (documenting “a century of colorblindness” in the federal administration of tax data); *Minding the Tax Gap: Improving Tax Administration for the 21st Century Before the Subcomm. on Select Revenue Measures & the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 117th Cong. (2021) (statement of Steven A. Dean, Professor of Law, Brooklyn Law School) (addressing how a “race-blind approach . . . produces bad tax policy” and what the IRS should do to improve fairness in tax enforcement).

<sup>23</sup> See, e.g., Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 637 (2021).

<sup>24</sup> See, e.g., Cynthia Lee, “*But I Thought He Had a Gun*”: *Race and Police Use of Deadly Force*, 2 HASTINGS RACE & POVERTY L.J. 1, 3 (2004).

<sup>25</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* 84–85 (2012) (discussing systemic denial of competent legal representation).

<sup>26</sup> See, e.g., Roger A. Fairfax, Jr., *Should the American Grand Jury Survive Ferguson?*, 58 HOW. L.J. 825, 830 (2015).

<sup>27</sup> See, e.g., Michael E. Antonio & Valerie P. Hans, *Race and the Civil Jury: How Does a Juror’s Race Shape the Jury Experience?*, in *PSYCHOLOGY IN THE COURTS: INTERNATIONAL ADVANCES IN KNOWLEDGE* 69, 69–81 (Ronald Roesch, Raymond R. Corrado & Rebecca Dempster eds., 2001).

<sup>28</sup> See, e.g., John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUD. 637, 637 (2014).

<sup>29</sup> See, e.g., ALEXANDER, *supra* note 25, at 2 (examining the racialized origins and impact of mass incarceration); see also Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RSCH. 445, 446 (2006).

ship, developed over multiple generations, raises doubts about the IRS presumption of race neutrality in tax enforcement.<sup>30</sup>

The international experience with tax enforcement also suggests potential for disparate enforcement by race or ethnicity. In the Netherlands, tax personnel were able to use the surnames that appeared on tax documents to infer the ancestry of the filer.<sup>31</sup> Those filers who did not appear ethnically Dutch by surname were then targeted for heightened enforcement.<sup>32</sup> As originally reported by *The New York Times*, “an administrative mistake like a missing signature was enough for the tax authority to label parents as frauds and fine families as much as tens of thousands of euros.”<sup>33</sup> How tax personnel respond to errors on a tax form is just one example of the many types of discretion that occur in most tax enforcement settings.<sup>34</sup> And while the publicity of the discriminatory tax enforcement in the Netherlands led to substantial political consequences, including the resignation of the Prime Minister, current IRS data policy obstructs such potential accountability.<sup>35</sup>

The demonstrated potential for racially biased tax enforcement that I identify in this Article, presenting three original models of racial bias in tax enforcement and illustrating how these models can operate within seven distinct tax enforcement settings, further erodes the case for omitting race and ethnicity from the collection and analysis of fed-

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<sup>30</sup> While I expect subsequent empirical work will also seek to analyze disparate enforcement activity in specific tax settings, such work will necessarily adopt a narrower scope for its inquiry similar to the approach in criminal law. Empirical work on potential disparate racial impact of tax enforcement must also rely on a theoretical foundation, such as the three models of racial bias in tax enforcement developed in this Article.

<sup>31</sup> See Stephanie van den Berg, *Dutch Government Quits Over ‘Colossal Stain’ of Tax Subsidy Scandal*, REUTERS (Jan. 15, 2021, 7:44 AM), <https://www.reuters.com/article/us-netherlands-politics-resignation/dutch-government-quits-over-colossal-stain-of-tax-subsidy-scandal-idUSKBN29K11O> [<https://perma.cc/RMF7-EUEG>] (reporting that Dutch bureaucrats had picked out “foreign-looking names”).

<sup>32</sup> *Id.* (“Many of the families were targeted based on their ethnic origin or dual nationalities, the tax office said last year.”); *Government in Netherlands Resigns After Benefit Scandal*, TELEGRAPH (Jan. 15, 2021, 10:27 PM) [hereinafter *Government in Netherlands*], <https://www.telegraphindia.com/world/government-in-netherlands-resigns-after-benefit-scandal/cid/1803786> [<https://perma.cc/W7VE-NRT7>] (“In a separate investigation, the Dutch Data Protection Authority concluded that tax inspectors had discriminated against citizens with dual nationality.”).

<sup>33</sup> *Government in Netherlands*, *supra* note 32.

<sup>34</sup> See, e.g., Rita de la Feria, *Tax Fraud and Selective Law Enforcement*, 47 J.L. & Soc’y 240, 257, 268–69 (2020) (discussing how tax personnel discretion can lead to, for example, authorities refusing to deduct taxes where documents were incomplete or not immediately amended, and, at the extreme, overlooking the collection of taxes that yield low net revenues).

<sup>35</sup> See *Government in Netherlands*, *supra* note 32; Bearer-Friend, *supra* note 22, at 44–45 (arguing that the IRS has foreclosed avenues for policy intervention and public debate by “diligently preserving the colorblindness of federal tax data”).



eral tax data. Without adequate data collection and data analysis, any disparate tax enforcement by race will go unacknowledged and, subsequently, unaddressed.

This Article proceeds as follows. Part I lays out the current approach to race and ethnicity by the IRS. Part II provides three distinct models of racial bias in tax enforcement. Part III identifies the ways that such biases can operate within seven tax enforcement settings even though race and ethnicity are not asked about by the IRS. I conclude with a menu of alternative approaches to ensuring racial equity in tax enforcement other than the current IRS policy of purported colorblindness.

## I

### IRS POSITION ON RACIAL BIAS IN TAX ENFORCEMENT

The investigative journalism outlet ProPublica made shockwaves both inside and outside the tax policy community when it reported on the high audit rates of Black counties in the South relative to white counties in the North.<sup>36</sup> Specifically, the five counties with the highest audit rates in the United States were all majority Black.<sup>37</sup> While the initial study documenting the high audit rates was released behind a paywall to a niche tax specialist audience, ProPublica brought national attention to the issue and over time, even television stations started covering the tax news.<sup>38</sup> Eventually, United States Senators started asking questions.<sup>39</sup>

In Commissioner Rettig's first testimony before a new Democratic majority in the Senate, he was asked about racial disparities in tax enforcement. And in response to the first line of inquiry he

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<sup>36</sup> Kiel & Fresques, *supra* note 2 (mapping counties across the United States where the IRS audited income tax files at a higher rate than the nation as a whole and finding significant racial disparities).

<sup>37</sup> *Id.* ("The five counties with the highest audit rates are all predominantly African American, rural counties in the Deep South.").

<sup>38</sup> See Kim M. Bloomquist, *Regional Bias in IRS Audit Selection*, 162 TAX NOTES 987 (2019) (initially documenting regional bias in tax audits based on county-level estimates). For an example of the mass public attention following the ProPublica reporting, see Aimee Picchi, *Here Are the Counties Where Taxpayers Are Most Likely to Be Audited*, CBS NEWS (Apr. 2, 2019, 8:47 PM), <https://www.cbsnews.com/news/where-does-the-irs-audit-the-most-poor-rural-counties-that-are-mostly-black> [<https://perma.cc/E9LB-NXH6>] ("Many of the counties with the highest IRS audit rates have larger minority populations. That includes Humphreys, where 3 of every 4 residents is [B]lack.").

<sup>39</sup> See *2020 Filing Season*, *supra* note 1, at 34 (including Senator Brown's questions about the disproportionate incidence of IRS audits by race and ethnicity); see also *The IRS's Fiscal Year 2022 Budget: Hearing Before the S. Comm. on Fin.*, 117th Cong. 2:37:06–2:44:48 (2021), <https://www.finance.senate.gov/hearings/the-irss-fiscal-year-2022-budget> [<https://perma.cc/RN3X-R42C>] (including questions by Senator Warren on disparate audit rates of Black taxpayers in the South).



had ever received from the Senate Finance Committee on racial bias in tax enforcement, he focused on outright denial. Here is the exchange between IRS Commissioner Charles Rettig and Senator Sherrod C. Brown, Senior United States Senator from Ohio:

Senator Brown: “Does the IRS study racial disparities in its enforcement efforts?”

Commissioner Rettig: “There are no race or geographic issues that come up with respect to audit selection, which is what most people consider to be the enforcement side of [the IRS].”

Brown: “[C]an you assure me, and assure the American people, that IRS audit rates do not disproportionately—not by intention, but by commission perhaps—that IRS audit rates do not disproportionately hit [B]lack and brown people?”

Rettig: “Yes.”<sup>40</sup>

Unfortunately, the brief five-minute period permitted for each senator’s questions did not allow for further elaboration of the Commissioner’s one-word answer to such an important question. And as this was the Senate Finance Committee’s very first foray into the issue of colorblind tax data in a live hearing, additional follow-up was necessary to garner any genuine clarity regarding the IRS position on disparate enforcement by race.

In order to further clarify the IRS position on disparate tax enforcement by race, Senator Brown submitted a series of questions to Commissioner Rettig to be included in the Committee’s records for the hearing. He inquired about how the IRS defines disproportionate impact, who at the IRS is tasked with conducting that nondiscrimination review, and how such review is documented and verified.<sup>41</sup> He also sought additional information about the data techniques used to generate conclusions about disparate racial impact.<sup>42</sup> And he inquired about enforcement activity other than examinations.<sup>43</sup>

None of Senator Brown’s questions for the record were directly answered. Instead, the IRS provided a series of “[p]lease see combined response below” answers to each individual question, and then a single essay disclaiming any access to data that would allow for non-discrimination review.<sup>44</sup> It is in this response to Senator Brown’s ques-

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<sup>40</sup> 2020 Filing Season, *supra* note 1, at 34.

<sup>41</sup> *Id.* at 68.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

tions for the record that the IRS provides the full account of its colorblind tax enforcement approach:

The IRS does not have, nor does it collect, any information or data related to the race and ethnicity of taxpayers. For example, the Form 1040 does not ask for the race or ethnicity of the taxpayer, and, therefore, the IRS cannot track any of this information. *Thus, the IRS does not base any tax administrative actions and procedures on race or ethnicity.*<sup>45</sup>

Restated as a formal “if A, then B” proposition, the position taken in this IRS statement is that, *if* the IRS does not ask about race or ethnicity, *then* the IRS does not base its actions on a taxpayer’s race or ethnicity.<sup>46</sup>

This proposition submitted to the Senate Finance Committee was not a one-off statement. It instead became a recurring position of the IRS. One year later, the proposition was repeated by the Chief Diversity Officer for the IRS’s Office of Equity, Diversity and Inclusion (EDI), Valerie Gunter. In response to an inquiry about potential disparate impact of IRS examination rates, Ms. Gunter stated:

It is not IRS practice or plan to collect demographic information on taxpayers. *And that is how we are able to ensure that there is no disparity in treatment as relates to tax treatment.* At this point there is no expectation of a change in that policy.<sup>47</sup>

This statement, repeating the same if-then causal logic of Commissioner Rettig’s submitted testimony, was made to an audience

<sup>45</sup> *Id.* (emphasis added).

<sup>46</sup> This type of statement is referred to by logicians as *modus ponens* (A, therefore B). This is a more absolutist version of the Pentagon’s previous “Don’t Ask, Don’t Tell” (DADT) policy. That policy did not purport to *guarantee* the protection of all LGBTQ servicemembers who were not asked to disclose their sexuality, though it was assumed to be preferable to the prior status quo of outright ban on LGBTQ servicemembers. See RAND NAT’L DEF. RSCH. INST., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND’S 1993 STUDY 3–4 (2010) (reviewing the history of military policy governing the service of gay, lesbian, and bisexual servicemembers and the origins of DADT). Ultimately, DADT was viewed as a failure. See *id.* at 4–5 (discussing implementation challenges and ambiguity in the policy from its inception); Ryan Beals, *Decade After ‘Don’t Ask, Don’t Tell’ Repeal, a ‘Hurtful’ Legacy Remains*, NBC NEWS (Dec. 22, 2020, 2:02 PM), <https://www.nbcnews.com/feature/nbc-out/decade-after-don-t-ask-don-t-tell-repeal-hurtful-n1252104> [<https://perma.cc/E5A5-PT6N>] (including comments from former servicemembers on DADT’s harmful and permanent effects).

<sup>47</sup> Valerie Gunter, Chief Diversity Officer, Off. of Equity, Diversity and Inclusion, IRS, *The Multicultural Taxpayer: How to Address Discrimination with the IRS*, ABA Tax Section May Meeting (May 12, 2021) (emphasis added) (transcript on file with author); see also INTERNAL REVENUE SERV., FORM 1040 (2020) (illustrating how the IRS does not ask any questions related to race or ethnicity on the tax form for personal federal income tax returns).

of tax practitioners and tax reporters at the ABA Tax Section Annual Meeting.<sup>48</sup>

Former IRS personnel also swiftly rallied around the colorblind enforcement position. Former IRS Commissioner John Koskinen claimed that asking about race or ethnicity on tax forms “won’t help reduce bias; that’s what anonymity does.”<sup>49</sup> His public statement implies the same causal theory of nondiscrimination, whereby nondisclosure of race leads to unbiased enforcement of tax law. He further claimed that this colorblind approach was supported by the evidence of his own experience at the IRS.<sup>50</sup> Additional former IRS personnel also came forward, but only under the condition of anonymity. According to *Politico*, a former top IRS official responded to the idea of including race and ethnicity in tax data by stating anonymously: “This sends a chill down my spine.”<sup>51</sup>

A public commitment to the colorblind tax enforcement position has received support across party affiliation and presidential administrations. Commissioner Rettig was appointed by a Republican president, confirmed by a Republican majority in the Senate, and continues his service under a Democratic president.<sup>52</sup> Commissioner Koskinen was appointed by a Democratic president, confirmed by a Democratic majority in the Senate, and served under both Democratic and Republican administrations.<sup>53</sup> And the IRS Chief Diversity Officer Valerie Gunter is a civil servant hired outside of political appointment processes. Both Commissioners and the Chief Diversity Officer justified IRS practice using the colorblind enforcement logic. Despite our polarized times, colorblind tax enforcement appears to transcend partisanship.

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<sup>48</sup> The colorblind tax enforcement position stands in stark contrast to the IRS approach to nondiscrimination in employment, where the Service *does* ask employees to identify their race and ethnicity and provides public reporting of the diversity of its workforce in its annual data book. See, e.g., INTERNAL REVENUE SERV., *supra* note 6, at 74 (presenting data on the IRS labor force by gender, race/ethnicity, disability, and veteran status).

<sup>49</sup> William Hoffman, *Biden Focus on Agency Biases Could Implicate Tax Administration*, 171 TAX NOTES FED. 143, 143 (2021).

<sup>50</sup> See *id.* (“[A]s commissioner from 2013 to 2017, [John Koskinen] never encountered an accusation of racial bias in IRS enforcement.”).

<sup>51</sup> Brian Faler, *Taxes May Not Be Colorblind, and Critics Say More Data Could Prove It*, POLITICO (Mar. 16, 2021, 4:22 PM), <https://www.politico.com/news/2021/03/16/race-taxes-irs-476371> [<https://perma.cc/DT4U-EX5H>]. The choice of remaining anonymous despite no longer serving at the IRS may imply an anxiety surrounding discussions of race.

<sup>52</sup> *Senate Confirms Charles Rettig to Be IRS Commissioner*, CBS NEWS (Sept. 13, 2018, 7:02 AM), <https://www.cbsnews.com/news/senate-confirms-charles-rettig-to-be-irs-commissioner> [<https://perma.cc/J3GH-26LU>].

<sup>53</sup> *Senate Confirms Koskinen as IRS Commissioner*, ACCT. TODAY (Dec. 20, 2013, 12:19 PM), <https://www.accountingtoday.com/news/senate-confirms-koskinen-as-irs-commissioner> [<https://perma.cc/HZ43-BQF5>].

Not only have current and former IRS personnel embraced the colorblind tax enforcement position, but many of the statutorily mandated oversight bodies have also helped maintain it. In a May 11, 2021 hearing in the Senate Finance Committee specifically on the matter of tax enforcement, almost one year after Senator Brown's inquiry into disparate enforcement by race, not a single witness discussed race and ethnicity in their submitted testimony.<sup>54</sup> Testimony was submitted by former National Taxpayer Advocate and current Executive Director of the Center for Taxpayer Rights, Nina Olson, former IRS Commissioner Charles Rossotti, the Treasury Inspector General for Tax Administration (TIGTA), Russell George, and two current leaders from within the IRS.<sup>55</sup> Across 113 pages of submitted testimony, the words "race," "ethnicity," "Black," and "African-American" do not appear.<sup>56</sup>

Even recent signs of progress on the inclusion of race and ethnicity in federal tax data analysis have not shifted the commitment to colorblind tax enforcement at the IRS. On the first day of the Biden presidency, a new executive order on racial equity required the creation of an equitable data working group and called for the disaggregation of federal data by race.<sup>57</sup> The order includes broad language, stating "Many Federal datasets are not disaggregated by race . . . . This lack of data has cascading effects and impedes efforts to measure and advance equity."<sup>58</sup> But the only entity named to the working group that does not already disaggregate data by race is the Treasury Department.<sup>59</sup> All of the other members of the group, including the Census Bureau, Office of Management and Budget, and the Council of Economic Advisors, all already consistently include race and ethnicity in their public data analysis.<sup>60</sup> Treasury is the sole participant currently practicing a colorblind data approach. The decision to place disaggregation of data by race outside of Treasury

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<sup>54</sup> See *Closing the Tax Gap: Lost Revenue from Noncompliance and the Role of Offshore Tax Evasion Before the S. Subcomm. on Tax'n & IRS Oversight of the S. Comm. on Fin.*, 117th Cong. (2021), <https://www.finance.senate.gov/hearings/closin54g-the-tax-gap-lost-revenue-from-noncompliance-and-the-role-of-offshore-tax-evasion> [<https://perma.cc/QEP5-LN5M>].

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (including all submitted testimony from the Senate Finance Committee hearing). All calculations were performed by the author.

<sup>57</sup> Exec. Order No. 13,985 § 9, 86 Fed. Reg. 7009, 7011 (Jan. 20, 2021).

<sup>58</sup> *Id.*

<sup>59</sup> See *id.* (listing required members of the Interagency Working Group on Equitable Data); Bearer-Friend, *supra* note 22, at 2 (documenting the absence of race and ethnicity data in the Treasury Department's Office of Tax Analysis).

<sup>60</sup> See Bearer-Friend, *supra* note 22, at 3–4, 22 n.121, 23 n.124 (reviewing the inclusion of race and ethnicity data in the publications of other federal agencies).

through a newly formed working group, rather than an executive order simply requiring Treasury to change its own data practices, implies an ongoing apprehension towards including race in tax data. And indeed, five months after the executive order, Treasury's annual Green Book was released, and it continued the practice of omitting any reference to race and ethnicity from the entire document, including both quantitative projections of tax policy changes and qualitative descriptions and rationales for the proposed changes.<sup>61</sup> Even Treasury publications specifically on tax enforcement note that any work on racial disparities is preliminary and emphasize the potential disparate racial impacts of Internal Revenue Code provisions over IRS enforcement activity.<sup>62</sup> This same document also argued in support of doubling IRS enforcement spending.<sup>63</sup> Outside of the context of enforcement, Treasury has had a bit more progress, with the Deputy Secretary of Treasury and the Assistant Secretary of Tax Policy announcing that they are in the preliminary stages of conducting research projects related to race and ethnicity, though no findings have been announced.<sup>64</sup>

Meanwhile, despite President Biden's executive order, the IRS continues to resist departure from its nominally colorblind enforcement position. When asked by Senior Senator of Massachusetts Elizabeth Warren about his progress on improving data analysis by race at the IRS, Commissioner Rettig repeatedly insisted that this was the role of Treasury and not the IRS.<sup>65</sup> His distinction was curious,

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<sup>61</sup> See U.S. DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2022 REVENUE PROPOSALS (2021).

<sup>62</sup> See generally U.S. DEP'T OF THE TREASURY, THE AMERICAN FAMILIES PLAN TAX COMPLIANCE AGENDA 13 (2021) (noting that "the Treasury Department is currently undertaking research to study the relationship between the tax code and racial inequities" without specifying any actions that Treasury is taking to address racial inequality aside from research).

<sup>63</sup> See Phill Swagel, *The Effect of Increased Funding for the IRS*, CONG. BUDGET OFF.: BLOG (Sept. 2, 2021), <https://www.cbo.gov/publication/57444> [<https://perma.cc/C7Y4-PHW3>] (explaining that under Treasury's "Tax Compliance Agenda" proposal, the IRS budget would increase by more than ninety percent between 2021 and 2031, with most of the increase going towards enforcement activities).

<sup>64</sup> U.S. DEP'T OF THE TREASURY, ADVANCING EQUITY ANALYSIS IN TAX POLICY (Dec. 12, 2021), <https://home.treasury.gov/news/featured-stories/advancing-equity-analysis-in-tax-policy> [<https://perma.cc/P5EJ-6F4K>]. A change in leadership may be part of the explanation for this encouraging development. The newly confirmed Assistant Secretary for Tax Policy, Professor Lily Batchelder, included an analysis of tax policy by race in her very first law review article. Lily L. Batchelder, *Taxing the Poor: Income Averaging Reconsidered*, 40 HARV. J. ON LEGIS. 395, 449 tbl.4 (2003).

<sup>65</sup> *The IRS's Fiscal Year 2022 Budget*, U.S. SENATE COMM. ON FIN., at 02:37:30 (June 8, 2021), <https://www.finance.senate.gov/hearings/the-irss-fiscal-year-2022-budget> [<https://perma.cc/B8FP-QZKN>] ("Treasury Office of Tax Policy and Office of Tax Analysis are the ones that handle that. [T]he appropriate thing would be to have Treasury . . . give you a

especially given the IRS's own research capacity. For example, according to the Internal Revenue Manual, the IRS Applied Analytics and Statistics Division (RAAS) group "combines advanced analytics, dynamic testing, reporting, and prototyping with appropriate scientific rigor and deep IRS domain expertise to deliver valid and actionable insights using diverse sources of data."<sup>66</sup> This includes eight different data labs,<sup>67</sup> which rely on diverse sources of data and are staffed by statisticians, economists, and other trained data professionals. Such a cutting-edge research group should be well equipped to use the matching or imputation techniques available to other social scientists when studying the potential disparate racial impacts of IRS procedures.<sup>68</sup> These research teams also regularly report on IRS tax enforcement activity, they simply do so with no mention of race or ethnicity.<sup>69</sup> The IRS also plans to use facial recognition software as a gateway to accessing IRS services,<sup>70</sup> despite longstanding evidence that facial recognition error rates are correlated with race.<sup>71</sup>

Ultimately, the IRS record is clear: The IRS does not ask taxpayers to identify their race or ethnicity. And in statements to Congress, to the press, to those who represent clients before the IRS, and to taxpayers themselves, the IRS has maintained that nondisclosure guarantees nondiscrimination, thus making review of racial disparities in enforcement unnecessary. While the explicit justification made by the IRS for its colorblind tax data approach is new, the

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heads up on what they are looking at . . . . But the IRS itself does not collect data with respect to race.”).

<sup>66</sup> IRM 1.1.18, 1.1.18.1 (Sept. 25, 2020).

<sup>67</sup> *Id.* 1.1.18, Exhibit 1.1.18-2 (showing a diagram including eight labs organized under five research and analytics units).

<sup>68</sup> The Statistics of Income Division (SOI) of the IRS has also consistently included demographic information not asked on Form 1040 in its own publications. For example, SOI has included gender breakouts in its public reports. *See* Bearer-Friend, *supra* note 22, at 16.

<sup>69</sup> *See, e.g.,* INTERNAL REVENUE SERV., *supra* note 6, at 35 (reporting on IRS compliance presence as part of the IRS's annual Data Book publication). Public reporting on tax enforcement activity is already viewed as standard procedure at the IRS. Subsequent to Commissioner Rettig's statements before the Finance Committee and nearly one year after President Biden's Executive Order, the Deputy Secretary of the U.S. Treasury Department and the Assistant Secretary of the Treasury announced that RAAS was contributing to one specific research project on race: the delivery of Economic Impact Payments, a historical policy that is no longer in effect, U.S. DEP'T OF THE TREASURY, *supra* note 64.

<sup>70</sup> Drew Harwell, *IRS Plan to Scan Your Face Prompts Anger in Congress, Confusion Among Taxpayers*, WASH. POST (Jan. 28, 2020 6:10 PM), <https://www.washingtonpost.com/technology/2022/01/27/irs-face-scans> [<https://perma.cc/2YEB-86RT>].

<sup>71</sup> Alex Najibi, *Racial Discrimination in Face Recognition Technology*, HARV. UNIV. SCI. IN THE NEWS (Oct. 24, 2020), <https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology> [<https://perma.cc/64CD-4ZZD>].

underlying practice of refusing to provide evidence of nondiscrimination in tax enforcement to the public goes back a century.<sup>72</sup> The long-standing practice of omitting race and ethnicity from the collection and analysis of tax data, documented in my previous research, implies that the IRS commitment to nominal colorblindness as a strategy for preventing racial bias has a longer history than Rettig's recent statements. In the following Part, I will evaluate the extent to which tax enforcement activity is immune from potential racial bias under this *de facto* policy of colorblind tax enforcement.

## II

### CONCEPTUAL MODELS OF RACIAL BIAS IN TAX ENFORCEMENT

A theory of how racial bias *could* operate in tax enforcement is a necessary foundation for any claims to the absence, or presence, of racial bias at the Internal Revenue Service. The foundational work of developing a theory of racial bias in tax enforcement is the focus of this Part. This is also a necessary building block for future empirical work that may seek to identify racial bias in specific enforcement settings. As the National Research Council states:

To be able to measure the existence and extent of racial discrimination of a particular kind in a particular social or economic domain, it is necessary to have a theory (or concept or model) of how such discrimination might occur and what its effects might be. The theory or model, in turn, specifies the data that are needed to test the theory, appropriate methods for analyzing the data, and the assumptions that the data and analysis must satisfy in order to support a finding of discrimination. Without such a theory, analysts may conduct studies that do not have interpretable results and do not stand up to rigorous scrutiny.<sup>73</sup>

This Part presents three distinct theories of racial bias in tax enforcement: racial animus, implicit bias, and transmitted bias. The first two theories of bias are rooted in individual behavior of IRS personnel. The third theory of bias is concerned with tax enforcement

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<sup>72</sup> Bearer-Friend, *supra* note 22, at 8 (addressing the question of race not appearing on Form 1040).

<sup>73</sup> NAT'L RSCH. COUNCIL, MEASURING RACIAL DISCRIMINATION 24 (Rebecca M. Blank, Marilyn Dabady & Constance F. Citro eds., 2004). Notably, the work of presenting various causal theories of racial bias is distinct from making normative claims that evaluate the desirability (or undesirability) of racial bias based on various moral foundations. I write from the premise that racial bias is undesirable and do not seek to prove that point here, although I recognize not all readers will share that premise.



outcomes that are influenced by bias in non-tax settings.<sup>74</sup> In all three theories, I focus on historically disadvantaged racial minorities, though I do not presume that only white IRS personnel are capable of racial bias.<sup>75</sup> In each theory, I also use the term “taxpayer” to broadly include all individuals who interact with the IRS, rather than in the more limited sense of those who have a net tax liability.<sup>76</sup>

Many adherents of one model of racial bias included in my analysis may disagree with other models. For example, there is a substantial movement that views the individually-based racial animus model as a distraction from the structural racism model.<sup>77</sup> It is precisely because of this debate, and my awareness that there is no consensus (amongst scholars, courts, or federal agencies) about the definition of racial bias in tax enforcement, that I have included three theories here.<sup>78</sup> The inclusion of three distinct models of racial bias also makes the conclusions in Part III of this Article more robust: Across all three

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<sup>74</sup> Some studies collapse these three categories into two. *See, e.g., id.* at 55 (“[A] two-part definition of racial discrimination: differential treatment on the basis of race that disadvantages a racial group and treatment on the basis of inadequately justified factors other than race that disadvantages a racial group (differential effect). Our definition encompasses both individual behaviors and institutional practices.”).

<sup>75</sup> The IRS has a diverse workforce, especially compared to other agencies. *See* INTERNAL REVENUE SERV., *supra* note 6, at 72 (“Ethnic minority employees made up 49.1% of the IRS and Chief Counsel workforce, compared to 37.8% share of the overall Federal civilian labor force . . .”).

<sup>76</sup> For example, someone who files a Form 1040 and receives a refundable credit providing them with a net negative federal income tax liability, is still referred to as a “taxpayer.” In many instances, more than one individual is also impacted by the enforcement activity on a single return due to joint filing. I will note where the multi-person nature of our tax forms is relevant to these models of discrimination.

<sup>77</sup> For example, the racial animus model has been designated the perpetrator’s perspective of racism as distinct from the victim’s perspective. *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–53 (1978) (contrasting between “the victim’s perspective,” from which “racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass” and which “suggests that the problem will not be solved until the conditions associated with it have been eliminated,” with the “perpetrator perspective,” which “sees racial discrimination not as conditions but as actions, or series of actions, inflicted on the victim by the perpetrator,” and whose “remedial dimension . . . is merely to neutralize the inappropriate conduct of the perpetrator”).

<sup>78</sup> *See, e.g.,* Katie Eyer, *The But-For Theory of Anti-Discrimination Law* 8 (Mar. 11, 2021) (unpublished manuscript) (on file with author) (“[W]hat should be a basic first-order question—what is the central defining principle of disparate treatment law—remains unsettled. This has left anti-discrimination law’s core theory rudderless, with predictably problematic results for the development of anti-discrimination law doctrine.”). *See also* Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, 113 NW. U. L. REV. 1163, 1167 (2019) (“This Article argues that animating the most common approaches to detecting discrimination in both law and social science is a model of discrimination that is, well, wrong.”). *But see* Stephen M. Rich, *One Law of Race?*, 100 IOWA L. REV. 201, 203 (2014) (on the

models, we would still expect to see racial bias in tax enforcement despite the nondisclosure of race and ethnicity by taxpayers.

Although I include multiple theories of racial bias, I do not propose this set of theories as comprehensive of all possible definitions of racial bias. For example, I deliberately exclude a “magic words” theory of racial bias wherein bias is only deemed to exist when racial categories are explicitly referred to in a statute or an agency’s written protocol.<sup>79</sup> Although such a model of bias has often been referred to as evidence of the neutral application of federal tax law given the lack of references to race or ethnicity in the Internal Revenue Code, tax history demonstrates the illegitimacy of such a standard. Poll taxes adopted in the Southeastern United States at the end of Reconstruction were unambiguously intended to systematically deny the right to vote to Black citizens, but the text of those statutes include no mention of race or ethnicity.<sup>80</sup> Indeed, poll taxes were selected as an instrument of racially targeted oppression specifically because the statutory text would survive early Fifteenth Amendment challenges by nominally omitting reference to race while being discriminately enforced.<sup>81</sup> This Part also does not include theories of racial bias that disregard the history of white supremacy as irrelevant to determinations of racial bias, such as treating policies that disadvantage white citizens as equivalent to policies that disadvantage Black citizens.

### A. *Racial Animus Model of Tax Enforcement*

In the conventional racial animus model of racial bias, individuals deliberately act to harm others because of their race.<sup>82</sup> This understanding of racial bias is primarily rooted in social psychology, where the phenomenon has been widely documented as a persistent trait of

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convergence of statutory anti-discrimination law jurisprudence and constitutional equal protection jurisprudence).

<sup>79</sup> See Bearer-Friend, *supra* note 22, at 38–39 (rejecting “magic word formalism” and its conceit of racial “neutrality,” in which race is presumed irrelevant to tax merely because the tax code does not include any racial terminology).

<sup>80</sup> See Jeremy Bearer-Friend, *Tax Without Cash*, 106 MINN. L. REV 953, 984–85 (2021) (discussing how a tax initially imposed on all men above a certain age was then weaponized against Black citizens to impede their right to vote through discriminatory enforcement of the tax liability); see also AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929, at 55–56 (describing how poll taxes eliminated African Americans from politics).

<sup>81</sup> See MEHROTRA, *supra* note 77, at 55–56.

<sup>82</sup> See NAT’L RSCH. COUNCIL, *supra* note 73, at 56 (“Most people’s concept of racial discrimination involves explicit, direct hostility expressed by whites toward members of a disadvantaged racial group.”).

human behavior.<sup>83</sup> Courts have also regularly relied on this model of racial bias when interpreting nondiscrimination statutes, though not exclusively.<sup>84</sup> Legal scholars regularly rely on racial animus models in the context of criminal law, employment law, health law, and education.<sup>85</sup>

Deploying the racial animus model in the context of tax enforcement would require the following elements for racially biased tax enforcement to be possible. First, the relevant IRS personnel would need to have racial animus, defined as a negative attitude towards a specific racial group that a taxpayer is a member of. Second, the relevant IRS personnel would need access to information that allows the personnel to identify the taxpayer's race or ethnicity.<sup>86</sup> Finally, the relevant IRS personnel would need to have some level of discretion over the tax enforcement outcome of the taxpayer.

FIGURE 1. RACIAL ANIMUS MODEL OF TAX ENFORCEMENT



<sup>83</sup> For a foundational text on stereotyping and prejudice, see GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954). For a thorough survey of more recent developments, see BERNARD WHITLEY JR. & MARY E. KITE, *THE PSYCHOLOGY OF PREJUDICE AND DISCRIMINATION* (2006).

<sup>84</sup> See, e.g., *Rosemond v. Stop & Shop Supermarket Co.*, 456 F. Supp. 2d 204, 212 (D. Mass. 2006) (analyzing whether the plaintiff was subjected to “conduct tainted by racial animus” to determine whether the defendant violated Title VII and the Massachusetts antidiscrimination statute). *But see Yu v. Idaho State Univ.*, No. 4:15-cv-00430-REB, 2020 WL 2835750, at \*28 (D. Idaho May 31, 2020), *aff’d*, 11 F.4th 1065 (9th Cir. 2021) (addressing plaintiff’s argument that evidence of implied bias is relevant to determining intentional discrimination).

<sup>85</sup> See *supra* notes 23–29 and accompanying text (providing examples of legal scholarship applying racial animus models to criminal law); Paul Frymer, *Racism Revised: Courts, Labor Law, and the Institutional Construction of Racial Animus*, 99 AM. POL. SCI. REV. 373 (2005) (applying a racial animus model to employment law); Renée M. Landers, *Race (and Other Vulnerabilities) in Healthcare and Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT (Sept. 1, 2020), <https://www.yalejreg.com/nc/race-and-other-vulnerabilities-in-healthcare-and-administrative-law-by-renee-m-landers> [<https://perma.cc/8XEC-P73N>] (applying a racial animus model to health law); Sharon E. Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1 (1997) (applying a racial animus model to education law).

<sup>86</sup> Racial animus in tax enforcement is distinct from theories of racial bias in Congress that shape the design of tax legislation. The animus amongst political actors who enact the law then produces biased tax law that yields biased tax outcomes. See, e.g., Brown, *supra* note 22.

As noted in Part I, current IRS procedures do not allow IRS personnel to ask taxpayers to identify their race and ethnicity. This has been IRS practice since the original 1040 Form for partial Tax Year 1913.<sup>87</sup> Nevertheless, across many enforcement contexts, IRS personnel have access to a substantial amount of personal information that allows inferences about the race or ethnicity of a taxpayer. On Form 1040 alone, taxpayers must include their first and last name on the submitted returns.<sup>88</sup> Returns also include the name of a taxpayer's spouse and the names of any children claimed as dependents.<sup>89</sup> Taxpayers also provide their address, including zip code. Tax returns also include personal information about family structure—for example, if a taxpayer is unmarried with children. And the federal income tax form asks taxpayers to provide their occupation. Each of these datapoints can lead to inferences of racial identity in the mind of the relevant IRS personnel, with the combination of data points creating a stronger likelihood of inference.

A longstanding body of research has established that adults rely on a variety of cues as proxies for race regardless of self-identification and that racial animus can occur in such settings.<sup>90</sup> Randomized controlled trials have shown that first and last names are used as a proxy for race, with employers contacting candidates with stereotypically white names for interviews at higher rates than candidates with stereotypically Black names, despite identical credentials.<sup>91</sup> Accent dis-

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<sup>87</sup> See Bearer-Friend, *supra* note 22, at 8. *But see id.* at 25 (regarding Department of Justice's insistence that Treasury require grantees to request the race and ethnicity of beneficiaries served).

<sup>88</sup> INTERNAL REVENUE SERV., FORM 1040, *supra* note 47. Surnames can imply ethnicity, such as Hispanic surnames.

<sup>89</sup> *Id.*

<sup>90</sup> See, e.g., Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J.: APPLIED ECON. 1 (2017) (conducting a field experiment which found that guests with distinctively Black names were more likely to be declined by hosts than guests with distinctively white names).

<sup>91</sup> See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (Nat'l Bureau of Econ. Rsch., Working Paper No. 9873, 2003) (performing a field experiment to measure racial discrimination in the labor market and finding that white names receive fifty percent more interview callbacks than Black names); see also Brian Libgober, *Getting a Lawyer While Black: A Field Experiment*, 24 LEWIS & CLARK L. REV. 53 (2020) (conducting a randomized audit and finding that people with Black-sounding names receive only half the callbacks of people with white-sounding names when they request legal representation). The potential for bias based on surname and a negative stereotype associated with the surname was alleged by a taxpayer in *Greenberg's Express, Inc. v. Comm'r*, 62 T.C. 324, 325 (1974) (“[P]etitioners allege that the [IRS enforcement] agent stated, ‘Your trouble is that “The Godfather” got so much publicity, everybody was breathing down everybody’s neck and we were told that we had to do something to take the heat off, so we went out to get a Gambino.’”).

crimination is possible over the phone, not just for national origin but also race and ethnicity.<sup>92</sup> During in-person interactions, visual assumptions allow for racial animus, including responses to hair and skin color.<sup>93</sup> While any of these cues may trigger racial stereotypes in isolation, a typical tax enforcement context would present many such cues simultaneously. An IRS personnel who attends an in-person conference with a taxpayer, and can thus see visual signifiers of race and ethnicity, will hear the accent of the taxpayer and will know the taxpayer's name, address, and family structure.<sup>94</sup> Hence, the condition that IRS personnel be exposed to information that is used to infer a taxpayer's race—an element required in the racial animus model of racial bias—can occur in tax enforcement settings.

Aside from the information provided on a federal income tax return, follow-up interactions with taxpayers through IRS enforcement procedures also introduce opportunities for IRS personnel to infer the race or ethnicity of the taxpayer. In some instances, IRS personnel meet in person or on video with taxpayers, introducing visual cues about racial identity. Taxpayer communication can also occur telephonically, where cues related to a taxpayer's accent would be shared with the IRS, as well as the voices of potential family members in the background. Follow-up written correspondence can also introduce information from which racial inferences based on stereotypes can occur, such as a correspondence audit about eligibility for a tax credit requiring disclosure about where a child is sleeping.<sup>95</sup>

The final element of the racial animus model that must be present for racially biased tax enforcement to be possible is IRS personnel discretion over tax enforcement outcomes. Discretion is a common

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<sup>92</sup> See Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1361 (1991) ("Most speakers of North American English have an accent that reflects their regional affiliations, their ethnicity, or their age.").

<sup>93</sup> See D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. REV. 333 (2013) (analyzing the workplace regulation and exclusion of Black and Muslim women due to their natural hairstyles or donning of a hijab).

<sup>94</sup> For analysis of the cues available across seven distinct tax enforcement settings, see *infra* Part III.

<sup>95</sup> See CHYE-CHING HUANG & RODERICK TAYLOR, CTR. ON BUDGET AND POL'Y PRIORITIES, HOW THE FEDERAL TAX CODE CAN BETTER ADVANCE RACIAL EQUITY 20 (2019) (describing correspondence audits for the CTC and EITC, which require inquiries into where the child lives); see also Leslie Book, *Tax Administration and Racial Justice: The Illegal Denial of Tax-Based Pandemic Relief to the Nation's Incarcerated Population*, 72 S.C. L. REV. 667, 695–96 (2021) (describing how agency discretion and concerns of fraud can be a cloak for unfair racial burdens).

feature of tax enforcement, though it is not present in all settings.<sup>96</sup> For example, in reviewing dependents claimed on Schedule EIC used by taxpayers seeking to claim the Earned Income Tax Credit, IRS personnel could be directed to only determine whether the required elements were present. This approach avoids personnel discretion. A requirement that the personnel perform a qualitative assessment about the trustworthiness of the submitted terms within the submitted schedule, and that such determination would produce a different outcome for the taxpayer contingent on the judgment of the personnel, would entail discretion.

Combining the elements of the racial animus model into a single hypothetical will help illustrate how a taxpayer's race can determine tax enforcement outcomes even when race is not asked about by the IRS. Imagine that a taxpayer owes a tax liability that she cannot pay, and she calls the IRS's general call line to ask for temporary relief while she gets her finances in order. The IRS call-center employee assumes the taxpayer's race based on the taxpayer's accent. The IRS employee makes certain assumptions about the reasons why the taxpayer can't repay her taxes, or about why she didn't pay them in the first place. Instead of granting the taxpayer a temporary non-payment status, the IRS employee demands that the taxpayer make monthly payments that the taxpayer cannot afford. The taxpayer is not aware of the temporary nonpayment option, so she agrees to the monthly payments and suffers significant financial hardship. In summary, failure to ask a taxpayer to identify their race or ethnicity does not preclude the three above elements from being present in a tax enforcement setting. When all three elements are present, they can create a system of racially biased tax enforcement.

### *B. Implicit Bias Model of Tax Enforcement*

Alternatively, even if the IRS personnel does not have racial animus, tax enforcement actions may be affected by the race or ethnicity of a taxpayer due to implicit bias. Implicit bias refers to the "mental processes that affect social judgments but operate without conscious awareness or conscious control."<sup>97</sup> Implicit racial bias occurs when such unconscious cognitive processes impact an indi-

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<sup>96</sup> For additional details about the many instances of IRS personnel discretion across seven different areas of tax enforcement, see *infra* Part III.

<sup>97</sup> Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 467 (2010). See also Osamudia James, *The "Innocence" of Bias*, 119 MICH. L. REV. 1345 (2021) ("[Discriminatory] bias refers to favorable or unfavorable attitudes and beliefs individuals can harbor regarding ingroups and outgroups.").

vidual's favor or disfavor of others due to their perceived racial identity. One crucial aspect of implicit bias is that even those with a stated commitment to treating others the same without regard to their race persistently demonstrate racial bias across a variety of settings.<sup>98</sup>

Although the concept of implicit bias originated in the field of social psychology, it has now expanded to many fields of legal research.<sup>99</sup> For example, in public health law, Dayna Bowen Matthew developed a Biased Care Model that describes how implicit racial bias leads to increased Black patient mortality.<sup>100</sup> Her analysis begins with a documentation of disparate health outcomes for Black patients, and then proceeds to identify the causal mechanisms that explain these outcomes, with implicit bias as the primary motor.<sup>101</sup> Bowen Matthew breaks down her model into many stages of interaction in the health-care process.<sup>102</sup> Legal scholars have also widely documented the prevalence of implicit bias in the context of criminal law enforcement.<sup>103</sup>

The implicit bias model of tax enforcement has many similarities to the racial animus model. Like the racial animus model, the relevant personnel must have discretion that impacts the tax enforcement outcome. The relevant IRS personnel must also have access to racially identifying information about the taxpayer. Hence, the settings where a racial animus model of racial bias could operate are typically also ones where implicit bias could operate. The primary distinction between the racial animus model and the implicit bias model, how-

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<sup>98</sup> See Kang & Lane, *supra* note 94, at 468–89 (summarizing numerous studies that relied on the Implicit Association Test (IAT) to show that even people claiming to be “cognitively colorblind” were still subject to implicit biases).

<sup>99</sup> See, e.g., Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (applying the concept of implicit bias to challenge the doctrine of discriminatory purpose, which requires plaintiffs challenging the constitutionality of a facially neutral law to prove that the actors responsible for the law's enactment or administration had a racially discriminatory purpose).

<sup>100</sup> DAYNA BOWEN MATTHEW, *JUST MEDICINE: A CURE FOR RACIAL INEQUALITY IN AMERICAN HEALTH CARE* 4–5 (2015) (introducing the Biased Care Model as identifying the mechanisms by which implicit biases affect disparate outcomes and explaining how health providers continue to discriminate against minority patients).

<sup>101</sup> *Id.* at 33–54.

<sup>102</sup> *Id.* at 5 (“[T]he impact of implicit biases before a physician and patient meet, . . . the role of implicit bias during the clinical encounter, and . . . the mechanisms that permit implicit biases . . . continue contributing to health disparities even after the clinical encounter ends.”).

<sup>103</sup> See, e.g., Cynthia Lee, *Denying the Significance of Race* (Geo. Wash. L. Sch., Working Paper No. 2017-62, 2014); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE UNIV. L. REV. 795 (2012) (arguing that implicit racial attitudes and stereotypes skew criminal prosecutorial decisions in a range of racially biased ways).



ever, is that relevant IRS personnel do not need to act with discriminatory intent in order to produce racially biased outcomes.

FIGURE 2. IMPLICIT BIAS MODEL OF TAX ENFORCEMENT



Because implicit bias is generally more common amongst individuals than racial animus, there is a much broader set of potential tax enforcement activities that could be affected by implicit bias. In other words, a greater number of IRS personnel may act on implicit racial bias than on racial animus, in turn affecting a greater number of tax enforcement activities, even though both forms of bias are possible in the same enforcement settings. The literature on implicit bias outside of the tax context has also noted how the harms of implicit bias may in some respects be worse because individuals who are unconscious of their biases do not self-correct.<sup>104</sup>

Implicit bias in tax enforcement raises distinct legal issues for taxpayers seeking redress. While harms from racial animus can be a cause of action, the doctrine on implicit bias is still evolving.<sup>105</sup> To the extent disparate impact is sufficient for redress, implicit bias can produce such actionable disparate impact harms. But the absence of deliberate intent has often quashed discrimination claims.<sup>106</sup> Even empirical evidence of implicit bias does not yield the same liability as evidence of racial animus.<sup>107</sup>

<sup>104</sup> See MATTHEW, *supra* note 97, at 32 (stating that “unconscious racism” leads physicians and other health providers to contribute to disparate treatment between majority and minority patients without any intention or awareness that they hold racially biased viewpoints).

<sup>105</sup> See, e.g., Alyson Grine & Emily Coward, *Recognizing Implicit Bias within the Equal Protection Framework*, TRIAL BRIEFS (April 2017) (highlighting how our growing understanding of implicit biases challenges the viability of the intent doctrine).

<sup>106</sup> See, e.g., John Tyler Clemons, *Blind Injustice: The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 689–90 (2014) (noting that the Supreme Court has favored an intent-based discrimination standard that is “all but impossible for plaintiffs to meet” and urging the Court to update this standard after recognizing the influence of implicit racial bias on the criminal justice system).

<sup>107</sup> Discriminatory intent is required under the standard set by *Washington v. Davis*, greatly limiting the viability of equal protection claims for implicit bias. See, e.g., Yvonne Elosiebo, *Implicit Bias and Equal Protection: A Paradigm Shift*, 42 N.Y.U. REV. L. & SOC. CHANGE 451, 454 (noting that under current Supreme Court doctrine, “only an overt intention to discriminate on the basis of race qualifies as impermissible bias”).

Implicit bias research has not been universally accepted.<sup>108</sup> Some of the criticism focuses on how implicit bias is measured, rather than the concept itself.<sup>109</sup> A separate line of critique focuses on the strategies used for undoing implicit bias.<sup>110</sup> Others have expressed dismay at how concerns over implicit bias still center the role of individuals rather than structural interventions.<sup>111</sup> But even if we accept the uncertainty over the current measures of implicit bias and strategies for interrupting bias, the empirical reality that individuals hold racial biases is not in doubt.<sup>112</sup> And such biases are known to impact behavior.<sup>113</sup>

The current IRS policy of omitting race and ethnicity from the collection and analysis of tax data does not eliminate the possibility of racially biased tax enforcement under the implicit bias model. All three required elements of the implicit bias model remain present in the many tax enforcement settings described in Part III. Before turning to specific tax enforcement settings vulnerable to racial bias, however, we have a third model of racial bias to consider: transmitted bias.

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<sup>108</sup> See, e.g., Rachel S. Rubinstein, Lee Jussim & Sean T. Stevens, *Reliance on Individuating Information and Stereotypes in Implicit and Explicit Person Perception*, 75 J. EXPERIMENTAL SOC. PSYCH. 54 (2018) (arguing that results from a behavioral study they conducted show that the effect of implicit bias on individual preferences has been exaggerated as people often base their preferences on information they have on the specific individual—not on group-based implicit bias); Jesse Singal, *Psychology's Favorite Tool for Measuring Racism Isn't Up to the Job*, CUT (Jan. 2017), <https://www.thecut.com/2017/01/psychologys-racism-measuring-tool-isnt-up-to-the-job.html> [<https://perma.cc/Z6JT-DC6X>] (criticizing the excessive attention that implicit bias has received given its overstated explanatory power and arguing that explicit bias can explain much of what implicit bias purports to explain).

<sup>109</sup> For example, the validity of the Implicit Association Test has been widely questioned. See Beth Azar, *IAT: Fad or Fabulous?*, 39 AM. PSYCH. ASS'N MONITOR 44 (2008).

<sup>110</sup> See Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (July 2016), <https://hbr.org/2016/07/why-diversity-programs-fail> [<https://perma.cc/ZKN6-YEKP>] (presenting empirical research on thirty years of data showing that the “classic command-and-control” approach to diversity—which many employers still use—fails to increase workforce diversity).

<sup>111</sup> See *infra* note 113 on structural racism scholarship that decenters individual behaviors as the root cause of racial injustice.

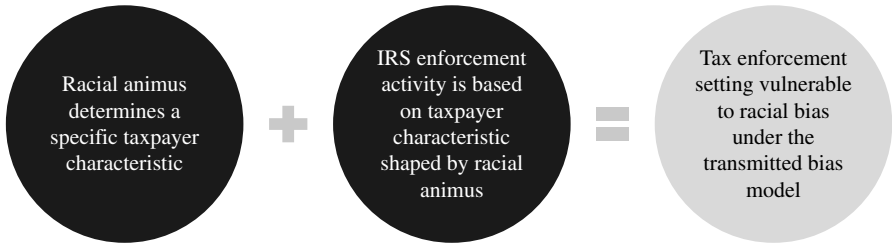
<sup>112</sup> See Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 357–411 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 1998) (summarizing five decades of research on implicit bias and highlighting that researchers now unanimously agree on the pervasive human propensity to automatically and rapidly categorize each other, notably along racial lines).

<sup>113</sup> *Id.* (discussing the ability of stereotypes (cognitive biases) and prejudices (emotional biases) to drive discriminatory behaviors targeted at “outgroup” members (including members of other races)).

### C. Transmitted Bias Model of Tax Enforcement

Under the transmitted bias model of racial bias in tax enforcement, racial animus from a non-tax context has tax enforcement effects. The causal chain begins with racial animus determining certain characteristics of the taxpayer; IRS personnel must then base tax enforcement activity on the taxpayer characteristics impacted by racial animus.<sup>114</sup>

FIGURE 3. TRANSMITTED BIAS MODEL OF TAX ENFORCEMENT



As represented in Figure 3, the transmitted bias model of tax enforcement requires different elements than the prior two models. Indeed, not a single element of the prior models must occur within the IRS for racially biased tax enforcement to occur. Unlike the implicit bias and racial animus models, relevant IRS personnel do not need discretion, personnel do not need access to racially identifying information, and personnel do not need to possess either implicit or explicit bias.

Under the transmitted bias model, the initial racial animus producing bias in tax enforcement can be historical or current. For example, while racial covenants for housing are no longer legal, the consequences of past racial covenants remain a daily reality for many current taxpayers. Tax enforcement activity that relies on characteristics defined by such prior racial covenants would thus yield a form of transmitted bias in tax enforcement. In other instances of transmitted bias, not only are the *consequences* of a non-tax racial animus current, but the racial animus itself is current, such as racial animus in policing. If such contemporary racial animus in policing has an impact on contemporary taxpayer characteristics that affect tax enforcement, then there is also transmitted bias in tax enforcement.<sup>115</sup>

<sup>114</sup> I have excluded implicit bias from this definition of transmitted bias because I believe there is a greater consensus around the abhorrence of racial animus, and thus greater shared concern with the legacy effects of racial animus. But others may wish to include implicit bias in their model of transmitted bias.

<sup>115</sup> For example, the Treasury Department excluded imprisoned individuals from receiving stimulus checks, despite no mention of such exclusion in the CARES Act, Pub. L.

Despite the attention to disparate outcomes in the transmitted bias model, it is nevertheless distinguishable from a “disparate impact” model in that there is still a foundational focus on racial animus as the initial causal mechanism that produced the disparate outcome. In the transmitted bias model, it is the deliberate, racially targeted hatred that yields the disparate outcome, rather than a focus on disparate outcomes as *per se* racial bias.<sup>116</sup>

Transmitted bias rests on the same normative priors as the racial animus model. It violates the moral principle that hatred toward immutable characteristics of an individual, such as race, should not determine the life chances of that individual—assuming one accepts such a principle.<sup>117</sup> Under the transmitted bias model, tax enforcement activity further compounds the morally unacceptable racial bias that originated in a nontax context. For example, transmitted bias occurs when there are “racialized burdens” in tax filing.<sup>118</sup>

A common form of transmitted bias in tax enforcement relates to enforcement impacted by a taxpayer’s economic circumstances. If the taxpayer’s economic circumstances were initially shaped by racial bias, then enforcement activity that varies due to a taxpayer’s economic circumstances would satisfy the elements of the transmitted bias model. An example of this type of transmitted bias would be lack of access to competent tax preparation assistance due to lack of financial resources that then leads to higher civil penalties.<sup>119</sup>

But transmitted racial bias in tax enforcement is not exclusively traceable to racial disparities in economic circumstances. For example, noncompliance with IRS summonses can have severe consequences

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No. 116-136, 134 Stat. 281 (2020). See Book, *supra* note 92, at 1–5. To the extent that incarceration is a taxpayer characteristic that is determined by racial animus, this exclusion is a form of transmitted bias.

<sup>116</sup> The transmitted bias model is also related to theories of systemic racism or structural racism. There is not an established consensus about a singular usage for these terms, but they generally refer to the operation of systems of subordination that go beyond the actions of a specific individual with bad intentions. See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018) (offering a more recent account of structural approaches to racial inequality).

<sup>117</sup> See K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* (1996) (arguing for the need to recognize the extent to which race continues to influence the life chances of individuals and to correct for it through “color conscious” policies).

<sup>118</sup> Book, *supra* note 92, at 13–14 (“The concept of racialized burdens allows us to see how tax administration can at times normalize and reinforce patterns of racial inequality even in the absence of rules that overtly identify people of color for adverse treatment.”).

<sup>119</sup> For an elaboration of how all three models of bias can operate in the context of civil tax penalties, see *infra* Section III.B.

for a taxpayer.<sup>120</sup> If racial animus in imprisonment disproportionately results in unstable housing for Black men, with intermittent mailing addresses, and penalties are assessed for noncompliance with tax summonses because of intermittent mailing addresses, then we see an example of transmitted racial bias in tax enforcement that is distinct from a bias against low-income taxpayers.<sup>121</sup> Because there are distinct harms that result from racial animus, and also economic harms that are further compounded by racial animus, the transmitted bias model cannot be subsumed into a purely economic-harms model.<sup>122</sup>

Under the transmitted bias model, the fact that the IRS does not ask taxpayers to identify their race has no material impact on the potential for racially biased tax enforcement. All of the elements of transmitted bias can be present regardless of whether the IRS deliberately inquires into the racial identity of the taxpayer.

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This Part has presented three distinct models of racial bias that could deflect tax enforcement and the elements required for such bias to be present in a tax enforcement setting. In the subsequent Part, I assess the extent to which current tax enforcement practices may be vulnerable to racial bias under each proposed model.

### III TAX ENFORCEMENT ACTIVITIES VULNERABLE TO RACIAL BIAS

IRS activities fall within three broad categories: taxpayer services, operations support, and enforcement.<sup>123</sup> In this Part, I focus on

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<sup>120</sup> See *infra* Section III.A.

<sup>121</sup> In another example of transmitted bias, housing instability could also impact contestation of EITC denials. While over fifty percent of EITC audits receive a nonresponse from the filer, or are undelivered, forty percent of respondents succeed. John Guyton, Kara Leibel, Day Manoli, Ankur Patel, Mark Payne & Brenda Schafer, *The Effect of EITC Correspondence Audits on Low-Income Earners 14*, 32 (Aug. 2021) (unpublished manuscript) (on file at <https://georgetown.app.box.com/s/yy8ymvqz7uy0yhkmz5jspcsfjuvria0w> [<https://perma.cc/9GXL-L8KU>]) (showing that likelihood of success on audit is contingent on ability to respond to audit, which itself is driven in part by ability to receive notice).

<sup>122</sup> For a theory of tax procedure that is rooted in class rather than race, see Joshua D. Blank & Ari Glogower, *Progressive Tax Procedure*, 96 N.Y.U. L. REV. 668 (2021).

<sup>123</sup> See INTERNAL REVENUE SERV., *supra* note 6, at 73. Even though taxpayer assistance is not included in this Article, it is, of course, another area where there is potential for racial bias in tax administration. The IRS has been more proactive on diversity, equity, and inclusion in its taxpayer services than its enforcement activities, including monitoring for ADA compliance and expanding multilingual service options. See *Topic No. 102, Tax Assistance for Individuals with Disabilities*, IRS, <https://www.irs.gov/taxtopics/tc102> [<https://perma.cc/X8ML-ULXA>] (Nov. 4, 2021); Jim Clifford, *Our Commitment to Serving a*

IRS enforcement activities and identify seven tax enforcement settings that are vulnerable to racial bias under three distinct models.<sup>124</sup> By identifying the potential for racial bias in each tax enforcement setting, I refute the IRS claim that racial bias in tax enforcement is impossible under current IRS procedures.

IRS enforcement is generally summarized as examinations activity to determine unreported tax liability (colloquially referred to as audits), collections activity (to acquire unpaid tax liability), appeals activity (where taxpayers challenge IRS examination and collection activity), and criminal investigations.<sup>125</sup> Enforcement activities include issuing summonses to acquire tax returns from delinquent non-filers and verifying submitted return information with third parties after a discrepancy in a submitted return.<sup>126</sup>

The staffing required for the IRS to enforce the Internal Revenue Code illustrates the substantial scope of federal tax enforcement activity under current law. The IRS has nearly 30,000 full-time-equivalent personnel on examinations and collections activity, including 8,526 field revenue agents.<sup>127</sup> Enforcement personnel comprise approximately forty-five percent of the full-time IRS workforce.<sup>128</sup> Enforcement funding represented about \$4.6 billion in Fiscal Year 2019 (FY 2019), thirty-nine percent of total IRS

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*Diverse Nation*, IRS, <https://www.irs.gov/about-irs/our-commitment-to-serving-a-diverse-nation> [https://perma.cc/W477-MNQG] (Nov. 23, 2021) (describing the IRS's recent multilingual initiatives).

<sup>124</sup> For my definitions of racial bias, see *supra* Part II, where I present three separate models of racial bias with distinct elements.

<sup>125</sup> See JOHN A. TOWNSEND, FEDERAL TAX PROCEDURE 40 (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3665377](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665377) [https://perma.cc/2N8R-YQGT] (listing three categories for civil compliance functions). My analysis also includes the criminal enforcement function. The IRS uses the terms “enforcement” and “compliance function” interchangeably. See Sunita Lough, *How the IRS Ensures Compliance with the Tax Laws*, IRS, <https://www.irs.gov/about-irs/how-the-irs-ensures-compliance-with-the-tax-laws> [https://perma.cc/RD4Y-439E] (Nov. 2, 2021) (listing “compliance actions” that include audits and criminal investigations); *IRS Update on Audits*, IRS, <https://www.irs.gov/newsroom/irs-update-on-audits> [https://perma.cc/E5WM-GZYJ] (July 21, 2021) (“A key component in promoting the highest degree of voluntary compliance on the part of taxpayers is enforcement of the tax law.”). See also IRM 9.1.1.3.1 (Nov. 4, 2004) (outlining the “compliance strategy” of the IRS’s criminal investigation division).

<sup>126</sup> See GARY GUENTHER, CONG. RSCH. SERV., IN11578, THE INTERNAL REVENUE SERVICE’S ENFORCEMENT BUDGET AND TAX COMPLIANCE 1 (2021).

<sup>127</sup> See INTERNAL REVENUE SERV., *supra* note 6, at 75; *The IRS’s Fiscal Year 2022 Budget Before the S. Comm. on Fin.*, 117th Cong. (2021) (statement of Charles P. Rettig, Comm’r, IRS). This is out of 73,000 FTE personnel. INTERNAL REVENUE SERV., *supra* note 6, at 71.

<sup>128</sup> See INTERNAL REVENUE SERV., *supra* note 6, at 72; see also *id.* at 73 (“The Enforcement appropriation funds activities to determine and collect owed taxes, to provide legal and litigation support, to conduct criminal investigations, to enforce criminal statutes related to violations of Internal Revenue laws, and to purchase and hire motor vehicles.”).

funding.<sup>129</sup> Enforcement personnel include revenue agents, tax examiners, revenue officers, special agents, attorneys, tax technicians, and appeals officers.<sup>130</sup>

The seven tax enforcement settings selected for this Part encompass the broad range of activity across collections, appeals, and criminal investigations. They convey the scope of the filing administration process. They touch on different divisions within the IRS and include both automated processes and manually administered review.<sup>131</sup> Although there are too many IRS enforcement activities for this Article to claim to be entirely comprehensive, the seven settings included here are representative of the primary activities of the enforcement function.<sup>132</sup>

In organizing the presented tax enforcement activities below, I have sought to separate out specific settings, but the categories often overlap. For example, a docketed appeal can lead to an offer and compromise, or a summons can be triggered in the context of an examination or a collections action after assessment. Nevertheless, each setting is sufficiently distinct to merit individual attention.

Separating out each specific enforcement setting for assessing its vulnerability to racial bias is especially important because the amount of taxpayer information that is available to relevant IRS personnel varies across these enforcement settings. Reliance on the individual discretion of IRS personnel also varies across settings. Hence, each model of racial bias has different degrees of risk across settings and must be assessed separately.<sup>133</sup>

After providing an account of each enforcement setting, this Part concludes with a synthesis of tax enforcement areas where vulnerability to racial bias is most worrisome and where the IRS should prioritize its internal review.

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<sup>129</sup> See *id.* at 71.

<sup>130</sup> See *id.* at 75 (listing roles within IRS personnel).

<sup>131</sup> For example, the Automated Correspondence Examination software adopted in 2007 assists in the opening, processing, and closing of “no reply” cases where penalties can be assessed. IRM 4.19.20.1.1 (Dec. 13, 2018). Hence, penalties can be imposed on taxpayers through both automated and manual processes at the IRS.

<sup>132</sup> The largest category of enforcement activity I have excluded from my analysis is examination selection due to the public attention already afforded to this issue. See Kiel & Fresques, *supra* note 2 (observing that the five most heavily audited counties are all predominantly Black). Another area of discretion excluded in this Part is the review of tax exemption applications. Because review of tax-exempt status is already an area of IRS discretion that is regularly subjected to public scrutiny, I have not focused my analysis there. See, e.g., David A. Brennan, *The Power of the Treasury: Racial Discrimination, Public Policy and Charity in Contemporary Society*, 33 U.C. DAVIS L. REV. 389 (2000).

<sup>133</sup> Taxpayer and personnel demographics may also vary across these settings. For example, the IRS may have more diverse field agent staff than appeals officer staff.



### A. *Summonses*

In order to enforce the Internal Revenue Code, the IRS has broad authority to summon.<sup>134</sup> The IRS may summon persons to give testimony or to produce “any books, papers, records, or other data which may be relevant or material.”<sup>135</sup> These summonses can be issued not only to the taxpayer whose return or tax liability is in question, but also to any third party “the Secretary may deem proper” due to their potential possession or knowledge of relevant information.<sup>136</sup> In some instances, the IRS does not know the name of the taxpayer when summoning a third party to disclose information.<sup>137</sup>

In order for IRS summons activity to be vulnerable to racial animus or implicit bias, relevant IRS personnel must have discretion over the summons activity that produces impact on the taxpayer. The personnel must also have access to taxpayer information from which the personnel could assume the race or ethnicity of the taxpayer. Both elements are present in IRS summons activity, even though the IRS does not ask taxpayers to identify their race or ethnicity.

In terms of discretion, determining the scope of information to be summoned entails substantial discretion exercised by the IRS. IRS personnel must decide how much information to ask for, within easily satisfied legal limits; so long as the information requested is relevant to a “legitimate purpose” and “the information sought is not already within the [IRS’s] possession,” the summons is permissible.<sup>138</sup> The range of financial documents requested and the number of tax years to be included are two examples of IRS personnel’s discretion over summonses, the result of which determines the extent of compliance burden imposed.<sup>139</sup>

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<sup>134</sup> See I.R.C. § 7602(a) (permitting the IRS to summon “[f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . or collecting any such liability”); see also *Mollison v. United States*, 481 F.3d 119, 122 (2d Cir. 2007) (citing I.R.C. § 7602(a)(1)); *United States v. Clarke*, 573 U.S. 248, 250 (2014) (same).

<sup>135</sup> I.R.C. § 7602(a)(1).

<sup>136</sup> *Id.* § 7602(a)(2). For a description of the additional procedures required when issuing summonses to third parties, see LEANDRA LEDERMAN & STEPHEN W. MAZZA, *TAX CONTROVERSIES: PRACTICE AND PROCEDURE* 160–63 (4th ed. 2018). There are also notice requirements to the taxpayer when contacting third parties. MICHAEL SALTZMAN & LESLIE BOOK, *IRS PRACTICE AND PROCEDURE* ¶ 13.01[1][b] *Advance Notice to Taxpayer Following the TFA of 2019* (2021).

<sup>137</sup> See I.R.C. § 7609(f). These types of summonses are referred to as John Doe summonses. See *id.*

<sup>138</sup> *United States v. Powell*, 379 U.S. 48, 57–58 (1964).

<sup>139</sup> See *IRS Audits*, INTERNAL REVENUE SERV., (June 2, 2021), <https://www.irs.gov/businesses/small-businesses-self-employed/irs-audits> [<https://perma.cc/5HCU-YY3C>] (describing how the IRS can include returns filed within the past three to six years in an audit, and how the IRS can request any records used to prepare a tax return within three

The scope of how many people to summon in a given tax enforcement matter also entails discretion. Because the IRS can deploy its summons powers on third parties to seek information that may pertain to a separate taxpayer, the IRS must then also make a decision about how many third parties to contact. This choice has substantial implications for the taxpayer, even if only third parties are summoned. Taxpayers could suffer substantial harm if those who conduct business with them receive an IRS summons about tax records that signals their business partner is not reliable or trustworthy.<sup>140</sup>

The extent to which the IRS seeks to enforce a summons upon those who do not comply further entails discretion. As Lederman and Mazza have noted, “[t]he IRS’s summons is not self-enforcing. The IRS has several options if the taxpayer fails to comply voluntarily with the summons.”<sup>141</sup> The IRS Internal Revenue Manual is explicit about this discretion: “After a person neglects or refuses to comply with a summons, decide if summons enforcement is appropriate.”<sup>142</sup>

The choice of whether or not to enforce a summons has material consequences for the taxpayer. Under the most common path, the IRS can simply move forward with its assessment and issue a notice of deficiency to the taxpayer, in effect starting the clock on the interest and penalties that apply to underpayment before receiving additional information to confirm its assessment.<sup>143</sup> Alternatively, the IRS can seek an order from a U.S. district court, typically from a magistrate judge.<sup>144</sup> If the IRS personnel decide to enforce the summons, they can pursue either criminal proceedings or civil proceedings.<sup>145</sup> Failure to comply with such a summons can lead to fines or even arrest.<sup>146</sup>

Like most tax enforcement settings, the IRS summons process generally provides sufficient identifying information for the relevant IRS personnel to make assumptions about the race or ethnicity of the taxpayer. The name of the taxpayer is commonly known, as are other

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years of filing). The use of form letters for summons activity reduces the potential role of bias, though there is still discretion over *which* form letter to use.

<sup>140</sup> See, e.g., Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1789 (2000) (arguing that tax compliance provides a signal to others that one is trustworthy).

<sup>141</sup> See LEDERMAN & MAZZA, *supra* note 133, at 158.

<sup>142</sup> IRM 25.5.10.4.1.1 (May 12, 2016). This usually involves review by someone in the Chief Counsel’s Office who looks at the legal sufficiency of the summons and problems with enforcement, such as Fifth Amendment defenses. *Id.* at 25.5.10.2(3) (May 2, 2016).

<sup>143</sup> LEDERMAN & MAZZA, *supra* note 136, at 158.

<sup>144</sup> *Id.* at 159.

<sup>145</sup> See I.R.C. § 7210 (for criminal); I.R.C. § 7604 (for civil).

<sup>146</sup> I.R.C. § 7210 (setting forth a maximum fine of \$1,000 and a maximum term of imprisonment of one year).

personal details of the taxpayer, including occupation, zip code, and family structure.<sup>147</sup>

Given the availability of information and the scope of discretion, IRS summons activity is vulnerable to racial bias under both the racial animus and implicit bias models. The relevant IRS personnel have substantial discretion and access to identifying information that can be used as a proxy for race.

IRS summons enforcement is also vulnerable to racial bias under the transmitted bias model. Because an IRS summons will rely on a taxpayer's last known address, and failure to reply to a summons can lead to a cascade of additional consequences, housing instability can determine IRS summons enforcement outcomes. And because housing instability is partially driven by racial animus, including racially motivated evictions, racially targeted policing, and historic redlining practices, summons enforcement that is affected by housing instability is thus also affected by racial animus.<sup>148</sup> This is just one example of the disparate outcomes we might expect to see in summons enforcement as a result of transmitted bias.

### B. Civil Penalties

There are over 140 civil penalty provisions in the Internal Revenue Code.<sup>149</sup> It is the responsibility of the IRS to impose these penalties. Penalties apply to delinquency, such as failure to file a return or remitting a bad check, and inaccuracy, such as understating the amount of tax owed by failing to report tip income.<sup>150</sup> In 2019, the IRS assessed nearly \$40.5 billion in civil penalties, including 862,000 bad check penalties.<sup>151</sup> While many penalties are automated, this is

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<sup>147</sup> John Doe summonses are the exception to this general pattern, though the name of the party being summoned is known even if the relevant taxpayer's name is unknown. For a discussion of the ways certain cues can be used to assume an individual's race or ethnicity under a racial animus or implicit bias model, see *supra* Part II.

<sup>148</sup> See Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 649, 653 (2020) (documenting disproportionality in eviction rates by race); MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 242–54 (2016) (documenting causal mechanisms that yield evictions, including racial animus). See also *supra* notes 23–29 and accompanying text (on racial bias in criminal law enforcement). On the role of explicitly race-based government housing policies, which lasted until the 1960s, in shaping housing patterns to this day, see RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

<sup>149</sup> TOWNSEND, *supra* note 122, at 278.

<sup>150</sup> See IRM 20.1.1.1.1 (Nov. 25, 2011) (listing three categories of penalties: those related to the filing of returns, the payment of tax, and the accuracy of information).

<sup>151</sup> INTERNAL REVENUE SERV., *supra* note 6, at 61.

not exclusively the case.<sup>152</sup> The IRS also abates penalties, with almost \$23.9 billion in civil penalties abated in a year.<sup>153</sup>

The imposition and abatement of tax penalties is vulnerable to racial bias under the racial animus model, the implicit bias model, and the transmitted bias model. This is due to the discretion on the part of the personnel imposing the penalty, the availability of information about the taxpayer through which the personnel may assume a taxpayer's race, and the fact that penalty enforcement is impacted by taxpayer characteristics that are themselves determined by racial animus.

Take the example of the civil fraud penalty.<sup>154</sup> Civil fraud incurs one of the steepest penalties in the Internal Revenue Code.<sup>155</sup> Asserting civil fraud also has implications beyond the amount owed, since it also affects the statute of limitations for enforcement.<sup>156</sup> According to the Internal Revenue Manual, if an examiner believes there are indicators of fraud, they must check with their group manager.<sup>157</sup> If the manager agrees, then the examiner will refer the matter to the Fraud Enforcement Advisor, and eventually to the IRS Chief Counsel Office for review.<sup>158</sup> The requirement that multiple personnel review the taxpayer in question mitigates the risks of racial animus in fraud selection, as the likelihood of both employees carrying the same animus is reduced, but it may not reduce the impact of implicit bias if the two personnel share the same biases. And because the relevant identifying information for assumptions about race are present, such as first name and surname, implicit bias could impact an IRS staff member's judgment call over whether there are sufficient indicators of fraud in the return.

To the extent racial animus produces taxpayer characteristics that are deemed by the IRS to be potential indicators of fraud, enforcement of the tax fraud penalty is also vulnerable to transmitted bias. One indicator of fraud that is relevant to the imposition of the fraud penalty, though not dispositive, is the use of cash rather than tradi-

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<sup>152</sup> SALTZMAN & BOOK, *supra* note 136, ch. 7B.

<sup>153</sup> INTERNAL REVENUE SERV., *supra* note 6, at 58.

<sup>154</sup> To be sure, fraud is a relatively severe example. For FY 2020 only 1,330 fraud penalties were assessed all year compared to over 422,000 non-fraud-based accuracy-related penalties. *Id.* at tbl.26.

<sup>155</sup> See I.R.C. § 6663 (establishing a penalty of seventy-five percent of the amount understated, as compared to twenty percent for accuracy penalties under I.R.C. § 6662).

<sup>156</sup> See I.R.C. § 6501(c)(1) ("In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.").

<sup>157</sup> IRM 25.1.6.3(1) (June 10, 2021).

<sup>158</sup> *Id.* 25.1.6.2, 25.1.6.3(1), (5), (10), (12), (13), (14), (17) (directing IRS staff to consult a Fraud Enforcement Advisor and/or area counsel when various issues arise related to civil fraud).

tional banks.<sup>159</sup> Because we know that access to banking is partially driven by a legacy of racial animus, this approach to civil penalty tax enforcement is vulnerable to transmitted racial bias.<sup>160</sup>

### C. Appeals

The Independent Office of Appeals (Appeals) conducts settlement conferences with taxpayers. These settlement conferences require direct communication between IRS personnel and the taxpayer. During FY 2019, the IRS Appeals Office closed 73,207 cases, including those received in prior fiscal years.<sup>161</sup> Although Appeals handles categories of enforcement discussed in later portions of this Part, including collection due process hearings and innocent spousal relief, the broad category of docketed deficiency appeals is sufficiently distinct as to merit a separate discussion.<sup>162</sup>

Upon the receipt of a notice of deficiency from IRS Examinations, a taxpayer may file a petition with the Tax Court to redetermine their deficiency.<sup>163</sup> IRS Chief Counsel (Counsel) refers cases docketed with the Tax Court to Appeals within thirty days for settlement consideration, subject to a few rare exceptions.<sup>164</sup> First, Counsel does not refer cases after the taxpayer has notified Counsel that they wish to forego settlement considerations.<sup>165</sup> Second, Counsel does not refer cases they have “designated for litigation.”<sup>166</sup>

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<sup>159</sup> See Susan Cleary Morse, Stewart Karlinsky & Joseph Bankman, *Cash Businesses and Tax Evasion*, 20 STAN. L. & POL'Y REV. 37, 39 (noting that “[b]y far the most important determinant of tax compliance is income source”).

<sup>160</sup> See MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 1* (2017) (“[B]lack and white Americans have had a separate and unequal system of banking and credit.”).

<sup>161</sup> INTERNAL REVENUE SERV., *supra* note 6, at 63. Among the cases closed by Appeals, Collection Due Process cases made up 36.4% of the total, while Examination cases made up 30.9%. *Id.* at 59.

<sup>162</sup> Appeals can also hear nondocketed cases after the taxpayer files a protest post thirty-day letter and prior to stat notice. SALTZMAN & BOOK, *supra* note 136, ¶ 9.02[1][a].

<sup>163</sup> I.R.C. § 6213(a).

<sup>164</sup> Rev. Proc. 2016-22, 2016-15 I.R.B. 577, § 3.01, .04. In addition to the exceptions listed in the textual sentences, Counsel also does not refer a case to Appeals if Appeals initiated the issuance of the notice of deficiency to the taxpayer. *See id.* § 3.01. This only applies, however, to non-docketed cases when a taxpayer requests consideration of their case by Appeals instead of (or before) filing a petition with the Tax Court. *See* IRM 8.2.2.2.2 (May 29, 2014).

<sup>165</sup> Rev. Proc. 2016-22, 2016-15 I.R.B. 577, § 3.01.

<sup>166</sup> *Id.* § 3.03. IRM 33.3.6.1(1) (Aug. 11, 2004) provides the following description of when Counsel may designate a case for litigation: “[C]ases are designated for litigation in the interest of sound tax administration to establish judicial precedent, conserve resources, or reduce litigation costs for the Service and taxpayers. For example, judicial precedent may provide guidance for the resolution of industry-wide, tax shelter or other issues.” This is just one example of the discretion embedded in tax enforcement.

Appeals holds exclusive settlement authority on behalf of the IRS after a case is referred to Appeals and until it is returned to Counsel.<sup>167</sup> After receipt of a case from Counsel, Appeals has forty-five days to make initial contact with the taxpayer or their representative by letter or telephone.<sup>168</sup> Settlement conferences are held telephonically, virtually, in person, or through correspondence between the taxpayer or their representative and an Appeals Technical Employee.<sup>169</sup> During this conference, the taxpayer and Appeals attempt to settle the case based on an “impartial” review, after discussing the facts, arguments, and relevant law.<sup>170</sup>

The Internal Revenue Manual is Appeals’ “primary source” to guide them in settlement discussions.<sup>171</sup> During a settlement conference, Appeals strives to reach a resolution that is “*fair and impartial* to both the Government and the taxpayer, promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws, and enhances public confidence in the integrity and efficiency of the IRS.”<sup>172</sup> According to the Internal Revenue Manual, the IRS considers a settlement “fair and impartial” when the settlement reached is “the probable result in the event of litigation.”<sup>173</sup>

Appeals attempts to settle all cases, except those that involve “negligible litigation hazards” and those Counsel designates for litigation.<sup>174</sup> Appeals is instructed to rely on its “experience and judgment” when considering what litigation hazards a case presents, including potential uncertainties in the outcome of a trial due to “factual, legal and evidentiary” issues, but not lacking case law.<sup>175</sup> Appeals is generally encouraged to concede issues when they cannot recommend a trial.<sup>176</sup> No case, however, may be settled based on “nuisance value” alone, meaning when concessions are made “solely to eliminate the

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<sup>167</sup> Rev. Proc. 87-24, 1987-1 C.B. 720, § 2.04, *superseded by* Rev. Proc. 2016-22, 2016-15 I.R.B. 577; IRM 8.6.4.1.1 (June 16, 2020).

<sup>168</sup> IRM 8.2.1.4(1) (June 1, 2021). The Taxpayer Advocate Service estimates that approximately eighty-two percent of taxpayers were *pro se* before the Tax Court between fiscal years 2011 and 2020. NAT’L TAXPAYER ADVOC., PUB. NO. 2104, NATIONAL TAXPAYER ADVOCATE ANNUAL REPORT TO CONGRESS 166 (2020), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20\\_FullReport.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_FullReport.pdf) [<https://perma.cc/R46T-X8DT>].

<sup>169</sup> IRM 8.6.1.5.1(1) (Sept. 25, 2019).

<sup>170</sup> *Id.* 8.6.4.2.5(1) (June 16, 2020).

<sup>171</sup> *Id.* 8.6.4.1.6(1) (June 16, 2020).

<sup>172</sup> *Id.* 8.6.4.1.1 (July 1, 2020) (emphasis added).

<sup>173</sup> *Id.* 8.6.4.2(2) (June 16, 2020). In addition to the IRM, the Taxpayer Bill of Rights guarantees taxpayers “the right to pay no more than the correct amount of tax.” I.R.C. § 7803(a)(3)(C).

<sup>174</sup> IRM 35.5.2.2(1) (Aug. 11, 2004).

<sup>175</sup> *Id.* 8.11.1.2.7.5(2), (5) (July 3, 2019).

<sup>176</sup> *Id.* 8.6.4.2.7(2) (Oct. 26, 2007).

inconvenience or cost of further negotiations or litigation.”<sup>177</sup> During settlement talks, Appeals may provide a taxpayer with “an evaluation of the case,” which helps the taxpayer understand what the IRS will accept.<sup>178</sup> All cases where Appeals fails to reach a settlement, or the case is scheduled for trial, return to Counsel.<sup>179</sup> At this point, Counsel has authority to settle the case on behalf of the IRS.<sup>180</sup>

The conditions that allow for racial animus or implicit bias in tax enforcement are present in the Appeals settlement procedures. Although the information on a tax return is already sufficient to infer the race or ethnicity of many taxpayers, the amount of taxpayer information available to Appeals personnel goes beyond information included in the return. Appeals personnel have direct communication with the taxpayer, often including in-person or telephonic interactions with taxpayers while holding settlement conferences.<sup>181</sup> Appeals personnel also have substantial discretion over tax enforcement outcomes. In a standard settlement negotiation, for example, an Appeals officer must use their “experience and judgment” when reviewing a case to determine the merit of a settlement.<sup>182</sup> The Appeals personnel act based on a review of the litigation hazards—uncertainties in the event of litigation. The scope of discretion and information available make Appeals’ settlement of docketed cases vulnerable to racial bias.

#### D. Offers in Compromise

The IRS may make an offer in compromise to reduce a taxpayer’s unpaid tax liability, including penalties, when it determines that full collection is “unlikely,” and the amount offered by the taxpayer reflects their “collection potential.”<sup>183</sup> In FY 2019, the IRS accepted only a third of all offers: The IRS received 54,225 offers in compromise, accepting 17,890 of them for a total of \$289,422,000.<sup>184</sup> Because of the discretion involved in accepting offers in compromise, and the taxpayer information made available to relevant IRS personnel with discretion, offers in compromise procedures are vulnerable to racial bias under the implicit bias and racial animus models. Offers in compromise decisions are also vulnerable to transmitted bias.

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<sup>177</sup> *Id.* 8.6.4.2.4(1) (Oct. 26, 2007).

<sup>178</sup> *Id.* 1.2.1.9.6(2) (Apr. 6, 1987).

<sup>179</sup> *See Rev. Proc.* 16-22, 2016-15 I.R.B. 577 § 3.07.

<sup>180</sup> *See Rev. Proc.* 87-24, 1987-1 C.B. 720 § 2.04; *see also* IRM 8.6.4.1.1(1) (June 16, 2020) (describing the responsibility of the Appeals department).

<sup>181</sup> *See* IRM 8.6.1.5.1(1) (Sept. 25, 2019).

<sup>182</sup> *See id.* 8.11.1.2.7.5(2) (July 3, 2019).

<sup>183</sup> *See* Treas. Reg. § 301.7122-1(a)(2) (2021); IRM 5.8.1.2.2(1) (Apr. 20, 2021).

<sup>184</sup> INTERNAL REVENUE SERV., *supra* note 6, at 60. The Independent Office of Appeals received 6,841 Offers in Compromise during FY 2019. *Id.* at 63.



To request an “offer to compromise,” the taxpayer must file Form 656 with the IRS.<sup>185</sup> The taxpayer may request compromise on the following grounds: “doubt as to liability . . . doubt as to collectability [sic] . . . [or to] promote effective tax administration.”<sup>186</sup> The component of the IRS with jurisdiction over an offer in compromise depends on the taxpayer’s stated grounds for compromise.<sup>187</sup> In all circumstances where an offer in compromise may be appropriate, the IRS discusses it with the taxpayer and may help with the requisite paperwork for filing Form 656.<sup>188</sup> The IRS components with primary jurisdiction over offers in compromise are also authorized to contact the taxpayer for information about their case, though many offers are determined based on submitted documents without additional interaction.<sup>189</sup>

For offers in compromise requested under “doubt as to liability” (DATL), the IRS Examinations department has primary jurisdiction.<sup>190</sup> Examination procedures listed in the Internal Revenue Manual state that an officer generally contacts the taxpayer within thirty days of receiving a case for consideration.<sup>191</sup> Regardless of the grounds for an offer in compromise, however, the IRS officer considering the offer may request additional information from the taxpayer when needed to fully evaluate the offer.<sup>192</sup> If the IRS does not receive the requisite information to conduct a full consideration of the offer,

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<sup>185</sup> Rev. Proc. 2003-71, 2003-36 I.R.B. 517 § 4.01. IRS will only consider an offer in compromise from an individual taxpayer, not including business owners, once the taxpayer has (1) filed all legally required returns, (2) “received a bill for at least one tax debt included on [their] offer,” and (3) made “all required estimated tax payments for the current [tax] year.” INTERNAL REVENUE SERV., FORM 656 BOOKLET: OFFER IN COMPROMISE 1. Other filing requirements include Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, a \$205 application fee unless exempt as a low-income taxpayer, and the initial offer payment based on the payment option chosen by the taxpayer. *Id.* at 3. This process can be initiated within the context of a collections due process case. SALTZMAN & BOOK, *supra* note 136, ¶ 15.06[11].

<sup>186</sup> Treas. Reg. § 301.7122-1(b)(1)–(3) (2002).

<sup>187</sup> See IRM 5.8.1.6 (Mar. 16, 2010).

<sup>188</sup> *Id.* 5.8.1.2.2(1) (Apr. 20, 2021). In some circumstances, Form 433-A(OIC) is used.

<sup>189</sup> See Treas. Reg. § 301.7122-1(d)(2) (2002); Rev. Proc. 2003-71, 2003-36 I.R.B. 517, §§ 5.04, 6.01, 6.02.

<sup>190</sup> IRM 4.18.1.2.3(3) (Nov. 4, 2020). A taxpayer may seek a compromise offer under “doubt as to liability” (DATL) when the taxpayer shows a “genuine dispute as to the existence or amount of the correct tax liability.” Treas. Reg. § 301.7122-1(b)(1) (2002). There is no DATL, however, when a court has made a final decision or judgment with regards to “the existence or amount of the liability.” *Id.* According to the IRS, DATL is “rare” and generally is accepted only when the IRS has no way to determine the taxpayer’s liability. See IRM 4.18.1.4.3.2(2) (Nov. 4, 2020).

<sup>191</sup> IRM 4.18.1.4.2(3) (Nov. 4, 2020).

<sup>192</sup> Treas. Reg. § 301.7122-1(d)(2) (2002); Rev. Proc. 2003-71, 2003-36 I.R.B. 517, § 5.04.

then the IRS will return the offer to the taxpayer without accepting or rejecting it.<sup>193</sup>

Unlike in the context of DATL offers, Collection has primary jurisdiction over offers requested under “doubt as to collectability” (DATC)<sup>194</sup> and those requested based on “effective tax administration” (ETA) economic hardship grounds.<sup>195</sup> In both cases, Collection generally follows the same procedures for accepting cases for consideration as Examination.<sup>196</sup> Regardless of the grounds for an offer in compromise, all IRS components may need to contact the taxpayer for additional information to fully consider the offer.<sup>197</sup> The Internal Revenue Manual, however, specifically instructs Collection officers to contact a taxpayer telephonically, if necessary, to collect additional necessary information while also indicating that Collection may request information from the taxpayer in person.<sup>198</sup> Collection may also communicate with a taxpayer over the phone if it must raise the offer amount requested by the taxpayer to recommend acceptance under DATC, or if the officer’s review of the case results in a decision

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<sup>193</sup> See Rev. Proc. 2003-71, 2003-36 I.R.B. 517, § 5.04–06.

<sup>194</sup> A taxpayer may seek a compromise offer under “doubt as to collectability” (DATC) when the taxpayer’s full liability is greater than their combined income and the value of their assets. Treas. Reg. § 301.7122-1(b)(2) (2002). Pursuant to a compromise under DATC, the IRS seeks to collect the case’s “reasonable collection potential.” Rev. Proc. 2003-71, 2003-36 I.R.B. 517, § 4.02(2). The “reasonable collection potential” represents the amount the IRS “could collect through other means, including administrative and judicial collection remedies.” *Id.* When calculating reasonable collection potential, the IRS considers the taxpayer’s “net realizable equity in assets,” their “expected future income” over their allowance for living expenses, the amount collectible from third parties, and assets available to the taxpayer but not within the government’s reach. IRM 5.8.4.3.1(1) (Apr. 30, 2015). The IRS does not accept a DATC offer when the taxpayer can pay the liability in full either by “lump sum” or under an “installment agreement.” *Id.* 5.8.4.3(3) (Sept. 24, 2020).

<sup>195</sup> IRM 5.8.1.6.3(1) (Apr. 20, 2021), 5.8.1.6.5(1) (Apr. 20, 2021). A taxpayer may request consideration of an offer in compromise based on Effective Tax Administration (ETA) for economic hardship grounds or for public policy reasons. Treas. Reg. § 301.7122-1(c)(3) (2002); Rev. Proc. 2003-71, 2003-36 I.R.B. 517, § 4.02(3). The taxpayer may qualify on economic hardship grounds due to factors such as an inability to earn a living, lack of income to cover basic living expenses, and if liquidation of their assets “would render the taxpayer unable to meet basic living expenses.” Treas. Reg. § 301.7122-1(3)(A)–(C) (2002). Acceptance for public policy reasons is justified when collection of the taxpayer’s full liability “would undermine public confidence that the tax laws are being administered in a fair and equitable manner.” Rev. Proc. 2003-71, 2003-36 I.R.B. 517, § 4.02(3)(b).

<sup>196</sup> See Treas. Reg. § 301.7122-1(d)(2) (2002) (explaining process for accepting cases for Collection); Rev. Proc. 2003-71, 2003-36 I.R.B. 517, § 5.04 (explaining process for accepting cases for Examination).

<sup>197</sup> See Rev. Proc. 2003-71, 2003-36 I.R.B. 517, § 6.01–02.

<sup>198</sup> See IRM 5.8.4.6(3), 5.8.4.7(2)(j), 5.8.4.8(1), 5.8.4.8(2) (Sept. 24, 2020) (discussing multiple instances in which the IRS will contact taxpayers in-person or by telephone).

that the taxpayer can pay the full amount of liability through liquidation of assets or an installment agreement.<sup>199</sup>

The decisions to accept an offer in compromise is a discretionary one for the appropriate IRS component with jurisdiction.<sup>200</sup> If the IRS decides to reject an offer in compromise, it must conduct an “independent administrative review” of the rejection before communicating it to the taxpayer.<sup>201</sup> Once a rejection is communicated to the taxpayer, they have thirty days from the date on the letter to appeal it.<sup>202</sup> Appeals, discussed in the previous Section, assumes jurisdiction over the appeal.<sup>203</sup> During its consideration of an appealed offer in compromise after rejection, Appeals must follow its standard procedures for conducting a settlement conference with the taxpayer.<sup>204</sup> Appeals may hold a settlement conference with the taxpayer telephonically, in person, virtually, or through other correspondence.<sup>205</sup>

While both an offer in compromise and general settlement may result in a reduction in the taxpayer’s liabilities, offers in compromise are different in several ways. First, offers in compromise allow taxpayers to request a reduction in tax liabilities because of factors affecting their ability to afford the underlying tax liability.<sup>206</sup> Second, taxpayers must specifically request an offer in compromise by filing Form 656 with the IRS while all docketed Tax Court cases receive general settlement consideration by Appeals.<sup>207</sup> Finally, the decision to reject an offer in compromise by an IRS officer is guaranteed an additional independent review, while docketed cases that fail to settle are returned to Counsel and proceed to trial before the Tax Court.<sup>208</sup>

Two procedures built into the offer in compromise process may reduce some risk of racial animus or implicit bias affecting IRS enforcement outcomes. First, the guaranteed independent review of all IRS decisions to reject an offer in compromise before it is commu-

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<sup>199</sup> *Id.* 5.8.4.9(1) (Sept. 24, 2020).

<sup>200</sup> *See* Rev. Proc. 2003-71, 2003-36 I.R.B. 517, § 6.03.

<sup>201</sup> I.R.C. § 7122(e)(1).

<sup>202</sup> Treas. Reg. § 301.7122-1(f)(5)(i) (2002).

<sup>203</sup> *See* Rev. Proc. 2003-71, 2003-36 I.R.B. 517, § 9.02.

<sup>204</sup> IRM 8.23.1.3(1) (Aug. 23, 2021).

<sup>205</sup> *Id.* 8.6.1.5.1(1) (Sept. 25, 2019). Even before the pandemic, many appeals conferences were conducted remotely.

<sup>206</sup> *See* Treas. Reg. § 301.7122-1(a)(2), (b)(2)–(3) (2002) (listing grounds for compromising on the amount of tax liability).

<sup>207</sup> *See* Rev. Proc. 2016-22, 2016-15 I.R.B. 577, § 3.01 (describing the default settlement consideration of docketed Appeals cases); IRM 5.8.1.2.2(1) (Apr. 20, 2021) (describing how taxpayers must initiate the compromise process).

<sup>208</sup> *See* I.R.C. § 7122(e)(1) (describing the guarantee of an independent administrative review); Rev. Proc. 2016-22, 2016-15 I.R.B. 577, § 3.07 (describing the process by which docketed cases which fail to settle are returned to Counsel).

nicated to the taxpayer provides an opportunity for bias in an original determination to be corrected by a subsequent review. Second, the taxpayer's right to appeal a rejected offer in compromise also provides some protection against biased outcomes.<sup>209</sup> Nevertheless, the elements required for racial bias to occur in tax enforcement remain present in the IRS offers in compromise process, and current IRS data practices obscure potential disparities in tax enforcement.

### *E. Collection Due Process Hearings*

Collection Due Process (CDP) hearings allow taxpayers to challenge an IRS assessment prior to attachment of a lien or levy on their property.<sup>210</sup> Prior to a hearing, the taxpayer is contacted by collections personnel, in most cases handled by the Automated Call Sites. The CDP hearing process was introduced as a taxpayer protection in 1998 in response to concerns that a court judgment is not required for the IRS to seize property for unpaid tax liabilities.<sup>211</sup> The CDP hearing procedures provide taxpayers with an opportunity to first be heard by a settlement officer in the IRS Appeals Office.<sup>212</sup> If the taxpayer and settlement officer cannot come to an agreed settlement, then the IRS personnel issues a determination letter.<sup>213</sup> The taxpayer then has the right to a review of the Appeals Officer Determination in U.S. Tax Court.<sup>214</sup> Current IRS protocols do not eliminate the possibility of racial bias in collection due process hearings, and current IRS data practices conceal any disparities from internal oversight and public accountability.<sup>215</sup>

In a CDP hearing, a taxpayer must affirmatively request the hearing in writing after receiving a notice of the lien or levy.<sup>216</sup> The

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<sup>209</sup> See I.R.C. § 7122(e)(1)–(2) (describing the taxpayer's right to appeal); Rev. Proc. 2003-71, 2003-36 I.R.B. 517, § 6.03.

<sup>210</sup> See I.R.C. §§ 6320, 6330; see also Treas. Reg. § 301.6320-1 (2002).

<sup>211</sup> See generally I.R.S. Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685. See also LEDERMAN & MAZZA, *supra* note 136, at 807 (describing the impetus behind the I.R.S. Restructuring and Reform Act of 1998); Leslie Book, *The Collection Due Process Rights: A Misstep or a Step in the Right Direction*, 41 HOUS. L. REV. 1145, 1156–58 (2004) (explaining how CDP hearing procedures arose out of a broader tax reform movement, intended to interpose external checks on the IRS' collection discretion).

<sup>212</sup> See IRM 8.22.4.5.1 (Aug. 26, 2020) (mentioning that Appeals Officers conduct hearings).

<sup>213</sup> *Id.*

<sup>214</sup> I.R.C. § 6330(d).

<sup>215</sup> The issues that arise in Appeals procedures generally also apply to CDP hearings conducted by Appeals. Because they are a distinct type of hearing, I have included them as a separate subsection.

<sup>216</sup> See I.R.C. § 6320 (describing the procedures surrounding hearings upon filings of notices of liens).

taxpayer is entitled to a single hearing with an impartial officer.<sup>217</sup> At the hearing, which can occur in person or telephonically, “the taxpayer has the right to raise any relevant issues related to the unpaid tax, the lien, or the proposed levy, including the appropriateness of the collection action, collection alternatives, spousal defenses, and, under certain circumstances, the underlying tax liability.”<sup>218</sup> After the Appeals Officer issues a determination, the taxpayer can then petition the U.S. Tax Court, where the taxpayer can also allege deficiencies in the initial due process hearing. For example, in *Mason v. Commissioner*, a taxpayer alleged an abuse of discretion by the Appeals Officer for proposing a collection action without independently reviewing the taxpayer’s separately negotiated offer in compromise.<sup>219</sup>

The vast majority of taxpayers who receive a notice of collections from the IRS do not seek a collection due process hearing. In 2020, over 1.5 million taxpayers received a notice, with fewer than 28,000 taxpayers seeking a collections due process hearing.<sup>220</sup> Of taxpayers who sought review by an Appeals Officer, only roughly 1,000 petitioned the Tax Court for review, and only seventy-four taxpayers fully litigated their cases to judgment.<sup>221</sup>

Despite being designed as mechanisms to protect taxpayers from overly zealous tax collection, current CDP hearing procedures are vulnerable to racial bias under all three models. From the standpoint of racial animus, a settlement officer is in a position to make an adverse determination of a taxpayer’s appeal after exposure to racially identifying information, such as name, address, accent, and appearance. The elements required for racial animus to potentially occur are all present, despite the fact that there is no question on Form 12153 requesting racial information.<sup>222</sup> The presence of these elements also enables potential racially biased enforcement under an implicit bias model. Disparate enforcement outcomes could result from these hearings. Examples of potential bias currently obscured by IRS data practices include the proportion of taxpayers seeking due process hearings, the proportion of taxpayers receiving settlements versus

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<sup>217</sup> See *id.* § 6320(b).

<sup>218</sup> NAT’L TAXPAYER ADVOC., *supra* note 168, at 183.

<sup>219</sup> See *Mason v. Comm’r*, 121 T.C.M. (CCH) 1485 (2021).

<sup>220</sup> NAT’L TAXPAYER ADVOC., *supra* note 168, at 185.

<sup>221</sup> *Id.* There is some controversy over whether cases decided by summary judgment should be considered fully litigated for purposes of this statistic.

<sup>222</sup> See INTERNAL REVENUE SERV., FORM 12153 REQUEST FOR A COLLECTION DUE PROCESS OR EQUIVALENT HEARING (2020) (showing an absence of asking for racial identification).

determinations that include no adjustments to the tax debt owed, and the size of those adjustments.

Under a transmitted bias model, characteristics of a taxpayer influenced by racial animus would then also be relied on by the IRS in ways that may produce different CDP enforcement. Again, such transmitted bias remains possible despite the absence of a race or ethnicity question on CDP forms. For example, in order for a taxpayer to receive a CDP hearing, they must affirmatively elect to challenge a collections notice within thirty days.<sup>223</sup> Notice is valid if sent by certified mail to a taxpayer's last known address, even if the taxpayer has no actual knowledge of the notice.<sup>224</sup> Here, housing instability created through racial animus yields disparate access to CDP hearings.

Collection due process hearings are distinct from the prior tax enforcement settings discussed in this Part in that they also introduce a Presidentially-appointed and Senate-confirmed judge as a potential decisionmaker in the taxpayer's outcome. While this could serve as a backstop against racial bias that occurred earlier in the causal chain by allowing a judge to review whether the IRS Appeals Office has abused discretion, it can also be an additional avenue for racial bias.<sup>225</sup> Because the U.S. Tax Court also does not track outcomes by race, whether there are racial disparities in the results of collection due process litigation remains unknown.

### F. *Innocent Spouse Relief*

The joint-filing regime in the United States imposes joint and several liability on married taxpayers who file their income taxes on the same return.<sup>226</sup> In some instances, however, the Internal Revenue Code does provide relief from a spouse's tax liabilities for taxpayers deemed to be innocent spouses.<sup>227</sup> Such relief is often pursued within the context of domestic violence or divorce. In order to enjoy this ben-

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<sup>223</sup> *Id.*

<sup>224</sup> See INTERNAL REVENUE SERV., PUB. NO. 1660, COLLECTION APPEAL RIGHTS (REV. 1) (2020) (explaining how the taxpayer has a thirty-day period from the date of the notice with no mention of actual knowledge).

<sup>225</sup> For documentation of racial bias in the non-tax judiciary, see, for example, Donohue, *supra* note 28.

<sup>226</sup> I.R.C. § 6013(d).

<sup>227</sup> I.R.C. § 6015(b). For alternative prongs that also provide relief, see LEDERMAN & MAZZA, *supra* note 136, at 860 (discussing elective proportionate liability and discretionary equitable relief). Nevertheless, the risk for racial animus and implicit bias is more likely in the context for requests for relief under section 6015(b) and 6015(f), which both require subjective determinations as to whether on account of the facts and circumstances it is inequitable to hold the requesting spouse jointly and severally liable. For additional context on the challenges associated with innocent spousal relief, see Orli Oren-Kolbinger, *The Error Cost of Marriage*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 643, 671–72 (2021).

efit, the taxpayer must satisfy a series of criteria focused on whether the taxpayer knew or had reason to know that there was an understatement attributable to the other spouse who filed the return.<sup>228</sup>

In order to request innocent spousal relief from a tax liability, including any related penalties and interest, the taxpayer must file Form 8857.<sup>229</sup> According to the Internal Revenue Manual, “[a]n innocent spouse technician applies the law to the facts provided by the requesting spouse and the non-requesting spouse, as well as any other facts the technician is able to establish, to determine whether the [requesting spouse] should be relieved of any or all tax liability owed.”<sup>230</sup>

The procedures for submitting and reviewing a request for innocent spouse relief are vulnerable to racial bias across all three models. The Innocent Spouse Relief Form includes multiple indicators that could function as proxies for race under a racial animus or implicit bias model of tax enforcement. First, the Form asks for full name and address.<sup>231</sup> The Form also asks for substantial narrative components that include other qualitative information and natural language patterns.<sup>232</sup> The IRS innocent spouse technician may also review personal financial information that might also imply racial identity.<sup>233</sup> Although follow-up interactions are possible, most decisions are made through correspondence.<sup>234</sup>

Transmitted bias could also impact who seeks innocent spousal tax relief. Because relief is primarily limited to those who submit Form 8857, if racial animus plays a role in which taxpayers are more likely to submit the form, then innocent spousal relief is vulnerable to transmitted bias. This is just one example of the disparate enforcement outcomes that we might see and that the IRS currently does not share with the public.

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<sup>228</sup> See I.R.C. § 6015(b).

<sup>229</sup> See IRM 25.15.18.1.1 (Mar. 20, 2019).

<sup>230</sup> *Id.* 25.15.18.1.1(3).

<sup>231</sup> INTERNAL REVENUE SERV., FORM 8857 (Rev. 1-2014), l. 4.

<sup>232</sup> *Id.* l. 30 (“Please provide any other information you want us to consider in determining whether it would be unfair to hold you liable for the tax.”).

<sup>233</sup> There are various examples of financial information asked for such as transfer of assets, large expenses, debt, etc. *Id.* ll. 19–23.

<sup>234</sup> The initial application for innocent spousal relief, the preliminary letter granting or denying relief, and the form for seeking an appeal of denied relief are conducted by mail. *Appeal an Innocent Spouse Determination*, IRS (Feb. 25, 2021), <https://www.irs.gov/appeals/innocent-spouse> [<https://perma.cc/5ERP-66DP>].



### G. Criminal Tax Referrals to Department of Justice

The Internal Revenue Service has a Criminal Investigations (CI) division separate from its other civil enforcement groups. These specialized agents conduct the preliminary administrative investigations into allegations of criminal violations of Title 26 and Title 18, such as fraud or willful failure to pay tax.<sup>235</sup> CI initiated over 2,500 investigations in FY 2020 and made over 1,800 prosecution recommendations to the Department of Justice Tax Division.<sup>236</sup> Of cases prosecuted in partnership with the DOJ, the incarceration rate was eighty percent with an average of forty-four months served.<sup>237</sup>

CI generally will receive referrals from other divisions within the IRS, from private whistleblowers, or from other government agencies.<sup>238</sup> CI then must determine whether to approve for investigation based on whether there is prosecution potential or if, under their discretion, the matter warrants follow-up.<sup>239</sup> This judgment call is also guided by the availability of staff resources to pursue the matter, so the division must prioritize investigations within a limited set of resources.<sup>240</sup> Determining which criminal investigation categories to prioritize, such as employment tax fraud versus distinguishing partnership distributions fraudulently disguised as loans, also requires discretion. In some instances, the IRS can “refer the case directly and simultaneously to both the United States Attorney’s Office and the Tax Division for an expedited guilty plea.”<sup>241</sup> If the DOJ declines to prosecute a matter referred by CI, the IRS is free to continue to pursue investigation to build a case against the taxpayer.<sup>242</sup> As noted previously, the IRS has broad summons powers for such investigations.<sup>243</sup> The IRS can also resubmit the matter to the DOJ as a new referral.<sup>244</sup>

Because of the discretion involved in whether to further investigate or refer a taxpayer to the DOJ, and the availability of taxpayer information that can cue racial stereotypes when the relevant IRS per-

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<sup>235</sup> See, e.g., 18 U.S.C. §§ 286, 287, 371, 1341 (establishing penalties for defrauding the government); I.R.C. §§ 7201–7217 (criminalizing the willful failure to pay taxes); see also U.S. Dep’t of Just., *supra* note 10, § 6-4.110 (describing how CI investigates and refers potential criminal violations to the Department of Justice).

<sup>236</sup> INTERNAL REVENUE SERV., IRS:CI ANNUAL REPORT 2020, at 132 (2020).

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

<sup>238</sup> U.S. Dep’t of Just., *supra* note 10, § 6-4.110.

<sup>239</sup> *Id.* (describing the steps by which CI staff review and approve prosecution referrals).

<sup>240</sup> See *id.* (“Special agents pursue those matters to the extent available resources permit.”).

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

<sup>242</sup> *Id.*

<sup>243</sup> See *supra* Section III.A.

<sup>244</sup> U.S. Dep’t of Just., *supra* note 10, § 6-4.110.

sonnel must exercise discretion, DOJ Criminal Investigations activity is vulnerable to racial bias under the implicit bias model and the racial animus model. And although no single CI agent is able to make a referral without review by a supervisor, there is no systematic review within CI for disparities by race or ethnicity.<sup>245</sup> CI activity is also vulnerable to transmitted bias to the extent that the taxpayer characteristics that impact CI enforcement decisions are also characteristics shaped by racial animus. For example, we know that pass-through income disproportionately accrues to white taxpayers as compared to Latinx taxpayers due in part to racial animus in the labor market.<sup>246</sup> If CI makes enforcement of wage-related income tax refunds a priority, while pass-through income is not, we see an example of transmitted bias.<sup>247</sup>

Although the Department of Justice collects and publicly reports on the race and ethnicity of defendants, IRS Criminal Investigations does not.<sup>248</sup> This means that publicly reported data are unavailable on the demographics of referrals from IRS civil enforcement divisions to CI, as are the taxpayer demographics of investigations by CI that do not get referred to the DOJ or that the DOJ does not prosecute. And although the Criminal Investigations division has an Equity, Diversity, and Inclusion Office, their purview is exclusively focused on employment nondiscrimination matters.<sup>249</sup>

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

<sup>246</sup> *Racial Disparities and the Income Tax System*, TAX POL'Y CTR. (Jan. 30, 2020), <https://apps.urban.org/features/race-and-taxes/#pass-through-business> [<https://perma.cc/3ZXC-XLJV>].

<sup>247</sup> Assistant Secretary Lily Batchelder noted the disparity in audit rates of pass-through filers versus EITC filers at her 2021 confirmation hearing. *Hearing to Consider the Pending Nominations of Lily Lawrence Batchelder to be an Assistant Secretary of the Treasury, Benjamin Harris to be an Assistant Secretary of the Treasury, J. Nellie Liang to be an Under Secretary of the Treasury, and Jonathan Davidson to be Deputy Under Secretary of the Treasury Before the S. Comm. on Fin.*, 117th Cong. at 1:01:04 (May 25, 2021), <https://www.finance.senate.gov/hearings/hearing-to-consider-the-pending-nominations-of-lily-lawrence-batchelder-to-be-an-assistant-secretary-of-the-treasury-benjamin-harris-to-be-an-assistant-secretary-of-the-treasury-j-nellie-liang-to-be-an-under-secretary-of-the-treasury-and-jonathan-davidson-to-be-deputy-under-secretary-of-the-treasury> [<https://perma.cc/NY9Y-TUMV>] (contrasting the disparity in audits between high net worth individuals and corporations and individuals whose taxes are paid based on wage income). Although examinations are not yet criminal investigations, they are typically the necessary first step before referral to CI.

<sup>248</sup> Race and ethnicity data are collected by the probation officer for the presentence report. This information is self-reported by the defendant during the presentence interview. See U.S. SENT'G COMM'N, VARIABLE CODEBOOK FOR INDIVIDUAL OFFENDERS: STANDARDIZED RESEARCH DATA DOCUMENTATION FOR FISCAL YEARS 1999–2019, at 3, 39 (2020).

<sup>249</sup> See Internal Revenue Serv., *supra* note 230, at 39 (“The mission of the Criminal Investigation (CI) Equity, Diversity, and Inclusion Office (EDI) is to identify, examine, and address the organization’s employment practices, policies, guidelines, and procedures

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As documented across each tax enforcement setting in this Part, the decision not to ask taxpayers about their race or ethnicity does not guarantee that there will be no racial bias in IRS tax enforcement. In settings where only a name is provided, that name can still be used as a proxy for race. Other disclosed characteristics on a form can also cue racial biases when combined with name, including occupation and family structure. In settings where there is a telephonic interaction, additional cues are present, such as accent. And in tax enforcement settings where there is a video or in-person interaction, visual cues of race or ethnicity are present.

The following table provides a summary of the tax enforcement settings included in this Part and the extent to which the setting is vulnerable to racial bias under two models of bias: racial animus and implicit bias.<sup>250</sup> In no tax enforcement setting examined is there no risk of racial bias.

TABLE 1. CONDITIONS THAT ENABLE RACIAL BIAS BY AREA OF TAX ENFORCEMENT

Tax Enforcement Activity	Areas of Discretion	Racial Cues
Summonses	Whom to summon; What to summon; Whether to enforce noncompliance	Return information
Civil Penalties	Badges of fraud; Abatement	Return information
Offers in Compromise	Accept offer; Amount of offer	Return information; Narrative filing; In-person meeting
Appeals	Accept settlement; Size of settlement	Return information; Narrative filing; In-person meeting
Collection Due Process	Whether to move to collections	Return information; Narrative filing; In-person meeting
Innocent Spouse Relief	Whether to grant relief; Amount of relief	Return information; Narrative filing; In-person meeting
Criminal Investigations	Whether to investigate; Whether to refer to DOJ	Return information; Third-party information; Summoned information

Despite the ongoing risks of racial bias in tax enforcement, some safeguards do exist. The broad availability of appeal, the delay in

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to ensure that all employees and applicants for employment achieve equal opportunity in every facet of the CI's programs, activities, and services.”).

<sup>250</sup> The factors that contribute to potential transmitted racial bias do not require IRS personnel to have discretion or for personnel to be exposed to racial cues.

many enforcement actions until secondary review, and the regular presence of managerial oversight mitigate the most severe risks.<sup>251</sup> Nevertheless, these existing features of IRS practice are insufficient to support a presumption that racial bias does not exist in tax enforcement. Racial animus, implicit bias, and transmitted bias all remain possible in IRS tax enforcement settings, and the IRS has yet to provide documentation of tax enforcement activity by race.

#### IV

#### GUARDING AGAINST RACIAL BIAS IN TAX ENFORCEMENT

My review of potential racial bias in tax enforcement procedures is not an assertion that such racial bias is already occurring at the IRS. Current IRS data practices inhibit such an inquiry. Rather, I have identified the conditions necessary for racial bias in tax enforcement and demonstrated how the decision not to ask taxpayers their race or ethnicity does not prevent such conditions, even across multiple definitions of racial bias. The cumulative implication is that current IRS procedures are insufficient to address racial bias in tax enforcement.

In this Part, I provide alternative approaches to preventing racial bias in tax enforcement other than the current IRS policy of purported colorblindness. I first discuss internal IRS procedures to guard against racial bias, including addressing the primary obstacle to racial equity in tax enforcement: the ongoing omission of race and ethnicity from federal tax data. I then describe external oversight mechanisms, such as the DOJ and Congress. I conclude with a discussion of the challenges in defining racial equity in tax enforcement. Even if no consensus definition of racial equity in tax enforcement is adopted, the IRS can improve its current approach to racial bias in tax enforcement.

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<sup>251</sup> As noted by the IRS: “[T]axpayers may administratively appeal most IRS decisions . . . . [T]he Office of Appeals . . . will contact the taxpayer, hear the case and decide whether to sustain the enforcement action. Most taxpayers can also petition the U.S. Tax Court for a pre-assessment review . . . or seek a refund in other federal courts.” IRM 1.2.1.2.36 (Oct. 24, 2016). The availability of appeal also exists in law enforcement settings outside of tax, such as criminal law, where it is viewed as insufficient for preventing racial bias. See Praatika Prasad, *Implicit Racial Biases in Prosecutorial Summations: Proposing an Integrated Response*, 86 *FORDHAM L. REV.* 3091, 3118 (2018) (describing how appellate court review usually fails to cure harms caused by prosecutors’ explicit or implicit racial references in trial court summations).

## A. Internal Controls

### 1. Data

Measurement of racial bias is often a precondition to redress of racial bias.<sup>252</sup> This progression, from data to remedy, appears in many of the most important findings about racial bias in law.<sup>253</sup> It is this longstanding legacy of the importance of data on race that has led contemporary scholars of race and the law to call for racial impact studies and racial equity audits.<sup>254</sup> Although the causal mechanisms that might produce disparate outcomes often entail subsequent research beyond simple documentation of the disparities, the proposition that such disparities should never even be disclosed prevents any deliberate intervention.

The IRS is in the best position to produce statistics on racial disparities in tax enforcement. Not only is the IRS most familiar with its own procedures and thus best placed to track them, the IRS is also provided the most access to taxpayer information under the privacy protections of the Internal Revenue Code.<sup>255</sup> The IRS also already has

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<sup>252</sup> See NAT'L RSCH. COUNCIL, *supra* note 73, at 23–24. This is why the NAACP, MALDEF, ACLU and others advocated against the Racial Privacy Ballot Initiative in California that sought to ban questions about race on government forms. See Dean E. Murphy, *Affirmative Action Foe's Latest Effort Complicates California Recall Vote*, N.Y. TIMES (Aug. 3, 2003), <https://www.nytimes.com/2003/08/03/us/affirmative-action-foe-s-latest-effort-complicates-california-recall-vote.html> [<https://perma.cc/3B3F-MJ8N>]. The initiative lost two-to-one. *California Voters Overwhelmingly Reject Ward Connerly's Ban on Race Data Collection*, AM. C.L. UNION (Oct. 15, 2003), <https://www.aclu.org/press-releases/california-voters-overwhelmingly-reject-ward-connerlys-ban-race-data-collection> [<https://perma.cc/B2RY-M6UR>].

<sup>253</sup> Proposals to address racial inequality in criminal justice, public health, housing, and employment would all seem unnecessary if there was no documentation of inequality. See, e.g., Allen Fremont & Nicole Lurie, *The Role of Racial and Ethnic Data Collection in Eliminating Disparities in Health Care*, in NAT'L RSCH. COUNCIL, *ELIMINATING HEALTH DISPARITIES: MEASUREMENT AND DATA NEEDS 202–03* (Michele Ver Ploeg & Edward Perrin eds., 2004) (highlighting the importance of widespread and reliable data to both identifying and mitigating racial disparities in healthcare). Often, awareness of race is such a basic element of a study of racial inequality that it goes unacknowledged as an important step in a research design. See, e.g., *supra* notes 23–29 (where documentation of disparities by race in criminal law enforcement then lead to inquiries about the causes of such disparities).

<sup>254</sup> See Deborah Archer, *Good Governance Paper No. 16: Legislating Racial Equity Impact Studies in Transportation Infrastructure Policy*, JUST SEC. (Oct. 30, 2020), <https://www.justsecurity.org/73128/good-governance-paper-no-16-legislating-racial-equity-impact-studies-in-transportation-and-infrastructure-policy> [<https://perma.cc/8WM5-XTE2>] (arguing that equity studies will help governments uncover structural conditions that perpetuate racial inequality); R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1549–50 (2011) (encouraging audits that look at cumulative racial disadvantages over time, rather than a focus on intentional discrimination).

<sup>255</sup> See I.R.C. § 6103(h)(1) (establishing that tax return information is generally open to tax administration officials without requiring written requests).

the capacity to assess racial disparities in tax enforcement without adding a new question to its tax forms. Matching techniques allow the IRS to pair demographic data from non-tax datasets to tax return information, while imputation techniques allow for missing demographic information to be imputed using known information, such as surname and zip code.<sup>256</sup> As one scholar noted to an audience of tax policy experts, merging this data is a question of “political will” rather than one of technological capacity for the IRS.<sup>257</sup> The IRS Statistics of Income Division also has sufficient discretion to conduct such studies; indeed, it could be argued that the plain language of section 6108 already requires inclusion of race and ethnicity in some published analyses.<sup>258</sup>

The use of matching or imputation to provide racial breakouts of IRS enforcement activity avoids the potential risks of adding a race question to tax forms.<sup>259</sup> This should appease those who believe that racial bias in tax enforcement would become more likely were taxpayers asked their race or ethnicity. The IRS also has procedures for compartmentalizing certain taxpayer data at different stages of an enforcement activity or from certain staff altogether.<sup>260</sup> Race data could be included in a taxpayer record for some purposes and not others.

Initial reporting of tax enforcement statistics by race and ethnicity could follow the standard practices used by other federal agencies to comply with nondiscrimination requirements.<sup>261</sup> For example, the IRS could disclose the proportion of audited households by race and ethnicity, rather than requiring both Congress and the

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<sup>256</sup> Bearer-Friend, *supra* note 22, at 64–65 (describing available imputation and matching techniques).

<sup>257</sup> *Data Infrastructure in the 21st Century: A Focus on Racial Equity*, WASH. CTR. FOR EQUITABLE GROWTH, at 1:14:20 (June 15, 2021), <https://equitablegrowth.org/event/data-infrastructure-for-the-21st-century-a-focus-on-racial-equity> [<https://perma.cc/DL3D-BZWE>] (statement of Randall Akee).

<sup>258</sup> See I.R.C. § 6108(a) (“The Secretary shall prepare and publish not less than annually statistics reasonably available with respect to the operations of the internal revenue laws, including classifications of taxpayers and of income, the amounts claimed or allowed as deductions, exemptions, and credits, *and any other facts deemed pertinent and valuable.*” (emphasis added)).

<sup>259</sup> Bearer-Friend, *supra* note 22, at 60–61.

<sup>260</sup> See Nathan Richman, *Tax Court Becoming Comfortable With the APA*, TAX NOTES (Apr. 26, 2021), <https://www.taxnotes.com/tax-notes-federal/collection-due-process-cdp/tax-court-becoming-comfortable-apa/2021/04/26/52gyz> [<https://perma.cc/MSE8-PGCB>] (“I have to say, ‘I’m so sorry, I don’t have access to that.’ I wish I could log into my computer and see everything that they’ve ever sent to the IRS . . . and see their tax returns, and it’s not that simple . . .”).

<sup>261</sup> For a summary of the race and ethnicity statistics provided by agencies other than the IRS, see Bearer-Friend, *supra* note 22, at 3–4.

public to rely on media reports to determine racial disparities in enforcement. This reporting could also follow the model of IRS reporting on diversity statistics of its own employees.

## 2. *Bias Interrupters*

With improved data practices, the IRS will have a better sense of where to focus its attention in averting racial bias in enforcement. But the data alone will not remedy racial bias in tax enforcement. Data are merely the first step to intervention. Improved data must ultimately be combined with racial bias interrupters.<sup>262</sup> Because of the potentially explosive political liability of making public the problems of racial bias in tax enforcement before acting on them, adopting bias interrupters preemptively may also provide a record of commitment to racial equity at the IRS.

The IRS already has an existing foundation for dealing with racial bias in its approach to employment nondiscrimination. Through its Office of Equity, Diversity, and Inclusion (EDI), the IRS implements the requirements of the Equal Employment Opportunity Commission, mandated under the Civil Rights Act of 1964. This includes monitoring and evaluating compliance through periodic agency self-assessments.<sup>263</sup> The efforts:

[H]elp[] identify program limitations and uncover potential discrimination of equal opportunities for all employees. [EDI] also provides EEO plans to remove barriers and respond to problems. The EDI staff develops action plans to eliminate barriers and correct program deficiencies to ensure compliance with the following six essential elements of a model EEO program . . . .<sup>264</sup>

Within the context of employment nondiscrimination, the IRS asks employees to identify their race and ethnicity, without assuming such disclosure produces racial bias. Instead, the IRS uses these data to evaluate the extent of racial bias in its hiring practices.<sup>265</sup> The IRS

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<sup>262</sup> See Joan C. Williams, Denise Lewin Loyd, Mikayla Boginsky & Frances Armas-Edwards, *How One Company Worked to Root Out Bias from Performance Reviews*, HARV. BUS. REV. (Apr. 21, 2021), <https://hbr.org/2021/04/how-one-company-worked-to-root-out-bias-from-performance-reviews> [<https://perma.cc/W4J6-62E2>] (describing the successful use of bias interrupters in the workplace). Bias interrupters are designed to change systems of racial bias rather than individuals.

<sup>263</sup> See INTERNAL REVENUE SERV., CRIMINAL INVESTIGATION ANNUAL REPORT 2019, at 53 (2019).

<sup>264</sup> *Id.*

<sup>265</sup> See INTERNAL REVENUE SERV., PUB. NO. 5465, MANAGEMENT DIRECTIVE MD-715 ANNUAL REPORT: FISCAL YEAR 2020, at 36–39 (2021) [hereinafter I.R.S. PUB. NO. 5465]. As noted previously, the IRS has a more diverse staff than the median civilian agency. INTERNAL REVENUE SERV., *supra* note 6, at 70.



could expand the scope of EDI review to evaluate potential racial bias in tax enforcement activity.

EDI is especially committed to improving awareness of racial bias in order to interrupt it. Rather than assuming that racial bias does not exist amongst IRS personnel, EDI expects managers to recognize the race and ethnicity of their employees in an effort to combat implicit bias.<sup>266</sup> This approach has been recommended as a bias interrupter in criminal law contexts and could be applied in tax enforcement.<sup>267</sup>

Attention to race and ethnicity would also address automated IRS procedures vulnerable to racial bias. If racial bias has affected a substantial proportion of past enforcement decisions, then statistical or machine learning processes that seek to derive enforcement algorithms from past returns will create predictive models that reproduce racial bias. As a number of scholars have demonstrated, the modeling of racial bias cannot be stopped by omitting race or obvious proxies like zip code from the data that is analyzed to create the predictive tool.<sup>268</sup> It is virtually certain that a dataset that is rich enough to produce reasonably good predictions about likelihood of tax evasion—which would contain details ranging from the number of dependents claimed to the number and sources of wage income and the types of deductions taken—could also reasonably predict the race of taxpayers. If it can, then the analytical process that seeks to find patterns predictive of discovered tax evasion will end up modeling race if racial bias affected enforcement decisions in cases included in that dataset. Eliminating variables from the dataset until race can no longer be pre-

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<sup>266</sup> See I.R.S. PUB. NO. 5465, *supra* note 265, app. B, INTERNAL REVENUE SERV.: AGENCY FIN. REP. FY 2020 TREASURY ONE REPORT, at 4–5. See also U.S. DEP'T OF THE TREASURY, OFF. OF C.R. AND DIVERSITY, DIVERSITY AND INCLUSION & EQUAL EMPLOYMENT OPPORTUNITY STRATEGIC PLAN: FISCAL YEARS 2021-2024, at 24, 33 (2021) <https://home.treasury.gov/system/files/306/2021-00362-OCRD-2021-2024-DandI-Strategic-Plan-0409.pdf> [<https://perma.cc/29BK-YK9G>] (describing similar policies addressing implicit bias at the Department of the Treasury, which oversees the IRS).

<sup>267</sup> See Cynthia Lee, (*E*)*Racing Trayvon Martin*, 12 OHIO ST. J. CRIM. L. 91, 95 (2014) (“I offer a common-sense solution to the intransigent problem of racial bias: calling attention to race to encourage jurors to consciously combat stereotypical thinking.”). Calling attention to race in a systematic way through IRS procedures should be distinguished from general diversity trainings. See generally Katerina Bezrukova, Chester S. Spell, Jamie L. Perry & Karen A. Jehn, *A Meta-Analytical Integration of Over 40 Years of Research on Diversity Training Evaluation*, 142 PSYCH. BULL. 1227 (2016) (reviewing types of diversity trainings and their effectiveness).

<sup>268</sup> See Devin G. Pope & Justin R. Sydnor, *Implementing Anti-Discrimination Policies in Statistical Profiling Models*, 3 AM. ECON. J.: ECON. POL'Y 206–07 (2011); Anya E. R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. REV. 1257, 1275, 1303 (2020); Zach Harned & Hanna Wallach, *Stretching Human Laws to Apply to Machines: The Dangers of a “Colorblind” Computer*, 47 FLA. ST. U. L. REV. 617, 634 (2019).

dicted—what Yang and Dobbie call an “excluding-inputs algorithm”—would almost certainly result in a thin dataset that would be useless for predicting tax evasion.<sup>269</sup>

The equal protection algorithm approaches developed by Yang and Dobbie necessitate inclusion of race and ethnicity in order to prevent racial bias.<sup>270</sup> In their “colorblinding-inputs algorithm,” demographic information is included as an input in order to reduce the bias of outputs.<sup>271</sup> This approach is more promising than the “excluding-inputs algorithm,” where all correlates to race must also be removed, which would be unfeasible in a tax enforcement context where income is an often dispositive taxpayer characteristic.<sup>272</sup> The inclusion of the direct variable of race ensures that none of the other variables gain weights that reflect their ability to predict race. Importantly, when the resulting algorithm is applied to make a prediction about whether a particular taxpayer is likely evading taxes, the data about that particular taxpayer provided to the algorithm does not differentiate by race. In that respect, the prediction is “colorblind” both in the sense that the predictive tool does not reflect any racial bias in the training data, and in the sense that the prediction is not made on the basis of any information about the race of the particular taxpayer. Yet to apply that de-biasing technique, the IRS research division that designs examination algorithms would need demographic information about taxpayers included in its training data.

### B. External Oversight

Reliance on outside agencies to guard against racial bias in tax enforcement within the IRS is likely to be insufficient for ensuring the absence of racial bias. The IRS is principally responsible for its own actions, and the work of eliminating racial bias cannot be entirely outsourced. IRS internal controls *in combination* with external oversight, however, would provide the best protections against racial bias in tax enforcement. This includes both formal oversight mechanisms by other federal institutions, and informal oversight mechanisms enabled by better data practices within the IRS.

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<sup>269</sup> Crystal S. Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework*, 119 MICH. L. REV. 291, 344–45 (2020).

<sup>270</sup> *Id.* at 298–99.

<sup>271</sup> *Id.* at 346 (“[T]he key feature of the colorblinding-inputs algorithm is that it explicitly uses race in the estimation step in order to colorblind all nonrace inputs, and then ignores individual race information in the prediction step.”).

<sup>272</sup> *Id.* at 344.

## 1. *Formal Oversight*

The IRS already provides deidentified, aggregate tax data to many outside government bodies. Some of the recipients include the Joint Committee on Taxation in Congress (JCT), the U.S. Census Bureau, and the Board of Governors of the Federal Reserve.<sup>273</sup> Although to date these recipients have not prioritized analysis for racial bias in general, or bias in tax enforcement specifically, such analysis could be done. For purposes of Congressional oversight, JCT is particularly well-suited to evaluate these data for racial bias in tax enforcement.<sup>274</sup>

Entities with legal obligations to oversee the activities of the IRS could also begin to review tax enforcement actions for racial bias. For example, the office of the National Taxpayer Advocate could include analysis by race in its annual reports to Congress. To date, race and ethnicity have never been a focus of their otherwise comprehensive annual reports.<sup>275</sup> The Federal Coordination and Compliance Section (FCS) within DOJ's Civil Rights Division is also well positioned to review tax enforcement actions for racial bias.<sup>276</sup> Lastly, the Treasury Inspector General for Tax Administration (TIGTA) could conduct greater oversight of potential racial bias in tax enforcement.<sup>277</sup>

## 2. *Informal Oversight*

Oversight of racial bias in tax enforcement can also be achieved by entities working outside of government. These informal oversight mechanisms may even be more impactful than formal government oversight alone. Many past IRS reforms began as a result of publications outside of the IRS that garnered public attention. Both the "Tea Party" scandal, regarding tax-exempt status of conservative organizations, and the "collections controversy," regarding collection of tax

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<sup>273</sup> IRM 1.1.18.1.4 (Sept. 28, 2018).

<sup>274</sup> This recommendation is based on JCT's existing staff capacity and expertise, its embedded role in the tax legislative process, and its access to taxpayer data. See NICHOLAS H. GREENIA, INTERNAL REVENUE SERV., STATISTICAL USE OF U.S. FEDERAL TAX DATA, 4 (2008), <https://www.irs.gov/pub/irs-soi/08rpsstatusegreenia.pdf> [<https://perma.cc/6SPQ-HMQN>].

<sup>275</sup> See, e.g., NAT'L TAXPAYER ADVOC., *supra* note 168, at ii–iv (noting the National Taxpayer Advocate's responsibility to identify the most serious problems faced by taxpayers, none of which in 2020 included racial bias).

<sup>276</sup> FCS "ensures that all federal agencies consistently and effectively enforce civil rights statutes and Executive Orders that prohibit discrimination in federally conducted and assisted programs and activities." *Federal Coordination and Compliance Section*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/fcs> [<https://perma.cc/BBF6-QNY5>].

<sup>277</sup> TIGTA has not made racial bias a priority in its testimony before Congress on tax administration. See *supra* notes 54–56 and accompanying text.

debts, led to institutional accountability and substantial reform within the IRS.<sup>278</sup>

One important informal oversight mechanism to guard against racial bias in tax enforcement is the press. The ProPublica reporting on disparate audit rates is just one example of the impact that freely available media coverage can have.<sup>279</sup> In other policy domains, the public availability of federal data by race is a crucial lever of accountability.<sup>280</sup> Current IRS data practices prevent such accountability.

Academic research is an additional informal oversight mechanism. Scholars can pursue research questions on racial bias in tax enforcement that government actors may be too hesitant to pursue due to potential political consequences. Although outsiders generally do not have full access to the taxpayer data available to the IRS, nor do they have the same resources as the federal government, independent investigations have already garnered the attention of Congress in the design of the Internal Revenue Code.<sup>281</sup> Academic scholarship can also inform press attention, bringing together both forms of informal oversight.<sup>282</sup>

Informal oversight is not a substitute for improved IRS data practices, however. Neither the press nor outside academics have easy access to the full scope of data available to those within the IRS. The motivations of academics and the press are also different than those of public servants, with novelty prioritized over consistency. And the ability to respond to the data quickly is different, with internal IRS review of tax enforcement activities by race more directly connected

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<sup>278</sup> See Leandra Lederman, *IRS Reform: Politics As Usual?*, 7 COLUM. J. TAX L. 36, 38–39, 55 (2016). In the case of the Tea Party, IRS personnel acknowledged at a tax conference that organizations seeking tax-exempt status received extra scrutiny if the term “Tea Party” appeared in their application. *Id.* at 43, 53. This raised fears of political targeting by the executive branch that led to legislation which provided additional procedures for contesting IRS collections and increased penalties on employees found to be targeting filers based on presumed ideology. *Id.* at 67–68. In the case of the collections controversy, concerns over IRS seizure of property without due process led to an entire restructuring of the Tax Exempt and Government Entities division of the IRS. *Id.* at 62.

<sup>279</sup> Kiel & Fresques, *supra* note 2.

<sup>280</sup> See, e.g., Danielle Douglas-Gabriel & John D. Harden, *To Protect Taxpayer Dollars, the Education Dept. Is Disproportionately Auditing Black and Latino College Students*, WASH. POST (Feb. 7, 2021, 8:06 AM), <https://www.washingtonpost.com/education/2021/02/07/fafsa-verification-black-latino-college-aid> [<https://perma.cc/2JCV-XXRB>] (bringing to light racial disparities in audit rates of student aid applications).

<sup>281</sup> See *Combating Inequality: The Tax Code and Racial, Ethnic, and Gender Disparities: Hearing Before the S. Comm. on Fin.*, 117th Cong. (2021) (statement of Dorothy A. Brown, Asa Griggs Candler Professor of Law, Emory University School of Law) (testifying to Congress as to the ways the tax code perpetuates racial inequality).

<sup>282</sup> See, e.g., Kat Eschner, *Why It Matters That Race and Ethnicity Aren't Recorded By the IRS*, POPULAR SCI. (June 23, 2020, 10:00 AM), <https://www.popsoci.com/story/health/irs-taxes-race-ethnicity> [<https://perma.cc/3BT8-BKVQ>].

to IRS decisionmakers than outside academic or journalist agitators. The ability of outsiders to improve transparency of potential racial bias in tax enforcement would not justify maintaining current internal IRS practices.

### C. *Ongoing Challenges in Defining Racial Equity*

In this Article, I have presented three distinct models of racial bias that remain possible in tax enforcement contexts under current IRS policy. My inclusion of multiple models reflects the ongoing academic debate over what constitutes racial bias in tax policy and is suitable for an academic inquiry into discriminatory tax enforcement. But an audience within the IRS will need to commit to a specific definition of racial equity for its own oversight of potential racial bias in tax enforcement. Too much variation across definitions would likely undermine IRS implementation of a racial equity agenda.<sup>283</sup> Where the IRS ultimately lands in its definition of racial equity in tax enforcement will of course shape what interventions it pursues.

By one standard, racial equity in tax enforcement is achieved simply by removing bias. It is a negative definition comprised of absence rather than presence. To the extent there is no racial animus, implicit bias, or transmitted bias, then there is racial equity in tax enforcement. And to the extent the IRS selects only one definition of bias, then only one type of bias must be absent. Prioritizing the absence of either animus or implicit bias would align with a focus on disparate processes, rather than disparate outcomes. Enforcement procedures would be designed in ways to prevent the bias of an individual from determining a tax enforcement outcome without requiring equivalent enforcement outcomes across racial groups. By contrast, were the IRS to prioritize the absence of transmitted bias in its definition of racial equity, then measuring disparate outcomes becomes the primary way to trace the absence of transmitted bias; the initial bias

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<sup>283</sup> For a thorough elaboration of how differences in the definition of “progressivity” produce different tax policy choices, see Manoj Viswanathan, *Rethorizing Progressive Taxation*, TAX L. REV. (forthcoming 2022) (manuscript at 11–33), <https://ssrn.com/abstract=3465029> [[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3465029](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3465029)]. Such challenges are also present in metrics related to racial equity. See, e.g., Francisca D. Fajana & Camille D. Holmes, *Advancing Racial Equity – A Legal Services Imperative*, 47 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 139, 144–45 (highlighting how a lack of consensus among legal services providers about definitions of racism and racial justice undermines the goal of furthering racial equity).

occurred outside the scope of IRS action, so enforcement outcomes are the primary locus of control for the IRS.<sup>284</sup>

Should the IRS prioritize a concern over disparate outcomes, the importance of defining what constitutes a disparity also grows. What does it mean for a particular group of taxpayers to be “over-represented” in tax summons enforcement, for example? Should we assume that the underlying noncompliance that led to the disproportionate enforcement has equal rates across groups? Or would we need to know that underlying distribution of noncompliance to then base any estimate of disproportionate enforcement and direct interventions at disparate rates of noncompliance? And would taxpayer characteristics that correlate with race also be removed from the analysis?

One commonly adopted standard for evaluating disparities in tax outcomes is to examine “similarly situated” taxpayers under the principle of horizontal equity.<sup>285</sup> This approach asks whether similarly situated taxpayers are taxed similarly and has been applied when analyzing racial disparities in the Internal Revenue Code.<sup>286</sup> Extending the principle further to a definition of racial equity in tax enforcement, the horizontal equity analysis would look to whether two taxpayers of different races but otherwise similar characteristics are treated differently in an IRS enforcement setting. Here, the income characteristics of the taxpayers would be treated as fixed, so that race can be isolated as the driving factor in the disparate outcome.<sup>287</sup> A limitation of this approach is the way that some of the most important features of racial inequality might be dropped from the analysis. If racial discrimination produces different incomes, by fixing incomes when comparing tax enforcement outcomes, we are removing an important aspect of racial discrimination from the analysis. This is especially an issue under the transmitted bias model of tax enforcement, where disparate outcomes analysis is most important.

A second question in measuring racial disparities in tax enforcement is the scope of tax provisions included in the enforcement out-

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<sup>284</sup> A focus on addressing transmitted bias at the IRS may prove most politically viable, as it does not require a “mea culpa” by the IRS acknowledging tax enforcement actions have previously been influenced by racial animus or implicit bias.

<sup>285</sup> See Beverly Moran, *Exploring the Mysteries: Can We Ever Know Anything About Race and Tax*, 76 N.C. L. REV. 1629, 1635–36 (1998) (using the “similarly situated” approach to counter claims made by Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1565 (1998) that the tax code and its implications for racial equity, if measured against a consumption tax ideal, could be conceived as favoring Black taxpayers over white taxpayers).

<sup>286</sup> See Moran & Whitford, *supra* note 20, at 753; BROWN, *supra* note 16, at 11–12, 209.

<sup>287</sup> This is sometimes referred to as the but-for theory of antidiscrimination law. Eyer, *supra* note 75 (manuscript at 17).

comes under study. Many studies on racial disparities in the Internal Revenue Code have looked provision-by-provision, with a cumulative implication for overall distribution.<sup>288</sup> This has been challenged as potentially misleading, if the cumulative effect is racially neutral.<sup>289</sup> For evaluating disparities in enforcement, analysis would need to consider whether abatement of a civil penalty assessment, for example, would need to be netted against disparate selection for audit in order to determine an overall racial bias.

A final approach to racial equity in tax enforcement would be to reject the use of white baselines for determining racial equity. This is what is proposed by Kohler-Hausmann from the standpoint of a constructivist theory of race.<sup>290</sup> According to Kohler-Hausmann's alternative standard, "[a]n adequate theory of discrimination must rest upon (1) an account of the system of social meanings or practices that constitute the categories at issue and (2) a moral theory of what is fair and just in various state and private arenas *given* what the categories are."<sup>291</sup> Nevertheless, the use of white taxpayer baselines could be an indication that racial equity principles have been violated, even though the disparity is not an injustice per se.

Despite the challenges in defining racial equity in tax enforcement, complexity is not an excuse for total inaction. As documented by this Article, vulnerability to racially biased tax enforcement is too widespread to accept the IRS's purported colorblind enforcement position as a permanent status quo.

## CONCLUSION

This Article asks: Under what conditions is racial bias in tax enforcement possible? After providing three original models of racial bias in tax enforcement, this Article then determines that such conditions can be present across every major enforcement function of the IRS, including appeals, collections, and criminal investigations. This

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<sup>288</sup> See, e.g., Thomas S. Neubig, *Disparate Racial Impact: Tax Expenditure Reform Needed*, TAX NOTES STATE (Mar. 8, 2021), <https://www.taxnotes.com/tax-notes-state/tax-policy/disparate-racial-impact-tax-expenditure-reform-needed/2021/03/08/3k5dq> [<https://perma.cc/HK9M-7QT8>] (focusing primarily on the racially disparate impact of tax expenditures provisions).

<sup>289</sup> See Lawrence Zelenak, *Examining the Internal Revenue Code for Disparate Racial Impacts*, TAX NOTES FED. (Sept. 7, 2020), <https://www.taxnotes.com/special-reports/capital-gains-and-losses/examining-internal-revenue-code-disparate-racial-impacts/2020/09/04/2cx24> [<https://perma.cc/SBL5-5ZQN>] (arguing that the level of granularity at which one approaches tax code provisions is an under-considered factor in racial disparity analyses).

<sup>290</sup> See Kohler-Hausmann, *supra* note 75, at 1171 (noting that under this theory, "we must reject attempts to detect racial discrimination that seek to isolate the causal effect of race alone").

<sup>291</sup> *Id.* at 1163–64.



finding is a direct rebuttal to the IRS proposition that because the IRS does not ask taxpayers to identify their race or ethnicity, the IRS cannot discriminate. Although current IRS data practices prevent the public from determining the full scope of racial bias in tax enforcement under current law, the credible risks identified here demonstrate the ongoing threat of racial bias in tax enforcement that will persist absent an immediate change to IRS policy and practice.