

IS TAX “LAW”?

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Although taxation remains a hotly contested issue in debates by both politicians and political theorists—over the optimal size of government, distributive (and sometimes corrective) justice, or even the legitimacy of current private property arrangements—taxation has been largely ignored by legal theorists, to the detriment of both tax law and legal theory. This Article argues that tax law, driven by its battle against tax evasion, is in deep conflict with widely accepted conceptions of “legality”—that is, the qualities that make a rule distinctively and normatively “law.” This matters because legality is a key buttress in jurisprudential and political theory accounts that legitimate the law, the State, and their coercive nature.

Specifically, this Article contends that three fundamental principles of legality (noncontradiction, congruence, and clarity) are critically flouted by our tax law. The nearly universal use of vague anti-abuse rules in the tax code violates the principle of noncontradiction, often presenting taxpayers with impossible choices. Tax law’s price discrimination, through special incentives and individualized determinations, violates the principle of congruence, which requires that the law be congruent between its communication and its enforcement. Lastly, the tax law’s unique complexity and its unintelligibility to laypersons and experts alike violate the principle of clarity, despite the widespread availability of services like TurboTax that purport to make tax law approachable. So, what do we do if tax law—a basic component of our public law and a cornerstone of a functioning State—is not really “law”?

This Article counsels against a resolution that requires either eliminating our current tax architecture or our strong conceptions of legality undergirding mainstream jurisprudential theories. Analyzing tax law’s particular legality shortcomings reveals a pattern: a critical driver of this

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conflict is the State's necessity to ensure that taxpayers obey the law. Rather than underscoring the inevitability of the conflict between legality and modern taxation, this driver reveals an opportunity. Recent research on tax compliance shows that taxpayer compliance is itself driven by taxpayers' perceptions of legality. As a result, targeted reforms could both restore legality and enhance tax compliance. This Article concludes by highlighting specific policy proposals, designed to both restore legality and increase compliance, and by underscoring deeper policymaking reforms directed at more generally preventing these conflicts.

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INTRODUCTION

The story of King Rex is a tale of good intentions.¹ His kingdom flourished, but its fortunes had seemingly taken a turn. The kingdom's

1. This story is adapted from Professor Lon Fuller's King Rex allegory in *The Morality of Law*. See LON L. FULLER, *THE MORALITY OF LAW* 33–38 (1964) [hereinafter FULLER, *MORALITY*].

stability and long-term viability were endangered: citizens’ burgeoning ability to game the kingdom’s tax laws threatened its public coffers. King Rex thus embarked on an urgent and zealous journey to reform his kingdom’s tax system.

As he set to enact his first reforms, he attempted to close all the law’s loopholes and resolve the law’s ambiguities. Yet he quickly realized that his system seemed incapable of providing a determinate answer to the plethora of innovative transactions that his subjects structured in the kingdom’s evolving and complex economy. Although concerned by the sheer volume, capaciousness, and intricacy of his reforms, Rex was determined and kept pushing, eventually producing encyclopedic volumes of tax law. He had tried to birth a system that had a clear, determinate, and administrable answer to every ambiguity and loophole; instead, Rex had birthed a system that was so byzantine and complex, both ordinary citizens and most experts found it unintelligible. Only a select cadre of experts—most of whom had themselves assisted him in writing the reforms—could decipher the exact outline of the law’s commands.²

Complexity notwithstanding, his dutiful citizens attempted to comply with the new law, but in the end, many failed—even after enlisting his select cadre to help interpret Rex’s voluminous reforms. Considering their difficulties complying with the law, Rex came up with an easy solution: he would just tell his citizens not to bother with the prosaic chore of actually understanding the law; Rex’s tax virtuosos would review each citizen’s finances and inform them of how much they were obliged to pay.³ Although it saved them the time and frustration of deciphering Rex’s byzantine reforms, eventually the citizens grew dissatisfied with this black-box solution. After all, how were Rex’s requests different from arbitrary—yet obligatory—demands for tribute? Sensing his citizens’ escalating anger and frustration at his reforms and the futility of his efforts to assuage them, Rex decided to roll back his clarification agenda.

Eventually, Rex came up with another idea. Rather than trying to close every loophole and address every context, Rex would build into his system some flexibility and room to evolve. After all, Rex was convinced that some of his subjects would engage the elite cadre of interpreters and, with time and effort, discover a backdoor to Rex’s supposedly impenetrable tax reforms. So Rex sought to retain flexibility by leaving some vagueness in the system. A little flexibility would not do. Some of his subjects would eventually find ways to bend even vague rules in their favor, so Rex decided to outsmart them: he would leave those areas so vague that two opposite conclusions

2. See *infra* Part II.C. See generally Stanley S. Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 L. & CONTEMP. PROBS. 673 (1969).

3. Cf. Shu-Yi Oei & Leigh Osofsky, *Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels*, 104 IOWA L. REV. 1291, 1296–97 (2019) (explaining that tax statutes are often drafted for experts rather than ordinary taxpayers).

were possible. When the time came, Rex would have enough wiggle room to argue in court whichever position favored the government!⁴

But again, these measures frustrated the kingdom's citizens, who complained that the reforms had rendered the system so vague, inconsistent, and—worse—contradictory that the law offered no practical guidance on how to arrange their affairs. Acknowledging his reforms' imminent failure, Rex reversed them once more.

The king saw himself between Scylla and Charybdis: his attempts to build any uniform and comprehensive tax system capable of stopping noncompliance appeared destined to fail. But inaction was not a feasible option either; the kingdom's coffers were decimated by evasion. So he came up with a different strategy. He would abandon the ideal of consistent and uniform reforms, instead opting for an individualized administrable system. Deciding on a rule that applied in all future contexts was a challenging affair; resolving an individual case was decidedly simpler. Furthermore, granting individual petitions would placate the loudest critics of the law and resolve the system's most pressing issues—without forcing Rex into a comprehensive uniform reform that could set the blueprint for tax gaming by the rest.⁵

The individualization efforts quickly got out of control. Petitions overwhelmed Rex and, despite his best efforts, his citizens quickly discerned that his decisions were neither uniform nor consistent, reaching wildly different conclusions on comparable petitions. Rex had thus created parallel legal systems applicable to different people—all supposedly valid but devoid of value in giving his citizens guidance on how to conduct their affairs.

Rex's good intentions were not enough. Given the widespread disillusionment with his reform attempts, he recognized his failures and abdicated. His successor, Queen Regina, quickly announced upon ascending the throne that she was taking the powers of government away from lawyers and policymakers and placing them in the hands of psychiatrists and experts in public relations, who would be able to resolve the government's fiscal problems through creative administration *and* make people happy—all without rules.

* * *

Over fifty years ago, two of the century's greatest legal thinkers—Professors Lon Fuller⁶ and H.L.A. Hart—spurred over hundreds of pages of the *Harvard Law Review*, debating the essential qualities of law and aiming

4. See *infra* Part II.A; Sarah B. Lawsky, *Probably?: Understanding Tax Law's Uncertainty*, 157 U. PA. L. REV. 1017, 1031–34, 1065–74 (2009); Suzanne Scotchmer & Joel Slemrod, *Randomness in Tax Enforcement*, 38 J. PUB. ECON. 17, 17 (1989).

5. See *infra* Part II.B; *Dixon v. United States*, 381 U.S. 68, 72–75, 77 n.9 (1965); Erwin N. Griswold, *A Summary of the Regulations Problem*, 54 HARV. L. REV. 398, 423 (1941).

6. See ROBERT S. SUMMERS, LON L. FULLER 1 (1984) (characterizing Fuller as “one of the four most important American legal theorists of the last hundred years”).

to nail down the precise nature (and origins) of Rex’s failure.⁷ Two questions anchored this famous debate: what qualities make a rule a distinctive “legal” rule, as opposed to rules of social etiquette or individual morality? And why do those distinctive qualities—the “legality” of the rule—matter? In Rex’s context, their debate can be boiled down to a simple question: Had Rex merely failed to create good law? Or had Rex failed so spectacularly that his failures were more significant, instead failing to create law *at all*?

Legal scholars have debated these fundamental questions for centuries⁸—and continue to do so.⁹ These debates matter because answering these contested questions is critical to broader, more urgent and consequential disputes—from ostensibly practical ones about the nature of lawmaking¹⁰ and why people do (or should) follow the law,¹¹ to grander theories about how law can constrain pure political power.¹² As evidenced by the fact that the debate is not over, scholars have failed to arrive at an official consensus on an exhaustive definition of “legality”: a rule’s qualities that make it uniquely and distinctly “legal”—distinct from, for example, the rules of social etiquette or mere orders backed by force.¹³

But despite disagreements about specifics, legal philosophers of all stripes—including the famously adversarial Fuller and Hart—generally agree that rules must possess certain basic procedural qualities to be considered “good” or “effective” laws.¹⁴ To be a “good” or “effective” law, for example, a rule must be sufficiently clear, noncontradictory, or generally applicable, as evidenced by Rex’s mistakes.

The argument for Fuller, however, goes further:¹⁵ these procedural characteristics are not only necessary for a rule to be “good law” (measured against an external ethical yardstick defining “good,” such as utilitarianism or Kantianism) but are necessary for the rule to be “law” at all.¹⁶ In that way,

7. Compare H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (defending legal positivism and the separation of law from morality), with Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (arguing that law’s validity depends in part on fidelity to legality’s internal moral requirements). The debate continued for many years and culminated in Lon Fuller’s magnum opus, *The Morality of Law*. See FULLER, MORALITY, *supra* note 1.

8. See generally, e.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832).

9. See generally, e.g., Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018); THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY (Peter Cane ed., 2010); Jeremy Waldron, *Positivism and Legality: Hart’s Equivocal Response to Fuller*, 83 N.Y.U. L. REV. 1135 (2008).

10. See H.L.A. HART, *THE CONCEPT OF LAW* 82–83 (2d ed. 1994).

11. See FULLER, MORALITY, *supra* note 1, at 41.

12. See, e.g., Nicola Lacey, *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 N.Y.U. L. REV. 1059, 1087 (2008).

13. See HART, *supra* note 10, at 7 (criticizing Professor John Austin’s command theory of law as “a distortion and a source of confusion”).

14. See *infra* Part I for a more fulsome rehearsal of Fuller’s theory.

15. And, arguably, Hart agrees with Fuller. See Waldron, *supra* note 9, at 1145.

16. See FULLER, MORALITY, *supra* note 1, at 39 (concluding that a failure in these characteristics “results in something that is not properly called a legal system at all, except

legality's procedural components are themselves *morally good* and play a central role in justifying law's coercive nature to the citizen, and consequently a legal system lacking them would be morally bankrupt and illegitimate.¹⁷ Note that this claim about whether a rule is "law" is distinct from a claim about whether the rule is "law" in the shallow sense that the government might enforce it as law; after all, defining law shallowly to include whatever is enacted by the legislature, legally enforced, or force backed cannot meaningfully serve to distinguish the force-backed commands of an armed robber from the force-backed commands of a legitimate court decision.¹⁸

Notwithstanding legality's centrality to legal thought and broad applicability to a wide array of practical and policy decisions, legality has only been seriously incorporated into discussions aimed at wider policy and legal audiences recently, with Professors Cass R. Sunstein and Adrian Vermeule's work applying Fullerian principles to administrative law as a leading example.¹⁹ As such, although scholars and theorists have incessantly debated legality's requirements in theory and such debate interacts with other top-shelf ideals (e.g., rule of law, ideal constitutional structure), legal scholars have neglected to evaluate current legal systems. In doing so, scholars have failed to analyze whether our laws meaningfully correspond, embody, or otherwise relate to any of these lofty conceptions of legality or investigate the real-world relationship between a system's legality and ordinary citizen behavior and beliefs.²⁰

This Article aims to fill those lacunae in the literature by investigating how tax law—an area both in perpetual need of justification and constantly in flux—fares when evaluated under Fuller's principles of legality. As we will see, King Rex's story is more than just loosely inspired by real life. An (admittedly limited) examination indicates that our tax law fundamentally

perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract").

17. Fuller devotes an entire chapter to this conflict, analyzing the relationships between the internal and external moralities of law: "Against this view of Hart's [that a system might preserve the requirements of legality while pursuing evil ends] . . . I shall . . . connect the problem of legality with the other major issues of legal philosophy." *Id.* at 155. The clash between Hart and Fuller is also evident in Fuller's account of Nazi Germany's legal system. *See id.* at 40–41. Hart, a strong proponent of the separability thesis, refused to accept Fuller's relationship of *necessity* between morals and law.

18. *See* HART, *supra* note 10, at 20 (positioning his theory in opposition to Austin's command theory); Fuller, *supra* note 7, at 631–33, 638–48 (criticizing Hart's critique of Austin's command theory as insufficient given its insistence on the separability thesis). In addition, Fuller believed that a positivist Holmesian "prediction" account was also an insufficiently robust theory of law. *See, e.g.,* FULLER, MORALITY, *supra* note 1, at 106–18.

19. *See generally* Sunstein & Vermeule, *supra* note 9; Maggie Blackhawk, *Equity Outside the Courts*, 120 COLUM. L. REV. 2037 (2020). This scholarly work has not been extended to tax law.

20. This is a common line of inquiry in other philosophical debates. In ethics, for example, a large literature aims to uncover people's reasons for action, their general motivations, and their self-reported beliefs. *See, e.g.,* Geoff Sayre-McCord, *Metaethics*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 24, 2023), <https://plato.stanford.edu/entries/meta-ethics/> [https://perma.cc/2CBU-VHJR].

contravenes core tenets of legality, such as noncontradiction, congruence, and intelligibility. First, the tax law’s vagueness and its deployment of general anti-abuse rules (GAARs) to prevent tax avoidance contravenes the principle of noncontradiction by deliberately presenting citizens with multiple possible contradictory interpretations of the law.²¹ Second, the tax law’s application and enforcement are systematically incongruous with its proclamation: individualized tax incentives and determinations (e.g., private letter rulings) have led to a system structured on price discrimination, where a few (often wealthy) taxpayers experience a law different than that applied to everybody else.²² Third, given its byzantine nature and ever-increasing span, tax law is practically unintelligible to ordinary citizens and “experts” alike—a jurisprudential problem that is not resolved by the existence of tax preparers or the ubiquity of TurboTax.²³ As such, structural components of the tax law seem fundamentally at odds with the legality presupposed by widely accepted jurisprudential accounts.

So what do we do if our tax rules are not “law”? Neither abandon legality nor our current tax system. Rather, this Article illuminates an opportunity in this conflict: scholarship on tax morale and legal compliance suggests that tax evasion—an essential driver of conflict between the tax law and principles of legality—is *itself* significantly driven by perceptions of a system’s legality. Consequently, targeted reforms aimed at improving tax law’s legality could have the virtuous second-order consequence of improving tax compliance, dispelling King Rex’s perception of an inevitable dilemma between the principled demands of legality and the understandable necessity for tax compliance.

This Article makes several important contributions to the tax policy and legal philosophy literature. First, the Article reintroduces a concept—legality—that can better explain the reasons for (and force behind) significant, but seemingly unrelated, taxpayer and legal concerns with contemporary taxation (e.g., the unintelligibility of the tax code, the vagueness of the economic substance doctrine, the “unfairness” with corporate taxpayers such as Amazon receiving sweetheart tax deals)²⁴ and these gripes’ relationship to tax compliance. Furthermore, after an investigation of legality in tax and an exploration of the role of legality in tax compliance, this Article makes a policy contribution to the literature on tax evasion and tax avoidance by stressing how uber-technocratic policy proposals countering tax evasion must not exclusively focus on deterrence—but must take legality seriously in designing policy. In doing so, the Article advances novel, specific, and concrete policy and policymaking recommendations with a focus on harmonizing legality and taxation. Finally,

21. See *infra* Part II.A.

22. See *infra* Part II.B.

23. See *infra* Part II.C.

24. Christopher Ingraham, *Amazon Paid No Federal Taxes on \$11.2 Billion in Profits Last Year*, WASH. POST (Feb. 16, 2019), <https://www.washingtonpost.com/us-policy/2019/02/16/amazon-paid-no-federal-taxes-billion-profits-last-year/> (on file with the *Fordham Law Review*).

this Article advances this nascent literature in legal philosophy and more generally explores a test case for the underappreciated relationship between legality and legal compliance, invoking half a century of empirical literature unavailable to Fuller and Hart at the time of their famous debate. In doing so, it underscores the relevance of earthly legal compliance considerations to lofty theories of legality.

Beginning this journey requires us to first understand the general contours of popular conceptions of legality. Part I thus rehearses the main elements of the most influential and widely-accepted account of legality—Lon Fuller’s account in *The Morality of Law*.²⁵ Legality—the quality that separates legal rules from other types of rules and makes legal rules “special” in a normative sense—requires that rules comply with several intuitive desiderata.²⁶ Part II then documents fundamental conflicts between our current tax system and three desiderata of legality: noncontradiction, congruence, and clarity. Part III seeks a way out of this conflict by highlighting a leading cause of the conflict—the fight against tax evasion. Further, it turns to the concrete by discussing specific policy and policymaking proposals that aim to harness the relationship between legality and tax compliance.

I. FULLER’S CONCEPTION OF LEGALITY

Lon Fuller, one of the “four most important American legal theorists of the last hundred years,”²⁷ delineated his conception of “legality” in four Storrs Lectures at Yale Law School, which he later published as *The Morality of Law*.²⁸ Some context is helpful to grasp both the significance and novelty of Fuller’s theory. Other accounts sought to break free from legal positivism—i.e., the theory most prominently expounded by H.L.A. Hart, arguing that law (and its contents) are determined by social, rather than moral, facts.²⁹ In contrast, Fuller did not define “legality” on substantive terms or by naturalist appeals to external notions of justice or morality (e.g., only “just” rules are “legal” rules).³⁰ Instead, Fuller formulated eight procedural elements *inherent* to law and in turn argued that these characteristics gave law its “internal morality.” Such internal morality was distinguishable from law’s “external morality” (i.e., the law’s correspondence with a person’s “external” moral system, such as utilitarianism or Kantianism). In other words, a legal

25. See generally FULLER, MORALITY, *supra* note 1.

26. See *id.* at 39.

27. SUMMERS, *supra* note 6, at 1.

28. See generally FULLER, MORALITY, *supra* note 1.

29. Different positivists will take different stances on whether law can be described *solely* by social facts, or whether they accept that moral facts can determine the law, without agreeing to a relationship of necessity between law and morality. See HART, *supra* note 10, at 7–8 (differentiating positivism from natural law theory).

30. This draws on the well-known and oft-quoted naturalist maxim of *lex iniusta non est lex*. See Norman Kretzmann, *Lex Iniusta Non Est Lex: ‘Laws on Trial in Aquinas’ Court of Conscience*, 33 AM. J. JURIS. 99, 101 (1988).

rule could be “just” under some external moral system yet not be “law” because it failed to follow law’s “internal morality.”³¹

In stressing the significance of the law’s procedural dimensions, Fuller was not just echoing the now-commonplace legal process tradition³² popularized by Professor Henry M. Hart Jr. (and Dean Albert Sacks), which emphasizes the relationship between, for example, process, institutional competence, and the law’s substance.³³ Rather, Fuller departed more radically from positivism: he was putting forth a *naturalist* account of the law in which procedural characteristics determined a rule’s “legality” and contributed to its “goodness.” For Fuller, law needed to follow these procedural principles of legality to be considered “law” as such; a rule following the principles was less likely to be “wicked, unjust, or tyrannical,”³⁴ as “even in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerances, and inhumanities into law.”³⁵

With that context, we can consider Fuller’s account. Fuller explains his conception of legality through the story of King Rex, adapted in this Article’s Introduction. Fuller’s original tale recounts eight legislative failures by King Rex, each highlighting a distinct component of legality.³⁶ Because his actions repeatedly contravened the principles of legality, Rex failed to reform the system despite his best efforts.³⁷ This resulted in a practical policymaking failure to enact effective rules and, more importantly, a failure to enact rules that were “laws.”³⁸

Fuller notes that “Rex’s bungling career as legislator and judge illustrates that the attempt to create and maintain a system of legal rules may miscarry in at least eight ways; there are in this enterprise, if you will, eight distinct routes to disaster.”³⁹ First, there is “a failure to achieve rules at all, so that

31. See FULLER, MORALITY, *supra* note 1, at 154.

32. This is not only clear from Fuller’s *Morality of Law*. After *Morality of Law* was published, Fuller resisted calls to reinterpret his strong case for a procedural naturalist account of legality in his correspondence. A scholar of Fuller notes that

A number of scholars have sought to reinterpret Fuller’s eight principles as simply functional conditions of efficacy for the rule of law, a position that would be much more consistent with Fuller’s work on private contracts. . . . Fuller dismissed this interpretation of his work. “In treating my principles of legality as mere conditions of efficacy you are in harmony with Hart, Dworkin, Cohen, Hughes and Summers. Nevertheless, in my humble opinion you are all wrong.”

James Boyle, *Legal Realism and the Social Contract: Fuller’s Public Jurisprudence of Form, Private Jurisprudence of Substance*, 78 CORN. L. REV. 371, 376 n.25 (1993) (quoting SUMMERS, *supra* note 6, at 37).

33. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 4–5 (1958). See generally Anthony J. Sebok, *Reading The Legal Process*, 94 MICH. L. REV. 1571 (1996).

34. Waldron, *supra* note 9, at 1142; see also FULLER, MORALITY, *supra* note 1, at 96–97.

35. Fuller, *supra* note 7, at 637.

36. See FULLER, MORALITY, *supra* note 1, at 33–38.

37. See *id.*

38. See *id.*

39. *Id.* at 38–39.

every issue must be decided on an ad hoc basis.”⁴⁰ The others, he explains, are

(2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration.⁴¹

Although this list might initially strike some as idiosyncratic, Fuller’s principles have been independently explored in other contexts by different legal theorists.⁴² In fact, even though legal philosophers were quick to render their competing views on *The Morality of Law*, they mostly expressed agreement with Fuller’s principles of legality. In replying to his critics in a later edition of his book, Fuller notes,

My four critics [(H.L.A. Hart, Ronald Dworkin, Marshall Cohen, and Robert Summers)] . . . do not assert that anything—even a grunt or a groan—is law provided only it comes from a source identified by the Rule of Recognition; they share the view that before what emanates from the source can be called law, it must conform to certain standards that will enable it to function meaningfully in men’s lives.⁴³

In fact, legal philosophers of all stripes—from H.L.A. Hart⁴⁴ and Professor Ronald Dworkin⁴⁵ to Professors Joseph Raz⁴⁶ and Scott J. Shapiro⁴⁷—appear to generally endorse the importance of Fuller’s principles of legality. So have judges committed to varying judicial philosophies and with different political

40. *Id.* at 39.

41. *Id.*

42. For example, the literature on clarity, noncontradiction, and congruence is considerable. See *infra* Parts II.A–C. Other principles not discussed at length in this Article have also received considerable scholarly attention. See, e.g., Timothy Endicott, *The Generality of Law*, in READING HLA HART’S *THE CONCEPT OF LAW* 15, 21, 22 (2013) (arguing that Chapter II of Hart’s *The Concept of Law* is an essay on the generality of law and that for Hart, “generality is a necessary feature of law”). Similarly, Fuller’s critics have sometimes adopted or accepted his list of principles completely. See, e.g., Ronald Dworkin, *Philosophy Morality and Law-Observations Prompted by Professor Fuller’s Novel Claim*, 113 U. PA. L. REV. 668, 669 (1965).

43. FULLER, *MORALITY*, *supra* note 1, at 198 (emphasis added).

44. See H.L.A. Hart, *Problems of Philosophy of Law*, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 88, 115 (1983). See generally Waldron, *supra* note 9 (expertly summarizing Hart’s views on the matter).

45. Dworkin, *supra* note 42, at 668–69.

46. JOSEPH RAZ, *THE AUTHORITY OF LAW* 214–19 (1986) (adopting some of Fuller’s principles while proposing his own principles of legality).

47. SCOTT J. SHAPIRO, *LEGALITY* 395–96 (2011) (discussing Fuller’s desiderata in relation to his own social planning conception of the law).

inclinations.⁴⁸ Leading academics continue to look to Fuller, with recent works by Sunstein and Vermeule deploying Fuller’s *Morality of Law* as their framework in defense of the administrative state.⁴⁹ A review of a book on Fuller by the influential legal philosopher and professor Robert Summers succinctly summarizes the importance of his views: “Understanding Lon Fuller is a key to understanding the evolution of twentieth-century American legal philosophy.”⁵⁰

Fuller’s list is thus not a “brooding omnipresence in the sky”⁵¹—rather, his list is representative of characteristics widely accepted by legal thinkers as constitutive of legality, as evidenced by recent scholarship reintroducing Fuller’s discussions of legality to policy. In Professor John Rawls’s or Dworkin’s terminology,⁵² Fuller’s list is not merely describing his conception of legality but perhaps outlines the *concept* of legality altogether.

But what are the stakes behind his long laundry list of procedural desiderata? Fuller takes a strong stance arguing that King Rex “failed spectacularly, since not only did he not succeed in introducing the needed reforms” (e.g., lowering the price of legal representation, reducing corruption), “*but he never even succeeded in creating any new law at all, good or bad.*”⁵³ In other words, the story of King Rex is not merely one about policy inefficacy or bureaucratic ineptitude—it is a story adumbrating the frontier dividing mere *rules* from *law*.⁵⁴ It is a story about (il)legal rules, about rules that do not belong in a legitimate legal system.

At stake are not merely semantics: when Fuller claims that a rule is not “legal,” he is not sophistically debating whether such rule was duly published in the *Federal Register* or whether the rule is practically enforceable as law. (Do not read this Article as advocating for tax evasion!). For Fuller, legality is constitutive of law’s “internal morality” and undergirds an essential relationship of reciprocity with the State that justifies law’s—and taxation’s—coercive nature.⁵⁵ So, making a claim about a rule’s “illegality” is disputing the rule’s status as “law.” This status clothes the rule with

48. See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (using the principle of clarity when stating that a law is unconstitutionally vague if “it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits”); *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994) (quoting *The Morality of Law* when discussing issues of generality and retrospectivity); *Korematsu v. United States*, 323 U.S. 214, 220 (1944) (discussing the principle of noncontradiction).

49. See *supra* note 19 and accompanying text.

50. William Powers, Jr., *Lon L. Fuller by Robert Summers*, 1985 DUKE L.J. 221, 221 (book review).

51. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

52. See JOHN RAWLS, *A THEORY OF JUSTICE* 5–6 (rev. ed. 1999); RONALD DWORKIN, *LAW’S EMPIRE* 70–72 (1986).

53. FULLER, *MORALITY*, *supra* note 1, at 34 (emphasis added).

54. *Id.*

55. See, e.g., *id.* at 219 (“The functioning of a legal system depends upon a cooperative effort—an effective and responsible interaction—between law-giver and subject.”).

normative force⁵⁶ and incorporates the rule inside a grander architecture that normatively justifies and legitimates such rule's existence, an architecture built around lofty notions such as the "rule of law," "legitimacy," or even "happiness."⁵⁷ In doing so, Fuller does not dispute that the armed police might enforce the rule, but rather disputes that such enforcement is "legal"—and distinct from the coercive commands of an armed robber.

Even positivists (Fuller's most ardent critics) have acknowledged that the principles of legality are essential to the law's effectiveness—and further, to the system's success in fostering rule-of-law values⁵⁸ and human happiness.⁵⁹ With an understanding of what legality entails, what discussions of legality are really about, and the stakes at hand, we can proceed to evaluate tax law's legality.

II. TAX LAW'S (IL)LEGALITY

With a better (and complete for our purposes) understanding of legality, we can evaluate whether our tax system generally aligns with Fuller's concept of legality. The results of this analysis should shed light on whether our current system is compatible with legality *in practice*—and perhaps even on the desirability of using legality as a lens to evaluate tax laws (or laws generally) in the first place.⁶⁰ Given the complexity of some of these subjects and the limitations of article form, the analysis is meant to elucidate the frequent and fundamental ways in which core structures (rather than individual rules) of our tax system are frequently, and by design, at odds with elementary requirements of a "legal" system.

This Article evaluates legality in tax law through three of Fuller's principles: (A) noncontradiction, (B) congruence, and (C) intelligibility and clarity. This analysis does not exhaust Fuller's eight desiderata of legality. Such an analysis, however, would be unnecessarily repetitive and unbearable to read (or write), without necessarily adding much to the evaluation. As Fuller himself argued, "infringements of legal morality tend to become cumulative";⁶¹ it is unlikely that a system of law systematically contravening

56. See *id.* at 197–200 (discussing Professors H.L.A. Hart, Ronald Dworkin, Marshall Cohen, and Robert Summers's views on his theory); *id.* at 200 (noting his critics' negative reaction to his notion of "internal morality of law"). Even Raz, who adopted a modified version of H.L.A. Hart's theory of legality, still notices the importance of these principles. See RAZ, *supra* note 46, at 223 & n.11. While Raz's formulation of legality construes Fuller's very narrowly, his conception of the rule of law evidences significant overlaps between his concern with legality and Fuller's. See *id.* at 223–25.

57. See *supra* note 56 and accompanying text; H.L.A. Hart, *The Morality of Law*, 78 HARV. L. REV. 1281, 1289–91 (1965) (book review) (arguing that he, Hans Kelsen, John Austin, and Jeremy Bentham all share the importance of legality by reference to the *efficiency* of law in pursuing other top-shelf values, like happiness).

58. See, e.g., John Gardner, *Legal Positivism: 5 1/2 Myths*, 46 AM. J. JURIS. 199, 210 (2001).

59. See Waldron, *supra* note 9, at 1155–56 (rehearsing Hart's arguments).

60. Cf. Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636 (1999).

61. FULLER, *MORALITY*, *supra* note 1, at 92.

three principles would work much better when measured under the other five. Nonetheless, for the indefatigable reader, this part ends by briefly delineating how the foregoing legal structures conflict with Fuller’s remaining principles.

A. *Noncontradiction and GAARs*

An essential, intuitive, and noncontroversial desideratum of legality is noncontradiction. Fuller’s emphasis on this element is shared by other influential legal theorists, such as Professors H.L.A. Hart,⁶² Hans Kelsen,⁶³ Ernest Weinrib,⁶⁴ and Joseph Raz,⁶⁵ who have similarly stressed noncontradiction’s importance in their work. So has the U.S. Supreme Court.⁶⁶

Achieving noncontradictory rules is not trivial, requiring “painstaking care” from the legislator.⁶⁷ Such care is required because contradiction cannot only result from laws whose text or logic is squarely at odds (e.g., “do A” and “do not do A”),⁶⁸ but can also arise in a broader set of circumstances. Take, for example, laws that might compel an action and, at the same time, punish a set of actions covering the compelled action (e.g., “do A” and “punish not-B”). Laws could also be self-contradictory, where compliance with the law *requires* violating the law.

62. Hart, *supra* note 57, at 1285.

63. Kelsen was a proponent of applying the “Principle of Exclusion of Contradictions” to rules of law. HANS KELSEN, *PURE THEORY OF LAW* 206 (Max Knight trans., 1967).

[L]ogical principles in general, and the Principle of the Exclusion of Contradictions in particular, are applicable to rules of law describing legal norms and therefore indirectly also to legal norms. . . . To say that *a* ought to be done and at the same time ought not to be done is just as meaningless as to say at the same time that *a* is and at the same time that it is not. A conflict of norms is just as meaningless as a logical contradiction.

Id.; see also John Prebble, *Kelsen, the Principle of Exclusion of Contradictions, and General Anti-Avoidance Rules in Tax Law*, in *PHILOSOPHICAL FOUNDATIONS OF TAX LAW* 79, 86 (Monica Bhandari ed., 2017).

64. See, e.g., Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L.J.* 949, 952 n.6 (1988) (discussing Hart’s view).

65. See Joseph Raz, *Critical Study: Kelsen’s General Theory of Norms*, 6 *PHILOSOPHIA* 495, 502–03 (1976) (rejecting Kelsen’s late relaxation of the noncontradiction principle in legality as “quite plainly a wholly unacceptable solution to the problem of practical conflicts. It leads directly to the conclusion that practical reasoning is impossible and practical discourse either equally impossible or at any rate completely pointless” and stressing the importance of a theory that can resolve practical conflicts in the law); see also RAZ, *supra* note 46, at 53–61.

66. Even anticanonical decisions acknowledge this maxim. See *Korematsu v. United States*, 323 U.S. 214, 220 (1944) (“Of course, a person cannot be convicted for doing the very thing which it is a crime to fail to do. But the outstanding orders here contained no such contradictory commands.”).

67. FULLER, *MORALITY*, *supra* note 1, at 65.

68. For the sake of simplicity and accessibility, I avoid the formal logic notation that usually accompanies these discussions, as it is not necessary for the fundamental points discussed here.

Relevant for our purposes, laws might be *vague* to the point that they contradict because citizens cannot determine the law's exact contours.⁶⁹ Fuller provides an apt example of this vagueness conflict, where “a judge struggl[es] with a statute that in one section seems to say Mr. A ought to pay a tax and in another that he is exempt from it.”⁷⁰

Most legal theorists have sought to solve the problem of contradiction through legal *interpretation*.⁷¹ They often say it is simple: a judge confronted with two laws that seemingly conflict should just interpret them in a way that avoids the contradiction. This practice is common: courts frequently invoke noncontradiction interpretive or construction canons, such as constitutional avoidance,⁷² harmonious-reading,⁷³ or implied-repeal,⁷⁴ to avoid conflicts and contradictions. In fact, some scholars have sought to reimagine canons of construction to aid tax law's war on tax abuse.⁷⁵

But it is not always so simple. Some conflicts cannot be easily “interpreted” away because the text or purposes of the contradicting laws might be so at odds that a resolution through interpretation cannot be faithfully or practically achieved.⁷⁶ Our tax laws systematically and intentionally present taxpayers and courts with such situations—especially in the context of anti-abuse provisions, like GAARs.

69. Whether to apply the principle of noncontradiction might depend on what character a theorist attributes to legal rules: Are they propositions? Are they norms? *See, e.g.,* Raz, *supra* note 65, at 503 (pointing to this conflict). A detailed analysis of these discussions is outside the scope of this Article, and I will construe contradiction in line with Fuller.

70. FULLER, MORALITY, *supra* note 1, at 112.

71. *Id.* at 67–69 (discussing interpretive techniques to resolve seemingly contradictory laws); *see also* DWORKIN, *supra* note 52, at 267–68 (discussing interpretation, integrity, and contradiction in law). For our purposes, we will set aside the thorny interpretation/construction debate. *See* Francisco J. Urbina, *Reasons for Interpretation*, 124 COLUM. L. REV. 1661, 1718–22 (2024) (discussing the debate and its relationship to interpretive choice).

72. “When ‘a serious doubt’ is raised about the constitutionality of an act of Congress, ‘it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.’” *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

73. “[The] task is to fit, if possible, all parts into a[] harmonious whole.” *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)).

74. “[R]epeals by implication are not favored,’ and are a ‘rarity.’ Presented with two statutes, the Court will ‘regard each as effective’—unless Congress’ intention to repeal is ‘clear and manifest,’ or the two laws are ‘irreconcilable.’” *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (citations omitted) (first quoting *Morton v. Mancari*, 417 U.S. 535, 549 (1974); then quoting *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 142 (2001); then quoting *Morton*, 417 U.S. at 550–51; then quoting *id.*; and then quoting *id.*).

75. *See generally* Jonathan H. Choi, *The Substantive Canons of Tax Law*, 72 STAN. L. REV. 195 (2020) (arguing that courts should treat tax anti-abuse doctrines as substantive canons of construction).

76. *See infra* Part II.A.2.

1. GAARs and the Vague Trigger

GAARs are the paradigmatic example of a rule contravening the principle of noncontradiction through vagueness.⁷⁷ As their name implies, these rules are by design phrased in uniquely broad and general terms. GAARs usually state that *while* a transaction might comply with all the technical requirements of a specific rule explicitly allowing the transaction, *if* some other condition is met, then the first specific rule will be ignored and that transaction might be deemed illegal or subject to some punishment.⁷⁸

In more general terms, even if *Rule X* says doing α is legal, if β happens, then *Rule Y* renders α illegal.⁷⁹ In this sense, the GAAR (*Rule Y*) operates to negate another rule (*Rule X*) when some trigger condition (β) is met. That would not necessarily imply a contradiction. The problem is that β —the trigger condition that is grounds for disallowance under the GAAR—is rarely defined in terms that are clear enough to drive taxpayer behavior. Therefore, the vagueness and indeterminacy of the trigger condition might mean that regardless of the legality of an economic interaction, unaware parties might find themselves *simultaneously* allowed to engage in a transaction (by *Rule X*) and punished by a GAAR (*Rule Y*). In practice, this means that because of the vagueness of the trigger condition, some taxpayers will experience the law as if they were subject to two simultaneous and conflicting rules (*Rule X* and *Rule Y*).⁸⁰

GAARs are not an unrepresentative example of “real” tax law. Jurisdictions around the world have increasingly adopted GAARs: Australia, Canada, China, France, Germany, India, the Netherlands, New Zealand, Poland, and the United Kingdom have adopted them in one way or another.⁸¹ As of December 2017, “out of 46 countries in the [Organisation for Economic Co-operation and Development (OECD)] and G20 combined, 35 have a GAAR.”⁸² Moreover, signatories to the OECD’s Base Erosion and Profit Shifting (BEPS) Multilateral Instrument adopt a GAAR-like rule with

77. See, e.g., Prebble, *supra* note 63, at 86 (discussing this conflict in the context of Kelsen’s theory of law).

78. See, e.g., Christophe Waerzeggers & Cory Hillier, *Introducing a General Anti-Avoidance Rule (GAAR)*, 1 IMF LEGAL DEP’T 10 (2016), <https://www.imf.org/external/pubs/ft/tltn/2016/tltn1601.pdf> [<https://perma.cc/V7CT-N3S8>] (introducing IMF’s model GAAR).

79. In some situations, a GAAR may leave a transaction’s legal status unchanged but still penalize it. There, we could describe the situation in the same formal way, substituting “legal” for “benefitted” and “illegal” for “punished.”

80. This is distinguishable from a situation where the application of a rule is *uncertain* or where a citizen might not know the extent of a law. Such uncertainties are common in the law, but they are neither *systematic* nor *intentional*, presenting much less serious problems of legality. See *infra* note 95 and accompanying text.

81. See PWC, GAAR DECODED 3 (2017), <https://www.pwc.in/assets/pdfs/publications/2017/gaar-decoded.pdf> [<https://perma.cc/H4EP-3W64>].

82. Christoph Suter, *The Rise of General Anti-Avoidance Rules in Taxation*, FINANCIER WORLDWIDE (Dec. 2017), <https://www.financierworldwide.com/the-rise-of-general-anti-avoidance-rules-in-taxation/> [<https://perma.cc/5JVJ-UBQ6>].

respect to their vast bilateral tax treaty network.⁸³ GAARs are so widely used that some commentators have argued that they are now best conceived as a “general principle of international law.”⁸⁴

The United States has a GAAR in the form of the (now partly codified)⁸⁵ overlapping common-law doctrines of economic substance (“ESD”), substance-over-form, sham transaction, and business purpose.⁸⁶ These broad doctrines generally work to disallow the tax benefits obtained by taxpayers in reliance on statutory text but in contravention of the tax law’s purpose.⁸⁷

Countries differ in how β —the trigger condition for the GAAR—is codified, but they have almost uniformly codified it with unworkably vague language. For example, Australia’s provision (perhaps the oldest GAAR)⁸⁸ states that it applies if “the person . . . who entered into . . . the scheme . . . did so for the purpose of: enabling a taxpayer . . . to obtain a tax benefit.”⁸⁹ In other words, any transaction that is entered into with the purpose of obtaining a “tax benefit”—that is, potentially *any* transaction—could be disallowed.

The U.S. GAAR’s applicability is not any less fuzzy. The ESD, for example, is vexingly relevant to any transactions that are inconsistent with “congressional purpose,” even if within the literal meaning of the statute.⁹⁰

83. Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting art. 7(1), *opened for signature* June 7, 2017 (entered into force July 1, 2018), <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf> [<https://perma.cc/N6BF-26FX>]; see also Organisation for Economic Co-Operation and Development [OECD], *Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, para. 88 (“The Action 6 Report includes three alternative rules to address situations of treaty abuse. The first of these alternatives is a general anti-abuse rule based on the principal purpose of transactions or arrangements.”).

84. João Dácio Rolim, *The General Anti-Avoidance Rule: Its Expanding Role in International Taxation*, 44 *INTERTAX* 815, 819 (2016).

85. I.R.C. § 7701(o) (codifying the economic substance doctrine). Some commentators have further urged policymakers to plainly codify a broad GAAR. See generally Reuven Avi-Yonah, *A Response to Professor Choi’s Beyond Purposivism in Tax Law*, 108 *IOWA L. REV. ONLINE* 69 (2023) (arguing that Congress should explicitly adopt a broad statutory GAAR to curb abusive tax shelters).

86. See *Frank Lyon Co. v. United States*, 435 U.S. 561, 583–84 (1978) (expounding the economic substance doctrine); Reuven S. Avi-Yonah & Amir Pichhadze, *GAARs and the Nexus Between Statutory Interpretation and Legislative Drafting: Lessons for the U.S. from Canada*, *ACCT., ECON., & L.: A CONVIVUM*, Mar. 2017, at 1, 7–8 (discussing the economic substance doctrines as the United States’ GAAR). Furthermore, the tax code contains a GAAR textually covering its partnership tax provisions. See *Treas. Reg.* § 1.701-2.

87. See STAFF OF THE JOINT COMM. ON TAX’N, 111TH CONG., *TECHNICAL EXPLANATION OF THE “REVENUE PROVISIONS OF THE RECONCILIATION ACT OF 2010,” AS AMENDED, IN COMBINATION WITH THE “PATIENT PROTECTION AND AFFORDABLE CARE ACT”* 152 n.344 (Comm. Print 2010) (discussing the intended applicability of the codified economic substance doctrine).

88. See Suter, *supra* note 82 (noting that GAARs “were first introduced as early as 1915 in Australia and 1925 in the Netherlands”).

89. *Income Tax Assessment Act 1936* (Cth) s 177D(1) (Austl.).

90. See STAFF OF THE JOINT COMM. ON TAX’N, *supra* note 87, at 152 n.344; see also Bret Wells, *Economic Substance Doctrine: How Codification Changes Decided Cases*, 10 *FLA. TAX REV.* 411, 419–20 (2010).

Sister doctrines seemingly apply to transactions where tax reduction is a legally relevant motive.⁹¹ As the U.S. Court of Appeals for the Ninth Circuit once clarified when discussing the applicability of an anti-abuse doctrine: “[t]ax reduction is not evil if you do not do it evilly.”⁹²

But surely this cannot be the way the GAARs are indeed applied, as their breadth would seemingly cover everything under the sun.⁹³ By their own terms, the ESD and sister doctrines do have some legal limitations.⁹⁴ However, this has not stopped taxpayers from arguing that limitations have an “unworkable vagueness” or a “know-it-when-I-see-it” quality⁹⁵. The Internal Revenue Service (IRS)⁹⁶ (and other foreign equivalents)⁹⁷ have

91. See Alan Gunn, *Tax Avoidance*, 76 MICH. L. REV. 733, 738 (1978) (critically assessing motive-based anti-abuse doctrines by noting that the “tax-avoidance purpose” principle “means nothing” if transactions lacking a nontax reason are denied effect). The economic substance doctrine, for example, (inconsistently) disallows benefits where there is no substantial nontax motive. See Choi, *supra* note 75, at 203. The application of the doctrine is further complicated by how it deals with the mixed-motives problem. See Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106, 1141, 1170 (2018) (discussing law’s different approaches to the problem of mixed motives). Critically, the doctrine inconsistently grapples with the problem that there might be *both* a substantial tax-reduction motive *and* a substantial economic substance motive.

92. Gunn, *supra* note 91, at 747 (quoting *Murphy Logging Co. v. United States*, 378 F.2d 222, 223 (9th Cir. 1967)).

93. Perhaps this is the case; if so, this section should confront how GAARs are not contradictory but rather impossible to comply with, another desideratum of legality. See *infra* Part II.D.

94. For example, the ESD is only supposed to deny a benefit where (1) the transaction does not “change[] in a meaningful way (apart from Federal income tax effects) the taxpayer’s economic position” or (2) the taxpayer lacks a “substantial purpose (apart from Federal income tax effects) for entering into such transaction.” I.R.C. § 7701(o). These limitations have also proved quite vague, leaving tax experts begging for more guidance on their “unclear and confusing” meaning and their application. See, e.g., REPORT ON CODIFICATION OF THE ECONOMIC SUBSTANCE DOCTRINE, N.Y.S. BAR ASS’N, TAX SECTION 3, 4–5 (2011).

95. See *Petition for a Writ of Certiorari at 1–2, TIFD III-E, LLC v. United States (Castle Harbour)*, 577 U.S. 1092 (2016) (mem.) (No. 15-331) [hereinafter *Castle Harbour* Petition] (“In this extraordinary case, which has been the subject of three separate appeals, the Second Circuit adopted an unprecedented—and unworkably vague—test [(derived from anti-abuse doctrines)] for determining when a partner’s interest in a partnership can be disregarded for tax purposes. . . . The Second Circuit’s new ‘we-know-it-when-we-see-it’ test departs from this Court’s governing precedent, creates a conflict among the circuits, and, as many commentators have noted, introduces confusion into the tax treatment of corporate instruments.”).

96. See LARGE & MID-SIZE BUS. DIV., I.R.S., LMSB-20-0910-024, CODIFICATION OF ECONOMIC SUBSTANCE DOCTRINE AND RELATED PENALTIES (2010). However, during the administration of President Joseph R. Biden Jr., the IRS sought a forceful and broad application of the ESD, for example, arguing that the ESD was relevant to *all* transactions and that if the tax benefits obtained from a transaction “dwarf” the economic change from the transaction, then the ESD is relevant to such transaction. See Rev. Rul. 2024-14, 2024-28 I.R.B. 18 (analyzing the application of the ESD to a transaction without first determining whether the ESD is relevant to the transaction); IRM 4.10.13.11 (July 27, 2023) (communicating the enforcement position to IRS agents).

97. See, e.g., AUSTL. TAX’N OFF., PRACTICE STATEMENT LAW ADMINISTRATION, paras. 18–40 (2020), <https://www.ato.gov.au/law/view/pdf?DocId=PSR%2FPS200524%2FNAAT%2FATO%2F00001&PiT=99991231235958&filename=law%2Fview%2Fpdf%2Fpsr%2Fps2005-024c1.pdf> [<https://perma.cc/AMT3-RR4J>] (delineating the procedures of the panel that administers Australia’s GAAR decisions).

sought to allay fears of excessive or arbitrary governmental enforcement of these provisions. These promises, however, do not allow a taxpayer to ex ante nail down the law and indeed seem to retain unrestricted discretion for tax authorities to determine a transaction's legality.⁹⁸

Importantly, the vagueness of a GAAR's trigger condition is not a bug—but a feature—of the tax system. Both supporters and critics of GAARs agree that its vagueness and fuzziness are intentional, meant to reserve flexibility to a government at war with well-advised evaders.⁹⁹ The Joint Committee on Taxation similarly acknowledged as much,¹⁰⁰ while also recognizing that the GAAR's applicability is “blurred” by the courts, the IRS, and litigants and that the GAAR is at “odds with an objective, ‘rule-based’ system of taxation.”¹⁰¹

GAARs thus implicate the principle of noncontradiction as the tax laws point the taxpayer in opposite directions. The taxpayer is placed in a position where they cannot know whether their transaction might be benefited or punished by the legal regime, even after engaging in a quixotic quest for the purpose or meaning of an Internal Revenue Code (the “Code”) provision. Tax law simultaneously tells the taxpayer: *Rule X* provides α is legal, and *Rule Y* says α is illegal if β —where β is both incredibly broad and vague. β 's “unworkable vagueness” or “know-it-when-I-see-it” quality¹⁰² effectively means that, in the eyes of the perplexed taxpayer, α can be contradictorily *legal* and *illegal* at the same time.

2. Interpretation and Purposivism

Some might (misguidedly) oppose this characterization of GAARs on two related grounds. First, some might argue that these conflicts can all be sorted out through “interpretation,” pressing that any issues with GAARs might be resolved by employing rules cabining the scope of GAARs, preventing any actual conflicts.

This position would seem to have some credibility: GAARs technically have lists of limiting factors.¹⁰³ Nonetheless, GAARs are broad and vague *by design*—for example, any transaction allowed by the tax system can be disallowed by a GAAR if a court or bureaucrat found that it violated the

98. Perhaps they even retain “arbitrary power.” See RAZ, *supra* note 46, at 224–25; see also David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 877–79 (1999) (discussing GAAR's “heads I win, tails you lose” character).

99. See, e.g., Weisbach, *supra* note 98, at 875–76 (defending intentionally “fuzzy” anti-abuse rules); Gunn, *supra* note 91, at 765–67 (criticizing “fuzzy” notions of preventing tax avoidance and motive-based anti-abuse reasoning).

100. See STAFF OF THE JOINT COMM. ON TAX'N, *supra* note 87, at 142.

101. See *id.*

102. See *Castle Harbour* Petition, *supra* note 95, at 1–2.

103. See, e.g., *Income Tax Assessment Act 1936* (Cth) s 177D(2) (Austl.) (describing schemes to which this section applies). Some, like the United States' GAAR, however, are “relevant” in a dizzyingly broad array of circumstances. See *supra* notes 90–92.

“provision’s purpose” or that it was “abusive.”¹⁰⁴ Given that the trigger condition (β) is by design not given a precise meaning by its drafters, any attempt at cabinining its meaning or specifying its contours would be an exercise of judicial *lawmaking*, not interpretation. That would not actually solve the law’s unpredictability or contradiction and would bring about a whole new set of normative issues. Moreover, the unpredictability of β (even with judicial lawmaking) would still lead to the vague and contradictory character of the law *in the eyes of the law’s subject* ex ante, because the taxpayer might still not know how to plan or appropriately conduct their behavior.¹⁰⁵

Unconvinced readers might be quick to argue that there is not really a contradiction posed by the GAAR because some GAARs only apply where the legislature’s intent has been contravened by “abusive” behavior. Accordingly, because such abusive behavior was not *really* allowed in the first place under an appropriate reading of the Code, the GAAR does not generate an actual contradiction, just a perceived one.¹⁰⁶ In other words, the GAAR never generates “real” contradictions or conflicts; rather, there are only “apparent” conflicts or misunderstandings, borne out of taxpayers’ mistaken conceptions of the “true” meaning of the law intended by Congress.¹⁰⁷

Although this strongly purposivist criticism superficially addresses the perceived conflict, it fails. It rests on an indefensible view of the law—one that assesses the law from an external or “objective” point of view where the legislators’ or the law’s “true” purposes can somehow be ascertained from

104. This example would violate the United Kingdom’s GAAR. See HM REVENUE & CUSTOMS, GENERAL ANTI-ABUSE RULE (GAAR) GUIDANCE 11 (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695255/gaar_parts_a_b_c_2018.pdf [<https://perma.cc/RV4Z-J6AG>] (“The GAAR only comes into operation when the course of action taken by the taxpayer aims to achieve a favourable tax result that Parliament did not anticipate when it introduced the tax rules in question and, critically, where that course of action cannot reasonably be regarded as reasonable.”); Judith Freedman, *United Kingdom*, in GAARS—A KEY ELEMENT OF TAX SYSTEMS IN THE POST-BEPS WORLD, ch. 37, § 37.2.1 (Michael Lang, Alexander Rust, Josef Schuch, Claus Staringer, Jeffrey Owens & Pasquale Pistone eds., 2016).

105. This formulation of the importance of noncontradiction might be more important to some theorists than others. See SHAPIRO, *supra* note 47, at 393–94 (using our friend Rex to show that even “crystal clear” rules can still fail legality when they are “massively contradictory”); see also Martin J. Stone, *Planning Positivism and Planning Natural Law*, 25 CAN. J.L. & JURIS. 219, 219 (2012) (pushing back on Shapiro’s planning positivism).

106. A prominent practitioner asks, “[H]ow can you tell whether a particular step in a transaction is *Dover*-style ‘legitimate tax planning’ or *Gregory*-style ‘abusive tax avoidance’? I believe the key is the sentence in the legislative history of codification stating that [the economic substance doctrine] does not apply if the tax result was clearly intended by Congress.” Michael Schler, *Thoughts on the Economic Substance Doctrine*, COLUM. J. TAX L. (Aug. 7, 2019), <https://journals.library.columbia.edu/index.php/taxlaw/announcement/view/129> [<https://perma.cc/JS9E-KLHQ>].

107. Fuller criticizes Kelsen and Professor Felix Somló for this contention. See FULLER, *MORALITY*, *supra* note 1, at 111–12; see also Jonathan H. Choi, *Beyond Purposivism in Tax Law*, 107 IOWA L. REV. 1439, 1445–60 (2022).

the ether and where taxpayers can, as a practical matter, do the same.¹⁰⁸ As Professor Jonathan Choi convincingly argues, this is an especially salient problem in tax, where purposivism is ill-suited to distinguish legitimate transactions from tax shelters.¹⁰⁹ Fuller's account—and that of many other legal philosophers—draws on the law as a social enterprise for this reason, emphasizing not “objective” but rather “subjective” social understandings of the law. In this sense, the criticism misses the mark, as the “basic problem” of contradiction is that the law “gives a confused direction to the citizen,”¹¹⁰ a problem that purposivist sophistry does not resolve.

More importantly, this criticism fails insofar as it ignores the fact that the β is *intentionally* undefined (or underdefined), as in King Rex's allegory. Looking to congressional purpose would not clarify a rule that is *meant* to be vague.¹¹¹

Adding another layer of complexity, taxpayers wishing to outline the GAAR's scope (by first determining β 's content and scope) might be forced to engage in the Herculean task of making a second order determination as to what a judge will subjectively consider to be under the GAAR's scope.¹¹² Complicating things further, empirical evidence suggests that even simple procedural matters—e.g., whether a lawsuit is asking for a refund of tax paid rather than an economically equivalent reduction on the tax liability due—might be determinative of a GAAR's applicability.¹¹³

Structures like GAARs create legality problems because they result in a legal system in which taxpayers practically experience contradictory laws. The laws, in the United States and around the world, both allow taxpayers to undertake a transaction, while simultaneously disallowing such a transaction if a vague and mysterious condition applies. Taxpayers thus experience a

108. Even the most ardent purposivists are unlikely to take such a strong position. See generally, e.g., John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1912 (2015).

109. See Choi, *supra* note 107, at 1449 (arguing that purposivism cannot reject “tax shelters” without also condemning legitimate tax planning because both can exceed any particular provision's “specific purpose”).

110. FULLER, *MORALITY*, *supra* note 1, at 67.

111. See Gunn, *supra* note 91, at 759 (“[S]tatements about the necessity of preventing tax avoidance prove upon examination to be question-begging.”).

112. A prominent practitioner notes that the economic substance doctrine, the American equivalent of a GAAR, “at least as currently applied by the courts, is primarily a *subjective* anti-abuse rule the application of which is objective in name only.” David Hariton, *Has Codification Changed the Economic Substance Doctrine?*, COLUM. J. TAX L. (Aug. 7, 2019), <https://journals.library.columbia.edu/index.php/taxlaw/announcement/view/129> [https://perma.cc/JS9E-KLHQ] (emphasis added).

113. See Joshua D. Blank & Nancy Staudt, *Corporate Shams*, 87 N.Y.U. L. REV. 1641, 1703 (2012) (“[W]hen a tax controversy arises from the IRS's denial of a corporation's claim for a refund, instead of from an IRS agent's own discovery of a deficiency item during an audit, the government's chances of success in litigation increase significantly.”). A possible explanation is that the Supreme Court justices might “fram[e] . . . the controversy as a dispute over the corporation's request for a *refund* of taxes from the government, as opposed to one that involves an *underpayment* of taxes to the government.” *Id.*

deeply contradictory system, revealing tax rules’ worrisome conflict with legality.¹¹⁴

*B. Congruence and Taxation’s
Price Discrimination*

Fuller’s principle of congruence requires that the rules communicated to citizens are applied congruently in the citizens’ relationship to the State. “[T]he most complex of all the desiderata that make up the internal morality of law,” recounts Fuller, is the “congruence between official action and the law.”¹¹⁵ He explains, “This congruence may be destroyed or impaired in a great variety of ways: mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive toward personal power.”¹¹⁶ As with other principles of legality, congruence is derived from and buttressed by the reciprocity between the State and its citizens.

How does U.S. tax law fare? Tax law suffers from a systematic incongruence between the law and governmental action. Every area of the law suffers from a certain degree of inconsistency—perfect consistency has never been on the table¹¹⁷—but modern taxation is exceptional in that its incongruences are systematic, fundamental, and intentional.

Governments appear to have intentionally built the entire tax structure and rate system on incongruences. As many prominent models of governmental action would presuppose, governments have an incentive to systematically manipulate vagueness and differences between the law-as-publicized and the law-as-enforced for their own benefit, be it to increase compliance, revenues, or “efficacy.”¹¹⁸

The State “optimizes” its tax system by informally price discriminating among taxpayers through the creation of several subsystems for which different rules apply. For the sake of exposition, let us posit that there are two main “models” of price discrimination. In a standard model of price discrimination, a producer is able to optimally charge its customers by having

114. The taxpayer’s petition for certiorari in *TIFD III-E, LLC v. United States (Castle Harbour)*, 577 U.S. 1092 (2016) (mem.), the famous sham transaction case, is a prominent example of this frustration. See generally *Castle Harbour* Petition, *supra* note 95.

115. FULLER, MORALITY, *supra* note 1, at 81.

116. *Id.*

117. Perfection is not a goal of Fuller’s theory. As Fuller explains, the internal morality of the law is one of aspiration, allowing for degrees of legality that are context dependent. See FULLER, MORALITY, *supra* note 1, at 41–44. However, the existence of “grays” does not mean that there are no “black” and “white” cases as a matter of practice.

118. This impulse can be understood as following Professor Joseph E. Stiglitz’s case for a welfare-optimizing random tax. See generally Joseph E. Stiglitz, *Utilitarianism and Horizontal Equity*, 18 J. PUB. ECON. 1 (1982) (arguing that ex ante and ex post random taxes are Pareto optimal and welfare enhancing, suggesting that a utilitarian tax system requires discrimination among taxpayers). See also Leandra Lederman & Ted Sichelman, *Enforcement as Substance in Tax Compliance*, 70 WASH. & LEE L. REV. 1679, 1690–1705 (2013) (summarizing the literature). Fuller recognized this impulse and rejected it as expressing *managerial* rather than *legal* values. See FULLER, MORALITY, *supra* note 1, at 207–09.

complete information about their willingness to pay for certain goods. (Assume the producer is able to stop customers from generating a secondary market for its goods.) This is usually called a primary or “perfect” discrimination model.¹¹⁹

But sometimes the producer has imperfect information; that is, though the producer knows the distribution of willingness to pay among consumers, it cannot match individual consumers with their corresponding willingness to pay. In these cases, the producer might generate bundles of quantities and prices that force consumers to “reveal” their preferences, thus sorting themselves. As an example, think about a good with a high sticker price but also with generous coupons available for buying in bulk. Less price-sensitive consumers will ignore the coupons and pay full price; price-sensitive consumers will go through the hassle of couponing and pay a lower price as a result. This method (called “secondary” price discrimination) enables the producer to more “efficiently” price its good.¹²⁰

Tax scholars have previously likened features of our tax systems to price discrimination.¹²¹ To show the dynamics in rate setting, Professor Benjamin Alarie analogized governments to producers, taxpayers to customers, and the price of the good to the tax rate.¹²² Taxpayers, however, are not all the same—they have different *responsiveness* to the tax rate, usually a function of the “economic fundamentals of the taxpayer” (e.g., where does the taxpayer derive their income, what is their work or leisure function), “the willingness to comply” (i.e., their *ex ante* willingness to follow the law), and the “ability to use the tax system to avoid taxation.”¹²³ Taxpayers will differ along these characteristics, making them more or less likely to respond to a tax hike by finding a way to effectively lower their tax through tax avoidance or evasion.¹²⁴

A revenue-maximizing government, therefore, might price discriminate by setting a “relatively high ‘advertised’ tax rate that applies on a tax base that is common to all taxpayers.”¹²⁵ Yet not all taxpayers will respond by paying such a rate, with highly responsive taxpayers (e.g., mobile multinational enterprises, well-advised wealthy individuals) “proactively manag[ing] their income tax burden through innovative tax avoidance measures (shifting income to other jurisdictions, using sophisticated tax shelters, etc.) more easily than . . . low-responsiveness taxpayers.”¹²⁶ The result is that highly

119. See Benjamin Alarie, *The Challenge of Tax Avoidance for Social Justice in Taxation*, in *PHILOSOPHICAL EXPLORATIONS OF JUSTICE AND TAXATION* 83, 92–93 (Helmut P. Gaisbauer, Gottfried Schweiger & Clemens Sedmak eds., 2015).

120. See *id.*

121. *Id.* at 93 (explaining that “types of market-based price discrimination” can be “translate[d] . . . into versions” of domestic and international income tax systems).

122. *Id.*

123. *Id.*

124. See *id.*

125. *Id.* at 95.

126. *Id.*

responsive taxpayers help themselves to lower effective tax rates, while low-response taxpayers pay higher advertised tax rates.¹²⁷

Rather than a coincidence, a revenue-maximizing government might enact these tax rates intentionally. After all, as some optimal tax theorists have argued since Frank P. Ramsey, this might be the rational, optimal revenue-raising strategy given some taxpayers’ high rate-responsiveness.¹²⁸ These models echo Jean-Baptiste Colbert’s bon mot: “[T]he art of taxation consists in so plucking the goose as to obtain the largest amount of feathers with the least amount of hissing.”¹²⁹

Examples of secondary discrimination are easy to come by. Just consider how (and why) the Code provides differential tax rates for individuals, partnerships, and corporations—even when the underlying economic activity is identical. At least part of the justification for the difference is that corporations are thought to have a lower “willingness-to-pay” or higher “tax responsiveness” than other taxpayers.¹³⁰ In fact, the increased mobility of corporate taxpayers for tax purposes (related to legal fictions such as “tax residence”) has led to steep downward pressures on corporate tax rates¹³¹ and motivated governments to reform their tax systems.¹³²

Although the policy responses to corporations’ mobility are arguably objectionable from an economic or ethical standpoint,¹³³ these price discrimination mechanisms are (arguably) not themselves an affront to taxation’s legality or “internal” morality; they instead concern the law’s “external” morality (e.g., because these preferences violate someone’s egalitarian commitments).¹³⁴ This system of rules, notwithstanding its

127. *Id.*

128. See, e.g., Joel Slemrod, *Income Creation or Income Shifting?: Behavioral Responses to the Tax Reform Act of 1986*, 85 AM. ECON. REV. 175, 175–76 (1995) (noting substantial taxpayer responsiveness to tax rates). See generally F.P. Ramsey, *A Contribution to the Theory of Taxation*, 37 ECON. J. 47 (1927) (arguing that optimal taxes minimize excess burden, taxing the least elastic bases relatively more heavily).

129. See Alarie, *supra* note 119, at 89.

130. Other factors, like the political economy of who pays tax and for what, clearly are also part of this policy’s rationale. See, e.g., Jeremy Bearer-Friend, Ari Glogower, Ariel Jurow Kleiman & Clinton G. Wallace, *Taxation and Law and Political Economy*, 83 OHIO ST. L.J. 472, 504 (2022).

131. See Thomas R. Tørsløv, Ludvig S. Wier & Gabriel Zucman, *The Missing Profits of Nations* 1–2 (Nat’l Bureau of Econ. Rsch., Working Paper No. 24701, 2018), <https://www.nber.org/papers/w24701.pdf> [<https://perma.cc/4SAY-EALX>]. Yet this decline is not only clear in the nominal rates, but also clear in the corporation’s effective rates, as corporations increasingly use profit shifting to reduce their tax rates. See *id.* fig. 7.

132. See, e.g., Donald Trump, President of the U.S., Remarks by President Trump at Tax Reform Event (Sep. 27, 2017) (expressing the motivations for the Tax Cuts and Jobs Act).

133. See generally Stiglitz, *supra* note 118 (showing how the fact that utilitarianism might allow for welfare-enhancing randomized taxation evidences utilitarianism’s conflicts with horizontal equity).

134. Again, note the distinction between internal and external moralities of law. See FULLER, *MORALITY*, *supra* note 1, at 154.

arguable inequity, is at least uniformly publicized and communicated—although perhaps less uniformly and congruently enforced.¹³⁵

That said, there are a plethora of instances of price discrimination that squarely run afoul of the congruence principle. The sections below discuss two ways in which the U.S. tax system engages in *primary* price discrimination—either by agreeing to legal determinations that are effectively only available and binding to a single taxpayer or by assigning individual reductions to tax liability for certain mobile companies. Both phenomena open an incongruence between the uniform tax system published and the ad hoc individualized system that is enforced in many circumstances.

1. Primary Price Discrimination: Private Letter Rulings and Individualized Determinations

The U.S. tax system systematically engages in primary price discrimination through individual arrangements between the government and (almost exclusively)¹³⁶ corporate or wealthy taxpayers. In these deals, the government crafts *individual* (and often secret) legal rules exclusively applicable to a particular fact pattern, with no practical precedential value to other taxpayers¹³⁷ and subject to questionable transparency and disclosure requirements.¹³⁸ Such a system strikingly resembles a coupon price discrimination system, where well-advised taxpayers are subject to individualized laws.

Private letter rulings (PLRs), analogs to the scandalous LuxLeaks rulings,¹³⁹ are the most common example of individualized tax deals in the

135. A clear example of this differential enforcement is the IRS's focus on audits of Earned Income Tax Credit (EITC) recipients, who are generally lower income, over auditing the top 1 percent. As should be evident, the potential revenue gains from auditing the 1 percent far outweigh the potential gains from strictly enforcing the law against the country's poor. See, e.g., Paul Kiel, *It's Getting Worse: The IRS Now Audits Poor Americans at About the Same Rate as the Top 1%*, PROPUBLICA (May 30, 2019, at 10:16 ET), <https://www.propublica.org/article/irs-now-audits-poor-americans-at-about-the-same-rate-as-the-top-1-percent> [https://perma.cc/8P4V-MQF5].

136. Given the "private" nature of the rulings, there are no readily available statistics on the percentage of rulings issued by the IRS to wealthy taxpayers. However, IRS pronouncements on the issue and topics covered by rulings issued suggest that low-income taxpayers request very few rulings. See *The IRS Increases Cost of a Private Letter Ruling (PLR) and Now a Fee for Estate Tax Closing Letters. The IRS Is Seeking Comments by March 1*, TAXPAYER ADVOC. SERV. (Feb. 16, 2021), <https://www.taxpayeradvocate.irs.gov/news/nta-blog-the-irs-increases-cost-of-a-private-letter-ruling-plr-and-now-a-fee-for-estate-tax-closing-letters-the-irs-is-seeking-comments-by-march-1/> [https://perma.cc/4LMF-B98N]; see also Anna Gooch, *Tax Questions, User Fees, and Private Letter Rulings*, TAX NOTES (Nov. 9, 2020), <https://www.taxnotes.com/procedurally-taxing/tax-questions-user-fees-and-private-letter-rulings/2020/11/09/7h6sr> [https://perma.cc/M935-M56P].

137. See *infra* note 143 and accompanying text.

138. Until the 1970s, most rulings were not routinely published. See Leandra Lederman, *Avoiding Scandals Through Tax Rulings Transparency*, 50 FLA. ST. L. REV. 219, 225 (2023). Section 6610 makes private letter rulings (PLRs) subject to public disclosure. See I.R.C. § 6110(a)–(b)(1).

139. See generally Leandra Lederman, *The Untold Tale of a Tax Rulings Haven*, 29 STAN. J.L. BUS. & FIN. 1 (2024) (discussing LuxLeaks).

United States. Consider some of their characteristics. The Code requires that the PLRs be publicly disclosed,¹⁴⁰ but most factual background information—often necessary to precisely understand the rule the PLR is promulgating—is easily redactable.¹⁴¹ PLRs can also frequently contain implicit “intermediate” conclusions.¹⁴² Moreover, even if one were able to decipher the exact rule that a PLR announces, it would be of limited precedential value to other taxpayers.¹⁴³ Accordingly, to the extent PLRs award favorable one-time deals for taxpayers willing and able to engage in the complex and costly process of obtaining a PLR,¹⁴⁴ they effectively result in government price discrimination.¹⁴⁵

Although rarer in practice,¹⁴⁶ the IRS also enters into even more problematic individualized agreements: closing agreements, prefiling agreements, or advance pricing agreements (APAs), depending on their exact characteristics and context.¹⁴⁷ These agreements are even more expensive to obtain, with some requiring user fees of \$181,500.¹⁴⁸ In these agreements,

140. See § 6110(a)–(b)(1).

141. See Treas. Reg. § 301.6110-3 (providing a PLR recipient the right to redact identifying details, commercial or financial information that is arguably confidential, or trade secrets).

142. For example, PLRs can reach “intermediate” conclusions that are either necessary predicates to the ruling or implicit applications of a new standard. These intermediate and implicit conclusions simultaneously allow the IRS to not have to publicly disclose the individual application of a new rule *and* allow the lucky taxpayer to get a tax benefit from the application of this new rule.

143. PLRs cannot generally be invoked as valid binding precedent. See I.R.C. § 6110(k)(3). They can be relied on, however, to avoid certain penalties. See Treas. Reg. § 1.6662-4(d)(3)(iii) (stating that PLRs are available for use as “substantial authority” when disputing a penalty for substantial understatement of tax). A taxpayer may not rely on a PLR not issued to them, as PLRs are taxpayer-specific and nonprecedential. See, e.g., Letter from Barbara A. Felker, Office of Chief Couns., I.R.S., to Sen. Tom Udall (Oct. 13, 2004), <https://www.irs.gov/pub/irs-wd/04-0176.pdf> [<https://perma.cc/P7JY-TJCE>]. That being said, Professor Noah Hertz Marks argues that despite their nonprecedential quality, PLRs have been used—to a limited extent—to strategically foreclose tax strategies enjoyed by competitors. See Noah Hertz Marks, *Winning by Losing: The Strategy of Adverse Private Letter Rulings*, 66 B.C. L. REV. 659, 706–12 (2025).

144. Requesting a ruling is a complex process, requiring the taxpayer to file a brief-type request to the IRS. Preparing the request can take several months. From the date the request is received by the IRS, the IRS aims to answer the request in 180 days. See IRM 32.3.2.3 (July 9, 2014). However, I acknowledge that more complicated requests can take up to a year from conception to the ruling being issued.

Even excluding the prohibitive costs of the legal representation required to prepare a ruling request and appear before the IRS (if necessary), the PLR process is itself very costly, with user fees for most private letter rulings at \$38,000. See Rev. Proc. 2021-1, 2021-1 I.R.B. 1, app. A, § (3)(C)(ii). Fee discounts for certain taxpayers do not make rulings attainable, especially considering the cost of legal representation in preparing a complex request. See *supra* note 136 and accompanying text.

145. This price discrimination is both primary (because the IRS gives a “special” taxpayer a tax goody) and secondary (because that goody is expensive, so only certain taxpayers apply).

146. This is a result of the IRS requiring a higher degree of agency clearance. Compare Treas. Reg. § 601.201(a)(2) (stating that a ruling must be under the supervision of an assistant commissioner, delegated to director, corporation tax division and director, individual tax division), with Treas. Reg. § 601.201(a)(7) (stating that a closing agreement is based on a signed ruling by the commissioner or his delegate).

147. See, e.g., I.R.C. § 7121.

148. See Rev. Proc. 2021-1, 2021-1 I.R.B. 1, app. A, § (7).

the IRS does not necessarily “rule” on a point of law. It does, however, sign a binding contract agreeing with finality to a legal result (i.e., tax liability of a transaction), a result that will often involve the application of conflicting rules of law or the novel interpretation of a rule—vis-à-vis a single taxpayer.¹⁴⁹ These agreements often are awarded to large corporate taxpayers on contested issues of law.¹⁵⁰ Perhaps more troubling, the Code explicitly bars the disclosure of these agreements.¹⁵¹

It is not difficult to imagine how these determinations foster an inconsistent individualized system of rules. An article describing the PLR practice before it was subject to public disclosure (as APAs, closing agreements, and prefiling agreements currently are) was telling: “Among the tax practitioners contacted, virtually all knew of circumstances in which taxpayers gained an advantage by obtaining a private ruling or learning of one of which competitors were unaware.”¹⁵² Differentiating these agreements from arbitrary individualized exactions, à la Rex, is thus difficult.

Accordingly, given their individual character, relative secrecy, limited availability, and lack of precedential value, these individualized determinations set up a legal architecture of horizontal inequity—where symmetrically situated taxpayers might have systematically different abilities to rely on a given rule.¹⁵³ Moreover, the structural differential ability of poorer taxpayers to seek individualized guidance¹⁵⁴ similarly posits problems of incongruence. As Professor Leandra Lederman notes, the result of this system is the “inconsistent treatment of similarly situated taxpayers.”¹⁵⁵ Others have similarly warned that the IRS’s ruling practices pose critical “procedural fairness” and “perceived legitimacy” problems.¹⁵⁶

149. The IRS will only issue closing agreements where “it is advantageous to have the matter permanently and conclusively closed, or where a taxpayer can show good and sufficient reasons for an agreement and the Government will sustain no disadvantage by its consummation.” Treas. Reg. § 601.201(a)(7). However, recent litigation has put into question how “advantageous” these agreements are to the fisc, with Coca-Cola receiving the IRS’s blessing for a mind-bogglingly advantageous transfer pricing scheme. *Coca-Cola v. Commissioner*, 155 T.C. 145, 168 (2020).

150. See Lederman, *supra* note 138, at 226–31 (describing advanced pricing agreements).

151. I.R.C. § 6110(b)(1)(B) (establishing an exception from disclosure of advance pricing agreements or closing agreements by cross-referencing § 6103(b)(2)(C)–(D)).

152. Thomas R. Reid III, *Public Access to Internal Revenue Service Rulings*, 41 GEO. WASH. L. REV. 23, 25 n.15 (1972).

153. See Lederman, *supra* note 138, at 262 (“Uniform taxpayer access to letter rulings should be considered a feature, not a bug.”).

154. See generally Joshua D. Blank & Leigh Osofsky, *The Inequity of Informal Guidance*, 75 VAND. L. REV. 1093 (2023) (describing how reliance on informal IRS guidance entrenches a two-tier tax-law system that disadvantages less-resourced taxpayers).

155. Lederman, *supra* note 138, at 262.

156. See Blank & Osofsky, *supra* note 154, at 1150.

2. Primary Price Discrimination: State and Local Tax Incentives

U.S. state and local governments also frequently engage in primary price discrimination.¹⁵⁷ They do so through selective tax incentives, in effect using governmental discretion to charge some companies higher or lower taxes, mimicking the “State Aid” scandals that, after a decade, are still rocking the European Union.¹⁵⁸

State and local governments in the United States have adopted all sorts of tax incentives to attract economic development and corporate relocations, often negotiated in secret.¹⁵⁹ By one estimate, these tax deals cost state and local governments up to \$95 billion yearly.¹⁶⁰ Some of these are billion-dollar tax agreements, where corporations get a significant reduction to their tax bills by promising new investments in a location (or desisting from threats to leave it).

These investments are not *always* made pursuant to the generally applicable and publicized law: states and localities usually award substantial discretionary tax abatements to businesses.¹⁶¹ For example, Wisconsin effectively handed around \$2.85 billion in “refundable tax credits” to Foxconn¹⁶²—a deal granting Foxconn a drastically different treatment from the one awarded to other businesses in Wisconsin. (We should note that the

157. See Cailin Slattery & Owen Zidar, *Evaluating State and Local Business Incentives*, 34 J. ECON. PERSPS. 90, 96–99, 105 (2020).

158. The European Union (EU) prohibits members from generally granting “State Aid,” which includes using their tax systems to provide “selective” incentives (e.g., tax incentives or private letter rulings) to corporations affecting competition or trade in the EU. See Consolidated Version of the Treaty on the Functioning of the European Union art. 107(1), Oct. 26, 2012, 2012 O.J. (C 326) 47, 91. The European Commission has been pursuing cases against several countries for allegedly aiding certain multinationals (e.g., Amazon, Fiat, Apple) through either selective application of their domestic tax system or favorable tax rulings with a recent victory. See Alexander F. Peter, *CJEU Reinstates €13 Billion State Aid Decision Against Apple*, TAX NOTES (Sep. 11, 2024), <https://www.taxnotes.com/featured-news/cjeu-reinstates-eu13-billion-state-aid-decision-against-apple/2024/09/10/7163y> [https://perma.cc/HR3J-T3U2]. Regardless of the final outcome of these investigations, they have illustrated how EU members have widely (and perhaps almost structurally) engaged in selective regulation of multinationals—regardless of the aid’s legal status under EU law.

159. See Luís C. Calderón Gómez, *The Failed Transparency Revolution: Local Tax Competition & Accountability* 5–6 (2019) (unpublished manuscript) (on file with the *Fordham Law Review*).

160. See MATTHEW D. MITCHELL, MICHAEL D. FARREN, JEREMY HORPEDAHL & OLIVIA GONZALEZ, MERCATUS CTR., *THE ECONOMICS OF A TARGETED ECONOMIC DEVELOPMENT SUBSIDY* 5 (2019), <https://www.mercatus.org/media/72251/> [https://perma.cc/MEB7-A6NE].

161. As such, not only do these subsidies contravene the principle of congruence, but perhaps they also contravene publicity and generality.

162. See Press Release, Wis. Budget Project, *New Report Says Foxconn Tax Credits Could Cost Taxpayers up to \$587,000 per Job* (Aug. 3, 2017), <https://www.wispolitics.com/wp-content/uploads/2017/08/170803FoxconnCostTaxpayers.pdf> [https://perma.cc/QJC6-HJRG]. See generally Calderón Gómez, *supra* note 159.

deal has been “disastrous” for Wisconsin,¹⁶³ even resulting in part of the benefits being clawed back.)¹⁶⁴ Just in 2021, Amazon received more than \$650 million in opaque tax “sweeteners” from state and local jurisdictions, a sizeable portion of which are individualized incentives.¹⁶⁵

These practices are not outliers; rather, they constitute business as usual in state and local economic development.¹⁶⁶ The problem is that even when these practices are successful, they are in deep tension with the requirement of congruence. After all, taxpayers in general (or even similarly situated taxpayers) are not eligible for these incentives, which are often negotiated in secret and awarded individually—at politicians’ discretion.¹⁶⁷ In doing so, U.S. states and localities create a parallel system of (more favorable) rules that are communicated exclusively to certain taxpayers—creating an incongruence between the uniform law communicated and the uneven legal patchwork that is actually applied to a jurisdiction’s taxpayers. Why is this a violation of legality? Imagine how unsettling it would be to officially have two parallel tax codes, one for the rich and mobile and one for the rest.¹⁶⁸

C. Clarity and the Tax Code’s Intelligibility

A third desideratum of legality is intelligibility, “one of the most essential ingredients of legality.”¹⁶⁹ “[I]t is obvious,” Fuller claims, “that obscure and incoherent legislation can make legality unattainable by anyone.”¹⁷⁰ Echoing Fuller, other leading scholars have stressed the obvious or “essential” importance of the intelligibility of the law,¹⁷¹ even when expressing skepticism of Fuller’s broader project or the reasons why intelligibility is ultimately important.¹⁷²

To be more precise, Fuller’s account of legality emphasizes the intelligibility of the law vis-à-vis the citizen—that is, it evaluates whether the

163. See Austin Carr, *Inside Wisconsin’s Disastrous \$4.5 Billion Deal with Foxconn*, BLOOMBERG (Feb. 6, 2019), <https://www.bloomberg.com/news/features/2019-02-06/inside-wisconsin-s-disastrous-4-5-billion-deal-with-foxconn> (on file with the *Fordham Law Review*).

164. See Corri Hess, *State Says No Tax Credits for Foxconn Without New Contract*, WIS. PUB. RADIO (Oct. 12, 2020), <https://www.wpr.org/economy/state-says-no-tax-credits-foxconn-without-new-contract> [<https://perma.cc/Q38Q-6W3L>].

165. See Dave Lee, *Amazon Wins Record US Tax Breaks to Expand Delivery Network*, FIN. TIMES (Oct. 6, 2021), <https://www.ft.com/content/164b2c3d-c7e1-4107-bc6f-ec6375dd3416> (on file with the *Fordham Law Review*).

166. See *Subsidy Tracker*, GOOD JOBS FIRST, <https://subsidytracker.goodjobsfirst.org/> [<https://perma.cc/W9M2-ETXK>] (last visited Jan. 23, 2026) (providing a database of state and local tax incentives to corporations).

167. See Matthew D. Mitchell, Jonathan Riches, Veronica Thorson & Anne Philpot, *Outlawing Favoritism: The Economics, History, and Law of Anti-Aid Provisions in State Constitutions* 3 (Mercatus Ctr., Working Paper, 2020), <https://www.mercatus.org/media/71786/> [<https://perma.cc/K5P7-YRRW>].

168. For a discussion of this fact world, see Alex Raskolnikov, *Law for the Rich*, 109 MINN. L. REV. 1399, 1399–402 (2025).

169. FULLER, MORALITY, *supra* note 1, at 63.

170. *Id.*

171. See, e.g., Weinrib, *supra* note 64, at 963–66.

172. See, e.g., Dworkin, *supra* note 42, at 669.

law is intelligible in the citizen’s eyes.¹⁷³ Although clarity and the related concept of intelligibility, itself linked to complexity, are essential components of legality, obviously Fuller (and his followers and critics) cannot be taken to mean that *all* laws must be *completely* understood by everyone. That would phrase this desideratum in terms that are too demanding and would unfairly “straw man” Fuller’s account. Instead, we should conceive of clarity and intelligibility on a spectrum with a minimum threshold required for legality and with enlightened lawmakers aspiring to make the law as intelligible as practically possible.¹⁷⁴

What does that actually require, then? Fuller hints at an answer, telling us that Rex’s “masterpiece in obscurity” countered legality because it could not “be understood either by an ordinary citizen or by a trained lawyer.”¹⁷⁵ Yet this less stringent formulation¹⁷⁶ of the requirement of clarity (“understood either by an ordinary citizen or by a trained lawyer”)¹⁷⁷ is still intentionally, systematically, and fundamentally flouted by tax law. In today’s world, neither ordinary citizens nor most “experts” (be it tax lawyers, accountants, judges, or even bureaucrats) can consistently grasp the obscure and byzantine world of tax law—except perhaps for the elite cadre of experts who are themselves responsible for that obscure and byzantine framework. Tax, however, *should* be understandable to ordinary citizens. Unlike other complex areas of the law, such as environmental law, tax law covers all kinds of conduct—even seemingly innocuous interactions—and covers all citizens, both experts and ordinary citizens alike.¹⁷⁸ Despite how TurboTax and other preparers might have practically simplified the way that some people approach their taxes, they remain an insufficient substitute for actual clarity.¹⁷⁹

173. FULLER, MORALITY, *supra* note 1, at 36, 213.

174. Others have read Fuller’s clarity desideratum this way. See Dworkin, *supra* note 42, at 677–78 (“[A] requirement of some degree of clarity . . . contemplates a rough and shifting minimum.”). This is the way that many tax policymakers and commentators see themselves. See, e.g., Surrey, *supra* note 2, at 709 (“The solution thus does not lie in any ‘simplification’ of the tax law. . . . Rather, the challenge [in the future of the tax law] lies in finding the most efficient way for the management of tax complexity.”).

175. FULLER, MORALITY, *supra* note 1, at 36.

176. Note that Fuller’s requirement of intelligibility is not too demanding. Popular theories of constitutional interpretation, such as public meaning originalism, are much more stringent. These theories would evaluate intelligibility exclusively vis-à-vis “ordinary citizens” without much thought as to what a “trained lawyer” would think. Conversely, an original intentions or ratifiers’ understanding of originalism would be exclusively concerned with what “trained lawyers” can understand, not what “ordinary citizens” can. See Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1627 (2017).

177. FULLER, MORALITY, *supra* note 1, at 36.

178. See *infra* Part II.C.2.

179. See *infra* Part II.C.3.

1. Ordinary Citizens Do Not Understand the Tax Law

Most “ordinary citizens” do not understand the tax law—and it bothers them.¹⁸⁰ Although surveys vary, they generally show that a significant number of people do not think the tax law is clear and cannot understand it.¹⁸¹ In fact, over 80 percent of Americans surveyed said that the complexity of the federal tax system bothered them, regardless of partisan affiliation.¹⁸² This lack of understanding is not cabined to esoteric areas of the law; citizens also misunderstand the contours of routinely applicable tax law. For example, more than half of surveyed citizens in one study thought that their entire income is taxed at their tax bracket rate.¹⁸³

The tax law’s unintelligibility is not news to anyone. In fact, the U.S. legal system has seemingly accepted that—as a matter of *law*—the Code is too complicated for ordinary people to understand.¹⁸⁴ That is why, unlike virtually any other crime, U.S. law provides an exception from the long-standing¹⁸⁵ doctrine of *ignorantia juris non excusat* (“ignorance of the law excuses no one”) to potential tax evaders.¹⁸⁶ “The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws,” the Supreme Court matter-of-factly acknowledged

180. See *infra* Part II.C.3. This result holds, regardless of partisanship. See J. Baxter Oliphant, *Top Tax Frustrations for Americans: The Feeling That Some Corporations, Wealthy People Don’t Pay Fair Share*, PEW RSCH. CTR. (Apr. 7, 2023), <https://www.pewresearch.org/short-reads/2023/04/07/top-tax-frustrations-for-americans-the-feeling-that-some-corporations-wealthy-people-dont-pay-fair-share/> [https://perma.cc/A4ZH-BDXG] (showing that although views about the tax law vary widely by party, general dislike of the tax law’s complexity transcends partisanship: around 53 percent of respondents say they are bothered “a lot” by its complexity).

181. See, e.g., IRS TAXPAYER ADVOC., *FACTORS INFLUENCING VOLUNTARY COMPLIANCE BY SMALL BUSINESSES: PRELIMINARY SURVEY RESULTS 27* (2021), <https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/Research-Studies-Factors-Influencing-Voluntary-Compliance-by-Small-Businesses-Preliminary-Survey-Results.pdf> [https://perma.cc/2LVL-UZYW]; *Most Americans Don’t Understand the Tax Code: Survey*, FOX BUS. (Jan. 31, 2018), <https://www.foxbusiness.com/markets/most-americans-dont-understand-the-tax-code-survey> [https://perma.cc/QSF8-YPYF] (finding that 57 percent of Americans surveyed did not understand the tax code); *Schenk Tells NPR That the U.S. Tax Code Is So Complex That Most Filers Make Mistakes*, NYU L. (Apr. 14, 2009), https://www.law.nyu.edu/news/SCHENK_NPR [https://perma.cc/7H6A-BSDQ] (quoting Professor Deborah H. Schenk arguing that “[a] lot of people don’t understand what their marital status is,” and that “people d[o] not know whether they [a]re entitled to a dependency exemption”).

182. Oliphant, *supra* note 180.

183. See Zoe Callaway, *New National Tax Literacy Poll Highlights Need for Better Tax Education*, TAX FOUND. (Apr. 8, 2024), <https://taxfoundation.org/blog/national-tax-literacy-poll-education> [https://perma.cc/W2KA-FM4K].

184. Professor Stanley S. Surrey insisted that the Code’s complexity was “inevitable” and that the “degree of the complexity will probably increase rather than decrease.” See Surrey, *supra* note 2, at 708–09.

185. See, e.g., *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 182 (1820) (Livingston, J., dissenting) (noting that “no one is allowed to allege his ignorance in excuse for any crime he may commit”).

186. *Cheek v. United States*, 498 U.S. 192 (1991).

in a case departing from this principle.¹⁸⁷ Without noting any cause for concern, the Court continued, “Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses.”¹⁸⁸ Therefore, the Court concluded, the law has decided to ignore “innocent mistakes caused by the complexity of the Internal Revenue Code.”¹⁸⁹

While Professor Stanley S. Surrey, “[b]y common consent . . . the greatest tax scholar of his generation,”¹⁹⁰ insisted that the challenge of tax policymaking consisted of “find[ing] an acceptable way to manage the complexity that is inevitable,”¹⁹¹ tax law’s complexity and unintelligibility are largely a matter of *design*. Professors Shu-Yi Oei and Leigh Osofsky’s extensive interviews with the small group of elite tax lawyers who draft the Code certainly support that conclusion.¹⁹² Collectively, the interviewees had participated in Code drafting for the last four decades.¹⁹³ The interviews reiterated the point made above: the Code is incredibly complex, to the point of being almost unreadable.¹⁹⁴ Nonetheless, interviews of the drafters of the Code, which binds and molds the lives of all citizens, revealed that for drafters complexity is not a bug, but rather a *feature* of the tax law. For these drafters, “tax statutes are not drafted for the ordinary taxpayer; therefore, it did not matter whether statutes were convoluted because ordinary taxpayers would not be reading the statute.”¹⁹⁵ Oei and Osofsky also noted that “almost no interviewees indicated that they were drafting for taxpayers themselves”¹⁹⁶ (or to members of Congress, who were intentionally left in the dark regarding drafting choices).¹⁹⁷

Drafters’ (and lawmakers’) nonchalance regarding the unintelligibility raises the question: has the State abdicated its political responsibility for making the law comprehensible to the “ordinary citizen”? Some might respond with a shrug; after all, some areas of the law are similarly complex and intricate.¹⁹⁸ Fuller himself could be misread as endorsing a relaxation of

187. *Id.* at 199–200.

188. *Id.* at 200.

189. *Id.* at 205.

190. See Erwin N. Griswold, *In Memoriam: Stanley S. Surrey—a True Public Servant*, 98 HARV. L. REV. 329, 331 (1984).

191. Surrey, *supra* note 2, at 710.

192. See Oei & Osofsky, *supra* note 3, at 1316–17 (reporting interviewees’ “majority view” that drafting/readability choices “did not really matter” because “tax statutes are not drafted for the ordinary taxpayer” and thus convolution was not a drafting concern).

193. *Id.* at 1313.

194. *Id.* at 1317 n.105 (interviewing a government tax counsel, who stated that staff “created a whole regime . . . that was really complicated, no member of Congress would understand what we’re doing and what the words meant. But the end user, the taxpayer . . . imported stuff from TurboTax” (first alteration in original)).

195. *Id.* at 1317.

196. *Id.*

197. See *id.* at 1352.

198. Surrey, *supra* note 2, at 686 (explaining that tax rules operate within “an enormously complex economic and legal system” and observing that technical tax rules may generate “more fertile breeding ground” for further complexity than “any other part of our legal system”).

the law's intelligibility. He does note that in some subject matters, "[a] specious clarity can be more damaging than an honest open-ended vagueness."¹⁹⁹ Can we, therefore, ignore tax law's lack of clarity?

"[I]t is a serious mistake—and a mistake made constantly—to assume that, though the busy legislative draftsman can find no way of converting his objective into clearly stated rules, he can always safely delegate this task to the courts or to special administrative tribunals," Fuller notes.²⁰⁰ He rejects lawmakers' abdication by rejecting an even more modest version of that claim—i.e., that a lawmaker can abdicate their duty to make the law clear as long as they pass the "hot potato" to an administrative agency or tribunal, hoping it can make the law intelligible.²⁰¹

2. Trained Lawyers, TurboTax, and the Pragmatic Intelligibility of the Law

Other critics might, echoing tax drafters, counter that it does not matter whether "ordinary taxpayers" (or lawmakers) themselves understand the law because "interpreters" can render the law intelligible to them.²⁰² A drafter summarized this concern, noting that

[w]e as a staff wanted to make life easier for taxpayers. . . . So we created a whole regime . . . that was really complicated, no member of Congress would understand what we're doing and what the words meant. But the end user . . . got a number from [a third party], they put the number on the return, and then went to sleep. . . . Yes, there's a level of complexity to the actual statute, and that complexity is necessary in often cases. . . . And the real question, though, is how can that complexity be translated in a way so that the end user, the taxpayer, can complete the return and comply without going through undue expenditures and efforts, and confusion.²⁰³

This reply makes a superficially intuitive point: empirically, the vast majority of individuals use a tax preparation service when filing their taxes.²⁰⁴ Therefore, skeptics argue, intelligibility is a nonissue if tax preparation services clarify the law to the majority of filers.²⁰⁵

This argument relies on two main premises. First, it presumes that tax preparers (i.e., experts) understand the tax law and can guide ordinary

199. FULLER, *MORALITY*, *supra* note 1, at 64.

200. *Id.*

201. *See id.* But *see* Surrey, *supra* note 2, at 703–04 (suggesting that a solution to complexity is for Congress to only address issues of structure and to delegate issues of detail to the U.S. Department of the Treasury).

202. *See* Oei & Osofsky, *supra* note 3, at 1349.

203. *Id.* at 1317 n.105 (second, third, fifth, and seventh alterations in original).

204. *See Important Considerations as You Select Your Return Preparer This Filing Season*, TAXPAYER ADVOC. SERV.: NTA BLOG (Mar. 8, 2024), <https://www.taxpayeradvocate.irs.gov/news/nta-blog/important-considerations-as-you-select-your-return-preparer-this-filing-season/2024/03/> [https://perma.cc/W724-CM5B] ("[In 2023,] over 54 percent of all individual income tax returns were prepared by paid return preparers.").

205. For example, this premise underlies policy reforms aimed at increasing use of assisted preparation methods for EITC. *See* Jacob Goldin, *Tax Benefit Complexity and Take-Up: Lessons from the Earned Income Tax Credit*, 72 TAX L. REV. 59, 106–07 (2018).

citizens in complying with the law. Second, it presumes that nothing of value is lost if taxpayers do not *themselves* understand the tax law.

But both premises are incorrect. First, just like “ordinary citizens,” experts (and “trained lawyers”) frequently do not understand the tax law—whether they are tax practitioners, judges, or even administrators.²⁰⁶ Second, it is both positively²⁰⁷ and normatively²⁰⁸ essential that people can understand and engage with the law in substantive ways: not just that they “got a number” and “went to sleep.”²⁰⁹

The existence of experts—e.g., TurboTax, tax lawyers, and accountants—has not been sufficient to make clarity widespread. Taxpayers of all kinds—whether they comply with the law or not—agree that the law is too complex and unclear, even with the help of experts.²¹⁰

Furthermore, an (admittedly methodologically primitive) study revealed that trained professionals of all stripes (including “trained lawyers”) were incapable of accurately assessing an average middle-class family’s tax liability. The survey “sent a hypothetical fact situation to sixty tax professionals who agreed to prepare the family’s tax return.”²¹¹ Forty-six tax professionals participated: thirty-one certified public accountants, twelve enrolled agents, and three other professional tax return preparers.²¹² Yet “[f]or the seventh time” since the survey was conducted, “no two tax experts came up with the same tax liability figure. It was also the third time that no one turned in an error-free return.”²¹³ Thirty experts overestimated the tax liability due (by an average of 20 percent), and sixteen underestimated the tax liability (by a more acceptable 3 percent).²¹⁴ Ultimately, “[n]o one calculated the correct tax liability.”²¹⁵

Studies with more sophisticated methodologies have generally arrived at the same results: tax experts and preparers have difficulties with the complexity of the law and make costly mistakes in filing taxes for their

206. See *infra* notes 210–21 and accompanying text.

207. Compliance with the law—a phenomenon central to theorists writing in both the formalist and realist traditions—is deeply intertwined with being able to understand the law. See *infra* Part III.A.

208. This presumed or potential engagement is central to many theories. For example, it would be impossible to have an “internal point of view” of the law without first being able to understand what the law directs. Merely “being told” what the law is would seem to qualitatively change the *active* relationship between citizen and the law, turning it into a mere *passive* relationship in which the citizen is merely commanded to follow certain rules. Cf. HART, *supra* note 10, at 82–83.

209. Oei & Osofsky, *supra* note 3, at 1317 n.105.

210. See IRS TAXPAYER ADVOC., *supra* note 181, at 27.

211. Robert W. McGee, *The Void for Vagueness Doctrine*, in THE PHILOSOPHY OF TAXATION AND PUBLIC FINANCE 89, 91 (2004).

212. *Id.*

213. *Id.* at 91–92.

214. *Id.* at 92.

215. *Id.*

clients.²¹⁶ In fact, an analysis of troves of tax returns from 2006 to 2009 concluded that “[tax] returns prepared by a paid preparer showed a higher estimated error rate—60 percent—than returns prepared by the taxpayer—50 percent.”²¹⁷ In-person studies of tax preparers are consistent with tax preparers being more error-prone than self-prepared returns.²¹⁸

But the intelligibility problems are not cabined to Fuller’s “ordinary citizens” or “trained lawyers”; the tax law is often unintelligible to enforcers as well. The U.S. Department of the Treasury has often acknowledged this much.²¹⁹ So have the IRS²²⁰ and the courts. Judge Learned Hand, one of the foremost legal intellects of the twentieth century, put it eloquently:

In my own case the words of such an act as the Income Tax, . . . I cannot help recalling a saying of William James about certain passages of Hegel: that they were no doubt written with a passion of rationality; but that one cannot help wondering whether to the reader they have any significance save that the words are strung together with syntactical correctness.²²¹

Those intelligibility problems—even if only partial—undercut the argument that the law is not impenetrable or that somehow ordinary citizens’ lack of technical sophistication is at fault. Rather, they underscore the obviously and intentionally byzantine nature of the tax system.

Regarding the second premise, it is both positively and normatively important²²² that the law’s subjects can understand the law they are supposed

216. See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO-02-509, TAX DEDUCTIONS: FURTHER ESTIMATES OF TAXPAYERS WHO MAY HAVE OVERPAID FEDERAL TAXES BY NOT ITEMIZING 3–4 (2002), <https://www.gao.gov/assets/gao-02-509.pdf> [<https://perma.cc/CZY6-LUF3>] (estimating that in 1998, over two million taxpayers may have overpaid their taxes by failing to itemize, instead taking the standard deductions, even though about half of them used a preparer); U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-467T, PAID TAX RETURN PREPARERS: IN A LIMITED STUDY, PREPARERS MADE SIGNIFICANT ERRORS 12–13 (2014), <https://www.gao.gov/assets/gao-14-467t.pdf> [<https://perma.cc/X3TK-73D5>] [hereinafter PAID TAX RETURN PREPARERS] (finding that tax preparers in the study made significant and punishable errors, such as understating income or not filing the correct form).

217. PAID TAX RETURN PREPARERS, *supra* note 216, at 20.

218. *Id.* at 12–13.

219. U.S. DEP’T OF THE TREAS., OFF. OF TAX POL’Y, A COMPREHENSIVE STRATEGY FOR REDUCING THE TAX GAP 15 (2006), https://www.irs.gov/pub/irs-news/comprehensive_strategy.pdf [<https://perma.cc/4NE5-AE3W>] (advocating for a simpler tax code as a way to increase compliance, not only because taxpayers “struggle to understand complicated rules and forms,” but also because a complex tax code “makes it difficult for the IRS to detect noncompliance” and a “simpler tax code will . . . be easier for the IRS to administer”).

220. The IRS’s challenges are plentiful. For example, a commentator notes that in 1990, of twenty-nine million penalties imposed, “the IRS abated nearly four million penalties, admitting, in effect, that they were wrong or unjustified.” James L. Payne, *Unhappy Returns: The \$600-Billion Tax Ripoff*, 59 POL’Y REV. 18, 22 (1992), https://static.heritage.org/1992/pdf/pr_59.pdf [<https://perma.cc/R2J2-WAUP>]. Another example of the IRS’s struggles comes from audits of large partnerships, where the IRS systematically fails to assert noncompliance because of “the complexities arising from large partnership structures.” See GOV’T ACCOUNTABILITY OFF., GAO-14-732, LARGE PARTNERSHIPS: WITH GROWING NUMBER OF PARTNERSHIPS, IRS NEEDS TO IMPROVE AUDIT EFFICIENCY 24–25 (2014), <https://www.gao.gov/assets/gao-14-732.pdf> [<https://perma.cc/YUG9-YNF8>].

221. Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947).

222. See *supra* notes 207–08 and accompanying text.

to follow, as the Code itself acknowledges in its “bill of rights.”²²³ As previewed above, a skeptic might nonetheless insist that this form of argument is misguided: even though the tax law might be unintelligible to citizens *semantically*, it might be *pragmatically* intelligible.²²⁴ In other words, ordinary citizens might not be able to understand the tax law directly (i.e., in the Code or its regulations); however, ordinary citizens can approach the tax law through the forms and procedures set by the IRS that determine their tax liability (e.g., Form 1040,²²⁵ IRS “FAQs,” or popular third-party services that interface citizens’ interaction with the tax law like TurboTax). If ordinary citizens understand the forms or know how to answer the questions on TurboTax, the criticism goes, then it is irrelevant whether the Code is itself intelligible.²²⁶ (We can set aside the point that tax preparers are far from perfect, giving the citizens at best an imperfect remedy and at worst a pricey incorrect return.)²²⁷

This insistence on interpreters, however, misses the whole point of having a concept of legality that operates in a relationship between the citizen and the State. A State’s abdication of its responsibility to explain its rules to its citizens and its reliance on third parties is problematic because doing so intermediates, distances, and privatizes such State’s relationship with its citizens. This is especially fraught when those intermediaries are for-profit corporations that are lightly regulated (or that have captured the agencies trying to regulate them).²²⁸ Their perverse economic incentives are clear: ensure the laws are as opaque and technical as possible²²⁹ while eliminating competing interpreters or intermediaries (including those who might not be profit-motivated).²³⁰ In any other area of the law, it would be troublesome for laypeople to pay to “learn” of their legal obligations through a for-profit interpreter. Furthermore, an architecture built on for-profit interpreters means that low-income individuals might be barred from effectively accessing the law because interpreters’ services can be expensive and free

223. See I.R.S., YOUR RIGHTS AS A TAXPAYER (2017), <https://www.irs.gov/pub/irs-pdf/p1.pdf> [<https://perma.cc/MHL8-AYP8>]; I.R.C. § 7803(a)(3)(A) (explaining the taxpayer’s “right to be informed”).

224. Thanks to Professor Daniel Markovits for this thoughtful point.

225. I.R.S., FORM 1040: U.S. INDIVIDUAL INCOME TAX RETURN (2025), <https://www.irs.gov/pub/irs-pdf/f1040.pdf> [<https://perma.cc/2MP3-2ZST>].

226. *But see* Blank & Osofsky, *supra* note 154, at 1136–37 (criticizing the inequity between informal guidance intended for low-resource taxpayers and much more complex, but helpful, guidance available to high-resource taxpayers).

227. See *supra* notes 210–18 and accompanying text.

228. Justin Elliott & Paul Kiel, *Inside TurboTax’s 20-Year Fight to Stop Americans from Filing Their Taxes for Free*, PROPUBLICA (Oct. 17, 2019), <https://www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free> [<https://perma.cc/DZ9K-DUMN>] (recounting Intuit’s relentless lobbying campaign against filing simplification reforms and government free-filing programs).

229. See Lawrence Zelenak, *Complex Tax Legislation in the TurboTax Era*, 1 COLUM. J. TAX L. 91, 91–92 (2010) (intuiting that the rise of TurboTax-like services in turn makes complexity more politically palatable, resulting in more drafting complexity and a higher need for TurboTax-like services).

230. See Elliot & Kiel, *supra* note 228.

options are practically unavailable.²³¹ Even in the notoriously dystopian sphere of immigration law, policymakers have decided that noncitizens with limited English proficiency deserve to meaningfully engage with the law and have provided interpreters to help them do so.²³²

Perhaps more troublesome from a jurisprudential perspective is that these modern-day interpreters do not “explain” the law as much as simply communicate its commands—or as one tax drafter put it, “g[e]t a number.”²³³ As such, the law is neither meaningfully intelligible nor accessible to its subjects²³⁴—just ask anyone who has been flummoxed when their expected “refund amount” on TurboTax experiences sudden drops or increases after answering a seemingly innocuous question (much drama, but not much explanation).²³⁵ That is how the tax law, even after its supposed “pragmatic” interpretation, remains a black box to many of its subjects and consequently still fails to be understandable in a meaningful sense to “ordinary citizens.”²³⁶ Even if the law is practically easy to follow, taxpayers’ lack of ability to actually engage with the law results in a system not different in kind to one where the State communicates arbitrary exactions to its citizens, seeking to determine revenue through management, rather than by law.²³⁷

A review of the mechanics of U.S. tax law thus reveals that the law flouts even lenient standards of clarity and intelligibility. If “ordinary citizens” and “trained lawyers” (including experts, preparers, judges, and administrative enforcers) are often perplexed by the complexity of the law and fail to

231. Although TurboTax promised the IRS to have a free service for low-income filers, TurboTax has been unsurprisingly skillful in hiding it from potential low-income filers, nudging them into paying for the service instead. See Justin Elliott & Lucas Waldron, *Here’s How TurboTax Just Tricked You into Paying to File Your Taxes*, PROPUBLICA (Apr. 22, 2019), <https://www.propublica.org/article/turbotax-just-tricked-you-into-paying-to-file-your-taxes> [<https://perma.cc/6B5R-NELK>]; Intuit Inc., No. 9408, Order at 3–4 (F.T.C. Jan. 19, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/d09408_commission_final_order.pdf [<https://perma.cc/A3B7-CGQH>] (ordering Intuit to stop TurboTax’s deceptive “free” marketing and other material misrepresentations). Efforts by the Biden administration to develop a government-led free-filing program were recently reversed by the Trump administration. See Chuck Marr, *Trump Plan to End Free ‘Direct File’ Program and Rely on For-Profit Tax Preparers Is a Mistake*, CTR. ON BUDG. & POL’Y PRIORITIES (Dec. 10, 2025), <https://www.cbpp.org/blog/trump-plan-to-end-free-direct-file-program-and-rely-on-for-profit-tax-preparers-is-a-mistake> [<https://perma.cc/S77Q-7VWU>].

232. Unsurprisingly, this system is imperfect. See *infra* note 314 and accompanying text.

233. See Oei & Osofsky, *supra* note 3, at 1317 n.105.

234. Yet intelligibility of the law’s command is clearly insufficient. The fact that the Austinian man’s threat is intelligible does not make it any more “legal.” The reasons and the structure of the command must be intelligible to the subjects as well.

235. Some scholars do not have a problem with this. For example, in the context of EITC take-up, Professor Jacob Goldin advocates for the increased use of tax preparers to pragmatically reduce the complexity of the Code. See Goldin, *supra* note 205, at 99–100.

236. While not comprehensive or statistically representative, consumer complaints echo this sentiment. See Justin Elliott & Meg Marco, *Listen to TurboTax Lie to Get Out of Refunding Overcharged Customers*, PROPUBLICA (May 9, 2019), <https://www.propublica.org/article/listen-to-turbotax-lie-to-get-out-of-refunding-overcharged-customers> [<https://perma.cc/NC7E-3XZK>] (reporting customer accounts and recorded calls alleging misleading statements about free-filing eligibility and refunds).

237. Professor Wei Cui has convincingly argued that China follows this system. See WEI CUI, *THE ADMINISTRATIVE FOUNDATIONS OF THE CHINESE FISCAL STATE* 18 (2022).

understand it, the law cannot be said to be clear in a meaningful sense. How can we get past this unintelligibility when it is so systemic (given that the violations affect all areas of taxation, including simple areas that “ordinary citizens” must interpret), intentional (since the system is unintelligible *by design*), and fundamental (since the flaws in clarity are not incidental, but rather strike at the core of the Code)?

3. Is Tax “Exempt” from Clarity?

A relentless skeptic—most likely a tax “exceptionalist”—might have a stronger criticism. They might contend that this application of Fuller’s conception of legality is inapposite; Fuller might not have intended to cover such a technocratic area of federal policymaking under a blanket requirement of clarity.²³⁸

As a purely historical matter, this is incorrect—in his writings, Fuller treats public law as subject to the principle of legality²³⁹ and, in some places, he even readily analogizes to the tax law without any indication that it has some sort of *sui generis* character.²⁴⁰

But the criticism is also mistaken substantively, as illustrated by an analogy to environmental law. The skeptic might be right that the clarity requirement should perhaps be “relaxed” (or, in Fuller’s words, should aspire for less clarity)²⁴¹ for specific cases of technical environmental legislation, such as the regulation of concentrations of certain noxious substances in industrial byproducts. In this context, scientific considerations might indeed drive and necessitate certain complexity in the law. Moreover, a relaxation of clarity seems reasonable, the skeptic and the regime’s drafters would also argue, because the law’s incidence mostly falls on sophisticated actors who are specialized, aware, and embedded in the regulatory regime, for whom intricate and complex drafting might not be a considerable barrier to intelligibility. Because tax law is also a highly technical field, one might argue for an analogous relaxation of the clarity standard.²⁴² Fuller in fact draws on similar “technical” laws when differentiating *legal* from *managerial* relationships.²⁴³

238. Cf. Sunstein & Vermeule, *supra* note 9, at 1967–71 (discussing with approval certain limitations of legality’s scope).

239. Fuller was *especially* worried about the legality of public law, as evidenced by his discussion with H.L.A. Hart over the law in Nazi Germany. Unlike Hart, Fuller did not just see Nazi law as *bad* law or law directed at *bad* purposes; Fuller did not see Nazi public law as law at all. See FULLER, MORALITY, *supra* note 1, at 40–41, 54–55, 62, 152–55. Moreover, the whole story of King Rex refers to public law. *Id.* at 33–38.

240. *Id.* at 75.

241. See *id.* at 212.

242. See Surrey, *supra* note 2, at 673–95 (discussing the causes of tax complexity).

243. Fuller comments on the relaxation of clarity in economic regulation for the sake of expediency and flexibility. Fuller, however, notes that in the context of managerial control, clarity takes a different meaning.

[O]ne might speak of a kind of optimum position between a definiteness of coverage that is unduly restrictive of governmental discretion and a vagueness so pronounced

Tax laws are, however, an essentially different creature than environmental laws. First, unlike environmental regulations, tax laws prescribe the conduct (and affect the paychecks) of the general public—not just a small number of sophisticated actors for whom drafting complexities are an inconvenient but manageable issue. Yet the rules that apply to the general public are not simple: complex and unintelligible rules govern everyday transactions, like a couple (filing individually) while taking a joint mortgage,²⁴⁴ a worker seeking to deduct her home office expenses,²⁴⁵ or a teleworker figuring out the state taxes they owe.²⁴⁶

Second, the Code and its regulations prescribe virtually *every aspect* of the economic life²⁴⁷ in a jurisdiction (and sometimes, outside of a jurisdiction too,²⁴⁸ as many teleworkers have come to realize). These rules are not merely meant to apply to a narrow set of circumstances; they apply to almost all circumstances. Moreover, even the rules' nonapplication is imbued with normative significance.²⁴⁹ Tax law thus differs from environmental law given its broad applicability and scope.

Third, because of their broad scope, tax laws are not concerned merely with a specific kind of conduct that would put a citizen on notice that they may be entering a heavily regulated space (e.g., am I an industrial polluter?). Instead, tax laws attach to ordinary life events—receiving a paycheck, moving states, or working from home—often without alerting the citizen to alter their behavior or seek to nail down the law. Tax law is full of “traps for the unwary.”²⁵⁰ These traps should be especially problematic for legal

that it will not only fail to frighten the citizen away from a general area of conduct deemed undesirable, but may also rob the statute of its power to lend a meaningful legitimation to action taken pursuant to it.

FULLER, *MORALITY*, *supra* note 1, at 212. He concludes by asking, “whether there is not a damaging and corrosive hypocrisy in pretending to act in accordance with preestablished rules when in reality the functions exercised are essentially managerial and for that reason demand—and on close inspection exhibit—a rule-free response to changing conditions.” *Id.* at 213–14.

244. See Luís C. Calderón Gómez, *Whose Debt Is It Anyway?*, 76 *TAX L. REV.* 159, 165–66 (2022) (examining the complex, incoherent, and uncertain tax treatment of debt with two or more borrowers).

245. See Rev. Proc. 2013-13, 2013-6 *I.R.B.* 478 (providing for an ironically named simplified “safe harbor method” for deducting home office expenses).

246. See generally Edward Zelinsky, *Taxing Interstate Remote Workers After New Hampshire v. Massachusetts: The Current Status of the Debate*, 25 *FLA. TAX REV.* 767, 778 (2022) (discussing the current legal uncertainty given the Supreme Court’s silence on states’ taxing rights over telecommuters).

247. Some argue that the tax law’s effects go much further. See, e.g., Tsilly Dagan, *The Currency of Taxation*, 84 *FORDHAM L. REV.* 2537, 2537–38 (2016) (arguing that income tax does more than advance welfare and distributive justice—it also shapes taxpayers’ identities, self-perceptions, and social interactions).

248. Such is the case with provisions that deal with international economic activity, such as global intangible low-taxed income. See *I.R.C.* § 250.

249. See generally Luís C. Calderón Gómez, *Taxation’s Limits*, 119 *Nw. U. L. REV.* 571 (2024) (discussing the normative significance of tax exemptions).

250. See, e.g., Laura Saunders, *What an IRS Battle Over an 850-Year-Old Painting Means for Your Taxes*, *WALL ST. J.* (May 2, 2025), <https://www.wsj.com/personal-finance/taxes/os>

theorists concerned with notions of reciprocity between the State and its citizens²⁵¹ or for theorists who view the law as essentially a planning project.²⁵² Thus, the relationships of reciprocity between the citizen and the State—which justify and undergird the necessity of the principle of clarity—take a different form in environmental law than they do in tax, necessitating different intelligibility baselines as a result.²⁵³ In a nutshell, environmental law’s intelligibility concerns environmental experts, administrators, and scientists; the tax law must be understood by everyone in their everyday lives.

D. Additional Principles of Legality

The tax law does not seem to fare any better under Fuller’s remaining desiderata. The tax law often contravenes the requirements of generality, publicity, stability (over time), retroactivity, and impossibility—although perhaps not to the same degree it violates the requirements of clarity, intelligibility, noncontradiction, and congruence.

Without even having to venture into different factual or legal scenarios, we can adumbrate how the foregoing examples implicate legality’s principles. Generality is directly in conflict with, for example, (1) tax law’s insistence on “gap filling” by economic rationales, especially in the context of GAARs;²⁵⁴ (2) the individualized letter ruling system, which often provides an “exceptional” rule to a single taxpayer (the vast majority of which are wealthy individuals and corporations), often in secret;²⁵⁵ or (3) individualized tax determinations through state and local incentives.²⁵⁶ Other tax regimes discussed in this Article—such as selective tax enforcement through price discrimination and secretive tax rulings (incentives and abatements)—are squarely at odds with the desideratum of publicity.²⁵⁷ Stability is often impaired by the unpredictable structure of the tax law, in which much discretion and deference is given to administrative (and reversible) determinations like PLRs, perhaps to an exceptional degree. Moreover, the vague and “flexible” nature of anti-avoidance doctrines and measures might result in some taxpayers experiencing retroactivity. Finally, insofar as compliance with the tax law necessitates a working understanding

car-tang-met-museum-donation-ff8e03f7 (on file with the *Fordham Law Review*) (noting that “there are many traps for the unwary on the path to a tax deduction for charitable donations of property”).

251. See, e.g., FULLER, *MORALITY*, *supra* note 1, at 39–40.

252. See SHAPIRO, *supra* note 47, at 396 (detailing a *positivist* planning account of the law); Stone, *supra* note 105, at 223 (setting forth a *naturalist* planning account of the law).

253. Additionally, it is not clear why, even if we accept that environmental law and tax law are analogous, we should embrace a lack of clarity in tax simply because it exists in environmental regulations.

254. See Prebble, *supra* note 63, at 85–87 (describing Kelsen’s views on noncontradiction); *id.* at 96–97 (describing how appeals to economic logic and morality as means to resolving otherwise irreconcilable legal conflicts are incompatible with Kelsen’s pure theory of law).

255. See *supra* Parts II.B.1–2 (discussing confidential rulings and incentives).

256. See *supra* Part II.B.2.

257. See *supra* Part II.B; Lederman, *supra* note 138, at 262.

of its rules, the problems with the law's clarity or noncontradiction might in practice lead to infractions of the impossibility principle.

* * *

Our brief tour of contemporary taxation's legality leaves much to be desired and much to be worried about. Although the analysis is by no means comprehensive or exhaustive, several fundamental tax regimes and structures appear systematically, fundamentally, and intentionally at odds with the legality principles that we so cherish. Is tax "law"?

III. RECLAIMING LEGALITY FOR TAX LAW

Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, . . . or was unintelligible, or was contradicted by another rule of the same system. . . . It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point obedience becomes futile—as futile, in fact, as casting a vote that will never be counted.²⁵⁸

So what if tax law does not live up to scholars' conception of "law"—as ordinary people (and academics) seem to intuit in complaints about the tax system that presciently echo Fuller's theories? We could take two antipodal paths: giving up legality in taxation, as suggested by bureaucrats worried by tax evasion,²⁵⁹ or abandoning modern taxation altogether, as championed by

258. FULLER, *MORALITY*, *supra* note 1, at 39 (emphasis added).

259. This would perhaps result in what Fuller deems a "managerial" approach. *Id.* at 210. Such a system is perhaps analogous to China's current tax system, as Professor Mitchell Kane thoughtfully pointed out. *See generally* Wei Cui, *Administrative Decentralization and Tax Compliance: A Transactional Cost Perspective*, 65 U. TORO. L.J. 186 (2015) (examining the causes of China's "non-rule-based tax collection"). Prominent tax theorists have (perhaps uncritically) endorsed that the tax system should be more "administration rather than . . . law." *See* Griswold, *supra* note 5, at 423.

Such a system is commonly justified by arguments about State capacity and the "necessity" to combat tax evasion; however, such "State necessity" reasoning is frequently problematic. *See* GIORGIO AGAMBEN, *STATE OF EXCEPTION* 4–9, 24–30 (Kevin Attell trans., 2005) (warning that emergency "lawmaking by administrative degree" can become "lasting peacetime institutions" and that "necessity has no law" and "is not a source of law"). Moreover, it is unclear whether such historical departures from legality have indeed resulted in decreases in tax evasion; a dubious empirical claim given, for example, rising complexity and unintelligibility of the Code but either a flat or rising tax gap. *See Federal Tax Law Keeps Piling Up*, WOLTERS KLUWER CCH (2013), [https://www.cch.com/wbot2013/WBOT_TaxLawPileUp_\(22\)_f13.pdf](https://www.cch.com/wbot2013/WBOT_TaxLawPileUp_(22)_f13.pdf) [<https://perma.cc/TDU2-MMZL>]. *Compare* INTERNAL REVENUE SERV., I.R.S. PUB. 1415 (REV. 9-2019), *FEDERAL TAX COMPLIANCE RESEARCH: TAX GAP ESTIMATES FOR TAX YEARS 2011–2013*, at 9 (2019), <https://www.irs.gov/pub/irs-prior/p1415-2019.pdf> [<https://perma.cc/5YLB-9VWA>] (estimating a voluntary compliance rate of 83.6 percent), *with* INTERNAL REVENUE SERV., I.R.S. PUB. 7285, *INCOME TAX COMPLIANCE RESEARCH: GROSS TAX GAP ESTIMATES AND PROJECTIONS FOR 1973–1992*, at 3, 5, 7, tbls. I.1–3 (1988), <https://www.irs.gov/pub/irs-soi/p7285388.pdf> [<https://perma.cc/2KT4-HZVY>] (estimating a voluntary compliance rate of 83.7 percent in 1973 and 82.4 percent in 1976, despite huge advancements in information reporting and sharing, the elimination of bank secrecy, and the use of computing and artificial intelligence by tax administrations). As such, in abandoning legality, there seems to be much to lose and not much to gain.

those favoring a minimal State, like Professor Randy E. Barnett.²⁶⁰ But both paths are radically unattractive. Is there a sensible compromise?

This Article’s reconstruction of King Rex’s tale is suggestive. Rex’s mistakes were not only caused by his obliviousness of legality and its value. In significant part, Rex’s mistakes were driven by the perception of a practical dilemma between the necessity for tax compliance—compliance being nonnegotiable for today’s revenue-hungry States—and the supposedly unyielding demands of the principles of legality.

Upon closer inspection, many current failings of the tax law can indeed be traced to policy decisions taken with the “necessity” of preventing tax avoidance.²⁶¹ Individuals’ and corporations’ ability and willingness to “game” the tax system regularly forces the government to respond, often in ways that contravene legality, as we saw in Part II. Tax drafters have sacrificed clarity in part because experts deem vague and complex rules as necessary to separate “good” from “bad” transactions, especially when those transactions are complex.²⁶² The State deploys broad and vague “catchall” provisions like GAARs to respond to rapid changes in avoidance techniques, which often outpace the State’s slow ability to adapt.²⁶³ Furthermore, tax architecture’s discrimination among different taxpayers, in principle subject to the *same* general rules, is seen as necessary to incentivize mobile companies (or individuals) to remain and be compliant with a specific jurisdiction’s tax demands, “plucking the goose as to obtain the largest amount of feathers with the least amount of hissing.”²⁶⁴

260. See, e.g., Randy E. Barnett, *Toward a Theory of Legal Naturalism*, 2 J. LIBERTARIAN STUD. 97, 100–02 (1978) (concluding that the State does not follow the principles of legality and proposing adopting nonmonopolistic and noncoercive systems of law by basically privatizing public law, with citizens choosing between competing firms running local and self-contained legal systems).

261. I use the term tax avoidance as “knowingly exploiting the letter of tax regulations in a way that is inconsistent with legislative intent and public policy.” Daniel T. Ostas & Axel Hilling, *Global Tax Shelters, the Ethics of Interpretation, and the Need for a Pragmatic Jurisprudence*, 53 AM. BUS. L.J. 745, 750 (2016).

262. Whether standards—rather than rules—would be a better general structure for our tax system is beyond the scope of this Article. Compare Surrey, *supra* note 2, at 707–08 & n.31 (favoring a system with anti-abuse rules, i.e., a system that uses standards, over a system that relies only on rules because standards allow for a simpler system), with Weisbach, *supra* note 98, at 862 (arguing that, although anti-abuse rules create a “simpler” tax system, they are not always advisable, because they often refer to taxpayers’ state of mind and create unilateral legal rules that apply only to the taxpayers, not the government).

263. See, e.g., *supra* notes 86–102 and accompanying text.

264. See Alarie, *supra* note 119, at 89–90. Evidence of the government’s concern with multinational tax avoidance is plentiful. Speeches prior to the passage of the Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017), reveal the government’s willingness to capitulate to the “realities” of global tax competition, for example, by dropping the nominal corporate tax rates. See, e.g., Trump, *supra* note 132 (expressing the motivations for the Tax Cuts and Jobs Act). Evidence of state and local concerns over relocations and “sweetheart” deals offered to particular companies, lest they leave a jurisdiction, are also plentiful. See Shayndi Raice & Laura Stevens, *In Their Push to Lure Amazon, Cities Face Unintended Demands*, WALL ST. J. (Mar. 15, 2018), <https://www.wsj.com/articles/in-their-push-to-lure-amazon-cities-face-unintended-demands-1521115200> (on file with the *Fordham Law Review*).

Holmesian bad men²⁶⁵ might abound in other areas of the law, yet they pose such an essential threat to tax that the law seems to be uniquely built around them. After all, what is the State to do if “there is not even a patriotic duty to increase one’s taxes”?²⁶⁶ Surrey, “the greatest tax scholar of his generation,”²⁶⁷ presupposed that tax policymaking would necessarily be subject to a certain amount of illegality due to its dual complexity and requirement for administrative flexibility.²⁶⁸

To learn from Rex, we must find a way out of his dilemma. That is, a way to foster the legality of the system while simultaneously addressing the necessities of a modern tax system—most saliently, policymakers’ necessity of ensuring sufficient compliance with the law.²⁶⁹ Not doing so would render any harmonization process Sisyphean—any reforms meant to restore legality would be later frustrated by the State’s necessity to enact policies responding to novel tax avoidance. Think of King Rex.²⁷⁰

But harmonization can promise to *simultaneously* decrease tax avoidance and evasion by reinvigorating legality and citizens’ internal motivations to follow the law. Theoretical and empirical literature shows that legality and compliance can operate in a feedback loop.²⁷¹ This part briefly outlines the theoretical and empirical literature examining the direct positive relationship between legality and tax compliance. This Article then seeks to convert those empirical insights into practice, examining several examples of how policymakers could address shortcomings in legality while simultaneously fostering tax compliance.

Just a reminder—what is at stake in “harmonizing” the tax law with legality? At stake is not merely comforting ivory-tower theorists. Legality is a cornerstone in justifying State coercion—central to any popular justification of taxation—and, depending on one’s values, overlaps or buttresses other top-shelf values like legitimacy, democracy, or rule of law. Furthermore, legality is crucial to fostering internal motivations for legal compliance, especially in tax law. As such, addressing tax law’s shortcomings is *critical*, regardless of whether one prizes legality’s intrinsic or instrumental values. With those stakes in mind, let us explore the relationship between legality, tax compliance, and the failings of the tax law.

265. See generally Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

266. *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934).

267. See Griswold, *supra* note 190, at 331.

268. See Surrey, *supra* note 2, at 709.

269. FULLER, MORALITY, *supra* note 1, at 93 (discussing tailoring the demands of legality to the branch of law).

270. See, e.g., *Tax Code Simplification Hearing Before the Subcomm. on Oversight & the Subcomm. on Select Revenue Measures of the H. Comm. on Ways & Means*, 117th Cong. 92 (2001) (statement of William G. Gale, Brookings Inst.) (discussing how tax evasion would be the main source of complexity were a national retail sales tax to replace the income tax).

271. See *infra* Part III.A.

A. *The Relationships Among Compliance,
Internal Motivations, and Legality*

A growing literature in the fields of psychology and law has sought to answer an incredibly complex question: why do people obey the law? Psychologists often organize their answers by explaining that people obey the law acting on internal and external motivations.²⁷²

For our purposes, it is sufficient to specify that they act under external motives when they are driven by deterrence-type considerations (i.e., they have determined that the expected costs of noncompliance will be higher than the benefits of compliance), which in turn can be driven by governmental²⁷³ or community sanctions.²⁷⁴ External motivations are thus appealing to a policymaker, given their seeming simplicity and manipulability: if you want to improve compliance, simply increase the perceived costs of noncompliance, for example, by raising the fees or prison term associated with a violation or by increasing the perception of policing or detection of the offense.²⁷⁵ That being said, depending on the context, external motivations can be costly, fleeting, and ineffective.²⁷⁶ Additionally, deterrence only explains part of tax compliance; people follow the law because of other motivations, so there are limits to the compliance rates that increased deterrence can accomplish.²⁷⁷

People also follow the law because of *internal* motivations.²⁷⁸ In simple terms, internal motivations can arise out of personal morality, affect, or

272. Although theorists have proposed many different typologies, with important nuances, this simple framework suffices for expository purposes. *See, e.g.*, RICHARD M. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 2–4 (2015).

273. *See generally, e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (for a general standard deterrence model); Michael G. Allingham & Agnar Sandmo, *Income Tax Evasion: A Theoretical Analysis*, 1 J. PUB. ECON. 323 (1972) (for a standard deterrence model of tax evasion).

274. These sanctions might in some cases be so powerful as to produce compliance with some rules, even in the partial absence of law. *See, e.g.*, ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES*, 167–83 (1994) (arguing that in Shasta County, California, order was partly established through a close-knit community’s informal social control). Of course, this type of social control can be deployed to ensure compliance with both community norms and the law. *See id.*

275. *See generally* Becker, *supra* note 273 (arguing that raising either the probability of conviction or the severity of punishment reduces the expected payoff from offending and therefore tends to reduce offenses).

276. *See* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 22–24 (2006).

277. A vast literature has challenged the notion that tax compliance rates can be exclusively—or even significantly—explained by deterrence, rejecting Becker/Sandmo-type models of compliance. *See, e.g.*, Benno Torgler, *Tax Morale and Tax Compliance: A Cross Culture Comparison*, 96 NAT’L TAX ASS’N 63, 72 (2003) (“There is even a negative correlation between coercion and tax compliance, being audited having a stronger negative effect on tax compliance than the degree of penalties.”).

278. *See generally* TYLER, *supra* note 276 (setting a general framework for legal compliance); Benno Torgler, *Tax Morale, Rule-Governed Behaviour and Trust*, 14 CONST. POL. ECON. 119 (2003) (developing a typology for taxpayer compliance decisions). *See also* Uwe Dulleck, Jonas Fooker, Cameron Newton, Andrea Ristl, Markus Schaffner & Benno Torgler, *Tax Compliance and Psychic Costs: Behavioral Experimental Evidence Using a*

legitimacy. Legitimacy is found where citizens “see adequate reason for feeling that they should voluntarily obey the commands of authorities.”²⁷⁹ In contrast, “legitimacy” (i.e., I follow the law *because* the law is legitimate—regardless of the action’s particular costs, benefits, or my particular ethical or moral orientation) is distinct from related internal motivations such as “personal morality” (i.e., I follow the law *because*, in this instance, the law coincides with my particular ethical or moral orientation) and “affect” (i.e., I follow the law *because* I trust government and my community).²⁸⁰ Although these motives might correlate, overlap, or reinforce each other, their relationship is not directly causal or one-to-one: people often follow the law because the law is “legitimate”—even when they think that the law is “wrong”²⁸¹ or when they hold negative attitudes toward legal authorities (judges or police officers) enforcing such law.²⁸² Similarly, even in situations where a law is “illegitimate,” people might follow it because it aligns with their personal morality or because of affect.

Although the borders of these categories can be fuzzy and, in most cases, people will have mixed motives to follow the law, conflicts do arise. That is the case, for example, where there are insufficient external motivations to follow a particular legal rule. External motivators might be insufficient when the government cannot efficiently deter people to follow the law due to citizens’ ability to conceal noncompliance (e.g., U.S. citizens’ prior ability to avoid taxes using secretive Swiss bank accounts²⁸³ or foreigners’ current ability to hide assets from foreign governments in U.S. entities).²⁸⁴ It is also very expensive (and difficult) for the government to ensure compliance from highly motivated and well-resourced taxpayers (e.g., the expense to the IRS of hiring specialized auditors to conduct time-intensive audits of all partnership returns).²⁸⁵ Lastly, there is an inherent difficulty in finding the

Physiological Marker, 134 J. PUB. ECON. 9, 14 (2016) (finding that internal motivations to obey the law might be channeled through psychic stress, increasing a taxpayer’s “cost” to evading taxes).

279. See TYLER, *supra* note 276, at 25 (summarizing Professor David Easton’s definition of legitimacy).

280. See *id.* at 28–29.

281. See *id.* at 45–46.

282. See *id.* at 46–49.

283. At least until the U.S. Government was able to strongarm banks into complying. See Press Release, U.S. Dep’t of Just., UBS Enters into Deferred Prosecution Agreement (Feb. 18, 2009), <https://www.justice.gov/opa/pr/ubs-enters-deferred-prosecution-agreement> [<https://perma.cc/TV4S-H8ZQ>].

284. See Calderón Gómez, *supra* note 244, at 214–17.

285. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-453, PARTNERSHIPS AND S CORPORATIONS: IRS NEEDS TO IMPROVE INFORMATION TO ADDRESS TAX NONCOMPLIANCE 1 (2014), <https://www.gao.gov/assets/670/663185.pdf> [<https://perma.cc/LAQ6-FCL2>] (concluding that “IRS examinations and automated document matching have not been effective at finding most of the estimated misreported income”); INTERNAL REVENUE SERV., I.R.S. PUB. 1415 (REV. 10-2022), FEDERAL TAX COMPLIANCE RESEARCH: TAX GAP ESTIMATES FOR TAX YEARS 2014–2016, at 20 (2022), <https://www.irs.gov/pub/irs-pdf/p1415.pdf> [<https://perma.cc/95YR-UQ9C>] (estimating that 9 percent of the tax gap is attributable to underreporting in flow-through entities). These difficulties have been ameliorated since the

right balance for the doctrinal evolution necessary to ensure deterrence (i.e., fast enough to react to taxpayers’ innovative avoidance schemes but slow enough to allow taxpayers to plan according to the law).²⁸⁶ Deterrence might also be insufficient where communities cannot effectively sanction compliance informally due to the community not being tight-knit or disagreement as to the rule’s appropriateness (such as when tax cheats argue that they merely avoided, not evaded, tax and therefore should not receive community censure).²⁸⁷

That is where internal motivations are most critical: they provide citizens with reasons to follow the law *even when* the external consequences of their actions (e.g., deterrence in the form of official prosecution or community shaming) are not present or otherwise sufficient to motivate compliance.

There is a strong case for increased attention to internal motivations in the status quo. Given the large benefits of tax evasion to wealthy taxpayers (due to record-breaking wealth inequality), tax evaders’ increasing technical sophistication, persistently low audit rates, and uncertainty over increased funding for the IRS,²⁸⁸ the government finds itself currently “outgunned” by the tax avoidance industry and cannot effectively deter tax cheats.²⁸⁹ Similarly, social enforcement is also unlikely to result in compliance, as individual noncompliance is hidden from the community²⁹⁰ and the distinguishment of “evasion” from avoidance has reduced the community’s

passage of the Bipartisan Budget Act of 2015. Pub. L. No. 114-74, 129 Stat. 584 (2015) (establishing a through partnership audit regime). However, the complexity of both the substantive law and the structures involved, paired with a scarcity of seasoned partnership auditors, means that the costs of detection are still prohibitively high. *See also* Edward Fox, Zachary Liscow & Michael Love, *How to Tax Business?: Economic Rents, Legibility, and the Corporate-Pass-Through Divide* 23–29 (Feb. 2026) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6206239 (on file with the *Fordham Law Review*) (discussing how the explosion of complex, multitiered pass-throughs has rendered enforcement impossible).

286. *See* Daria Roithmayr, Alexander Isakov & David Rand, *Should Law Keep Pace with Society?: Relative Update Rates Determine the Co-Evolution of Institutional Punishment and Citizen Contributions to Public Goods*, 6 GAMES 124, 136 (2015) (arguing that effective legal change requires a “Goldilocks” update rate).

287. *See* EMMANUEL SAEZ & GABRIEL ZUCMAN, *THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY* 54–55 (2019) (recounting the origins of the tax avoidance versus tax evasion distinction with J.P. Morgan’s defense against revelations that he had paid no income tax in 1931 and 1932).

288. *See, e.g.,* Natalie Alms & Eric Katz, *Trump Signals New Direction for IRS as He Announces Atypical Plan to Replace Its Leadership*, GOV’T EXEC. (Dec. 5, 2024), <https://www.govexec.com/management/2024/12/trump-signals-new-direction-irs-he-announces-atypical-plan-replace-its-leadership/401458/> [<https://perma.cc/7R9K-QERX>].

289. *See* Seth Hanlon, *Unrigging the Economy Will Require Enforcing the Tax Laws*, CTR. FOR AM. PROGRESS (Mar. 12, 2020), <https://www.americanprogress.org/issues/economy/reports/2020/03/12/481539/unrigging-economy-will-require-enforcing-tax-laws/> [<https://perma.cc/NYR3-TJZA>] (noting that the IRS “is badly outgunned” but arguing that reforms could increase enforcement of the tax laws).

290. Some have advocated for the disclosure of tax cheats as a “shaming” mechanism that could deter noncompliance. *See* James Alm, Michele Bernasconi, Susan Laury, Daniel J. Lee & Sally Wallace, *Culture, Compliance, and Confidentiality: Taxpayer Behavior in the United States and Italy*, 140 J. ECON. BEHAV. & ORG. 176, 177–78 (2017).

appetite for informal control of “mere” tax avoidance.²⁹¹ Against that background, internal motivations prove crucial to ensuring compliance with the tax laws and remain relatively underappreciated²⁹² compared to external motivations for tax compliance.²⁹³ Even in the abstract, experts advise a dual focus on internal and external motivations to maximize compliance.²⁹⁴

Studies employing varying methodologies corroborate the existence and significance of the intimate relationship between internal motivations and tax compliance. For example, recent surveys of sole proprietors by the IRS’s Taxpayer Advocate Service highlight the importance of internal motivations for compliance and the inability of deterrence to significantly motivate taxpayers to comply with the law. “Responses do not show that economic deterrence motivates compliance decisions,” the survey concluded.²⁹⁵ “Those in the low-compliance group were less likely to agree that noncompliance goes unpunished,” thus suggesting that expectations of deterrence were insufficient—holding other variables constant—to explain differences in tax compliance.²⁹⁶

Regarding internal motivation, the IRS study found that taxpayer compliance was influenced by taxpayers’ experiences and feelings toward the State, the law more generally, and the tax law more specifically, suggesting that affect and legitimacy play a key role in this relationship.²⁹⁷ Moreover, the finding also demonstrated that individual internal motivations might have a *social* dimension. Sole proprietors living in communities with

291. Cf. Chris Kahn, *Trump Calls Tax Avoidance ‘Smart,’ Most Americans Call It ‘Unpatriotic’*, REUTERS (Oct. 5, 2016), <https://www.reuters.com/article/us-usa-election-poll/trump-calls-tax-avoidance-smart-most-americans-call-it-unpatriotic-poll-idUSKCN1242FH> [<https://perma.cc/EJ75-M42H>]; see also Weisbach, *supra* note 98, at 886 (discussing the importance of changing taxpaying norms).

292. The substantial literature on tax morale has often failed to get necessary traction in the legal and policy arenas, as the literature is perceived as lacking the pseudoscientific precision that some deterrence models purport to provide. Cf. James Alm, *What Motivates Tax Compliance?*, 33 J. ECON. SURVS. 353, 371 (2018).

293. A meta-analysis of the literature on tax compliance succinctly concluded:

There are individuals who always cheat and those who always comply, some who behave as if they maximize the expected utility of the tax evasion gamble, others who seem to overweight[] low probabilities, individuals who respond in different ways to changes in their tax burden, some who are at times cooperative and at other times free riders and many who seem to be guided by such things as social norms, moral sentiments and equity.

Id. at 369.

294. See generally Kent W. Smith, *Reciprocity and Fairness: Positive Incentives for Tax Compliance*, in *WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT* 223 (Joel Slemrod ed., 1992).

295. IRS TAXPAYER ADVOC., *supra* note 181, at 5.

296. *Id.*

297. See *id.* at 8. Experimental studies have similarly identified a significant role for internal motivations. See, e.g., Dulleck, *supra* note 278, at 10. Cross-cultural analyses of compliance have similarly found internal motivations to be a significant factor in tax compliance. See generally, e.g., Alm, *supra* note 290 (comparing the United States and Italy); Torgler, *supra* note 277 (comparing Costa Rica and Switzerland); Benno Torgler, Ihsan C. Demir, Alison Macintyre & Markus Schaffner, *Causes and Consequences of Tax Morale: An Empirical Investigation*, 38 ECON. ANALYSIS & POL’Y 313 (2008) (analyzing the United States and Turkey).

low compliance rates were more likely to express dissatisfaction with the government,²⁹⁸ the IRS, its treatment of taxpayers,²⁹⁹ and the tax laws.³⁰⁰ They also were more likely to agree that the tax laws favor the rich³⁰¹ and that the laws are unfair.³⁰² The converse was true for the communities where the survey had identified individuals with high compliance rates. Surveys in other contexts support these results.³⁰³

Sociological approaches that do a deeper dive into taxpayer motivations similarly substantiate the importance of internal motivations and the role that procedural experiences have to play in fostering those internal motivations. Scholar Vanessa Williamson conducted extensive surveys of dozens of Americans regarding their motivations for paying taxes. Highlighting the salience of internal motivations in taxpaying, the study reported that a significant majority of Americans surveyed described paying their taxes as a “civic and moral responsibility,”³⁰⁴ invoking the communitarian benefits of taxpaying.³⁰⁵ At the same time, however, people reported high dissatisfaction with the Code’s complexity and with the effective price discrimination between the well-advised rich and the rest, resulting in an unfair tax system.³⁰⁶

Yet the internal motivations showing up in surveys and interviews are not “fixed”—they are mediated by individuals’ personal experiences with the system. Experimental studies confirm that a government can foster (or hinder) internal motivations, and therefore compliance with the law, by addressing the tax law’s shortcomings with legality because people’s inclinations to view a system as legitimate are (partly) a consequence of their experience of the system’s legality. Professor Tom R. Tyler’s famous Chicago study on people’s motivations to comply with the law similarly supports legality’s role: the desiderata of legality have significant overlap

298. IRS TAXPAYER ADVOC., *supra* note 181, at 16.

299. *See id.* at 15–16.

300. *See id.* at 14. Note, however, that most taxpayers surveyed—whether in high-compliance or low-compliance communities—believed that the tax laws were unfair. Moreover, some differences between the groups were not statistically significant at a 95 percent level. *Id.* at 14 n.20.

301. *See id.* at 14.

302. *See id.* at 14, 21 fig. 7 (finding that the low-compliance group is much more likely to report that others in their local organizations believe the tax laws are unfair).

303. *See generally* Alm, *supra* note 290 (comparing the United States and Italy); Torgler, *supra* note 277 (comparing Costa Rica and Switzerland).

304. VANESSA S. WILLIAMSON, READ MY LIPS: WHY AMERICANS ARE PROUD TO PAY TAXES 26–32 (2017).

305. *See id.* at 32, 36.

306. *See id.* at 133–34. A respondent intuited the relationships discussed in this Article: “I think that everything’s so convoluted that only people that are in very good financial situations are able to use the system to their advantage when it comes to the IRS and tax loopholes, that kind of thing.” *Id.* at 134. Not only does the respondent’s statement link the Code’s complexity and unintelligibility to price discrimination in favor of the rich, but he also intuited their relationship with tax avoidance.

with (if not outright correspondence to)³⁰⁷ the procedural virtues that Tyler found to strongly motivate compliance with the law, even when controlling for the “outcomes” of the law.³⁰⁸ (More recent studies have confirmed the importance of principles of legality to internal motivations).³⁰⁹ In addition, the study rejected the notion that these motivations were somehow exogenously determined, finding that people’s recent experiences with the legal system can change their prior opinions and thus affect their motivations to comply.³¹⁰

In short, empirical evidence strongly suggests that deterrence might not be particularly well-situated to further increase tax compliance. Or, at least, that a “balance of strategies often produces more compliance more efficiently than does either strategy alone.”³¹¹ Moreover, studies from sociological surveys to psychological lab experiments indicate that taxpayers frequently act on internal motivations (whether they arise out of legitimacy, personal morality, or affect) when complying with the tax law and that those internal motivations are mediated by their experiences of tax law’s legality. A feedback relationship becomes apparent: (1) if people’s dissatisfaction with legality reduces their internal motivations to follow the law, then (2) compliance is reduced, and (3) the government is forced to introduce more anti-avoidance measures, (4) measures that frequently further lessen

307. For example, congruence between the law as communicated and as enforced seems identical to what Tyler tested as “impartiality” (consisting of a measure of bias, dishonesty, and effort to be fair). See TYLER, *supra* note 276, at 135–37. Similarly, noncontradiction maps quite well to “consistency,” another procedural virtue tested by Tyler. *Id.* Lastly, clarity overlaps significantly with the idea of representation and fairness tested by Tyler and has been found to be internally motivating by other literature. See *id.*; Natrah Saad, *Tax Knowledge, Tax Complexity and Tax Compliance: Taxpayers’ View*, 109 *PROCEDIA: SOC. & BEHAV. SCIS.* 1069, 1069 (2014) (finding that lack of “tax knowledge and tax complexity are contributing factors towards non-compliance” in New Zealand); Merima Ali, Odd-Helge Fjeldstad & Ingrid Hoem Sjørnsen, *To Pay or Not to Pay?: Citizens’ Attitudes Toward Taxation in Kenya, Tanzania, Uganda, and South Africa*, 64 *WORLD DEV.* 828, 835, 838 (2014) (finding that the clarity and complexity of the tax system have significant compliance effects in Uganda, South Africa, Kenya, and Tanzania).

308. TYLER, *supra* note 276, at 136–37 (finding that procedural attributes have a statistically significant relationship to compliance with the law, even when controlling for the outcome of the procedure).

309. See generally, e.g., Piotr Bystranowski, *Ignorance of Law Does Not Excuse: A New Empirical Account* (Nov. 4, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5009360 (on file with the *Fordham Law Review*) (discussing complexity, intelligibility, and internal motivations).

310. TYLER, *supra* note 276 at 103 (“[T]here is little direct effect on compliance of judgments based on experience. Instead, experience influences compliance *through its effect on judgments about legitimacy*.” (emphasis added)). IRS studies have supported Tyler’s results. See TAXPAYER ADVOC. SERV., *WHAT INFLUENCE DO IRS AUDITS HAVE ON TAXPAYER ATTITUDES AND PERCEPTIONS?: EVIDENCE FROM A NATIONAL SURVEY 80* (2018), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/11/ARC18_Volume2_04_InfluenceAudits.pdf [<https://perma.cc/A9US-7KDK>] (“Our findings demonstrate that IRS audits have the potential to change taxpayer attitudes in both positive and negative ways.”).

311. Smith, *supra* note 294, at 223.

the perceived legality of the system, fueling the avoidance cycle and bringing us back to (1).³¹²

Against that background, internal motivations become increasingly important as a policy tool to reverse that negative feedback loop into a virtuous cycle, especially as academics and policymakers seem to have exhausted the role of deterrence in compliance decisions. The interrelationship between legality and tax compliance is therefore not a challenge but an *opportunity*. In recognition of policymakers’ strong preference for the concrete and tangible, the following section advances some policy recommendations illustrating the ways in which we can reclaim legality for tax.

*B. Reclaiming Legality for Tax in
Practice: Policy and Policymaking*

Reconciling legality and current taxation demands not only elegant theories but also concrete practice, especially praxis that can accommodate the State’s necessity to ensure satisfactory tax compliance. This section provides examples of practical reforms that could address some of tax law’s problematic features while simultaneously enhancing tax compliance—both directly as a result of effective policy and indirectly as a second-order result of increased perceptions of legality. In doing so, this section challenges policymakers’ perceived dilemma between a tax system capable of ensuring compliance or fighting evasion and a tax system respectful of legality.

Take a couple of policies related to the foregoing examples. To ameliorate contradiction, governments could cabin the application of GAARs to certain provisions or certain taxpayers—that is, adopt specific anti-avoidance rules (SAARs). As suggested by some, this could be done to address contexts, such as partnerships, where the imposition of a SAAR would actually *decrease* complexity vis-à-vis a system that relies on rules, not standards.³¹³ In fact, evidence suggests that SAARs are equally, if not more, effective than GAARs in addressing prototypical tax avoidance schemes because courts are more prone to apply them.³¹⁴ This would not resolve the general problem of contradiction in certain areas of the tax law where SAARs could potentially

312. This Article is not making the claim that internal motivations, compliance, anti-avoidance policy responses, and legality are all one-to-one relationships: these are complex phenomena, with other contributing causes and complicated causal mechanisms. Just consider how increasing deterrence might, for example, decrease compliance long term by “crowding out” internal motivations for following the tax law. *See generally* Alm, *supra* note 290. That being said, the relationship among internal motivations, compliance, anti-avoidance policy responses, and legality is important insofar as it can provide a partial account of these phenomena, especially when other accounts have so far glossed over this relationship.

313. *See* Weisbach, *supra* note 98, at 882–83.

314. *See* Benjamin T. Kujinga, *Factors that Limit the Efficacy of General Anti-Avoidance Rules in Income Tax Legislation: Lessons from South Africa, Australia, and Canada*, 47 COMPAR. & INT’L J. S. AFRICA 429, 438–39 (2014) (discussing the historical evidence of courts’ hesitation to apply GAARs); *see also* TRACEY BOWLER, THE INST. FOR FISCAL STUD., COUNTERING TAX AVOIDANCE IN THE UK: WHICH WAY FORWARD? 27, 36–37 (2009) (discussing the trade-offs between GAARs and SAARs).

apply (because those SAARs would presumably still have a “fuzzy” β); however, replacing the GAAR would at least notify taxpayers of the GAAR’s applicability and diminish the legal domains in which taxpayers experience contradictory norms.³¹⁵ In doing so, the law would limit contradictions to certain spheres where taxpayers are better positioned to dispel them or where the government’s anti-abuse interests are at their peak—for example, in the international merger and acquisition, sole-proprietorship, or large partnership contexts.³¹⁶

A superior alternative—yet perhaps a demanding one from a political economy perspective—is to address noncontradiction by clarifying to the taxpayer the trigger condition upon which a GAAR would apply, as professional organizations have loudly requested.³¹⁷ Such a reform could be accomplished without sacrificing the general applicability of the GAAR. Policymakers should stop defining β under value-neutral, meaningless, and unpredictable terms. Under those, the taxpayer is unable to determine *ex ante* whether the rule applies to them; consider, for example, GAARs that are relevant whenever taxpayers seek to “obtain a tax benefit.”³¹⁸ Instead, a legality-minded policymaker could adopt a more value-laden but clearer β , such as “bad faith.” Notwithstanding its ambiguity in a strict sense, a value-laden β would closely follow moral intuitions that are, although contested, generally shared and routinely used in the law³¹⁹ (and accessible to the taxpayer *ex ante*), therefore allowing the citizen to plan their affairs and experience the law in a noncontradictory way.³²⁰ Such a solution—unlike replacing the GAAR with different SAARs—would also preserve the GAAR’s ability to fight creative tax avoidance schemes that exploit

315. This solution, however, reduces taxing authorities’ flexibility to combat certain types of unexpected or innovative schemes, not planned for when enacting the different SAARs. As such, redefining β is a preferable policy solution.

316. See, e.g., Tobias Burns, *IRS Eyes Partnerships in Tax Evasion Crackdown*, HILL (Oct. 4, 2023), <https://thehill.com/business/4236004-irs-eyes-partnerships-in-tax-evasion-crackdown/> [<https://perma.cc/5E6A-GFKZ>].

317. See, e.g., N.Y.S. BAR ASS’N, TAX SECTION, *supra* note 94, at 4–5.

318. See *Income Tax Assessment Act 1936* (Cth) s 177D(1) (Austl.).

319. See David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 890–96 (2016) (noting that “[g]ood faith may also be used in a ‘gap-filling’ role to disallow conduct that otherwise would not run afoul of controlling legal texts” and that “[t]he duty of good faith appears in more than fifty provisions of the Uniform Commercial Code (U.C.C.) and is a fixture of modern contract litigation. . . . Tens of thousands of lawyers worldwide must deal with the concepts of good faith and bad faith on a regular basis.” (emphasis added)); see also Weisbach, *supra* note 98, at 884–85 (analogizing GAARs to the duty of good faith in contract law).

320. Some tax scholars have criticized the use of these standards—especially motive standards—as inequitably creating “simplicity” for taxpayers with fewer resources, favoring bright-line rules that can be easily translated to informal guidance. See, e.g., Blank & Osofsky, *supra* note 154, at 1141–42. However, in this context, it is unlikely that a taxpayer with few resources would not understand “bad faith” but would understand the plethora of factors that a court would consider in determining whether a transaction is a sham, for example. *Id.* at 1142 (“And without sufficient tax penalties or anti-abuse provisions, taxpayers may attempt to exploit bright-line rules to claim tax benefits that Congress did not intend.”). Therefore, this tailoring of the GAAR should be a welcome reform by those worried with the system’s “simplicity.”

vagueness or inconsistencies in the law (especially around the boundaries of the SAAR).³²¹ As an added benefit, this solution would harmonize tax with other areas of the law that already employ such value-laden terms.³²²

With congruence in mind, we could end or significantly curtail letter-ruling programs.³²³ Alternatively, governments could expand their availability, transparency, and precedential value.³²⁴ In the United States, Congress could do so by repealing Code § 6110(k)(3),³²⁵ which specifically provides that PLRs and other written determinations cannot be used as precedent. Moreover, Congress could expand the transparency procedures applicable to PLRs to include closing agreements and make background files easily accessible so that any “intermediate” or implicit conclusions are *actually* available to all taxpayers.³²⁶

Additionally, the Treasury Department could lower fees and simplify the procedures for rulings and other written determinations, thus expanding the scope of who can apply for them. On one hand, these policy changes would alleviate the law’s deficiency as to congruence. On the other, these reforms would also stem the tax avoidance resulting from sweetheart deals given to wealthy and corporate taxpayers. Although sweetheart deals have been more frequently spotted in Europe, recent transfer pricing litigation revealed that the IRS is not impervious to awarding generous “compromises” to large corporate taxpayers.³²⁷ Moreover, U.S. states could enhance congruence by enacting laws requiring that any tax incentives offered be transparent and openly available to all applicants.³²⁸

Lastly, governments could reduce complexity and enhance intelligibility by finally taking steps to meaningfully simplify the Code. Although, as Surrey notes, hopes of a postcard tax code are pipe dreams,³²⁹ the tax law could be significantly simplified, resulting in not only a law that abides more

321. A good example of the IRS’s need to err on the side of overbreadth rather than underbreadth is the listed transaction rules, which require any transaction “substantially similar” to a listed transaction to be disclosed to the IRS, with “substantially similar” being interpreted broadly. See Treas. Reg. §§ 1.6011-4(b)(2), (c)(4).

322. Moreover, such a redrafting of the GAAR would seem to enable “textualist” judges to apply it by using legal concepts with which they are comfortable. See Avi-Yonah, *supra* note 85, at 78–79.

323. Doing so would reduce the overall gap in the law between taxpayers with resources and taxpayers without. See Blank & Osofsky, *supra* note 154, at 1093–94.

324. See, e.g., Lederman, *supra* note 138, at 262–63 (arguing for increased transparency).

325. I.R.C. § 6110(k)(3).

326. In this way, the IRS should also publish PLRs that are withdrawn after a negative determination, communicating the IRS’s position on the law not just to the taxpayer who requested the PLR but to all taxpayers. See Marks, *supra* note 143, at 718–26. *But cf.* David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 159 (2018) (arguing that, past a functional threshold, added transparency yields diminishing marginal returns and can become “more and more threatening to the capacity and legitimacy of the institutions”).

327. See generally, e.g., Coca-Cola v. Commissioner, 155 T.C. 145 (2020).

328. See Slattery & Zidar, *supra* note 157, at 114–15.

329. See Surrey, *supra* note 2, at 709.

closely to legality, but one that is more effective at confronting tax cheats.³³⁰ As with any policy reforms, simplification could be targeted and could achieve many goals by merely aligning law and taxpayer intuition—especially in areas where the law interacts with ordinary citizens the most.³³¹ There is less of a need to simplify the rules for the treatment of preferred stock in a spin-off or the treatment of intercompany debt under the consolidated return rules than there is a need to clarify timely issues for ordinary citizens (such as when home office expenses are deductible or which states can tax telecommuters).³³² However, given that complexity itself empowers the well-advised to play games with the rules, we might also prefer simple spin-off rules.³³³

A second-best reform targeting clarity would aim to improve *public* tax preparation services. Current policy proposals are puzzling.³³⁴ Why would we be willing to find a mere translation of the outcomes sufficient (or desirable) when, in other contexts, it is fundamental to due process that citizens can understand and engage with the law's commands?³³⁵ Policy proposals should emphasize literacy, autonomy, and education—rather than numerical outputs—breaking with the erroneous and paternalistic (but

330. See U.S. DEP'T OF THE TREAS., OFF. OF TAX POL'Y, *supra* note 219, at 15 (advocating for a simpler tax code as a way to increase compliance not only because taxpayers “struggle to understand complicated rules and forms,” but also because a complex tax code “makes it difficult for the IRS to detect noncompliance” and because a “simpler tax code will also be easier for the IRS to administer”).

331. FULLER, MORALITY, *supra* note 1, at 50. See generally Blank & Osofsky, *supra* note 154 (discussing the elimination of “simplicity” in focusing on areas important to taxpayers with the fewest resources); Bystranowski, *supra* note 309 (finding that increasing a rule’s “lawlikeness” by making it public and clear is likely to increase people’s motivations to follow such law and to censure violators).

332. See Zelinsky, *supra* note 246, at 778 (discussing the current legal uncertainty given the Supreme Court’s silence on states’ taxing rights over telecommuters).

333. See, e.g., Joel Slemrod, *The Economics of Corporate Tax Selfishness*, 57 NAT’L TAX J. 877, 884 (2004) (“To be sure, creative compliance is facilitated because the tax law is exceedingly complex and open to alternative interpretations, and this undoubtedly facilitates ethical rationalizations of positions taken.”).

334. See generally, e.g., Goldin, *supra* note 205; Joseph Bankman, *Using Technology to Simplify Individual Tax Filing*, 61 NAT’L TAX J. 773 (2008); AUSTAN GOOLSBEE, THE BROOKINGS INST., THE ‘SIMPLE RETURN’: REDUCING AMERICA’S TAX BURDEN THROUGH RETURN-FREE FILING (2006), <https://www.brookings.edu/wp-content/uploads/2016/06/200607goolsbee.pdf> [<https://perma.cc/32E2-T3V6>].

335. For example, both federal and state governments view interpreters for people with low English proficiency as essential to a fair adjudication process. See, e.g., A.B.A., STANDARDS FOR LANGUAGE ACCESS IN COURTS 15 (2012), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf [<https://perma.cc/S6QE-M7H8>] (“As a fundamental principle of law, fairness, and access to justice, and to promote the integrity and accuracy of judicial proceedings, courts should develop and implement an enforceable system of language access services, so that persons needing to access the court are able to do so in a language they understand, and are able to be understood by the court.”); 28 U.S.C. § 1827 (codifying the Court Interpreters Act of 1978, which provides for government-compensated interpreters in any criminal or civil judicial proceeding initiated by the United States).

widespread) assumption that the tax system should be content with delivering an accurate, yet unexplainable, bill to the citizen.³³⁶

This is by no means an exhaustive list of cure-all proposals, but these exemplify the wide range of policy opportunities that lie ahead if tax policymakers aim to reclaim legality. More broadly, recognizing the feedback between legality and compliance should cause policymakers to learn from Rex’s mistakes and integrate legality as a criterion of standard policy analysis. Current policy analysis is too often constrained to the lenses of equity, efficiency, and administrability. Such a change should influence policy in the right direction by asking that reformers consider legality and seek viable alternatives that reconcile the tax system’s necessities with legality’s commands.³³⁷

CONCLUSION

This Article has sought to provide a much-needed assessment of taxation’s legality, not only as a way to learn more about our tax law and how jurisprudential accounts work in practice, but also to diagnose the malaise behind ordinary citizens’ common perceptions of (and frustrations with) the tax law.³³⁸ Upon examination, the tax law frequently violates several core tenets of legality: (1) GAARs run against the principle of non-contradiction; (2) taxation’s “price discrimination” mechanisms effectively violate the principle of congruence; and (3) the Code’s unintelligibility, driven by its complexity, contravenes the principle of clarity by design. Although not comprehensive or by themselves fatal, these significant tensions are indicative of a deep, structural, and intentional conflict between our current tax system and legality.

So what are we to do now that we have revealed this conflict, a conflict seemingly fueling serious challenges to tax law, such as a deep disaffection with the tax system and popular challenges to tax administration? Abandoning either legality or taxation would be radical, unnecessary, and ultimately undesirable. This Article argues for a middle path forward: harmonizing tax law (and tax policymaking) with legality. That path arises out of a recognition that tax compliance frequently lies at the center of the conflict between legality and modern taxation. It acknowledges that increased deterrence is in our context neither particularly well-suited nor by itself sufficient to foster sufficient tax compliance. Consequently, what is routinely (but subliminally) perceived as a dilemma between the demands of legality and the needs of modern taxation can be reimagined as an

336. See *supra* Part II.C.3.

337. Cf. Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 1 (2006) (lamenting that debates about taxation are almost exclusively “waged on the traditional grounds for evaluating tax policy: efficiency, equity, and administrability”). Others have pointed out the critical importance of policy evaluation criteria in actually determining policy. See, e.g., Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1693–700 (2018).

338. This assessment also highlights ordinary citizens’ perceptions of (and frustrations with) the administrative state more generally. See CASS R. SUNSTEIN & ADRIAN VERMEULE, *LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* 6–13 (2020).

opportunity to enact policies that synchronously restore legality *and* increase tax compliance. In other words, by reforming our tax systems to enliven the system's legality in citizens' eyes, we can restore their internal motivations to follow the law, enhancing tax compliance in the process.

Uncovering this relationship provides a powerful case for redesigning some current policies and abandoning other popular ones in favor of reforms that can simultaneously enhance both legality and tax compliance: simplifying the Code; aligning GAARs with *ex ante* intuitive conditions; or making letter rulings more widely available, transparent, and precedential. More generally, reclaiming legality for tax counsels an epistemic shift in tax policymaking by opening traditional tax policy analysis's rigid structure—focused exclusively on equity, efficiency, and administrability—to include considerations of legality.

The Article identifies a conflict between legality and tax law and illuminates the mediating role of compliance, which should be generative for legal theorists. For example, both positivists and nonpositivists are generally committed to defining law such that a legal system can be effective and stable³³⁹—and in doing so, are committed to a system with significant legal compliance. Yet positivists usually view such a compliance requirement as having no logical relationship with legality.³⁴⁰ As this Article illustrates, such theoretical positions might be untenable: in areas of the law where citizens have considerable (or even fundamental) incentives to disobey the law and where deterrence alone is insufficient to motivate sufficient compliance, having a functional system of law might *necessitate* a respect for the principles of legality. Yet these are not esoteric, one-off, or hypothetical concerns. As this Article illustrates, such a respect for legality might be required for us to have a functioning tax “law”—a prerequisite for a functioning legal system and State. If that is so, then perhaps there is a more meaningful relationship between the principles of legality and the constitutive elements of law than previously acknowledged.³⁴¹ Perhaps this relationship is not merely coincidental or contingent, but rather is borne out of the factual realities of human psychology, free-riding strategic dynamics, and a legal system's need for a functioning tax system.³⁴² Exploring this relationship should thus be generative for both positivists and nonpositivists alike. Maybe we can all learn from King Rex.

339. See Waldron, *supra* note 9, at 1157–67.

340. Waldron gestures at this when discussing Hart's equivocation to Fuller. See *id.* at 1167–69.

341. See *id.*

342. Moreover, replying that these are considerations that would not enter into an “ideal” definition of the law would seem like a big disconnect for positivists, who generally seek their systems to be embedded in a social context. See generally Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 FORDHAM L. REV. 1171 (2006) (discussing, and later criticizing, Hart's definition of the internal point of view in partial reference to a rule's social context); Jacob T. Levy, *There Is No Such Thing as Ideal Theory*, 33 SOC. PHIL. & POL'Y 312 (2016) (making the case against “ideal” theory).