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Pink Tax and Other Tropes

Bridget J. Crawford

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Pink Tax and Other Tropes

Bridget J. Crawford[†]

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 have descriptive force in both popular and academic literature as a shorthand for group-based disparities, but they have limited impact on law and human behavior. 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, policymakers 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 datasets of printed popular and scholarly literature to compare the relative “success” of the phrases “nanny tax,” “death tax,” “soda tax,” “Black tax,” and “pink

[†] Bridget J. Crawford is a University Distinguished Professor of Law at the Elisabeth Haub School of Law at Pace University. For helpful comments and conversations, the author thanks Horace E. Anderson, Jr., Barbara Atwell, Holly Boux, Noa Ben-Asher, Joshua Galperin, Alexander K.A. Greenawalt, Brant Hellwig, Daniel Hemel, John A. Humbach, Joshua T. Katz, Kathleen Kisner, Katrina Fischer Kuh, Dylan Moore, Leigh Osofsky, Margot Pollans, Gregg Polsky, Daniel Shaviro, Leslie Y. Garfield Tenzer, Lee-ford Tritt, Richard Winchester, and James Wetzler. I also received generous feedback from colleagues after presentations at the Elisabeth Haub School of Law and the Benjamin N. Cardozo School of Law and participants in the Tax Policy Colloquium at New York University School of Law.

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 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 recommends rethinking the 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. Note at the outset that the majority of existing research in the field deploys a binary understanding of gender as cis male and cis female. In relying on that research, this Article builds a more nuanced account of the complex operation of discrimination on the basis of gender. Such discrimination limits all people, regardless of whether and how they do (or do not) fit within narrow categories. This Article builds to the argument that 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, generalized “pink tax” rhetoric describing figurative taxes likely will 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 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 five-year-old niece: a much longed-for pink scooter for \$49.99 (plus tax).⁷

¹ See, e.g., *Gillette Venus Sensitive Women’s Disposable Razor, 3 Count*, WALMART, <https://www.walmart.com/ip/Venus-Gillette-Sensitive-Women-s-Disposable-Razor-3-Count/14651715> [https://perma.cc/GJE7-SA7C].

² See, e.g., *id.*

³ See, e.g., *Tampax Pearl Tampons Regular/Super Absorbency with LeakGuard Brand -Duo Pack - Unscented - 34ct*, TARGET, <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/BXY2-6WXG]; *Always Radiant Overnight Sanitary Pads with Wings - Scented*, TARGET, <https://www.target.com/p/always-radiant-overnight-sanitary-pads-with-wings-scented/-/A-81279515?preselect=76155417#lnk=sametab> [https://perma.cc/G3ZE-P8T3].

⁴ See, e.g., *Trojan ENZ Lubricated Premium Latex Condoms - 12ct*, TARGET, <https://www.target.com/p/trojan-enz-lubricated-premium-latex-condoms-12ct/-/A-11235052#lnk=sametab> [https://perma.cc/6WD8-YERX].

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”).

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> [https://perma.cc/DJ9T-V8AK] (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>

* * *

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 five-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

* * *

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

[<https://perma.cc/98ZK-W4MQ>] (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> [<https://perma.cc/KCQ7-GATE>] [hereinafter *From Cradle to Cane*] (showing pink “Radio Flyer Girls My 1st Scooter Sparkle-Pink” retailing for \$49.99).

⁸ See, e.g., *Gillette Mach3 Sensitive Mens [sic] Disposable Razor, 3 Count*, Walmart, <https://www.walmart.com/ip/Gillette-Mach3-Mens-Disposable-Razors-for-Smooth-Shave-3-ct/11961016> [<https://perma.cc/96WW-5JYS>] (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, e.g., *id.*

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

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

¹² See *From Cradle to Cane*, *supra* note 7 (showing red “Radio Flyer My 1st Scooter Sport-Red” retailing for \$24.99)

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 by the Jane and Jerry hypotheticals.¹⁵ These include (1) the gender wage gap;

¹³ See, e.g., *Radiologic Technologist II Salary in the United States*, SALARY, <https://www.salary.com/research/salary/benchmark/radiologic-technologist-ii-salary> [<https://perma.cc/7B85-AE7W>] (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. 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.” *Glossary of Terms - Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> [<https://perma.cc/JQ75-454R>]. 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.” *Id.*; 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)*, UCLA SCH. L. WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/publications/geniuss-transpop-based-survey> [<https://perma.cc/6P8A-9WV4>] (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)”).

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.

(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 print source data sets 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

See generally Glossary of Terms - Transgender, 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. 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*, <https://www.plannedparenthood.org/learn/health-and-wellness/menstruation> [<https://perma.cc/2Q3R-LBF4>].

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), which explains 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 (\$10.98 pre-tax for 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 retile 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

¹⁸ See John Leoppsky, *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> [<https://perma.cc/78MZ-4SLN>]; see also Alice Wong, *#CripTax: Hidden Costs of Being Disabled*, WAKELET, <https://wakelet.com/wake/435a5ef7-1f7b-4a1d-8254-2de2a411a203> [<https://perma.cc/F995-ZG65>] (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*, URBAN DICTIONARY (Dec. 22, 2016), <https://www.urbandictionary.com/define.php?term=trans%20tax>.

²⁰ See *infra* Sections II.B-C, E.

²¹ 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”).

“stamp tax”²² and “whiskey tax” may ring a bell to students of American 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 making 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

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 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 (Aug. 6, 2019), <https://www.dictionary.com/e/pop-culture/cat-tax/> [<https://perma.cc/UY7L-3SH3>] (“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*, URBAN DICTIONARY (Dec. 17, 2020), <https://www.urbandictionary.com/define.php?term=Cat%20Tax> [<https://perma.cc/M7LD-D45J>] (“The cat tax is the requirement to post cute pictures of your cat when you mention them on the internet.”).

²⁵ See *Tax*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/198260?rskey=lmxBDG&result=1#eid>, [<https://perma.cc/L83B-EXWA>] (“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*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/196458?redirectedFrom=synecdoche#eid>, [<https://perma.cc/N344-G8UM>] (“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”).

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 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.

Part V then 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

²⁸ See *Metonymy*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/117628?redirectedFrom=metonymy#eid>, [https://perma.cc/8H77-KAB9] (defining “metonymy” to mean “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”).

³⁰ See *Trope*, OXFORD ENG. DICTIONARY, <https://www.oed.com/view/Entry/206679?rskey=KFPbzQ&result=1#eid>, [https://perma.cc/V65B-M52B] (“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.”).

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 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,

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); 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 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). 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*, TAXPROF BLOG, <http://taxprof.typepad.com/files/blm.pdf> [<https://perma.cc/P6MM-85K8>]. 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, *Tax Protest, “A Homosexual,” and Frivolity: A Deconstructionist Meditation*, *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).

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 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)

³⁵ See *Tax*, *supra* note 25; Anthony C. Infanti, *Taxing Civil Rights Gains*, 16 MICH. J. GENDER & LAW 319, 337 (2010) (evaluating the strategic value of harnessing tax language to advance LGBT rights and quoting the OED’s different definitions of “tax” before the Supreme Court’s recognition of same-sex marriage). 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 See *Tax*, *supra* note 25; see also Infanti, *Taxing Civil Rights Gains*, *supra* note 35, at 337.

A. Nanny Tax

The “nanny tax” is a 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 did inspire 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 and her husband had employed undocumented immigrants as household employees and failed to pay related employment taxes.⁴⁰ Clinton’s second likely nominee for the position, Judge Kimba Wood, also withdrew from consideration after a similar issue surfaced from her past.⁴¹ The press dubbed “Nannygate” 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 said they could not find anyone

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”); 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; Michael Kelley, *Clinton Cancels Baird Nomination for Justice Dept.*, N.Y. TIMES (Jan. 22, 1993), <https://timesmachine.nytimes.com/timesmachine/1993/01/22/955593.html?pageNumber=1> [<https://perma.cc/PWW9-JXMQ>]. 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 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), <https://timesmachine.nytimes.com/timesmachine/1993/02/06/386093.html?pageNumber=1> [<https://perma.cc/NFN3-ADXJ>] (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).

⁴² See, e.g., Anna Quindlen, *I’m O.K., You’re Bill*, N.Y. TIMES (Jan. 24, 1993), <https://www.nytimes.com/1993/01/24/opinion/public-private-i-m-ok-you-re-bill.html> [<https://perma.cc/B5M2-3DFB>] (describing the “first crisis” of Bill

else suited for their household employment (and therefore hired undocumented workers).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 who owed more than \$100 in federal and state unemployment insurance (commonly known as FUTA) were required to pay quarterly, too.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

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, at 53, 55 (describing Baird's attempts to explain the decision made by herself 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); 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 "[t]he 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"); 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?*, INTERNAL REV. SERV., <https://www.irs.gov/pub/irs-soi/18resconerard.pdf> [<https://perma.cc/K9ZX-EX3D>] (explaining an employer's FICA and FUTA obligations as of 1993).

⁴⁶ *Id.*

⁴⁷ See, e.g., Publication 17 (2021), *Your Federal Income Tax* at Table 1-1, INTERNAL REV. SERV., https://www.irs.gov/publications/p17#en_US_2021_publink1000170407 [<https://perma.cc/8UK6-UZ9X>] (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, *Conformity to Federal Income Tax Base*, in STATE TAXATION § 20.02 (3d ed. 1998) (providing an overview of differences in state-level income taxation in those jurisdictions that have a state income tax); ERICA YORK &

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

Due 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) 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

JARED WALCZAK, STATE AND LOCAL TAX BURDENS, CALENDAR YEAR 2019 at Table 1, <https://files.taxfoundation.org/20210322135318/State-and-Local-Tax-Burdens-Calendar-Year-20192.pdf> [<https://perma.cc/WD54-Y8DZ>] (providing an overview of state-local tax burdens by state).

⁴⁸ See, e.g., *Publication 926 (2022), Household Employer's Tax Guide* 2-3, 6-9, INTERNAL REV. SERV., <https://www.irs.gov/pub/irs-pdf/p926.pdf> [<https://perma.cc/FAL7-97GG>] (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 Senator Moynihan that "only 25 percent of households with domestic workers report wages paid to these employees").

⁵⁰ See Social Security Domestic Employment Reform Act of 1994, Pub. L. 103-387, 108 Stat. 4071 (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, 1191-92 (1999).

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. SERV. 57, 57 (2005), <https://www.irs.gov/pub/irs-soi/05bloom.pdf> [<https://perma.cc/HE6E-VUD5>] (explaining revisions to tax law and reporting requirements in the wake of high profile cases).

⁵² See *Employment Coverage Thresholds for 2023*, SOC. SECURITY ADMIN., <https://www.ssa.gov/oact/cola/CovThresh.html> [<https://perma.cc/SQ7R-T3SU>].

Medicare taxes. Otherwise, Social Security and Medicare obligations amount to 15.3% of cash wages.⁵³ For 2022, 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 As this short description suggests, the “nanny tax” trope did lead to concrete tax reform.

Despite the phrase’s success at influencing legislation, it is not clear that compliance with even the new “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 Survey estimates that there are approximately 370,000 employees in this

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 (2022), Household Employer’s Tax Guide*, *supra* note 48, at 7.

⁵⁴ *Id.* at 5.

⁵⁵ See, e.g., *A Preliminary Look at the 2022 SUI Taxable Wage Bases*, EY (Dec. 15, 2021), <https://taxnews.ey.com/news/2021-2255-a-preliminary-look-at-the-2022-sui-taxable-wage-bases> [<https://perma.cc/5QZU-JTYP>] (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), <https://www.nytimes.com/1998/04/05/business/despite-an-easing-of-rules-millions-evade-nanny-tax.html> [<https://perma.cc/KF7N-VNKK>] (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). The simplification measures were enacted in 1994 and became effective in 1995. See *id.*; see also *supra* note 51 and accompanying text.

⁵⁷ See *SOI Tax Stats – Individual Income Tax Returns Complete Report (Publication 1304)*, INTERNAL REV. SERV. at Table A, https://www.irs.gov/statistics/soi-tax-stats-individual-income-tax-returns-complete-report-publication-1304#_tbla [<https://perma.cc/7WPY-Y6RV>] (showing estimates of number of returns filing household employment taxes trending downward from 284,706 in 1998 to 177,407 in 2019).

⁵⁸ See *Private Households: NAIC 814*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/iag/tgs/iag814.htm> [<https://perma.cc/NAH3-UYB2>]; *Private Households*, DATAUSA, <https://datausa.io/profile/naics/private-households> [<https://perma.cc/RQS3-2GGP>] (reporting data from the American Community Survey).

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 suggest that widespread noncompliance with the law continues.⁶⁰ According to one study, up to ninety-five percent of all current employer 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, childcare workers, and other household staff comply with applicable tax laws.⁶² The many possible reasons for taxpayer noncompliance 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

⁵⁹ See 2019 American Community Survey 1-Year Experimental Public Use Microdata Sample, U.S. CENSUS, <https://www.census.gov/programs-surveys/acs/microdata.html> [<https://perma.cc/9Z8L-29SH>]; *Private Households*, *supra* note 58 (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 (Aug. 9, 2021), <https://www.investopedia.com/best-nanny-payroll-services-5089900> [<https://perma.cc/UP5C-GJUC>] (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. 10, 1993), 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’” since “President Clinton’s initial choice for attorney general, you’ll recall, not only

the “nanny tax” peaked in 1996, three years after the Baird nomination; thereafter, the usage rates returned to levels consistent with 1990 and 1991, 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 attempts to describe.

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 sole responsible party and notably dubbed the affair “Nannygate,” not “Chauffeurgate.”⁶⁹ The very word “nanny” specifically invokes the image of an upper-class *woman* who is too busy or uninterested to care for her own children.⁷⁰ The word choice further highlights that the payment of another

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.

⁶⁵ GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams/graph?content=nanny+tax&year_start=1980&year_end=2019&corpus=26&smoothing=3&direct_url=t1%3B%2Cnanny%20tax%3B%2CC0 [https://perma.cc/35QD-6RFE] (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 SCI. 176 (2010) (describing the system now known as Google Ngram, which permits users to conduct quantitative analysis of language trends over a corpus of digital texts representing four percent of all books ever in print).

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

⁶⁷ *See Synecdoche, 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 law-professor 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 (Dec. 12, 2012), <https://www.kveller.com/the-euphemisms-we-use-instead-of-nanny/> [https://perma.cc/EFK8-GA3Q] (in which the author describes speaking with another new parent and thinking that “I didn’t want to further

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 or housekeepers, none of these men became the face of “Nannygate.”⁷² To be sure, anyone with contemporary political aspirations is probably more careful in selecting employees than were Zoë Baird, Kimba Wood, or other Clinton-era appointees,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 had 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

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 Banks, *supra* note 43, at 20-21 (pointing out that, in the media, “nannies” connotes “surrogate mothers for upper class children” and discussing more generally the gendered aspects of “Nannygate”).

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> [<https://perma.cc/CB2Y-ZJB6>] (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 applicable 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> [<https://perma.cc/9WWM-WNMV>] (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*, AM. PROSPECT (May 17, 2004), <https://prospect.org/special-report/unenlightened-self-interest/> [<https://perma.cc/JH3S-7685>] (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

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 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, despite the estate tax’s limited reach.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,

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 (“[T]he coalition for repeal eventually did such an effective job at convincing legislators that public opinion 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”).

⁷⁹ *Id.* at 442.

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 were 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> [<https://perma.cc/YEW7-5VNB>] (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 Table 17, INTERNAL REV. SERV., <https://www.irs.gov/statistics/soi-tax-stats-historical-table-17> [<https://perma.cc/QQZ3-BXEU>].

⁸⁵ *See* Birney et al., *supra* note 76, at 450-51.

the estate tax exemption was \$675,000.⁸⁶ A mere two percent of all decedents paid any estate tax that year.⁸⁷ Legislative reform further shrank that number. 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% of all decedents were subject to the estate tax.⁹⁰ Given that the estate tax exemption in 2023 is \$12,920,000 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

⁸⁶ See *SOI Bulletin - Historical Table 17*, *supra* note 84.

⁸⁷ See *id.*

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

⁸⁹ See *SOI Bulletin - Historical Table 17*, *supra* note 84.

⁹⁰ See Greg Iacuri, *Here's How Many People Pay the Estate Tax*, CNBC (Sept. 29, 2021, 11:14 AM), <https://www.cnbc.com/2021/09/29/heres-how-many-people-pay-the-estate-tax-.html> [<https://perma.cc/5YW7-JN2J>] (noting that the number of taxable estates in 2011 represented the “lowest percentage on record” in light of historic percentages in the range of one-to-two percent). In 2001, when temporary repeal was enacted, there were 108,071 estate tax returns filed; 47.6% of these estates owed any tax. See *SOI Estate Tax Statistics*, INTERNAL REV. SERV., <https://www.irs.gov/statistics/soi-tax-stats-estate-tax-statistics> [<https://perma.cc/H8AK-V9CB>] (showing 108,701 estate tax returns filed in 2001 and 51,736 of these resulting in estate tax payable); Brian G. Raub, *Recent Changes in the Estate Tax Exemption Level and Filing Population*, INTERNAL REV. SERV., 114, 115 Fig. C, <https://www.irs.gov/pub/irs-soi/05estate.pdf> [<https://perma.cc/KV99-FMG3>]. 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, Pub. 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; \$5,450,000 in 2016; and \$5,490,000 in 2017. See *Estate Tax*, INTERNAL REV. SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax> [<https://perma.cc/W672-DPDA>] (listing exemption amounts in 2023 and prior years).

⁹¹ See Rev. Proc. 2022-38, 2022 WL 11598865 (Oct. 18, 2022). Permanent tax reform is almost never that. Under President Trump, Congress passed the Tax Cut and Jobs Act in 2017, which 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; \$12,060,000 in 2022; and \$12,092,000 in 2023. See *Estate Tax*, *supra* note 90 (listing exemption amounts in 2023 and prior).

President Biden and 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 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

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> [https://perma.cc/T4LW-EP6C] (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* 125 (2005) (citing Greenberg Quinlan Rosner Research Survey of May 6-8, 2002, showing that even supplying survey respondents with accurate data about who is subject to the estate tax, a full thirty percent of respondents erroneously 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).

⁹⁵ *Id.*

⁹⁶ *Id.* See also Derek Thompson, *The Very Bad Arguments for Killing the Estate Tax*, ATLANTIC (Nov. 13, 2017), <https://www.theatlantic.com/business/archive/2017/11/the-very-bad-arguments-for-killing-the-estate-tax/545633/> [https://perma.cc/A5MM-UFWJ] (noting the cleverness of “rall[y]ing” around the moniker ‘death tax.’ This succeeded in persuading many Americans that the law threatened upper-middle-class families. In a 2001 Gallup survey, seventeen percent of Americans said they feared they owed estate taxes, at least eight times higher than the actual figure.”).

⁹⁷ See Birney et al., *supra* note 76 (discussing effectiveness of “fairness” rhetoric); see also NPR, Kaiser Fam. Found. & Kennedy Sch. of Gov’t, *National Survey of Americans’ Views on Taxes*, KAISER FAM. FOUND. (Apr. 2003),

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 enslaved people 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 – in that it refers to the estate tax, 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 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

<https://www.kff.org/wp-content/uploads/2003/03/3340-t-survey-of-americans-views-on-taxes.pdf> [<https://perma.cc/CDK7-MK9M>] (showing ninety-two percent 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 seventy-four percent 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 Chester Thigpen before the Committee on Ways and Means). 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 one’s 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.

¹⁰³ See *supra* note 76 and accompanying text.

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 on consumers of one cent on every 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. We did our bit too! Nix on

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 War 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 (Apr. 6, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/04/06/what-happened-when-america-put-a-national-tax-on-soda> [<https://perma.cc/WS2K-HURD>].

¹⁰⁶ See Revenue Act of 1918, Pub. L. 065-254, 40 Stat. 1057, § 628(a) (imposing tax of ten percent 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”); *id.* at § 630 (“[T]here shall be levied, assessed, collected and paid a tax of 1 cent for each ten cents or fraction thereof 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.”).

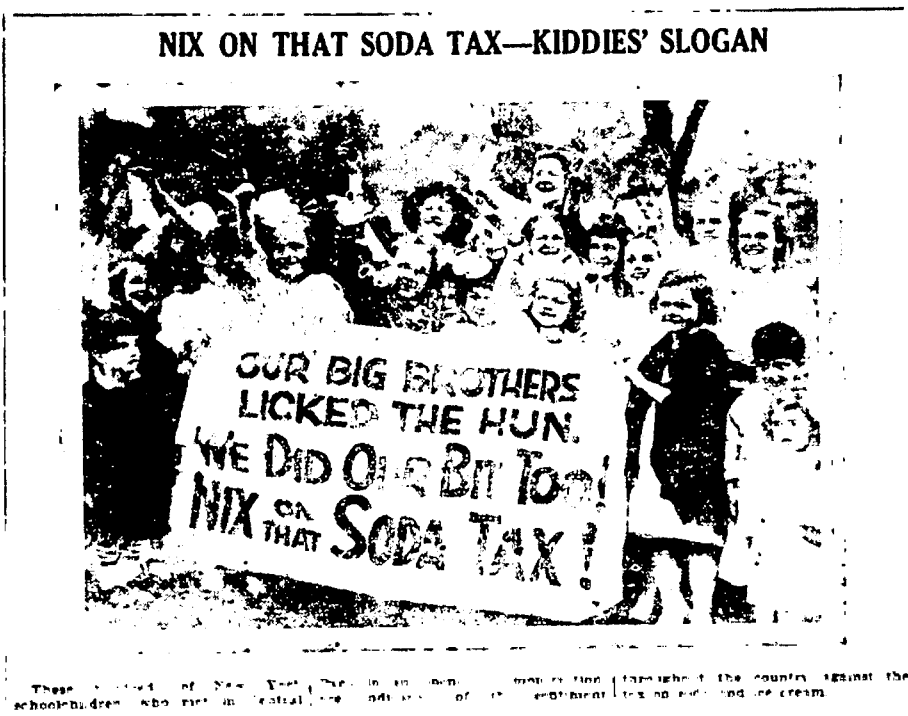
¹⁰⁷ See Dewey, *supra* note 105 (“Editorial cartoonists regularly spoofed the taxes. Industry representatives—including John Candler, brother of Coca-Cola founder Asa—testified they would result in plant closures and layoffs.”).

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> [<https://perma.cc/EMA6-YQVK>] (featuring picture of young people in New York City on a truck bearing this sign); *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-5> [<https://perma.cc/WS4F-EDE7>] (showing picture of young children in Central Park holding a sign with the same text).

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 it in 1922.¹¹⁰

Seizing an opportunity, some states stepped into the legislative gap as early as 1925, when 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> [<https://perma.cc/2GGT-6C5L>] (explaining that at its height, the federal tax raised approximately \$58 million and represented approximately one percent 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, usually pass the tax along the chain in the form of higher prices for retailers, which are ultimately passed on to 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 outcomes such as obesity, heart disease, and diabetes.¹¹⁷ Advocacy around

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). Sales taxes are paid by the consumer at the point of sale to the retailer, which then remits the tax to the appropriate authority. See *id.*

¹¹³ See *id.*; 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> [<https://perma.cc/625P-T2TQ>] (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 (2007) (providing an analysis of numerous

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 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*

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. PUB. HEALTH e61, e63 (2015).

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> [<https://perma.cc/CQ9E-P9B8>] (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); *Beverage Industry Fight Against Soda Ban Just Beginning*, GOTHAM GAZETTE, <https://www.gothamgazette.com/index.php/about/1420-soda-ban-war> [<https://perma.cc/QU37-WL7Y>] (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> [<https://perma.cc/JTG4-V553>] (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 (Jan. 25, 2012, 6:24 AM),

showing Michael Bloomberg dressed as a 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 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

<https://www.cnn.com/2013/01/23/health/new-york-large-drinks/index.html>
[<https://perma.cc/CS53-RBYK>].

¹²⁵ See *Soft Drink Industry Fights Back, Depicting Bloomberg as Nanny*, ABC NEWS (June 2, 2012), <https://abcnews.go.com/blogs/health/2012/06/02/soft-drink-industry-fights-back-depicting-bloomberg-as-nanny> [<https://perma.cc/A3XE-BJ2B>]. 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.” *Cartoon: Bloomberg’s Soda Ban*, CTR. FOR CONSUMER FREEDOM (June 15, 2012), <https://www.consumerfreedom.com/2012/06/cartoon-bloombergs-soda-ban> [<https://perma.cc/GJF9-JC52>].

¹²⁶ See Banks, *supra* note 43 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* Section I.D.

¹²⁹ See *N.Y. Statewide Coal. of Hispanic Chambers of Comm. v. N.Y. City Dep’t of Health and Mental Hygiene*, 16 N.E.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).

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 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 shorthand 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

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.*

¹³² See Tricia L. Nadolny, *Soda Tax Passes: Philadelphia is First Big City in Nation to Enact One*, PHILA. ENQUIRER (June 16, 2016), https://www.inquirer.com/philly/news/politics/20160617_Philadelphia_City_Council_to_vote_on_soda_tax.html [<https://perma.cc/PT7E-G8MG>] (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).

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> [<https://perma.cc/RD66-C99M>] (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 ("[T]he 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.

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 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 statewide 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

¹³⁷ See *supra* note 47 and accompanying text.

¹³⁸ See *supra* notes 112–116 and accompanying text.

¹³⁹ See *supra* note 130 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 Revenue Act of 1918, Pub. L. 065-254, 40 Stat. 1057, § 900(9) (imposing a five-cent tax on candy).

¹⁴¹ See *supra* notes 108–109 and accompanying text.

¹⁴² See also Dana & 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* Section I.C.

¹⁴⁴ Compare Lynn D. Silver et al. *Changes in Prices, Sales, Consumer Spending, and Beverage Consumption One Year After a Tax on Sugar-Sweetened Beverages in Berkeley, California, US: A Before-and-After Study*, 14 PLOS MED. 1 (2017)

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

(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 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”. 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); Seiler et al., *supra* note 144, at 35-39 (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).

¹⁴⁶ See, e.g., Gretchen Frazee, *How Taxing Sugary Drinks Affects a Community’s Health and Economy*, PBS (Oct. 4, 2018), <https://www.pbs.org/newshour/economy/making-sense/how-taxing-sugary-drinks-affects-a-communitys-health-and-economy> [<https://perma.cc/5CA4-4PFP>] (“[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> [<https://perma.cc/GZS3-M87W>] (“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.”).

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 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 enumerates the constituent financial harms.¹⁵¹ In

¹⁴⁸ Henry Louis Gates famously called race the “ultimate trope” in American society. Henry Louis Gates, *Introduction*, in *RACE, WRITING AND DIFFERENCE* 1, 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 & SOC’Y* 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 people of color.” Haeny et al, *supra*, 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).

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).

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 obligations 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*

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 (2015) (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* (NPR broadcast May 23, 1992) (including an interview with Joseph Boyce, a Black editor at the Wall Street Journal, describing as a "black tax" the fifteen percent 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 13, 2021), <https://www.indystar.com/story/money/2021/05/13/indianapolis-black-homeowner-home-appraisal-discrimination-fair-housing-center-central-indiana/4936571001> [<https://perma.cc/8ER7-KPVP>] (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 shorthand 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*, D.C. FILM SOC'Y (Feb. 2006), <http://www.dcfilmsociety.org/storyboard0602.htm#somethingnew> [<https://perma.cc/Q7J5-8VGQ>].

different than a tax imposed on their white counterparts.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

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. Carolyn 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 BOOKS NGRAM VIEWER, https://books.google.com/ngrams/graph?content=black+tax&year_start=1500&year_end=2019&case_insensitive=on&corpus=26&smoothing=3&direct_url=t4%3B%2Cblack%20tax%3B%2Cc0%3B%2Cs0%3B%3Bblack%20tax%3B%2Cc0%3B%3BBblack%20Tax%3B%2Cc0%3B%3BBblack%20tax%3B%2Cc0%3B%3BBLA%20TAX%3B%2Cc0 [https://perma.cc/X4KH-WT8E] (setting search parameters to years “1500-2019,” “English (2019),” “Case-Insensitive” and “Smoothing of 3” and searching “black tax”). See, e.g., LA. SUPERVISOR OF PUBLIC ACCOUNTS, 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 the 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 DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS AND HOW WE CAN FIX IT 42-47 (2021);

¹⁵⁸ See Crawford & Gerzog, *infra* note 159, at 794-800 (providing an overview of income and wealth transfer tax benefits for higher education and the fact that white taxpayers disproportionately benefit from them).

¹⁵⁹ See, e.g., Brown, *supra* note 157; Dorothy A. Brown, *The Marriage Penalty/Bonus Debate in Black and White*, 16 N.Y.L. SCH. J. HUM. RTS. 168 (1999); Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CINN. L. REV. 787 (1997); Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007); Karen B. Brown, *Not Color- or Gender- Neutral: New Tax Treatment of Employment Discrimination Damages*, 7 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); 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); Leslie Book, *Tax Administration and Racial*

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 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

Justice: The Illegal Denial of Tax-Based Pandemic Relief to the Nation's Incarcerated Population, 72 S.C.L. REV. 667 (2021); 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 151, 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 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> [<https://perma.cc/5EHT-MQ95>].

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, 390-91 (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, *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

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

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 Sawers, *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); 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., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 7 (2017) (discussing state laws that prohibit felons from voting for life); *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUSTICE (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021> [<https://perma.cc/W2SK-4Y7Z>] (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, https://www.si.edu/object/poll-tax-receipt-lee-carr-hardin-county-texas:nmaahc_2012.104 [<https://perma.cc/JVH8-UQD4>] (showing that the voter paid \$1.50 poll tax on January 31, 1955); *see also* Allison Keyes, *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> [<https://perma.cc/XC42-QRF5>] (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 in a suitcase among other family memorabilia).

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 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

¹⁷⁴ See Sherrod, *supra* note 172.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See *United States v. Bridges*, 217 F.3d 841 (4th Cir. 2000) (upholding conviction of tax preparer 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> [<https://perma.cc/4DZ2-G485>] (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> [<https://perma.cc/FS6P-2ZSX>]. 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> [<https://perma.cc/SER3-DF55>] (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).

¹⁷⁹ See Turley, *supra* note 173 (providing figures for amount of improper refunds issued by the IRS).

¹⁸⁰ *Slavery Reparations Scams Surge, Release No. IR-2002-8*, INTERNAL REV. SERV. (Jan. 24, 2002), <https://www.irs.gov/pub/irs-news/ir-02-08.pdf> [<https://perma.cc/YZ2R-DY4P>] (reporting the 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

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,” and “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 multi-faceted. 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-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

conversations about reparations for slavery will be complicated by the fact that “several tax protestors and scammers ‘sold’ the idea to naïve 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); David Weiss, *Metonymy in Black and White: Shelby Steele’s Revelatory Racial Tropes*, 16 HOWARD J. 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* Section II.A.

¹⁸⁷ See *infra* Section II.B.

¹⁸⁸ See *infra* Section II.C.

¹⁸⁹ See *infra* Section II.D.

¹⁹⁰ See *infra* Section II.E. In discussing these topics, this Article makes use of research conducted by others that largely focuses on “men” and “women.” This

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 is largely descriptive; it takes up each version of the “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)

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

reliance on the work of others is descriptive. Gender discrimination is far too complex to be measured neatly on any binary.

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 27 and accompanying text.

¹⁹³ See, e.g., Dorothy S. Brady, *Equal Pay for Women Workers*, 251 ANN. AM. ACAD. POLITICAL & SOC. SCI. 53 (1941) (describing the policy of the U.S. National

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

1. Summary

Measured from 1979 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

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 LAB. STAT., <https://www.bls.gov/opub/reports/womens-earnings/2020/home.htm> [<https://perma.cc/MH6N-VEGD>]. 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> [<https://perma.cc/BV93-G3HQ>] (comparing earnings for all full-time workers fifteen years of age and older, where men reported median earnings of \$66,943 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, at tbl. 13 (reporting the historic gender wage gaps since 1979, "the first year for which comparable earnings data are available"); 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> [<https://perma.cc/PVZ3-QHFJ>] ("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."); U.S. Dep't of Labor, *Batgirl Teaches Batman a Lesson About Equal Pay*, YOUTUBE, https://www.youtube.com/watch?v=n00xZ_mKQgk [<https://perma.cc/4Z9Z-XLAS>] (showing a 1970s public service announcement where Batgirl's refuses 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").

those of white men.¹⁹⁸ Even when compared to men of the same race, the average Black, Latina, Asian, or Native American woman earns less than her male counterpart.¹⁹⁹

¹⁹⁸ See *Highlights of Women's Earnings in 2020*, *supra* note 194, at tbl. 23 (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 \$1,110, white women earned \$905 (81.53%), Black or African American women earning \$764 (68.82%), "Hispanic or Latino identity" women earning \$705 (63.51%), and "Asian" women earning \$1,143 (102.97%)). 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 performed 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 the same data for men who self-identified as white and not of Hispanic, Latino or Spanish origin. See *B20017C, Median Earnings in the Past 12 Months (in 2021 Inflation-Adjusted Dollars) by Sex by Work Experience*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=%20B20017C> [https://perma.cc/R5AP-4QU6]; *B20017H, Median Earnings in the Past 12 Months (in 2019 Inflation-Adjusted Dollars) by Sex by Work Experience*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=%20B20017H> [https://perma.cc/X4X5-2QR9]. 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; *Measuring Household Experiences during the Coronavirus Pandemic*, U.S. CENSUS BUREAU, <https://www.census.gov/data/experimental-data-products/household-pulse-survey.html> [https://perma.cc/D744-KPGK]; *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> [https://perma.cc/D5L5-PYYR] (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> [https://perma.cc/FM9F-D4LK] (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> [https://perma.cc/8BVP-6Q37] (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. CTR. (Sept. 2021), <https://nwlc.org/wp-content/uploads/2020/09/Native-Women-Equal-Pay-2021.pdf> [https://perma.cc/FBN4-Q9AT] (reporting that a Native woman's earnings

Across nations, scholars and policymakers 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 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

are \$0.60 for every dollar paid to a white man and noting difficulty in obtaining data on Native Americans generally).

¹⁹⁹ See *Highlights of Women's Earnings in 2020* *supra* note 194, at tbl. 13. (showing that in 2020 Black or African American women earned 92% of what Black or African American men earned, “Hispanic or Latino identity” women earned 88.5% of what “Hispanic or Latino identity” men earned, and “Asian” women earned 79% of what “Asian” men earned); *B20017C, Median Earnings in the Past 12 Months (in 2021 Inflation-Adjusted Dollars) by Sex by Work Experience*, *supra* note 198; *B20017H, Median Earnings in the Past 12 Months (in 2019 Inflation-Adjusted Dollars) by Sex by Work Experience*, *supra* note 198 (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) (“[T]he 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.”).

²⁰¹ See *Global Gender Gap Report 2021*, WORLD ECON. FORUM (Mar. 30, 2021), <https://www.weforum.org/reports/global-gender-gap-report-2021> [<https://perma.cc/GJ65-QV72>].

²⁰² See, e.g., Hansi Lo Wang, *2020 Census Will Ask About Same Sex Relationships*, NPR (Mar. 30, 2018, 5:02 AM), <https://www.npr.org/2018/03/30/598192154/2020-census-will-ask-about-same-sex-relationships> [<https://perma.cc/W6DJ-GCN8>] (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. See *id.*

²⁰³ See, e.g., *Employment Situation News Release*, U.S. BUREAU OF LAB. STAT. at Tables A-9, A-10 (Jan. 2020), <https://www.bls.gov/news.release/archives/empst02072020.htm> [<https://perma.cc/DGV9-F2C4>] (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*,

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% compared to 7.5%) and to have suffered recent loss of employment (21.6% compared to 16%).²⁰⁶

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

FORBES (Feb. 7, 2020, 1:48 PM), <https://www.forbes.com/sites/dawnstaceyennis/2020/02/07/the-first-gay-inclusive-jobs-report-is-out-and-its-telling/?sh=78cd7f903a4f> [<https://perma.cc/FFG7-J2J2>] (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* Wang *supra* note 202.

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> [<https://perma.cc/9QG2-GYYK>] (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> [<https://perma.cc/5S3E-C96J>].

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/> [<https://perma.cc/9M9T-D93S>]; *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> [<https://perma.cc/B72Z-ZYL8>] (reporting a fourteen percent unemployment rate for trans workers compared to seven percent 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*, *supra* note 14 (defining terms “trans,” “non-binary,” and “genderqueer”).

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

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

²⁰⁸ See *Bias in the Workplace*, UCLA SCH. L. WILLIAMS INST. (June 2007), <https://williamsinstitute.law.ucla.edu/publications/bias-in-the-workplace> [<https://perma.cc/4DZQ-7WJW>]. 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. 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 job pay rate comparison from “BEFORE you underwent any procedures to change your gender that would have been noticeable to your supervisors or co-workers.” *Id.* at 7-8.

²¹¹ MCKINSEY & CO., BEING TRANSGENDER AT WORK 2, 5 (Nov. 10, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/being-transgender-at-work#> [<https://perma.cc/9DP8-2LMQ>].

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*, *supra* note 207 (reporting that transgender workers experiences unemployment at a rate of fourteen percent compared to seven percent for the entire U.S. workforce, and that forty-four percent of transgender 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”); Lips,

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

2. Applicable Law

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 *Bostock v. Clayton County*, the Supreme Court interpreted Title VII’s 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

supra note 200, at 88 (“[G]overnments 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 194-213 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).

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

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 will likely need to be accomplished through additional legislation or judicial interpretation.²²²

The third major piece of U.S. legislation prohibiting employment discrimination on the basis of sex is the Lilly Ledbetter Fair Pay Act of 2009, which amended Title VII, broadening the filing window for Title VII 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

²²⁰ See *id.*

²²¹ Section 10 Compensation Discrimination, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Dec. 5, 2000), <https://www.eeoc.gov/laws/guidance/section-10-compensation-discrimination> [<https://perma.cc/VR9B-VLYX>] (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).

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), H.R. 7, 117th Cong. (2021-2022) § 3(b) (2020-2021); see also *The Paycheck Fairness Act Fact Sheet*, NT'L PARTNERSHIP FOR WOMEN & FAMILIES (Mar. 2021), <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/the-paycheck-fairness-act.pdf> [<https://perma.cc/WA7M-QXYA>] (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 Grace Segers, *House Passes Equal Pay Bill, But It's Likely to Stall in the Senate*, CBS NEWS (Apr. 16, 2021), <https://www.cbsnews.com/news/equal-pay-act-passed-house-likely-stall-senate> [<https://perma.cc/A6WZ-3S9L>].

²²⁵ See, e.g., Katherine McAnallen, *The Current State of Equal Pay Laws*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 2015), <https://ncsl.org/research/labor-and-employment/the-current-state-of-equal-pay-laws.aspx> [<https://perma.cc/L935-K45T>] (reporting that forty two states had laws on equal pay as of 2015, with eight states granting exemptions for small businesses).

governments have also enacted laws that prohibit employers from asking 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 to all men.²²⁸

Scholars have explained the gender wage gap as a result of factors including intentional (and illegal) discrimination; occupational segregation; women's lack of education, experience, or training; women choosing part-time employment over full-time employment; or women 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,

²²⁶ See, e.g., *State and Local Salary History Bans*, AAUW, <https://www.aauw.org/resources/policy/state-and-local-salary-history-bans> [<https://perma.cc/F796-X4XD>] ("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 RSCH. CTR. (May 25, 2021), <https://www.pewresearch.org/fact-tank/2021/05/25/gender-pay-gap-facts> [<https://perma.cc/PGR2-9WJ8>] (noting that the "gender gap in pay has remained relatively stable in the United States over the past 15 years or so"); 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 RSCH. 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> [<https://perma.cc/373E-DX7Y>] (reporting that, during the period of 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); Michael Baker et al., *Pay Transparency and the Gender Pay Gap* 4, (Nat'l Bureau of Econ.

there is a clear need for better enforcement of the existing laws that attempt to remedy the gender wage gap.²³¹

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

Research, Working Paper No. 25834), https://www.nber.org/system/files/working_papers/w25834/w25834.pdf [https://perma.cc/MU5D-YE5H] (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. RADICAL POL. ECON. 278, 279-80 (2013) (arguing for better enforcement of existing laws).

²³² See, e.g., STATISTICS SWEDEN (SCB), WOMEN AND MEN IN SWEDEN 2020: FACTS AND FIGURES 4-5 (June 17, 2020), https://www.scb.se/contentassets/95ffcd4b3f394877abb3bd41e40df0a0/le0201_2019b20_br_x10br2002eng.pdf [https://perma.cc/8SA7-M75V] (describing Official Statistics Ordinance that requires statistical reporting on gender equality programs); 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.*, 103 SCANDINAVIAN J. ECON. 559 (2001).

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 [https://perma.cc/W6ZU-CHVP].

²³⁴ See, e.g., Kaitlin Holmes & Danielle Corley, *International Approaches to Closing the Gender Wage Gap*, CTR. FOR AM. PROGRESS nn.23-30 (Apr. 4, 2017), <https://www.americanprogress.org/article/international-approaches-closing-gender-wage-gap> [https://perma.cc/7EEF-M7WB] (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> [https://perma.cc/WB4C-NBA5]. 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?* (Colum. Bus. Sch. Rsch. Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3865689 [https://perma.cc/V28E-SSHK] (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).

that all employees, but especially women, will be better able to negotiate their way to pay equity if they have increased access to quality 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 Suggestions include improving and expanding childcare 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 may never become available to all. Even where flexibility is possible, simply

But see Kate Andrews, *The Gender Pay Gap Reporting Measures: 2019 Update*, INST. ECON. AFFS. BRIEFING 2 (Apr. 4, 2019), <https://iea.org.uk/publications/the-gender-pay-gap-reporting-measures-2019-update> [<https://perma.cc/LV32-LYG2>] (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 thus failing "to provide any meaningful insight into equal or fair pay for men and women in the workplace").

²³⁶ *Id.* at 280-81 (reviewing other possible means of addressing gender wage gap). A complex and understudied potential intervention against the gender wage gap is the use of robots. *See* Massimo Anelli, Osea Giuntella & Luca Stella, *Robots, Marriageable Men, Family and Fertility*, 2021 J. HUM. RES. 1020 (finding that the introduction 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* Anelli, Giuntella & Stella *supra* note 236.

²³⁸ *See, e.g.,* Rani Molla, *Many People Don't Want to Work Unless From Home*, VOX (June 24, 2021, 8:20 AM EDT), <https://www.vox.com/recode/22543409/remote-work-from-home-jobs-supply-demand-hiring-platforms> [<https://perma.cc/BJ5G-AYMH>]; 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> [<https://perma.cc/WQ3C-VFNM>] (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 in 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> [<https://perma.cc/82DN-8CZC>] (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).

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 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

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 (June 19, 2021, 10:00 AM EDT), <https://www.theguardian.com/business/2021/jun/19/switch-to-more-home-working-after-covid-will-make-gender-inequality-worse> [<https://perma.cc/V964-6DKG>].

²⁴² See *supra* note 154 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., Cheryl A. Jacques, *Shear Discrimination: Bureau Survey Finds Wide Price Bias Against Women at Massachusetts Hair Salons Despite Anti-Discrimination Laws*, SEN. POST AUDIT & OVERSIGHT BUREAU (July 1997), <https://archives.lib.state.ma.us/bitstream/handle/2452/845415/ocm37357144.pdf?sequence=1&isAllowed=y> [<https://perma.cc/N8MT-4KUQ>] (finding based on a study of 192 hair salons that the majority of them charged women an average of \$5.95 more than men for a basic haircut, without regard to the length and style of the hair); Catherine Liston-Heyes & Elena Neokleous, *Gender-Based Pricing in the*

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.

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% 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

Hairdressing Industry, 23 J. CONSUMER POL’Y 107 (2000); Ian Ayres & Peter Siegelman, *Gender and Race Discrimination in Retail Car Negotiations*, in PERVERSIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 19 (Ian Ayres ed., 2001); Men Win the Battle of the Sexes, CONSUMER REPS. (Jan. 2010), <https://www.consumerreports.org/cro/2012/05/men-win-the-battle-of-the-sexes/index.htm> [<https://perma.cc/4JX9-GYH9>] (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), <https://hrc.vermont.gov/sites/hrc/files/gender-based%20pricing%20guidance.pdf> [<https://perma.cc/32JQ-PXZX>] (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*, HUFFINGTON POST (July 10, 2019, 7:59 PM), https://www.huffpost.com/entry/pink-tax-examples_1_5d24da77e4b0583e482850f0 [<https://perma.cc/R3K9-99MA>] (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).

²⁴⁶ See N.Y.C. DEP’T OF CONSUMER AFFS., GYPPED BY GENDER: A STUDY OF PRICE BIAS AGAINST WOMEN IN THE MARKETPLACE (1992) [hereinafter GYPPED BY GENDER].

²⁴⁷ See *id.* at 2.

²⁴⁸ *Id.* (finding a twenty-five percent 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*

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 for “girls” versus “boys”); eight percent for adult clothing (e.g., sweaters, socks, and underwear for “women” versus “men”), thirteen percent for personal care products (e.g., lotions, razors, and body wash for “women” versus “men”), and eight percent for senior or home health care products (e.g., incontinence products, canes, compression socks, supports, and braces for “women” versus “men”).²⁵²

In between the conduct of the two New York City Department of Consumer Affairs studies, 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

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 GYPPEd BY GENDER, *supra* note 246.

²⁵⁰ See *From Cradle to Cane*, *supra* note 7.

²⁵¹ See *id.* at 3-5.

²⁵² *Id.* at 5, 17-19.

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 1995-1996 Reg. Session (Ca. 1995); see also Analysis of AB 1100, CA. SEN. JUDICIARY COMM. 5 (Aug. 22, 1995); Ca. S. Comm. Judiciary & Sen. Select Comm. On Women, Work & Families, The “Pink Tax”: How Gender-Based Pricing Discrimination Undermines Women’s Economic Opportunity and What To Do About It, CA. S. COMM. JUDICIARY 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 [https://perma.cc/6Q65-37QF] [hereinafter *Judiciary Committee Pink Tax Report*] (referring to various antecedent studies for the 1994 California report: GENDER-BASED DISCRIMINATION IN THE LAUNDRY BUSINESS, PUBLIC L. RES. INST. (1987); CTR. FOR STUDY OF RESPONSIVE

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 annually 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-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

L., WHY WOMEN PAY MORE (1993); CA. ASSEMBLY OFF. OF RES. , A SURVEY OF HAIRCUTS & LAUNDRY SERVICES IN CALIFORNIA (1994)).

²⁵⁴ See also *Analysis of AB 1100*, *supra* note 253, at 5; *Judiciary Committee Pink Tax Report*, *supra* note 253, at 3 (explaining that this amount indexed for inflation was \$2,381 in 2020)

²⁵⁵ See *From Cradle to Cane*, *supra* note 7.

²⁵⁶ See U.S. 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 [<https://perma.cc/6Z9K-AGTH>] [hereinafter Joint Econ. Comm. Report].

²⁵⁷ *Id.* at 1, 2.

²⁵⁸ *Id.* at 1 (comparing prices at Wal-Mart 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); *id.* at 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); *id.* at 4 (comparing prices from an unnamed online retailer for a 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 *Id.* at 6-7 (discussing gendered differences in subprime mortgages and default rates); cf. *Most Large Auto Insurers Charge 40 and 60-Year-Old Women Higher Rates Than Men, Often More Than \$100 Per Year*, CONSUMER FED’N AM. (Oct. 12, 2017), https://consumerfed.org/press_release/large-auto-insurers-charge-40-60-

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 \$500,000 over the course of the average woman’s working lifetime—and other incidences of the “pink tax” discussed below.²⁶¹

3. Legislation

There are selected state laws 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 Speier, 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, difficulty or cost of providing the services.”²⁶³

In 1988, New York City adopted legislation similar to California’s; that also was limited to services (not goods) and made allowance for any

year-old-women-higher-rates-men-often-100-per-year [https://perma.cc/6K68-NUXE].

²⁶⁰ JOINT ECON. COMM. REPORT, *supra* note 256, 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, 5:30 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> [https://perma.cc/949C-DGSZ] (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); Paul Goldmith-Pinkham & Kelly Shue, *The Gender Gap in Housing Returns* 1 (Nat’l Bur. of Econ. Research Working Paper 26914), <http://www.nber.org/papers/w26914> [https://perma.cc/QRX5-4DK7] (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, *supra* note 256, at 1.

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*, *supra* note 7, 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); 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).

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

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 2022, California adopted legislation that prohibits gender-based price discrimination in “substantially similar” goods.²⁶⁷

At the federal level, United States Representative Jackie Speier (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 Speier, who previously 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 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

²⁶⁴ 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*, DAILY ORANGE (Oct. 7, 2020), <http://dailyorange.com/2020/10/new-york-passes-legislation-prohibits-gender-based-pricing> [<https://perma.cc/8CPZ-9PDP>] (quoting Professor Danielle Taana Smith).

²⁶⁷ A.B. 1287, 2022 Reg. Sess. (Ca. 2022) (adding Cal. Civ. Code § 51.14).

²⁶⁸ See Pink Tax Repeal Act, H.R. 5686, 114th Cong. (2016); H.R. 5464, 115th Cong. (2017-18); H.R. 2048, 116th Cong. (2019-20); H.R. 3853, 117th Cong. (2021-22).

²⁶⁹ See sources cited *supra* note 268.

²⁷⁰ See *Reps Spier & Reed Reintroduce Pink Tax Repeal Act to End Gender-Based Pricing Discrimination*, CONGRESSWOMAN JACKIE SPIER (Apr. 3, 2019), <https://speier.house.gov/2019/4/reps-speier-reed-reintroduce-pink-tax-repeal-act-end-gender-based> [<https://perma.cc/YLB6-GSSG>].

²⁷¹ See, e.g., *Pink Tax Repeal Act Would Ban Higher Prices Based on Gender, Like for Haircuts*, GOVTRACK (Apr. 11, 2019), <https://govtrackinsider.com/pink-tax-repeal-act-would-ban-higher-prices-based-on-gender-like-for-haircuts-f8b2db1d0f93> [<https://perma.cc/MK8L-CDH5>] (summarizing arguments of opponents of the Pink Tax Repeal Act and the history of California’s legislation).

²⁷² See *supra* notes 253-254 and accompanying text.

²⁷³ See *supra* note 7 and accompanying text.

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 “shelf price” discrimination, 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 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

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*, FED. TRADE COMM’N 1-2,

https://www.ftc.gov/system/files/documents/public_events/1588356/mosharybhatia_tuchman_updated2.pdf [<https://perma.cc/4YYH-MVJ5>] (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*, *supra* note 7.

²⁸⁰ See Lori L. Taylor & Jawad Dar, *Fairer Trade: Removing Gender Bias in US Import Taxes*, THE TAKEAWAY at Fig. 2 (March 2015), <https://oaktrust.library.tamu.edu/bitstream/handle/1969.1/153774/V6-3%20Tariff%20Discrimination%20Takeaway.pdf?sequence=1&isAllowed=y> [<https://perma.cc/MK63-N6C8>] (showing higher U.S. tariffs on women’s footwear and apparel compared to men’s); Jacobsen, *supra* note 262, at 242 (identifying gender-based differentials in tariffs as one of the explanations for the pink tax in consumer goods).

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.” Second, when “men’s” products are priced lower than the same “women’s” products, men’s experiences should be centered, with a focus on the “discount” they pay, in comparison with female consumers.²⁸⁵ Because Professor Horowitz does not seem to understand that the word “tax” can be

²⁸¹ See Steven Horowitz, *Is There Really a Pink Tax?*, FOUND. FOR ECON. EDUC. (May 13, 2015), <https://fee.org/articles/is-there-really-a-pink-tax> [<https://perma.cc/DTE2-7NW7>] (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* note 154 and accompanying text (exploring the use of the “Black tax” to refer to home 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; 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.*

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.²⁸⁶ The phrase is not linked to any discrete law reform, even though (like the other “pink tax” tropes discussed so far) this tax trope refers to *figurative* taxes, not literal ones,²⁸⁷ and it is *metonymic*, using “pink” because of its close association with girls and women.²⁸⁸ This manifestation of the “pink tax” refers, for example, to women’s expenditures for transportation due to concerns for personal safety.²⁸⁹ 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.²⁹⁰ Jerry walked to the bus stop, incurring no additional cost.²⁹¹

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.²⁹² Seventy-five percent of female respondents (compared to forty-

²⁸⁶ See, e.g., Yvette Basson, *Relative Poverty in Female Disability Grants Recipients in South Africa*, 54 DE JURE L.J. (PRETORIA) 346, 352 (2021).

²⁸⁷ See *Metonymy*, *supra* note 28 (defining metonymy).

²⁸⁸ See *supra* note 191 and accompanying text (discussing present-day association of pink with girls and women).

²⁸⁹ See, e.g., Aarian Marshall, *The Pink Transit Tax: Women Spend More Than Men to Get Around NYC*, WIRED (Nov. 12, 2018), <https://www.wired.com/story/nyc-public-transportation-pink-tax-gender-gap> [<https://perma.cc/XM8B-2P99>] (quoting Professor Sarah Kaufman 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 Sustainable Mobility for All, World Bank Grp. & German Cooperation, *Global Roadmap of Action Toward Sustainable Mobility: Gender, Sustainable Mobility for All*, WORLD BANK 2 (2019), <https://thedocs.worldbank.org/en/doc/229591571411011551-0090022019/original/GenderGlobalRoadmapofAction.pdf> [<https://perma.cc/GV4S-QKVA>] (referring to groups who are often targets of discrimination during their travels).

²⁹⁰ See *supra* note 6 and accompanying text.

²⁹¹ See *supra* notes 11-12 and accompanying text.

²⁹² See Sarah M. Kaufman, Christopher F. Polack & Gloria A. Campbell, *The Pink Tax on Transportation: Women’s Challenges in Mobility*, NYU RUDIN CTR. FOR TRANSP. (Nov. 2018),

seven percent of male respondents) said they had experienced harassment or crime when taking public transportation.²⁹³ 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.²⁹⁴ 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).²⁹⁵ In Jane's case, she commuted to work primarily by means of public transportation, but she did not feel safe walking to the bus stop, so she took a taxi.²⁹⁶ 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.²⁹⁷

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

https://wagner.nyu.edu/files/faculty/publications/Pink%20Tax%20Survey%20Results_finaldraft4.pdf [<https://perma.cc/6AH2-NXZY>].

²⁹³ *Id.* at 5. The survey treated as "female" people of "all female forms, including cis, trans and female-presenting." *Id.* at 2.

²⁹⁴ *See id.* at 5-6.

²⁹⁵ *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> [<https://perma.cc/6TUV-ZBTB>]; 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.").

²⁹⁶ *See supra* note 6 and accompanying text.

²⁹⁷ *See, e.g., The Facts Behind the #MeToo Movement: A National Study on Sexual harassment and Assault*, STOP STREET HARASSMENT 21, 25 (Feb. 21, 2018), <https://stopstreetharassment.org/our-work/nationalstudy/2018-national-sexual-abuse-report> [<https://perma.cc/YL38-GC22>] (reporting results of survey of 2,009 adults in the United States over the age of eighteen, including 996 women, in which sixty-six percent of all women reported being sexually harassed in public spaces).

company Bolt for requesting a female driver.²⁹⁸ 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 five percent of the company's drivers in Nairobi are women.²⁹⁹ Even so, 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 than a male driver to harass or victimize them.³⁰⁰ 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.³⁰¹

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,³⁰² and Jane's pink scooter and Jerry's red scooter,³⁰³ personal preference or choice, however influenced by gendered stereotypes, is the primary driver.³⁰⁴ But Jane decides to take a taxi to the bus stop for

²⁹⁸ 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> [<https://perma.cc/PK78-DT4Q>].

²⁹⁹ See *id.* (paraphrasing an explanation offered by a spokesman for Bolt).

³⁰⁰ *Id.* (quoting twenty-year-old student Malaika Cheyne).

³⁰¹ See *Global Roadmap of Action Toward Sustainable Mobility: Gender, Sustainable Mobility for All*, *supra* note 289, 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. 7, 2018), <https://www.washingtonpost.com/express/2018/12/07/do-women-face-transportation-pink-tax-dc> [<https://perma.cc/ST7F-9QAL>] (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).

³⁰² See *supra* notes 1, 8 and accompanying text.

³⁰³ See *supra* notes 7, 12 and accompanying text.

³⁰⁴ 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> [<https://perma.cc/YPY5-FWXR>] (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).

safety reasons while Jerry walks the same route³⁰⁵ Jane makes 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.³⁰⁶ 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 pink-colored products are not comparable to expenses for safety as personal "choices."

Beyond safety-related transportation expenses, related "extra" expenses associated with this genre of "pink taxes" include makeup, accessories, hairstyling products, and other personal grooming expenditures to conform to traditional gendered expectations for a "feminine" appearance.³⁰⁷ This version of the "pink tax" may be especially salient for some trans people, who may also incur legal fees associated with name changes or medical treatments.³⁰⁸ 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."³⁰⁹ Thus, this manifestation of the "pink tax" has racial dimensions that the phrase does not necessarily capture.

³⁰⁵ See *supra* notes 6, 11-12 and accompanying text.

³⁰⁶ See Kaufman, Polack & Campbell, *supra* note 292.

³⁰⁷ See, e.g., Elaine Showalter, *In Hope She Didn't Trust*, TIMES LITERARY SUPP. (July 3, 2020), <https://go.gale.com/ps/i.do?id=GALE%7CA632220997&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=0307661X&p=LitRC&sw=w&userGroupName=29002> [https://perma.cc/U7FF-AFBV] (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); Aishwarya Murthy, *Capitalism & Patriarchy: The Cost of Being a Woman—The Pink Tax*, WOMEN UNBOUNDED (Jan. 21, 2021), <https://www.womenunbounded.com/post/capitalism-patriarchy-the-cost-of-being-a-woman-the-pink-tax> [https://perma.cc/AKP6-N36R] (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").

³⁰⁸ See, e.g., Emily VanDerWerff, *The Assimilationist, or: On the Unexpected Cost of Passing as a Trans Woman*, VOX (Feb. 19, 2020: 6:50 AM), <https://www.vox.com/the-highlight/2020/2/12/21075683/trans-coming-out-cost-of-womanhood-pink-tax> [https://perma.cc/VRN3-M54X] (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").

³⁰⁹ 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).

D. Time and Caretaking

A fourth figurative and metonymic usage of the phrase “pink tax” 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 older adults, typically after they have completed the day’s or week’s wage labor in the paid market.³¹⁰ “Pink tax” is another way to describe the second shift.³¹¹ In the context of the COVID-19 pandemic, author Saba Karim Khan has called virus-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.³¹² 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 to describe the pandemic’s gendered impacts.³¹³

³¹⁰ 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. 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).

³¹¹ See, e.g., 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 A PANDEMIC* 101 (Andrea O’Reilly & Fiona Joy Green eds., 2021) (citing work of Arlie Hochschild).

³¹² See, e.g., Saba Karim Khan, *Pink Tax*, DAWN (May 28, 2020), <https://www.dawn.com/news/1559852> [<https://perma.cc/S6YP-JP47>]; see also Khan, *supra* note 311.

³¹³ For an excellent overview of the many ways that the COVID-19 pandemic disproportionately impacted women in the United States, see, for example, Naomi R. Cahn & Linda L. McClain, *Gendered Complications of COVID-19: Toward a Feminist Recovery Plan*, 22 GEO. J. GENDER & LAW, 1, 3-4 (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” and that “[t]he 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).

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.³¹⁴ This “pink tax” is *metonymic*; it invokes a color stereotypically associated with cis girls and cis women, many of whom use menstrual products.³¹⁵ More commonly, though, the tax on menstrual products is known as the “tampon tax.”³¹⁶ In that grammatical form, the tax trope is *synecdochic*—using “tampon” as a stand-in for all menstrual products that are subject to sales tax.³¹⁷ 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.³¹⁸

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 four states (New Hampshire, Oregon, Delaware, and Montana) that have no state-wide sales tax at all.³¹⁹ In forty-five states and the District of Columbia, state sales tax is imposed on the sale of tangible property such as books, paperclips, or toys.³²⁰ Thirty-six states allow additional sales tax to be collected at the local

³¹⁴ See Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 442 (2019) [hereinafter *The Unconstitutional Tampon Tax*] (defining the “tampon tax”).

³¹⁵ It is important to acknowledge that not all cis women use menstrual products, and not all users of menstrual products are cis women. See, e.g., BRIDGET J. CRAWFORD & EMILY GOLD WALDMAN, *MENSTRUATION MATTERS: CHALLENGING THE LAW’S SILENCE ON PERIODS* 11 (2022) [hereinafter *MENSTRUATION MATTERS*] (“[B]iology, 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); Margaret E. Johnson, Emily Gold Waldman & Bridget J. Crawford, *Title IX and Menstruation*, 43 HARV. J. L. & GENDER 225, 268 (2020) (“[N]ot all girls and women menstruate, [and] . . . not all who menstruate are girls or women”).

³¹⁶ See *The Unconstitutional Tampon Tax*, *supra* note 314, at 442.

³¹⁷ See *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.

³¹⁸ See *supra* notes 27-28 and accompanying text.

³¹⁹ Alex Raut, *States Without Income Taxes Rely on Varying Forms of Revenue*, TAX FOUND. (Apr. 26, 2012), <https://taxfoundation.org/states-without-income-taxes-rely-varying-forms-revenue> [<https://perma.cc/NU3C-92LR>] (explaining that Alaska, Delaware, Oregon, Montana, and New Hampshire have no sales tax).

³²⁰ See, e.g., Arthur R. Rosen & Walter Nagel, *Sales and Use Taxes: General Principles*, 1300 TAX MGMT. SALES & USE TAX PORTFOLIOS (BNA) 1300:01

level.³²¹ Alaska has no state-wide sales tax but permits localities to collect sales taxes.³²² Generally speaking in state or local sales tax systems, all sales are subject to taxation unless the property has been specifically exempted. 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-three states, menstrual products are subject to sales tax because they have not been specifically exempted.³²⁴ Although approximately half of 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, Professor Emily Gold Waldman and I have argued that this manifestation of the pink tax is both discriminatory and unconstitutional.³²⁶

(“What is a Sales Tax?”) (explaining how states impose, calculate, and collect state sales taxes).

³²¹ *The State of State (and Local) Tax Policy*, TAX POLICY CENTER, <https://www.taxpolicycenter.org/briefing-book/how-do-state-and-local-sales-taxes-work>.

³²² See Raut, *supra* note 319.

³²³ See Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination and Human Rights*, 2017 WIS. L. REV. 491, 500-06 (explaining and providing examples of different U.S. state sales tax classifications); *The Unconstitutional Tampon Tax*, *supra* note 314, at 449-53 (describing the “necessity”/“luxury” dichotomy in state sales taxes).

³²⁴ See *Tax Free. Period. State Scoreboard*, PERIOD LAW, <https://www.periodlaw.org> [<https://perma.cc/R3LZ-6PN>] (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 DEP’T (July 2013), <https://tax.wv.gov/Documents/TSD/tsd419.pdf> [<https://perma.cc/6BNX-73RZ>] (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 “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> [<https://perma.cc/P8S3-RAKQ>] (scrolling over interactive map to reveal items that are taxed in the various states that maintain sales tax on menstrual products).

³²⁶ See MENSTRUATION MATTERS, *supra* note 315, at 42-48 (providing an overview of the argument that the tampon tax is unconstitutional); *The Unconstitutional Tampon Tax*, *supra* note 314, at 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),

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 as financially 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, a menstruating individual will spend, on average, \$6,360 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 tax rates range from 2.9% to 7.25%, 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

<https://www.law.com/newyorklawjournal/2020/07/22/tampons-and-pads-should-be-allowed-at-the-bar-exam> [<https://perma.cc/M5JH-5Y3S>] (making the related argument that bans on menstrual products at the bar exam are an unconstitutional form of discrimination); Bridget J. Crawford, *Menstruation and the Bar Exam: Unconstitutional Tampon Bans*, 41 COLUM. J. GENDER & L. 63 (2021) (same); Marcy L. Karin, 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 Allison Sadlier, *New Research Reveals How Much the Average Woman Spend Per Month on Menstrual Products*, SWNS DIGITAL (Sept. 6, 2021), <https://swnsdigital.com/us/2019/11/new-research-reveals-how-much-the-average-woman-spends-per-month-on-menstrual-products/> [<https://perma.cc/X9AM-VTFD>].

³²⁹ See *id.* See also Jordan Gass-Poore', *Citing Gender Bias, State Lawmakers Move to Eliminate "Tampon Tax,"* NPR (Mar. 6, 2016, 1:00 PM ET), <https://www.npr.org/2016/03/06/467377295/citing-gender-bias-state-lawmakers-move-to-eliminate-tampon-tax> [<https://perma.cc/LG3C-D479>] (providing an estimate of average number of menstrual cycles over a lifetime and the cost of menstrual products alone).

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 data on 2018 spending: \$1.04 billion on tampons, \$1.76 billion on pads and \$630 million on menstrual cups).

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

³³² See, e.g., Janelle Cammenga, *State and Local Sales Tax Rates*, TAX. FOUND. 1 (2021), <https://files.taxfoundation.org/20210106094117/State-and-Local-Sales-Tax-Rates-2021.pdf> [<https://perma.cc/S2UZ-5MGC>] (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 (9.55%) and the lowest in Hawaii (4.44%)). Both Tennessee and Hawaii impose a sales tax on menstrual products. See State Scoreboard, TAX-FREE PERIOD, <https://www.taxfreeperiod.com/> [<https://perma.cc/TAV3-P3QF>]

consumer, the cumulative tax expenditure on top of the expenses for the products is consequential; menstruation occurs regularly for several days 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, collected approximately \$6.3 million in tampon taxes each year,³³⁴ while 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 is incomplete. It does not fully capture the full range of human experiences. Trans women, some gender non-binary people, and post-menopausal cis women do not use menstrual products and thus will not be subject to this particular form of the “pink tax.” So, though 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

(listing Tennessee and 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, but exempt from taxation products like Viagra and condoms. *See* MENSTRUATION MATTERS, *supra* note 315, at 35, 54 (explaining that the “tampon tax” state sales taxes imposed on menstrual products in approximately twenty-seven states); *The Unconstitutional Tampon Tax*, *supra* note 314, at 465, 476 (referring to sales tax exemptions for Viagra and spermicidal condoms).

³³³ *See* Off. on Women’s Health, *What Happens During the Typical 28-Day Menstrual Cycle?*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <https://www.womenshealth.gov/menstrual-cycle/your-menstrual-cycle> [<https://perma.cc/9FCG-LHY6>] (“On average, women get a period for about 40 years of their life.”); *The Unconstitutional Tampon Tax*, *supra* note 314, at 455 (estimating that the average user of menstrual products will spend between \$20 and \$145 over a lifetime on tampon taxes).

³³⁴ *See* David Eggert, *Michigan Will No Longer Tax Tampons, Other Feminine Products*, AP NEWS (Nov. 4, 2021), <https://apnews.com/article/business-health-michigan-gretchen-whitmer-sales-taxes-719fd55af1d384adff71ff419f468afb> [<https://perma.cc/DMU6-MVMY>] (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 v. 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* Section II.A.

³³⁷ *See supra* Section II.B.

³³⁸ *See supra* Section II.C.

³³⁹ *See supra* notes 3, 5 and accompanying text.

products—the same tropes fail to convey the nuances of the particular discrimination that advocates seek to remedy.³⁴⁰

* * *

This Part has explained how 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 of 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 in printed books.³⁴³ Mentions of the “soda tax” are more frequent than the “nanny tax,” the “pink tax” or the “Black tax.”³⁴⁴ As shown in Figure 6, the frequency of use of “pink tax” trope has seen a dramatic uptick since 2014.³⁴⁵ To be sure, media mentions, standing alone, do not necessarily accurately reflect public interest or understanding; media companies perform a gatekeeping function.³⁴⁶ Yet to the extent that almost everyone relies on external sources for some information, frequency of media mentions are indicative of what information likely is being consumed.³⁴⁷

³⁴⁰ See *The Unconstitutional Tampon Tax*, *supra* note 314.

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

³⁴² See *supra* Section I.D.

³⁴³ See *infra* Figure 5.

³⁴⁴ See *id.*

³⁴⁵ See *infra* Figure 6 and Figure 8.

³⁴⁶ See, e.g., PAMELA J. SHOEMAKER & TIM P. VOS, GATEKEEPING THEORY 4 (2009) (explaining that media companies make complex decisions about what information is presented to the public and that “issues and events that are not covered are absent from the worldview of most audience members”).

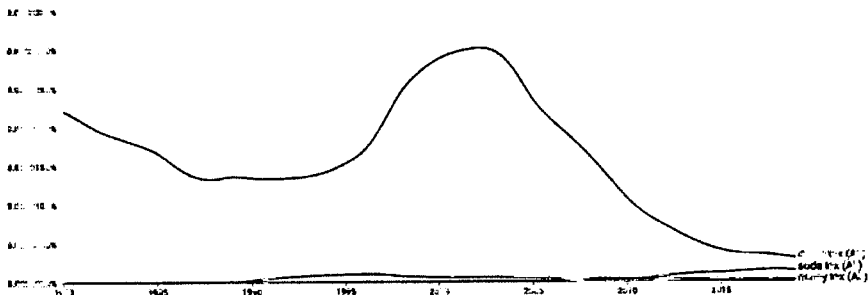
³⁴⁷ See *id.*

A. Five General Tax Tropes

To contextualize the frequency of use of the five tax tropes studied here, consider first the number of times each were mentioned in books between 1980 and 2019.³⁴⁸ A Google Ngram analysis reveals that from an all-time high in 2002, book mentions of the “death tax” have declined steadily, but the “death tax” has greater current circulation than any of the other five tropes.³⁴⁹

Figure 5

Frequency of Mentions of “Death Tax,” “Nanny Tax,” and “Soda Tax” in Books, 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 that trend appears to be continuing.³⁵⁰

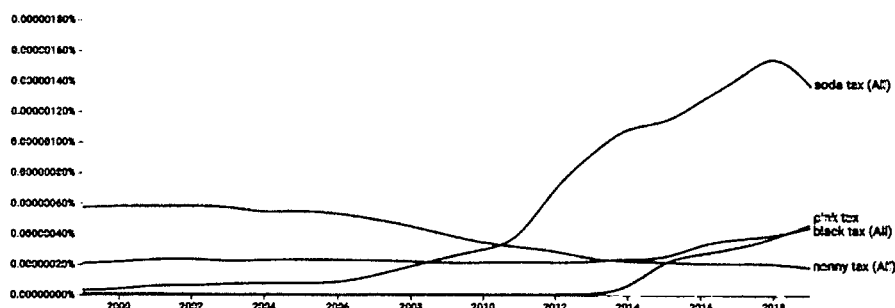
³⁴⁸ GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams/graph?content=death+tax%2C+nanny+tax%2C+soda+tax%2C+Black+tax%2C+pink+tax&year_start=1980&year_end=2019&corpus=26&smoothing=3&case_insensitive=true [https://perma.cc/T3ZF-ASF4] (setting search parameters to years “1980-2019,” “English (2019),” “Case-Insensitive” and “Smoothing of 3” and searching “death tax, nanny tax, soda tax, Black tax, pink tax”).

³⁴⁹ See *infra* Figure 5.

³⁵⁰ GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams/graph?content=nanny+tax%2C+soda+tax%2C+Black+tax%2C+pink+tax&year_start=1999&year_end=2019&corpus=26&smoothing=3&case_insensitive=true [https://perma.cc/WX7X-MLHN] (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. See also Figure 8.

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 2014 makes sense; in that year *Cosmopolitan* magazine co-sponsored a petition entitled “No Tax on Tampons: Stop Taxing Our Periods! Period.” to draw attention to the injustice of U.S. state sales taxes on menstrual products.³⁵¹ The new attention to the injustice of those sales taxes also marked the start of an era of activism around other products-based reform including efforts to make menstrual products available in schools, jails, and other public facilities.³⁵²

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 to almost everyone, given that everyone dies.³⁵³ 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.³⁵⁴ Because approximately half of the U.S. population is “female,” details about the wage gap, gender-based pricing differentials, or other

³⁵¹ See *The Unconstitutional Tampon Tax*, *supra* note 314, at 456-68 (describing the origins of twenty-first century menstrual equity activism in the United States).

³⁵² See, e.g., *Schools and Menstruation*, in *MENSTRUATION MATTERS*, *supra* note 315, at 59 (describing advocacy around menstrual products in schools); *Periods in Public*, in *MENSTRUATION MATTERS*, *supra* note 315, at 86 (describing advocacy to make menstrual products available in jails, prisons, and other public buildings).

³⁵³ See *supra* notes 79-80 and accompanying text.

³⁵⁴ 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> [<https://perma.cc/3SKN-ZVVN>] (reporting rates of consumption of sugar sweetened beverages in 2014).

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” language to be in circulation at a level similar to that of the “soda tax,” but it is not.³⁵⁵

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 of 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%, according to U.S. 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 twenty-eight percent.³⁵⁶ To be sure, of the five tax tropes, the “nanny tax” applies to the fewest people.³⁵⁷ There are roughly 821,000 private household workers in the United States.³⁵⁸ 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.³⁵⁹ 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

³⁵⁵ Quick Facts, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/LFE046219>

[<https://perma.cc/ZA4H-PU5V>] (providing population estimates as of July 1, 2021 under “All Topics” and “Age and Sex” to show that “female persons” represent 50.8% of the population).

³⁵⁶ *Id.* (showing under “All Topics” and “Race and Hispanic Origin” that the percent of persons identified as “Black or African American alone” is 13.4 percent and persons identified as “two or more races” is 2.8 percent). *But see Historical Census Statistics On Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For the United States, Regions, Divisions, and States*, U.S. CENSUS BUREAU at Table A-1, <https://www.census.gov/content/dam/Census/library/working-papers/2005/demo/POP-twps0076.pdf> [<https://perma.cc/X4QP-4KM8>] (showing Blacks as a percentage of the total population ranging from a high of 19.3 percent in 1790 to a low of 9.7% in 1930); *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin: April 1, 2010 to July 1, 2019*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-detail.html> [<https://perma.cc/387Q-SG5E>] (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%).

³⁵⁷ See *Private Households: NAIC 814*, *supra* note 58.

³⁵⁸ See *id.*

³⁵⁹ See *id.*

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; 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.³⁶⁰ To understand more about the diverse usages of “pink tax,” I conducted seven different searches across two different databases: Dow Jones’ Factiva and HeinOnline’s Core Law Journal Library.³⁶¹ At best, these figures might serve as an imperfect and 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.

³⁶⁰ See *supra* notes 186-190 and accompanying text.

³⁶¹ All searches were conducted on November 5, 2022.

Figure 7

Frequency and Nature of "Pink Tax Term" Usage

Search	Number of Separate Results in Dow Jones Factiva ³⁶²	Number of Separate Articles in HeinOnLine U.S. Law Journal Library ³⁶³
"pink tax"	893	38
"pink tax" SAME (wage* OR earning* OR salar*)	221	0
"pink tax" SAME (different* OR higher) AND price* AND (good* or service*)	138	0
"pink tax" SAME (transport* OR "make-up" OR makeup OR hair)	99	0
"pink tax" SAME mother* AND (household OR children OR time)	37	0
"pink tax" SAME (tampon* OR sanitary or "feminine hygiene" OR hygiene OR menstrua* OR "tampon tax")	234	0
"tampon tax" NOT "pink tax"	687	59

As an initial observation, there appears to be more attention to the "pink tax" in general media than in legal literature.³⁶⁴ Contributing factors may include the greater number of major newspapers, magazines, trade publications, and the like, compared to law reviews or journals;³⁶⁵ a perceived

³⁶² Within the Factiva database, the search was restricted as to language (English) and region (the United States). "Duplicates: Similar" was selected.

³⁶³ Within the HeinOnLine Law Journal Library database, the search was unrestricted by date, section type or title. Each query returned the indicated number of sources (results on file with the author). For searches in HeinOnLine, "/"p" replaced "SAME" because the search functions differ slightly across the two databases.

³⁶⁴ See *supra* Figure 7.

³⁶⁵ In the HeinOnLine Law Journal Library, there are more sources than in the Factiva database. Compare Core Law Journal Library, HEINONLINE (containing 3,137 titles) with Factiva, DOW JONES (containing over 32,000 sources). The earliest mention of the "pink tax" in the law review literature appears to be in 2010. See Infanti, *Taxing Civil Rights Gains*, *supra* note 35, at 343 n.94 (quoting a poster to an

catchiness of the phrase for popular, but not academic, communications; the relatively small number of tax law professors in the legal academy compared to faculty teaching and writing articles about, say constitutional law;³⁶⁶ 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.³⁶⁷ Still another explanation might be the relatively small number of tax scholars working in the critical tax tradition generally and on gender issues within that tradition.³⁶⁸

internet forum calling for the imposition of a new tax on gay men called the “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 calling the tampon tax 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 GLOBE (Jan. 9, 2015), <https://www.bostonglobe.com/business/2015/01/09/gillette-introduce-new-razor-for-women/y1tcVwXvir6qi58MrRTmWO/story.html> [<https://perma.cc/MDH4-99KE>] (referring to gender-based pricing differentials in consumer goods). The earliest mention of the “pink tax” in books comprising 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); JOSEPH QUINLAN & JACKIE VANDERBRUG, *GENDER LENS INVESTING: UNCOVERING OPPORTUNITIES FOR GROWTH, RETURNS, AND IMPACT* (2016) (published Nov. 7, 2016); see also generally Michel et al., *supra* note 65 (describing Google Ngram’s corpus of four percent of all books ever in print).

³⁶⁶ See, e.g., AM. ASS’N OF L. SCHS., *DIRECTORY OF LAW TEACHERS*, (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) (on file with the author).

³⁶⁷ I determined the percentage of tax law professors who are female by taking the list of fifteen pages of faculty members 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) (on file with the author).

³⁶⁸ 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 “[i]f the one thing that everyone seems to agree on is the youth and outsider status of the

Second, the database searches reveal that the “tampon tax” has currency as a standalone *synecdochic* reference to *literal* taxes; 687 sources in the Factiva database use the phrase “tampon tax” without mentioning the “pink tax,” compared to 893 separate sources containing any reference at all to the “pink tax.”³⁶⁹ Similarly in law reviews and journals, there are also more sources that mention the “tampon tax” without the “pink tax” (fifty-nine) than the “pink tax” (thirty-eight), but the difference is much smaller.³⁷⁰ Both search results suggests that in both the popular and scholarly imaginations, the “tampon tax” is not necessarily understood or discussed in the context of other manifestations the “pink tax.”³⁷¹

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” in general sources 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.”³⁷² There appear to be few materials in general sources (Factiva) and none in U.S. law reviews and journals (the Core U.S. Law Journals) that use the “pink tax” to describe time-based burdens experienced disproportionately by individuals with responsibility for households and/or caretaking.³⁷³

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.³⁷⁴

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

critical tax movement” but suggesting that critical tax scholarship is far from a “marginal” movement, as its detractors claim).

³⁶⁹ See *supra* Figure 7.

³⁷⁰ *Id.*

³⁷¹ See e.g., Jorene Ooi, Note, *Bleeding Women Dry: Tampon Taxes and Menstrual Inequity*, 113 NW. U. L. REV. 109 (2018).

³⁷² See *supra* Figure 6.

³⁷³ See *supra* Figure 6.

³⁷⁴ 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 *supra* notes 94-98 and accompanying text.

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.³⁷⁵ The decision to focus on law is grounded in the understanding of tax tropes as a vernacular for protest.³⁷⁶ 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.³⁷⁷ 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.³⁷⁸ But

³⁷⁵ See, e.g., *supra* notes 94-98 and accompanying text (discussing misperception bias as regards the estate tax). On other tax metaphors, see, for example, Infanti, *Taxing Civil Rights Gains*, *supra* note 35, at 340, which references other tax metaphors such as the “gender tax,” “ethnicity tax,” and “gay tax”; Jeff Strnad, *Conceptualizing the “Fat Tax”: The Role of Food Taxes in Developed Economies*, 78 S. CAL. REV. 1221 (2005), which describes 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, *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> [<https://perma.cc/G368-SPT8>], which refers 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.

³⁷⁶ See *supra* notes 32-33 and accompanying text.

³⁷⁷ See *supra* notes 50-55 and accompanying text.

³⁷⁸ See *supra* notes 50-55 and accompanying text.

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.³⁷⁹ Other possible explanations are 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.³⁸⁰ Another possible explanation is that there are more 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.³⁸¹ The reasons for non-compliance with “nanny tax” obligations are not well understood.³⁸²

³⁷⁹ See *supra* notes 56-57 and accompanying text.

³⁸⁰ See Charles P. Rettig et al., *Internal Revenue Service Data Book*, INTERNAL REV. SERV. 33 (2021), <https://www.irs.gov/pub/irs-pdf/p55b.pdf> [<https://perma.cc/GD9J-P7YL>] (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 *IRS Audits Poorest Families at Five Times the Rates for Everyone Else*, TRAC IRS (Mar. 8, 2022), <https://trac.syr.edu/tracirs/latest/679> [<https://perma.cc/Z8U7-GH9U>] (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 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> [<https://perma.cc/4ZCU-UNRR>].

³⁸¹ 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> [<https://perma.cc/5DLS-24XR>]; *Immigrant Share of U.S. Population Nears Historic High*, PEW RSCH. 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 [<https://perma.cc/C5AM-JNMU>] (showing that the foreign-born population of the United States was 13.7% in 2018, compared to less than 10% in the mid-1990s).

³⁸² Attorney Fay Vincent has opined, “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*

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.³⁸³ 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.³⁸⁴ 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 \$12.92 million per person (or \$25.84 million for married couples).³⁸⁵

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.³⁸⁶

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”

Killed or Cured, TCPALM (Mar. 2, 2017), <https://www.tcpalm.com/story/opinion/contributors/2017/03/02/guest-column-nanny-tax-should-killed-cured/98628378> [<https://perma.cc/9T3Y-6XCK>].

³⁸³ See *supra* notes 85-89 and accompanying text.

³⁸⁴ 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> [<https://perma.cc/2W8R-LWUG>] (discussing failed legislation to repeal the estate tax in 2006); Thompson, *supra* note 96 (discussing ongoing focus by some Republicans on estate tax repeal).

³⁸⁵ See *supra* notes 91-93 and accompanying text.

³⁸⁶ See, e.g., Joseph Brownstein, *Lack of Estate Tax in 2010: Now Cheaper to Die?* ABC NEWS (Dec. 23, 2009, 6:48 PM), <https://abcnews.go.com/Health/HealthCare/lack-estate-tax-2010-now-cheaper-die/story?id=9412614> [<https://perma.cc/UM82-5K6E>] (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”).

in at least eight U.S. cities—and fierce opposition to similar laws in places like New York City—in the twenty-first century.³⁸⁷ 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.³⁸⁸ 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.³⁸⁹

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.”³⁹⁰ Unfortunately, it can claim no direct link to legal reform.³⁹¹ Historically speaking, “Black tax” rhetoric, dating from the 1950s, did not bring an end to slavery.³⁹² Nor did the tax trope play a role in the repeal of poll taxes or compulsory government levees imposed on the basis of race.³⁹³ The “Black tax” exists in the form of marketplace fees and pricing discrimination, despite, for example, fair-lending laws.³⁹⁴ And it is difficult to imagine a law that effectively addresses everyday instances of racism and white supremacy.³⁹⁵ 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

³⁸⁷ See *supra* notes 117-135 and accompanying text; see also *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> [<https://perma.cc/GML9-M997>] (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).

³⁸⁸ See *supra* notes 113-115 and accompanying text (explaining the difference between an excise tax and a sales tax).

³⁸⁹ See *supra* notes 145-146 and accompanying text.

³⁹⁰ See *supra* Section I.D.

³⁹¹ Given the mid-century origins of the phrase “Black tax” to describe racial inequalities, legal reforms prior to this era have no connection to the tax metaphor. See *supra* Section I.D. 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; Orville Vernon Burton, *Tempering Society’s Looking Glass: Correcting Misconceptions About the Voting Rights Act of 1965 and Securing American Democracy*, 76 LA. L. REV. 1 (2015).

³⁹² See *supra* note 156 (discussing early usage of the phrase “Black tax”).

³⁹³ See *supra* notes 162-168 and accompanying text.

³⁹⁴ See *supra* note 149-151 and accompanying text (discussing marketplace discrimination).

³⁹⁵ See *supra* note 149 (discussing this meaning of the “Black tax”).

“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.³⁹⁶

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.³⁹⁷ In these cases, the phrase may have influenced taxpayer behavior, but not in a positive way.

³⁹⁶ See, e.g., Ovetta Wiggins, *States are Banning Discrimination Against Black Hairstyles. For Some Lawmakers, it's Personal.*, WASH. POST (Mar. 16, 2020, 7:18 PM EDT), https://www.washingtonpost.com/local/md-politics/maryland-bill-crown-act-hairstyles-discrimination/2020/03/12/c3b81582-5f05-11ea-b014-4fafa866bb81_story.html [<https://perma.cc/XL2P-6MEL>] (listing multiple states that have passed laws that expand discrimination laws to protect “Afro hairstyles, and protective hairstyles such as braids, twists and locs”); 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); *supra* (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”).

³⁹⁷ See *supra* notes 172-180 and accompanying text.

E. Pink Tax

Turning now to the “pink tax,” evaluating the trope’s success requires distinguishing among its different meanings. Generally speaking, the term has come to prominence only in the last six years or so.³⁹⁸ 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 Paycheck Fairness Act of 1997.³⁹⁹ 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.⁴⁰⁰

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.⁴⁰¹ Similar federal legislation may eventually advance in Congress.⁴⁰² 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.⁴⁰³

³⁹⁸ See, e.g., *supra* Figure 6; MENSTRUATION MATTERS, *supra* note 315, at 34-58 (tracing menstrual advocacy around the “tampon tax”).

³⁹⁹ See *supra* notes 216-224 and accompanying text.

⁴⁰⁰ See https://heinonline.org/HOL/LuceneSearch?specialcollection=leghisdb&typea=bill_number&termsa=&operator=AND&typeb=congress&termsb=&operatorb=AND&typec=doctitle&termc=pink+tax&operatorc=AND&typed=bill_number&termsd=&operatord=AND&typee=bill_number&termse=&operatore=AND&typef=bill_number&termsf=&collection=leghis&journal=ALL&only_vol=&collection_true=&searchtype=field&submit=Search§ions=any [https://perma.cc/46EV-2T2M] (returning no results for “pink tax” in the U.S. Federal Legislative History Library); See also Legislative History of the Equal Pay Act of 1963, Pub. 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, Pub. L. 88-353; 155 Cong. Rec. H127-32 (daily ed. Jan. 9, 2009) (statements of multiple representatives) (no mentions of the “pink tax”).

⁴⁰¹ See *supra* notes 262-275 and accompanying text.

⁴⁰² See *supra* notes 268-271 and accompanying text.

⁴⁰³ 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 noting 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”).

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.⁴⁰⁴

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 8.⁴⁰⁵ 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 people in need.⁴⁰⁶ 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.⁴⁰⁷ 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.⁴⁰⁸ In a short period of time, the “tampon tax” has gathered a uniquely descriptive and instrumental force.⁴⁰⁹

⁴⁰⁴ See *supra* note 391 and accompanying text.

⁴⁰⁵ GOOGLE BOOKS NGRAM VIEWER, https://books.google.com/ngrams/graph?content=pink+tax%2C+tampon+tax&year_start=2015&year_end=2019&corpus=26&smoothing=3&case_insensitive=true [https://perma.cc/7XQD-KGYS] (setting search parameters to years “2015-2019,” “English (2019),” “Case-Insensitive” and “Smoothing of 3” and searching “pink tax, tampon tax”).

⁴⁰⁶ See *supra* note 340 and accompanying text; 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).

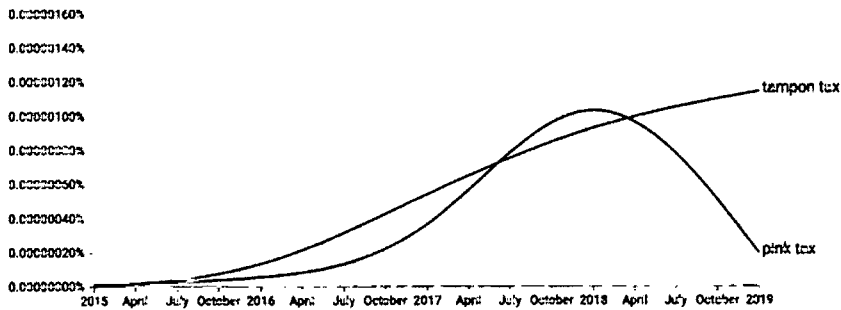
⁴⁰⁷ See, e.g., MENSTRUATION MATTERS, *supra* note 315, at 34-58 (describing efforts that have led to the repeal of state sales taxes on menstrual products in California, Connecticut, Florida, Illinois, Louisiana, Michigan, Nevada, New York, Ohio, Rhode Island, Utah, Vermont, Washington, and Washington, D.C.).

⁴⁰⁸ See *id.*

⁴⁰⁹ See *id.*; see also *infra* Figure 9.

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.⁴¹⁰ 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.⁴¹¹

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

⁴¹⁰ See *supra* Section IV.B.

⁴¹¹ See, e.g., Crawford & Waldman, *supra* note 406, at 1592-93 (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 Deploying 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.⁴¹² 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.⁴¹³ But it is unclear that tax tropes referring to figurative taxes can command the attention of 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”).⁴¹⁴ 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.⁴¹⁵ “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).⁴¹⁶ 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.⁴¹⁷ 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.⁴¹⁸ After all, the image suggests that the government is depriving well-dressed and scrubbed children an occasional treat.⁴¹⁹ It lands differently than an

⁴¹² See *supra* Figure 9.

⁴¹³ See Jones *supra* note 31.

⁴¹⁴ See *supra* Figure 8 (showing frequency of usage of the “pink tax” and “tampon tax” tropes).

⁴¹⁵ See also *The Unconstitutional Tampon Tax*, *supra* note 314, at 486-87 (discussing the salience of the tampon tax and its easily quantifiable harms).

⁴¹⁶ See *supra* Section I.B.

⁴¹⁷ 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); *supra* notes 76-79, 94.

⁴¹⁸ See *supra* notes 108-109 and accompanying text.

⁴¹⁹ See *supra* Figure 2.

image urging voters to support a soda tax by showing an obese young person drinking soda.⁴²⁰

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 likely reasons that metonymic tropes for figurative taxes—“Black tax,” “pink tax,” “crip tax,” and “trans tax”—exist in the first place.⁴²¹ To be sure, no law can eliminate the psychological harms of everyday discrimination.⁴²² But when a phenomenon like the gender wage gap persists despite laws like the Equal Pay Act of 1963,⁴²³ the Civil Rights Act of 1964⁴²⁴ and the Lily Ledbetter Fair Pay Act of 2009,⁴²⁵ and civil rights laws do not adequately protect Black Americans from disproportionate violence at the hands of police officers,⁴²⁶ one wonders whether the law alone can ever adequately remedy the figurative taxes that some tax tropes identify.

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.⁴²⁷ 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-

⁴²⁰ See, e.g., Melina Packer, *Soda Policies and Social Anxieties*, BERKELEY J. SOC. (May 19, 2016), <http://berkeleyjournal.org/2016/05/soda-policies-and-social-anxieties> [<https://perma.cc/5DNV-WG9X>] (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).

⁴²¹ See, e.g., *Morning Edition*, *supra* note 154 (describing ongoing discrimination against Blacks in real estate transactions).

⁴²² See Renee Nicole Allen, *From Academic Freedom to Cancel Culture: Silencing Black Women*, 68 UCLA L. REV. 364, 392 (2021) (detailing particular aspects 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”).

⁴²³ See *supra* notes 215–216 and accompanying text.

⁴²⁴ See *supra* note 218 and accompanying text.

⁴²⁵ See *supra* notes 223–224 and accompanying text.

⁴²⁶ 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 e0141854 (2015) (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”).

⁴²⁷ See *supra* note 408 and accompanying text.

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.⁴²⁸ The other forms of the “pink tax” persist despite applicable laws, as is the case with the gender wage gap,⁴²⁹ have far less clear legal solutions, such as spending for safety-related travel or other “extras,”⁴³⁰ or they might not properly be subject to direct legislation at all, as in the case of disproportionate time burdens on those responsible for households or caregiving⁴³¹ 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).⁴³²

Given that “pink tax” tropes are useful shorthand for some manifestations of gender inequality, it is not necessary to 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

⁴²⁸ See MENSTRUATION MATTERS, *supra* note 315, at 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).

⁴²⁹ See *supra* Section II.A.

⁴³⁰ See *supra* Section II.C.

⁴³¹ See *supra* Section II.D.

⁴³² See *supra* Section II.B.

“girls” and “women” and blue is for “boys” and “men,” or that those gender binaries have significant ongoing utility.⁴³³ In the case of the “pink tax,” rejecting the term itself might be one step toward gender equality.⁴³⁴

Gender equality jurisprudence, broadly understood, necessarily and properly rejects deeply rooted stereotypes about what “men” and “women” are capable of doing or accomplishing.⁴³⁵ Just as gender equality jurisprudence evolves, so does the language it uses. What was initially known as “sex discrimination” came to be known as “gender discrimination.”⁴³⁶ 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.⁴³⁷ 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.

⁴³³ See *supra* note 304 and accompanying text.

⁴³⁴ 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*, *supra* note 201, at 4-5 (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”).

⁴³⁵ On anti-stereotyping in equality jurisprudence, see, for example, Mary Ann Case, *Feminist Fundamentalism as an Individual and Constitutional Commitment*, 19 AM. U. J. GENDER, POL’Y & L. 549, 560 (2011), which explains that “[t]hrough a consistent line of Supreme Court cases over my lifetime, we in the 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).

⁴³⁶ 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> [<https://perma.cc/5R2Y-GA7W>] (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.*

⁴³⁷ *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731 (2020).