

Pink Tax and Other Tropes

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ABSTRACT

Law reform advocates should be strategic in deploying tax tropes. This Article examines five common tax phrases—the “nanny tax,” “death tax,” “soda tax,” “Black tax,” and “pink tax”—and demonstrates that tax rhetoric is more likely to influence law when used to describe specific economic injustices resulting from actual government duties, as opposed to figurative “taxes” in the form of other real-life burdens or differences. Slogans referring to figurative taxes are less likely to influence law and human behavior, despite their descriptive force in both popular and academic literature as a short-hand for group-based disparities. This Article catalogues and evaluates what makes for effective tax talk, in terms of impact on the law generally as well as day-to-day actions on the ground. With this roadmap, lawyers, policy makers and others will be able make more forceful and precise arguments aimed at reforming the law and changing human behavior.

This Article makes three principal claims—one descriptive, one empirical, and one normative. The Article first develops a taxonomy of tax phrases based on the object of critique. The classification distinguishes between criticisms of compulsory formal levies, on the one hand, and burdens or oppressions that are akin to taxes, on the other. The taxonomy also accounts for differences among tax tropes based on their linguistic form. Some phrases deploy a single-word modifier for “tax” (“nanny,” “death,” or “soda”) to signify a larger relationship, event, or transaction that is subject to taxation. Other phrases use a single-word modifier for “tax” (“Black” or “pink”) that is strongly associated with the persons subject to taxation.

The Article next engages in a content analysis of multiple data sets of printed popular and scholarly literature to compare the relative “success” of the phrases “nanny tax,” “death tax,” “soda tax,” “Black tax,” and “pink tax,” as measured by frequency of use, links to legal reform, and impacts on taxpayer behavior. The resulting preliminary hypothesis is that tax tropes that deploy suggestive modifiers to describe

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literal taxes are more effective than those that allude to identity axes associated with figurative taxes.

Finally turning its focus to the highly variable “pink tax” trope, in particular, the Article then makes normative recommendations for rethinking use of that complex phrase. The “pink tax” is an overarching description of related manifestations of gender inequality: the gender wage gap, gender-based pricing differences in consumer goods or services, disproportionate expenses incurred by a large portion of the population for safe travel or to maintain stereotypically “feminine” appearances, and unequal time burdens experienced by those responsible for households or caregiving. But only one manifestation of the “pink tax,” as a description for the state sales tax on menstrual products, has been well served by a tax shorthand phrase. “Tampon tax” talk has fueled litigation and advocacy efforts; it has led to law reform in at least eleven jurisdictions, with more states expected to follow. Indeed, “pink tax” rhetoric describing figurative taxes might not, on its own, lead directly to legal change. For that reason, at least when arguing for law reform, gender equality advocates should not over-rely on “pink tax” talk or figurative tax tropes.

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INTRODUCTION

Jane is an x-ray technician at the local hospital. She makes \$24.75 an hour working the 8:00 a.m. to 8:00 p.m. shift. On her way to work one day, Jane stops at the local store to buy a package of three razors for \$6.97.¹ The razors are pink and labeled as appropriate for “sensitive” users.² Jane also purchases a box of thirty-four tampons for \$6.99 and a package of ten menstrual pads for \$3.99.³ These tampons and pads will allow Jane to meet her menstrual management needs that month, perhaps with a few products left over. She buys a pack of twelve condoms for \$8.89; Jane may or may not engage in sexual activity in the coming days and weeks, but if she does, the supply will be sufficient for Jane’s sexual health needs for the month.⁴ With tax, Jane’s total purchase comes to \$27.60; the condoms are tax free but all of the other products are subject to state and local sales tax.⁵ When Jane leaves the hospital that evening after work, it is dark and she does not

¹ See Gillette Venus Sensitive Women's Disposable Razor, 3 Count, WALMART.COM, <https://www.walmart.com/ip/Venus-Gillette-Sensitive-Women-s-Disposable-Razor-3-Count/14651715> [<https://perma.cc/3BG2-LTRY>] (showing package of three Gillette Venus Sensitive Women’s Disposable razors with pink and white handles, white heads, three blades, and packaging that contains an image of a moisture drop).

² See *id.*

³ See Tampax Pearl Tampons Regular/Super Absorbency with LeakGuard Brand -Duo Pack - Unscented - 34ct, Target.com, TARGET.COM, <https://www.target.com/p/tampax-pearl-tampons-regular-super-absorbency-with-leakguard-braid-duo-pack-unscented-34ct/-/A-46793820#lnk=sametab> [<https://perma.cc/E6CX-N9KM>]; Always Radiant Overnight Sanitary Pads with Wings - Scented, TARGET.COM, <https://www.target.com/p/always-radiant-overnight-sanitary-pads-with-wings-scented/-/A-81279515?preselect=76155417#lnk=sametab> [<https://perma.cc/MLD9-X2F5>] (advertising package of ten pads “with wings” for \$3.99).

⁴ See Trojan ENZ Lubricated Premium Latex Condoms - 12ct, TARGET.COM, <https://www.target.com/p/trojan-enz-lubricated-premium-latex-condoms-12ct/-/A-11235052#lnk=sametab> (showing package of twelve lubricated latex condoms with spermicidal lubricant for \$8.89).

⁵ See, e.g., WIS. STAT. § 77.52 (2020) (imposing five percent sales tax on the “sale, license, lease or rental of tangible personal property sold, licensed, leased or rented at retail in this state”).

feel safe walking alone to public transportation. She pays \$4.56 to take a taxi several blocks to the bus stop.⁶ That weekend, she buys a birthday present for her 5-year old niece: a much longed-for pink scooter for \$49.99 (plus tax).⁷

* * *

Jerry works as an x-ray technician at the same hospital as Jane; he makes \$30.07 an hour. Like Jane, Jerry works from 8:00 a.m. to 8:00 p.m. On his way to work one day, Jerry stops at the local store to buy a package of three Gillette Mach3 Disposable Razors for \$6.88.⁸ The razors are black and labeled as appropriate for “sensitive” users.⁹ He also buys a pack of twelve condoms for \$8.89; Jerry may or may not engage in sexual activity in the coming days and weeks, but if he does, the supply will be sufficient for Jerry’s sexual health needs for the month.¹⁰ With tax, Jerry’s total purchase comes to \$16.16 (the condoms are not subject to sales tax, but the razors are).¹¹ When Jerry leaves the hospital that evening after work, it is dark, but he walks to the bus stop and takes public transportation home. That weekend, Jerry buys a birthday present for his 5-year old nephew. Jerry buys a scooter identical to the one Jane bought at the same store, except Jerry buys a red scooter instead of a pink one. Jerry pays only \$24.99 (plus tax).¹²

⁶ This illustration is a rough estimate for a short trip in a major metropolitan area. See, e.g., Taxi Fare, NYC TAXI & LIMOUSINE COMM’R, <https://www1.nyc.gov/site/tlc/passengers/taxi-fare.pager> (providing for an initial charge of \$2.50, an additional surcharge of \$0.50 from 8 p.m. to 6 a.m., and a rate of \$.050 per 1/5 of a mile when traveling above a certain speed, or every minute, when the taxi is traveling slowly or stopped in traffic); Calculate Your Taxi Fare New York City Now, TAXI CALCULATOR, <https://www.taxi-calculator.com/taxi-fare-new-york-city/259> (explaining that starting at 8:00 p.m., the base taxi fee is \$2.50, with the per kilometer price of \$1.56 added to the base).

⁷ See ANNA BESSENDORF, N.Y.C. DEP’T OF CONSUMER AFFS., FROM CRADLE TO CANE: THE COST OF BEING A FEMALE CONSUMER (Shira Gans ed., 2015), <https://www1.nyc.gov/assets/dca/downloads/pdf/partners/Study-of-Gender-Pricing-in-NYC.pdf> [hereinafter *From Cradle to Cane*] (showing pink “Radio Flyer Girls My 1st Scooter Sparkle-Pink” retailing for \$49.99).

⁸ See Gillette Mach3 Sensitive Mens [sic] Disposable Razor, 3 Count, WALMART.COM, <https://www.walmart.com/ip/Gillette-Mach3-Mens-Disposable-Razors-for-Smooth-Shave-3-ct/11961016> [<https://perma.cc/YHS9-5PQJ>] (showing package of three Gillette Mach3 Sensitive Men’s Disposable Razors with black handles, black heads, three blades and packaging that promises “more lubricants released”).

⁹ See *id.*

¹⁰ See Trojan ENZ Lubricated Premium Latex Condoms - 12ct, *supra* note 4.

¹¹ See, e.g., WIS. STAT. §§ 77.52, 77.5(14) (exempting “drugs” from five percent retail sales tax), 11.09(2)(k) (2020) (defining “medicated condoms” as “drugs,” and thus exempt, for state sales tax purposes).

¹² See *From Cradle to Cane* (showing red “Radio Flyer My 1st Scooter Sport-Red” retailing for \$24.99)

* * *

In these two simple hypotheticals, the contours of the “pink tax” are readily apparent. First, Jane makes a lower hourly wage (\$24.75) than Jerry (\$30.07), seemingly for performing the same job, although admittedly the hypotheticals do not furnish potentially relevant information about any differences in their education, employment histories, or current responsibilities.¹³ Second, Jane pays \$0.09 more for razors that appear to be identical to the ones Jerry buys, except that the “women’s” razors are pink and the “men’s” razors are black. Third, Jane buys menstrual products to address an involuntary biological function; she pays sales tax on these necessary items. In contrast, there is no tax on the condoms that either Jane or Jerry purchases for prospective sexual activity that is, presumably, entirely voluntary and not certain to occur. Fourth, even though both employees leave the hospital at the same time, Jane feels unsafe walking to the bus stop alone at 8:00 p.m., so she pays a taxi fare of \$4.56 that Jerry does not. Finally, the scooter Jane buys in pink costs \$25 more than the same scooter Jerry purchases in red. Two similarly situated individuals thus have different financial positions, seemingly attributable to gender.¹⁴

In both scholarly and popular literature, the phrase “pink tax” describes many of the gendered economic or fiscal inequalities illustrated

¹³ See, e.g., *Radiologic Technologist II Salary in the United States*, SALARY.COM, <https://www.salary.com/research/salary/benchmark/radiologic-technologist-ii-salary> (providing an average salary of \$60,885 for a “Radiologic Technologist II,” but noting, unsurprisingly, that salary “can vary widely depending on many important factors, including education, certifications, additional skills, the number of years you have spent in your profession”).

¹⁴ In this article, I use the term “gender” to refer both to gender identity as well as gender expression. See, e.g., *Glossary of Terms - Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> [<https://perma.cc/6W4Q-EX93>] (defining terms “sex,” “gender identity” and “gender expression”). Sex is the “classification of a person as male or female...A person’s sex...is actually a combination of bodily characteristics including chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics.” *Id.*; cf. Badgett et al., *supra* note 14. Gender identity is a person’s “internal, deeply held sense of their gender,” which may or may “match the sex they were assigned at birth” or “fit neatly” into the male/female gender binary. *Id.* Gender expression refers to the collective “[e]xternal manifestations of gender, expressed through a person’s name, pronouns, clothing, haircut, behavior, voice, and/or body characteristics” that society then “identifies ... as masculine and feminine, although what is considered masculine or feminine changes over time and varies by culture.” *Glossary of Terms - Transgender*, GLAAD. See also M.V. Lee Badgett et al., *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys* (GenIUSS) at v, UCLA SCH. OF LAW WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/publications/geniuss-trans-pop-based-survey/> (providing sample question for demographic studies, asking respondents to choose their “current gender identity” and listing the options “male,” “female,” “trans male/trans man,” “trans female/trans woman,” “genderqueer/gender non-conforming,” and “different identity (please state)”).

by the Jane and Jerry hypotheticals.¹⁵ These include (1) the gender wage gap; (2) gender-based pricing differentials in goods or services; (3) extra expenses to secure transportation because of gender-related personal safety concerns; and (4) literal taxes on menstrual products.¹⁶ Through the lens of the “pink tax,” this Article catalogues and evaluates what makes for effective tax talk, in terms of impact on the law and day-to-day actions on the ground.

This Article makes three principal claims—one descriptive, one empirical, and one normative. First it develops a taxonomy of tax phrases, based on the object of critique and grammatical form. The purpose is not to engage in linguistic analysis, though; the aim is to understand how tax-related language is or is not linked to the law and taxpayer behavior.¹⁷ A comparative content analysis of multiple data sets of print sources facilitates analysis of the “success” of the phrases “nanny tax,” “death tax,” “soda tax,” “Black tax,” and “pink tax” as measured by frequency of use, links to legal reform, and impacts on taxpayer behavior. The Article argues that tax tropes that deploy suggestive modifiers to describe literal taxes are more effective than those that allude to identity axes associated with figurative taxes. For that reason, advocates for gender equality should be especially cautious in deploying the “pink tax” trope. Only some rhetorical deployments of “pink tax” talk are likely to lead to law reform.

For some critics, all “pink tax” rhetoric may seem hyperbolic. After all, the differences between Jane and Jerry’s expenditures could be easily dismissed as mere pennies (in the case of the razors), attributable to an

¹⁵ To be more precise, almost all discussions of the “pink tax” employ a male/female gender binary, despite a more capacious contemporary understanding of sex, gender identity and gender expression. *See generally Glossary of Terms - Transgender*, GLAAD, *supra* note 14. This Article’s discussion of the pink tax embraces expansive and contemporary understandings of sex and gender. *See id.*; Badgett et al., *supra* note 14. To the extent that this Article uses gender binary terms, it is because the original sources do or because it is in the context of stereotypes historically associated with “women” (cis or trans) and “men” (cis or trans), without a more nuanced understanding of gender identity or gender expression.

¹⁶ The observation about gendered marketing includes in the category of “woman” consumers who are cis or trans. With regard to menstrual products, note that not all girls and women need menstrual products and not all who need menstrual products are girls or women. *See* Margaret E. Johnson, Emily Gold Waldman & Bridget J. Crawford, *Title IX and Menstruation*, 43 HARV. J. OF L. & GENDER 225, 231 n.22 (2020). Nevertheless, those who menstruate have at least one ovary and a uterus. *See, e.g., Menstruation*, PLANNED PARENTHOOD, www.plannedparenthood.org/learn/health-and-wellness/menstruation [https://perma.cc/5LB8-4Y4G].

¹⁷ *See also* Bridget J. Crawford, *Tax Talk and Reproductive Technology*, 99 B.U. L. REV. 1757, 1761-62 (2019) (describing “tax talk” as the ways people talk or fail to talk about taxation). For a related discussion of the interrelationship between language and another potential manifestation of gender-based inequality, see Lee-ford Tritt, *Litigation Blues for Red-State Trusts: Judicial Construction Issues for Wills and Trusts*, 72 FLA. L. REV. 841 (2020) (explaining potential interpretation issues that may arise over terms like “descendants” and “spouse” in estate planning documents executed before same-sex marriage became legal in all fifty states).

“inherent” difference (\$11.54 for taxable menstrual products), or the product of personal choice (\$4.56 for the taxi). And while the \$25 price difference in the scooters is puzzling, it is mentally convenient to attribute that price disparity to either idiosyncratic practices (perhaps the store made a mistake) or some rational, market-based response (perhaps there is more demand for pink scooters than red scooters, or pink paint is more expensive than red paint).

Indeed, one can point to a variety of analogous situations where tax rhetoric is entirely absent. In common parlance, a classmate with poor eyesight does not pay a “myopia tax” when buying glasses. A coworker does not pay a “tissue tax” to manage their runny nose. The partygoer does not pay a “taxi tax” to arrive at the party on time when trains are running behind schedule. But when an artist with cerebral palsy purchases a wheelchair to allow him to leave the house, or when he pays out of pocket for medical massages that are not covered by insurance, he might call that a “crip tax.”¹⁸ And when a trans person has difficulty getting a bank to retitle her account, despite proof of a legal name change, she may call that a “trans tax.”¹⁹ Thus, tax talk is more than a mere description of economic disparities that one individual may experience at a single point in time. It attempts to capture expenses and economic inequalities that add up both longitudinally (over the course of one person’s lifetime) and when aggregated across an entire population (looking at total differentials at a particular point in time).²⁰ To label expenses, experiences, or conditions a part of a “Black tax,” “pink tax,” “crip tax,” or “trans tax” is to denounce them as unfair because they are based on one’s identity as a member of a distinct and historically disadvantaged group.

In developing the taxonomy of tax talk, Part I does not attempt to catalogue all tax phrases or even the most familiar ones. “Sin tax” refers to actual government duties imposed on cigarettes and alcohol.²¹ Phrases like “stamp tax”²² and “whiskey tax” may ring a bell to students of American

¹⁸ See John Leoppky, *The “Crip Tax”: Everything Has a Cost, But for People With Disabilities That’s Quite Literally the Case*, CBC NEWS, Apr. 15, 2021, 5:00 AM CT, <https://www.cbc.ca/news/canada/saskatchewan/crip-tax-opinion-1.5856848>. See also Alice Wong, *#CripTax: Hidden Costs of Being Disabled*, WAKELET.COM, <https://wakelet.com/wake/435a5ef7-1f7b-4a1d-8254-2de2a411a203> (providing a sample of tweets using the hashtag “#criptax” to describe “the many material, social, and emotional costs of being disabled”).

¹⁹ See *Trans Tax*, URBANDICTIONARY.COM (Dec. 22, 2016), <https://www.urbandictionary.com/define.php?term=trans%20tax>.

²⁰ See *infra* Parts II.B, C.

²¹ “Sin tax” comes to mind. See, e.g., Bruce G. Carruthers, *The Semantics of Sin Tax: Politics, Morality, and Fiscal Imposition*, 84 FORDHAM L. REV. 2565, 2565 (2016) (referring to taxes on “alcohol consumption, tobacco consumption, and gambling”).

²² See, e.g., Robert G. Nelson, *What the Constitution Means by “Duties, Imposts, and Excises”—and “Taxes” (Direct or Otherwise)*, 66 CASE W. RES. L. REV. 297, 322 (2015) (describing

history, too.²³ A frequent contributor to social media may have demanded or paid the tongue-in-cheek “cat tax” for failing to observe particular internet norms.²⁴ Far from being exhaustive, however, Part I uses four representative tax phrases—the “nanny tax,” “death tax,” “soda tax,” and “Black tax”—to build a basic taxonomy of tax talk. Terms are classified both with reference to the type of inequality the phrase describes and its linguistic construction. At an initial level, tax talk may take aim at *literal* taxes: government-imposed duties.²⁵ Conversely, tax talk may target *figurative* taxes: burdens akin to government-imposed duties, but either not imposed by the government or not financial, or both.²⁶ After this initial classification, one may discern *synecdochic* tax talk: the use of a word to modify “tax,” where the modifier is a constituent part of a larger relationship, event, or transaction subject to taxation (e.g., “nanny tax,” “death tax,” “soda tax”).²⁷ Other tax talk is *metonymic*: it also deploys a word to modify “tax,” but the modifier is closely associated with the persons subject to tax (e.g., “Black tax”).²⁸ Note that the metonymic “Black tax” can refer to literal or figurative taxes; thus discussion of this phrase sets the stage for Part II’s analysis of the multiple uses of the phrase “pink tax,” many of which are illustrated by the Jane and Jerry hypotheticals above.²⁹ All of these phrases together are what this Article calls *tax tropes*—grammatical

the “pre-Revolution Stamp Tax” as a “kind of duty...imposed on court orders, ship clearances, deeds, mortgages, licenses, pamphlets, newspapers, gambling supplies, and even college diplomas”).

²³ See, e.g., Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 844 (2002) (explaining the 1791 excise tax on whiskey as the direct cause of the Whiskey Rebellion during the presidency of George Washington).

²⁴ See *Cat Tax*, DICTIONARY.COM (Aug. 6, 2019), <https://www.dictionary.com/e/pop-culture/cat-tax/> (“A *cat tax* is a cute image or video of a *cat* posted online as a fun, ironic “fine” (*tax*) upon introduction to a forum or social media platform, for breaking an internet group rule, or just for fun. Meow!”). Cf. *Cat Tax*, URBANDICTIONARY.COM (Dec. 17, 2020), <https://www.urbandictionary.com/define.php?term=Cat%20Tax> (“The cat tax is the requirement to post cute pictures of your cat when you mention them on the internet.”).

²⁵ See *tax*, OXFORD ENGLISH DICTIONARY (online ed. 2022) (“A compulsory contribution to the support of government, levied on persons, property, income, commodities, transactions, etc., now at fixed rates, mostly proportional to the amount on which the contribution is levied.”).

²⁶ See *id.* (“Something compared to a tax in its incidence, obligation, or burdensomeness; an oppressive or burdensome charge, obligation, or duty; a burden, strain, heavy demand.”).

²⁷ See *synecdoche*, *id.* (“A figure of speech in which a more inclusive term is used for a less inclusive one or vice versa, as a whole for a part or a part for a whole”).

²⁸ See *metonymy*, *id.* (“a word or phrase denoting an object, action, institution, etc.” used to denote “a property or something associated with it”). I thank Jeanne Schroeder for her contributions to this analysis.

²⁹ See *supra* notes 15-16 and accompanying text (describing different forms of the “pink tax”).

constructions that use one of the words (either “tax” or the modifier) in a way that is not technically accurate.³⁰

Building on the developed taxonomy of tax tropes, Part III then engages in an empirical evaluation of the frequency with which each tax phrase is used. Part IV extends that analysis to additional data sets in order to provisionally evaluate the comparative “success” of each tax trope. While there are many possible measures of a tax trope’s “success,” including how well the average person understands the term’s meaning, this study instead engages in a content analysis of two databases of print sources to determine how frequently each tax trope appears in popular and scholarly literature. It then considers what impact, if any, the trope has had on legal reform and taxpayer behavior. Measured along these three axes, this Article concludes that synecdochic tropes for literal taxes tend to be more “successful” than metonymic tropes for figurative taxes.

Building on this insight, Part V turns to normative recommendations for how gender equality advocates might cautiously deploy “pink tax” tropes; it offers related suggestions for advocates for allied movements for disability rights and trans rights. Given the multiple meanings of the “pink tax” and its lack of connection to direct legal change, though, advocates might consider dropping this form of tax talk in favor of more precise language and specific legislative proposals. For journalists, scholars, and others, the “pink tax” can be an effective shorthand; phrases like “Black tax,” “pink tax,” “crip tax,” and “trans tax” can also foster a sense of community awareness.³¹ Yet concrete legal change requires greater clarity than figurative tax talk can provide in naming and norming a vision for the future.

I. A TAXONOMY OF TAX TROPES

To call something a “tax” is to invoke one shorthand for injustice; doing so is part of a long and venerable American political tradition.³² From

³⁰ See *trope*, *id.* (“A figure of speech which consists in the use of a word or phrase in a sense other than that which is proper to it.”).

³¹ See Carolyn C. Jones, *Mapping Tax Narratives*, 73 *TULANE L. REV.* 653, 693 (1998) (“To some extent, one can view the use of taxation metaphors primarily as community-building that reconstructs perceptions of experience within the disfavored group. Resistance to taxation is an expression of a refusal to accept the dominant images describing the experience of racial or gender discrimination.”)

³² See, e.g., Anthony C. Infanti, *Tax Protest, “A Homosexual,” and Frivolity: A Deconstructionist Meditation*, 24 *ST. LOUIS U. PUB. L. REV.* 21 (2005) (discussing the stigma attached to the phrase “tax protestor,” despite the long history of patriotic tax protests in the United States) and Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 *BUFF. L. REV.* 819, 824 (2002) (“In the United States, anti-tax

the protests against the Stamp Act of 1765 to the contemporary Black Lives Matter movement, taxes are the frequent subject of popular scrutiny, the vernacular of outrage, and even cause for civil disobedience.³³ As a discursive framework, individuals and groups at all points on the political spectrum use tax talk as a form of protest.³⁴ But calling something a “tax” does not mean that it is, at least in the ways that economists and tax scholars tend to talk about taxes. As Professor Anthony Infanti has explained, there are at least two meanings of the word. There is the literal meaning of tax: “[a] compulsory contribution to the support of government, levied on persons, property, income, commodities, transactions, etc.”³⁵ Then there is the figurative meaning of tax: something “compared to a tax in incidence, obligation, or burdensomeness; an oppressive or burdensome charge, obligation, or duty; a burden, strain, heavy demand.”³⁶ This Part considers four common phrases—“nanny tax,” “death tax,” “soda tax,” and “Black tax”—and classifies each trope according to its descriptive aims and operation. “Nanny tax,” “death tax,” and “soda” taxes are all *synecdochic*—phrases with a constituent word that refers to a larger schema—and describe literal taxes. In contrast, “Black tax” is a *metonymic* reference, using a word for skin color to refer to a race of people; it gestures at mostly figurative

sentiments, along with anti-government sentiments generally, are an intrinsic aspect of American patriotism and national character. .”).

³³ According to John Adams, the Stamp Act was “form’d . . . to introduce the inequalities and dependencies of the feudal system, by taking from the poorer sort of people all their little subsistence, and conferring it on a set of stamp officers, distributors and their deputies.” John Adams, *A Dissertation on the Canon and the Feudal Law* (1765), in 1 PAPERS OF JOHN ADAMS 123, 128 (Robert J. Taylor ed., 1977) (quoted in Justin Du Rivage & Claire Priest, *The Stamp Act and the Political Origins of American Legal and Economic Institutions*, 85 S. CAL. L. REV. 875, 899 (2015)). On the relevance of taxation to the Black Lives Matter movement, see Anja Ruddiger, Cathy Albisa, & Karl Kumodzi, A Progressive Restructuring of All Tax Codes at the Local, State, and Federal Levels to Ensure a Radical and Sustainable Distribution of Wealth, <http://taxprof.typepad.com/files/blm.pdf> [<https://perma.cc/YQM3-2FJM>]. See also Erez Aloni, *The Marital Wealth Gap*, 93 WASH. L. REV. 1, 13-14 n. 72 (2018) (describing racial disparities in household income and noting the uptake of tax reform as part of the Black Lives Matter Agenda).

³⁴ See, e.g., Infanti, *supra* note 32, at 26 (noting that the Boston Tea Party’s protest slogan against “taxation without representation” is so engrained in the American lexicon that car owners residing in the District of Columbia have the option of purchasing license plate with the slogan, in protest of the fact that the District has only a non-voting delegate in the United States House of Representatives and none in the Senate).

³⁵ See *supra* note 25 and Anthony C. Infanti, *Taxing Civil Rights Gains*, 16 MICH. J. GENDER & LAW 319, 337 (2010) (before the Supreme Court’s recognition of same-sex marriage, evaluating the strategic value of harnessing tax language to advance LGBT rights and quoting the OED’s different definitions of “tax”). Professor Infanti has identified other forms of discrimination that persist in the wake of the decisions of the United States Supreme Court in *United States v. Windsor*, 133 S. Ct. 2675 (2013) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). See Anthony C. Infanti, *Victims of Our Own Success: The Perils of Obergefell and Windsor*, 76 OH. ST. L. J. FURTHERMORE 79 (2015).

³⁶ *Tax*, OXFORD ENGLISH DICTIONARY ONLINE, <https://www.oed-com>. See also Infanti, *Taxing Civil Rights Gains*, *supra* note 35, at 337.

taxes, except in the historic context. Figure 1 provides a graphical guide to the taxonomy that this Part will now develop.

Figure 1

A Taxonomy of Tax Tropes

| | Literal Taxes | Figurative Taxes |
|--|------------------------------------|------------------------------|
| synecdochic phrases (use one word as a stand in for larger transaction, event or relationship) | nanny tax death tax soda tax | |
| metonymic phrases (use a word closely associated with persons subject to tax) | Black tax (historic) | Black tax (1950s to present) |

A. Nanny Tax

The “nanny tax” is a tax trope that refers to a cluster of literal, employment-related taxes applicable to many household employees, not just nannies.³⁷ Widespread use of the phrase beginning in the 1990s appears to have had limited influence on taxpayer behavior, but it was the impetus for law reform.³⁸ The phrase “nanny tax” became national news in 1993.³⁹ President Bill Clinton’s first nominee for United States Attorney General, Zoë Baird, withdrew from consideration after revelations that she had employed undocumented immigrants as household employees and failed to pay related employment taxes.⁴⁰ Clinton’s second likely nominee for the

³⁷ See *infra* notes 47 to 49 and accompanying text.

³⁸ See *infra* notes 56 to 63 and accompanying text.

³⁹ See, e.g., Beth Frerking, *Questions on “Nanny Tax” Flood IRS*, CHI. SUN TIMES, Feb. 10, 1993, at 3 (reporting that someone walked into a local office of the Internal Revenue Service and “asked for the ‘Zoe Baird’ package of forms”) and Delia Flores, *Will a Loophole Save You If You Owe “Nanny Tax”?*, CHI. TRIB., Feb. 28, 1993, at 1 (“Though you may not be up for a political job, you probably know that if you’ve paid a housekeeper, babysitter or gardener more than \$50 per quarter and haven’t paid the workers’ Social Security taxes you have failed to obey the law.”).

⁴⁰ See, e.g., David Johnston, *Clinton’s Choice for Justice Dept. Hired Illegal Aliens for Household*, N.Y. TIMES, Jan. 14, 1993, at A1, and Michael Kelley, *Clinton Cancels Bair Nomination for Justice Department*, N.Y. TIMES, Jan. 22, 1993, at A1, <https://timesmachine.nytimes.com/timesmachine/1993/01/22/955593.html?pageNumber=>. Baird was the first woman ever nominated for the position. See Jerry Seper, *Zoe Baird’s Justice*, WASH. TIMES, Jan. 18, 1993 at D1 (noting that Baird was the “first woman to

position, Judge Kimba Wood, also withdrew from consideration after a similar issue surfaced in her past.⁴¹ The press dubbed “nanny gate” one of the first crises of the Clinton presidency.⁴² Baird and her husband, both sophisticated lawyers, acknowledged that they knew about their tax obligations but could not find anyone else suited for their household employment (or at least they offered this as an explanation for their employees’ immigration statuses).⁴³ In contrast, at the same time that Baird and then Wood were in the national spotlight, there were probably many other parents who had no idea that they were violating tax laws in hiring an occasional babysitter.⁴⁴ In 1999, the payment of just \$50 in a single fiscal quarter triggered an employer’s obligation to withhold and pay Social Security and Medicare taxes (commonly known as FICA).⁴⁵ Employers

serve as general counsel at a major American company” and the “first woman to be nominated as attorney general).

⁴¹ Wood’s situation was, in fact, somewhat different than Baird’s. Wood had hired an undocumented immigrant as a child-care provider, when it was legal to do so, and Wood paid the required taxes. See, e.g., Richard L. Burke, *Judge Withdraws From Clinton List for Justice Post*, N.Y. TIMES, Feb. 6, 1993, at A1 <https://timesmachine.nytimes.com/timesmachine/1993/02/06/386093.html?pageNumber=1> (reporting that Judge Wood withdrew her name from consideration as Attorney General “after the White House learned she had employed an illegal immigrant as a babysitter” before the law changed a).

⁴² See, e.g., Anna Quindlen, *The Grace Period*, NEW ORLEANS PICAYUNE, Jan. 26, 1993, 993 WLNR 860884 (describing the “first crisis” of Bill Clinton’s presidency as “perhaps fittingly, Nannygate, and at its center was this timeless political question: What did the president know about child care and when did he know it?”).

⁴³ See Sidney Blumenthal, *Adventures in Babysitting*, NEW YORKER, Feb. 15, 1993, 53, 55 (describing Baird’s attempts to explain the decision made by her and her then-husband, Yale Law School professor Paul Gewirtz, to hire an undocumented immigrant and to fail to comply with their tax obligations as a household employer) and Robert D. McFadden, *The White House and Judge’s Allies Clash Over Hiring*, N.Y. TIMES, Feb. 7, 1993, at A1 (saying that Baird “admitted that she had violated laws by not paying taxes for two illegal aliens she employed as household help”). See also Taunya Lovell Banks, *Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate*, 3 J. GENDER RACE & JUSTICE 1, 3 (1999) (“Baird, like a majority of working affluent women, knowingly and unlawfully failed to pay Social Security taxes for her domestic employee.”).

⁴⁴ See, e.g., McFadden, *supra* note 43 (reporting that “The White House and people close to Judge Kimba Wood gave contradictory accounts yesterday of the extent and timing of the information she supplied the Clinton Administration about her hiring of an illegal alien”) and Robert Pear, *No Law Violated by Judge in 1986*, N.Y. TIMES, Feb. 7, 1993, at A23 (explaining that at the time Judge Kimba Wood had hired an undocumented immigrant as a childcare worker in 1986, it was legal to do so and that the change in law was prospective only).

⁴⁵ See Brian Erard, *Who Is Minding the Nanny Tax?* <https://www.irs.gov/pub/irs-soi/18resconerard.pdf> (explaining an employer’s FICA and FUTA obligations as of 1993).

who owed more than \$100 in federal and state unemployment insurance (commonly known as FUTA) were required to pay quarterly.⁴⁶

At the most basic level, the term “nanny tax” is a misnomer. There is no special tax on nannies; they pay income tax like all other employees.⁴⁷ The phrase refers more accurately to a cluster of tax withholding and payment obligations imposed on *employers* of household workers (e.g., elder care providers, personal assistants, drivers, housekeepers, and childcare providers).⁴⁸ According to statements made by the Commissioner of the Internal Revenue Service in 1994, approximately seventy-five percent of all households with employees failed to comply with their obligations to withhold and pay payroll taxes (although that estimate may have been too low).⁴⁹

In large part to the publicity surrounding the Baird and Wood nominations, Congress subsequently took steps to simplify tax compliance for household employers. In 1994, new legislation increased the threshold for filing FICA taxes from \$50 a quarter to \$1,000 per year, although taxpayers still had to file a separate annual FUTA return.⁵⁰ Then for the 1995 tax year, the Internal Revenue Service reformed Form 1040 to permit taxpayers to calculate and pay all federal payroll taxes (FICA and FUTA)

⁴⁶ *Id.*

⁴⁷ *See, e.g.*, Publication 17 (2021), Your Federal Income Taxation, Table 1-1, INTERNAL REV. SERV., <https://www.irs.gov/publications/p17> (showing that for 2021, in the case of an unmarried adult individual under the age of 65 who other than a head of household or surviving spouse, the obligation to file an income tax return begins once the taxpayer has income of \$12,550). The minimum threshold for filing income tax returns at the state level may or may not track the federal requirements. *See* JEROME HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION § 20.02 (3d ed.) (Conformity to Federal Income Tax Base) (providing an overview of differences in state-level income taxation in those jurisdictions that have a state income tax) and ERICA YORK & JARED WALCZAK, STATE AND LOCAL TAX BURDENS, CALENDAR YEAR 2019, Table 1, <https://files.taxfoundation.org/20210322135318/State-and-Local-Tax-Burdens-Calendar-Year-20192.pdf> (providing an overview of state-local tax burdens by state).

⁴⁸ *See, e.g.*, Publication 926 (2021), Household Employer’s Tax Guide 2-3, 6-9, INTERNAL REV. SERV., <https://www.irs.gov/pub/irs-pdf/p926.pdf> (explaining the circumstances in which an employer must pay employment taxes for a “household employee” and how to determine who is a household employee and describing employer’s withholding and tax payment obligations).

⁴⁹ *See* Alexandra Alger, *Zoe’s Revenge*, FORBES, Nov. 6, 1995, at 376 (quoting Commissioner of the Internal Revenue Service Fred Goldberg); 140 CONG. REC. 11,803 (1994) (statement of Sen. Moynihan that “only 25 percent of households with domestic workers report wages paid to these employees”), file:///Users/bridgetcrawford/Downloads/GPO-CRECB-1994-pt8-7-1-2.pdf. *See also* Banks, *supra* note 43 (citing the rate of compliance with FICA obligations in 1993).

⁵⁰ *See* Social Security Domestic Employment Reform Act of 1994, P.L. 103-387, 108 Stat. 4071 § (1994) (codified as amended at 26 U.S.C. § 3121(x)). Other changes include a shift from quarterly to annual filing and an exemption for occasional teenage babysitters. *See* 26 U.S.C. § 3121(b)(21) (1994) (containing the so-called “babysitter exemption”). *See also* Debra Cohen-Whelan, *Protecting the Hand That Rocks the Cradle: Ensuring the Delivery of Work Related Benefits to Child Care Workers*, 32 IND. L. REV. 1187, 1191-1192 (1999)

via a new Schedule H.⁵¹ Over the years, the annual threshold limit that triggers the requirement to pay payroll taxes has increased; in 2022, it is \$2,400 per year.⁵² Earnings below that amount are not subject to Social Security or Medicare. Otherwise, Social Security and Medicare obligations amount to 15.3 percent of cash wages.⁵³ Federal unemployment taxes are six percent of the first \$7,000 in cash wages.⁵⁴ State unemployment insurance rates on taxable wage bases vary by jurisdiction.⁵⁵ In leading to concrete tax reform, the “nanny tax” trope has been quite successful.

Despite the phrase’s success at influencing legislation, it is not clear that compliance with the so-called “nanny tax” rules has improved since Baird and Woods were national news. To the contrary, according to the Internal Revenue Service, the number of returns paying household employment taxes declined from approximately 500,000 in 1994 to 300,000 in 1995 and then rose slightly to 314,000 in 1996.⁵⁶ The trend has continued downward to a low of 177,405 households in 2019, the most recent year for which data is available.⁵⁷ Compare that to Bureau of Labor Statistics data, which shows that an estimated 821,000 people were employed as private household workers in 2019.⁵⁸ The Census Bureau’s American Community

⁵¹ See Kim M. Bloomquist & Jhiyong An, *Geographic Variation in Schedule H Filing Rates: Why Should Location Influence the Decision to Report “Nanny Taxes”?* INTERNAL REV. SVC. 190 (2005), <https://www.irs.gov/pub/irs-soi/05bloom.pdf> (explaining revisions to tax law and reporting requirements in the wake of Zoë Baird failed nomination).

⁵² See Employment Coverage Thresholds for 2022, SOC. SECURITY ADMIN., <https://www.ssa.gov/oact/cola/CovThresh.html>

⁵³ The amounts may be paid either half by the employer and half by the employee (via withholding) or the employer can choose to pay the employee’s share and not withhold. Publication 926 (2021), Household Employer’s Tax Guide 27.

⁵⁴ *Id.* at 9.

⁵⁵ See, e.g., A Preliminary Look at the 2022 SUI Taxable Wage Bases, Tax News Update, EY.COM (Dec. 15, 2021), <https://taxnews.ey.com/news/2021-2255-a-preliminary-look-at-the-2022-sui-taxable-wage-bases> (providing table of the 2021 and 2022 state unemployment insurance taxable wage bases).

⁵⁶ See David Cay Johnston, *Despite an Easing of Rules, Millions Evade “Nanny Tax,”* N.Y. TIMES, Apr. 5, 1998 at 1 (reporting that those paying federal taxes with respect to household employees was approximately 500,000 in 1994, approximately 300,000 in 1995, and 314,000 in 1996) <https://www.nytimes.com/1998/04/05/business/despite-an-easing-of-rules-millions-evade-nanny-tax.html>. The simplification measures were enacted in 1994 and became effective in 1995. See *id.* and *supra* note 51 and accompanying text.

⁵⁷ See IRS Statistics of Income Individual Income Tax Returns, Publication 1304, Table A: Selected Income and Tax Items for Selected Years (in Current and Constant Dollars), https://www.irs.gov/statistics/soi-tax-stats-individual-income-tax-returns-complete-report-publication-1304#_tbla (showing estimates of number of returns filing household employment taxes trending downward from 284,706 in 1997 to 177,407 in 2019).

⁵⁸ See Private Households: NAIC 814, U.S. BUREAU OF LABOR STAT., <https://www.bls.gov/iag/tgs/iag814.htm>, and Private Households, DATAUSA.IO, <https://datausa.io/profile/naics/private-households> (reporting data from the American Community Survey).

Survey estimates that there are 368,000 employees in this cohort.⁵⁹ Even noting this significant discrepancy, whether due to survey undercounting or inaccuracies (because, for example, an employee may change jobs or have multiple jobs), the data suggests that widespread noncompliance with the law continues.⁶⁰ According to one study, up to ninety-five percent of all current households may be noncompliant with their federal payroll tax obligations, with a resulting tax deficit as large as \$4 billion.⁶¹ This is true even though there is a veritable cottage industry of professionals devoted to helping employers of housekeepers, child-care workers, and other household staff comply with applicable tax laws.⁶² The many possible reasons for taxpayer non-compliance are beyond the scope of this discussion, but the level of noncompliance is noteworthy.⁶³

Nearly thirty years after the phrase “nanny tax” first entered popular discourse, increased awareness combined with simplification of the law have not caused more taxpayers to comply with the tax law.⁶⁴ Print mentions of the “nanny tax” peaked in 1996, three years after the Baird nomination; thereafter, the usage rates returned to levels consistent with 1990 and 1991,

⁵⁹ See 2019 American Community Survey 1-Year Experimental Public Use Microdata Sample, <https://www.census.gov/programs-surveys/acs/microdata.html> and Private Households, DATAUSA.IO, <https://datausa.io/profile/naics/private-households> (reporting data from the American Community Survey).

⁶⁰ See Erard, *supra* note 45, at 195-96 (pointing out several possibly inaccuracies in data estimates).

⁶¹ See *id.* at 189 (“According to our estimates, only 5.3 percent of household employers file Schedule H (Household Employment Taxes) with their individual income tax returns and remit the required payroll taxes for their domestic employees. Overall, only \$1.1 billion in payroll taxes were remitted with Schedule H in 2015, leaving an estimated revenue gap of between \$2.4 billion and \$4 billion”).

⁶² See, e.g., Jessica Elliott, *Best Nanny Payroll Services of 2021*, INVESTOPEDIA.COM (Aug. 9, 2021), <https://www.investopedia.com/best-nanny-payroll-services-5089900> (providing summary of services offered by eight different companies that facilitate tax compliance by employers of household staff).

⁶³ See Johnston, *supra* note 56 (suggesting lack of enforcement, a widespread culture of non-compliance, incorrect advice from accountants, and frustrations with interacting with the government as reasons that taxpayers may not comply with their obligations to pay household employment taxes). See also Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1794 (2000) (discussing lack of stigma as one factor contributing to the evasion of nanny taxes compared to, for example, embezzlement).

⁶⁴ See, e.g., Beth Frerking, *Questions on “Nanny Tax” Flood IRS*, CHI. SUN TIMES (Feb. 20, 1992) at 3, 1993 WLNR 5343666 (describing the nanny tax as “hot topic” at field offices responding to queries from concerned taxpayers, suggesting that “Americans have suddenly become aware that they have to pay taxes for domestic help”); Albert B. Crenshaw, *Lawmakers Tackle Nanny Tax Issues*, WASH. POST (Mar. 7, 1993), 1993 WLNR 5610923 (describing work on new legislation to raise the threshold after which an employer must pay Social Security taxes for a household worker from its then-current level of \$50 per fiscal quarter, noting that “these measures deal with only one aspect of the so-called ‘Zoe Baird problem.’ President Clinton’s initial choice for attorney general, you’ll recall, not only hadn’t paid taxes for her household employees, but the employees she’d hired also were illegal immigrants”). See also *supra* notes 56-61 and accompanying text.

before Baird and Wood became front-page news.⁶⁵ Without robust survey data, though, it is difficult to understand what to make of the frequency of print mentions of the phrase "nanny tax." Just because the phrase appears in newspapers and the like, to a greater or lesser extent in one year or another, does not mean that the general public understands the details of the literal taxes the phrase describes.

Taking a step back then, consider how the phrase "nanny tax" functions in operation. The trope mostly describes literal taxes; it refers to a concrete set of interrelated tax obligations of a household employer (i.e., to withhold and/or pay FICA and FUTA).⁶⁶ The word "nanny," standing in for the worker whose employment triggers the tax obligations, has uniquely classed and gendered aspects.⁶⁷ Note that both Baird and her husband (not Baird alone) had employed two undocumented immigrants: one worked as a nanny and the other worked as a chauffeur.⁶⁸ Yet the press focused on Baird as the solely responsible party and notably dubbed the affair "nanny gate," not "chauffeur gate."⁶⁹ The very word "nanny" specifically invokes the image of an upper-class *woman* who is too busy or disinterested to care for her own children.⁷⁰ The word choice further highlights that the payment of another woman to do "mothering" work, so that Baird could work outside the home.⁷¹ Perhaps not surprisingly, even though several of President Clinton's potential or actual male appointees for political office revealed they, too, had not paid household employment taxes for childcare workers

⁶⁵ See Google Books Ngram Viewer (setting search parameters to years "1980-2019" and "English (2019)" and searching phrase "nanny tax"). See also generally Jean-Baptiste Michel et al., *Quantitative Analysis of Culture Using Millions of Digitized Books*. 331 SCIENCE 176 (2010) (describing the system now known as Google Ngram that permits users to conduct quantitative analysis of language trends over a corpus of digital texts representing 4% of all books ever in print).

⁶⁶ See *supra* notes 47-48 and accompanying text.

⁶⁷ See *supra* note 27 (providing the definition of synecdoche).

⁶⁸ See Blumenthal, *supra* note 43.

⁶⁹ See McFadden, *supra* note 43 (emphasizing Baird's hiring of employees and Baird's failure to pay taxes, without mentioning her lawyer-husband's participation in the decisions).

⁷⁰ For some, the word "nanny" has a certain snobbishness or connotation of high economic or social status of the employer; for others, the word "nanny" conveys respect for someone who is a professional who works regularly in the home of another, as opposed to a "babysitter" who might be a teenager or someone else doing part-time work. See, e.g., Hillary Levey Friedman, *The Euphemisms We Use Instead of "Nanny,"* KVELLER.COM (Dec. 12, 2012) (in which the author describes speaking with another new parent and that "I didn't want to further complicate matters by having this woman think I was a rich and spoiled diva. So instead of saying my son has a nanny during the week, I said he has a babysitter.")

⁷¹ See McFadden, *supra* note 43. See also Taunya Lovell Banks, *Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate*, 3 J. GENDER, RACE & JUST. 1, 20-21 (1999) (pointing out that, in the media, "nannies" connotes "surrogate mothers for upper class children" and discussing more generally the gendered aspects of "nanny gate").

or housekeepers, none of these men became the face of “nanny gate.”⁷² To be sure, anyone with contemporary political aspirations is probably more careful in selecting employees than were Zoë Baird, Kimba Wood, or appointees from the Clinton era,⁷³ but the rise in the frequency of use of the phrase “nanny tax” in the 1990s did not translate into increased taxpayer compliance.⁷⁴

B. Death Tax

Turning to the next tax trope, the “death tax” refers (inaccurately) to literal taxes. The phrase has an enormous impact on federal legislation and public opinion. In fact, there is no such thing as a “death tax,” but most Americans vigorously oppose it all the same.⁷⁵ The phrase is political; pollsters and politicians began using phrase “death tax” in the late 1990s to refer to estate taxes imposed at the state or federal level (or both) on the transfer of assets at death.⁷⁶ Through strategic phrasing in multiple opinion polls, conservative advocates elicited data they needed to credibly claim that the majority of Americans favor estate tax repeal.⁷⁷ For example, when asked in 2000, “Do you approve or disapprove of abolishing the estate tax, also known as the ‘death tax’?” seventy-nine percent of respondents said they approved.⁷⁸ This makes intuitive sense; everyone dies, so the “death

⁷² See, e.g., Michael Kelly, *Household Hiring is Trickier with New Broom in Capital*, N.Y. TIMES (Feb. 12, 1993), <https://timesmachine.nytimes.com/timesmachine/1993/02/12/990993.html?pageNumber=1> (reporting that none of Charles Ruff, a potential nominee for Attorney General, Barry Zigas, a potential nominee for a position with the Department of Housing and Urban Development, Transportation Secretary Federico Pena, nor Commerce Secretary Ron Brown had paid application household employment taxes for nannies or housekeepers).

⁷³ See e.g., Form SF86, Questionnaire for National Security Positions, U.S. GEN. SERV. ADMIN., <https://www.gsa.gov/forms-library/questionnaire-national-security-positions> (asking in Question 26.3, “In the past seven (7) years have you failed to pay Federal, state, or other taxes when required by law or ordinance?”).

⁷⁴ See *supra* notes 56-63 and accompanying text.

⁷⁵ See Larry M. Bartels, *Unenlightened Self Interest: The Strange Appeal of Estate Tax Repeal*, AM. PROSPECT 1049 (Jun. 1, 2004) (discussing results of 2002 National Election Survey showing that a large majority of respondents favored “doing away with the death tax,” although the author points out that the results were substantially similar, whether the question was phrased in terms of the “estate tax” instead).

⁷⁶ See Mayling Birney, Michael J. Graetz & Ian Shapiro, *Public Opinion and the Push to Repeal the Estate Tax*, 59 NAT’L TAX J. 439 (2006) (“At one point in 1999 or 2000, the Republican leadership in fact issued a directive to its membership to use only the term ‘death tax’ to refer to the estate tax.”).

⁷⁷ *Id.* at 459 (“the coalition for repeal eventually did such an effective job at convincing legislators that public option was on their side, and could reliably be maintained that way, that the conventional wisdom was all but reverse”).

⁷⁸ *Id.* at 443 (reporting results of January 2000 poll by McLaughlin and Associates, a group of “Republican consultants”).

tax” sounds universal, as Professor Michael Graetz and others have emphasized.⁷⁹ The practical reality, though, is that a mere fraction of all decedents will be subject to the estate tax.⁸⁰

Estate tax repeal moved from a fringe issue in the 1990s to the mainstream in the early 2000s.⁸¹ The shift is largely attributable to two factors. First, extensive polling by proponents of estate tax repeal was conducted with the express intention of impacting elite opinion.⁸² Second, political conservatives won support from national membership organizations such as the American Farm Bureau, the National Association of Manufacturers and the National Federation of Independent Businesses.⁸³ The overall impression became one of widespread applicability of the “death tax” and strong public opinion against it. In reality, though, very few decedents are subject to the estate tax.⁸⁴

In 2001, when Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) with bipartisan support⁸⁵ and agreed to a temporarily, one-year repeal of the estate tax for the year 2010, the estate tax exemption was \$675,000.⁸⁶ A mere 2% of all decedents paid any estate tax that year.⁸⁷ Legislative reform made that number shrink even further. Under EGTRRA, the estate tax exemption gradually increased to \$3.5 million in 2009 and there was no estate tax at all in 2010.⁸⁸ When the estate tax returned in 2011 with an exemption of \$5 million,⁸⁹ only 0.2

⁷⁹ *Id.* at 44.

⁸⁰ See, e.g., Joel Slemrod, *The Roles of Misconceptions in Support for Regressive Tax Reform*, NAT'L TAX J. 57, 69-70 (2006) (finding that views on eliminating the estate tax not significantly associated with income levels).

⁸¹ See, e.g., Joshua Green, *Meet Mr. Death*, AM. PROSPECT (Dec. 19, 2001), <https://prospect.org/features/meet-mr.-death> (comparing the limited congressional support in 1993 for estate repeal legislation with the 254 votes that pro-repeal legislation received in 2001). See also Richard L. Heaton, *The Death of the Death Tax?* 42 ORANGE CO. LAW. 6 (2000) (“When Chris Cox introduced his bill in Congress to repeal the death tax in 1993, people laughed and said that such a bill could not be taken seriously.”).

⁸² See Birney et al., *supra* note 76, at 440.

⁸³ See *id.* at 451.

⁸⁴ See, e.g., SOI Bulletin, Historical Tbl. 17 Taxable Estate Tax Returns as a Percentage of Adult Deaths, Selected Years of Death, 1934-2016, INTERNAL REV. SRV., <https://www.irs.gov/statistics/soi-tax-stats-historical-table-17>.

⁸⁵ See *id.* at 450-51.

⁸⁶ See SOI Bulletin, Historical Tbl. 17 Taxable Estate Tax Returns as a Percentage of Adult Deaths, Selected Years of Death, 1934-2016, *supra* note 84.

⁸⁷ See *id.*

⁸⁸ Economic Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16, 115 Stat. 38 (codified in scattered sections of 26 U.S.C.).

⁸⁹ See SOI Bulletin, Historical Tbl. 17 Taxable Estate Tax Returns as a Percentage of Adult Deaths, Selected Years of Death, 1934-2016, *supra* note 87.

percent of all decedents were subject to the estate tax.⁹⁰ Given that the estate tax exemption in 2022 is \$12,060,000 per individual, the number of decedents subject to the estate tax is likely even lower now.⁹¹ While there appears to be some appetite among Democratic lawmakers to either lower the estate tax exemption or to institute a wealth tax, it is difficult to predict the future of the estate tax under President Biden or beyond.⁹² One thing remains certain, however: the “death tax” is highly unpopular, even if it has a more limited reach now than when the issue first became mainstream.⁹³

The perception that the estate tax applies broadly is difficult to correct.⁹⁴ Scholars attribute this to several factors. First, preferences expressed in poll responses may be based on misperception, meaning a lack of knowledge about how large an estate must be before it is subject to the

⁹⁰ See Greg Iacuri, *Here's How Many People Pay the Estate Tax*, CNBC.COM (Sept. 29, 2021, 11:14 AM), <https://www.cnbc.com/2021/09/29/heres-how-many-people-pay-the-estate-tax-.html> (noting that the number of taxable estates in 2011 represented the “lowest percentage on record” in light of historic percentages in the rate of 1% to 2%). In 2001, when temporary repeal was enacted, there were 108,071 estate tax returns filed; 47.9% of these estates owed any tax. See SOI Estate Tax Statistics, INTERNAL REV. SRV., <https://www.irs.gov/statistics/soi-tax-stats-estate-tax-statistics> (follow link for 2001 to spreadsheet showing 108,701 estate tax returns filed in 2001 and 56,335 of these resulting in estate tax payable) and Brian G. Raub, *Recent Changes in the Estate Tax Exemption Level and Filing Population*, INTERNAL REV. SVC., 114, 115 Fig. C, <https://www.irs.gov/pub/irs-soi/05estate.pdf>. Under President Obama’s leadership, Congress enacted the American Taxpayer Relief Act 2013 and established the estate tax exemption “permanently” at \$5 million, indexed for inflation. American Taxpayer Relief Act, P.L. 112-240, 126 Stat. 2313 (2013). The estate and gift tax exemption amounts, indexed for inflation, were \$5,000,000 in 2011; \$5,120,000 in 2012; \$5,250,000 in 2013; \$5,340,000 in 2014; \$5,430,000 in 2015; \$5,400,000 in 2016; and \$5,490 in 2017. See Estate Tax, INTERNAL REV. SRV., <https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax> (listing exemption amounts in 2022 and prior years).

⁹¹ See Rev. Proc. 2021-45, I.R.B. 2021-45 (Nov. 8, 2021). Permanent tax reform is almost never that. Under President Trump, Congress passed the Tax Cut and Jobs Act in 2017 and doubled the estate tax exemption and included inflation adjustments. Tax Cut and Jobs Act, P.L. 115-97, 131 Stat. 3054 (2017). The estate and gift tax exemption amounts, indexed for inflation, were \$11,180,000 in 2018; \$11,400,000 in 2019; \$11,580,000 in 2020; \$11,700,000 in 2021. See Estate Tax, *supra* note **Error! Bookmark not defined.** (listing exemption amounts in 2022 and prior).

⁹² See, e.g., Alan Gassman, *Hey President Biden-What Are You Doing on Estate Tax?* FORBES (Oct. 28, 2021, 9:26 AM), <https://www.forbes.com/sites/alangassman/2021/10/28/will-there-be-a-change-in-the-estate-tax-laws/?sh=5f940ee92afd> (referring to proposals by both Senator Bernie Sanders and the House Ways and Means Committee to reduce the estate and gift tax exemption, among other reforms, and other proposals for a “billionaire tax,” but noting the absence of any estate tax legislation in President Biden’s “Build Back Better” plan).

⁹³ See *supra* note 75 and accompanying text.

⁹⁴ E.g., MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* 124 (2005) (citing Greenberg Quinlan Rosner Research Survey of May 6-8 2002 showing that even when presented with data about who is subject to the estate tax, a full 30% of respondents counterfactually believed that their household would be subject to the tax). Cf. John Sides, *Stories or Science? Facts, Frames, and Policy Attitudes*, 44 AM. POLITICS RES. 387, 388 (2015) (describing what the author sees as “manipulation of information specific to the estate tax” that fails to take into account “policy-specific knowledge” among the polled population).

estate tax.⁹⁵ Second, Americans of all asset and income levels retain persistent beliefs that, through a stroke of good luck or sheer hard work, they, too, might be subject to the estate tax one day.⁹⁶ Third, the framing of poll questions likely impacts results. Michael Graetz and Ian Shapiro, for example, have noted that throughout the 1990s, Republican-affiliated organizations asked the public about their views on “double taxation” (as a claimed proxy for the estate tax) and the estate tax’s hypothetical impacts of the tax on sympathetic targets like small business owners and family farmers.⁹⁷ The poll responses allowed repeal proponents to claim that most Americans shared their views.⁹⁸ Finally, by promoting the voices of Americans such as Chester Thigpen, an eighty-three-year-old Black tree farmer and descendant of slaves who worked the land where he was born,⁹⁹ repeal supporters came to drive and dominate the public narrative.¹⁰⁰ In fact, so popular was the message of repeal advocates that even the majority of the Congressional Black Caucus came to support estate tax repeal, ostensibly “to protect the capital accumulation of the first large wave of black entrepreneurs and businessmen.”¹⁰¹

Taking a broader view of the use of the phrase “death tax,” note that this verbal formulation, like the “nanny tax,” refers to an actual fiscal burden imposed by the government.¹⁰² The “nanny tax” is a descriptive shorthand for a cluster of taxes imposed on those who have household employees. The “death tax” is both descriptive (it refers to the estate tax,

⁹⁵ *Id.*

⁹⁶ See, e.g., Derek Thompson, *The Very Bad Arguments for Killing the Estate Tax*, THE ATLANTIC (Nov. 13, 2017), <https://www.theatlantic.com/business/archive/2017/11/the-very-bad-arguments-for-killing-the-estate-tax/545633/> (reporting results of a 2001 Gallup survey).

⁹⁷ See Birney et al., *supra* note 76 (discussing effectiveness of “fairness” rhetoric). See also National Survey of Americans’ Views on Taxes, NPR/KAISER FAMILY FOUNDATION, KENNEDY SCH. OF GOV’T, Apr. 2003, <https://www.kff.org/wp-content/uploads/2003/03/3340-t-survey-of-americans-views-on-taxes.pdf> (showing 92% of those who favor eliminating the estate tax give as a reason that “the money was already taxed once and shouldn’t be taxed again” and that 74% said that it “might force the sale of small businesses and family farms”).

⁹⁸ See Birney et al., *supra* note 76, at 440.

⁹⁹ See 141 CONG. REC. S7617 (daily ed. May 26, 1995) (Statement of Mr. Chester Thigpen Before the Committee on Ways and Means, Feb. 1, 1995). Law professor Michael Graetz later observed that “Thigpen’s estate was too small to be affected by the estate tax, but that was just a detail.” David Wessel, *Populist Scythe Aides “Death Tax” Foes*, WALL ST. J., Apr. 14, 2005, A2 (quoting Michael Graetz). See also Michael J. Graetz, *Death Tax Politics*, 57 B.C. L. REV. 801, 805-06 (2006) (quoting testimony of Chester Thigpen and Mr. Thigpen’s son Roy, who said that “some professors” wrote Mr. Thigpen’s 1995 congressional testimony).

¹⁰⁰ Scholars have observed that polling data suggests little correlation between one’s opinion on estate tax repeal and personal income or wealth. See, e.g., Joel Slemrod, *The Roles of Misconceptions in Support for Regressive Tax Reform*, NAT’L TAX J. 57, 69-70 (2006) (finding that views on eliminating the estate tax not significantly associated with income levels).

¹⁰¹ Birney et al., *supra* note 76, at 453.

¹⁰² See *supra* note 76 and accompanying text.

which applies after someone *dies*) and political. To use the phrase “death taxes” is to claim that the estate tax is unfair.¹⁰³

C. Soda Tax

Like the “nanny tax” and “death tax” tropes, the phrase “soda tax” also refers to literal taxes. The phrase has played an important role in the both the enactment of and opposition to local laws on the sale of sweetened drinks. To be sure, the “soda tax” is not new; sugary beverages have been subject to taxation in the United States for almost one hundred years.¹⁰⁴ Around the time of World War I, for example, the federal government briefly imposed on manufacturers of soft drinks a tax in the form of a tariff on the bottled beverages themselves and on drink ingredients such as corn syrup.¹⁰⁵ Then in 1918, the federal government enacted a new tax: a ten percent tax on all sales by manufacturers of bottled soda plus a tax consumers of a one cent tax per ten cents spent.¹⁰⁶ That tax was highly unpopular and widely derided.¹⁰⁷ In 1919, newspapers all over the country carried photographs of staged protests against the “soda tax” in New York City.¹⁰⁸ Children gathered in Central Park and rode through the city on open-sided trucks with signs proclaiming, “Our big brothers licked the Hun.

¹⁰³ See *supra* note 76 and accompanying text.

¹⁰⁴ See, e.g., Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. PUB. HEALTH 854, 856 (2000) (discussing tax on soft drinks, sugary beverages or syrups in South Carolina (beginning in 1925), Louisiana (beginning in 1938), Texas (beginning in 1961 and New York (beginning in 1965).

¹⁰⁵ See Revenue Act of 1917, tit. III (“War Tax on Beverages”), § 313 (imposing a tax on syrups and the carbonic acid gas used in the manufacture of soft drinks). See also Caitlin Dewey, *What Happened When Congress Decided to Tax All Soda*, WASH. POST: WONKBLOG (Apr. 6, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/04/06/what-happened-when-america-put-a-national-tax-on-soda>

¹⁰⁶ See Revenue Act of 1918, § 628(a) (imposing tax of 10% of price sold on “all unfermented grape juice, ginger ale, root beer, soft drinks, beer, sarsaparilla, pop, artificial mineral waters (carbonated or not carbonated), other carbonated waters or beverages, and other soft drinks...in bottles or other closed containers”) and § 630 (“there shall be levied, assessed, collected and paid a tax of 1 cent for each 10 cents or fraction thereof of the of the amount paid to any person conducting a soda fountain, ice-cream parlor, or other similar place of business, ...for drinks commonly known as soft drinks”), <http://www.archive.org/details/cu31924018724116>.

¹⁰⁷ See Dewey, *supra* note 105 (“Editorial cartoonists regularly spoofed the taxes. Industry representatives—including John Candler, brother of Coca-Cola founder Asa—testified they would result in plant closures and layoffs.”).

¹⁰⁸ See, e.g., *New York Kiddies Making Public Protest Against Soda Tax*, ALBUQUERQUE MORNING J., June 11, 1919, <https://chroniclingamerica.loc.gov/lccn/sn84031081/1919-06-11/ed-1/seq-2> (featuring picture of young people in New York City on a truck bearing this sign) and *Nix on That Soda Tax—Kiddies’ Slogan*, NEW BRITAIN HERALD, June 5, 1919, <https://chroniclingamerica.loc.gov/lccn/sn82014519/1919-06-05/ed-1/seq-59> (showing picture of young children in Central Park holding a sign with the same text).

We did our bit too! Nix on that soda tax!”¹⁰⁹ A reprinted newspaper photograph of this “soda tax” protest appears in Figure 2.

Figure 2

Photo from the New Britain (CT) Herald, June 15, 1919



Given the strongly negative popular opinion against this federal tax and the tax’s minimal contribution to national revenue, it is not surprising that Congress repealed the tax in 1922.¹¹⁰

Seizing an opportunity, some states stepped into the legislative gap as early as 1925; South Carolina enacted an excise tax on soft drinks.¹¹¹

¹⁰⁹ See *id.*

¹¹⁰ See Joseph J. Thorndike, *Pop Goes the Soda Tax*, TAX HISTORY PROJECT (May 21, 2009), <http://www.taxhistory.org/thp/readings.nsf/ArtWeb/186B22AE29FA8E15852575CA00439846?OpenDocument> (explaining that at its height, the federal tax raised approximately \$58 million and represented approximately 1% of total federal tax revenue).

¹¹¹ See David A. Dana & Janice Nadler, *Soda Taxes as a Legal and Social Movement*, 13 N.W. J.L. & SOC. POL’Y 84, 87 (2018) (reviewing history of twentieth century taxes on sugary drinks).

Excise taxes are tariffs that may be imposed in addition to any applicable sales taxes.¹¹² But unlike sales taxes, which are paid directly by the customer at the point of sale, an excise tax typically is imposed on distributors of a particular product, such as alcohol or tobacco.¹¹³ Distributors, in turn, typically pass the tax along the chain in the form of higher prices for retailers and then ultimately for consumers.¹¹⁴ Throughout the twentieth century, several other states followed South Carolina's example in imposing excise or sales taxes on sugary drinks, primarily as a way of increasing general revenue.¹¹⁵ These taxes fall under the umbrella term "soda tax": a tax on the "manufacture, distribution, sale, or consumption of non-alcoholic beverages such as soft drinks, both carbonated and uncarbonated, and sweetened either naturally or artificially."¹¹⁶

In the twenty-first century, researchers and advocates began to draw attention to the links between consumption of soft drinks and health-related concerns such as obesity, heart disease, and diabetes.¹¹⁷ Advocacy around this issue led New York State Governor David Patterson to include in his proposed 2009 budget an eighteen percent sales tax on sugary beverages.¹¹⁸

¹¹² See, e.g., Nadav Shoked, *Cities Taxing New Sins: The Judicial Embrace of Local Excise Taxation*, 79 OHIO ST. L.J. 801, 806-07 (2018) (explaining how excise taxes are different from sales taxes). In contrast, sales taxes are paid by the consumer at the point of sale to the retailer, which then remits the tax to the appropriate authority.

¹¹³ See *id.* and Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 445-47 (2018) (describing that sales taxes are imposed on the sale of goods and typically are paid by the customer at the point of sale) [hereinafter, *Unconstitutional Tampon Tax*].

¹¹⁴ See *What Are the Major Federal Excise Taxes and How Much Money Do They Raise?*, TAX POL'Y CTR., <http://www.taxpolicycenter.org/briefing-book/what-are-major-federal-excise-taxes-and-how-much-money-do-they-raise> (distinguishing between "general fund" excise taxes, for general fiscal purposes, and "trust funds" excise taxes, allocated for a specific purpose).

¹¹⁵ See Dana & Nadler, *supra* note 111, at 87 (noting Louisiana's excise tax on bottled soft drinks and syrups (1938), a Texas sales tax on candy, gum, and bottled beverages (1963) and New York's sales tax on candy and soft drinks (1965)).

¹¹⁶ *Id.* at 84 n.1, 89, 93 (defining "soda tax" and further distinguishing between "sugar-sweetened beverages," such as sodas, juices and teas with added natural sugars, and diet beverages, typically sweetened with artificial ingredients such as aspartame).

¹¹⁷ See, e.g., Kelly D. Brownell & Thomas R. Frieden, Ounces of Prevention: The Public Policy Case for Taxes on Sugared Beverages, 360 N. ENG. J. MED. 1805 (2009); Kelly D. Brownell et al., The Public Policy Case for Taxes on Sugared Beverages, 360 N. ENG. J. MED. 1599 (2009); Vasanti Malik et al., Sugar-sweetened Beverages, Obesity, Type 2 Diabetes Mellitus, and Cardiovascular Disease Risk, 121 CIRCULATION 1356, 1356 (2011) (reporting relationship between consumption of sugar-sweetened beverages and weight gain, type 2 diabetes and cardiovascular disease); Lenny R. Vartanian, Marlene Schwartz & Kelly D. Brownell, Effects of Soft Drink Consumption on Nutrition and Health: A Systematic Review and Meta-analysis, 97 AM. J. PUBLIC HEALTH 667-675 (2007) (providing an analysis of numerous studies showing correlation between consumption of sugar-sweetened beverages and negative health outcomes).

¹¹⁸ See Susan M. Kansagra et al., *Reducing Sugary Drink Consumption: New York City's Approach*, 105 AM. J. OF PUB. HEALTH e61, e63 (2015).

The following year, the governor's proposed budget included a one-cent-per-ounce excise tax on the same.¹¹⁹ Both years, the budget measures had the explicit goal of increasing prices in order to reduce consumption (and presumably to reduce rates of obesity and other health conditions).¹²⁰ The American Beverage Association, the soda industry's trade group, lobbied vigorously against both measures, which did not become law.¹²¹

In 2012, shortly after the New York State budget measures failed, New York City mayor Michael Bloomberg announced a plan to ban the sales of sugary drinks in sizes larger than sixteen ounces.¹²² The American Beverage Association again mobilized in opposition, framing the Bloomberg plan as an assault on individual freedom and personal choice.¹²³ The group allied with the NAACP and the Hispanic Federation to argue that any bans on large sugary drinks would have a disproportionate impact on minority-owned businesses.¹²⁴ A full-page industry ad appeared in the *New York Times* showing Michael Bloomberg dressed as a gigantic middle-aged woman towering over the city skyline with the tagline "New Yorkers need a Mayor, not a Nanny."¹²⁵ Soda tax critics invoked a version of a "nanny" as a scold, presumably the opposite of the nurturing caretaker such as the

¹¹⁹ *Id.*

¹²⁰ *Id.* (noting that the 2009 proposal was predicted to cause a ten percent decline in the rate of consumption of sugary drinks).

¹²¹ See Anemona Hartocollis, *A Failure of State Soda Tax Plan Reflects Power of an Antitax Message*, N.Y. TIMES, July 3, 2010, <https://www.nytimes.com/2010/07/03/nyregion/03sodatax.html> (reporting that "by most accounts, the beverage industry has outspent the pro-tax side and has succeeded in painting the soda tax as a naked money grab cleverly disguised as a health policy" and that the American Beverage Association spend \$9.2 million in the first four months of 2010 on "strategic advocacy" against the New York tax) and *Beverage Industry Fight Against Soda Ban Just Beginning*, GOTHAM GAZETTE (n.d.), <https://www.gothamgazette.com/index.php/about/1420-soda-ban-war> (reporting that the American Beverage Association "spent \$12.9 million in 2010 to successfully defeat then-Gov. David Paterson's proposed tax on sugary beverages").

¹²² See, e.g., Michael M. Grynbaum, *New York's Ban on Big Soda's Is Rejected by Final Court*, N.Y. TIMES (June 26, 2014), <https://www.nytimes.com/2014/06/27/nyregion/city-loses-final-appeal-on-limiting-sales-of-large-sodas.html?smid=url-share> (describing the "Bloomberg big-soda ban").

¹²³ See *id.* (describing the American Beverage Association's funding of the campaign against the Bloomberg portion caps).

¹²⁴ See, e.g., Jason Kessler, *Minority Groups: NYC Soda Ban Unfair to Small, Minority-Owned Businesses*, CNN.COM, Jan. 25, 2012, 6:24 AM, <https://www.cnn.com/2013/01/23/health/new-york-large-drinks/index.html/>.

¹²⁵ See *Soft Drink Industry Fights Back, Depicting Bloomberg as Nanny*, ABCNEWS.GO.COM, June 2, 2012, <https://abcnews.go.com/blogs/health/2012/06/02/soft-drink-industry-fights-back-depicting-bloomberg-as-nanny>. Cartoonist Nate Beeler, then of the *Columbus Dispatch*, also created a witty drawing of Mayor Michael Bloomberg standing on a stepstool behind a podium (a gesture to Mayor Bloomberg's small stature) saying, "It's cool, refreshing, and most importantly, you get no other choice!" next to an oversize soda bottle with a label in the style of Coca-Cola reading "Enjoy Nanny State Classic." See *Cartoon: Bloomberg's Soda Ban*, CTR. FOR CONSUMER FREEDOM (June 15, 2012), <https://www.consumerfreedom.com/2012/06/cartoon-bloombergs-soda-ban/>.

one Zoë Baird had hired for her children.¹²⁶ Again, note the gendered dimensions of the tax trope. The American Beverage Association could have presented Bloomberg as a sort of “Big Brother” lecturing figure, but instead portrayed him in drag, hunched over, and with outstretched arms, as if saying, “Behave, children!”¹²⁷ By emphasizing the “nanny-state” aspects of the soda tax, its regressive nature, and the disproportionate impacts on poor Black and brown people and the businesses owned or patronized by them, the industry organization successfully harnessed public opinion against the “soda tax” and, to a certain extent, positioned it as a kind of “Black tax,” which is discussed later in this Part.¹²⁸ In 2014, New York’s highest court ruled that the New York City Board of Health had exceeded its regulatory authority in implementing Bloomberg’s ban on the sales of sugary drinks in portions larger than sixteen ounces.¹²⁹

Undeterred by the failure in New York City, other municipalities took up the challenge of improving public health via “soda taxes” designed to increase the cost for consumers and decrease rates of consumption.¹³⁰ In 2014, Berkeley, California became the first city to impose a tax on sugar-sweetened drinks; the tax took the technical form of an excise tax, not a sales tax.¹³¹ In 2016, Philadelphia enacted an excise tax on all sweetened beverages, not just those sweetened with sugar, bringing diet sodas within the tax’s ambit.¹³² Given his stated personal interest in the issue of public health and the “soda tax,” it is perhaps not surprising that former New York City mayor (and billionaire) Michael Bloomberg invested millions of dollars in getting similar laws enacted by local governments across the

¹²⁶ See Banks, *supra* note 71, and accompanying text.

¹²⁷ See Soft Drink Industry Fights Back, Depicting Bloomberg as Nanny, *supra* note 125.

¹²⁸ See Dana & Nadler, *supra* note 111, at 91-92; see *infra* Part I.D.

¹²⁹ See N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y. City Dept of Health and Mental Hygiene, 16 N.Ed.3d 538 (N.Y. Ct. App. 2014).

¹³⁰ See Dana & Nadler, *supra* note 111, at 88-89 (discussing excise or sales taxes imposed in cities including San Francisco, Oakland, Albany (California), Boulder, and Chicago).

¹³¹ See, e.g., Jennifer Falbe et al., Higher Retail Prices of Sugar-Sweetened Beverages 3 Months After Implementation of an Excise Tax on Berkeley, California, 105 AM. J. PUB. HEALTH 2194 (2015). Generally speaking, an excise tax is different from a sales tax in terms of the point in the product “lifecycle” at which the tax is imposed. See *id.* at 2194. Excise taxes typically are imposed on distributors, which then pass the cost along to retailers (and then to consumers). See *id.* at 2194.

¹³² See Tricia L. Nadolny, *Soda Tax Passes: Philadelphia is First Big City in Nation to Enact One*, PHILA. INQUIRER (June 16, 2016), https://www.inquirer.com/philly/news/politics/20160617_Philadelphia_City_Council_to_vote_on_soda_tax.html (reporting that, by a vote of 13 to 4, the Philadelphia City Council passed a 1.5 cent per ounce tax on both sugar-sweetened and artificially sweetened beverages, with the tax to be levied on distributors and the proceeds targeted for early childhood education programs).

country.¹³³ Scholars David Dana and Janice Nadler have reasoned that these types of local taxes are less vulnerable to legal attack than budget measures (like New York Governor Patterson's) or regulatory action (like Mayor Bloomberg's).¹³⁴ Dana and Nadler argue that unless explicitly preempted by state law, local taxes on sweetened drinks should be upheld.¹³⁵

In some ways, rhetoric about the "soda tax" resembles the "nanny tax." Both phrases are short-hand for a group of related and highly technical taxes of which the modifier ("soda" or "nanny") is a lesser-included part. In the case of the "nanny tax," for example, there are both FICA and FUTA taxes that a household *employer* must withhold and/or pay with respect to each household employee.¹³⁶ The "nanny tax" is *synecdochic*, insofar as there is no unique tax on nannies per se; the tax is on the employers of nannies and other household workers.¹³⁷ But the "nanny tax" trope captures the general concept. So, too, the phrase "soda tax" may not be technically accurate: there are excise taxes (typically imposed on *distributors* of soda) and sales taxes (typically imposed on those who *purchase* soda).¹³⁸ A sales tax is the more salient of the two, insofar as it appears on a receipt at the point of sale, but the distinction is largely irrelevant, at least rhetorically speaking. Most Americans likely understand that the customer will bear the brunt of any "soda tax," regardless of whether it is imposed on soda ingredients or soda sales.¹³⁹ The single phrase "soda tax" conveys the general meaning of all forms of the tax in a succinct and attention-getting way.

The phrase "soda tax" has two further noteworthy layers of complexity. First, the phrase occasionally acts as a shorthand for taxes on things other than soda. For example, the children photographed in New York's Central Park in 1919 (shown in Figure 2 above) urged, "Nix on that soda tax!"¹⁴⁰ But the newspaper caption explains that the protest was against

¹³³ See John Kell, *Bloomberg Drops \$18M for His Crusade Against Sugary Sodas*, FORTUNE (Nov. 3, 2016, 12:28 PM), <https://fortune.com/2016/11/03/michael-bloomberg-soda-taxes> (reporting that Bloomberg donated \$18 million to support soda tax ballot initiatives in Oakland and San Francisco, as well as \$1.6 million in favor of Philadelphia, which went through city council).

¹³⁴ See Dana & Nadler, *supra* note 111, at 93-94 ("the biggest challenge for state soda taxes is express, not implied, preemption").

¹³⁵ *Id.* at 93-103. The authors note, however, that in evaluating the validity of a local law such as a soda tax, some state courts analyze a statute under an implied preemption framework, instead of limiting their inquiry to express preemption only. *Id.*

¹³⁶ See *supra* notes 47-49 and accompanying text.

¹³⁷ See *supra* note 47 and accompanying text.

¹³⁸ See *supra* note 116 and accompanying text.

¹³⁹ See *supra* note 138 and accompanying text.

¹⁴⁰ See *supra* notes 108-109 and accompanying text. The federal tax on candy was separate from the tax on manufacturers or consumers of soda. See Federal Revenue Act of 1918, § 900(9) (imposing a five cent tax on candy).

taxes on both soda *and* candy, which were technically separate taxes.¹⁴¹ Second, the phrase “soda tax” sometimes refer to governmental actions that are not, in fact, literal taxes at all. Some scholars refer to Mayor Michael Bloomberg’s proposed portion caps as a “soda tax” even though, factually speaking, Bloomberg’s proposal was to limit the *size* of drinks, not to tax them.¹⁴² For the general public, the effect was largely the same: limiting consumer choice. The full-page ad lampooning Mayor Michael Bloomberg as a nanny—which asked, “What’s next? Limits on the width of a pizza slice, size of a hamburger or amount of cream cheese on your bagel?”—resonated precisely because both the failed state-wide soda tax and the proposed citywide portion cap represented “nanny-state” types of interventions aimed at controlling consumer choices.¹⁴³

Interestingly, experts are not in complete agreement on whether “soda taxes” do, in fact, decrease consumption of sweet beverages.¹⁴⁴ At a minimum, the taxes do seem to shift buying patterns, with those consumers who are mobile leaving cities where the beverages are taxable to make their purchases outside city-limits.¹⁴⁵ Whether the soda tax also has a long-term impact on public health might be the ultimate test of the “success” of not just the tax trope but of the ability of Pigouvian taxes generally to change

¹⁴¹ Id.

¹⁴² See also & Nadler, *supra* note 111, at 91 (explaining in the context of the analysis of the “soda tax” as a social movement that the “ ‘nanny-state’ argument [against Bloomberg’s proposed portion caps] struck a chord with many New Yorkers across otherwise familiar divides like race, class, and education).

¹⁴³ See *supra* notes 122-129 and accompanying text.

¹⁴⁴ Compare Lynn D. Silver et al. *Changes in Process, Sales, Consumer Spending, and Beverage Consumption One Year After a Tax on Sugar-Sweetened Beverages in Berkeley, California, US: A Before and After Study*, PLOS MED. 1 (2017), <https://doi.org/10.1371/journal.pmed.1002283> (finding decline of sales of sugar-sweetened beverages in some, but not all, geographic areas after implementation of soda tax) with Stephan Seiler, Anna Tuchman & Song Yao, *The Impact of Soda Taxes: Pass-Through, Tax Avoidance and Nutritional Effects*, 58 J. MARKETING RES. 22, 23 (2021) (reporting the finding that implementation of tax in Philadelphia did impact overall sales of taxed beverages, but that the lowest rate of decrease was found in low-income neighborhoods). Professor Barbara Atwell argues in favor of s soda taxes generally, insofar as “many of the legal restrictions applicable to tobacco products—warning labels, advertising restrictions and excise taxes—should also apply to processed foods with large quantities of added sugar”). See also Barbara Atwell, *Is Sugar the New Tobacco? How to Regulate Toxic Foods*, 22 ANNALS HEALTH L. 138, 170 (2013).

¹⁴⁵ See, e.g., Silver et al., *supra* note 144, at 9-10 (reporting that in the wake of the enactment of Berkeley’s soda tax, sales of taxed beverages declined within city limits but increased outside of city limits, despite prices remaining constant) and Seiler et al., *supra* note 144 (reporting that in the wake of the enactment of Philadelphia’s soda tax, sales of taxed beverages declined within city limits but increased in stores of up six miles outside of city limits, for an overall net decline of twenty-two percent).

human behavior.¹⁴⁶ Future studies will reveal the extent of the practical effectiveness of the “soda tax” in operation.¹⁴⁷

D. Black Tax

Compared to the “nanny tax” and “soda tax,” the “Black tax” trope is more complicated and less obviously linked to law reform.¹⁴⁸ “Black tax” has multiple and overlapping meanings; it often describes interpersonal and financial consequences of racism and white supremacy in both everyday interactions and the marketplace.¹⁴⁹ For example, Professor Jody David Armour uses “Black tax” as an umbrella term for numerous *de facto* harms:

The Black Tax is the price Black people pay in their encounters with Whites (and some Blacks) because of Black stereotypes. The concept of a “tax” captures several key characteristics of these stereotype-laden encounters: like a tax, racial discrimination is persistent, pervasive, must be dealt with, cannot be avoided, and is not generally resisted. . . . Blacks often have good cause to view state

¹⁴⁶ See, e.g., Gretchen Frazee, *How Taxing Sugary Drinks Affects a Community's Health and Economy*, PBS.ORG, Oct. 4, 2018, <https://www.pbs.org/newshour/economy/making-sense/how-taxing-sugary-drinks-affects-a-communitys-health-and-economy> (“a so-called “sin tax” does in fact lead to changes in behavior, including reduced consumption of sugary drinks. But it also drives shopping away from cities that charge more for sugary drinks and into surrounding suburbs”).

¹⁴⁷ See, e.g., Greg Miller, *The Global Soda Tax Experiment*, KNOWABLE (Oct. 18, 2019), <https://knowablemagazine.org/article/health-disease/2019/do-soda-taxes-work> (“Chronic conditions like obesity and diabetes take years to develop, and so, too, will any health benefits resulting from a new tax. But an emerging body of research suggests that beverage taxes have already reduced consumption of sugary drinks in some communities — an encouraging and essential step.”).

¹⁴⁸ Henry Louis Gates famously called race the “ultimate trope” in American society. Henry Louis Gates, *Introduction*, in *RACE, WRITING AND DIFFERENCE* 5 (Henry L. Gates, ed. 1986).

¹⁴⁹ As used in this article, “racism” refers to “a system of beliefs (racial prejudices), practices (racial discrimination), and policies based on race that operates to advantage those with historic power.” Angela M. Haeny, Samantha C. Holmes & Monnica T. Williams, *The Need for Shared Nomenclature on Racism and Related Terminology in Psychology*, 16 *PERSPECTIVES ON PSYCHOL. SCI.* 886 (2021). It also includes structural racism, meaning “a highly organized system of race-based group privilege that operates at every level of society and is held together by a sophisticated ideology of color/race supremacy. Racist systems include, but cannot be meaningfully reduced to, racial bigotry.” Noel A. Cazenave & Darlene Alvarez Maddern, *Defending the White Race: White Male Faculty Opposition to a White Racism Course*, 2 *RACE & SOCIETY* 25, 42 (1999). In this article, the phrase “white supremacy” means “an ideology that presumes the superiority of [w]hite people and the inferiority of all other groups.” Haeny at 889. Kathryn Stanchi has parsed the different meanings and frequency of use of the terms “racist,” “racism” and “white supremacy” in the jurisprudence of the Supreme Court of the United States. See Kathryn M. Stanchi, *The Rhetoric of Racism in the United States Supreme Court*, 62 *B.C. L. REV.* 1251 (2021).

representatives such as police and judicial officers as IRS agents for the Black Tax.¹⁵⁰

Personal finance consultant Shawn Rochester uses the phrase “Black tax” similarly but expands it to include enumerated financial harms.¹⁵¹ In Rochester’s articulation, the “Black tax” is the “cost of implicit bias on African-Americans” that manifests in the “housing, business, finance, the automotive industry, online commerce, and employment” by way of segregation, employment discrimination, and race-based differentials in marketplace fees and pricing.¹⁵² Thus, the “Black tax” includes discriminatory real estate practices such as overcharging Black families for homes in neighborhoods from which whites may be fleeing.¹⁵³ The phrase describes frequent and documented instances of Black homeowners’ receiving lower real estate valuations for their property than a white person does when posing as the owner of the same home.¹⁵⁴

These multiple usages of the “Black tax” refer to figurative taxes; they do not describe government-imposed compulsory obligation that someone must pay because they have a particular race.¹⁵⁵ Just as there is no tax imposed on nannies that is different from any tax imposed on other employees, there currently is no tax on Black Americans that is *formally*

¹⁵⁰ JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 13-14 (1997).

¹⁵¹ Shawn D. Rochester, *The Black Tax: The Cost of Being Black in America* 3-4 (2018). See also Andre L. Smith, *Tax Law and Racial and Economic Justice: Black Tax* (2015).

¹⁵² ROCHESTER, *supra* note 151.

¹⁵³ See Jennifer Nwachukwu, *Community Development vs. Economic Development: Residential Segregation, Tax Credits, and the Lack of Economic Development in Baltimore’s Black Neighborhoods*, 5 U. BAL. J. LAND & DEV. 1, 6-7 (citing “slum clearance and containment, restrictive covenants, blockbusting, redlining, and the black tax” as factors contributing to racial segregation in Baltimore’s residential real estate in the early part of the twentieth century).

¹⁵⁴ See, e.g., *Morning Edition*, NAT’L PUB. RADIO (May 23, 1992) (including an interview with Joseph Boyce, a Black editor at the Wall Street Journal, describing as a “black tax” the 15% difference in appraisal value of his home after his white secretary and her white son posed as its residents). Racially biased practices continue to this day. See Alexandria Burris, *Black Homeowner Had a White Friend Stand in for Third Appraiser; Her Home Value Doubled*, INDYSTAR (May 12, 2021), <https://www.indystar.com/story/money/2021/05/13/indianapolis-black-homeowner-home-appraisal-discrimination-fair-housing-center-central-indiana/4936571001> (reporting on the experience of Carlette Duffy, a Black woman, who received values of \$125,000 and \$110,000 when she had her home appraised; Ms. Duffy later received an appraisal at \$259,000 after she removed personal items from the home, interacted with the appraiser only by email, and had the white husband of a white friend posing as the seller’s brother during the third home inspection).

¹⁵⁵ See *supra* notes 35-36 and accompanying text. Another, but perhaps less frequent meaning of the “Black tax” is as a short-hand for the related notion that Black Americans have to work “twice as hard to keep pace with White counterparts...especially in corporate America.” See Amani Roberts, *Something New: An Interview with Director Sanaa Hamri and Actress Sanaa Lathan*, Storyboard (Wash., D.C. Film Society, Wash., D.C.), Feb. 2006, <http://www.dcfilmsociety.org/storyboard0602.htm>.

different than a tax imposed on white Americans.¹⁵⁶ Yet despite this seemingly facial neutrality, Black married couples are more likely to be subject to the marriage penalty than white couples are.¹⁵⁷ Black families are less able take advantage of tax deductions and credits for higher education expenses than white families are.¹⁵⁸ As Professors Dorothy Brown, Beverly Moran, William Whitford, Karen Brown, and many others have demonstrated—tax policy in the United States is not racially neutral in its impact.¹⁵⁹ Historically speaking, the relationship between race and taxation in the United States is undeniable and direct.¹⁶⁰ Professor Andre Smith, for example, has called slavery a “nearly 100 percent tax on Black labor, and so was Jim Crow era convict-leasing/sharecropping system[s].”¹⁶¹ Prior to

¹⁵⁶ Carolyn Jones has discovered that “Black tax” was used to refer to inflated rents charged to Caribbean immigrants to Great Britain in the 1950s. See Jones, *Mapping Tax Narratives*, 73 TULANE L. REV. 653, 658-59, 680-84 (1998) (exploring twentieth century uses of the phrase “black tax” and nineteenth century suffragists’ use of the phrase “tax on sex” to describe multiple injustices and citing TREVOR CARTER, SHATTERING ILLUSIONS: WEST INDIANS IN BRITISH POLITICS 31 (1986). The phrase “black tax” does appear in print earlier in the twentieth century, but those references generally refer to taxes on carbon-related products or activities. See Google Ngram Viewer (setting search parameters to years “1500-2019,” “English (2019),” “Case-Insensitive” and “Smoothing of 3” and searching “black tax”). See, e.g., Report of the Supervisor of Public Accounts to the Gov. and Legislature of the State of Louisiana 117 (1928) (reporting “carbon black tax receipts” for year 1928). For a selection of scholarship that addresses the disparate impacts of tax laws on the basis of race, see *infra* note 159.

¹⁵⁷ See *id.* at 21.

¹⁵⁸ See Bridget J. Crawford & Wendy C. Gerzog, *Tax Benefits, Higher Education and Race: A Gift Tax Proposal for Direct Tuition Payments*, 73 S.C. L. REV. 783 (2021), at 794-800 (providing an overview of income and wealth transfer tax benefits for higher education and the fact that white taxpayers).

¹⁵⁹ See, e.g., DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS AND HOW WE CAN FIX IT (2021); Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative issues in Black and White*, 16 N.Y.L. SCH. HUM. RTS. 287 (1999); Dorothy A. Brown, Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787 (1997); Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. REV. 790 (2007); Karen B. Brown, *Not Color- or Gender- Neutral: New Tax Treatment of Employment Discrimination Damages*, S. CAL. REV. L. & WOMEN’S STUD. 223 (1998); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996); Emily A. Satterthwaite, *Entrepreneurs’ Legal Status Choices and the C Corporation Survival Penalty*, 16 J. EMPIRICAL LEGAL STUD. 542, 583 (2019); Leo P. Martinez, *Latinos and the Internal Revenue Code: A Tax Policy Primer for the New Administration*, 20 HARV. LATINX L. REV. 101 (2017); Crawford & Gerzog, *supra* note 158; Leslie Book, *Tax Administration and Racial Justice: The Illegal Denial of Tax-Based Pandemic Relief to the Nation’s Incarcerated Population*, 72 S.C. L. REV. 667 (2021); and Steven Dean, *FATCA, the U.S. Congressional Black Caucus, and the OECD Blacklist*, 168 TAX NOTES 95 (2020).

¹⁶⁰ See, e.g., ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY (2006) (tracing the roots of U.S.-based anti-government rhetoric to tax-related arguments about the consequences of enslavement of Blacks by white Americans).

¹⁶¹ See Smith, *supra* note 152 at 2. Professors Goldburn P. Maynard Jr. and David Gamage call the different tax treatment of wage and salary labor compared to wealth under current law a form of “wage enslavement.” Goldburn P. Maynard Jr. & David Gamage, *Wage Enslavement: How the Tax*

Emancipation and the enactment of the Fourteenth Amendment, in some slave states free Blacks were exempt from paying school taxes (as Black children were not allowed to attend schools),¹⁶² but were subject to inheritance taxation on their own literal freedom,¹⁶³ required to pay tax if they remained more than a minimal number of days in some jurisdictions,¹⁶⁴ and forced to pay disparately high taxes for simply existing.¹⁶⁵ These were taxes in a literal sense: a compulsory government levee.¹⁶⁶ Relatedly, federal poll taxes were legal until the 1926 enactment of the Twenty-Fourth Amendment.¹⁶⁷ State poll taxes (along with literacy tests) were legal for almost forty years more, until the passage of the Voting Rights Act of 1965.¹⁶⁸ Figure 3 shows a 1955 poll tax receipt from Hardin County, Texas

System Holds Back Historically Disadvantaged Groups of Americans 2 (Ind. Univ. Maurer Ch. of L. Leg. Stud. Research Paper Series, No. 471, 2022), <http://ssrn.com/abstract=4006682>.

¹⁶² See Christopher J. Bryant, *Without Representation, No Taxation: Free Blacks, Taxes, and Tax Exemptions Between the Revolutionary and Civil Wars*, 21 MICH. J. RACE & L. 91, 99 (2015) (“a few Maryland counties exempted free Blacks from paying school taxes for schools their children could not attend”).

¹⁶³ See, e.g., *Maryland v. Dorsey*, 6 Gill 388 (1848) (“It is therefore our opinion that the manumission, or bequest of freedom to a slave by last will and testament, confers on such slave the identical rights, interests and benefits, which would pass, if the testator had bequeathed the same slave to another person, and that such bequest to another would be a legacy,” and thus the executor of an estate was required to pay to the State of Maryland a tax of 2.5% of the “value” of any slave freed under a will). See also Bryant, *supra* note 162, at 100 (discussing *Maryland v. Dorsey* case).

¹⁶⁴ See, e.g., Dorothy B. Porter, *Library Sources for the Study of Negro Life and History*, 5 J. NEGRO EDUC. 232, 235 (1936) (referring to a tax in St. Augustine, Florida on all free Blacks who remained within the city limits for longer than two weeks).

¹⁶⁵ See Bryant, note *supra* note 162, at 102-03 (describing Alabama’s poll taxes in 1852).

¹⁶⁶ See *supra* notes 35-36 and accompanying text.

¹⁶⁷ U.S. CONST. amend. XXIV, § 1 (“The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”). See also *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (declaring unconstitutional a state law that required the payment of a tax before a citizen could vote). In the immediate aftermath of the Civil War, poll taxes remained an obstacle to exercising the franchise, but literacy tests, not poll taxes, blocked most Black men from voting. See, e.g., Brian Sawyers, *The Poll Tax Before Jim Crow*, 57 AM. J. LEGAL HIST. 166 (2017) (explaining, however, that during presidential Reconstruction, poll taxes were loosely enforced and only started to increase during congressional Reconstruction) and Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 79 (2009) (arguing that by the 1940s, literacy requirements, not the poll tax, was the “major obstacle to black suffrage”).

¹⁶⁸ Voting Rights Act of 1965, Pub. L. No. 89-110, §10, 79 Stat. 437, 442-43 (codified as amended at 42 U.S.C. § 1973(b) (2000)). Poll-tax like practices continue in the present day. These take the form of laws permanently disenfranchising felons, conditioning the franchise of former felons on the payment of court fines, and voter suppression laws such as ID laws, purges of voting rolls and prohibitions on providing food or water to those standing in long lines to vote. See, e.g., Ryan A. Partelow, *The Twenty-First Century Poll Tax*, 47 HASTINGS CONST. L.Q. 425 (2020) (describing impact of state laws on prohibitions on convicted felons from voting “until they pay off their financial obligations resulting from their conviction. These financial obligations can include outstanding court fines, legal fees, and victim restitution”) (citations omitted); JAMES FORMAN, JR.,

issued to a voter named Lee Carr who had lived there his entire life and carefully saved the record.¹⁶⁹

Figure 3

Poll Tax Receipt for Lee Carr from Hardin County, Texas

ORIGINAL

1954

POLL TAX RECEIPT

COUNTY OF HARDIN

No. 1176

WARD 1-2 DATE 1-21 1954

PRECINCT NUMBER 14

RECEIVED OF Lee Carr
ADDRESS Grayburg TX
STREET AND HOUSE NO. _____ R. F. D. _____ BOX _____

| Length of Residence | | | | CITIZEN | Native-Born <u>Naturalized</u> | Born in (State or Foreign Country) <u>Texas</u> |
|---------------------|----------------|-----------------|---------------|-------------------|-----------------------------------|--|
| AGE years | STATE years | COUNTY years | CITY years | | | |
| <u>34</u> | <u>34</u> | <u>34</u> | <u>34</u> | SEX <u>Male</u> | Occupation <u>Rail Road</u> | |
| | | | | RACE <u>White</u> | Paid by <u>Self</u> | Agent |

The sum of ONE and 50/100 Dollars, in payment of POLL TAX for the year shown above. The said Taxpayer being duly sworn by me says that the above is correct; all of which I certify.

By Stout Collier Deputy. **STOUT COLLIER**
Tax Assessor and Collector

In addition to being subject to racially discriminatory poll taxes, Black families have been excluded from tax benefits that were available to white Americans. For example, due to deliberate redlining by the federal government, residences in many Black neighborhoods were ineligible for the post-World War II GI Bill's low-interest home ownership loans.¹⁷⁰ Blacks received only two percent of all low-interest loans issued by the Federal Housing Administration between 1945 and 1959.¹⁷¹

LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 7 (2017) (discussing state laws that prohibit felons from voting for life) and Voting Laws Roundup: October 2021, Brennan Center of Justice (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021> (documenting multiple laws that make it difficult for individuals to vote).

¹⁶⁹ Poll Tax Receipt for Lee Carr from Hardin County, Texas, NTL. MUSEUM OF AFRICAN AM. HIST. & CULTURE (Jan. 31, 1955), https://www.si.edu/object/poll-tax-receipt-lee-carr-hardin-county-texas:nmaahc_2012.104 (showing that the voter paid \$1.50 poll tax) (object number 2012.105; no known copyright restrictions; credit line "Gift of the Carr Family"). See also Allison Keys, *Recalling When the Color of Your Skin Meant You Paid to Vote*, SMITHSONIAN MAG. (Mar. 18, 2016), <https://www.smithsonianmag.com/smithsonian-institution/recalling-era-when-color-your-skin-meant-you-paid-vote-180958469/> (referring explaining that the poll tax would be approximately \$13 in contemporary funds, the equivalent of a "day's wages" and that the Carr family donated the receipt to the National Museum of African American History after they found in a suitcase among other family memorabilia).

¹⁷⁰ See BROWN, THE WHITENESS OF WEALTH, *supra* note **Error! Bookmark not defined.**, at 12, 15-16.

¹⁷¹ *Id.*

A particularly notable literal—but misleading—use of the phrase “Black tax” appeared in a 1993 article published in *Essence* magazine.¹⁷² Author L.G. Sherrod claimed to be an “economics consultant” (but was later revealed to be a member of the *Essence* staff).¹⁷³ She urged the magazine’s readers to claim on their federal income tax returns that they had made prior payments of \$43,209 for “Black taxes.”¹⁷⁴ This amount, Sherrod asserted, represented the financial cost of past and ongoing racial discrimination in America.¹⁷⁵ If taxpayers entered this amount on their tax returns, Sherrod predicted that the Internal Revenue Service would presumably treat filers as having overpaid income taxes, and issue a refund.¹⁷⁶ Inspired by that *Essence* article, thousands of Black taxpayers did in fact file returns claiming the “Black tax,” often at the urging of unscrupulous tax preparers.¹⁷⁷ The *Essence* article touched off such a widespread and persistent myth that a “Black tax” credit is real, or that Black Americans can receive reparations payments from the Internal Revenue Service, that in 2011, 80,000 returns claimed over \$2.7 billion in refunds.¹⁷⁸ Perhaps even more surprising is that in 2000 and 2001, the IRS actually paid out—and then was forced to try to recover—erroneous “Black tax” refund claims of

¹⁷² See L.G. Sherrod, *Forty Acres and a Mule*, 23 ESSENCE 124 (Apr. 1993) (identifying the author as a “journalist and an economics consultant” and claiming that an organization called “The People’s Institute for Economics” had estimated that Black Americans were entitled to a tax rebate, “So when income-tax time rolls around, on line 59 of form 1040—which asks you to list “other payments”—simply enter \$43,209 in “Black taxes” and compute accordingly.”).

¹⁷³ See *id.* On the identity of L.G. Sherrod, see Jonathan Turley, *The Black Tax*, WASH. POST (Sept. 11, 2003), <https://www.washingtonpost.com/archive/opinions/2003/11/09/the-black-tax/531e97c4-4b5f-4b0f-aaeb-748face08551> (explaining that Lena Sherrod was at the time a “finance and careers” editor at *Essence*).

¹⁷⁴ See Sherrod, *supra* note 172.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See *United States v. Bridges*, 46 F. Supp. 2d 462 (E.D. Va. 1999), *aff’d* by 217 F.2d 841 (2000) (unpublished opinion) (upholding conviction of tax prepare Gregory Bridges for overstating taxpayers’ deductions, including by claiming the “Black Tax Credit” that he had read about in *Essence* magazine). See also Courtl & Milloy, *Reparations Don’t Start at the IRS*, WASH. POST (June 13, 1999), <https://www.washingtonpost.com/archive/local/1999/06/13/reparations-dont-start-at-the-irs/6fc89515-936c-46b2-83d1-f4c7ea2ada23> (reporting on the *Bridges* case). In another case, a taxpayer and his daughter defrauded the Internal Revenue Service by claiming a \$500,000, which the Service shockingly paid). See *2 Jailed in Slavery Tax Refund Case*, ASSOCIATED PRESS (Oct. 24, 2003), <https://www.latimes.com/archives/la-xpm-2003-oct-24-na-slave24-story.html>. The father received a jail sentence of thirteen years; the daughter received a sentence of just more than three years. See *id.*

¹⁷⁸ See *Justice Sues Tax Preparers Over Slavery Refund Quest*, WASH. TIMES (Mar. 7, 2002), <https://www.washingtontimes.com/news/2002/mar/7/20020307-040907-7155r> (reporting data from IRS for the year 2011). See also Angela Harris, *Vultures in Eagles’ Clothing: Conspiracy and Racial Fantasy in Populist Legal Thought*, 10 MICH. J. RACE & L. 269, 278 (2005) (discussing false “reparations credit” claims by African Americans).

approximately thirty million dollars.¹⁷⁹ The IRS has not made publicly available the number of improper claims or payment made in other years, but it has issued formal public news releases warning against “slavery reparation scams,” suggesting that this “Black tax” myth is alive and well.¹⁸⁰

Scholars of language call the use of skin color (or a popular term for skin color) as a stand-in for race a *metonymy*.¹⁸¹ Thus, in linguistic terms, all of these versions of the “Black tax,” whether describing figurative or literal taxes, are *metonymic* tax tropes.¹⁸² In contrast, “nanny tax,” “death tax,” “soda tax,” are *synecdoches*: the single-word modifier for “tax” is a constituent part of the larger relationship, event, or transaction that is subject to taxation.¹⁸³ All four tax phrases—the “nanny tax,” “death tax,” “soda tax,” and “Black tax”—are what this Article calls tax tropes; they use the word “tax,” its modifier, or both in non-literal ways.¹⁸⁴ The next Part takes up a fifth tax trope. Like the “Black tax,” the “pink tax” has multiple meanings.¹⁸⁵

II. LOCATING PINK TAXES IN THE TAXONOMY OF TAX TROPES

Of all the tax tropes, the “pink tax” is perhaps the most multifaceted, but as a tool of law reform, it can only claim success in a limited arena. Generally speaking, gender equality advocates and the popular press often use the phrase “pink tax” in multiple, overlapping, and shifting ways to describe one or more phenomena: (1) the gender wage gap;¹⁸⁶ (2) gender-

¹⁷⁹ See Jonathan Turley, *The Black Tax*, WASH. POST (Sept. 11, 2003), <https://www.washingtonpost.com/archive/opinions/2003/11/09/the-black-tax/531e97c4-4b5f-4b0f-aaeb-748face08551> (providing figures for amount of improper refunds issued by the IRS).

¹⁸⁰ Slavery Reparations Scams Surge, Release No. IR-2002-8, INTERNAL REV. SERVICE, Jan. 24, 2002, <https://www.irs.gov/pub/irs-news/ir-02-08.pdf> (reporting number of false claims received in 2001 and that “some promoters are targeting church congregations for the reparation scams, especially in the South). Professor Andre Smith has noted that any future conversations about reparations for slavery will be complicated by the fact that “several tax protestors and scammers ‘sold’ the idea to naive Blacks that the federal government had indeed absolved them of the responsibility to pay taxes because of slavery.” Andre Smith & Carlton Waterhouse, *No Reparation Without Taxation: Applying the Internal Revenue Code to the Conception of Reparations for Slavery and Segregation*, 7 PITT. TAX REV. 159, 193 (2010).

¹⁸¹ See, e.g., David Lloyd, *Race Under Representation*, 13 OXFORD LITERARY REV. 62, 74 (1991) (labeling the use of “skin colour for race” a form of metonymy) and David Weiss, *Metonymy in Black and White: Shelby Steele’s Revelator Racial Tropes*, 16 HOWARD J. OF COMM. 1, 6 (2005) (calling the use of “Black” as an adjective to refer to a race of people “the exemplary of the metonymy class” that defines a group by its “essential property”).

¹⁸² See *id.*

¹⁸³ See *supra* note 27 and accompanying text.

¹⁸⁴ See *supra* note 30 and accompanying text (defining “trope”).

¹⁸⁵ See *infra* Part II.

¹⁸⁶ See *infra* Part II.A.

based pricing differentials in goods or services;¹⁸⁷ (3) expenditures that women are more likely to have, or have at greater levels, than men do, for safety-related travel or for make-up or personal grooming to conform to traditional gender stereotypes;¹⁸⁸ (4) time-based burdens experienced disproportionately by individuals with responsibility for households and/or caretaking;¹⁸⁹ and (5) state sales taxes on menstrual products.¹⁹⁰ The first four articulations are *metonymies*: they deploy the word “pink” because of its association with women. In these contexts, “pink tax” refers to a figurative tax in the form of an actual or perceived burdens associated with gender identity.¹⁹¹ The fifth articulation is also metonymic; it refers to literal fiscal obligations imposed by the government. But when this form of the pink tax is described specifically as the “tampon tax,” the tax trope becomes *synecdochic* again. It uses the word “tampon” as a stand in for sales taxes on menstrual products as a whole.¹⁹²

This Part takes up each version of “pink tax” trope in turn. To guide the reader, Figure 4 locates each different version of the “pink tax” in the taxonomy of tropes developed earlier.

Figure 4

A Taxonomy of Tax Tropes

| | Literal Taxes | Figurative Taxes |
|--|---|--|
| synecdochic phrases (use one word as a stand in for larger transaction, event or relationship) | nanny tax death tax soda tax tampon tax | |
| metonymic phrases (use a word closely associated with persons subject to tax) | Black tax (historic) pink tax (to describe the tampon tax) | Black tax (1950s to present) pink tax (all other forms) |

¹⁸⁷ See *infra* Part II.B.

¹⁸⁸ See *infra* Part II.C.

¹⁸⁹ See *infra* Part II.D.

¹⁹⁰ See *infra* Part II.E.

¹⁹¹ See GAVIN EVANS, THE STORY OF COLOUR: AN EXPLORATION OF THE HIDDEN MESSAGES OF THE SPECTRUM 156 (2017) (describing how, at beginning of the twentieth century in the United Kingdom that pink, not blue, was the color more commonly associated with boys).

¹⁹² See *supra* note 36 and accompanying text.

A. The Wage Gap

The “pink tax” trope has not been a significant lever for change in achieving equal pay for equal work. That simple goal remains elusive.¹⁹³ According to data from the Bureau of Labor Statistics, in 2020, the weekly earnings of women of all races and ethnicities was \$0.82 cents for every dollar men earned.¹⁹⁴ This wage gap is reflected in the Jane and Jerry hypotheticals with which this Article began. Recall that Jane and Jerry are both x-ray technicians at the same hospital, but Jane’s hourly wage is approximately eighty-two percent of Jerry’s; Jane earns \$24.75 per hour compared to Jerry’s \$30.07 per hour.¹⁹⁵ This hypothetical example gestures at the type of pay differences that economists and others attribute to gender, absent differences in education, experience, or job responsibilities.¹⁹⁶

Measured from 1970 levels, when the women earned \$0.62 cents for every dollar earned by men, the gender pay gap has narrowed discernibly.¹⁹⁷ But the gender gap persists and disparities are especially notable when comparing the earnings of Black, Latina, and Native American women to those of white men.¹⁹⁸ Even when compared to men of the same race, the

¹⁹³ See, e.g., Dorothy S. Brady, *Equal Pay for Women Workers*, 251 ANN. AM. ACAD. POLITICAL & SOC. SCI. 53 (1941) <https://doi.org/10.1177/000271624725100108> (describing the policy of the U.S. National War Labor Board in 1918: “if it shall be necessary to employ women on work ordinarily performed by men, they must be allowed equal pay for equal work”).

¹⁹⁴ See Highlights of Women’s Earnings in 2020, U.S. Bureau of Labor Statistics, <https://www.bls.gov/opub/reports/womens-earnings/2020/home.htm>. But see Current Population Survey: PINC-05. Work Experience-People 15 Years Old and Over, by Total Money Earnings, Age, Race, Hispanic Origin, Sex, and Disability Status: 2019, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-05.html> (comparing median earnings for all full-time workers fifteen years of age and older, where men reported mean earnings of \$48,769 and women reported mean earnings of \$47,649).

¹⁹⁵ See *supra* note 13 and accompanying text.

¹⁹⁶ *Id.* (noting that the hypotheticals “do not provide any information about possible relevant differences in their education, employment histories, or current responsibilities”).

¹⁹⁷ See Highlights of Women’s Earnings in 2020, *supra* note 194 (reporting the historic gender wage gaps since 1979, “the first year for which comparable earnings data are available”). But see Mary Leisenring, *Women Still Have to Work Three Months Longer to Equal What Men Earned in a Year*, U.S. CENSUS BUREAU, Mar. 31, 2020, <https://www.census.gov/library/stories/2020/03/equal-pay-day-is-march-31-earliest-since-1996.html> (“At its lowest point in 1973, full-time, working women earned a median of 56.6 cents to every dollar that full-time, working men earned.”). See also *Batgirl Teaches Batman a Lesson About Equal Pay*, U.S. Dept. of Labor Pub. Svc. Announcement, https://www.youtube.com/watch?v=n00xZ_mKQgk (showing in a 1970s public service announcement, Batgirl’s refusing to rescue Batman and Robin from restraints presumably imposed by a villain, because she is paid less than Robin, asserting that “same job, same employer means equal pay for men and women”).

¹⁹⁸ See Highlights of Women’s Earnings in 2020, *supra* note 194, Table 23, Median Usual Weekly Earnings of Full-Time Wage and Salary Workers, by Race and Hispanic or Latino Ethnicity, 1979-2020 Annual Averages (showing that in 2020, median usual weekly earnings of full-time and salary workers varied by race and gender; compared to white men’s median usual weekly earnings of \$1,003, white women earned \$905 (90.23%), Black or African American women earning \$764

average Black, Latina, Asian, and Native American woman earns less than her male counterpart.¹⁹⁹ Across nations, scholars and policy makers use the gender wage gap as a general proxy that allows cross-national comparisons of gender equality.²⁰⁰ In 2021, the United States indicators for gender equality ranked thirtieth out of 156 countries studied by the World

(56.17%), “Hispanic or Latino identity” women earning \$705 (70.29%), and “Asian” women earning \$1,143 (113.96%). There is no data provided for women of other races or ethnicities or those who are multi-racial. *See id.*

For purposes of this Article, the calculation of Native American women’s wages is calculated using data from the 2019 American Community Survey and comparing median income data of women who self-identified as “American Indian or Alaskan Native” to same data for men who self-identified as white and not of Hispanic, Latino or Spanish origin. *See* Table B20017C, Median Earnings in the Past 12 Months (in 2019 Inflation-Adjusted Dollars) by Sex by Work Experience, <https://data.census.gov/cedsci/table?q=%20B20017C>, and Table B20017H, Median Earnings in the Past 12 Months (in 2019 Inflation-Adjusted Dollars) by Sex by Work Experience), AM. COMM. SURVEY, <https://data.census.gov/cedsci/table?q=%20B20017H> Data about the earnings of Native American women are more difficult to obtain, as the Bureau of Labor Statistics does not report any data for Native Americans and recent United States Census reports do not include information for individuals (of any gender) classified as “American Indian and Alaska Native.” *See, e.g.*, Highlights of Women’s Earnings in 2020, *supra* note 194, and U.S. CENSUS BUREAU, <https://www.census.gov/data/experimental-data-products/household-pulse-survey.html>, and *Income and Poverty in the United States: 2020*, U.S. CENSUS BUREAU 1 (Sept. 14, 2021), <https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf> (reporting no data for “American Indian and Alaska Native” people). For an explanation for the Census Bureau’s terminology, *see About*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/race/about.html> (explaining adherence to 1997 Office of Management and Budget guidelines on race and ethnicity). A spokesperson for the U.S. Census Bureau said that the agency collected, but did not report, data on American Indian and Alaska Native individuals due to the small sample size, without any explanation for why the sample size was so small. *See, e.g.*, Rob Capriccioso, *Census Fails to Include Native American Data in New Poverty, Income and Health Insurance Reports*, Tribal Bus. News (Oct. 4, 2021), <https://tribalbusinessnews.com/sections/economic-development/13644-census-fails-to-include-native-american-data-in-new-poverty-income-and-health-insurance-reports> (quoting email from Census Bureau spokesperson Veronica Vaquer). *See also* Native American Women Need Action That Closes the Wage Gap, NAT’L WOMEN’S L. CENTER (Sept. 2021), <https://nwlc.org/wp-content/uploads/2020/09/Native-Women-Equal-Pay-2021.pdf> (reporting that Native American women’s earnings are \$0.60 for every dollar paid to a white man and noting difficulty in obtaining data on Native Americans generally).

¹⁹⁹ *See id.* (showing Black or African American women earning 96.22% of what Black or African American men earn, “Hispanic or Latino identity” women earning 93% of what “Hispanic or Latino identity” men earn, and “Asian” women earning 87.25% of what “Asian” men earn), Highlights of Women’s Earnings in 2020, *supra* note 194, Table 23, Median Usual Weekly Earnings of Full-Time Wage and Salary Workers, by Race and Hispanic or Latino Ethnicity, 1979-2020 Annual Averages, Table B20017C, *supra* note 199, and Table B20017H, *supra* note 199 (showing American Indian and Alaska Native women earning a fraction of what American Indian and Alaska Native men earn).

²⁰⁰ *See, e.g.*, Hilary M. Lips, *The Gender Pay Gap: Concrete Indicator of Women’s Progress Toward Equality*, 3 ANALYSES OF SOC. ISSUES & PUB. POL’Y 87, 88 (2003) (“the gender pay gap may be thought of as an indicator of the regard in which women and their work is held by society.... The size of the gender pay gap is one of the most concrete ways of assessing women’s progress toward equality.”).

Economic Forum, behind countries such as New Zealand, Rwanda, Namibia, Nicaragua, Canada, Albania, and Burundi.²⁰¹

Considering the wage gap along axes other than predefined, narrow racial categories and “men” versus “women” is challenging because, historically speaking, government bureaus and agencies responsible for data collection, such as the United States Census Bureau and the Bureau of Labor Statistics, have not asked respondents to identify whether they are lesbian, gay, bisexual, trans, gender nonbinary, or genderqueer.²⁰² The Bureau of Labor Statistics made its first report on the financial position of same-sex couples in a January 2020 news release.²⁰³ For the first time on the 2020 decennial census, the United States Census Bureau asked whether couples living together were “opposite-sex” or “same-sex,” married or unmarried.²⁰⁴ In July 2021, the United States Census Bureau’s Household Pulse Survey included its first question about sexual orientation or gender identity.²⁰⁵ The survey revealed that compared to non-LGBT respondents, LGBT respondents tended to live in households that were more likely to be food insecure (13.5 percent compared to 7.5 percent) and to have suffered recent loss of employment (21.6 percent compared to sixteen percent).²⁰⁶

²⁰¹ See Global Gender Gap Report, World Econ. Forum, Mar. 2021, <https://resourcewatch.org> (follow link for “Data,” then “Society,” then “Gender Gap Index”).

²⁰² See, e.g., Hansi Lo Wang, *2020 Census Will Ask About Same Sex Relationships*, NPR.ORG (Mar. 30, 2018, 5:02 AM), <https://www.npr.org/2018/03/30/598192154/2020-census-will-ask-about-same-sex-relationships> (reporting change in the census form). Estimates of the number of same-sex couples based on census data has been possible since the mid-1990s, based on matching data provided about the sex of others living in the household.

²⁰³ See, e.g., Employment Situation News Release, Bureau of Labor Statistics (Jan. 2020), tbls A-9 and A-10, https://www.bls.gov/news.release/archives/empisit_02072020.htm (noting in footnote 1 to each table that marital status data includes persons in both “opposite-sex and same sex married couples”). See also Dawn Inniss, *The First Gay-Inclusive Jobs Report Points to Greater Equality*, FORBES.COM (Feb. 7, 2020, 1:48 PM), <https://www.forbes.com/sites/dawnstaceyenniss/2020/02/07/the-first-gay-inclusive-jobs-report-is-out-and-its-telling/?sh=78cd7f903a4f> (reporting the change to the Bureau of Labor Statistics reporting for its February 2021 employment report and noting that, unlike census data, the BLS data is not “separating the number of same-sex married workers from heterosexual couples in those categories tracking workers by marital status”). There has been no announcement about whether the Bureau of Labor Statistics intends to include sexual orientation or gender identity data in annual employment statistics or Current Population Survey Programs going forward. See *id.*

²⁰⁴ See Wang, *supra* note 202.

²⁰⁵ See Thom File & Joey Marshall, *House Pulse Survey Shows LGBT Adults More Likely to Report Living in Households with Food and Economic Insecurity Than Non-LGBT Respondents*, U.S. CENSUS BUREAU (Aug. 11, 2021), <https://www.census.gov/library/stories/2021/08/lgbt-community-harder-hit-by-economic-impact-of-pandemic.html> (reporting that for “first time ever on a population survey sponsored by the Census Bureau,” the Household Pulse Survey asked about sexual orientation and gender identity).

²⁰⁶ See Household Pulse Survey (July 21–Sept. 13, 2021), U.S. CENSUS BUREAU, <https://www.census.gov/library/stories/2021/11/census-bureau-survey-explores-sexual-orientation-and-gender-identity.html>.

Because of limited current and historic official data about sexual orientation and gender identity, it is difficult to report accurately any current wage gaps along these identity axes.²⁰⁷ According to a Williams Institute report from 2007, gay men earned between ten and thirty-two percent less than heterosexual men did.²⁰⁸ The nature and extent of any differences in earnings of lesbian-identifying individuals were less clear, with some (but not all) studies reporting that lesbians earned more than their heterosexual counterparts, although less than gay men or heterosexual men.²⁰⁹ According to one study of the workplace experiences of what the researchers called individuals “working in a gender other than which they were assigned at birth,” transgender men’s earnings increased post-transition; whereas, transgender women’s earnings declined post-transition by approximately one-third.²¹⁰ A 2021 report by McKinsey and Company found that transgender employees made thirty-two percent less than cisgender employees of similar or lower educational levels and were more likely to be out of the workforce entirely than cis workers.²¹¹ What is undeniable is that many trans, gender nonbinary, and genderqueer people experience significantly above-average rates of job precarity, unemployment, underemployment, and poverty.²¹²

²⁰⁷ See, e.g., Crosby Burns, *The Gay and Gender Transgender Wage Gap*, CTR. FOR AM. PROGRESS (Apr. 16, 2012), <https://www.americanprogress.org/article/the-gay-and-transgender-wage-gap/> and *Transgender Workers at Greater Risk for Unemployment and Poverty*, LGBTQ Task Force, <https://www.thetaskforce.org/transgender-workers-at-greater-risk-for-unemployment-and-poverty/> (reporting a 14% unemployment rates for trans workers compared to 7% for non-trans workers). The term “trans” refers to transgender or transsexual individuals, meaning a people whose “gender identity differs from the sex they were assigned by birth; nonbinary and/or genderqueer are terms used by some individuals “who experience their gender identity and or gender expression as falling outside the categories of man and woman...somewhere in between man or woman, or ... wholly different from these terms.” *Glossary of Terms - Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> [https://perma.cc/6W4Q-EX93] (defining terms “trans,” “non-binary,” and “genderqueer”).

²⁰⁸ See *Bias in the Workplace*, WILLIAMS INST. (June 2007), <https://williamsinstitute.law.ucla.edu/publications/bias-in-the-workplace/>. Note, however, that this data is approximately fifteen years old. See *id.*

²⁰⁹ See *id.*

²¹⁰ See Kristin Schilt & Matthew Wiswall, *Before and After: Gender Transitions, Human Capital, and Workplace Experiences*, 8 B.E. J. OF ECON. ANALYSIS & POL’Y 1 (2008). The study’s authors stated that they included self-identified trans subjects, regardless of whether the respondents had chosen to take hormones, undergo surgery, or not, but then asked about “any procedures to change your gender that would have been noticeable to your supervisors or co-workers.” *Id.* at 7.

²¹¹ Being Transgender at Work 2, 5 MCKINSEY & CO. (Nov. 10, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/being-transgender-at-work#>

²¹² Trans, gender nonbinary, and genderqueer individuals are more likely to be unemployed or underemployed compared to their cis counterparts. See, e.g., *Transgender Workers at Greater Risk for Unemployment and Poverty*, LGBTQ Task Force, <https://www.thetaskforce.org/transgender-workers-at-greater-risk-for-unemployment-and-poverty/> (reporting that transgender workers

Comparing wage data across groups—whether across racial classifications, “women” versus “men,” or LGBT versus non-LGBT workers—the extent of any wage gap will vary depending on who and what is counted, measured, calculated, compared, and reported.²¹³ Regardless of any differences in methodologies, though, the message is clear: across almost every measure, lower earnings are associated with having an identity other than that of a heterosexual cis white male.²¹⁴

In the United States, there are three major laws that prohibit employment discrimination on the basis of sex. First is the Equal Pay Act of 1963, which prohibits employers from discriminating on the basis of sex by “paying wages to employees in such establishment at a rate less than the rate at which he pays employees of the opposite sex” for “equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”²¹⁵ There are exceptions for distinctions based on seniority, merit, quantity or quality of production, or “any other factor other than sex.”²¹⁶ Thus, to win a case under the Equal Pay Act, a plaintiff must prove that they are paid less than an employee “of the opposite sex” doing equal (not “similar” or “comparable”) work.²¹⁷

Just one year after the enactment of the Equal Pay Act, Congress passed the Title VII of the Civil Rights Act of 1964, which makes it unlawful for any employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²¹⁸ In other words, Title VII protects against discrimination on the basis of sex (and other identity characteristics) in both wages and benefits. In 2020 in *Boston v. Clayton County*, the Supreme Court interpreted Title VII’s

experiences unemployment at a rate of 14% compared to 7% for the entire U.S. workforce, and that 44% of trans gender individuals report that they are underemployed).

²¹³ See, e.g., Sharon M. Oster, *Is There a Policy Problem?: The Gender Wage Gap*, 82 GEO. L.J. 109, 111 (1993) (distinguishing between an “aggregate wage gap,” meaning “the ratio of women’s to men’s earnings, averaged over all occupations and over all segments of the labor market,” and the “adjusted” or “corrected” wage gap that compares “men and women with identical labor market characteristics”) and Lips, *supra* note 200, at 88 (“governments all over the world are struggling to define and measure the pay gap, and gender pay disparities are cited by international agencies as a worldwide concern Who is correct? The controversy turns on issues such as which workers are included in the analyses, how earnings are counted, and how calculations are carried out.”).

²¹⁴ See *supra* notes 194-211 and accompanying text.

²¹⁵ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (2021)).

²¹⁶ 29 U.S.C. § 206(d)(1).

²¹⁷ See *id.*

²¹⁸ Civil Rights Act of 1964, Tit. VII, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2021)); 42 U.S.C. § 20000e-2(a)(1).

prohibition against discrimination on the basis of “sex” to extend to discrimination the basis of sexual orientation and gender identity, too.²¹⁹ On its face, though the reasoning in *Bostock* does not apply to legislation other than Title VII.²²⁰ Although plaintiffs may bring claims under both the Equal Pay Act and Title VII,²²¹ any expansion of the Equal Pay Act of 1963 to protect LGBT and transgender workers likely will need to be accomplished through additional legislation or judicial interpretation.²²²

The third major U.S. legislation prohibiting employment discrimination on the basis of sex is the Lilly Ledbetter Fair Pay Act of 2009, which broadened the filing window for cases alleging wage discrimination on the basis of sex by treating each paycheck as beginning a new statute of limitations.²²³ In light of the *Bostock* decision, the procedural protections also apply to claims of discrimination the basis of sexual orientation or gender identity.²²⁴

In addition to these three major federal employment laws, over forty states have equal pay laws.²²⁵ In the last decade, several states and local governments also have enacted laws that prohibit employers from asking

²¹⁹ See *Bostock v. Clayton County, Ga.*, 140 S.Ct. 1731, 1747 (2020) (“discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second”)

²²⁰ See *id.*

²²¹ U.S. Equal Emp. Opportunity Comm’n, Section 10 Compensation Discrimination (2000), <https://www.eeoc.gov/laws/guidance/section-10-compensation-discrimination> (explaining that the Equal Pay Act is “more targeted” than Title VII, but that claims of discrimination on the basis of sex can allege a violation of both the Equal Pay Act and Title VII) [<https://perma.cc/66XY-F2Z8>].

²²² See, e.g., Valentina Wilson, Comment, *The Limitations and Alternatives to Expanding the Equal Pay Act Under Bostock v. Clayton County, Ga.*, 56 U.S.F. L. Rev. 339 (2021) (finding some support for interpreting the Equal Pay Act of 1963 to prohibit discrimination on the basis of sexual orientation or gender identity in the case of *Scutt v. Carbonaro CPAs n Mgmt. Grp.*, No. 20-00362 U.S. Dist. LEXIS 182849, at *29 (D. Haw. Oct. 2, 2020)).

²²³ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified in scattered sections of 29 U.S.C. and 42 U.S.C. (2021)).

²²⁴ See *Bostock* 140 S.Ct. at 1747. The Paycheck Fairness Act, first introduced by Representative Rosa DeLauro (D-CT) in 1997 would have augmented the Equal Pay Act of 1963 with various procedural safeguards, had it passed. See, e.g., Paycheck Fairness Act, H.R. 2023, 105th Cong. § 3(b) (1997-1998) and H.R. 7, 117th Cong. (2021-2022) § 3(b) (2020-2021). See also The Paycheck Fairness Act Fact Sheet, NT’L PARTNERSHIP FOR WOMEN AND FAMILIES (Mar. 2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/the-paycheck-fairness-act.pdf> (describing salient provisions of the Paycheck Fairness Act). In 2021, the bill passed in the House, but it is not expected to pass in the Senate. See, e.g., Paycheck Fairness Act, H.R. 2023, 105th Cong. § 3(b) (1997-1998) and H.R. 7, 117th Cong. (2021-2022) § 3(b) (2020-2021). See also The Paycheck Fairness Act Fact Sheet, NT’L PARTNERSHIP FOR WOMEN AND FAMILIES (Mar. 2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/the-paycheck-fairness-act.pdf> (describing salient provisions of the Paycheck Fairness Act).

about a job candidate's salary history, in an effort to avoid carrying forward the past effects of gender discrimination in pay.²²⁶

Despite the existence of these laws, though, the gender wage gap persists.²²⁷ Indeed, during periods of the ongoing coronavirus pandemic, aspects of the gender wage gap have worsened, with more women than men losing their jobs, and Hispanic, Asian, and Black women experiencing the greater rates of job loss compared to other women and all men.²²⁸

Scholars have explained the gender wage gap as a result of factors including intentional (but illegal) discrimination; occupational segregation; women's lack of education, experience, or training; women's choosing part-time employment over full-time employment; or women's leaving the workforce entirely.²²⁹ Because of the tendency to attribute wage differentials to personal characteristics or individual choices, without regard to the structural inequalities that inform those choices, there is no agreement on whether additional anti-discrimination laws are appropriate.²³⁰ However, there is a clear need for better enforcement of the existing laws that attempt to remedy the gender wage gap.²³¹

²²⁶ See, e.g., *State and Local Salary History Bans*, AAUW, <https://www.aauw.org/resources/policy/state-and-local-salary-history-bans/> (explaining the rationale for these laws as follows: "Using salary histories, which may have been tainted by bias, means that discriminatory pay follows workers wherever they go, whatever their job, no matter their abilities. Curtailing this practice will go a long way in our fight for pay equity."). See also Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 567-87 (2020) (discussing enactment, undergirding rationale, and judicial reception of state laws preventing employers from asking about job candidates' salary histories).

²²⁷ See Amanda Barroso & Anna Brown, *Gender Pay Gap in U.S. Held Steady in 2020*, PEW RESEARCH CTR. (May 25, 2021), <https://www.pewresearch.org/fact-tank/2021/05/25/gender-pay-gap-facts/> (noting that the "gender gap in pay has remained relatively stable in the United States over the past 15 years or so") and Doris Weichselbaumer & Rudolf Winter-Ebmer, *A Meta-Analysis of the International Gender Wage Gap*, 19 J. ECON. SURVEYS 479 (2005).

²²⁸ See, e.g., Rakesh Kochnar, *Hispanic Women, Immigrants, Young Adults, Those With Less Education Hit Hardest by COVID-19 Job Losses*, PEW RESEARCH CTR. (June 9, 2020), <https://www.pewresearch.org/fact-tank/2020/06/09/hispanic-women-immigrants-young-adults-those-with-less-education-hit-hardest-by-covid-19-job-losses> (reporting that, during the period February to May 2020, women lost 11.5 million jobs compared to men who lost 9.0 million jobs; employment declined for Hispanic women at a rate of 21% (compared to 15% for Hispanic men), Asian women at a rate of 19% (compared to 17% for Asian men), Black women at a rate of 17% (compared to 13% for Black men), and white women at a rate of 13% (compared to 9% of white men)).

²²⁹ Marianne DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws—A Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. ON LEGIS. 385, 392-406 (2013).

²³⁰ See *id.* at 387 (advocating for mandatory salary disclosure laws) and Michael Baker et al., *Pay Transparency and the Gender Pay Gap* 4, (Nt'l Bureau of Econ. Research, Working Paper No. 25834), https://www.nber.org/system/files/working_papers/w25834/w25834.pdf (finding in a study of university faculty salaries in Canada that transparency laws reduce the gender wage gap).

²³¹ See, e.g., Marlene Kim, *Policies to End the Gender Wage Gap in the United States*, 45 J. OF RADICAL POLITICAL ECON. 278, 279-280 (2013) (arguing for better enforcement of existing laws).

In some European countries, governments collect a variety of gender-disaggregated data, including company-level wage information. In Sweden, for example, the Swedish Employers' Confederation gathers and collects pay data.²³² In Finland, the government agency Statistics Finland tracks and reports men's and women's earnings.²³³ Similar data collection programs exist in Austria, Belgium, Denmark, and Portugal.²³⁴ In the United Kingdom, a regulation promulgated by the Equality and Human Rights Commission requires companies with 250 or more employees to publicly disclose—via their own websites and via a government-sponsored searchable database—median and mean pay disparities between men and women in both hourly rates and bonuses.²³⁵ The rationale underlying these disclosure laws is that all employees, but especially women, will be better able to negotiate their way to pay equity if they have access to more and better information.

Beyond wage disclosure laws, lawmakers, policy analysts, scholars and others have pointed to the need for additional public or private initiatives to eliminate the gender wage gap in the United States.²³⁶

²³² See, e.g., WOMEN AND MEN IN SWEDEN 2020: FACTS AND FIGURES, STATISTICS SWEDEN 4-5 (June 17, 2020), https://www.scb.se/contentassets/95ffcd4b3f394877abb3bd41e40df0a0/le0201_2019b20_br_x10br_2002eng.pdf (describing Official Statistics Ordinance that requires statistical reporting on gender equality programs) and Eva M. Meyersson Milgrom, Trond Petersen & Vemund Snartland, *Equal Pay for Equal Work? Evidence from Sweden and a Comparison with Norway and the U.S.* (Jan. 2001), <https://emilgrom.people.stanford.edu/sites/g/files/sbiybj2511/f/wage5-equalpayequalwork.pdf>.

²³³ See *Gender Equality in Finland 2021*, STATISTICS FINLAND (2021), https://www.stat.fi/tup/julkaisut/tiedostot/julkaisuluettelo/yyti_gef_202100_2021_23461_net.pdf

²³⁴ See, e.g., Kaitlin Holmes & Danielle Corley, *International Approaches to Closing the Gender Wage Gap*, text at nn.23-30, CTR. FOR AM. PROG. (Apr. 4, 2017), <https://www.americanprogress.org/article/international-approaches-closing-gender-wage-gap/> (describing gender-disaggregated data collection and reporting practices in these countries).

²³⁵ See, e.g., Leah Shepherd, *UK Delays Deadline for Employers to Report Gender Pay Gap Data*, SHRM (Apr. 21, 2021), <https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/uk-delays-deadline-gender-pay-gap-data.aspx>. Whether the gender pay gap reporting requirements will have the intended impact is difficult to predict. See, e.g., Aneesh Raghunandan & Shivaram Rajgopal, *Mandatory Gender Pay Gap Disclosure in the UK: Did Inequity Fall and Do these Disclosures Affect Firm Value?* <http://dx.doi.org/10.2139/ssrn.3865689> (finding a small reduction in the gender pay gap in some but not all U.K. companies after the enactment of the wage transparency laws). But see The Gender Pay Gap Reporting Measures: 2019 Update, Inst. of Econ. Affairs Briefing 2 (Apr. 4, 2019), <https://iea.org.uk/publications/the-gender-pay-gap-reporting-measures-2019-update> (critiquing the reporting requirement's reliance on median and mean wage reporting instead of comparing pay for male and female employees in similar roles, and this failing "to provide any meaningful into equal or fair pay for men and women in the workplace" because comparable roles within the company").

²³⁶ *Id.* at 280-81 (reviewing other possible means of addressing gender wage gap). A complex and under-studied potential intervention against the gender wage gap is the use of robots. See Massimo Manelli, Osea Giuntella & Luca Stella, *Robots, Marriageable Men, Family and Fertility*, J. HUM. RESOURCES, Nov. 15, 2021, doi: 10.3368/jhr.1020-11223R1 (finding that the introduction

Suggestions include improving and expanding child care and family leave, as well as expanding the availability of part-time and flexible work arrangements.²³⁷ Indeed, because many employees are now accustomed to working from home during the (ongoing) coronavirus pandemic, employers may need to offer flexible schedules in order to attract and retain a talented workforce.²³⁸ But especially in low-paying or some service-oriented jobs, flexible work arrangements may not be easy to implement.²³⁹ Thus, increased workplace flexibility will never become available to all. And even where flexibility is possible, simply rearranging work schedules is not a magic solution to the gender wage gap.²⁴⁰ In fact, it is difficult to predict whether separation of employees from each other by distance or as a result of flexible scheduling of days in the office might ultimately exacerbate or lessen gender-based wage differentials.²⁴¹

B. Gender-Based Pricing Differentials

1. Overview

Just as sometimes the phrase “Black tax” is used to describe specific and measurable race-based differences in the consumer marketplace, so does one version of the “pink tax” describe gender-based pricing

of robotics and automation results in greater declines in men’s income compared to women’s and increasing women’s rates of participation in the paid labor force).

²³⁷ See *supra* note 236.

²³⁸ See, e.g., Rani Molla, *Many People Don’t Want to Work Unless From Home*, VOX.COM (June 24, 2021, 8:20 EDT), <https://www.vox.com/recode/22543409/remote-work-from-home-jobs-supply-demand-hiring-platforms>, and Laura Colorusso, *Can Working From Home Fix the Gender-Wage Gap?*, WASH. MONTHLY (June 27, 2021), <https://washingtonmonthly.com/2021/06/27/can-working-from-home-fix-the-gender-wage-gap> (quoting Kathy Regan, the chief operating officer of the Commonwealth Fund commenting on remote work: “The horse is out of the barn, and this is a perk that will need to be offered to attract the best talent”).

²³⁹ See, e.g., Elise Gould & Jori Kandra, *One on Five Workers Are Working From Home Due to COVID*, ECON. POL’Y INST. (June 2, 2021, 11:10 AM), <https://www.epi.org/blog/only-one-in-five-workers-are-working-from-home-due-to-covid-black-and-hispanic-workers-are-less-likely-to-be-able-to-telework/> (explaining that low wage industries such as retail and food service are not susceptible to teleworking, that Black and Hispanic workers are less likely to be able to work from home than white or Asian workers and that those with a high school degree or less were less likely to be able to work from home than those with a bachelor’s degree or higher).

²⁴⁰ Economists have been studying gender differences in wages since at least 1957. See GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971) (1957). See also Colorusso, *supra* note 238 (“If office culture hasn’t fundamentally changed and remote work remains a deviation from the norm, optional hybrid schedules could create two tiers of employees—the go-getters who choose to come into the office and the slackers who stay home—further stigmatizing caregivers”).

²⁴¹ See, e.g., Joanna Partridge, *Switch to More Home Working After Covid “Will Make Gender Inequality Worse,”* GUARDIAN (U.K.) (June 19, 2021, 10:00 EDT), <https://www.theguardian.com/business/2021/jun/19/switch-to-more-home-working-after-covid-will-make-gender-inequality-worse>

differentials in products marketed to “women” or “girls.”²⁴² This form of the “pink tax” is linked to some law reform at the local and state levels, but legislative success is somewhat limited.

The Jane and Jerry hypotheticals at the beginning of this Article illustrate this particular manifestation of the “pink tax.” Recall that Jane paid \$6.97 and Jerry paid \$6.88 for a package of three razors, with the only salient different being the color of the razors (pink for Jane and black for Jerry).²⁴³ Jane paid \$49.99 for a pink scooter for her niece and Jerry paid \$24.99 for the same scooter in red for his nephew.²⁴⁴ Numerous studies have confirmed that the Jane and Jerry scenario is consistent with reality; consumers tend to pay more for services and products that are marketed or provided to “women” or “girls” compared to “men” or “boys.”²⁴⁵ Representative examples of these studies include reports from New York City, California, and the Joint Economic Committee of the United States Congress. The findings are discussed in the next subsection.

²⁴² See *supra* note 152 and accompanying text.

²⁴³ See *supra* notes 1, 8 and accompanying text.

²⁴⁴ See *supra* notes 7, 12 and accompanying text.

²⁴⁵ See, e.g., Mass. Sen. Post Audit & Oversight Bureau, *Shear Discrimination: Bureau Survey Finds Wide Price Bias Against Women at Massachusetts Hair Salons Despite Anti-Discrimination Laws* (1997), <https://archives.lib.state.ma.us/bitstream/handle/2452/845415/ocm37357144.pdf?sequence=1&isAllowed=y> (finding based on a study of 192 hair salons that the majority of them charged women for a basic haircut an average of \$5.95 more than men, without regard to the length and style of the hair), Catherine Liston-Heyes & Elena Neokleous, *Gender-Based Pricing in the Hairdressing Industry*, 23 J. OF CONSUMER POL’Y 107 (2000); Ian Ayres & Peter Siegelman, *Gender and Race Discrimination in Retail Car Negotiations*, in *Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination* 19-24 (Ian Ayres ed., 2001); *Men Win the Battle of the Sexes: Price Differences for Personal Care Products Between Men and Women*, CONSUMER REPTS. 75, 8-10 (2010), <https://www.consumerreports.org/cro/2012/05/men-win-the-battle-of-the-sexes/index.htm>, and (finding gender-based price differentials in comparable “men’s” and “women’s” products in the same lines of Barbasol shaving cream, Degree antiperspirant, Excedrin pain reliever, Neutrogena eye cream, Nivea body wash and Schick razor blades), Office of the Attorney Gen. of VT. & the VT. Hum. Rts. Comm’n, *Guidance on the Use of Gender in Pricing of Goods and Services* 1 (2016), hrc.vermont.gov/sites/hrc/files/gender-based-pricing-guidance.pdf (providing evidence of gender-based pricing differentials in various consumer goods sold within the states and cautioning that “[g]ender based pricing is against the law” because it is “a form of discrimination”). There are abundant anecdotal examples of gender-based pricing differentials, too. See, e.g., Casey Bond, *7 Weird Examples Of How Women Pay More Than Men For The Same Products*, HUFFPOST.COM (Jul. 10, 2019, 7:59 PM), https://www.huffpost.com/entry/pink-tax-examples_1_5d24da77e4b0583e482850f0 (providing examples from Walgreens of thirty-two purple “Women’s Earplugs” selling for \$5.29 compared to a package of thirty-two similar blue “Foam Earplugs” selling for \$4.59 and from an unnamed retailer of a package of twenty-five “women’s gentle laxative tablets bisacodyl, 5 mg” selling in a pink package for \$3.69 and a package of twenty-five “gentle laxative tablets bisacodyl USP, 5 mg” selling in a green packet for \$1.49).

2. Studies

In 1992, the New York City Department of Consumer Affairs investigated gender-based pricing in delivery of two commercial services.²⁴⁶ Among the laundries surveyed, the average price for washing and drying a “women’s” basic cotton shirt was 27.3 percent higher than for a “man’s” basic cotton shirt.²⁴⁷ Of the hair salons surveyed, sixty-six percent charged a “female” customer higher prices than a “male” customer for a basic shampoo, cut, and blow dry, regardless of hair length, hair style, or anticipated time spent by the stylist.²⁴⁸ In fact, all prices were obtained over the phone and no other information was provided in the data-gathering process other than whether the prospective customer was a “woman” or “man.”²⁴⁹

In 2015, the New York City Department of Consumer Affairs reported again on gender-based pricing differentials, this time in the form of a study of thirty-five different product types and 794 individual items sold by twenty-four retailers in New York City and online.²⁵⁰ The report compared the prices of products that were close in “branding, ingredients, appearance, textile, construction, and/or marketing,” with the only significant distinction being that one set of products was marketed to “female” consumers while the other set of products was marketed to “male” consumers.²⁵¹ The Department of Consumer Affairs found an average markup of seven percent across all categories for “women’s” products, including seven percent for toys and accessories (e.g., scooters, arts and crafts, backpacks, safety helmets, and pads), four percent for children’s clothing (e.g., jeans, onesies, and toddler shoes), eight percent for adult clothing (e.g., sweaters, socks, and underwear), thirteen percent for personal care products (e.g., lotions, razors, and body wash), and eight percent for senior or home health care products (e.g., incontinence products, canes, compression socks, supports, and braces).²⁵²

²⁴⁶ See Mark Green, N.Y.C. Dep’t of Consumer Affairs, *Gypped by Gender: A Study of Price Bias Against Women in the Marketplace* (1992).

²⁴⁷ See *id.* at 6.

²⁴⁸ *Id.* (finding a 25% mark-up on the services for “women” than “men”). A 2011 study of hair salons in a four-county area in the southeastern United States found similar results. See Megan Duesterhaus et al., *The Cost of Doing Femininity: Gendered Disparities in Pricing of Personal Care Products and Services*, 28 GENDER ISSUES 175, 181 (2011) (finding average pricing disparities in eighty five out of 100 salons surveyed of \$35.02 for “women’s” haircut versus \$22.78 for “men’s” haircuts).

²⁴⁹ See Green, *supra* note 246.

²⁵⁰ See From Cradle to Cane.

²⁵¹ See *id.* at 3-5.

²⁵² *Id.* at 5, 17-19

In between the conduct of the two New York City Department of Consumer Affairs studies, in 1994 a California State Assembly Committee undertook a major investigation of gender price disparities in consumer services in that state.²⁵³ Under the leadership of Assemblymember (now United States Representative) Jackie Speier, the Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development found that in 1994, the average California woman paid \$1,351 more than a man did for the same services, amounting to \$15 billion in total for that year alone.²⁵⁴ The study did not consider gender-based pricing differences in consumer goods, the way the second New York City Department of Consumer Affairs study did.²⁵⁵

In a 2016, gender-based pricing differentials became a focus of the Democrat-led Joint Economic Committee of the United States Congress.²⁵⁶ The Committee defined the “pink tax” as the “markup on goods and services marketed to women” that are otherwise “practically identical” to those marketed to men.²⁵⁷ The Committee reported on numerous instances of gender-based pricing differences in consumer goods such as razors, soap, dry cleaning, pens, and toys.²⁵⁸ It provided evidence suggesting gender-

²⁵³ See Interim Hearing on Gender Discrimination in the Pricing and Availability of Products and Services, Ca. Assembly Committee on Consumer Protection, Governmental Efficiency and Economic Development (1994). See also Ca. Sen. Judiciary Com. Analysis of AB 1100 (1997-1996 Reg. Sess.), Aug. 22, 1995, p. 5. and Background Paper, The “Pink Tax”: How Gender-Based Pricing Discrimination Undermines Women’s Economic Opportunity and What To Do About It: Informational Hearing Before the Ca. Sen. Committee on Judiciary & Sen. Select Committee on Women, Work & Families 3 (referring to various antecedent studies for the 1994 California report: GENDER-BASED DISCRIMINATION IN THE LAUNDRY BUSINESS, PUBLIC L. RES. INST. (1987); WHY WOMEN PAY MORE, CTR. FOR STUDY OF RESPONSIVE L. (1993); A SURVEY OF HAIRCUTS & LAUNDRY SERVICES IN CALIFORNIA, CA. ASSEMBLY OFFICE OF RES. (1994)).

²⁵⁴ See also Ca. Sen. Judiciary Com. Analysis of AB 1100 at 5 (1997-1996 Reg. Sess.), Aug. 22, 1995, p. 5. and Background Paper, The “Pink Tax”: How Gender-Based Pricing Discrimination Undermines Women’s Economic Opportunity and What To Do About It: Informational Hearing Before the Ca. Sen. Committee on Judiciary & Sen. Select Committee on Women, Work & Families 3 (Feb. 18, 2020), https://sjud.senate.ca.gov/sites/sjud.senate.ca.gov/files/2.18.2020_sjud_gender_pricing_info_hearing_background_paper.pdf (explaining that this amount indexed for inflation was \$2,381 in 2020)

²⁵⁵ See *supra* note 250 and accompanying text.

²⁵⁶ See U.S. CONG. JOINT ECON. COMM. 114TH CONG. JOINT ECON. COMM., THE PINK TAX: HOW GENDER-BASED PRICING HURTS WOMEN’S BUYING POWER (2016) https://www.jec.senate.gov/public/_cache/files/8a42df04-8b6d-4949-b20b-6f40a326db9e/the-pink-tax---how-gender-based-pricing-hurts-women-s-buying-power.pdf [hereinafter JOINT ECON. COMM. REPORT].

²⁵⁷ *Id.* at 1, 2.

²⁵⁸ *Id.* at 1 (comparing prices at Walmart for a package of twelve Schick Slim Twin ST2 Sensitive Disposable Razors in pink for \$7.51 with a package of twelve Schick Slim Twin ST12 Sensitive Men’s Disposable Razors in green for \$4.99), 4 (comparing prices on Amazon for a package of two Bic for Her Retractable Ball Pens, Medium Point, Black Ink and purple and pink casings for \$4.97 with a package of two Bic Atlantic Original Retractable Ball Pens, Medium Point, Black Ink and black casings for \$2.47), 4 (comparing prices from an unnamed online retailer for a

based pricing differentials in mortgages and that women were thirty-two percent more likely than men to receive a subprime mortgage despite lower rates of loan defaults by women compared with men.²⁵⁹ Women also tended to pay more for cars and for auto insurance; they were more likely to sell their homes for less than men did.²⁶⁰ These financial burdens, the Committee noted, are especially acute when viewed in the overall context of both the gender wage gap—which may amount to \$10,500 over the course of the average woman’s working lifetime—and other incidences of the “pink tax” discussed below.²⁶¹

3. Legislation

There are laws at selected state and local levels that prohibit gender-based price differentials. In 1995, California became the first state to prohibit discrimination in the provision of services.²⁶² Under California’s Gender Repeal Act of 1995, introduced by Assemblymember Jackie Spear, service providers such as dry cleaners and hair stylists may not take gender into account in setting prices; they may consider “the amount of time,

Microsoft Wireless Mobile Mouse 1850 in pink for \$21.89 with a Microsoft Wireless Mobile Mouse 1850 in blue for \$15.79). The Joint Economic Committee’s report cited the 1994 California study, the 2015 New York City study and other antecedent research, and provided several of its own examples of gender-based prices in consumer goods. *Id.* at 3.

²⁵⁹ JOINT ECON. COMM. REPORT at 6-7 (discussing gendered differences in subprime mortgages and default rates). *Cf.* Press Release, Consumer Fed’n of Am., Most Large Auto Insurers Charge 40 and 60-Year-Old Women Higher Rates Than Men, Often More Than \$100 Per Year (Oct. 12, 2017), https://consumerfed.org/press_release/large-auto-insurers-charge-40-60-year-old-women-higher-rates-men-often-100-per-year [<https://perma.cc/8K4G-6XB6>].

²⁶⁰ JOINT ECON. COMM. REPORT at 5-6 (referring to Ayres & Siegelman, *supra* note 245, suggesting that women are quoted higher prices than men when shopping for cars). *See also* Steve Tengler, *New “Pink Tax” Study Shows Women Pay Upwards of \$7,800 More For Car Ownership*, FORBES (Oct. 21, 2021, 530 AM), <https://www.forbes.com/sites/stevetengler/2021/10/27/new-pink-tax-study-shows-women-pay-upwards-of-7800-more-for-car-ownership/?sh=b399c1163d8c> (noting that despite lower overall rates for car insurance for female drivers compared to male drivers, women tend to pay more new cars and car repair) and Paul Goldsmith-Pinkham & Kelly Shue, *The Gender Gap in Housing Returns 1*, Nt’l Bur. of Econ. Research Working Paper 26914, <http://www.nber.org/papers/w26914> (finding that in the case of both mortgage-free and mortgaged property, single women compared to single men earn lower returns on housing).

²⁶¹ Joint Econ. Comm. Report at 1, 6.

²⁶² CAL. CIV. CODE § 51.6 (West 2021). Other states that were early adopters of laws prohibiting gender-based price discrimination in services include Massachusetts, Washington D.C., and some counties in Virginia. *See From Cradle to Cane* at 15. *See also* Kenneth A. Jacobsen, *Rolling Back the “Pink Tax”: Dim Prospects for Eliminating Gender-Based Price Discrimination in the Sale of Consumer Goods and Services*, 54 CA. WESTERN L. REV. 241, 251-54 (2018) (providing an overview of several municipalities and states that have adopted laws prohibiting gender-based discrimination in services) and Mikayla R. Berliner, Comment, *Tackling the Pink Tax: A Call for Congress to End Gender-Based Price Discrimination*, 42 WOMEN’S RTS. L. REP. 67, 91-98 (2020) (evaluating anti-price discrimination laws in California, Miami-Dade County, New York City and Guam).

difficulty or cost of providing the services.”²⁶³ New York City adopted similar legislation in 1998; that law also was limited to services (not goods) and made allowance for any actual differences in time, difficulty, or cost in rendering the services.²⁶⁴

In September 2020, the New York State legislature passed the first-ever law banning gender-based pricing discrimination in the provision of services *or* goods.²⁶⁵ Danielle Taana Smith, a professor at Syracuse University, heralded the new legislation as an historic matter, remarking that gender-based pricing discrimination is just one of many “harmful” practices “embedded within major social institutions” that “contribute to windfall profits for few.”²⁶⁶ In 2021, ten Democrats introduced similar legislation in the California Assembly, but the bill failed to advance.²⁶⁷

At the federal level, United States Representative Jackie Spears (D-CA) first introduced the Pink Tax Repeal Act in 2016; she has done so three times since, most recently in 2021.²⁶⁸ That bill seeks to ban gender-based price discrimination in both goods and services.²⁶⁹ Representative Spier, who sponsored the California Gender Repeal Act of 1995, has called the pink tax “an insidious form of institutionalized discrimination that affects women across the country from the cradle to the grave.”²⁷⁰ Critics, though, predict that the federal bill is destined to fail because it applies to *both* services and goods.²⁷¹ They point to an early version of the 1995 California legislation and note only when the bill’s proponents agreed to limit its scope

²⁶³ CAL. CIV. CODE at § 51.6(b) (West 2021).

²⁶⁴ N.Y.C., N.Y., ADMIN. CODE tit. 20, §§ 750(c), 751(a) (2021).

²⁶⁵ N.Y. GEN. BUS. LAW § 391-U (McKinney 2020) (prohibiting gender-based price differentials in goods and services that are “substantially similar” but allowing for differences in amount of time, difficulty or cost of providing the services).

²⁶⁶ See Francis Tang, *New York Passes Legislation That Prohibits Gender-Based Pricing*, THE DAILY ORANGE (Oct. 7, 2020), <http://dailyorange.com/2020/10/new-york-passes-legislation-prohibits-gender-based-pricing> (quoting Professor Danielle Taana Smith).

²⁶⁷ See Ca. A.B. 1287 (2021 Reg. Sess.) (introduced by Assemblymembers *Bauer-Kahan*, *Cristina Garcia*, *Boerner Horvath*, *Burke*, *Cervantes*, *Lorena Gonzalez*, *Levine*, *Low*, *Nazarian* and *Robert Rivas*, all Democrats). See also *History*, CA. LEGIS. INFORMATION, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=202120220AB1287, and *Members*, CA. STATE ASSEMBLY, <https://www.assembly.ca.gov/assemblymembers>.

²⁶⁸ See Pink Tax Repeal Act, H.R. 5686, 114th Cong. (2d Sess. 2016); H.R. 5464 (115th Cong. 2017-2018); H.R. 2048 (116th Cong. 2019-2020); H.R. 3853 (117th Cong. 2021-2022).

²⁶⁹ See *id.*

²⁷⁰ See *supra* note 263 and accompanying text, and Press Release, Congresswoman Jackie Spier, Reps Spier & Reed Reintroduce Pink Tax Repeal Act to End Gender-Based Pricing Discrimination (Apr. 3, 2019), <https://speier.house.gov/2019/4/rep-spieer-reed-reintroduce-pink-tax-repeal-act-end-gender-based>.

²⁷¹ See, e.g., Pink Tax Repeal Act Would Ban Higher Prices Based on Gender, Like for Haircuts, GovTrackInsideer.com (Apr. 11, 2019) (summarizing arguments of opponents of the Pink Tax Repeal Act and the history of California’s legislation).

to gender-based price differentials in *services* did the bill become law.²⁷² Indeed, despite reports like those produced by the New York City Department of Consumer Affairs in 2015²⁷³ and the Joint Economic Committee of the United States Congress in 2016,²⁷⁴ there is no academic consensus about the existence of gender-based pricing *discrimination*, as opposed to difference, in consumer goods, let alone whether legal interventions are appropriate.²⁷⁵

4. Obstacles to Reform

In looking at the anecdotal evidence, some scholars suggest that “shelf price,” not gender-based discrimination, is the primary driver of higher prices for consumer goods marketed to “women” or “girls.”²⁷⁶ In other words, manufacturers actively choose to design and package similar goods differently in order to appeal to distinct and gendered market segments; women are not *required* to purchase the pink version of a product like razors or scooters.²⁷⁷ Furthermore, these scholars argue, pricing information is displayed openly and each consumer is free to make her own choice; thus, it is inaccurate to say that price differentials are *discriminatory*.²⁷⁸

Apart from discrimination or “shelf price,” why might gender-based pricing disparities exist? There are at least three possible explanations. First, there may be actual differences in the content or design of products, although the 1995 report by the New York City Department of Consumer Affairs belies this explanation.²⁷⁹ Second, because there are higher tariffs on the import of “women’s” clothes than “men’s” clothes, consumers pay more for imported “women’s” clothes.²⁸⁰ This would not explain why

²⁷² See *supra* note 263 and accompanying text.

²⁷³ See *supra* notes 250-252 and accompanying text.

²⁷⁴ See *supra* note 256 and accompanying text.

²⁷⁵ See Sarah Moshary, Anna Tuchman & Natasha Bhatia, Investigating the Pink Tax: Evidence against a Systematic Price Premium for Women in CPG, 1- 2, https://www.ftc.gov/system/files/documents/public_events/1588356/mosharybhatiatuchman_updated2.pdf (pointing to the “dearth of systematic evidence on the pink tax” and the different way that gender discrimination operates in the consumer goods market compared to markets for labor, cars or real estate, for example).

²⁷⁶ *Id.* at 2.

²⁷⁷ See *id.* See also *supra* note 258 and accompanying text.

²⁷⁸ See Moshary et al., *supra* note 275, at 2.

²⁷⁹ See From Cradle to Cane.

²⁸⁰ See Lori L. Taylor & Jawad Dar, *Fairer Trade: Removing Gender Bias in US Import Taxes*, Fig. 2, THE TAKEAWAY: POLICY BRIEFS FROM THE MOSBACHER INST. FOR TRADE, ECON., AND PUB. POL’Y (March 2015), <https://oaktrust.library.tamu.edu/bitstream/handle/1969.1/153774/V6-3%20Tariff%20Discrimination%20Takeaway.pdf?sequence=1&isAllowed=y> (showing higher U.S. tariffs on women’s footwear and apparel compared to men’s) and Jacobsen, *supra* note 262, at 242

consumers pay more for domestic “women’s” clothes, though. Third, some scholars argue that women as a group are less price sensitive than men as a group, so companies will charge more for the “women’s” version of a product because women are willing to pay more.²⁸¹ But this assumes the existence of market substitutes for so-called “women’s” products, which may not exist, and in any event this explanation does not interrogate the narrow assumptions about what “women’s” clothing, bodies, and preferences are presumed or constructed to be.

In the context of gender-based pricing differentials, the phrase “pink tax” operates at the figurative level, just as some usages of the “Black tax” do.²⁸² Indeed both the “pink tax” and “Black tax” tropes have notable deficiencies. First, consider that some deployments of both the “pink tax” and “Black tax” refer to market-based differences on the basis of identity. Despite the intention to describe a complex problem, the effect of the metonymic modifier (“pink” or “Black”) is to flatten consumers into a single identity box (i.e., gender or race) without describing discrimination at the intersection of race, gender, and/or other identity categories.²⁸³ Second, the phrase “pink tax” is often critiqued, even by academics. For example, libertarian economist Steven Horowitz has said that the “pink tax” is not a “tax” at all, but rather a “blue discount.”²⁸⁴ He appears to take issue with the trope on two grounds: first, because gender-based pricing differentials are not the result of any positive government action, one cannot call this a “tax.”²⁸⁵ Second, when “men’s” products are priced lower than the same “women’s” products, men’s experience are front and center; focus

(identifying gender-based differentials in tariffs as one of the explanations for the pink tax in consumer goods).

²⁸¹ See Steven Horowitz, *Is There Really a Pink Tax?*, FOUNDATION FOR ECON. EDUC. (May 13, 2015), <https://fee.org/articles/is-there-really-a-pink-tax> (calling the pink tax a “harmless” form of price discrimination that reflects the fact that “different groups have different price elasticities for the product”).

²⁸² See *supra* notes 151-154 and accompanying text (exploring the use of the “Black tax” to refer to pricing differentials).

²⁸³ The analytic framework of intersectionality, popularized in legal literature by Kimberlé Crenshaw, is well discussed elsewhere. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics*, 1989 U. CHI. LEGAL F. 139, 148-50 (1989) and Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1249 (1991). For applications and developments of Professor Crenshaw’s theories, see Nancy Ehrenrich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251 (2002) and Robert S. Chang & Jerome McCristal Culp, Jr., *After Intersectionality*, 71 UMKC L. REV. 485 (2002).

²⁸⁴ See Horowitz, *supra* note 281 (commenting that “blue discount” would be a more apt description than “pink tax”). When “pink tax” is properly understood in this context in a figurative sense, whether gender-based pricing differentials are a “tax” on one group or a “discount” for another misses the overall point. See *id.*

²⁸⁵ See *id.*

on the “discount” they pay, in comparison with female consumers.²⁸⁶ Because Professor Horowitz does not seem to understand that the word “tax” can be used figuratively, perhaps members of the general public find the “pink tax” trope confusing, too..

C. Transportation and Other “Extra” Expenditures

A third descriptive use of “pink tax” is for what some have called “the cost associated with being a woman,” meaning financial expenses above and beyond those of similarly situated men.²⁸⁷ The phrase is not linked to any discrete law reform, even though (like the other “pink tax” tropes discussed so far) the phrase refers to *figurative* taxes, not literal ones,²⁸⁸ and it is *metonymic*, using “pink” because of its close association with girls and women.²⁸⁹ This manifestation of the “pink tax” refers to women’s expenditures for transportation due to concerns for personal safety.²⁹⁰ Recall in the Jane and Jerry hypotheticals that both employees got out of work at 8:00 p.m., but Jane did not feel comfortable walking to the bus stop, so she paid \$4.56 for a taxi.²⁹¹ Jerry walked to the bus stop, incurring no additional cost.²⁹²

In 2018, a team of researchers associated with New York University’s Rudin Center for Transportation conducted an online survey of 544 New York City residents and asked them about their travel habits and expenses.²⁹³ Seventy-five percent of female respondents (compared to forty-seven percent of male respondents) said they had experienced

²⁸⁶ *Id.*

²⁸⁷ See, e.g., Yvette Basson, Relative Poverty in Female Disability Grants Recipients in South Africa, 54 DE JURE L.J. (PRETORIA) 346, 352 (2021).

²⁸⁸ See *supra* notes 28 (defining metonymy).

²⁸⁹ See *supra* note 191 and accompanying text (discussing present-day association of pink with girls and women).

²⁹⁰ See, e.g., Aarian Marshall, *The Pink Transit Tax: Women Spend More Than Men to Get Around NYC*, WIRED.COM (Nov. 12, 2018), <https://www.wired.com/story/nyc-public-transportation-pink-tax-gender-gap> (quoting Professor Sarah Rudin as explaining that the #MeToo movement inspired her study of whether women pay more for transportation in New York City, because of a concern over harassment or crime). Similar results likely would obtain for elderly, disabled and LGBT individuals, and others vulnerable to harassment and violence. See GLOBAL ROADMAP OF ACTION TOWARD SUSTAINABLE MOBILITY: GENDER, SUSTAINABLE MOBILITY FOR ALL 2, WORLD BANK (2019), <https://www.sum4all.org/publications/global-roadmap-action-toward-sustainable-mobility-gender> (referring to groups who are often targets of discrimination during their travels).

²⁹¹ See *supra* note 6 and accompanying text.

²⁹² See *supra* notes 11-12 and accompanying text.

²⁹³ See Sarah M. Kaufman, Christopher F. Polack & Gloria A. Campbell, *The Pink Tax on Transportation: Women’s Challenges in Mobility*, NYU RUDIN CTR. FOR TRANSPORTATION (Nov. 2018), https://wagner.nyu.edu/files/faculty/publications/Pink%20Tax%20Survey%20Results_finalraft4.pdf

harassment or crime when taking public transportation.²⁹⁴ Roughly fifty-four percent of female respondents (compared to twenty percent of male respondents) felt concerned about being harassed when using public transportation; twenty-nine percent of female respondents (compared to eight percent of male respondents) said they do not take public transportation late at night because they perceive a safety risk.²⁹⁵ The study found that women who must travel for work, but choose not to take public subways or buses for safety reasons, instead take ride services or taxis, incurring a median extra cost of \$26 to \$50 per month (compared to \$0 for the median male additional safety-related travel expenditures).²⁹⁶ In Jane's case, she still chose to take public transportation, but did not feel safe walking to the bus stop, so she took a taxi.²⁹⁷ Those who are female-presenting, who are older (and thus perhaps experiencing difficulties with mobility, vision, hearing), and/or who have visible disabilities (and thus would be perceived as "targets" for crime) may feel that they have no way to stay safe, other than to spend extra.²⁹⁸

The "pink tax" in the form of safety-related transportation expenses is not unique to the United States. In 2021, women in Nairobi, Kenya took to complaining about the double-whammy of paying for a car service to travel at night, and then being charged extra by the international ride-sharing company Bolt for requesting a female driver.²⁹⁹ In response to negative attention on social media in particular, the company blamed any pricing differentials on supply and demand, pointing to the fact that only

²⁹⁴ *Id.* at 5. The survey treated as "female" people of "all female forms, including cis, trans and female-presenting." *Id.* at 2.

²⁹⁵ *See id.* at 5-6.

²⁹⁶ *Id.* at 6. Note, however, that taking a taxi or using a ridesharing service like Lyft and Uber is a guarantee that a passenger will be free from assault or sexual violence, and that victims of violence at the hands of the drivers are likely to be women than men. See Thomas MacMillan & Pervaiz Shallwani, *Rise in Sexual Assaults Reported by Taxi Passengers*, WALL ST. J. (Jan. 10, 2016), <http://www.wsj.com/articles/rise-in-sexual-assaults-reported-by-taxi-passengers-1452476904> [<http://perma.cc/29WZ-9QPS>] and Elizabeth Brown, *Fare Trade: Reconciling Public Safety and Gender Discrimination in Single-Sex Ridesharing*, 35 YALE L. & POL'Y REV. 367, 370 (2017) ("Much of the violence reported in ridesharing and taxis, especially rapes, attempted rapes, sexual assaults, and sexual harassment, affects women more than men.").

²⁹⁷ *See supra* note 6 and accompanying text.

²⁹⁸ *See, e.g.*, The Facts Behind the #MeToo Movement: A National Study on Sexual harassment and Assault 21, 25, STOP STREET HARASSMENT (Feb. 21, 2018), <https://stopstreetharassment.org/our-work/nationalstudy/2018-national-sexual-abuse-report> (reporting results of survey of 2,009 adults in the United States over the age of eighteen, including 996 women, in which 69% of all women reported being sexually harassed in public spaces and 33% of all women reported being sexually harassed in public spaces).

²⁹⁹ *See, e.g.*, Rachel Chason, *Kenyan Women Love the Idea of a "Women-Only" Rideshare; They Hate That it Costs More*, WASH. POST (Sept. 12, 2021), <https://www.washingtonpost.com/world/2021/09/12/kenya-ride-share-women>

five percent of the company's drivers in Nairobi are women.³⁰⁰ But one Kenyan woman called Bolt's gender-based pricing differentials for female customers requesting female drivers "a pink tax at its finest," as users pay to take a car service instead of public transportation for safety reasons, and then on top of that, pay more for a female driver who was less likely to harass or victimize them than a male driver.³⁰¹ Safe public transportation is a key component of gender equality; without it, women and other vulnerable individuals may not be able to access education, health care, or employment on the same basis as cis, able-bodied young men.³⁰²

In the public transportation context, as with the gender wage gap and gender-based pricing differentials, the "pink tax" refers to figurative taxes that manifest economically. But the phrase's overlapping meanings fail to capture the different role that individual choice plays in consumer goods versus safety in travel. For example, in the case of Jane's pink razors and Jerry's black razors,³⁰³ and Jane's pink scooter and Jerry's red scooter,³⁰⁴ personal preference or choice, however influenced by gendered stereotypes, is the primary driver.³⁰⁵ But Jane's decision to take a taxi to the bus stop for safety reasons while Jerry walks the same route³⁰⁶ is a voluntary personal decision of a different kind. The behavior reflects the reality of gender-based violence and harassment on the streets or on public transportation itself.³⁰⁷ Satisfying a color preference in razors or scooters may increase one's subjective happiness, but safety is a precondition for full participation in public life, including having the ability to engage in marketplace labor. Expenses for literally pink products are not comparable to expenses for safety as personal "choices."

³⁰⁰ See *id.* (paraphrasing an explanation offered by a spokesman for Bolt).

³⁰¹ *Id.* (quoting 20-year old student Malaika Cheyne).

³⁰² See GLOBAL ROADMAP OF ACTION TOWARD SUSTAINABLE MOBILITY, *supra* note 290, at 8. In the United States, New York is not the only city where women others feel unsafe taking subways or buses. See Kery Murakami, *Do Women Face a Transportation "Pink Tax" in D.C.*, WASH. POST (Dec. 2018), <https://www.washingtonpost.com/express/2018/12/07/do-women-face-transportation-pink-tax-dc> (reporting that it is "unknown" whether any studies similar to the NYU Rudin Center's have been conducted in the District of Columbia, but providing anecdotal evidence of women's fears of harassment and crime when traveling at off-hours).

³⁰³ See *supra* notes 1, 8 and accompanying text.

³⁰⁴ See *supra* notes 7, 12 and accompanying text.

³⁰⁵ See Shelly Zalis, *Busting Gender Stereotypes: The Pink Versus Blue Phenomenon*, FORBES (Sept. 5, 2019), <https://www.forbes.com/sites/shelleyzalis/2019/09/05/busting-gender-stereotypes-the-pink-versus-blue-phenomenon/?sh=6eb7e0ed2764> (critiquing binary gender stereotypes in areas including children's extracurricular activities, academic performance and color preferences, noting that at earlier points in history, pink was considered the "stronger" color and therefore associated with boys, not girls).

³⁰⁶ See *supra* notes 6, 11-12 and accompanying text.

³⁰⁷ See Kaufman, Polack & Campbell, *supra* note 293.

Beyond safety-related transportation expenses, related “extra” expenses associated with this genre of “pink taxes” include make-up, accessories, hairstyling products, and other personal grooming expenditures to conform to traditional gendered expectations for a “feminine” appearance.³⁰⁸ This version of the “pink tax” may be especially salient for some trans people, who also may incur legal fees associated with name changes or chosen medical treatments.³⁰⁹ This “pink tax” is not experienced the same way by all women; some women of color, especially Black women are required under employers’ dress codes to “cut off, cover, or alter their naturally textured hair in order to obtain and maintain employment for which they are qualified.”³¹⁰ Thus, this manifestation of the “pink tax” has racial dimensions that the phrase does not necessarily capture.

D. Time and Caretaking

A fourth metonymic usage of the phrase “pink tax” as a referent to figurative taxes has had the least uptake in policy discussions. “Pink tax” sometimes operates as a shorthand for time associated with roles traditionally taken on by “women.” Sociologist Arlie Hochschild famously coined the phrase “second shift” to describe the disproportionate unpaid work that women in different sex-couples do in maintaining the household and providing for children and elders, typically after they have completed the day or week’s wage labor in the paid market.³¹¹ “Pink tax” is another

³⁰⁸ See, e.g., Elaine Showalter, *In Hope She Didn’t Trust*, TIMES LITERARY SUPP. (Jul. 3, 2020) (reviewing Curtis Sittenfeld’s novel *Rodham*, a fictional account of former presidential candidate Hillary Rodham Clinton and the “time-consuming ‘pink tax’ of feminine grooming” she must undergo in order to run for the Senate) and Aishwarya Murthy, *Capitalism & Patriarchy: The Cost of Being a Woman—The Pink Tax*, WOMENUNBOUNDED.COM (Jan. 21, 2021), <https://www.womenunbounded.com/post/capitalism-patriarchy-the-cost-of-being-a-woman-the-pink-tax> (summarizing multiple manifestations of the “pink tax” including the “grooming gap,” or “the extra amount of time and money women workers must spend conforming to normative beauty standards in order to appear attractive and professional”).

³⁰⁹ See, e.g., Emily VanDerWerff, *The Assimilationist, or: On the Unexpected Cost of Passing as a Trans Woman*, VOX.COM (Feb. 19, 2020: 6:50 AM), <https://www.vox.com/the-highlight/2020/2/12/21075683/trans-coming-out-cost-of-womanhood-pink-tax> (commenting on not only gender-based price differences in consumer goods but also voice training, a legal name change, surgeries, makeup, but observing that, for her, “passing” as a cis woman “gives me a thrill”).

³¹⁰ D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987, 990 n.15 (2017).

³¹¹ ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING FAMILIES AND THE REVOLUTION AT HOME* (1989). See also Maaïke van der Vleuten, Eva Jaspers & Tanja van der Lippe, *Same-Sex Couples’ Division of Labor from a Cross-National Perspective*, 17 J. OF GLBT FAM. STD. 150 (2021) (finding that female same-sex couples tend to share unpaid household labor more equally than male same-sex couples do).

way to describe the second shift.³¹² In fact, author Saba Karim Khan has called COVID-19-related closures of schools, daycares, and other “carefully curated arrangements to support . . . working parent goals” a kind of “pink tax” that exposes that, at least in opposite-sex couples, women remain the default caretakers for the home and children.³¹³ Given the many ways that the COVID pandemic exacerbated gendered patterns of care work and deepened gender-based inequalities, this manifestation of the “pink tax” is already receiving significant attention, although not all scholarship deploys the tax trope describe the pandemic’s gendered impacts.³¹⁴

E. Tampon Taxes

Unlike the preceding tax tropes that refer to figurative taxes, a fifth form of the “pink tax”—to describe *literal* state sales taxes on menstrual products—has had measurable success in changing the law.³¹⁵ This deployment of the “pink tax” is *metonymic*; it invokes a color stereotypically associated with cis girls and cis women, many of whom use menstrual products.³¹⁶ More commonly, though, the tax on menstrual products is known as the “tampon tax.”³¹⁷ In that grammatical form, the tax trope is *synecdochic*—using “tampon” as a stand-in for all menstrual

³¹² See, e.g., Saba Karim Khan, *Pink Tax: How COVID-19 Inadvertently Became a Field Experiment to Test Gender (In)justice in South Asia* n.p., in *Mothers, Mothering, and COVID-19: Dispatches From a Pandemic* (Andrea O’Reilly & Fiona Joy Green eds., 2021) (citing work of Arlie Hochschild).

³¹³ See, e.g., Saba Karim Khan, *Pink Tax*, DAWN (May 28, 2020), <https://www.dawn.com/news/1559852>. See also Saba Karim Khan, *Pink Tax: How COVID-19 Inadvertently Became a Field Experiment to Test Gender (In)justice in South Asia*, in *MOTHERS, MOTHERING, AND COVID-19: DISPATCHES FROM THE PANDEMIC* 101-116 (Fiona J. Green & Andrea O’Reilly eds., 2021).

³¹⁴ For an excellent overview of the many ways that the COVID-19 pandemic disproportionately impacted women in the United States, see, e.g., Naomi R. Cahn & Linda L. McClain, *Gendered Complications of COVID-19: Toward a Feminist Recovery Plan*, 22 GEO. J. GENDER & LAW, 3-4 1 (2020) (explaining that a “catalogue of COVID-19’s impact covers all aspects of women’s lives: work, family, education, health, reproduction, mental and physical well-being, leisure, and even retirement security. The unprecedented job losses during the pandemic hit women harder than men, and reports repeatedly emphasized how the loss of child care set women back in the workplace,” but not deploying the “pink tax” trope).

³¹⁵ See *The Unconstitutional Tampon Tax* at 442 (defining the “tampon tax”).

³¹⁶ It is important to acknowledge that not all cis women use menstrual products not all users of menstrual products are cis women. See, e.g., *MENSTRUATION MATTERS* at 11 (“biology, sex and gender are not coextensive terms and... not all who menstruate identify as female” and thus individuals who are trans men, trans boys, gender nonbinary, or genderqueer may menstruate) and Margaret E. Johnson, Emily Gold Waldman & Bridget J. Crawford, *Title IX and Menstruation*, 43 HARV. J. OF L. & GENDER 225, 268 (2020) (“not all girls and women menstruate, [and] ... not all who menstruate are girls or women”).

³¹⁷ See *id.*

products that are subject to sales tax.³¹⁸ Thus the “pink tax” and the “tampon tax” can be synonymous; one trope is metonymic and the other is synecdochic. This invites a comparison of the relative success of the linguistic devices.³¹⁹

By way of background, in the United States, sales tax is entirely a creature of state law; there is no federal sales tax. There are five states (Alaska, New Hampshire, Oregon, Delaware, and Montana) that have no sales tax at all.³²⁰ In the other forty-five states and the District of Columbia, tax is imposed on the sale of tangible property such as books, paper clips, or toys.³²¹ Generally speaking, all sales are subject to taxation unless the property has been specifically exempted from taxation.³²² Although details vary from state to state, broadly speaking, sales tax exemptions tend to map onto categories of “necessities” like groceries (and in some states, children’s clothing) while “luxuries” remain in the tax base.³²³

As of this writing, in twenty-two states, menstrual products are subject to sales tax because they have not been specifically exempted.³²⁴ Although approximately half the population uses menstrual products regularly for large portions of their lives, these states inappropriately treat tampons, pads, and other menstrual products as taxable “luxuries” while some other products curiously go tax-free. Some surprising examples of tax-free “necessities” include bingo supplies in Missouri, chewing gum in West Virginia, and private jet parts in Colorado.³²⁵ Elsewhere, Emily Gold

³¹⁸ *Id.* Thus, the “tampon tax” is a misnomer like the “nanny tax” is a misnomer, because there is no tax imposed on nannies that is different than the tax on other employees. *See supra* note 47 and accompanying text. It is also a misnomer in the same way the “Black tax” is, to the extent that there is no current tax formally imposed by the government on the basis of race. *See supra* note 156 and accompanying text.

³¹⁹ *See supra* notes 27-28 and accompanying text.

³²⁰ States Without Income Taxes Rely on Varying Forms of Revenue, TAX FOUNDATION (April 26, 2012), <https://taxfoundation.org/states-without-income-taxes-rely-varying-forms-revenue> (explaining that Alaska, Delaware, Oregon, Montana and New Hampshire have no sales tax).

³²¹ *See, e.g.*, Arthur R. Rosen & Walter Nagel, *Sales and Use Taxes: General Principles*, 1300 TAX MGMT. SALES & USE TAX PORTFOLIOS (BNA) No. 1300-2d at 1300:01 (“What is a Sales Tax?”) (explaining how states impose, calculate and collect state sales taxes).

³²² *See id.*

³²³ *See* Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination and Human Rights*, 2017 WIS. L. REV. 491, 500-506 (explaining and providing examples of different U.S. state sales tax classifications) and *The Unconstitutional Tampon Tax* at 449-53 (describing “necessity”/“luxury” dichotomy in state sales taxes).

³²⁴ *See* Tax Free. Period. State Scoreboard, PERIODLAW.ORG, <https://www.periodlaw.org> (providing graphic of which states do and do not impose a state sales tax on menstrual products).

³²⁵ *See* MO. REV. STAT. § 313.085 (2021) (exempting bingo supplies from state sales and use tax); Pub. TSD-419, Application of the Reduced West Virginia Consumer Sales and Service Tax to Food, W. VA. STATE TAX DEPT., July 2013, <https://tax.wv.gov/Documents/TSD/tsd419.pdf> (providing that “cessation of tax applies to the sale of food and food ingredients listed below,” including chewing gum); COLO. REV. STAT. § 39-26-711(b) (exempting from state sales tax any

Waldman and I have argued that this manifestation of the pink tax is both discriminatory and unconstitutional.³²⁶

Returning to the Article's opening hypotheticals, it may be tempting to categorize Jane's purchase of tampons for \$6.99 and menstrual pads for \$3.99 as the inevitable result of a biological difference or insignificant in any particular month.³²⁷ But longitudinally, the financial burden associated with an involuntary biological process is quantifiable and significant both for Jane and for all who menstruate.³²⁸ Over a lifetime, the average menstruating individual will spend between \$3,360 and \$4,800 on tampons, pads, and other menstrual products.³²⁹ Taking a population-wide view, national spending on menstrual products in the United States is approximately \$3.4 billion annually.³³⁰ Then there is the additional cost of state or local sales taxes imposed on menstrual products, even though personal healthcare products like the condoms purchased by both Jane and Jerry are not subject to taxation.³³¹ State sales taxes rates range from 2.9 percent to 7.25 percent, depending on the jurisdiction, so on Jane's purchase of tampons and pads, she might pay between \$0.39 and \$0.80 in state sales tax.³³² Over the lifetime of one consumer, the cumulative tax expenditure

"tangible personal property that is to be permanently affixed or attached as a component part of an aircraft"). See also Explore Our Interactive Map, TAX FREE. PERIOD, <https://www.taxfreeperiod.com/> (scrolling over interactive map to reveal items that are taxed in the various states that maintain sales tax on menstrual products).

³²⁶ See BRIDGET J. CRAWFORD & EMILY GOLD WALDMAN, *MENSTRUATION MATTERS: CHALLENGING THE LAW'S SILENCE ON PERIODS* (2022) at 42-48 (providing an overview of the argument that the tampon tax is unconstitutional) [hereafter *MENSTRUATION MATTERS*] and *The Unconstitutional Tampon Tax*, 468-83 (same). See also Bridget J. Crawford & Emily Gold Waldman, *Tampons and Pads Should Be Allowed at the Bar Exam*, N.Y.L.J. (July 22, 2020), <https://www.law.com/newyorklawjournal/2020/07/22/tampons-and-pads-should-be-allowed-at-the-bar-exam/> (making the related argument that bans on menstrual products at the bar exam are an unconstitutional form of discrimination) [<https://perma.cc/XMF5-93LN>]; Bridget J. Crawford, *Menstruation and the Bar Exam: Unconstitutional Tampon Bans*, 41 COLUM. J. GENDER & L. 63 (2021) (same); and Marcy L. Kin, Margaret E. Johnson & Elizabeth B. Cooper, *Menstrual Dignity and the Bar Exam*, 55 U.C. DAVIS L. REV. 1, 54-64 (2021) (same).

³²⁷ See *supra* note 3 and accompanying text.

³²⁸ See *supra* note 329 and accompanying text.

³²⁹ See, e.g., Gov. Whitmer Signs First Bill Repealing Tampon Tax, Drives Down Costs for Families, Off. of Gov. Gretchen Whitmer, Nov. 4, 2021 (estimating lifetime costs of menstrual products for average menstruating individual in Michigan).

³³⁰ See Amy Hait & Susan E. Powers, *The Value of Reusable Feminine Hygiene Products Evaluated by Comparative Environmental Life Cycle Assessment*, 150 Res., Conservation & Recycling 1, 2 (2019) (citing Feminine Hygiene Market, Statista (2019) for data on 2018 spending: \$1.04 billion on tampons, \$1.76 billion on pads and \$630 million on menstrual cups), <https://perma.cc/5D65-G6MD>.

³³¹ See *supra* notes 5, 11 and accompanying text.

³³² See, e.g., JANELLE CAMMENG, TAX. FOUND., *STATE AND LOCAL SALES TAX RATES 1* (2021), <https://files.taxfoundation.org/20210106094117/State-and-Local-Sales-Tax-Rates-2021.pdf> (reporting that, of all the states that have a sales tax system, the combined state and average local sales tax rate is the highest in Tennessee (9.5%) and the lowest in Hawaii (4.44%). Both Tennessee

on top of the expenses for the products is consequential; menstruation occurs regularly every month for approximately forty years.³³³ Again taking a population-based view, states collect a substantial amount of “tampon taxes” each year. Until recent legislation repealed the “tampon tax,” Michigan, for example, that state collected approximately \$6.3 million in tampon taxes each year;³³⁴ New York collected an estimated \$14 million in tampon taxes annually.³³⁵ So, women earn less on average than men do;³³⁶ they pay more for certain goods and services than men do;³³⁷ and they often spend more to ensure their personal safety while traveling.³³⁸ Some women then have expenditures solely attributable to the involuntary process of menstruation and pay sales tax for the privilege of purchasing necessary products.³³⁹

Even in the context of the sales tax on menstrual products, the “pink tax” trope does not fully capture the full range of human experiences. Trans women, some gender non-binary individuals, and post-menopausal cis women will not be subject to this particular form of the “pink tax.” So tax tropes can convey the general contours of a particular problem—what Professor Emily Waldman and I have called an unconstitutional sales tax on menstrual products—but the same tropes fail to convey the nuances of the particular discrimination that advocates seek to remedy.³⁴⁰

* * *

and Wyoming impose a sales tax on menstrual products. See State Scoreboard, PERIODEQUITY.ORG, <https://www.periodequity.org> (listing Tennessee and Wyoming among states that have a sales tax on menstrual products). Many jurisdictions that impose a state sales tax on tampons, menstrual pads and the like exempt from taxation products like Viagra and condoms. See MENSTRUATION MATTERS at 35, 54 (explaining that the “tampon tax” state sales taxes imposed on menstrual products in approximately twenty-seven states) and *The Unconstitutional Tampon Tax* at 465, 476 (referring to sales tax exemptions for Viagra and spermicidal condoms).

³³³ See *What Happens During the Typical 28-Day Menstrual Cycle?*, U.S. DEP’T OF HEALTH & HUMAN SERVS., OFF. ON WOMEN’S HEALTH, <https://www.womenshealth.gov/menstrual-cycle/your-menstrual-cycle> [<https://perma.cc/H2J3-JGM4>] (“On average, women get a period for about 40 years of their life.”) and *Unconstitutional Tampon Tax* at 455 (estimated that the average user of menstrual products will spend between \$20 and \$145 over a lifetime on tampons taxes).

³³⁴ See David Eggert, *Michigan Will No Longer Tax Tampons, Other Feminine Products*, APNEWS (Nov. 4, 2021), <https://apnews.com/article/business-health-michigan-gretchen-whitmer-sales-taxes-719fd55af1d384adff71ff419f468afb> (saying that the \$6.3 million in sales and use tax collections on menstrual products represented a “sliver” of the state’s total \$11 billion in collections).

³³⁵ Complaint at 1-2, Seibert, N.Y. State Dep’t of Taxation & Fin. No. 151800/2016 (N.Y. Sup. Ct. Mar. 3, 2016) (seeking restitution of an estimated \$14 million in tampon taxes collected from New York consumers).

³³⁶ See *supra* Part II.A.

³³⁷ See *supra* Part II.B.

³³⁸ See *supra* Part III.B.

³³⁹ See *supra* note 316 and accompanying text.

³⁴⁰ See *The Unconstitutional Tampon Tax*.

This Part has revealed that the “pink tax” can refer to literal or figurative taxes.³⁴¹ In that sense, the “pink tax” most resembles the “Black tax.”³⁴² The “pink tax” is like the “Black tax” in that both tropes are *metonymic*; they use a color closely associated with the people most likely to be subject to any form of the tax. But one variation on the “pink tax” trope, the “tampon tax,” is *synecdochic* and, thus, resemblant of the “nanny tax,” “death tax,” and “soda tax” in using one word to stand in for relationships, events, or transactions subject to taxation. The next Part takes a closer look at how frequently popular and academic sources deploy tax tropes in order to excavate a preliminary hypothesis about their usefulness.

III. FREQUENCY OF USE TAX TROPES

Of the five representative tax tropes (“nanny tax,” “death tax,” “soda tax,” “Black tax,” and “pink tax”), the “death tax” is by far the most widespread.³⁴³ Mentions of the “soda tax” and “nanny tax” are less frequent than either the “pink tax” or the “Black tax,” but the “pink tax” trope has seen a dramatic uptick since 2015.³⁴⁴

A. Five General Tax Tropes

To understand the frequency of use of the five tax tropes studied here, consider first the number of print mentions of each between 1980 and 2019.³⁴⁵ A Google Ngram analysis reveals that from an all-time high in 2002, print mentions of the “death tax” have declined steadily, but the “death tax” has greater current circulation than any of the other five tropes.³⁴⁶

³⁴¹ See *supra* note 35 and accompanying text (on the literal meaning of “tax”) and *supra* note 36 and accompanying text (on the figurative meaning of “tax”).

³⁴² See *supra* Part I.D.

³⁴³ See Figure 5 *infra*.

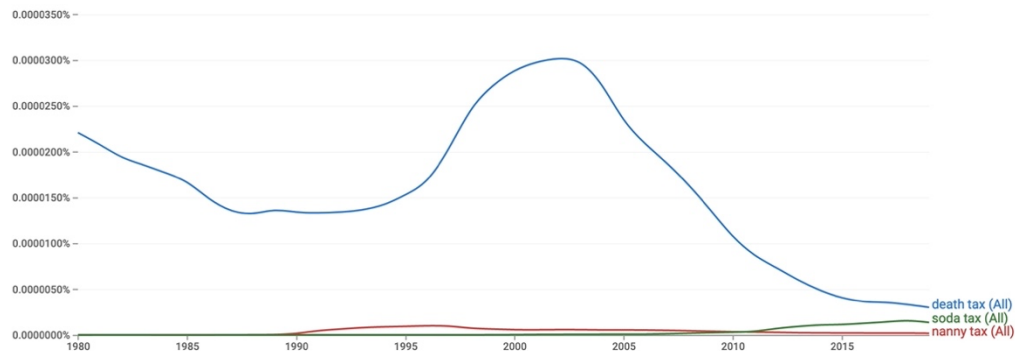
³⁴⁴ See Figure 6, *infra*.

³⁴⁵ Google Ngram Viewer (setting search parameters to years “1980-2019,” “English (2019),” “Case-Insensitive” and “Smoothing of 3” and searching “death tax, nanny tax, soda tax, Black tax, pink tax”).

³⁴⁶ See Figure 5.

Figure 5

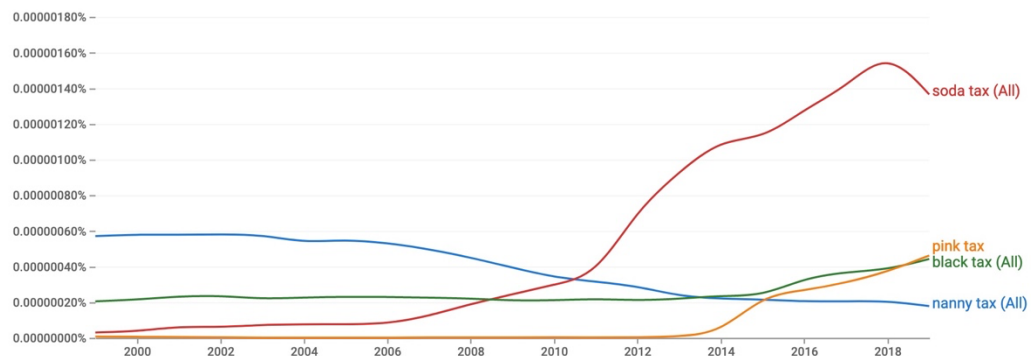
Frequency of Mentions of “Death Tax,” “Nanny Tax,” and “Soda Tax” “1980-2019



Taking “death tax” out of the analysis and further limiting the query to a twenty year period ending in 2019, Figure 6 provides further insight into the four remaining tropes. First, the “soda tax” appears much more frequently in print than the “nanny tax,” “Black tax,” or “pink tax” do, but usage of the “pink tax” has been rising since 2015 and appears to be continuing in that direction.³⁴⁷

Figure 6

Frequency of Mentions of “Nanny Tax,” “Soda Tax,” “Black Tax,” and “Pink Tax” 1999-2019



The uptick in mentions of the “pink tax” beginning in 2015 makes sense; that is the year that *Cosmopolitan* magazine co-sponsored a petition entitled

³⁴⁷ Google Ngram Viewer (setting search parameters to years “1999-2019,” “English (2019),” “Case-Insensitive” and “Smoothing of 3” and searching “nanny tax, soda tax, Black tax, pink tax”). I thank Christopher Buccafusco for this insight.

“No Tax on Tampons: Stop Taxing Our Periods! Period.” to draw attention to the injustice of U.S. state sales taxes on menstrual products.³⁴⁸ The new attention to the injustice of those sales taxes also marked a new era of activism around other products-based reform including efforts to make menstrual products available in schools, jails, and other public facilities.³⁴⁹

Differences in the rates of usage for all five of the tax tropes as shown in Figures 5 and 6 might be explained, at least in part, by self-interest and perceived applicability. For example, as discussed earlier, one of the reasons that people react so negatively to the phrase “death tax” is the misperception that it applies broadly, given that everyone dies.³⁵⁰ Likewise, because approximately one-half of the adult American population and sixty-one percent of all children in the country consume sugar-sweetened drinks, any soda tax likely would be of substantial personal interest to a large number of people.³⁵¹ Because approximately half of the U.S. population is “female,” details about the wage gap, gender-based pricing differentials, or other manifestations of the pink tax might be important to approximately half of all Americans. In fact, under that reasoning alone, one might expect the “pink tax” to be in even greater circulation than the “soda tax,” but it is not.³⁵²

The lower rates of use of the two remaining tax tropes, the “Black tax” and the “nanny tax,” might be explained by the fact that they are perceived to apply to far less than half the population, at least if one uses personal identity as a proxy for applicability or interest in the case of the “Black tax.” For example, the percentage of the U.S. population classified as “Black or African American alone” is 13.4 percent, according to census projections, although by including biracial or multiracial citizens, the percentage of the population that might perceive themselves to be subject to a “Black tax” may be as high as 28 percent.³⁵³ To be sure, of the five tax

³⁴⁸ See *The Unconstitutional Tampon Tax* at 456-68 (describing the origins of twenty-first century menstrual equity activism in the United States).

³⁴⁹ See, e.g., *MENSTRUATION MATTERS* at Chapter 3 (describing advocacy around menstrual products in schools) and Chapter 4 (describing advocacy to make menstrual products available in jails, prisons, and other public buildings).

³⁵⁰ See *supra* note 79 and accompanying text.

³⁵¹ See, e.g., Nicholas Bakalar, *Americans Are Putting Down the Soda Pop*, N.Y. TIMES (Nov. 14, 2017), <https://www.nytimes.com/2017/11/14/health/soda-pop-sugary-drinks.html> (reporting rates of consumption of sugar sweetened beverages in 2014).

³⁵² Quick Facts, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/LFE046219> (providing population estimates as of July 1, 2021) (under “All Topics,” choose dropdown menu of “Age and Sex” to show that “female persons” represent 50.8% of the population).

³⁵³ *Id.* (under “All Topics,” choose dropdown menu of “Race and Hispanic Origin” to show that the percent of persons identified as “Black or African American alone” is 13.4% and persons identified as “two or more races” is 2.8%). *But see* Historical Census Statistics On Population Totals

tropes, the “nanny tax” applies to the fewest number of people.³⁵⁴ There are roughly 821,000 private household workers in the United States.³⁵⁵ This figure might serve as a crude approximation of the number of households that are impacted by the “nanny tax,” although the same worker might have part-time employment in multiple households, and some households may employ multiple workers.³⁵⁶ Thus, the comparative differentials in print mentions of the five tax tropes track, to a certain extent, with the size of the imagined or actual population of taxpayers impacted by the taxes they describe. Admittedly, though, factors like dietary habits, gender, and race are crude proxies for interest. There may be many other factors that drive differences in how often the terms appear in print. For example, academic and popular literature may or may not reflect topics of interest or concern for everyday people. There may be a lag (in either direction) between the oral and print circulation of terms and ideas, too. Furthermore, by definition, searches of print data sets are necessarily limited to the materials included in those data sets. There may be print sources that are not captured for whatever reason; there may be non-print sources that are highly relevant. The preceding analysis is therefore tentative and qualified.

B. Five Specific “Pink Tax” Tropes

Moving beyond a simplistic assertion that a percentage of the population might be expected to be interested in a “tax” because of personal identity factors, a deeper investigation of the “pink tax” trope requires attention to the five distinct but related conditions that the phrase describes, as explored in Part II.³⁵⁷ To understand more about the diverse usages of “pink tax,” I conducted seven different searches across two different databases: Westlaw “Major Newspapers” and Westlaw “Law Reviews and Journals.”³⁵⁸ At best, these figures might serve as an imperfect and

By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For the United States, Regions, Divisions, and States, Table 1, U.S. CENSUS BUREAU, <https://www.census.gov/content/dam/Census/library/working-papers/2005/demo/POP-twps0076.pdf> (showing Blacks as a percentage of the total population ranging from a high of 19.3% in 1790 to a low of 9.8% in 1940) and Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin: April 1, 2010 to July 1, 2019, <https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-detail.html> (reporting for 2019 a “Black or African American” population of 44,075,086 and a population of “Black or African American” alone or in combination with another race or races of 48,221,139 out of a total population of 328,239,523 representing approximately 28%).

³⁵⁴ See Private Households: NAIC 814, *supra* note 58.

³⁵⁵ See *id.*

³⁵⁶ See *id.*

³⁵⁷ See *supra* notes 186-190 and accompanying text.

³⁵⁸ All searches conducted January 18, 2022.

preliminary proxy for the general public's knowledge of each version's usage. To be sure, the searches are imprecise on their own, and any one newspaper or law review article might appear in several different searches. Figure 7 shows the results of these searches and suggests three preliminary hypotheses.

Figure 7

Frequency and Nature of "Pink Tax Term" Usage

| Search | Number of Separate Articles in Major Newspapers ³⁵⁹ | Number of Separate Articles in Law Reviews & Journals ³⁶⁰ |
|--|--|---|
| "pink tax" | 126 | 22 |
| "pink tax" /p wage! or earning! or salary! | 3 | 5 |
| "pink tax" /p different! or higher & price* or goods or service! | 18 | 10 |
| "pink tax" /p transport! or "make-up" or makeup or hair | 10 | 3 |
| "pink tax" /p mother! /p household or children or time | 0 | 0 |
| "pink tax" /p tampon or sanitary or "feminine hygiene" or hygiene or menstrual or "tampon tax" | 44 | 11 |
| "tampon tax" % "pink tax" | 211 | 24 |

As an initial observation, there appears to be more attention to the "pink tax" in popular media than in legal literature.³⁶¹ Contributing factors may include the greater number of major news outlets compared to law reviews or journals;³⁶² a perceived catchiness of the phrase for popular, but

³⁵⁹ Within the Westlaw Edge "Major Newspapers" database, an advanced search using "ADV:" and the query returned the indicated number of sources (results on file with the author).

³⁶⁰ Within the Westlaw Edge "Law Reviews & Journals" database, an advanced search using "ADV:" and the query returned the indicated number of sources (results on file with the author).

³⁶¹ See Figure 5.

³⁶² In Westlaw's databases, there are more journals in the "Law Reviews and Journals" database than periodicals in "Major Newspapers," but newspapers are issued more frequently than law reviews or journals. Compare Major Newspapers, WESTLAW (containing 43 sources) with Law Reviews and Journals, WESTLAW (containing 1,050 sources). The earliest mention of the "pink tax" in the law review literature appears to be in 2010. See *Infanti*, *supra* note 35, at 343n. 94 (quoting a poster to an internet forum calling the disparate treatment of same sex couples under the tax laws a "pink tax"). The next came in 2017. See Victoria Hartman, Note, *End the Bloody Taxation: Seeing Red on the Unconstitutional Tax on Tampons*, 112 NW. U. L. REV. 313, 315 n.9 (2017) (referring to newspaper article referring to the tampon tax as a "pink tax"). The earliest mention in a "major newspaper" in the Westlaw database of the same name comes from 2015. See Taryn Luna, *Quest for a New Edge: Gillette Redesigns Razor Just for Women in Hopes of Halting the Growth of Disposables*, BOSTON

not academic, communications; the relatively small number of tax law professors in the legal academy, as a whole, writing tax articles compared to faculty teaching and writing articles about, say constitutional law;³⁶³ or that there are fewer female or female-presenting tax professors than there are male or male-presenting tax professors, again acknowledging that using gender presentation as a proxy for interest in the “pink tax” is grossly simplistic.³⁶⁴ Still another explanation might be the relatively small number tax of scholars working in the critical tax tradition generally and on gender issues within that tradition.³⁶⁵

Second, the database searches reveal that the “tampon tax” has currency as a stand-alone *synecdochic* reference to *literal* taxes; 211 separate sources in major newspapers use the phrase “tampon tax” without mentioning the “pink tax,” compared to 126 separate sources containing any reference at all to the “pink tax.”³⁶⁶ Similarly in law reviews and journals, there are also more sources that mention the “tampon tax” without the “pink tax” (twenty-four) than the “pink tax” alone (twenty-two), but the difference is much smaller.³⁶⁷ Both search results suggests that in both the popular and

GLOBE, Jan. 9, 2015 (referring to gender-based pricing differentials in consumer goods). The earliest mention of the “pink tax” in books comprising in the corpus included in the Google Ngram viewer are from 2016. *See, e.g.*, NYLA JO JONES HUBBARD, *THE RAPE OF THE AMERICAN WORKING WOMAN* (2016) (published Aug. 15, 2016), KRISTEN BARBER, *STYLING MASCULINITY: GENDER, CLASS AND INEQUALITY IN THE MEN’S GROOMING INDUSTRY* (2016) (published Aug. 25, 2016), and JOSEPH QUINLAN & JACKIE VANDERBRUG, *GENDER LENS INVESTING: UNCOVERING OPPORTUNITIES FOR GROWTH, RETURNS, AND IMPACT* (2016) (published Nov. 7, 2016) (all publication dates provided by Amazon). *See also generally* Michel et al., *supra* note 65 (describing Google Ngram’s corpus of 4% of all books ever in print).

³⁶³ *See, e.g.*, DIRECTORY OF LAW TEACHERS, AM. ASS’N OF L. SCHOOLS (2021-2022) (containing a list of fifteen pages of faculty members currently teaching “Taxation, Federal (including Income Tax)” and thirty-eight pages of faculty members listed as currently teaching Constitutional Law) (results on file with the author).

³⁶⁴ I determined the percentage of tax law professors who are female by taking the list of fifteen pages of fifteen currently teaching “Taxation, Federal (including Income Tax)” and sorting them by male or female based on personal knowledge, or where I lacked personal knowledge, based on a review of their publicly displayed photograph and pronouns on their law school’s website). The count may not include faculty who are trans, gender nonbinary, or genderqueer, insofar as the American Association of Law Schools does not keep a separate list of those faculty members against which I could check the list of law professors currently teaching Taxation. *See id.* (showing 372 faculty members currently teaching tax, of which 255 are male-presenting and 117 are female-presenting) (list on file with the author).

³⁶⁵ *See, e.g.*, Anthony C. Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity*, 26 WHITTIER L. REV. 707, 713-14 (2005) (observing about the field of critical tax theory that “If the one thing that everyone seems to agree on is the youth and outsider status of the critical tax movement...” but suggesting that critical tax scholarship is far from a “marginal” movement, as its detractors claim).

³⁶⁶ *See* Figure 7.

³⁶⁷ *Id.*

scholarly imaginations, the “tampon tax” is not necessarily understood or discussed in the context of other manifestations the “pink tax.”³⁶⁸

Third, some usages of the phrase “pink tax” tend to be more common than others. After the “tampon tax” trope, the next most frequent deployment of the “pink tax” is in connection with gender-based pricing differentials, followed by the gender wage gap and safety-related or other expenses associated with “being a woman.”³⁶⁹ There appear to be no articles in either major papers or law reviews and journals that use the “pink tax” to describe time-based burdens experienced disproportionately by individuals with responsibility for households and/or caretaking.³⁷⁰

Baseline data about the comparative frequency of use of each of the five tax tropes—“nanny tax,” “death tax,” “soda tax,” “Black tax,” and “pink tax”—including the five different versions of the “pink tax”—reveals something about the relative penetration of each phrase in popular consciousness. The next Part gestures at some of the initial parameters that scholars, advocates, policy makers, and others might use in considering how (and how effectively) tax tropes operate.³⁷¹

IV. IMPACT OF TAX TROPES ON LAW AND TAXPAYER BEHAVIOR

Apart from the observations that tax tropes exist, whether they refer to literal or figurative taxes, whether they have metonymic or synecdochic characteristics, and how often they appear in print, news, or law review literature, how might one begin to evaluate whether a tax trope is “successful”? This Part considers two further dimensions of each trope: its influence on law and any measurable impact on human behavior. To be sure, there are other worthy avenues of investigation and other tax tropes that merit analysis.³⁷² The decision to focus on law is grounded in the

³⁶⁸ See e.g., Jorene Ooi, Note, Bleeding Women Dry: Tampon Taxes and Menstrual Inequity, 113 NW. U. L. REV. 109 (2018).

³⁶⁹ Figure 6 and *supra* Part II.C.

³⁷⁰ See Figure 6 and *supra* Part II.D.

³⁷¹ Other helpful inquiries might include a tax metaphor’s accuracy and how well the general public understands the term, to name just two factors. At least in the context of the estate tax, there is ample evidence that the public has a limited grasp on what the law actually is and who is subject to it. See Birney et al., *supra* note 76, at 441-43 (discussing the revelation through multiple polls that most Americans misunderstand the estate tax).

³⁷² See, e.g., *supra* notes 94-96 and accompanying text (discussing misperception bias as regards the estate tax). On other tax metaphors, see, e.g., Infanti, *Taxing Civil Rights Gains*, *supra* note 35, at 340 (referencing other tax metaphors such as the “gender tax,” “ethnicity tax,” “gay tax”), Jeff Strnad, *Conceptualizing the “Fat Tax”: The Role of Food Taxes in Developed Economies*, 78 S. CAL. REV. 1221 (2005) (describing both “junk food taxes” that apply to soda and non-nutritious food, and “fat taxes” that apply to fatty foods or unhealthful foods, and distinguishing the latter as taxes specifically designed to decrease consumption in service of public health goals) and Jaweed Kaleem,

understanding of tax tropes as a vernacular for protest.³⁷³ Very rarely is the label “tax” used as a compliment; it is a demand for change. Practically speaking, then, the focus is on any links to the tax trope has to the law and how individuals comply (or not) with the law. Admittedly, though, the methodology is tentative at best. It uses frequency of mention in print sources as a proxy for shifts in law and policy discourse. The study also emphasizes positive law-making or opposition to it, instead of public attitudes or understandings. Acknowledging the circumscribed definition of “success,” the “nanny tax,” “death tax,” “soda tax,” and some, but not the majority, of usages of “pink tax” are “successful” to a certain extent. The “Black tax” and most uses of the “pink” tax are less successful. This Part takes up each trope in turn.

A. Nanny Tax

As a tax trope, the “nanny tax” is only partially successful. The phrase brought new attention to the laws applicable to employers of household workers.³⁷⁴ It also led to the reform of the thresholds that trigger an employer’s requirements to pay and withhold taxes, as well as administrative changes designed to facilitate compliance with the law.³⁷⁵ But its influence on taxpayer behavior appears to be negligible or even negative. Recall that just one year after the Baird nomination, there were approximately 500,000 tax returns that paid household employment taxes, but only 177,405 did so in 2019, even though there are many more households that employ such workers.³⁷⁶ One possible explanation is that people know and understand their tax obligations, but simply ignore them because the likelihood of being audited is much lower now than it was in the mid-1990s.³⁷⁷ Another possible explanation is that there are more

Asian Americans Are Divided After the Trump Administration's Move on Affirmative Action, L.A. TIMES (Aug. 3, 2017), <http://www.latimes.com/nation/la-na-asian-americans-affirmative-action-20170803-story.html> (referring to opponents of affirmative action who use the term “Asian tax” to refer to increased expectations placed on Asian-American applicants to admissions to highly competitive colleges).

³⁷³ See *supra* notes 32-33 and accompanying text.

³⁷⁴ See *supra* notes 50-55 and accompanying text.

³⁷⁵ *Id.*

³⁷⁶ See *supra* notes 56-58 and accompanying text.

³⁷⁷ See INTERNAL REVENUE SERVICE DATA BOOK, OCT. 1, 2022 TO SEPT. 20, 2021, at 33, <https://www.irs.gov/pub/irs-pdf/p55b.pdf> (reporting that for all returns filed for tax years 2011 through 2019, the IRS audited 0.55% of all individual income tax returns). In the mid-1990s, audit rates were much higher. See Audits of Individual Income Tax Returns 1992-2021, Transactional Records Access Clearing House, <https://trac.syr.edu/tracirs/latest/679/> (showing audit rates in 1995 and 1996 that were four times or more higher than in 2021). Based on ethnographic study of household employers and employees in the Washington D.C. metropolitan area, researcher Catherine

undocumented immigrants working in the United States now than there were in the mid-1990s, and employers take advantage of these vulnerable employees by paying them “off the books,” or undocumented immigrants wish to be paid in this way to avoid government attention, and their employers go along, for whatever reason, despite it being illegal to do so in either case.³⁷⁸ The reasons for non-compliance with “nanny tax” obligations are not well understood.³⁷⁹

B. Death Tax

Similarly, in the case of the “death tax,” one might say that the trope is partially successful in two notable ways. First, it caused estate tax repeal to move from the political margins to the center, so that it became possible to pass federal repeal legislation, albeit temporarily.³⁸⁰ Second, the term that has retained relevance, given the continued existence of the estate tax, multiple increases to the estate tax exemption since 2001, and ongoing efforts by some interest groups to make estate tax repeal permanent.³⁸¹ Indeed, the positioning of estate tax reform as a more centrist issue may be part of any calculation by President Biden in deciding whether to propose a reduction in the estate tax exemption amounts from their current level of \$12.06 million per person (or \$24.12 million for married couples).³⁸²

Haskins has hypothesized that “[a]mbition, personal concern for the worker, personal ethics, political views, and social norms all had a determining influence on payroll tax compliance.” Catherine B. Haskins, *Household Employer Payroll Tax Evasion: An Exploration Based on IRS Data and on Interviews with Employers and Domestic Workers* 4 (Feb. 2010) (unpublished Ph.D. dissertation, University of Massachusetts Amherst), <https://www.proquest.com/openview/5c67e13d7c0657df90d9469b3ea96597/1?pq-origsite=gscholar&cbl=18750>.

³⁷⁸ See Campbell Gibson & Kay Jung, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850 to 2000*, U.S. Census Working Paper No. POP-WP-081, <https://www.census.gov/library/working-papers/2006/demo/POP-twps0081.html> and *Immigrant Share of U.S. Population Nears Historic High*, Pew Research Ctr. (Aug. 19, 2020), https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/ft_2020-08-20_immigrants_01/ (showing that the foreign born population of the United States was 13.7% in 2018 was foreign born, compared to less than 10% in the mid-1990s).

³⁷⁹ Attorney Fay Vincent has opined that, “There are two main problems with the nanny tax. One is that the public believes the tax is wrong and simply ignores it. And two, lower-paid employees who do household work often insist on being paid in cash so they will not have income taxes withheld.” Fay Vincent, *“Nanny Tax” Should Be Killed or Cured*, TCPALM.COM (Mar. 2, 2017), <https://www.tcpalm.com/story/opinion/contributors/2017/03/02/guest-column-nanny-tax-should-killed-cured/98628378/>.

³⁸⁰ See *supra* notes 83-85 and accompanying text.

³⁸¹ See, e.g., Edmund L. Andrews, *Estate Tax Showdown Is Splitting the G.O.P.*, N.Y. TIMES (June 7, 2006), <https://www.nytimes.com/2006/06/07/business/07tax.html> (discussing failed legislation to repeal the estate tax in 2006) and Thompson, *supra* note 96 (discussing ongoing focus by some Republicans on estate tax repeal).

³⁸² See *supra* note 91-92 and accompanying text.

Framed a different way, if the appropriate measure of success is a change in taxpayer behavior, then the “death tax” should be judged unsuccessful as a trope. After all, the “death tax” moniker has no work to do at all with respect to taxpayer behavior. The existence or rate of estate tax at any time has no impact on human mortality rates, save in the sensational imagination of a few journalists.³⁸³

C. Soda Tax

In comparison to the “nanny tax” and the “death tax,” the “soda tax” is a high achieving tax trope. Framing a tax on sugary drinks or diet beverages in public health terms contributed to the adoption of “soda taxes” in at least eight U.S. cities—and fierce opposition to similar laws in places New York City—in the twenty-first century.³⁸⁴ Thus this tax trope is linked directly to both positive lawmaking and opposition to it. Where enacted, the “soda tax” is difficult to avoid, too.³⁸⁵ At the same time, to the extent that the “soda tax” has changed consumer behavior, it is far from clear that the behavioral impacts are as intended. Soda taxes may have changed *where* people buy soda, but not *how much* they buy or consume.³⁸⁶

D. Black Tax

As a reference to both literal and figurative taxes, the “Black tax” metaphor attempts to do more work than the “nanny tax,” “death tax,” and “soda tax.”³⁸⁷ Unfortunately, it can claim no direct link to legal reform.³⁸⁸

³⁸³ See, e.g., Joseph Brownstein, *Lack of Estate Tax in 2010: Now Cheaper to Die?* ABCNEWS.GO.COM, Dec. 23, 2009, 6:48 PM, <https://abcnews.go.com/Health/HealthCare/lack-estate-tax-2010-now-cheaper-die/story?id=9412614> (saying of temporary estate tax repeal in 2010 that “a tax loophole may in fact give the heirs of some wealthy people a financial incentive to make this new year their loved one’s last”).

³⁸⁴ See *supra* notes 122-125 and accompanying text and Soda Taxes, State and Local Finance Initiative, URBAN INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/soda-taxes> (describing eight U.S. cities that have one of an excise tax on sugar-sweetened beverages only, an excise tax on all sweetened beverages including diet drinks, or a sales taxes on soft drink purchases, as well as several states with general excise taxes on soda distributors).

³⁸⁵ See *supra* notes 112-114 and accompanying text (explaining the difference between an excise tax and a sales tax).

³⁸⁶ See *supra* notes 144-147 and accompanying text.

³⁸⁷ See *supra* Part I.D.

³⁸⁸ Given the mid-cis century origins the phrase “Black tax” to describe racial inequalities, legal reforms prior to this era have no connection to the tax metaphor. See *supra* notes 156, 162-168 and accompanying text. There is no evidence to suggest that later reforms, such as the Voting Rights Act of 1965, for example, is in any way linked to an understanding of “Black taxes.” See *supra* note 168 and accompanying text and Orville Vernon Burton, *Tempering Society’s Looking Glass: Correcting*

Historically speaking, “Black tax” rhetoric, dating from the 1950s, did not bring an end to slavery.³⁸⁹ Nor did the tax trope play a role in the repeal of poll taxes or compulsory government levees imposed on the basis of race.³⁹⁰ The “Black tax” exists in the form of marketplace fees and pricing discrimination, despite fair lending laws to give just one example.³⁹¹ And it is difficult to imagine a law that effectively addresses everyday instances of racism and white supremacy.³⁹² There may be some laws that address specific sites of institutional and interpersonal race-based discrimination, such the right to wear one’s hair in a natural style in the workplace, for example, but the “Black tax” trope itself played no role in the legal scholarship that inspired these important laws or in press coverage of the laws as enacted.³⁹³

One place where the phrase “Black tax” did appear, the 1993 *Essence* magazine article, led to the opposite of taxpayer compliance: increased tax fraud and compliance costs for the Internal Revenue Service, as several Black American taxpayers incorrectly claimed that they had paid a “Black tax” and thus were entitled to tax refunds.³⁹⁴ In these cases, the phrase may have influenced taxpayer behavior, but not in a positive way.³⁹⁵

E. Pink Tax

Turning now to the “pink tax,” evaluating the trope’s success requires distinguishing among its different meanings. Generally speaking,

Misconceptions About the Voting Rights Act of 1965 and Securing American Democracy, 76 LA. L. REV. 1 (2015).

³⁸⁹ See *supra* note 156 (discussing early usage of the phrase “Black tax”).

³⁹⁰ See *supra* notes 161-162 and accompanying text.

³⁹¹ See *supra* note 152 and accompanying text (discussing marketplace discrimination).

³⁹² See *supra* note 149 (discussing this meaning of the “Black tax”).

³⁹³ See, e.g., Ovetta Wiggins, *Hair Discrimination Bill Advances*, WASH. POST, Mar. 17, 2020 (listing multiple states that have passed laws that permit employees to wear “Afro hairstyles, and protective hairstyles such as braids, twists and locs”). See also Results of Westlaw Search, Apr. 22, 2022 (returning now result for search “Major Newspapers” database for “crown act” and “black tax”) (results on file with the author) and D. Wendy Greene, *Title VII: What’s Hair (and Other Race-Based Characteristics) Got to Do With It?* 79 U. COLO. L. REV. 1355 (2008) (identifying ways that courts’ narrow interpretations of Title VII have led to a failure to recognize discrimination based on hairstyles, among other characteristics, as related to race in multiple cases) and D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit’s Take on Workplace Bans Against Black Women’s Natural Hair* in *EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987, 992 (2017) (critiquing decision of Eleventh Circuit Court of Appeals decision that permitted an employer to require straightened hair as a condition of employment as an example of race-based discrimination and the “hyper-regulation of Black women’s bodies via their hair”).

³⁹⁴ See *supra* notes 173-180 and accompanying text.

³⁹⁵ *Id.*

the term has come to prominence only in the last six years or so.³⁹⁶ As shorthand for the gender wage gap, the phrase “pink tax” itself does not appear to have fueled any legislation. In fact, “pink tax” does not appear anywhere in the legislative history of the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Lilly Ledbetter Fair Pay Act of 2009, or the proposed the Paycheck Fairness Act in 1997.³⁹⁷ In terms of impact on behavior, whether awareness of the “pink tax” causes workers to engage in different or better negotiations to reduce the gender wage gap is a topic that is ripe for further study.³⁹⁸

As a reference to gender-based pricing differentials, that version of the “pink tax” is, in fact, linked to specific legal changes. As discussed in Part II, several states have enacted legislation outlawing gender-based price discrimination.³⁹⁹ Similar federal legislation may eventually advance in Congress.⁴⁰⁰ But whether and how awareness of this form of the “pink tax” inspires some individuals to reconsider their personal spending or choices is difficult to know, without more detailed study.⁴⁰¹

Two other deployments of the “pink tax”—to describe extra expenses for safety-related transportation or other “extras,” or time burdens on those responsible for households and/or caretaking have little currency and no apparent link to legal reform.⁴⁰²

The fifth version of the “pink tax,” in the synecdochic form of the “tampon tax,” is singularly successful. A Google Ngram analysis shows that, since 2015, the phrase “tampon tax” is used more frequently than the “pink tax,” as shown in Figure 8.⁴⁰³ This makes sense, as the “tampon tax” has been the most visible, but certainly not the only, source of menstrual activism that includes issues of poverty and access to products by vulnerable

³⁹⁶ See, e.g., *supra* Figure 8 and MENSTRUATION MATTERS at 34-58 (tracing menstrual advocacy around the “tampon tax”).

³⁹⁷ See *supra* notes 215-218 and accompanying text.

³⁹⁸ See U.S. Legislative History Library, HEINONLINE, heinonline.org (navigate to “U.S. Legislative History Library” and search “pink tax”) (returning no results). See also Legislative History of the Equal Pay Act of 1963, P.L. 88-38, 88th Congress, H.R. 6060 and S. 1409 (1963), <http://heinonline.org>; Legislative History of Title VII of the Civil Rights Act of 1964, P.L. 88-353; 155 Cong. Rec. H127-32 (daily ed. Jan. 9, 2009) (statements of multiple representatives) (no mentions of the “pink tax”).

³⁹⁹ See *supra* notes 262-267 and accompanying text.

⁴⁰⁰ See *supra* notes 268-269 and accompanying text.

⁴⁰¹ See Lobel, *supra* note 226, at 549-50, 588 (expressing optimism that “[w]omen can negotiate better salaries when they are made aware of where they stand relative to their coworkers,” but that recent law reforms are “piecemeal, primarily at the state level, heavily contested, and ... some of the most promising initiatives for systematic wage transparency have been halted.”).

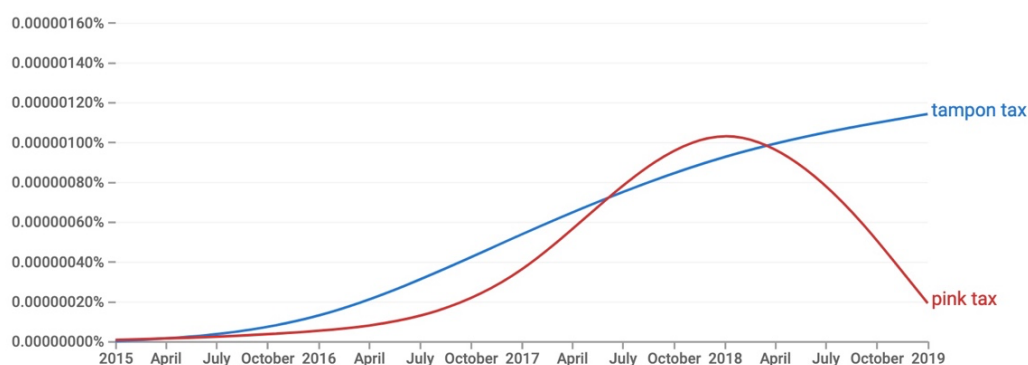
⁴⁰² See *supra* note 388 and accompanying text.

⁴⁰³ Google Ngram Viewer (setting search parameters to years “2015-2019,” “English (2019),” “Case-Insensitive” and “Smoothing of 3” and searching “pink tax, tampon tax”).

people in need.⁴⁰⁴ The “tampon tax” has been the focus of grassroots organizing by leaders of all ages, as well as more organized legal, policy, and strategic leadership by menstrual equity advocates.⁴⁰⁵ Since the first class action against the “tampon tax” was filed in New York in 2016, over fourteen states have repealed their tampon taxes, with other states expected to follow.⁴⁰⁶ In a short period of time, the “tampon tax” has gathered uniquely descriptive and instrumental force.⁴⁰⁷

Figure 8

Frequency of Use of “Tampon Tax” vs. “Pink Tax,” 2015-2019



In terms of the influence on taxpayer behavior, the “tampon tax” version of the “pink tax” is like the “death tax” in that it has very little work to do.⁴⁰⁸ Regardless of whether a state does or does not have a sales tax on menstrual products, people who can afford these products will continue to buy them. To be sure, the hope is that repeal of the “tampon tax” will help make menstrual products more affordable.⁴⁰⁹

Figure 9 summarizes this Part’s evaluations in a table form, to facilitate comparison of the “success” of the tax tropes.

⁴⁰⁴ See *supra* note 349 and accompanying text and Bridget J. Crawford & Emily Gold Waldman, *Period Poverty in a Pandemic*, 98 WASH. U. L. REV. 1569 (2021) (describing multiple manifestations of “period poverty” and ways laws might intervene to reduce it).

⁴⁰⁵ See, e.g., MENSTRUATION MATTERS at 34-58 (describing efforts that have led to the repeal of state sales taxes in California, Connecticut, Florida, Illinois, Louisiana, Michigan, Nevada, New York, Ohio, Rhode Island, Utah, Vermont, Washington, and Washington, D.C.).

⁴⁰⁶ See *id.*

⁴⁰⁷ See *id.* and Figure 9 *infra*.

⁴⁰⁸ See *supra* Part IV.B.

⁴⁰⁹ See, e.g., Bridget J. Crawford & Emily Gold Waldman, *Period Poverty in a Pandemic*, 98 WASH U. L. REV. 1569, 1592-93 (2021) (explaining the relationship between period poverty and the tax on menstrual products).

Figure 9

Success of Nanny Tax, Death Tax, Soda Tax, Black Tax and Pink Tax Tropes

| | Had (or Has) Some Currency in Popular Discourse? | Linked to legal reform? | Influenced rate of taxpayer compliance with laws? |
|------------------------------------|---|-------------------------------|--|
| <i>Nanny tax</i> | ✓ | ✓ | ✗ |
| <i>Death tax</i> | ✓ | ✓ | ✗ |
| <i>Soda tax</i> | ✓ | ✓ | ✓ |
| <i>Black tax</i> | ✗ | ✗ | ✗ |
| <i>Pink tax</i> | | | |
| Gender wage-gap | ✗ | ✗ | unknown |
| Gender-based pricing differentials | ✓ | ✓ | unknown |
| Transportation and other “extras” | ✗ | ✗ | n/a |
| Time and caretaking | ✗ | ✗ | n/a |
| Tampon tax | ✓ | ✓ | ✗ |

* * *

The inquiries into each tax trope’s prevalence, impact on law, and influence on taxpayer behavior are foundational but incomplete measurements of success. Indeed, this comparative analysis of the “nanny tax,” “death tax,” “soda tax,” “Black tax,” and “pink tax” suggests that complex dynamics are at play. Building on this Part’s conclusions of the relative successes of the five tropes, generally, and the five versions of the “pink tax” metaphor, in particular, the next Part turns to guidance for advocates interested in eliminating all forms of the “pink tax.”

V. STRATEGICALLY DEPLOY THE PINK TAX TROPE

Viewed at a distance, a pattern begins to emerge from this study of tax tropes. The more diffuse a trope is—in the sense of performing multiple but distinct descriptive duties—the less likely it is to lead to specific legal reform.⁴¹⁰ Metonymic tropes for figurative taxes, such as the “Black tax” and most forms of the “pink tax,” have limited instrumental value. This is not to say that tax tropes referring to figurative taxes are useless. Phrases like the “Black tax” and “pink tax” do function as communicative shorthand, especially among in-group members.⁴¹¹ But it is unclear that tax tropes referring to figurative taxes can command the attention of

⁴¹⁰ See Figure 9 *supra*.

⁴¹¹ See *supra* note 31.

lawmakers.

The analysis of the “nanny tax,” “death tax,” “soda tax,” and “tampon tax” suggests that *synecdochic* phrases that refer to literal taxes are more likely to lead to concrete change. Indeed, one reason that the phrase “tampon tax” appears more frequently than the “pink tax” (alone) is because it is alliterative, catchy (like the “death tax”), concrete (like the “soda tax”), and likely to generate some curiosity (like the “nanny tax”).⁴¹² Furthermore, it is a tax with high salience (like the “soda tax”) insofar as the purchaser of menstrual products can see the sales tax directly on a store receipt.⁴¹³ “Tampon tax” also has an air of unfairness, because it applies, on its face, to an inevitability—the need of approximately half the population for menstrual products for a large portion of their lives (not unlike the “death tax,” although that is misperceived to apply broadly).⁴¹⁴ And as shown in the earlier discussion of the “death tax,” expressions of public sentiment can be a powerful motivating force in favor of tax enactment or repeal.⁴¹⁵ Thus it is likely not a coincidence that the organizers of the “soda tax” protests in Central Park in 1919 chose children to hold signs urging the end to the tax.⁴¹⁶ After all, the image suggests that the government is depriving well-dressed and scrubbed children an occasional treat.⁴¹⁷ It lands differently than an image urging voters to support a soda tax by showing an obese young person drinking soda.⁴¹⁸

Generally speaking, the law has both potential and limitations in addressing the types of inequality that tax tropes seek to describe. On the one hand, the legal system is flexible enough to enact, reform, or repeal literal taxes like the “nanny tax,” “death tax,” “soda tax,” and the “tampon tax.” On the other hand, the failure of existing laws to guarantee equal opportunities in housing and employment and to prevent discrimination on the basis of race, gender identity, or disability, for example, are reasons that metonymic tropes for figurative taxes—“Black tax,” “pink tax,” “crip tax,” and “trans tax”—exist in the first place.⁴¹⁹ To be sure, no law can eliminate

⁴¹² See Figure 8 *supra* (showing frequency of usage of the “pink tax” and “tampon tax” tropes).

⁴¹³ See also *Unconstitutional Tampon Tax* at 486-87 (discussing the salience of the tampon tax and its easily quantifiable harms).

⁴¹⁴ See *supra* Part I.B.

⁴¹⁵ See Birney et al, *supra* note 76, at 458 (discussing the way conservative interested groups sought to present public opinion poll results for the express purposes of influencing elite opinion), and *supra* notes 76-79, 97.

⁴¹⁶ See *supra* notes 108-109 and accompanying text.

⁴¹⁷ See Figure 2 *supra*.

⁴¹⁸ See, e.g., Melina Packer, *Soda Policies and Social Anxieties*, BERKELEY J. OF SOC. (May 19, 2016), <http://berkeleyjournal.org/2016/05/soda-policies-and-social-anxieties> (reprinting a cartoon from the *Berkeley Times* urging voters to support a municipal soda tax and featuring a thin boy drinking water and an obese boy drinking soda).

⁴¹⁹ See *supra* note

the psychological harms of everyday discrimination.⁴²⁰ But when a phenomenon like the gender wage gap persists despite laws like the Equal Pay Act of 1963,⁴²¹ the Civil Rights Act of 1964⁴²² and the Lily Ledbetter Fair Pay Act of 2009,⁴²³ and civil rights laws do not adequately protect Black Americans from disproportionate violence at the hands of police officers,⁴²⁴ one wonders whether the law alone can ever adequately remedy the figurative taxes that some tax tropes.

As a purely descriptive matter, the “pink tax” is helpful to convey a sense of the multiple manifestations of gender inequality. Instrumentally speaking, though, it is unlikely that “pink tax” metaphors will lead directly to legal reform the way the “tampon tax” has.⁴²⁵ For that reason, gender equality advocates should use the “pink tax” strategically; it is not likely to become an effective rallying cry for laws to address longstanding and well-documented problems like the gender wage gap, gender-based pricing differentials, transportation and other “extra” expenses typically made by women, or gendered differences in time spent on household or care work. Advocates for disability justice and trans rights should be similarly strategic in their use of tax tropes. Achieving concrete reform of the many injustices described by figurative tax language requires more than metonymic tax talk.

CONCLUSION

Whether describing literal or figurative taxes, the “pink tax” trope is both consistent with and more complicated than tropes like the “nanny tax,” “death tax,” “soda tax,” and “Black tax.” Only one form of the “pink tax,” the one that is synonymous with the “tampon tax,” has a clear and ready solution: repeal the sales tax on menstrual products.⁴²⁶ The other forms of

⁴²⁰ See *supra* note 150 and accompanying text. See also Renee Nicole Allen, *From Academic Freedom to Cancel Culture: Silencing Black Women*, 68 UCLA L. REV. 364, 392 (2021) (detailing particular aspect of Black taxes imposed on women as the “unique forms of invisible labor related to their intersectional identities and experiences in the legal academy that contribute to Black women's silence and cancellation”).

⁴²¹ See *supra* note 215 and accompanying text.

⁴²² See *supra* note 218 and accompanying text.

⁴²³ See *supra* note 223 and accompanying text.

⁴²⁴ See, e.g., Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011-2014*, 10 PLoS ONE (Nov. 5, 2015), DOI:10.1371/journal.pone.0141854 (summarizing “evidence of a significant bias in the killing of unarmed black Americans relative to unarmed white Americans, in that the probability of being black, unarmed, and shot by police is about 3.49 times the probability of being white, unarmed, and shot by police on average.”).

⁴²⁵ See *supra* note 406 and accompanying text.

⁴²⁶ See MENSTRUATION MATTERS 157 (discussing the comparative “straightforward” solution of repealing the tampon tax compared to the lack of attention to health and safety issues with respect to menstrual products).

the “pink tax” persist despite applicable laws, as is the case with the gender wage gap,⁴²⁷ have far less clear legal solutions, such as spending for safety-related travel or other “extras,”⁴²⁸ or might not properly be subject to direct legislation at all, as in the case of disproportionate time burdens on those responsible for households or caregiving⁴²⁹ or gender-based price differentials (at least for those who consider the phenomenon a reflection of the realities of the marketplace, not a manifestation of discrimination).⁴³⁰

Given that “pink tax” tropes are useful shorthand for some manifestations of gender inequality, it is not necessary to completely spurn them entirely. In both popular and academic literature, they have communicative value. At the same time, though, it is important to recognize the limited instrumental legal value of tax talk about figurative taxes (e.g., the claim that something is *like* a tax), as opposed to metonymic references to literal taxes, where single words like “nanny,” “death,” “soda,” or “tampon,” for example, gesture in a concrete and provocative way toward the larger event, relationship or product being (literally) taxed.

Consider also whether even as an in-group term, equality advocates might want to drop entirely labels like “Black tax,” “pink tax,” “crip tax,” or “trans tax.” After all, as *synecdochic* tax tropes, these terms rely on associations that are reductive of a full range of human experiences. Moving to a more neutral trope, such as “gender tax” instead of “pink tax,” would have the salutary impact of slipping free of the presumption that pink is for “girls” and “women” and blue is for “boys” and “men,” or that those gender binaries have significant ongoing utility.⁴³¹ In the case of the “pink tax,” rejecting the term itself might be one step toward gender equality.⁴³²

Gender equality jurisprudence, broadly understood, necessarily and properly rejects deeply rooted stereotypes about what “men” and “women” are capable of doing or accomplishing.⁴³³ Just as gender equality

⁴²⁷ See *supra* Part II.A.

⁴²⁸ See *supra* Part II.C.

⁴²⁹ See *supra* Part II.D.

⁴³⁰ See *supra* Part II.B.

⁴³¹ See *supra* note 305 accompanying text.

⁴³² The World Economic Forum recently estimated that it will take more than 135 years to achieve gender parity in the realms of economics, education, health and politics. See GLOBAL GENDER GAP REPORT 2021 at 4-5, WORLD ECON. FORUM, Mar. 2021, <https://www.weforum.org/reports/global-gender-gap-report-2021> (noting particular challenges and setbacks related to the COVID-19 pandemic, as the “hardest hit sectors by lockdowns and rapid digitalization are those where women are more frequently employed. Combined with the additional pressures of providing care in the home, the crisis has halted progress toward gender parity in several economies and industries”).

⁴³³ On anti-stereotyping in equality jurisprudence, see, e.g., Mary Ann Case, *Feminist Fundamentalism as an Individual and Constitutional Commitment*, 19 AM. U. J. GENDER, POL’Y & L. 549, 560 (2011) (“Through a consistent line of Supreme Court cases over my lifetime, we in the

jurisprudence evolves, so does the language it uses. What was initially known as “sex discrimination” came to be known as “gender discrimination.”⁴³⁴ And in 2020, the Supreme Court ruled that, at least in the context of Title VII, an employee’s protection from discrimination on the basis of “sex” includes protection against discrimination on account of sexual orientation or being transgender.⁴³⁵ Reasoning in the same vein, advocates should consider untethering the “pink tax” metaphor from the gender binary so as to avoid association with gender stereotypes. More precise language to target specific harms is possible. So is inclusion.

United States have developed an orthodoxy with respect to sex equality. Central to this orthodoxy is that ‘fixed notions concerning the roles and abilities of males and females’ are anathema when embodied in law.”) (internal citations omitted) and Noa Ben-Asher, *The Two Laws of Sex Stereotyping*, 57 B.C. L. REV. 1187 (2016).

⁴³⁴ Justice Ginsburg publicly explained that when appearing as an advocate before the Supreme Court, she adopted the word “gender” instead of “sex” on the advice of her secretary who, according to Justice Ginsburg, observed, “ ‘I’m typing all these briefs and articles for you and the word sex, sex, sex, is on every page....’ ” Catharine Crocker, *Ginsburg Explains Origin of Sex, Gender*, L.A. TIMES (Nov. 21, 1993), <https://www.latimes.com/archives/la-xpm-1993-11-21-mn-59217-story.html> [perma <https://perma.cc/ZG8S-EH3B>] (quoting Ginsburg). The secretary then elaborated: “Don’t you know that those nine men--they hear that word, and their first association is not the way you want them to be thinking? Why don’t you use the word gender? It ... will ward off distracting associations.” *Id.*

⁴³⁵ *Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731 (2020).