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Caregivers and Tax Reform: Before and after Snapshots

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CAREGIVERS AND TAX REFORM: BEFORE AND AFTER SNAPSHOTS

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The Tax Cuts and Jobs Act (TCJA) changed the way families are taxed, starting in tax year 2018. By rearranging a myriad of deck chairs, politicians painted rosy pictures of families reaping the benefits of tax reform. In reality, however, generalizations cannot be made, and the extent to which any one family gains or loses depends on particular facts. Even more obscured is the way in which the TCJA changed — and failed to change — the taxation of different types of caregivers. This article seeks to provide needed clarity in this area.

It begins by offering snapshots of how parents of minor children were taxed immediately prior to and after the TCJA's enactment. Specifically, while the TCJA expanded some of the general benefits available to parents of minor children, it failed to expand — and in critical cases, even preserve — specific benefits that are contingent on "parenting model." For instance, the TCJA departed from historical norms by rolling back benefits reserved for unmarried parents and failed to make long over-due inflation adjustments to provisions of the Code that allow dual earning couples and unmarried parents (but not sole earning couples) to recover childcare costs incurred to work outside the home. These snapshots reveal how Congress, through the TCJA, picked winners and losers, enacting tax reform that disproportionately favored sole earners at the expense of other parents.

Next, this article turns to other types of caregiving, such as elder care and develops two more pre- and post-reform snapshots. These pictures show how the inequities that result from Congress's favoritism of sole earners extend to other caregiving arrangements and how these inequities compound for members of the "sandwich generation" who provide both parental and nonparental care. In the end, this article develops a series of snapshots that contrast starkly with rosy political rhetoric and reveal that the TCJA not only failed to address many pre-existing tax inequities between caregivers but also made them worse.

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I. INTRODUCTION

The Tax Cuts and Jobs Act (TCJA) changed the way families are taxed starting in tax year 2018.[1] Politicians painted rosy pictures of families reaping the benefits of tax reform.[2] For example, President Donald Trump boasted that the TCJA was the "biggest tax cut and reform in American history" and provides "tremendous relief for working families;"[3] the U.S. Department of Treasury's website casts the TCJA as "historic legislation" that "delivers relief to American Families through tax cuts and vital reforms;"[4] and the website for the U.S. House of Representative's Committee on Ways and Means states that "the Tax Cuts and Jobs Act helps Americans of all walks of life."[5] In reality, however, such generalizations cannot be made, and the extent to which any one family gains or loses depends on particular facts.[6] Even more obscured is the way in which the TCJA changed — and failed to change — the relative taxation of taxpayers with different caregiving responsibilities. This article seeks to provide much-needed clarity in this area.

To do so, this article first develops snapshots showing how parents of minor children were taxed immediately before and after tax reform. There are numerous (and constantly evolving) ways in which American parents allocate the responsibilities of earning income and providing personal care to children. America is no longer a country of sole earners.[7] But the Internal Revenue Code (the Code) has historically made few differentiations among "parenting models." Instead, Congress has preferred to tax similarly situated

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1 Amendment of 1986 Code (Tax Cuts and Jobs Act), Pub. L. No. 115-97, 131 Stat. 2054 (2017) (codified as amended in scattered sections of 26 U.S.C.). Many commentators refer to this legislation as the "Tax Cuts and Jobs Act" or "TCJA," although it was not the official name of the Act passed and signed into law.

2 S.A. Miller, *Trump Riding High on Tax Cut Boon: Unleashed Economic Miracle,* WASH. POST, June 29, 2018, at 2, https://www.washingtontimes.com/news/2018/jun/29/trump-tax-cut-boon-unleashed-economic-miracle/ ("'At last, our country finally has a tax system that is pro-jobs, pro-worker, pro-family and pro-America,' the president said at a White House event Friday marking six months to the day since he signed the tax cuts into law.").

3 Press Release, White House, President Donald J. Trump's Tax Cuts are Helping American Families Get Ahead (Apr. 15, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-tax-cuts-helping-american-families-get-ahead/.

4 U.S. DEP'T OF THE TREASURY, TAX CUTS FOR THE AMERICAN FAMILY, https://home.treasury.gov/policy-issues/top-priorities/tax-cuts-and-jobs-act/tax-cuts-for-the-american-family.

5 U.S. HOUSE OF REPRESENTATIVE, COMMITTEE WAYS AND MEANS, THE TAX CUTS AND JOBS ACT TAXPAYER EXAMPLES: TAX HOW THE TAX CUTS AND JOBS ACT HELPS AMERICANS OF ALL WALKS OF LIFE, https://republicans-waysandmeansforms.house.gov/uploadedfiles/tax_payer_examples.pdf.

6 *See, e.g.*, Elaine Maag, *How the Tax Cuts and Jobs Act Reduced the Value of the Childcare Credit*, TAX POL'Y CTR..: TAXVOX, (Nov. 27, 2018) https://www.taxpolicycenter.org/taxvox/how-tax-cuts-and-jobs-act-reduced-value-child-care-credit.

7 *See, e.g.*, PEW RES. CTR., THE AMERICAN FAMILY TODAY (Dec. 17, 2015), http://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today/ (summarizing statistics on rise of dual earners and unmarried parents).

parents — i.e., parents caring for the same number of dependent children and earning the same taxable income — homogenously, favoring general benefits for all parents over specific benefits that are contingent on parenting model.[8]

The Code does contain a few of these specific benefits. First, the Code has traditionally allowed unmarried parents and dual earning married parents to recover a modest portion of the childcare costs they incur to work (and which their sole earning married counterparts will not have to since they retain a parent in the home).[9] However, because Congress failed for decades to adjust these benefits for both inflation and the rising cost of childcare, parents with enough income to claim these benefits were often able to recover only a fraction of their actual costs.[10] And because these "dependent care benefits" have never been refundable, dual earners and unmarried parents of lower income levels did not benefit at all — they were taxed just like their sole earner married counterparts who did not have to incur childcare expenses to work.[11] Second, in addition to these modest dependent care benefits, unmarried parents who qualify as heads of household (generally because they provide primary care to a minor child) have traditionally been entitled to apply a tax rate schedule and claim a standard deduction that is more generous than the rates and deductions applicable to other unmarried taxpayers.[12]

But while the TCJA expanded some benefits generally available to parents with primary care of minor children, it either ignored or curtailed the specific benefits that are contingent on parenting model. For instance, it rolled back the beneficial head of household rates[13] and did not make dependent care benefits for childcare refundable or give them long overdue inflation adjustments.[14] These snapshots reveal that Congress, through the TCJA, picked winners and losers, disproportionately favoring sole earners (who only gained but did not lose benefits) over all other parents (who had benefits taken away).

But parents of minor children are not the only people who provide personal care to others. Adult family members fall ill. And, given the aging

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[8] *See, e.g.*, Pamela Gann, *The Earned Income Deduction: Congress' 1981 Response to the Marriage Penalty*, 68 CORNELL L. REV. 468, at 475 (1983) ("Congress's adoption in 1948 of the criterion that 'equal income married couples pay equal taxes' reflected a system designed for a society largely composed of one-worker married couples.").

[9] I.R.C. § 21.

[10] Shannon Weeks McCormack, *America's (D)evolving Childcare Tax Laws*, 53 U. GA. L. REV. 1093 (2019).

[11] *Id.* at 1165 (explaining history of non-refundability of dependent care credits).

[12] *Standard Deduction, 1970 to 2019,* TAX PO'LY CTR. (Jan. 31, 2020), https://www.taxpolicycenter.org/statistics/standard-deduction (showing pattern of allowing heads of household a standard deduction that is roughly average the deduction available to MFJ and UM taxpayers); *Federal Individual Income Tax Rates History*, TAX FOUNDATION, https://files.taxfoundation.org/legacy/docs/fed_individual_rate_history_nominal.pdf (showing pattern of allowing heads of household rates to break at rough average of MFJ and UM breaks).

[13] Amendment of 1986 Code (Tax Cuts and Jobs Act), *supra* note 1.

[14] McCormack, *supra* note 10.

of the baby boomer generation, American families increasingly find that elderly relatives require personal care as well.[15] This article next turns to other types of caregiving and develops two more pre- and post-reform snapshots. These snapshots expose how the inequities that result from Congress's favoritism of sole earners extend to other caregiving arrangements and compound for members of the "sandwich generation"[16] who provide both parental and nonparental care.

In the end, the snapshots developed in this article stand in stark contrast to the rosy pictures painted by politicians. Rather than helping families of "all walks of life,"[17] the TCJA not only failed to address pre-existing tax inequities between caregivers but also made them worse.

This article proceeds as follows: Part I provides a snapshot of the way in which parents of minor children were taxed immediately prior to and after the TCJA's enactment and shows how the TCJA's failure to expand and, in some cases, even maintain benefits contingent on parenting model disproportionately favored sole earners; Part II turns to other types of caregiving, such as elder care, and shows how the inequities described in Part I extend and compound for taxpayers with other caregiving obligations; Part III synthesizes the snapshots discussed in the previous Parts and sketches avenues for future conversations about the taxation of caregivers, which will be undertaken in companion work. A brief conclusion follows.

II. PARENTING MINOR CHILDREN

There are many types of caregiving arrangements. It makes sense to begin a discussion about the taxation of caregivers by focusing on parents of minor children for three reasons. First, the Code provides specific benefits to those who undertake these caregiving roles. Second, minor children generally require both personal and financial care. Of course, one might reasonably argue about the age at which this ceases to be true, but most people think young children (however the margins are drawn) must be cared for to be safe, let alone thrive. Third, it is well accepted that parents have an obligation to provide this personal care to their minor children.

The Code (both pre- and post-reform) divides parents of minor children (hereinafter parents) using bright lines. First, parents that are married under federal law are separated from those that are unmarried, regardless of cohabitation.[18] Next, sub-categories emerge. Married parent families are sub-categorized based on the number of wage earners. Married parents fall into the sole earner category if one parent earns every dollar of taxable income, and they fall into the dual earner category if both parents earn some income

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[15] *Id.*

[16] *See infra* notes 116–118.

[17] *See* COMMITTEE WAYS AND MEANS, *supra* note 5.

[18] I.R.C. § 1(a)–(d).

in the external workforce.[19] By contrast, unmarried parent families are sub-categorized as (roughly) primary and nonprimary caregivers.[20] While the primary caregiver often qualifies as a head of household and is eligible for certain benefits attendant to that status, the nonprimary caregiver will generally be treated like any other unmarried individual.[21]

Much has been written to criticize these categorizations.[22] This article does not seek to contradict this work. Instead, it aims to clarify how the TCJA changed the relative taxation of the parenting models it acknowledges, something that is sorely needed given the complexity of tax reform and oversimplified political rhetoric surrounding it.

In order to do so, the remainder of this article considers five hypothetical taxpayers. The first two taxpayers do not have children but differ in marital status: "Franz Solo" is not married while "Thelma & Louise" are happily married to one another. The next three taxpayers each provide primary care to two minor children but employ three different parenting models to do so. "T'Challa & Nakia" are married and employ the dual earner model — that is, both parents are employed in the external workforce. Like them, "Ozzie & Harriet" are also married but only Harriet works outside the home (i.e., they are sole earners). Finally, "Shuri" is an unmarried parent who supports her two children through paid market labor. This analysis assumes that none of the taxpayers provides personal care to other dependents (e.g., elderly relatives). Part II expands the hypotheticals to incorporate other caregiving responsibilities.

A. Pre-TCJA

Assume first that each of the hypothetical taxpayers above have "positive tax liabilities" — that is, they have sufficient taxable income to absorb all nonrefundable tax benefits and, as a result, do not claim refundable credits such as the Earned Income Tax Credit (EITC) or Additional Child Tax Credit (ACTC) discussed in Part I.A.2. To understand how the Code differentiates between the parenting models it recognizes, it is helpful to first understand how taxpayers with the same taxable income but without children are taxed. The discussion, therefore, begins with Franz Solo and Thelma & Louise.

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[19] This category emerges because dual earners (but not sole earners) are eligible to recover a portion of childcare costs incurred while working. *See* I.R.C. §§ 21, 129.

[20] *See* I.R.C. § 2(b) (defining head of household).

[21] *See id.*

[22] *See, e.g.*, Anne Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX LAW REV. 695, 700 n.23 (2013) (citing "a number of scholars in taxation and family law [that] have questioned the law's reliance on outdated categories, including formal marriage and the nuclear family."); *see also* Anthony Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 3 UTAH L. REV. 605, 605 (2010).

1. Positive Tax Liabilities

a. Childless Unmarried Taxpayers

In 2017, all taxpayers could claim a standard deduction (a fixed dollar deduction that could be claimed in lieu of so-called itemized deductions, which include deductions for certain medical expenses,[23] charitable contributions,[24] and home mortgage interest[25]) and personal exemptions to reduce their taxable income. Together these two items created a "zero-bracket amount" — taxpayers earning less than the sum of these amounts would not have tax liability that year.

In 2017, the zero-bracket amount for unmarried, childless taxpayers was $10,400, comprised of a $6,350 standard deduction[26] and a personal exemption of $4,050[27] (unless one earned over $261,500, at which point the personal exemption phased out and was lost completely once taxable income exceeded $384,000).[28]

Presuming Franz Solo did not earn income exceeding the phase-out threshold, he could have reduced his taxable income by the zero-bracket amount and then applied the rates applicable to unmarried filers.[29] The United States utilizes a progressive income tax, taxing bands of income at increasing rates. In 2017, the rates for unmarried taxpayers were as follows:

TABLE I: 2017 TAX RATES FOR UNMARRIED FILERS[30]

Tax Rate	Income Band
10%	$0 and $9,325
15%	Between $9,326 and $37,950
25%	Between $37,951 and $91,900
28%	Between $91,901 and $191,650
33%	Between $191,651 and $416,700
35%	Between $416,701 and $418,400
39.6%	Above $418,400

b. Childless, Married Taxpayers

Thelma & Louise are married and do not care for minor children. In 2017, they could choose between two filing statuses available to all couples "married by the close of [the] taxable year."[31] The majority of married

[23] I.R.C. § 213.

[24] I.R.C.§ 170.

[25] I.R.C.§ 163(h).

[26] Rev. Proc. 2016-55.

[27] *Id.*

[28] *Id.*

[29] I.R.C. § 1(c).

[30] *See* Kyle Pomerleau, *2017 Tax Brackets*, TAX FOUND. (Nov. 10, 2016), https://taxfoundation.org/2017-tax-brackets/.

[31] I.R.C. § 7703 (defining marriage for purposes of filing status).

couples that filed one return together[32] claimed "married filing jointly"[33] (MFJ) status while those that filed two individual returns claimed the "married filing separately"[34] status. Assuming Thelma & Louise filed a joint return in 2017, they could have claimed a standard deduction that was double the amount unmarried taxpayers could claim — $12,700.[35] They also could have claimed two personal exemptions to reduce their taxable income by $8,100.[36] In 2017, the personal exemption phased out for MFJ taxpayers once adjusted gross income reached $313,800 (compared to the $261,500 amount applicable to unmarried taxpayers) and was lost completely once income reached $436,300 (compared to $384,000 for unmarried taxpayers).[37]

Thus, in 2017, the zero-bracket amount for MFJ taxpayers without dependents was $20,100 (double the amount available to an unmarried taxpayer like Franz Solo). Assuming Thelma & Louise claimed these benefits in full, they would have then applied the tax rates for "married filing jointly" status. A comparison of the 2017 tax rates for taxpayers that are unmarried (UM) and married filing jointly (MFJ) is as follows:

TABLE II: 2017 TAX RATES FOR UNMARRIED AND MFJ FILERS[38]

Tax Rate	Income Band UM	Income Band MFJ
10%	*$0 and $9,325*	*$0 and $18,650*
15%	*Between $9,326 and $37,950*	*$18,651 and $75,900*
25%	Between $37,951 and $91,900	$75,901 and $153,100
28%	Between $91,901 and $191,650	$153,101 and $233,350
33%	Between $191,651 and $416,700	$233,551 and $416,700
35%	Between $416,701 and $418,400	$416,701 and $470,000
39.6%	Above $418,400	Above $470,700

Thus, in 2017, the MFJ income bands were double the unmarried bands for only the lowest two tax brackets. In tax parlance, MFJ couples in these brackets enjoyed full "income splitting" — i.e., they were "treated. . .substantially as though they were two unmarried individuals each with half of the total income of the couple."[39] After income exceeded $75,901, however, the income bands for MFJ and unmarried taxpayers converged. With these baseline facts in mind, we turn to the taxation of parents in 2017.

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[32] *Statistics of Income Bulletin Historical Table 1*, IRS (Updated Nov. 19, 2019), https://www.irs.gov/statistics/soi-tax-stats-historical-table-1 (estimating that 95% of married couples filed joint returns in 2016).

[33] I.R.C. § 1(a).

[34] I.R.C.§ 1(d).

[35] Rev. Proc. 2016-55, *supra* note 26.

[36] *Id.*

[37] *Id.*

[38] Pomerleau, *supra* note 30.

[39] BERNARD D. JR. REAMS, INTERNAL REVENUE ACTS OF THE UNITED STATES: 1950-1951, LEGISLATIVE HISTORIES, LAWS AND ADMINISTRATIVE DOCUMENTS 11 (1982).

c. *Two Married Parent Taxpayers*

In 2017, T'Challa & Nakia and Ozzie & Harriet were entitled to the same tax benefits as married, childless taxpayers — a $12,700 standard deduction and personal exemptions worth $8,100 — and were also entitled to additional benefits because of their parental obligations.[40]

Married, childless taxpayers could have claimed two additional exemptions for their dependent children.[41] Biological, foster, and adopted children for whom parents provide primary care — meaning the child lives with the parent and the parent provides most of the financial and personal support — will generally qualify as dependents so long as they are younger than 19 years of age.[42] These exemptions were subject to the same income phase-outs applicable to married, childless taxpayers.[43] Assuming neither T'Challa & Nakia nor Ozzie & Harriet earned enough to be phased out, the zero-bracket would have been $28,900.

Thus far, only the increased personal exemption amount reflected the presence of dependent children. But in 2017, after applying applicable rates, some parents could also claim a $1,000 credit for each "qualifying child," allowing our taxpayers to reduce their tax liability by an additional $2,000.[44] In 2017, however, the full credit was only available to MFJ taxpayers if income did not exceed $110,000, at which point the credit phased out quickly and was lost once income exceeded $135,000.[45]

At this point, all of the benefits for which T'Challa & Nakia are eligible were precisely the same as those available to Ozzie & Harriet, despite the fact that they used different parenting models. In fact, there was only one benefit available to dual earners but not sole earners.

Dual earners like T'Challa & Nakia may have incurred sizeable costs to provide care for their children while working. For many families, childcare expenses will be the highest cost in their household budget, sometimes exceeding housing costs and in-state college tuition.[46] In 2017, the Code contained two provisions, allowing limited relief for these expenditures. First, dual earners could claim a dollar-for-dollar credit for childcare expenses to reduce their tax liability. However, the credit was capped. Once a family earned more than $43,000 (far less than the median income for all

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[40] I.R.C. § 67(c).

[41] I.R.C. § 152 (defining dependent).

[42] *See* I.R.C. §152(c) (defining "qualifying child" and noting that children may qualify as dependents between the ages 19 and 24 if they are students and individuals other than biological, foster and adopted children may qualify depending on their relationship with the taxpayer).

[43] I.R.C. § 151(d)(3); *see, e.g.,* Rev. Proc. 2016-55(.24) (2016) (promulgating personal exemption amounts and phase outs).

[44] I.R.C. § 24 (qualifying children must meet requirements to qualify as dependents but be older than 17 years of age).

[45] I.R.C. §151(d)(3); *see, e.g.,* Rev. Proc. 2016-55(.24), *supra* note 43.

[46] *Parents and the High Cost of Childcare*, CHILD CARE AWARE 20 (2017), https://usa.childcareaware.org/wp-content/uploads/2017/12/2017CCAHighCostReportFINAL.pdf.

families in 2017[47]),[48] they could credit no more than $1,200 for two or more children and $600 for one child.[49] Alternatively, they could claim an exclusion (to reduce their taxable income), limited by a $5,000 cap.[50] The actual tax savings of the exclusion depended on the family's marginal tax bracket but could never exceed $2,000 even for the richest taxpayers.[51]

But regardless of whether the exemption or credit was claimed, the relief dual earner received from these "dependent care benefits" was severely limited. As I have previously explained,[52] in many instances, working families received tax relief for only a fraction of their actual childcare costs. And, as I have also explained, this situation occurred because Congress failed for *nearly three decades* to even adjust these benefits for inflation, no less the rising cost of childcare.[53] These stringent limitations also applied to unmarried parents such as Shuri, to whom we now turn.

d. Unmarried Parents

While unmarried individuals, like Franz Solo and Shuri, may both claim "single" status, the Code also allows many unmarried parents to file as "heads of household."[54] Generally, "head of household" filing status can be claimed when an unmarried taxpayer has primary care of a qualifying individual, which makes it different from all other filing statuses whose eligibility does not turn on whether the taxpayer cares for dependents. More specifically, a taxpayer can file as a head of household if (s)he is unmarried at the end of the taxable year and maintains — i.e., pays more than half the cost of[55] — a household that is the principle place of abode of both the taxpayer and a qualifying individual (which generally includes dependent children discussed above) for more than half of the year.[56]

In 2017, the Code differentiated between unmarried and married parents in two main ways. First, while all married taxpayers, regardless of number of children were entitled to the same standard deduction ($12,700 in 2017), heads of household such as Shuri could claim a standard deduction that was greater than the deduction available to unmarried taxpayers without children.

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[47] U.S. Census Bureau, Historical Income Tables: Table H-8. Median Household Income by State (Last Revised Aug. 29, 2019), https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-households.html.

[48] I.R.C. § 21.

[49] *Id.*

[50] I.R.C. § 129.

[51] I.R.C. § 1.

[52] *See, e.g.*, Shannon Weeks McCormack, *Over-Taxing the Working Family: Uncle Sam and the Childcare Squeeze*, 114 MICH. L. REV. 559 (2016); Shannon Weeks McCormack, *Postpartum Taxation for the Squeezed Out Mom*, 105 GEO. L. J. 1323 (2017); McCormack, *supra* note 10.

[53] McCormack, *supra* note 10.

[54] I.R.C. § 2(b).

[55] Treas. Reg. § 1.2-2(d) (1971) ("A taxpayer shall be considered as maintaining a household only if he pays more than one-half the cost thereof for his taxable year.").

[56] I.R.C. § 2(a)(b).

In 2017, the standard deduction for heads of household was $9,350 — roughly the average of the standard deduction available to UM and MFJ taxpayers.[57]

In 2017, Shuri would have also been entitled to three personal exemption amounts — $12,150 — one for her and each of her two dependent children. Thus, in 2017, the zero-bracket amount for heads of households with two children was $21,500. After Shuri reduced her taxable income by this amount, she would have applied the tax rates for the head of household (HH) status. In 2017, these rates compared with the rates for taxpayers claiming married filing jointly (MFJ) and unmarried (UM) statuses as follows:

TABLE III: 2017 TAX RATES, UNMARRIED, MARRIED FILING JOINTLY, AND HEADS OF HOUSEHOLD[58]

Tax Rate	**Income Band UM**	**Income Band MFJ**	***Average***	**Income Band HH**
10%	$0 and $9,325	$0 and $18,650	*$0 to $13,987*	$0 to $13,500
15%	Between $9,326 and $37,950	$18,651 and $75,900	*$13,988 and $56,925*	$13,501 and $50,801
25%	Between $37,951 and $91,900	$75,901 and $153,100	*$56,926 and $122,500*	$50,801 and $131,200
28%	Between $91,901 and $191,650	$153,101 and $233,350	*$122,501 and $212,500*	$131,201 and $212,500
33%	Between $191,651 and $416,700	$233,551 and $416,700	*$212,501 and $416,700*	$215,501 and $416,700
35%	Between $416,701 and $418,400	$416,701 and $470,000	*$416,701 and $444,200*	$416,701 and $444,550
39.6%	Above $418,400	Above $470,700	*Above $444,200*	Above $444,551

While MFJ taxpayers used the same rate schedule regardless of whether they provided personal care to minor children, heads of household were entitled to a schedule that was more favorable than the one that applied to unmarried taxpayers without children.[59] These different rates constituted the second HH benefit available in 2017.

As can be seen, the HH rates "broke" at points sandwiched between the UM and MFJ breaks. For instance, while the first $9,325 earned by an unmarried taxpayer is taxed at 10% and the first $18,650 earned by a MFJ couple was taxed at that rate, the 10% bracket applied to the first $13,500 earned by the head of household. The italicized column marked "Average" shows how these tax bands would appear if HH rates were the mathematical average of the MFJ and UM bands. As it shows, while some breaks were not

[57] Rev. Proc. 2016-55, *supra* note 26.

[58] *Id.*

[59] TAX PO'LY CTR., *supra* note 12.

an exact average, they were usually close (though the 15% bracket was $6,000 off to the head of household's detriment). As a result, heads of household enjoyed some — though not all — of the income splitting benefits MFJ couples enjoyed.

The two head of household benefits — the averaged standard deduction and beneficial tax rates — have two design features worth questioning.[60] First, HH benefits do not increase as number of dependents increase.[61] A head of household will receive the same benefits if she cares for one child or five. Second, the benefits depend on one's marginal tax bracket. For instance, the benefits offered by the averaged standard deduction are worth more to those in higher brackets than lower brackets, creating the well-known "upside down" subsidy effect.[62]

In 2017, after calculating this pre-credit tax liability, heads of household were entitled to the same $1,000 per child credit as MFJ parents. Thus, Shuri could have potentially claimed a $2,000 credit to reduce her tax liability. However, the phase out for heads of households began at $75,000 — earlier than the $110,000 threshold for MFJ taxpayers.[63]

Finally, assuming Shuri, like many heads of household, utilized external childcare to work outside the home, she would have been entitled to the same relief for childcare costs as dual earner couples but also subject to the same stringent limitations.[64]

The following chart provides a summary of how each of the hypothetical taxpayers were taxed immediately before the TCJA, if they had positive tax liabilities:

[60] *See, e.g.*, Lawrence Zelenak, *Children and Income Tax*, 49. TAX L. REV. 349, 405 (1993) (income splitting weak rationale for head of household benefits); Jacob Goldin & Zachary Liscow, *Beyond Head of Household: Rethinking the Taxation of Single Parents*, 71 TAX L. REV. 367 (2018).

[61] Goldin & Liscow, *supra* note 60, at 396.

[62] *Id.* at 395.

[63] I.R.C. § 24.

[64] *See* I.R.C. §§ 21, 129 (making no distinction between heads of households and dual earners).

TABLE IV: SUMMARY FOR POSITIVE TAX LIABILITIES, 2017

	UM, no children	**MFJ, no children**	**Dual Earners, n children**	**Sole Earners, n children**	**HH, n children**
Personal Exemption	\$4,050	2 x \$4,050	2 x \$4,050 + \$4,050 x n	2 x \$4,050 + \$4,050 x n	\$4,050 + \$4,050 x n
Standard Deduction	\$6,350	2 x \$6,350 = \$12,700	2 x \$6,350 = \$12,700	2 x \$6,350 = \$12,700	Approximate Average = \$9,350
Zero bracket (sum of above)	\$10,350	\$20,900	\$20,900 + n x \$4,050	\$20,900 + n x \$4,050	\$13,400 + \$4,050 x n
Rates See Table III	Unmarried	Income splitting mainly in first two brackets	Income splitting mainly in first two brackets	Income splitting mainly in first two brackets	Roughly average breaks allowing for some income splitting when available to MFJ
Child Tax Credit	N/A	N/A	n x \$1,000 Phase-out: \$110,000 -	n x \$1,000 Phase-out: \$110,000 -	n x \$1,000 Phase-out: \$75,000 68% of MFJ
Adjustment for working childcare expenses?	N/A	N/A	Capped Savings \$1,200 - \$2,000 if earnings >\$43,000	N/A	Capped Savings \$1,200 - \$2,000 if earnings > \$43,000

As the discussion has also shown, the pre-TCJA Code differentiated between dual earners and sole earners with positive tax liabilities in a singular respect — it allowed dual (but not sole) earners to deduct a (frequently very limited) portion of the childcare costs incurred to work. To this, the Code added two further differentiations for heads of households with positive tax liabilities by allowing for beneficial head of household rates and an average standard deduction (or, equivalently, an averaged zero bracket). This can be summarized as follows:

TABLE V: DIFFERENTIATIONS BETWEEN ACKNOWLEDGED PARENTING MODELS, 2017

Parenting Model	**Differentiations**
Dual and Sole Earners	• Childcare expenses (limited)
HH and Sole Earners	• Childcare expenses (limited) • HH Rates • Averaged Standard Deduction/Zero Bracket
HH and MFJ	• HH Rates • Averaged Standard Deduction/Zero Bracket

However, in 2017, these few and modest differentiations were largely eliminated for taxpayers with negative tax liabilities.

2. Negative Tax Liabilities, Pre-TCJA

Taxpayers with negative tax liabilities in 2017 (e.g., those earning less than the standard deduction and personal exemption amount) may have been entitled to tax refunds. This occurs only when the Code specifically makes a tax benefit refundable. Most relevantly in 2017, some taxpayers were entitled to receive refunds through the Earned Income Tax Credit (EITC).[65] While its scope was once far more modest, the EITC now operates as one of America's main "anti-poverty devices."[66] The similarly-refundable Additional Child Tax Credit (ACTC) may supplement refunds available under the EITC, but the benefits were more modest. Both of these benefits were designed not only to alleviate poverty but also to encourage low-income taxpayers to engage in paid work.[67] As a result, while a taxpayer must have sufficiently low earnings to receive benefits from these provisions, they also must have enough earned income to be eligible (e.g., taxpayers with zero earnings cannot receive benefits). This Part will compare the relative taxation of the five hypothetical families in 2017 in these lower income ranges.

a. Childless Taxpayers

In 2017 (and traditionally), the EITC provided only modest relief for taxpayers without dependent children.[68] For unmarried taxpayers such as

65 I.R.C.§ 32(a).

66 *See, e.g.*, Dennis Ventry, *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit, 1969–1999,* 53 NAT'L TAX. J. 983, 996 (2000) ("[M]uch to everyone's surprise . . . at the end of the 1970s . . . [the EITC] would no longer comprise simply a modest work subsidy . . . [but would instead] represent an anti–poverty device . . . .").

67 Many have criticized this. *See, e.g.*, Anne Alstott, *Does the EITC Make Work Pay?* 73 LAW & CONTEMP. PROBS. 285 (2010); Dorothy Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007).

68 Kerry Ryan, *EITC as Income (In)Stability?*, 15 FLA. TAX REV. 583, 593 n.33 ("In 2001, only two percent of total EITC dollars went to childless income tax filers, while 98

Franz Solo, the EITC increased from zero to $510 as earned income increased from zero to $6,650.[69] The maximum $510 credit was available for earnings between $6,650 and $8,350, at which point the EITC was gradually reduced and lost completely once earnings exceeded $15,000.[70]

In 2017, childless married taxpayers such as Thelma & Louise were entitled to the same EITC as unmarried, childless taxpayers like Franz Solo over earned income ranges $0 to $8,350.[71] However, Thelma & Louise were entitled to the maximum $510 credit until earned income exceeded $13,950, at which point the credit phased out and was lost at earned income level $20,600.[72] In other words, for non-parents with negative tax liabilities, the Code differentiated between unmarried and MFJ taxpayers by providing more generous phase-outs to the latter. In 2017, the Child Tax Credit was partially refundable as an Additional Child Tax Credit (ACTC). Because only taxpayers with dependent children could claim the ACTC, it was not available to childless taxpayers like Franz Solo and T'Challa & Nakia.

b. Married Parent Taxpayers

By deliberate design, the EITC offers far more relief to taxpayers with dependent children than to non-parents.[73] And, as mentioned above, the ACTC is exclusively available to parents. In 2017, married taxpayers with two children could claim a maximum credit of $5,616 while earned income was between $14,000 and $23,950.[74] The credit phased down after that point and was not lost until income exceeded $50,500.[75]

The ACTC was enacted to supplement the relief provided by the EITC.[76] In 2017, some taxpayers could claim a portion of the $1,000 per child CTC as a refund if they did not have enough tax liability to absorb it (e.g., a family with two children whose tax liability did not exceed $2,000).[77] In 2017, a portion of the CTC was refundable to those whose income exceeded $3,000 (again, the minimal threshold was meant to limit relief to those taxpayers engaged in the external workforce). Specifically, eligible parents could receive a refund equal to 15% of the amount by which their income exceeded

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percent of the total EITC expenditures were paid to income tax filers with at least one qualifying child.").

[69] IRS PUBLICATION 596 EARNED INCOME CREDIT (EIC) (2017), https://www.irs.gov/pub/irs-prior/p596—2017.pdf.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] Ryan, *supra* note 68.

[74] IRS PUBLICATION 596, *supra* note 69.

[75] *Id.*

[76] Larry Zelenak, *Tax or Welfare: The Administration of the EITC,* 52 *UCLA* LAW REV. 1867 (2005) (discussing use of ACTC to make EITC's phase-out less steep).

[77] Jobs Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, § 101, 117 Stat 753 (2003).

$3,000.[78] Thus, a married couple filing jointly with two children that earned income equal to $9,000 could claim a refund equal to $900 (15% of $6,000). Married couples with two children earning around $13,300 would be able to receive a full $2,000 refund and would continue to be able to do so as long as their income was low enough that a full refund was available (i.e., that they did not have positive tax liability to absorb the credit).

Neither the EITC nor the ACTC differentiated between married parent models. Thus, sole earning parents (such as Ozzie & Harriet) and dual earning parents (such as T'Challa & Nakia) were entitled to the same relief under these provisions. Added to this indifference, recall that the 2017 Code allowed dual (but not sole) earners to claim a "working childcare credit" or "dependent exemption" to reflect an often modest portion of their childcare costs incurred while working.[79] But these benefits were not (nor have they ever been) refundable,[80] so dual earner families without positive taxable income could not receive any relief from these provisions at all.

Thus, at negative income levels, the 2017 Code was completely indifferent between the dual earner and sole earner models — dual earning parents would be taxed exactly like their sole earning counterparts, who did not have to incur any childcare expenses to work.[81]

c. Unmarried Parents

The EITC is the same for heads of households and MFJ parents over income ranges $0 through $18,350.[82] However, the EITC begins to phase out earlier for heads of household — the HH phaseout begins at $18,350 (versus $23,950 MFJ).[83] And HH's with one, two and three children lose their entire EITC once income exceeds $39,650, $45,050, and $48,350 respectively.[84] By contrast, MFJs lose the EITC for one, two and three children once income exceeds $45,250, $50,600 and $53,900 respectively.[85]

The Additional Child Tax Credit did not differentiate among parenting models at all, consistent with the EITC's pattern, which does not differentiate between HH and MFJ parents within the income ranges that are likely to implicate the refundable portion of the ACTC.

The discussion of how dual earners, sole earners and heads of household were taxed immediately before the TCJA is summarized below:

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78 IRS PUBLICATION 972 (2017), https://www.irs.gov/pub/irs-pdf/p972.pdf.

79 IRS PUBLICATION 17 (2017), https://www.irs.gov/pub/irs-prior/p17—2017.pdf.

80 *See* Maag, *supra* note 6.

81 For further discussion on this point, *see* Dorothy Brown, *Separate but Unequal,* 54 EMORY L. J. 757 (2005).

82 IRS PUBLICATION 596, *supra* note 59.

83 *Id.*

84 *Id.*

85 *Id.*

TABLE VI: DIFFERENTIATIONS AMONG ACKNOWLEDGED PARENTING MODELS, POSITIVE AND NEGATIVE TAX LIABILITIES, 2017

Parenting Model	Differentiations
Dual and Sole Earners	**Positive:** • Childcare expenses (limited) **Negative**: • Complete indifference • No distinction (childcare benefits nonrefundable)
HH and Sole Earners	**Positive:** • Childcare expenses (limited) • HH rates • Averaged standard deduction **Negative:** • EITC phases out earlier for HH at higher income levels; • No distinction for childcare costs (childcare benefits nonrefundable)
HH and Dual Earners	**Positive:** • HH Rates • Averaged Standard Deduction/Zero Bracket **Negative:** • EITC phases outs earlier for HH at higher income levels

This Section now turns to the way the TCJA changed — and failed to change — the taxation of the parenting models the Code recognizes.

B. Taxing Parents, Post-TCJA

The TCJA changed the way parents were taxed in various ways starting in tax year 2018. In general, by expanding general benefits available to all taxpayers while curtailing or ignoring specific benefits that are contingent on parenting model, the TCJA selected sole earners as its winners at the expense of all other parents. In doing so, the TCJA not only failed to address existing tax inequities between parents but also made them worse.

1. Positive Tax Liabilities

The TCJA repealed the personal exemption amount ($4,050 in 2017).[86] It also roughly doubled the standard deduction for all taxpayers.[87] These two changes are summarized below:

[86] Amendment of 1986 Code (Tax Cuts and Jobs Act), *supra* note 1, at 2082.

[87] *Id.* at 2072.

TABLE VII: PERSONAL EXEMPTION REPEAL AND "DOUBLED" STANDARD DEDUCTION[88]

	UM, no children	**MFJ, no children**	**Dual Earners, n children**	**Sole Earners, n children**	**HH, n children**
~~**Personal Exemption**~~ **REPEALED**	~~$4,050~~	~~2 x $4,050~~	~~2 x $4,050 + $4,050 x n~~	~~2 x $4,050 + $4,050 x n~~	~~$4,050 + $4,050 x n~~
Standard Deduction DOUBLED	~~$6,350~~ $12,000	~~2 x $6,350 = $12,700~~ 2 X $12,000 = $24,000	~~2 x $6,350 = $12,700~~ 2 X $12,000 = $24,000	~~2 x $6,350 = $12,700~~ 2 X $12,000 = $24,000	Average = ~~$9,350~~ $18,000
Zero bracket	~~$10,400~~ $12,000	~~$20,900~~ $24,000	~~$20,900 + n x $4,050~~ $24,000	~~$20,900 + n x $4,050~~ $24,000	~~$13,400 + n x $4,050~~ $18,000

Non-parents benefitted more than parents from these changes in isolation. All taxpayers of the same filing status received a doubled standard deduction (which does not depend on number of dependents).[89] By contrast, the personal exemption (which changes with number of dependents) was repealed.[90] Thus, families of the same filing status experienced the same gain from the doubled standard deduction but parents with dependent children lost more from the repeal of the personal exemption than non-parents. Furthermore, and by the same reasoning, the more dependents a parent had, the more they lost from the repealed personal exemption amount (since each dependent allowed another exemption).

But the TCJA also doubled the child tax credit from $1,000 to $2,000 per child and greatly increased its phase-out thresholds, allowing MFJ couples to claim the full credit until their taxable income exceeds $400,000 (up from $110,000)[91] and allowing heads of households to do so until income exceeds $200,000 (up from $75,000).[92] Presumably then, most parents of dependent children would recoup a substantial portion of the losses they experienced because of the personal exemption's repeal.

None of this, however, depends on parenting model. This next part looks at how the TCJA changed the taxation of unmarried parents relative to married parents. The short answer: it took some benefits away from unmarried parents while granting new benefits to married parents.

a. *Unmarried vs. Married Parents*

As discussed, the pre-TCJA Code contained two benefits that differentiated unmarried from married parents. First, heads of households were entitled to

88 *Id.* at 2072–84.

89 *Id.* at 2072.

90 *Id.* at 2082.

91 *Id.* at 2073.

92 *Id.*

a standard deduction that was roughly the average of the deduction allowed to MFJ and UM taxpayers. Because the standard deduction was doubled for all taxpayers, the TCJA basically maintained this benefit.[93] However, the TCJA curtailed the second head of household benefit that existed under prior law, changing the tax rates applicable to different filing statuses in significant ways. The new rate schedule is below:

TABLE VIII: HEAD OF HOUSEHOLD RATES, POST-TCJA[94]

Tax Rate	**Income Band UM**	**Income Band MFJ**	***Average***	**HH**
10%	$0 and $~~9,325~~ $9,525	$0 and $~~18,650~~ $19,030	*$0 to $14,277*	$0 to ~~$13,500~~ $13,600
~~15%~~ 12%	$~~9,325~~ $9,525 and $~~37,950~~ $38,700	$~~18,650~~ $19,030 and $~~75,900~~ $77,400	*$14,278 and $58,050*	~~$13,500~~$13,600 and ~~$50,800~~ $51,800
~~25%~~ 22%	$~~37,951~~ $38,701 and $~~91,900~~ $82,500	$~~75,901~~ $77,401 and $~~153,100~~ $165,000	*$58,051 and $123,750*	~~$50,801~~$51,801 and ~~$131,200~~ $82,500
~~28%~~ 24%	$~~91,901~~$82,501 and $~~191,650~~$157,500	$~~153,101~~ $165,001 and $~~233,350~~ $315,000	*$123,751 and $236,250*	~~$131,201~~ $82,501 and $~~212,500~~ $157,500
~~33%~~ 32%	$~~191,650~~$157,501 and $~~416,700~~ $200,000	$~~233,350~~ $315,001 and $~~416,700~~ $400,000	*$236,251 and $300,000*	$~~212,500~~ $157,501 and $~~416,700~~ $200,000
35%	$~~416,701~~ $200,001 and $~~418,400~~ $500,000	~~$416,701~~ $400,001 and $~~470,000~~ $600,000	*$300,001 and $550,000*	$~~416,701~~ $200,001 and $~~444,550~~ $500,000
~~39.6%~~ 37%	Above $~~418,400~~ $500,000	Above $~~470,000~~ $600,000	*Above $550,000*	$~~444,550~~ $500,000

Thus, the TCJA lowered the tax rates for all filers. But it also changed the way the rates "break," eliminating some head of household benefits while making the MFJ rates more favorable than before.

Recall that in 2017, MFJ taxpayers enjoyed income splitting at only the lowest two brackets. However, after the TCJA, MFJ taxpayers enjoy income splitting through the first five brackets until income exceeds $400,000.[95] Also

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[93] This change alone benefitted unmarried taxpayers slightly more than married taxpayers, but both viewed alone and combined with the other changes discussed thus far, this did little to change the relative taxation of the parental caregiving models the Code chooses to acknowledge.

[94] I.R.C. § 1(j)(2).

[95] *Id.*

recall that in 2017, heads of households enjoyed some of these benefits because HH rates broke between MFJ and UM breaks. If the TCJA had followed this pattern, heads of households would have benefitted from the expanded income splitting benefits enjoyed by MFJ filers.

But the TCJA did not do so, and instead rolled benefits back substantially. As shown above, after the two lowest brackets, the HH breaks are substantially different from the UM/MFJ average, to the head of household's detriment. In fact, other than the lowest two brackets, the TCJA eliminated HH rate benefits, allowing HH bands to converge with UM bands while MFJ bands diverged from both.

Thus, the TCJA curtailed one of the main distinctions the Code made between unmarried and married parents, breaking not only with patterns established by immediately prior laws but also with historical norms.[96]

The next Part turns to how the TCJA changed the relative taxation of dual and sole earner married parents with positive tax liabilities. The short answer: it didn't.

b. *Dual- and Sole-Earner Married Parents*

As discussed, the TCJA changed the rates applicable to MFJ taxpayers, allowing full income splitting at all levels except for the highest two brackets. Furthermore, it doubled the per child credit available to all taxpayers while drastically increasing phase-out thresholds. But these changes make no differentiation between dual and sole earners — they are available to all MFJ parents.

As discussed in Part I.B, the Code does contain two provisions that, before the TCJA, allowed dual earner and unmarried parents very limited relief for the childcare costs they incurred while working.[97] The TCJA did not alter these particular benefits at all, not even to make inflation adjustments that had not been made for *almost thirty years*,[98] a failure that also affected heads of household.

2. Negative Tax Liabilities

The TCJA did not modify the EITC in any way that meaningfully altered the relative taxation of parenting models. The TCJA did make modest changes to the ACTC, which increased the availability and magnitude of benefits offered. For instance, the "refundability" threshold was reduced from $3,000 to $2,400, and the maximum amount refundable was raised from $1,000 to $1,400 per child (though not raised to the $2,000 per child credit

[96] The practice of "sandwiching" the HH rates between the UM and MFJ rates began in 1951 and Congress generally maintained this pattern for seventy years until the TCJA largely abandoned it. *See* TAX FOUNDATION, U.S. FEDERAL INDIVIDUAL INCOME TAX RATES, HISTORY 1913-2013 (Oct. 17 2013), https://taxfoundation.org/us-federal-individual-income-tax-rates-history-1913-2013-nominal-and-inflation-adjusted-brackets/.

[97] *See supra* text accompanying notes 86-90.

[98] McCormack, *supra* note 10.

available to taxpayers with positive tax liabilities).[99] However, these benefits are indifferent across — that is, the same for all — the recognized parenting models. The TCJA failed to make dependent care benefits refundable.

3. Summary of TCJA Changes to Parental Tax Laws

At positive income ranges, the TCJA curtailed head of household benefits and ignored working childcare benefits. At lower income ranges, it once again failed to make working childcare benefits refundable. The discussion is summarized below:

TABLE IX: DIFFERENTIATIONS AMONG PARENTING MODELS, POST-TCJA

Parenting Model	**Differentiations**
Dual and Sole Earners	**Positive:** NO CHANGE • Childcare expenses (limited) **Negative**: NO CHANGE • Complete indifference • No distinction (childcare benefits nonrefundable)
HH and Sole Earners	**Positive:** • Childcare expenses (limited) • <u>*HH rates CURTAILED*</u> • <u>*MFJ income splitting benefits EXPANDED*</u> • Averaged standard deduction **Negative:** NO CHANGE • EITC phases out earlier for HH at higher income levels; • No distinction for childcare costs (childcare benefits nonrefundable)
HH and Dual Earners	**Positive:** • <u>*HH Rates CURTAILED*</u> • <u>*MFJ income splitting benefits expanded*</u> • Averaged Standard Deduction/Zero Bracket **Negative:** NO CHANGE • EITC phases outs earlier for HH at higher income levels

These snapshots shine light on the overly-general claims made by various politicians. Rather than showing that the TCJA helps families of "all walks of life,"[100] these snapshots reveal that the TCJA picked winners and losers, disproportionately favoring sole earners over all other parents and hurting single parents more than married parents generally.

For positive tax liabilities, sole earners only gained benefits while unmarried parents and dual earners also had some taken away. All parents enjoyed the doubled CTC at positive income ranges.[101] But unmarried

[99] *Compare* I.R.C. §24(b) (2017), *with* I.R.C. §24(b) (2015).

[100] COMMITTEE WAYS AND MEANS, *supra* note 5.

[101] *See* I.R.C. § 24.

parents lost some of the benefits previously offered by the head of household rate schedule. And the value of dependent care benefits declined for both unmarried and dual earners, since those benefits do not adjust for inflation (and have not been adjusted for over thirty years).[102]

For negative tax liabilities, the TCJA failed to make dependent care benefits refundable, so the Code continued to be completely indifferent between families that must incur childcare costs to work and those that do not. In sum, the TCJA did nothing to address existing tax inequities between parents and added some more of its own.

Of course, minor children are not the only individuals that require personal care. The next Part moves beyond minor children and looks at how the Code taxes those with other caregiving responsibilities. It shows that the inequities resulting from the Code's favoritism towards sole earners extends to other caregiving arrangements and compound for members of the "sandwich generation" who have both parental and non-parental caregiving roles.

III. BEYOND CARE OF MINOR CHILDREN

Many families now find that minor children are not the only individuals for whom they must provide and/or obtain personal care. Perhaps most notably, given several demographic trends — including the aging of the Baby Boomer population and a general increase in life expectancies — the need for eldercare is growing.[103] By 2050, the elderly population is expected to be nearly double what it was in 2015.[104] Recently, the Department of Health and Human Services (HHS) estimated that over half of Americans turning age 65 by 2016 would eventually need long-term care.[105]

There is a growing body of data about elder-caregivers. In 2011, the Bureau of Labor Statistics (BLS) recognized "the need for quality data on how much time is devoted to eldercare and how it affects caregivers' lives"[106] and introduced new questions into the American Time Use Survey

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[102] *See* McCormack, *supra* note 10.

[103] DEPARTMENT OF LABOR, NAVIGATING THE DEMANDS OF WORK AND ELDERCARE 9 (June 30, 2014), https://www.dol.gov/sites/default/files/NavigatingTheDemandsOfWorkAndEldercare.pdf. ("The first Baby Boomers reached the age of 65 in 2011, and roughly 10,000 Boomers continue to hit that milestone every day."); *see also,* Stephen Ferrante, *The Sandwich Generation: A Review of the Literature*, 9 FLA. PUB. HEALTH REV. 95, 95 (2012), http://www.ut.edu/uploadedFiles/Academics/CNHS/Health_Sciences_and_Human_Performance/Public_Health/Florida_Public_Health_Review/FPHR2012pp095104DeRigneandFerrante.pdf ("Several demographic trends are putting caregiving pressure on middle-aged adults.").

[104] DEPARTMENT OF LABOR, *supra* note 103, at 9.

[105] HHS OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND DISABILITY, LONG-TERM SERVICES AND SUPPORT FOR OLDER AMERICANS: RISKS AND FINANCING (rev. Feb. 2016), https://aspe.hhs.gov/system/files/pdf/106211/ElderLTCrb-rev.pdf.

[106] Stephanie L. Denton, *Adding Eldercare Questions to the American Time Use Survey*, 2012 BUREAU OF LABOR STATISTICS, MONTHLY LABOR REVIEW, 26, 26, https://www.bls.gov/opub/mlr/2012/11/art3full.pdf.

(ATUS).[107] The new ATUS questions seek to "measure how many unpaid hours Americans spen[t] caring for older individuals."[108]

Averaging ATUS data for 2015–2016, the BLS reported that 41.3 million individuals provided some type of unpaid eldercare,[109] 56% of whom were women.[110] Some individuals provided unpaid eldercare for more than a decade.[111] While ATUS data suggested that "[a]lmost one-half (48 percent) of eldercare providers . . . provided [elder] care for 2 years or less . . . 14 percent . . . provided care for 10 years or more."[112] Furthermore, regardless of duration, this care is often time consuming to provide. ATUS data suggests "forty-five percent of caregivers provided care daily or several times a week."[113]

The ATUS questions also shed light on the caregiving models being used to provide eldercare. Many individuals and families are balancing the burdens of eldercare with outside employment. Averaging the 2015 – 2016 data, the BLS found that, of the 41.3 million unpaid eldercare providers, about 61% were also employed in some capacity[114] and almost 45% were employed full time (defined as working for over thirty-five hours per week).[115]

External work is, however, not the only competing demand facing unpaid eldercare providers. Parental and eldercare responsibilities converge for some families. Because many women are delaying the age at which they have children,[116] many families find themselves part of the so-called "sandwich generation,"[117] providing care to minor children and elderly parents

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[107] *Id.* at 33.

[108] *Id. See also* Amalavoyal V. Chari, et al., *The Opportunity Costs of Informal-Eldercare in the United States: New Estimates from the American Time Use Survey*, 50(3) HSR: HEALTH SERV. RES. 871 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4450934/pdf/hesr0050-0871.pdf. For more on the design of the questions, see generally Denton, *supra* note 106.

[109] BUREAU OF LABOR STATISTICS, *Unpaid Eldercare in the United States—2017-2018 Summary*, https://www.bls.gov/news.release/elcare.nr0.htm.

[110] *Id.*

[111] BUREAU OF LABOR STATISTICS, *Eldercare Providers by Sex and Selected Characteristics Related to Care Provided, Averages for the Combined Years 2017-2018*, https://www.bls.gov/news.release/elcare.t02.htm.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] Jooyeoun Suh, *Measuring the "Sandwich": Care for Children and Adults in the American Time Use Survey 2003-2012,* 37 J. FAM. ECON. ISS. 197, 197 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4883270/pdf/10834 2016 Article 9483.pdf ("As age at first birth has increased, along with life expectancy, the probability that adults will face responsibilities for care of both young children and elderly parents has increased.").

[117] *See, e.g.*, Dorothy Miller, *The Sandwich Generation: Adult Children of the Aging*, 26(5) SOC. WORK 419, 419 (1981) https://www.jstor.org/stable/23712207?seq=1#page_scan_tab_contents ("Adult children of the elderly, who are 'sandwiched' between their aging parents and own maturing children, are subject to a great deal of stress.").

simultaneously.[118]

The ATUS data provides information about this group, too. Averaging 2015 – 2016 ATUS data, the BLS reported that there were "8.7 million eldercare providers who were [also] parents of children living at home [and that] [o]f these parents, about one-third (33 percent) had a child under age 6, and the remainder (67 percent) were parents whose youngest child was between the ages of 6 and 17."[119] Most of these members of the sandwich generation were employed full time — "81 percent [of] eldercare providers who were parents were employed, and 64 percent were employed full time."[120] Furthermore, "[s]eventeen percent of eldercare providers who were parents had no spouse or unmarried partner present in the household."[121]

To illustrate how the TCJA affected the taxation of those who provide non-parental care, this Part turns back to the five hypothetical taxpayers, but now assumes that each provides substantial personal care to an elderly relative (Ernie).

A. Non-Parental Caregiving, Pre-TCJA

1. Positive Tax Liabilities

a. Unmarried Childless Taxpayers

Head of household status is not only available to parents of minor children. Head of household benefits can be claimed by any unmarried taxpayer that maintains (i.e., pays more than half the cost of)[122] a household that is the principle place of abode of both the taxpayer and any "qualifying individual" for more than half of the year, so long as other requirements are met.[123]

Recall that this article began its analysis with the care of minor children for specified reasons. In addition to the pragmatic reason — i.e., that the Code provides special benefits to primary caregivers of minor children — there is relatively sound consensus that minor children require personal care and that parents are responsible for giving it to them. Less agreement exists around other caregiving arrangements.

Perhaps reflecting this, the process of applying the requirements to

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[118] Kiah L. Evans, et al., *Working Sandwich Generation Women Utilize Strategies Within and between Roles of Achieve Role Balance*, 11(6) PLOS ONE, June 15, 2016, at 1, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4909236/pdf/pone.0157469.pdf ("increasing number of women simultaneously balancing the roles of mother and parental care[giver].").

[119] BUREAU OF LABOR STATISTICS, *Economic News Release, Unpaid Eldercare in the United States,* Table 9, https://www.bls.gov/news.release/elcare.t09.htm.

[120] *Id.* (Showing within Tables 2 and 9 that eldercare providers who were parents were less likely to provide daily care than the overall population of eldercare providers but were just as likely to provide care several times a week).

[121] *Id.*

[122] Treas. Reg. § 1.2-2(d) (1971) ("A taxpayer shall be considered as maintaining a household only if he pays more than one-half the cost thereof for his taxable year.").

[123] I.R.C. § 2(b)(1)(A) (2012) (providing principal place of abode requirement).

determine whether individuals for whom taxpayers like Franz Solo might potentially claim head of household status and/or claim dependency exemptions for individuals that are not qualifying children can feel convoluted. [124] To be deemed a qualifying individual, Ernie must have had gross income less than the now-repealed personal exemption amount (in 2017, $4,050).[125] Furthermore, Franz Solo (and other unmarried, childless taxpayers) must have generally provided a defined level of support to Ernie. Specifically, Franz Solo must have either (a) provided over half of total support for the taxable year;[126] or (b) if Franz Solo provided more that 10% but less than 50% of total support but the support of multiple people together represented half of the total support, unmarried, childless taxpayers like Franz Solo could claim head of household status if each contributor agrees he can do so.[127]

To synthesize, Franz Solo (and other unmarried, childless taxpayer) will generally be able to claim head of household status only if four things are true. First, Ernie generally resides with him by sharing a principal place of abode for more than half of the year.[128] Second, he pays more than half the cost of a residence he shares with Ernie.[129] Third, Ernie does not earn very much income (in 2017 not over $4,050).[130] And fourth, he provides that person substantial support (either 50% or 10% with an agreement from others).[131]

There is one further nuance. If Ernie is Franz Solo's parent, he may claim head of household status even if he/she lives in a different residence so long as all the other head of household requirements are met and Franz Solo provides half of the cost to maintain Ernie's residence.[132]

If these requirements were met such that Franz Solo qualified for head of household status in 2017, he could have claimed the averaged standard deduction and applied the beneficial rate structure described in Part I. Further, if Franz Solo was able to file as head of household, Ernie must have qualified as Franz Solo's dependent, as that is one of the requirements for head of household status.[133] Thus, Franz Solo would have also been eligible to claim a personal exemption amount ($4,050) for Ernie.

But even if Franz Solo did not qualify as a head of household, he still might have been able to claim an exemption for Ernie because Ernie may have still qualified as Franz Solo's dependent if the only reason why Franz Solo didn't qualify as head of household was that Ernie did not share a

124 I.R.C. § 2(b)(1)(A)(ii) (when an individual is not a qualifying child, taxpayer must be able to claim individual for dependency exemption).

125 I.R.C. § 152(d)(1)(B).

126 I.R.C. § 152(d)(1)(C).

127 I.R.C. § 152(d)(3).

128 I.R.C. § 2(b)(1)(A).

129 I.R.C. § 2(b).

130 I.R.C. § 152(d)(1)(B).

131 I.R.C. § 152(d)(1)(C), (d)(3).

132 I.R.C. § 2(b)(1)(B).

133 I.R.C. § 2(b)(1)(A)(ii).

residence with him and Franz Solo and Ernie have one of the relationships the Code "counts." These relationships are as follows:

(A) A child or a descendant of a child.

(B) A brother, sister, stepbrother, or stepsister.

(C) The father or mother, or an ancestor of either.

(D) A stepfather or stepmother.

(E) A son or daughter of a brother or sister of the taxpayer.

(F) A brother or sister of the father or mother of the taxpayer.

(G) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.[134]

If Ernie and Franz Solo did fit one of these relationships,[135] Franz Solo could claim Ernie as a dependent even if he did not share a principal place of abode with Franz Solo for more than half the year and/or Franz Solo did not pay half the cost of maintaining it. Ernie could qualify as Franz Solo's dependent if he did not earn more than the dependency amount ($4,050) and Franz Solo provided half of Ernie's support.[136]

There is still a bit more (if the reader is having trouble keeping this together, imagine how Franz Solo, who may also be struggling to support Ernie, feels). What if Franz Solo had to pay someone to care for Ernie while working? It is possible that Franz Solo could qualify for the "dependency care benefits" described in Part I. But the bar for doing so is high when non-parental care is involved. For Franz Solo (and non-parents generally) to receive benefits that reflect the costs of care for Ernie (and non-minor children generally) incurred while working, Ernie must once again have "the same principal place of abode as the taxpayer for more than one-half of such taxable year[.]"[137] It will not matter how Franz Solo and Ernie are related to one another.[138] Nor will Ernie need to earn less than the dependency exemption amount. Franz Solo will, however, still need to provide half of Ernie's support. And most strictly, Ernie must be "physically or mentally incapable of caring for himself or herself[.]"[139]

If all of these requirements are met, Franz Solo may be able to claim dependency care benefits to reflect some of the costs he must incur to keep Ernie safe while he works. There is one way he is lucky. As discussed in Part I, dependency care benefits are severely limited. But because childless, unmarried taxpayers like Franz Solo do not also have to pay for childcare, they will not have "used up" this limit and may at least receive some tax

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[134] I.R.C. § 152(d)(2)(A)–(G).

[135] Outside of these relationships, Ernie could not qualify as a dependent unless he had "the same principal place of abode as the taxpayer and is a member of the taxpayer's household[,]" so that head of household and dependency requirements collapse. I.R.C. § 152(d)(H).

[136] I.R.C. § 152(d)(1)(B)–(C).

[137] I.R.C. § 21(b)(1)(B).

[138] Because individuals with whom taxpayer shares principal place of abode can count as dependents regardless of relationship. *Id.*

[139] *Id.*

savings to reflect the costs of providing care to Ernie so that he can go to work.

However, Franz Solo (and other unmarried, childless taxpayers) will still probably hit that limit quickly. While data on eldercare costs is not as developed as data on childcare costs, even "back of the napkin" math reveals how stringent limitations are. If Franz Solo provides care for a "physically or mentally" incapable Ernie while he works (say) 35 hours per week for 220 days (since there are about 250 working days in most years and we will assume Franz Solo lucky enough to have about four weeks of vacation and sick leave), he will hit the $3,000 cap for the dependency care credit unless he pays the caregiver *39 cents per hour* and will hit the slightly higher $5,000 cap for the dependency care exclusion unless he pays *65 cents per hour*. Here is another way that Franz Solo is unlucky. The 2017 Child Tax Credit, as the name suggests, was available only to parents of minor children (under 17).[140]

The following synthesizes the varied moving parts that determine a taxpayer's eligibility for head of household status, dependency exemption, and dependent care provisions in 2017 when care for non-minor children is involved:

TABLE X: TAX BENEFITS FOR UNMARRIED TAXPAYERS WITH NON-PARENTAL CAREGIVING RESPONSIBILITIES[141]

	Does Relationship Matter?	**Must Ernie and Franz Share Abode?**	**Does Ernie's Income Matter?**	**Does Amount of Support Franz Provide Matter?**	**Other Requirements**
HH (beneficial rates, averaged standard deduction)	N/A	Yes	Yes	> 50%; or if others combine to 50%, 10% by agreement	Maintain home (over half cost)
Dependency exemption ($4,050)	Yes unless share abode	Yes if not otherwise qualifying relationship	Yes	Yes	
Dependent care benefits	No, because sharing abode required	Yes	No	Yes	Physically or mentally incapable of caring for self

b. *Married Childless Taxpayers*

Married childless taxpayers, like Thelma & Louise can never file for head of household benefits, which are only available to unmarried taxpayers. They may, however, have been able to claim the dependency exemption for their care of Ernie if they met the various requirements described above.

[140] I.R.C. § 24(c)(1).

[141] I.R.C. §§ 2(b), 151, 152.

If both Thelma & Louise are wage earners, they also might have been able to claim limited dependency care benefits to reflect costs of caring for Ernie while they are working. Of course, like Franz Solo and all other taxpayers, they would need to meet the requirements described above, which include Ernie being "physically or mentally" incapable of caring for himself.

Like Franz, Thelma & Louise are lucky in one respect — because they do not have minor children to care for, they will at least receive some savings from the dependency care provisions to reflect the costs they incur to keep Ernie safe while they are working.

We now move onto families who are not so lucky, as they already provide primary care to minor children. As will be illustrated, the inequities that have been described in this Part and Part I compound for these members of the "sandwich generation."

c. Two Married Parents in the Sandwich Generation

In 2017, both T'Challa & Nakia and Ozzie & Harriet could claim Ernie as a dependent if they met the requirements described above. Like Thelma & Louise, they were not entitled to head of household benefits because they were married.

While sole earners like Ozzie & Harriet retain a non-wager earner that is available to care for children and (now) Ernie, T'Challa & Nakia do not have this luxury. Like Franz Solo and Thelma & Louise, T'Challa & Nakia could theoretically claim the limited dependency care benefits if they met the high bar to do so (e.g., Ernie was physically and/or mentally incapable of caring for himself).[142] But unlike Solo and Thelma & Louise, T'Challa & Nakia may have already hit their limit because they have minor children who require care. As discussed in Part I, applicable limitations are so stringent that parents paying for childcare may easily incur expenses that (perhaps far) exceed the statutory limits.[143] Thus, it is not only possible but probable that many dual earning parents with minor children will receive absolutely no tax reduction to reflect the eldercare expenses they incur to provide care for individuals that are (by statutory mandate) physically or mentally incapable of caring for themselves, even though these costs are only incurred so that the dual earner couple can work. Heads of household, like Shuri, will likely find themselves in a similar situation.

d. Unmarried Parents

Because Shuri already qualified for head of household status because of her parenting responsibilities, she cannot receive additional head of household benefits from that status. This results from the curious design features of heads of household benefits, discussed in Part I, which are not contingent on number of dependents.[144]

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[142] I.R.C. § 21(b)(1)(A)–(C).

[143] *See supra* Part I.

[144] *Id.*

In 2017, however, Shuri might have at least been able to claim Ernie as an additional dependent if she met the requirements described. And like other working caregivers, Shuri may have been able to claim dependency care benefits for expenses paid to keep Ernie cared for while she worked, so long as Ernie was sufficiently incapable of self-care. However, like T'Challa & Nakia, but unlike our childless taxpayers, she will not be able to do this if her childcare expenses already exceeded stringent limits, a scenario that is very likely.

The tax benefits each hypothetical taxpayer might have claimed in 2017 to reflect care of Ernie (and more generally, caregiving of non-minor children) if they had positive tax liabilities is summarized below:

TABLE XI: 2017, TAXPAYERS WITH NON-PARENTAL CARE OBLIGATIONS[145]

Possibly Eligible? →	**Head of Household**	**Personal Dependent Exemption**	**Dependency Care Benefits**
Franz Solo Unmarried, childless taxpayers	Yes – May qualify for 1) beneficial rates and 2) averaged standard deduction if other requirements met (see Table Z)	Yes – $4,050	Yes, with stringent limits
Thelma & Louise	No (married)	Yes – $4,050	Yes, if dual earners, with stringent limits
Ozzie & Harriet Married sole earners	No (married)	Yes – $4,050	No (sole earners)
T'Challa & Nakia Dual earners	No (married)	Yes – $4,050	Yes, but probably will not benefit because childcare expenses already over limit
Shuri Unmarried parents	Yes but already qualified because of minor children—will, therefore, receive no additional HH benefits	Yes – $4,050	Yes, but probably will not benefit because childcare expenses already over limit

A few general points emerge. In 2017, those in the sandwich generation — i.e., those with parental and non-parental caregiving responsibilities — were likely to benefit only from the additional personal dependency exemption of $4,050. In other words, in 2017, when parents entered the sandwich generation by taking up care of Ernie, the Code gave them a $4,050 exemption. The tax savings of this exemption depended on their marginal tax bracket and ranged from approximately $400 (at the lowest bracket) to $1,600 (at the highest).

Of course, it might have cost a great deal more than $4,050 to provide care for Ernie. Sole earners (like Ozzie & Harriet) at least had the option to

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145 I.R.C. §§ 2(b), 151, 152.

provide care to Ernie themselves. By contrast, dual earners (like T'Challa & Nakia) and unmarried parents (such as Shuri) did not have this option. But because childcare expenses may have already exceeded the low statutory limits of the dependency care provisions, these caregivers may have received no relief for these expenditures, which Ozzie & Harriet had the ability to avoid.

But the situation is even worse if our hypothetical taxpayers have negative tax liabilities. In 2017, taxpayers that took up care of a dependent who was not a minor child but with negative tax liabilities received no tax benefits.

2. Negative Tax Liabilities

As discussed in Part I, neither head of household nor dependency care benefits were refundable in 2017.[146] Thus, taxpayers without sufficient taxable income or tax liability to absorb them received no relief to reflect care expenses.

However, as also discussed in Part I, parents of minor children who had negative tax liabilities might have been eligible to claim the refundable Earned Income Tax Credit and partially refundable Additional Child Tax Credit.[147] Furthermore, by design, the EITC was far greater for those who provided primary care to minor children than for those who did not.[148] This generosity, however, does not extend to those who care for other dependents, such as Ernie, that are not non-minor children. Indeed, the EITC does not reflect these caregiving arrangements. And similarly, the ACTC is only available to primary caregivers of non-minor children.

Thus, if any of our hypothetical families had negative tax liabilities and took on care of Ernie, the Code would not have taken that into account in any way. And again, while sole earners (like Ozzie & Harriet) might have avoided great financial cost by providing needed care, our other taxpayers may have had to incur substantial costs to provide care while working. But this did not matter for tax purposes. For negative tax liabilities, all the taxpayers will receive exactly the same refunds in 2017.

This Part now looks at how the TCJA changed this situation for non-parental caregivers. The short answer: the TCJA did nothing to address existing inequities for those with non-parental caregiving responsibilities and, in fact, curtailed the few benefits for which these caregivers had been eligible. This can be expected to most adversely affect the finances of dual earners and unmarried parents because, unlike sole earners, they will not be able to avoid substantial expenditures by providing care to Ernie themselves.

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[146] *See supra* Part I.

[147] *Id.*

[148] Lawrence Zelenak, *Redesigning the Earned Income Tax Credit as a Family-Size Adjustment to the Minimum Wage*, 57 TAX L. REV. 301, 306 (2004).

B. Taxing Non-Parental Care, Post-TCJA

1. Positive Tax Liabilities

a. Unmarried Taxpayers

In 2017, since she already qualified for head of household status and had probably already incurred childcare costs that exceeded the dependency care provisions' stringent limitations, the only new benefit Shuri might have claimed when she started to care for Ernie was the additional personal exemption amount. But, as discussed in Part I, the TCJA repealed that benefit.[149]

By raising the previously existing $1,000 per child credit to $2,000, the TCJA compensated parents of non-minor children. But Congress was not so generous to those with other caregiving obligations. For these other caregivers, the TCJA added a $500 "Family Tax Credit," which can be claimed by those who have dependents that are not minor children.[150] For almost all taxpayers with positive tax liabilities, this Family Tax Credit will provide less benefit than the personal exemption did.

The one exception is that taxpayers with a marginal tax rate of 10% (which is the lowest available tax bracket) will benefit slightly more.[151] The personal exemption amount would have provided $405 in tax savings (10% multiplied by $4,050), while the dollar-for-dollar Family Tax Credit will provide a full $500 in savings. However, for all other taxpayers, the Family Tax Credit does not compensate for the repeal of the personal exemption. For instance, taxpayers with marginal income tax rates of 25% would have received a benefit of over $1,000 by claiming the 2017 personal exemption. The TCJA's new Family Tax Credit cuts this in half.[152]

And, of course, as discussed in Part I, the TCJA did not even adjust dependency care benefits for inflation (a move that was over three decades overdue).[153] Unmarried parents like Shuri will, therefore, continue to receive no benefit to reflect expenses incurred to provide care to Ernie while working if, as is likely, childcare expenses already exceed stringent limits.

Franz may have lost even more than Shuri as a result of the TCJA's changes. Unlike Shuri, Franz (and other unmarried, childless taxpayers) stood to gain from claiming head of household status, since he did not have other dependents, which qualified him for those benefits anyway. But as discussed in Part I.C, the TCJA substantially rolled back the favorable tax

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[149] As also discussed, the TCJA doubled the standard deduction. But the standard deduction does not depend on whether taxpayers have caregiving obligations at all and, therefore, this benefit does not affect the relative taxation of caregivers and non-caregivers.

[150] Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11022, 131 Stat. 2054, 2073 (West).

[151] *Id.*

[152] I.R.C. § 24(h)(4).

[153] *See supra* Part I.

rates historically available to heads of household.[154] Thus, even if Franz qualified for that status because of his care for Ernie (Shuri already qualified by virtue of caring for her children), the benefits he received post-TCJA would be reduced at many income ranges. And like Shuri, Franz also could have benefitted from claiming a personal exemption for Ernie, and will generally receive less tax savings from the TCJA's replacement (the $500 Family Tax Credit).

b. *Married Taxpayers*

Though they were not eligible to file as heads of household and, therefore, cannot be said to have suffered by the TCJA's curtailment of benefits that attend to that status, married taxpayers also lost the personal exemption for Ernie in exchange for the generally lesser Family Tax Credit.

The way in which the TCJA affected the benefits available to taxpayers when they have positive tax liabilities is summarized below. In general, because our taxpayers took up care of Ernie, the post-TCJA Code will give them $500.

TABLE XII: NON-PARENTAL CAREGIVERS, POST-TCJA[155]

Possibly Eligible? →	**HH**	**~~Dependency Exemption~~**	**Dependency Care Benefits**
Franz Solo Unmarried, childless taxpayers	May now qualify for ~~*1) beneficial rates*~~ **CURTAILED* and 2) the averaged standard deduction	~~Y - $4,050~~ $500 Family Tax Credit	Yes, with stringent limits
Thelma & Louise	Cannot qualify	~~Y - $4,050~~ $500 Family Tax Credit	Yes, if dual earners
Ozzie & Harriet Married sole earners	Cannot qualify	~~Y - $4,050~~ $500 Family Tax Credit	No (sole earners)
T'Challa & Nakia Dual earners	Cannot qualify	~~Y - $4,050~~ $500 Family Tax Credit	Yes, but probably will not benefit because childcare expenses already over limit
Shuri Unmarried parents	Already qualified – will receive no additional benefit from HH status	~~Y - $4,050~~ $500 Family Tax Credit	Yes, but probably will not benefit because childcare expenses already over limit

2. Negative Tax Liabilities

The TCJA did nothing to change the situation for non-parental caregivers

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[154] *Id.*

[155] I.R.C. §§ 2(b), 21, 24(h), 129, 151, 152.

with negative tax liabilities. Unlike the Child Tax Credit, which is partially though not fully refundable, the new Family Tax Credit is completely non-refundable. If a taxpayer with negative tax liability takes up care for Ernie, the tax laws have nothing to say about it.

The last two Parts have developed a series of snapshots that show how different caregivers were taxed immediately before and after the TCJA took effect. The final Part of this article synthesizes these snapshots and sketches avenues for future work.

IV. SYNTHESIS AND AGENDA FOR FUTURE WORK

By rearranging a myriad of deck chairs, politicians were able to claim that the TCJA helped working families from "all walks of life."[156] But the snapshots developed in Parts I and II expose very different pictures. At the outset, generalizations are impossible. The extent to which any one family gains or loses from tax reform depends on particular facts.[157] Moreover, given the number of moving parts that determines a family's tax liability, it has been easy for politicians to obscure how the TCJA changed — and failed to change — the relative taxation of taxpayers with different caregiving responsibilities. But the snapshots developed in this article reveal that Congress, through the TCJA, chose winners and losers.

First, when the TCJA expanded benefits to caregivers, the changes disproportionally favored sole earners over dual earners and unmarried individuals. Second, when it curtailed benefits, the changes hurt unmarried individuals and dual earners more than sole earners. Third, the TCJA did nothing to address existing inequities between caregivers, which acted to the detriment of heads of household and dual earners.

A. Synthesizing Snapshots: Declaring Winners and Losers

1. Among Parents of Non-Minor Children

Among caregivers, sole earning married parents with positive taxable income probably benefited most from tax reform. First, as discussed in Part I, tax rates were reconfigured to expand the benefits of income splitting among married couples. Second, while the personal exemption amount was repealed, the newly doubled Child Tax Credit can be expected to provide more tax savings. So that in the end, sole earner parents with positive taxable income only gained from the TCJA but had no benefits taken away. They were, among caregivers, Congress's clearly selected winners.

Others did not fare as well. While heads of household and dual earning parents with positive taxable income enjoyed some expanded benefits, they also lost benefits. Like sole earners, dual earners will enjoy the new MFJ rates, which expanded income splitting for married couples as well as the

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156 COMMITTEE WAYS AND MEANS, *supra* note 5.

157 *See, e.g.*, Maag, *supra* note 6.

doubled Child Tax Credit.[158] However, because Congress did not adjust limitations within the dependency care provisions (a move which is more than thirty years overdue), dual earners will continue to see the value of those benefits erode.[159]

Parents that were heads of household suffered even more at positive income ranges. In addition to seeing the value of their dependent care benefits decline, the heads of household rates were curtailed for all but the first two brackets.

As for parents with negative tax liabilities, the TCJA did nothing to address existing inequities. Dependent care benefits remain non-refundable so that sole earning parents will be taxed exactly the same as unmarried and dual earning parents at negative income ranges, even though the latter two families may have had to incur sizeable childcare costs just to earn income.

2. Among Other Non-Parental Caregivers

Moving beyond the parenting of non-minor children, the TCJA curtailed benefits for other caregivers at positive income ranges. The TCJA repealed the personal exemption,[160] which could benefit some taxpayers who cared for non-minor children. In its place, it created a $500 Family Tax Credit that will only partially compensate most taxpayers for the tax savings lost from that repeal.[161]

This can be expected to affect dual earners and unmarried parents more than sole earners. Because sole earners retain an available caregiver in the home, they will have more flexibility to avoid financial strains than dual earners and heads of household, who will often have to incur sizeable costs to provide needed care while they are working outside the home. To make matters worse, the value of the dependency care benefits, left unaltered by the TCJA, will continue to erode over time providing minimal relief for the high costs of hiring care providers.

And for members of the sandwich generation, who have both parental and non-parental caregiving roles, these inequities compound. Given stringent limits, these caregivers will have likely incurred childcare expenditures that exceed statutory caps, so that they may receive no tax benefits to reflect non-parental care costs. To this already grim situation, some heads of household may also suffer from the TCJA's curtailment of the beneficial rates that have historically applied to that status.

Turning to negative income ranges, those with non-parental care obligations will find the Code as it was before the TCJA — completely indifferent to their caregiving roles. Caregivers of, for instance, the elderly will receive the same EITC as those with no dependents. Only care of non-

[158] *See* I.R.C. § 1(a) (providing rates that do not depend on whether married couples are sole or dual earners); I.R.C. § 24 (providing credit that is same for all couples married filing joint returns with same number of dependent children).

[159] *See supra* text accompanying note 98.

[160] *See* Amendment of 1986 Code (Tax Cuts and Jobs Act), *supra* note 1, at 2072–73.

[161] I.R.C. § 24(h)(4).

minor children ratchets up that credit. And likewise, these non-parental caregivers will not be eligible for the ACTC, whose benefits are restricted to parents. While of little comfort to families affected, Congress' favoritism of sole earners is nothing new.

3. Historical Context: Old Brine in New Bottles

Congress has historically been reluctant to make differentiations among "parenting models"[162] and has preferred to tax similarly situated parents — i.e., parents caring for the same number of dependent children and earning the same taxable income — homogenously. As a result, Congress has a long history of favoring tax benefits for all parents over those that depend on what parenting model is used.

Nor has this gone unnoticed in the legal tax scholarship. Writing in the 1980s, Professor Pamela Gann notes how "Congress' adoption in 1948 of the criteria that 'equal income married couples pay equal taxes'[163] has generally led Congress to avoid enacting benefits specific to dual earners and unmarried parents." Writing over a decade later, Professor McCaffery further chronicles Congress's "conscious policy of taxing equal earning couples equally"[164] and its long "history of dealing with secondary earners, or more accurately, not dealing with them."[165]

Thus, the TCJA only added to an already well-established pattern — expanding benefits for all parents (through the doubled the CTC) while ignoring or curtailing specific benefits for dual earners and heads of household. But while Congress's favoritism of sole earners is, in many ways, just "old brine in new bottles," it is important that future scholarship assess the consequences of applying a preferentialism borne in an era when sole earners predominated to a current society in which caregiving models are far more diverse.

The remainder of this article sketches a few questions that should be explored in the future work.

B. Questions for Future Work

1. Old Preferentialism, Changed Demographics

America is no longer a nation of sole earners. Indeed, for some races, ethnicities and economic classes, it really never was. In the 1960s the sole earner model clearly predominated the overall population.[166] However, even

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[162] *See* Gann, *supra* note 8 at 471 ("Congress' adoption in 1948 of [...] criteria that 'equal income married couples pay equal taxes' reflected a system designed for a society largely composed of one-worker married couples.").

[163] *Id.*

[164] EDWARD MCCAFFERY, TAXING WOMEN 23 (1997).

[165] *Id.* at 69.

[166] CENSUS BUREAU, FAMILIES BY PRESENCE OF OWN CHILDREN UNDER AGE 18: 1950 TO PRESENT, TABLE CH-1,

at that time, black families typically utilized the dual earner model, often requiring two incomes to make ends meet.[167] But by the 1980s the dual earner model was more common than the sole earner model overall, and this remains true today.[168] And just as the dual earner model has increased in prevalence, it has also become increasingly common for children to be raised by unmarried parents.[169]

As a result, Congress's favoritism of the sole earner model had different effects in 1960 than it has today. In the 1960s, Congress's preferentialism benefitted the many at the expense of the few. Today, however, demographics have shifted so that this partiality benefits the few at the expense of the many.

Additionally, the inequities that result from Congress's favoritism of sole earners may disparately affect certain demographics. For instance, in 2016, among demographic groups studied, the Census Bureau found that it was most common for black children to be raised by unmarried parents and least common for Asian children. Falling in the statistical middle, about 30% of white children and about 40% of Hispanic children were raised by unmarried parents in 2016.[170] And summarizing the March 2017 Census Data, Pew Research reported that 47% of all black children were being raised by a solo mother, compared to 23% of Hispanic children, 13% of white children, and 7% Asian children.[171]

In short, while the Code's favoritism for sole earners may not be new, shifting demographics have certainly changed the composition of the winning and losing groups. This article certainly will not undertake a

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https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/families-and-households/ch-1.pdf (showing percentage of children raised by married parents over time); *see also*, *Parenting in America*, PEW RESEARCH CTR 15 (2015), https://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today/ ("In 1960, the height of the post-World War II baby boom, there was one dominant family form. At that time 73% of all children were living in a family with two married parents in their first marriage.").

[167] *See, e.g.*, Allyson Sherman Grossman, *Working Mothers and Their Children*, *Special Labor Force Reports—Summaries* 51, https://www.bls.gov/opub/mlr/1981/05/rpt3full.pdf.

[168] *See* Scott A. Hodge & Andrew Lundeen, *America Has Become a Nation of Dual-Income Working Couples*, TAX FOUND. (Nov. 21, 2013), http://taxfoundation.org/blog/america-has-become-nation-dual-income-working-couples (providing graph showing over 50% of married couples were dual earners since 1980); *see also The Rise in Dual Income Households*, PEW RESEARCH CTR. (June 18, 2015), https://www.pewresearch.org/ftdual-income-households-1960-2012-2/.

[169] Emily Badger, *The Unbelievable Rise of Single Motherhood in America Over the Last 50 Years*, WASH. POST: WONKBLOG (Dec. 18, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/12/18/the-unbelievable-rise-of-single-motherhood-in-america-over-the-last-50-years/.

[170] *See generally* U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS AND MARITAL STATUS OF PARENTS, BY AGE, SEX, RACE, AND HISPANIC ORIGIN AND SELECTED CHARACTERISTICS OF THE CHILD FOR ALL CHILDREN: 2016, Table C3 (Nov. 2016), https://www2.census.gov/programs-surveys/demo/tables/families/2016/cps-2016/tabc3-all.xls.

[171] Gretchen Livingston, *About One-Third of U.S. Children are Living with an Unmarried Parent,* PEW RES. CTR. (April 27, 2018), http://www.pewresearch.org/fact-tank/2018/04/27/about-one-third-of-u-s-children-are-living-with-an-unmarried-parent/.

comprehensive discussion of how the Code's preference for the sole earner model affects different demographic groups, but it provides fertile ground for undertaking this study in future work.

2. Old Preferentialism, Underappreciated Dangers

The Code's favoritism of the sole earner model is also likely to create underappreciated dangers for dual earners and unmarried caregivers, particularly when they have both parental and non-parental responsibilities. As discussed, several demographic trends suggest that the ranks of the sandwich generation — i.e., those that are both caring for minor children and aging relatives — can be expected to increase considerably. The Baby Boomers are reaching their senior years and life expectancies are far longer than they once were.[172] Experts have estimated that over half of Americans that turned age 65 before 2016 would eventually need long-term care.[173]

As discussed, however, the inequities that result from the Code's favoritism of sole earners can compound for members of the sandwich generation. Unmarried and dual earning parents that take on care of elderly relatives are unlikely to receive dependency care benefits to reflect eldercare costs, because childcare costs will have already "used up" their limits. And because head of household benefits do not ratchet up as number of dependents increase, unmarried parents will not receive additional benefits from that status when they take up additional caregiving roles. As also discussed, those with negative incomes receive no tax benefits to reflect care of non-minor children.

In addition to violating notions of fairness, this favoritism may create particular dangers for dual earner and unmarried families. First, the Code may be contributing to (rather than seeking to prevent) the risks of caregivers facing financial collapse. In their book, *The Two Income Trap,* then legal scholar Elizabeth Warren and Amelia Warren Tyagi presented data illustrating that dual earner families were far more likely to declare bankruptcy than sole earners, and that unmarried families were even more in danger of financial collapse.[174] Warren and Tyagi also identified a myriad of reasons why this is so. High among them was that sole earners retain a stay-at-home partner that can act as a "safety net" if calamity strikes.[175] If a parent

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[172] DEPARTMENT OF LABOR, *supra* note 103, at 9 ("The first Baby Boomers reached the age of 65 in 2011, and roughly 10,000 Boomers continue to hit that milestone every day."); *see also,* Ferrante, *supra* note 103, at 95 ("Several demographic trends are putting caregiving pressure on middle-aged adults. Americans are experiencing longer life expectancies reaching just over 78 years old on average. Due to advancements in medical science, technology, and healthcare we have the oldest aging society in the history of the world.").

[173] OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND DISABILITY, Dept. of Health and Human Services, LONG-TERM SERVICES AND SUPPORT FOR OLDER AMERICANS: RISKS AND FINANCING (rev. Feb. 2016), *available at* https://aspe.hhs.gov/system/files/pdf/106211/ElderLTCrb-rev.pdf.

[174] WARREN & TYAGI, THE TWO INCOME TRAP WHY MIDDLE-CLASS PARENTS ARE (STILL) GOING BROKE 83, 105 (Basic Books 2004).

[175] *Id.* at 58.

or child falls unexpectedly ill, the non-wage earner can provide needed care; and if more income is needed to do so, that partner can enter the workforce for a time. Dual earners and unmarried parents lack this safety net. If children or family members fall ill, there is no one available to provide care or enter the workforce temporarily to help them "get by."[176]

In addition to being unresponsive to and even exacerbating dangers of financial bankruptcy, the Code's favoritism of sole earners may also increase the risk that some individuals will not receive care when they ideally should. Suppose that elderly Ernie is starting to show signs of mental and/or physical incapacity, but, as often happens among the aging, his symptoms ebb and flow. Some days Ernie seems relatively fine, whereas other days he has trouble with routine tasks. While Ernie has not received a formal medical diagnosis, his family members are increasingly concerned.

If Ernie's family members are sole earners, they will have the opportunity to monitor Ernie in a consistent way to make sure he is safe and assess his functioning. If, however, Ernie's family members are unmarried parents or a dual earning couple, there options will be far more limited. They cannot take care of Ernie themselves while they are working. Should they hire a care provider to do so even though on some days he seems entirely himself? Because this type of care is expensive, these families may struggle to determine if this financial commitment is worthwhile, given the uncertain nature of Ernie's condition. The Code's failure to provide tax savings to reflect this care may make it more unlikely that individuals like Ernie will receive care in these "marginal situations" — i.e., in situations in which it is not yet clear whether and to what extent personal care is needed for a particular individual and families are deciding whether to provide it.

This sketches only two of the possible dangers that might result from Congress's favoritism of the sole earner model. In addition to fully exploring the demographic inequities that result from Congress's habitual favoritism of sole earners (discussed in the previous part), future work should tie the tax inequities described in this article with data about how caregiving models might increase the likelihood of bankruptcy and decrease the likelihood that "marginally" ill individuals receive care.

This article concludes by making a more general point about how legal tax scholarship can meaningfully contribute to discussions concerning the taxation of caregivers and Congress's long-held favoritism for the sole earner model. In order to move beyond specious political rhetoric and engage in more fulsome debates, legal tax scholars should consider the theoretical basis for differentiating among caregivers more deeply than they currently have.

V. CONCLUSION

This article has shown that the TCJA favored sole earning caregivers over dual earning and unmarried caregivers by failing to address old inequities and creating new ones of its own. It is upon these inequities that

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[176] *Id.* at 8–12.

the legal tax scholarship has often focused, and understandably so. But while inequities may offend colloquial notions of fairness, unequal taxation alone is not *per se* problematic — the Code plays favorites all the time, providing a bevy of benefits that are meant to incentivize certain behaviors and stimulate economic activity.

It is, therefore, not enough to identify ways in which the Code taxes different caregivers unequally. Instead, legal tax scholars must be able to explain whether and why this differential treatment is inappropriate. To do so, legal tax scholars should more deeply engage with distributive theories that offer frameworks for assessing whether inequalities should be tolerated and which identify higher order goals that justify unequal treatment.

Outside the context of caregiving, there has been plentiful and influential work tying tax policies with distributive theories. Very commonly, legal tax scholarship had invoked utilitarianism to analyze the ideal design of a particular tax law. For utilitarians, the ideal tax law would maximize aggregate utility (e.g., happiness), and unequal taxation would be justified if it accomplished this goal. But legal tax scholarship has not gone very far to connect ideas about caregivers with utilitarianism, or the many other distributive theories that have been developed and utilized in both the legal and non-legal literature. Companion work will, therefore, begin to build these bridges and, it is fervently hoped, bring new voices into the debate about how we should tax caregivers.[177]

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[177] Shannon Weeks McCormack, *Taxing Parents: Welfarist Bridges* (2020) (full draft on file with Author); Shannon Weeks McCormack, *Taxing Parents: Resource and Luck Egalitarianism* (2020) (draft in progress); Shannon Weeks McCormack, *Taxing Parents: Welfarism and Other-Regarding Preferences* (2020) (draft in progress); Shannon Weeks McCormack, *Taxing Parents: Equality of Opportunity Approaches* (2020) (draft in progress); Shannon Weeks McCormack, *Taxing Parents: A New Theoretical Approach* (2020) (draft in progress).