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FILING WHILE BLACK: THE CASUAL RACISM OF THE TAX LAW*

Steven A. Dean**

I. INTRODUCTION

The tax law's race-blind approach produces bad tax policy.¹ This Essay uses three very different examples to show how failing to openly and honestly address race generates bias, and how devastating the results can be.² Ignoring race does not

* This Essay is adapted from testimony given before the Committee on Ways and Means of the U.S. House of Representatives on June 10, 2021.

** © 2022 Steven A. Dean. Steven Dean has been a professor at Brooklyn Law School since 2004. His work focuses on the causes and consequences of inequality both domestically and globally, with a particular focus on tax policy and an emphasis on anti-Black racism. In addition to law review articles and essays in journals such as the *NYU Law Review* and the *Emory Law Journal*, Dean has written for a range of publications including *The Nation*. He has coauthored three books with other Brooklyn Law professors: *For-Profit Philanthropy: Elite Power and the Threat of Limited Liability Companies, Donor-Advised Funds, and Strategic Corporate Giving* (Oxford University Press forthcoming) and *Social Enterprise Law: Trust, Public Benefit and Capital Markets* (Oxford University Press 2017) with Dana Brakman Reiser and *Federal Taxation of Corporations and Corporate Transactions* (Aspen Publishers 2018) with Brad Borden. He hosted the podcast The Tax Maven. He has testified before the U.S House Ways and Means Committee and been a consultant to the Organization for Economic Cooperation and Development.

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¹ Jeremy Bearer-Friend, *Colorblind Tax Enforcement*, 97 N.Y.U. L. REV. (forthcoming 2022) (“[R]acial animus, implicit bias, and transmitted bias from non-tax policies . . . predict racial bias in a variety of tax enforcement settings even without asking taxpayers to identify their race . . .”).

² Bearer-Friend's work describes the processes by which bias affects the way the tax laws are administered. *Id.* Dorothy Brown has powerfully documented the racial impact of how lawmakers write the tax laws. *See, e.g.,* Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 796–97 (2007) [hereinafter Brown, *Race and Class Matters*]; DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021) [hereinafter BROWN, *THE WHITENESS OF WEALTH*]. Karen Brown has highlighted some of the longstanding

solve problems; it creates them. ProPublica has shown, for example, that because of the perils of filing income taxes while Black, the five most heavily audited counties in the United States are Black and poor.³

The racial bias long tolerated—and sometimes exploited—by tax scholars and policymakers affects all aspects of the tax law. In 1986, Sam Gilliam was denied tax deductions that others in similar situations enjoyed.⁴ In 2000, Liberia was threatened with sanctions for being a tax haven, but Switzerland was not.⁵ In 2014, Eric Garner died in police custody after being suspected of evading a tax.⁶ In each instance, anti-Blackness played a role in ways the tax law either ignores or actively leverages. Because a succession of Democratic and Republican administrations—including the Biden administration after a full year in office—has declined to embrace comprehensive data on race, the tax law equivalent of body cameras, we must rely on stories to understand the impacts of filing while Black. The role of tax law in Black lives—and on Black deaths—demands our attention. Yet even today, the most powerful voices in tax policy, for example Treasury Secretaries,⁷ continue to disregard the lessons countless Gilliams, Liberias, and Garners have suffered or died to teach us.

international tax rules that impact Sub-Saharan Africa. *See, e.g.*, Karen B. Brown, *Missing Africa: Should U.S. International Tax Rules Accommodate Investment in Developing Countries?*, 23 U. PA. J. INT’L ECON. L. 45, 47 (2002).

³ Paul Kiel & Hannah Fresques, *Where in the U.S. Are You Most Likely to Be Audited by the IRS?*, PROPUBLICA (Apr. 1, 2019), <https://projects.propublica.org/graphics/eitc-audit> [<https://perma.cc/L3JD-5ALM>].

⁴ *Gilliam v. Commissioner*, 51 T.C.M. (CCH) 515, 541 (1986) (deeming expenses arising from a business trip non-deductible personal expenses rather than deductible business expenses).

⁵ Steven A. Dean & Attiya Waris, *Ten Truths About Tax Havens: Inclusion and the “Liberia” Problem*, 70 EMORY L. J. 1659, 1659 (2021).

⁶ *See* Al Baker, J. David Goodman & Benjamin Mueller, *Beyond the Chokehold: The Path to Eric Garner’s Death*, N.Y. TIMES (June 13, 2015), <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html> [<https://perma.cc/7R85-N5SC>] (noting that when Eric Garner died in police custody he had been “arrested twice already that year near the same spot, in March and May, charged both times with circumventing state tax law.”).

⁷ For example, five former U.S. Treasury Secretaries wrote an opinion piece in the *New York Times* discussing fixing tax evasion, yet they did not address the relationship between race and audit rates. *Compare* Timothy F. Geithner, Jacob J. Lew, Henry M. Paulson Jr., Robert E. Rubin & Lawrence H. Summers, Opinion, *We Ran the Treasury Department. This Is How to Fix Tax Evasion.*, N.Y. TIMES (June 9, 2021), <https://www.nytimes.com/2021/06/09/opinion/politics/irs-tax-evasion-geithner-lew-paulson-summers-rubin.html> [<https://perma.cc/SH8G-UH4B>] (“[A]udit rates of those in the top 1 percent have fallen most staggeringly over the course of the past decade, such that *rural counties in the Deep South* have some of the highest rates of examination in the country.”) (emphasis added), *with* Kiel & Fresques, *supra* note 3 (“The five counties with the highest audit rates are all *predominantly African American, rural counties* in the Deep South.”) (emphasis added).

Part II highlights the tendency of even the most inquisitive tax minds to disregard the potential impact of race on interactions between taxpayers and tax authorities. A Black artist—long treated unequally by dealers, curators, and critics—faced first the pain of being denied a deduction for business expenses readily granted to others, only to then suffer the further indignity of having that denial offered to generations of law students as comedy rather than tragedy. Part III offers a fleeting glimpse of a world in which a Black perspective shapes the course of global tax policymaking, with the Congressional Black Caucus handing a significant setback to efforts by the Organization for Economic Cooperation and Development (“OECD”) to punish poor Black countries as tax havens while ignoring the misdeeds of whiter, wealthier states. Finally, Part IV urges tax experts to ask uncomfortable questions about the role tax policy played in the death of Eric Garner while in the custody of NYC police officers, and how that death should change the design and enforcement of tax laws.

II. GILLIAM AND THE WHITEWASHING OF THE TAX LAW

Sam Gilliam traveled to give a lecture, incurring significant expenses after a prescription medication precipitated disruptive behavior on an airline flight.⁸ The incident left a bystander injured and Gilliam in police custody.⁹ What might today have been treated as a mental health crisis prompting treatment instead resulted in criminal charges. Gilliam attempted to deduct his legal expenses for federal income tax purposes, but the Internal Revenue Service and eventually the tax court determined that the expenses were “extraordinary” and therefore not deductible.¹⁰

Sam Gilliam is an abstract impressionist painter.¹¹ To most of the world, Gilliam has become famous for his singular talent and vision, and he is “widely

⁸ Gilliam, 51 T.C.M. (CCH) at 529–31.

⁹ *Id.* at 525, 539.

¹⁰ *Id.* at 534–37.

¹¹ Like countless other artists of color and women artists working during the 20th century, Gilliam’s work has been, until quite recently, underappreciated. A recent exhibit at a major New York City gallery punctuates a belated appreciation of an artist, and Fred Moten fittingly notes in the exhibition catalog that “[t]he spiraling continuity of Gilliam’s career induces punctuated disequilibrium, a rush of steady contemplation, the apposition of the unthought, which turns out to have been thinking all along.” Arne Glimcher, Courtney J. Martin, Fred Moten, Hans Ulrich Obrist, Tomo Makiura & Mine Suda, *Sam Gilliam: Existed Existing*, PACE (Feb. 11, 2021), <https://www.pacegallery.com/journal/sam-gilliam-existed-existing/> [<https://perma.cc/SQT8-56BJ>]. Gilliam’s place in federal tax law has been presented to students in introductory law school tax classes for decades as a lighthearted cautionary tale of how bias can influence courts in their treatment of taxpayers without ever acknowledging that his race may have been as or more important than his profession or mental health in producing its unfair result. JOSEPH BANKMAN, DANIEL N. SHAVIRO, KIRK J. STARK & EDWARD D. KLEINBARD, *FEDERAL INCOME TAXATION* 442–49 (18th ed. 2019).

considered one of the great innovators in postwar American painting.”¹² The *New York Times Style Magazine* described his recent exhibit as:

including an enthralling set of beveled-edge canvases that appear from a distance as largely black or white, but up close contain entire galaxies of colored flecks, their layers of sawdust and paint creating an impression of great depth, as though one could fall into a painting and float away, suspended within its force field.¹³

Race has become an essential part of Gilliam’s story, a fact suggested by the title of the *New York Times* story, *Once Overlooked, Black Abstract Painters Are Finally Given Their Due*.¹⁴ Gilliam’s experience on and after the flight raises another rich set of questions related to a striking pattern of “mistaking symptoms for criminality that deserve punishment, not treatment” when the individuals experiencing those symptoms happen to be Black.¹⁵ But for thousands of second- and third-year law students taking an introductory Federal Income Tax class, Gilliam remains a man of no particular race arrested on a business trip after reacting badly to anxiety medication his doctor prescribed.¹⁶

Remarkably, a leading law school textbook—one I long used—makes no mention of the fact that Gilliam is Black.¹⁷ The unsigned Tax Court memorandum opinion the textbook reproduces does not reveal his race.¹⁸ That omission must not be attributed to carelessness, a misguided sense of tact, or to the fact that Gilliam’s race does not appear on his tax return. The Tax Court opinion unflinchingly describes the mental health treatment he received and exhaustively details where and when he was born (Tupelo, Mississippi in 1933),¹⁹ where he received his Master of Arts in painting (University of Louisville),²⁰ and where he had exhibited his paintings (“numerous art galleries throughout the United States and Europe”).²¹ The

¹² Sam Gilliam, *Past* (art exhibition), in PACE GALLERY (2021), <https://www.pacegallery.com/exhibitions/sam-gilliam-2/> [https://perma.cc/GHY8-WJZF] (providing a link to Pace, a leading international art gallery, which displayed Sam Gilliam’s art in a Seoul exhibition space from May 27 to July 10, 2021).

¹³ Megan O’Grady, *Once Overlooked, Black Abstract Painters Are Finally Given Their Due*, N.Y. TIMES STYLE MAG. (Feb. 12, 2021), <https://www.nytimes.com/2021/02/12/t-magazine/black-abstract-painters.html> [https://perma.cc/H46M-VWJ5].

¹⁴ O’Grady, *supra* note 13.

¹⁵ Kylie M. Smith, *How Bigotry Created a Black Mental Health Crisis*, WASH. POST (July 29, 2019), <https://www.washingtonpost.com/outlook/2019/07/29/how-bigotry-created-black-mental-health-crisis/> [https://perma.cc/B9AC-KM8P].

¹⁶ See, e.g., J. MARTIN BURKE & MICHAEL K. FRIEL, UNDERSTANDING FEDERAL INCOME TAXATION 161–63 (4th ed. 2013) (giving the facts of Gilliam v. Commissioner with no mention of Gilliam’s race); BANKMAN ET AL., *supra* note 11, at 442–47.

¹⁷ See BANKMAN ET AL., *supra* note 11.

¹⁸ Gilliam v. Commissioner, 51 T.C.M. (CCH) 515 (1986).

¹⁹ *Id.* at 526.

²⁰ *Id.*

²¹ *Id.* at 526–27.

opinion contains no hint of racial animus, but failing to note Gilliam's race plainly represents an affirmative choice.

The textbook takes a similar approach, declining to add a mention of Gilliam's race.²² Its authors follow the reproduction of the case with four separate notes (two with subparts) to encourage students to grapple with the complex issues raised by the case.²³ The textbook invites students to consider the court's use of precedent and asks them to consider a comprehensive array of alternate hypothetical scenarios. Questioning whether Gilliam's treatment can be attributed to his being an "extraordinary" taxpayer, the last prompt playfully wonders, "[w]hat if an employer hires a yoga instructor to lead his employees in meditation each morning?"²⁴ Despite a thorough examination of the facts and the law—and, of course, yoga—the textbook, like the Tax Court, ignores Gilliam's race. Gilliam's experience might seem extraordinary to white Americans, but the treatment of countless Black men and women by the healthcare and legal systems suggests that Gilliam's case simply illustrates the perils of filing while Black.

Having already taught the case to hundreds of students, I learned that Gilliam was Black by happenstance.²⁵ From then on, I tentatively encouraged my students to consider how Gilliam's race might have influenced his tax outcome. I hope they also considered why neither the case nor the textbook acknowledges the role that Gilliam's being Black may have played in shaping his treatment by his physician,²⁶ on the flight,²⁷ during his arrest and prosecution,²⁸ or in shaping the successful government challenge to his deduction of the costs arising from his business trip.²⁹ They might also consider whether Gilliam's experience of having mental health

²² See BANKMAN ET AL., *supra* note 11.

²³ *Id.* at 447–49.

²⁴ BANKMAN ET AL., *supra* note 11, at 449.

²⁵ I learned of Gilliam's race from my wife, who happens to be a historian of American art and who has written extensively on issues of race and representation.

²⁶ Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, 43 A.B.A. HUM. RTS. MAG. 19, 19 (2018) ("Black people simply are not receiving the same quality of health care that their white counterparts receive, and this second-rate health care is shortening their lives.").

²⁷ See, e.g., Rachel Brown, *NAACP Warns African Americans About Traveling on American Airlines*, USA TODAY (Oct 25, 2017, 7:23 AM), <https://www.usatoday.com/story/news/nation-now/2017/10/25/naacp-warns-african-americans-traveling-american-airlines/797755001/> [<https://perma.cc/R4V4-JMAW>].

²⁸ See, e.g., Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. JUST., 1, 1 (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/3GKS-4GNS>] ("Black men comprise about 13 percent of the male population, but about 35 percent of those incarcerated. One in three black men born today can expect to be incarcerated in his lifetime, compared to one in six Latino men and one in 17 white men.").

²⁹ See Bearer-Friend, *supra* note 1 (considering the many points at which race may become a factor in the government's decision to challenge a taxpayer's return despite the fact that the 1040 never asks for a filer's race).

symptoms treated as criminal behavior would still be considered extraordinary today. Prior opinions had, after all, allowed businesspeople to deduct unusual legal expenses.³⁰

Gilliam's case and its steadfastly color-blind treatment in law school classrooms across the country highlight the challenge of addressing the role his race may or may not have played in causing him to receive less favorable treatment than others. Law school aims to teach students to think critically and creatively. But, without adequate context, future generations of lawyers have no opportunity to consider the costs of filing while Black.

III. LIBERIA AND THE OECD TAX HAVEN BLACKLIST

In 2000, when fears flared regarding the health of the corporate and individual income taxes sustaining the welfare states of North America and Europe,³¹ the OECD identified the source of the contagion.³² It developed a list of states it labeled "tax havens"³³ and pledged to enforce sanctions against those states unless they agreed to cooperate with OECD's member states.³⁴ It is easy to look back decades

³⁰ For a description of typically deductible business expenses, *see* I.R.C. § 162. An example cited in *Gilliam v. Commissioner* notes that the Court had allowed the unusual deduction of legal expenses related to a car crash "which resulted in injuries to a child." *Gilliam v. Commissioner*, 51 T.C.M. (CCH) 515, 539 (1986) (citing *Dancer v. Commissioner*, 73 T.C. 1103, 1105 (1980)) ("The relevant expenses were the taxpayer's payments to settle the civil claims arising from the accident."). The *Gilliam* opinion provides another example of an unusual deduction when "a taxpayer was allowed to deduct the cost of an unsuccessful criminal defense to securities fraud charges." *Gilliam*, 51 T.C.M. (CCH) at 540–42 (citing *Commissioner v. Tellier*, 383 U.S. 687 (1966)). A final example of an unusual deduction is the deduction of expenses related to a civil settlement stemming from a criminal charge of assault with intent to rape. *Gilliam*, 51 T.C.M. (CCH) at 540–42 (citing *Clark v. Commissioner*, 30 T.C. 1330 (1958)). Notably, the *Gilliam* court's characterization of *Clark* portrays the underlying civil claim and criminal charge as outcomes of "activities directly in the conduct of Clark's trade or business." *Gilliam*, 51 T.C.M. (CCH) at 541. Additionally, in the textbook, *FEDERAL INCOME TAXATION*, the editors include a helpful footnote about *Clark* detailing that the taxpayer was able to deduct the costs arising from a charge of attempted rape. *See* BANKMAN ET AL., *supra* note 11, at 446–47 n.12.

³¹ Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1576 (2000) ("Tax competition, in turn, threatens to undermine the individual and corporate income taxes, which traditionally have generated the largest share of revenue for modern welfare states.").

³² *Towards Global Tax Co-Operation: Report to the 2000 Ministerial Council Meeting and Recommendations by the Committee on Fiscal Affairs: Progress in Identifying and Eliminating Harmful Tax Practices*, OECD (2000), <https://www.oecd.org/ctp/harmful/2090192.pdf> [<https://perma.cc/S9RR-YHU7>] [hereinafter *Towards Global Tax Co-Operation*].

³³ *Id.* at 17.

³⁴ Barry James, *Tax Havens Face OECD Threat of Sanctions*, N.Y. TIMES (June 14, 2000), <https://www.nytimes.com/2000/06/14/news/tax-havens-face-oecd-threat-of-sanctions.html> [<https://perma.cc/97G3-PCM2>].

later and note the many mistakes the OECD made and wonder what the organization learned from them.³⁵

Equally important is understanding the serendipitous role that Black U.S. legislators played in preventing a far greater catastrophe. The OECD's tax haven list included an unlikely jurisdiction: the U.S. Virgin Islands.³⁶ It proved to be a far more capable adversary than the OECD expected. The list excluded another jurisdiction, Switzerland, that would soon find itself embroiled in a banking scandal that left little doubt that it too should have been included.³⁷ A threat of sanctions against dozens of small, mostly majority-Black jurisdictions did not provoke the widespread outrage one might expect.³⁸ But it did attract the attention of a U.S. Congresswoman.

Delegate Donna Christensen was elected to the House by the U.S. Virgin Islands. Quite rightly, she found the possibility of her constituents being subject to sanctions at the behest of what is often described as a club of rich countries alarming.³⁹ She wrote a compelling letter to the Treasury Secretary, Paul H. O'Neill, detailing her concerns.⁴⁰ But she did not stop there. Delegate Christensen may not have had the power to vote in Congress, but as a member of the Congressional Black Caucus, she had the ear of influential legislators.⁴¹ She joined with many—but not

³⁵ Unfortunately, the OECD seems to have learned precisely the wrong lessons from this episode. See Steven Dean, *Can the Most Powerful Global Tax Organization Shed Its Racist Ways?*, THE NATION (October 19, 2021), <https://www.thenation.com/article/economy/digital-tax-racism/> [<https://perma.cc/NE32-RBLS>] [hereinafter Dean, *Most Powerful Global Tax Organization*].

³⁶ See *Towards Global Tax Co-Operation*, *supra* note 32, at 17.

³⁷ See Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. REV. 532, 601 (2018) (“[T]he UBS and LGT leaks focused the world’s attention on high-net-worth American taxpayers who stashed assets offshore in Swiss bank accounts to avoid paying taxes.”).

³⁸ Contemporaneous reporting noted that “[d]istorting tax practices are not confined to offshore havens in the Caribbean, the Pacific or elsewhere,” and that a “working group in the European Union has identified more than 60 harmful or distorting tax practices by member countries.” But the prospect of sanctions on one vulnerable group and not its influential counterparts seemed uncontroversial. See James, *supra* note 34. Perhaps because of that absence of outrage, similar blacklists and greylists have proliferated, becoming “coercion-based pathways” shaping the evolution of international tax rules in ways disadvantageous to the states they target. Shu-Yi Oei, *World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership*, 47 YALE J. INT’L L. (forthcoming 2021–22).

³⁹ Letter from Donna M. Christensen, Cong. Pers., U.S. House Representatives, to Hon. Paul H. O’Neill, Sec’y, U.S. Dep’t Treasury (Mar. 12, 2001).

⁴⁰ *Id.*

⁴¹ See *About the CBC*, CONG. BLACK CAUCUS, <https://cbc.house.gov/about/> [<https://perma.cc/WB4Y-GCSZ>] (last visited Feb. 16, 2022) (“Since its establishment in 1971, the Congressional Black Caucus (CBC) has been committed to using the full Constitutional power, statutory authority, and financial resources of the federal government to ensure that African Americans and other marginalized communities in the United States have the opportunity to achieve the American Dream. . . . The CBC is engaged at the highest levels of Congress with members who serve in House leadership.”).

all⁴²—of the members of the Caucus to write a second letter to Secretary O’Neill.⁴³ Her efforts were effective. In May 2001, O’Neill and President George W. Bush announced the withdrawal of U.S. support for the OECD’s efforts.⁴⁴

Thanks to the intervention of Representatives Charles Rangel, Maxine Waters, Secretary O’Neill, President Bush, and others, an array of developing countries escaped sanctions that would have cost lives and imposed hardships.⁴⁵ But countries like Liberia never should have been targeted in the first place. I knew, again by chance, that Liberia and its President, Charles Taylor, had an ironclad alibi. While preparing to represent a pro bono asylum client from Liberia, I learned from first-hand accounts how absurd it was to imagine wealthy Americans or Europeans hiding assets in Liberia. Our client was granted asylum by the United States after detailing the brutal violence Taylor’s regime meted out to him and so many others. In 2000, Liberia was not—unlike Switzerland—a place the 1% would ever put anything they hoped to see again.

Ten years later, Representative Rangel, as Chairman of the House Ways and Means Committee, would collaborate with others to create the Foreign Account Tax Compliance Act that would spare Liberia while targeting Swiss banks reeling from bombshell revelations about their role in tax evasion.⁴⁶ Still, a totally unnecessary clash between the OECD and the Congressional Black Caucus over the OECD’s exploitation of the public’s willingness to believe that a state like Liberia could pose a threat to the social safety nets of far more prosperous countries to advance its agenda caused a lost decade in the fight against tax evasion.⁴⁷ Given how fragile Liberia was at the time, the OECD’s cynical gambit could easily have done great harm.

The tax law’s insistence on ignoring race—burying it—does not make it go away. Exploiting racial bias to promote tax policies represents a devil’s bargain few

⁴² A minor, but telling, example of even the most careful observers failing to accurately perceive and record the actions of Blacks in the tax context is the definitive account of the OECD’s failed effort, concluding that the second letter to O’Neill was signed by “all twenty-six members of the Congressional Black Caucus.” J. C. SHARMAN, *HAVENS IN A STORM: THE STRUGGLE FOR GLOBAL TAX REGULATION* 62 (2006).

⁴³ Cordia Scott & Adrion Howell, *Black Caucus Says OECD Tax Move Unfairly Blasts Developing Nations*, TAX NOTES (Mar. 27, 2001), <https://www.taxnotes.com/tax-notes-today-federal/multijurisdictional-taxation/black-caucus-says-oecd-tax-move-unfairly-blasts-developing-nations/2001/03/27/10fy8?highlight=Cordia%20Scott%2C%20Congressional%20Black%20Caucus%20Says%20OECD%20Tax%20Move%20Unfairly%20Blasts%20Developing%20Nations> [<https://perma.cc/2AZF-BM6S>].

⁴⁴ See Paul O’Neill, *Confronting OECD’s ‘Harmful’ Tax Approach*, WASH. TIMES A17 (May 11, 2001), <http://www.uniset.ca/microstates/oneill.pdf> [<https://perma.cc/R5VK-7282>].

⁴⁵ Steven A. Dean, L. Professor, Brook. L. Sch., Testimony Before the Committee on Ways and Means U.S. House of Representatives (June 10, 2021). Secretary O’Neill expressed “concern[] about the potentially unfair treatment of some non-OECD countries.” O’Neill, *supra* note 44.

⁴⁶ See Dean & Waris, *supra* note 5, at 1677–785 (describing the origins of the U.S. Foreign Account Tax Compliance Act (FATCA)).

⁴⁷ See Dean, *Most Powerful Global Tax Organization*, *supra* note 35.

can resist.⁴⁸ The worst of the suffering will always be endured by the most vulnerable. For those living on the margins, the intersection of race and tax can be deadly.

IV. PIGOUVIAN TAXES AND THE DEATH OF ERIC GARNER

Tax scholars adore Pigouvian, or sin, taxes.⁴⁹ Such taxes on market transactions can remedy market failures. They might, for example, target pollution by making polluters pay for the privilege.⁵⁰ They can be deployed to dissuade individuals from engaging in socially harmful behavior, such as using plastic shopping bags,⁵¹ or simply to force them to pay their fair share of the costs when they do. Tax scholars

⁴⁸ See, e.g., Steven Dean, *A Plea to President Biden to Stop Perpetuating Racist Tax Policy*, THE NATION (Apr. 13, 2021), <https://www.thenation.com/article/economy/biden-tax-policy/> [https://perma.cc/PYU6-T2HD] [hereinafter Dean, *A Plea to President Biden*]. “In his April 28 address to a joint session of Congress, President Joe Biden, responding to prompts from Professor Steven Dean, pivoted his message regarding tax havens” to include Switzerland along with the majority Black nations he had initially targeted. *President Joe Biden Takes Prompt from Professor Steven Dean on Racist Tax Haven Message*, BROOKLYN L. SCH., (Apr. 13, 2021), <https://www.brooklaw.edu/News-and-Events/News/2021/04/In-The-Nation-Professor-Steven-Dean-Urges-Biden-to-Adopt-AntiRacist-Tax-Policies> [https://perma.cc/ZR7V-6JPZ]; Dean, *Most Powerful Global Tax Organization*, *supra* note 35. Even more recently, the OECD produced a report to describe its corporate minimum tax. In the report, the OECD used an image of an island boasting a pair of coconut trees to represent a “low-tax jurisdiction” despite the fact that the Axis of Avoidance responsible for more than half of corporate tax abuse consists exclusively of European states, including Switzerland. See *OECD/G20 Base Erosion and Profit Shifting Project: Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, OECD (2021), <https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> [https://perma.cc/68NS-R3N7]; *What Is the Axis of Tax Avoidance?*, TAX JUSTICE NETWORK (Jan. 24, 2022, 10:25 AM), <https://taxjustice.net/faq/what-is-the-axis-of-tax-avoidance/> [https://perma.cc/FZL2-WH4V] (“The ‘axis of tax avoidance’ refers to the four countries responsible for over half of all the tax losses that countries lose to tax havens: the UK, Luxembourg, the Netherlands and Switzerland.”).

⁴⁹ Lawmakers, by contrast, seem skeptical. See, e.g., Jonathan S. Masur & Eric A. Posner, *Toward a Pigouvian State*, 164 U. PA. L. REV. 93, 97 (2015) (“We have been able to find only a few isolated examples of a pure Pigouvian tax in U.S. law.”).

⁵⁰ *Id.* at 95 (“[I]f a manufacturer pollutes, and the pollution causes a harm of \$100 per unit of pollution to people who live in the area, then the firm should pay a tax of \$100 per unit of pollution. This ensures that the manufacturer pollutes only if the value of the pollution-generating activities exceeds the harm, such that the social value of those activities is positive.”).

⁵¹ Tatiana A. Homonoff, *Can Small Incentives Have Large Effects? The Impact of Taxes Versus Bonuses on Disposable Bag Use*, 10 AM. ECON. J.: ECON. POLICY 177, 177 (2018) (finding that, because of the behavioral phenomenon of “loss aversion,” a plastic bag tax proved far more potent in persuading customers to avoid plastic bags than the equivalent subsidy).

do consider the impact of such taxes—carbon taxes for example—on vulnerable populations.⁵² But they do not consider the possibility of a death like Eric Garner’s.⁵³

Eric Garner died after a police officer put him in an illegal chokehold.⁵⁴ The arrest during which Garner’s death occurred was prompted by a suspicion of selling cigarettes without legally mandated tax stamps.⁵⁵ Without this Pigouvian tax, Garner would not have died on a Staten Island sidewalk in the summer of 2014. But Garner’s story has not been told by tax experts.⁵⁶ In time, Garner’s death, and his final words (“I can’t breathe”), became important symbols in the ongoing debate over policing.⁵⁷ It would be foolish to say that without Pigouvian taxes the Black Lives Matter movement would not have happened. It would be equally disingenuous to suggest that Garner’s death should now dominate discussions of sin taxes. But the available anecdotal evidence—with Black people and places attracting chilling, casual threats of violence over unpaid taxes—⁵⁸ makes a compelling case for not completely ignoring the role of race in tax law.

⁵² Brian Galle, *The Tragedy of the Carrots: Economics and Politics in the Choice of Price Instruments*, 64 STAN. L. REV. 797, 814 (2012) (“[P]roponents suggest targeting the revenues derived from the carbon tax for particular purposes, such as an income tax rebate for poorer households” to offset the costs they would otherwise impose on those poor households).

⁵³ See, e.g., Victor Fleischer, *Curb Your Enthusiasm for Pigovian Taxes*, 68 VAND. L. REV. 1673 (2015) (surveying “some often-overlooked weaknesses in the Pigovian instrument” just over a year after Garner’s death but not mentioning his death or considering the risks of filing while Black).

⁵⁴ See Baker et al., *supra* note 6 (“[T]he chokehold . . . was found to be a cause of Mr. Garner’s death, along with the compression of his chest by officers who helped to handcuff him.”).

⁵⁵ *Id.* (“The business of loose cigarettes is simple and longstanding. Drive to Pennsylvania or Delaware or a nearby Indian reservation. Return to heavily taxed New York City with cheaper boxes of cigarettes. Sell for a profit. Repeat.”).

⁵⁶ For example, the only article in Westlaw’s law review database that includes both the name Eric Garner and the term Pigouvian was written by a criminal law expert. See, e.g., Miriam H. Baer, *Pricing the Fourth Amendment*, 58 WM. & MARY L. REV. 1103 (2017).

⁵⁷ Christina Swarns, *“I Can’t Breathe!”: A Century Old Call for Justice*, 46 SETON HALL L. REV. 1021, 1021–22 (2016) (“These now ubiquitous chants, hashtags, and mantras are the contemporary rallying cries of those who have been moved to action by the police killings of Eric Garner, Michael Brown, Tamir Rice, Akai Gurley, Walter Scott, Freddie Gray, and far too many others to name.”).

⁵⁸ See, e.g., Ryan Cooper, *Janet Yellen’s Proposal to Revolutionize Corporate Taxation*, THE WEEK (Apr. 6, 2021), <https://theweek.com/articles/975735/janet-yellens-proposal-revolutionize-corporate-taxation> [<https://perma.cc/GHC8-QV76>] (“In the extreme, the U.S. could apply economic sanctions to tax havens or even threaten them with military force,” and illustrating this point with a picture of a giant Secretary Yellen looming over a map of Bermuda).

The initial official statements regarding Eric Garner's death made no mention of the chokehold that killed him.⁵⁹ A police report falsely quoted a witness reporting that rather than using a chokehold, "the two officers each took Mr. Garner by the arms and put him on the ground."⁶⁰ Thanks to a cellphone video of Garner's death, the world would learn the truth.

In the years since Garner's death, police body cameras have shed light on deaths linked to driving while Black.⁶¹ But such innovations can do little to uncover the harms of filing while Black. For now, we have the work of scholars like Dorothy Brown, who has dedicated decades to documenting the dangers of filing while Black and the work of new scholars, like Jeremy Bearer-Friend, who explore the dynamics through which racial bias can contaminate the tax law.⁶² Both agree that the tax law's equivalent of body cameras will look quite different: data generated by combining tax records with demographic information harvested from other sources.⁶³

Experts have honed the craft of using tax data in concert with other sources of information, and they use it to tell incredibly rich stories about our lives.⁶⁴ As one economist described his work using information the IRS already collects to determine which colleges provide the most opportunity: "the best data that we have in this country on student's outcomes, student backgrounds, and even where you go

⁵⁹ See Baker et al., *supra* note 6 ("In the hours after Mr. Garner died, an initial five-page internal report prepared for senior police commanders, known as a 49, did not refer to contact with his neck.").

⁶⁰ *Id.* ("[T]he report quotes by name a witness who described seeing how 'the two officers each took Mr. Garner by the arms and put him on the ground.' That same witness, Taisha Allen, later said she told the grand jury on Staten Island that she saw a chokehold. She said the statement attributed to her in the report was not accurate.").

⁶¹ See Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 641–42 (2021) ("[S]cholars and activists have long worried that . . . allowing officers to engage in pretextual stops . . . contributed to widespread and unchecked racial profiling by American police officers.").

⁶² See Bearer-Friend, *supra* note 1; Brown, *Race and Class Matters*, *supra* note 2; BROWN, *THE WHITENESS OF WEALTH*, *supra* note 2.

⁶³ Dorothy Brown, *Race and Tax: Colorblind No More*, JOTWELL (Feb. 25, 2021), <https://tax.jotwell.com/race-and-tax-colorblind-no-more/> [<https://perma.cc/S566-ZAU7>] (reviewing Jeremy Bearer-Friend, *Should the IRS Know Your Race? The Challenge of Colorblind Tax Data*, 73 TAX L. REV. 1 (2019)).

⁶⁴ See Raj Chetty, John N. Friedman, Nathaniel Hendren, Maggie R. Jones & Sonya R. Porter, *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility* (Nat'l Bureau Econ. Rsch. Working Paper, Paper No. 25147, 2020), https://opportunityinsights.org/wp-content/uploads/2018/10/atlas_paper.pdf [<https://perma.cc/742E-TZM2>] (explaining that the Opportunity Atlas combines tax return and census data to measure child outcomes based on neighborhood and demographic subgroups).

to college is collected as part of the tax system.”⁶⁵ The tax law does not need more information from taxpayers. It simply needs to use what it already has in an anti-racist fashion.

V. CONCLUSION

Sam Gilliam’s experience suggests the many ways in which filing while Black—like driving while Black—⁶⁶ can be costly. Eric Garner’s fate shows how even the most trivial tax burden can cost a life. Yet tax experts often remain willfully blind to the ways racial bias may cause Black taxpayers to suffer disproportionately at the hands of tax authorities. The powerful resistance offered by the Congressional Black Caucus to the OECD reveals how different the world might look if tax policymakers forced themselves to consider how their decisions impact Black lives.

This Essay invites scholars, lawmakers and all those interested in shaping our tax rules to consider the hazards of filing while Black. The casual racism of the tax law persists because experts prefer not to ask whether Sam Gilliam’s tax result had anything to do with the color of his skin. It persists even after a Congressional delegate defied some of the most powerful actors in the world to spare dozens of its least powerful nations. It persists because tax lawyers and tax scholars refuse to imagine that we may, in even a small way, be culpable in the death of Eric Garner. That can, and must, change.

⁶⁵ *Redistributing Opportunity (John Friedman)*, THE TAX MAVEN (Sept. 15, 2020), <https://taxmavenpodcast.com/episodes/john-friedman/transcript> [https://perma.cc/C54Z-KQWQ].

⁶⁶ See Rushin & Edwards, *supra* note 61.