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A Philosophy Toolkit for Tax Lawyers

Bret N. Bogenschneider

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A PHILOSOPHY TOOLKIT FOR TAX LAWYERS

*Bret N. Bogenschneider**

| | | |
|------|---|-----|
| I. | Introduction | 452 |
| II. | The Philosophical Toolkit for Tax Lawyers | 460 |
| | A. Moral Philosophy | 461 |
| | 1. Moral Philosophy & Taxation | 462 |
| | 2. Critique of Moral Philosophy & Taxation | 463 |
| | B. Legal Philosophy | 464 |
| | 1. Legal Philosophy & Taxation | 465 |
| | 2. Critique of Legal Philosophy & Taxation | 466 |
| | C. Law & Economics | 467 |
| | 1. Law and Economics & Taxation | 468 |
| | 2. Critique of Law & Economics and Taxation | 470 |
| | D. Philosophy of Science | 471 |
| | 1. Philosophy of Science and Taxation | 472 |
| | 2. Critique of Philosophy of Science and Taxation | 473 |
| | E. Philosophy of Mind | 474 |
| | 1. Philosophy of Mind and Taxation | 474 |
| | 2. Critique of Philosophy of Mind and Taxation | 476 |
| | F. Philosophy of Language | 476 |
| | 1. Philosophy of Language and Taxation | 477 |
| | 2. Critique of Philosophy of Language and Taxation | 479 |
| | G. Critical Legal Studies | 480 |
| | 1. Critical Tax Theory and Taxation | 481 |
| | 2. Critique of Critical Tax Theory and Taxation | 482 |
| III. | Criticisms of Philosophy as Applied in Legal Scholarship | 483 |
| | A. “Intellectual Voyeurism” | 483 |
| | B. The Case Against “Brilliance” in Law and Philosophy | 485 |
| | C. Is Philosophy and Tax Law Merely a Sub- Discipline of Legal Philosophy? | 486 |
| | D. Why is Chief Justice Roberts Opposed to Law and | |

| | | |
|-----|--|-----|
| | Philosophy?..... | 487 |
| IV. | Interdisciplinarity in Legal Scholarship | 490 |
| V. | Conclusion..... | 492 |

I. INTRODUCTION

Philosophy functions as a tool for tax lawyers. The various schools of philosophy are akin to a toolkit with different tools for differing projects where the more tools the tax lawyer knows how to use, the more effective he or she will be in the practice of tax law. However, scholarly research in the field of taxation is often not guided by philosophy. And, when a philosophical reference is given, such is rarely developed in a pluralistic manner. The most common citations given in tax scholarship are to Adam Smith,¹ John Locke,² and *increasingly* within law journals, to John Rawls.³ Modern research in tax law thus often takes a Rawlsian balancing approach based on evaluative criteria identified by Adam Smith or John Stuart Mill.⁴ This is the determination in tax law of the class of legal reasons that can be used to justify tax laws or legal opinions.⁵ The approach predominantly reflects “Moral Philosophy” where the idea is to identify “justice” with respect to tax laws.⁶ The intense focus on one particular school of philosophy is like using a hammer for any and all possible tasks; hence, from pounding nails to pounding screws, we can be fairly sure that tax scholars will generally set out to solve a problem using the philosophical hammer of Adam

* Senior Lecturer (Associate Prof.), University of Surrey (UK), School of Law.

1. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (5th ed., London, Strahan & Cadell 1789) (1776); *see also* DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (London, John Murray 1817).

2. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); *see also* THOMAS HOBBS, LEVIATHAN: OR THE MATTER, FORME, AND POWER OF A COMMON-WEALTH ECCLESIASTICAL AND CIVIL (n.p., n. pub. 1651).

3. JOHN RAWLS, A THEORY OF JUSTICE (2nd ed., Harvard Univ. Press 1999) (Cambridge, Mass., Belknap Press of Harvard University Press, 1971).

4. JOHN STUART MILL, ON LIBERTY (London, John W. Parker & Son 1859).

5. *Id.* at 561 (“Every theory of law (or jurisprudence) provides an account of the conditions of membership in the class of legal reasons.”).

6. *See* GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT § 215, et seq. (London, S. W. Dyde trans., George Bell & Sons 1896); *see also* Jules Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 554-55 (1993) (“Instead of illuminating the conceptual or theoretical commitments of our practices, normative theories set out the conditions under which certain practices and institutions could be justified or defended. Though analytic and normative theories differ in their purposes, they are not always unconnected.”). Coleman & Leiter identify philosophy of language as providing an account of conceptual and theoretical commitments of linguistic practices as *de facto* relevant to law. *Id.* at 555.

Smith, John Locke, or John Rawls.

This singular focus on Moral Philosophy is not reflective of the current practice of tax lawyers, or the research of tax scholars. At times, the conversation amongst tax lawyers shifts over to causative effects of tax policy more characteristic of the “Philosophy of Science”.⁷ Occasionally, a tax scholar will point out that tax evaluative criteria seem to be culturally determined as indicative of “Philosophy of Language.”⁸ Tax research is increasingly undertaken from the perspective of economic psychology that sets out to study the “social norms”⁹ of taxpayer behavior, which is premised, in part, on “Philosophy of Mind.”¹⁰ Nonetheless, research in this field does take human thought as objectively rational and self-interested, which is precisely why it is called *economic* psychology.¹¹ Such a presumption of self-interested rationality in human behavior is typical of the philosophy of “Law and Economics.”¹² If the philosophical orientation is extended beyond economics, there would be at least the potential for considerations of the “common good” or even altruism.¹³ The

7. See KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* (Routledge 1992).

8. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G. E. M. Anscombe trans., 4th ed. Wiley-Blackwell 2009); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (Princeton Univ. Press 1979); see, e.g., Omri Marian, *Meaningless Comparisons: Corporate Tax Reform Discourse in the United States*, 32 VA. TAX REV. 133, 140 (2012). But see Bret N. Bogenschneider, *Wittgenstein on Why Tax Law is Comprehensible*, 2015 BRIT. TAX REV. 252.

9. ERICH KIRCHLER, *THE ECONOMIC PSYCHOLOGY OF TAX BEHAVIOUR* (Cambridge Univ. Press, 2007).

10. RENÉ DESCARTES, *DISCOURSE ON METHOD FOR CONDUCTING ONE’S REASON WELL AND OF SEEKING TRUTH IN THE SCIENCES* (Donald A. Cress trans., 3rd ed., Hackett Publishing Company 1998) (1637); see, e.g., John Prebble, *Ectopia, Tax Law and International Taxation*, 1997 BRIT. TAX REV. 383.

11. Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); GUIDO CALABRESI, *THE COSTS OF ACCIDENTS, A LEGAL AND ECONOMIC ANALYSIS* (Yale Univ. Press 1970); Thomas S. Ulen, *Rational Choice Theory in Law and Economics*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS*, VOLUME I. 790 (Boudewijn Bouckaert & Gerrit De Geest eds., Elgar 2000).

12. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed., Wolter Kluwer 2014); see also Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rational Choice Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000). But see Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483 (1998); Bret N. Bogenschneider & Mathias Kasper, *The Human Subconscious and Taxation*, 5:4 INT. J. ECON. & BUS. LAW 8 (2016), citing SIGMUND FREUD, *VORLESUNGEN ZUR EINFÜHRUNG IN DIE PSYCHOANALYSE* (Frankfurt/Main, Fischer 1998) (1916-17); JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN: BOOK 1 & 2* (Jacques-Alain Miller ed., Cambridge Univ. Press, 1988).

13. See SÖREN KIERKEGAARD, *THE SICKNESS UNTO DEATH* (Princeton Univ. Press 1983) (1849); KIERKEGAARD, *KIERKEGAARD’S WRITINGS, XVI: WORKS OF LOVE* (Howard V. Hong & Edna H. Hong eds., Princeton Univ. Press 1995) (1847); FRANCIS HUTCHESON, *AN INQUIRY INTO THE ORIGIN OF OUR IDEAS OF VIRTUE AND MORAL GOOD* (Wolfgang Leidhold ed., Indianapolis: Liberty Fund 2004); see also Bret N. Bogenschneider, *Tax Jurisprudence with Benevolence & Love*, 25 KANSAS J. LAW & PUB. POL’Y 65 (2015).

philosophical question of how to know “rational” behavior has been largely excluded from tax journals over the strident objections of critical tax scholars, which would otherwise reflect an approach of “Critical Legal Studies” taken here as a form of “deconstructionism.”¹⁴ The basic presumption of nearly all tax research, however, is that tax avoidance must be moral and ethical when achieved within the bounds of the law.¹⁵ Tax scholars further presume to know the bounds of the tax law notwithstanding the fact that tax planning and adjudicative outcomes are indeterminate in actual practice.¹⁶ This leads to another area of philosophy referred to herein as “Legal Philosophy.”¹⁷ Of course, in tax law there is always a tax code, so tax scholars sometimes debate the implicit definition of “tax law” in relation to the code, and ask whether the common law of taxation, or principles of international tax law, might be also a source of justification for legal interpretation.¹⁸ A common type of legal interpretation in tax law centers on “logical positivism,”¹⁹ not to be confused with other more coherent types of “legal positivism.”²⁰

14. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 2nd ed., Vintage Books 1995); Bret N. Bogenschneider, *Foucault and Tax Jurisprudence: On the Creation of a “Delinquent” Class of Taxpayer*, 8 WASH. U. JURIS. REV. 59 (2015).

15. See, e.g., Frans Vanistendael, *Judicial Interpretation and the Role of Anti-Abuse Provisions in Tax Law*, in *TAX AVOIDANCE AND THE RULE OF LAW* 131-154 (Amsterdam: IBFD Publ. BV 1997); Zoë M. Prebble & John Prebble, *Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Abuse of Law*, BULL. INT’L TAX’N 151 (2008). But see Bret N. Bogenschneider, *Professional Ethics for the Tax Lawyer to the Holmesian “Bad Man”*, 49 CREIGHTON L. REV. 775 (2016).

16. See John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 WASH. L. REV. 1 (1993); Bret N. Bogenschneider, *Manufactured Factual Indeterminacy and the Globalization of Tax Jurisprudence*, 4:2 U. C. LONDON J. L. & JURIS. 250 (2015).

17. For further background on various schools of “Legal Philosophy” see H. L. A. HART, *THE CONCEPT OF LAW* (3rd ed. 2012); KARL N. LLEWELLYN, *THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY* (Oxford Univ. Press 2008) (1930); HANS Kelsen, *PURE THEORY OF LAW* (Max Knight trans., from the 2nd German ed., The Lawbook Exchange 2005) (1960); Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44 (1941).

18. See, e.g., KLAUS VOGEL ON DOUBLE TAXATION CONVENTIONS at 39 (4th ed., Ekkehart Reimer et al. eds., Wolters Kluwer 2015); J. Scott Wilkie & Peter Hogg, *Tax Law within the Larger Legal System*, 52:2 OSGOODE HALL L. J. 460 (2015); Bret N. Bogenschneider, *Is Tax Law Subordinated to Contract Law in Transfer Pricing Matters?*, 7:1 TRANSNAT’L LEGAL THEORY (forthcoming 2017).

19. See Jeffrey Brand-Ballard, *Kelsen’s Unstable Alternative to National Law: Recent Critiques*, 41 AM. J. JURIS. 133, 143 (“[L]ogical positivism proclaimed that only such statements as are logically warranted or empirically verifiable are meaningful; all else is nonsense. Armed with such principles what havoc must we make of our law libraries? With what confidence now do we take in our hand any legal treatise or textbook?”) citing Richard Tur, *The Kelsenian Enterprise*, in “Essays on Kelsen”, 157.

20. See John Gardner, *Legal Positivism: 5 ½ Myths*, 46 AM. J. JURIS. 199 (2001).

The proposal to use another area of philosophy for tax research, such as Philosophy of Language, to better resolve some problem of taxation is like presenting a craftsman with a new tool for the job. The tax lawyer can then weigh whether that new tool might have advantages or disadvantages over more conventional tools. But, for the most part, tax scholars do not investigate whether their own research is part of a larger philosophical framework with its own implicit methods and presumptions. Karl Popper referred to this sort of doctrinal entrenchment as “conventionalism.”²¹ Perhaps for this reason, we do not really have a pluralistic form of tax scholarship or knowledge akin to scientific pluralism as advocated by Paul Feyerabend.²²

Unfortunately, this means relatively straightforward criticisms could prove potentially devastating for tax law as a whole. For example, the indeterminacy critique of tax law has the very real potential to invalidate much of the prior research in taxation premised on legal determinacy in one fell swoop. Another way of saying this is that it is entirely plausible for a sharp critic of tax research to argue that *all* of tax scholarship is flawed in some significant way. Pluralistic knowledge about taxation or any subject is beneficial because it renders a form of acquired immunity to these sorts of existential challenges. Such strong challenges must periodically arise in any scholarly discipline. Thomas Kuhn referred to doctrinal challenges as “paradigm shifts.”²³ John Maynard Keynes did exactly that with respect to economic theory.²⁴ Ludwig Wittgenstein did it with philosophy.²⁵ Albert Einstein did it with theoretical physics.²⁶ The more entrenched tax scholars are in thinking they *know* what *they know* about taxation, the more drastic such paradigm shifts will be when they ultimately occur.

By way of illustration, if tax research was linked to philosophy, scholars could orient tax research within the broader scope of

21. POPPER, *supra* note 7, at 59 (“Whenever the ‘classical’ system of the day is threatened by the results of new experiments which might be interpreted as falsifications according to my point of view, the system will appear unshaken to the conventionalist. He will explain away the inconsistencies which may have arisen; perhaps by blaming our inadequate mastery of the system.”).

22. See PAUL K. FEYERABEND, *REALISM, RATIONALISM AND SCIENTIFIC METHOD: PHILOSOPHICAL PAPERS, VOLUME 1* (Cambridge Univ. Press 1981).

23. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (4th ed., Univ. of Chicago Press 2012).

24. See JOHN MAYNARD KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* (Macmillan Cambridge Univ. Press 1936).

25. See WITTGENSTEIN, *supra* note 8.

26. See ALBERT EINSTEIN, *RELATIVITY: THE SPECIAL AND GENERAL THEORY* (Robert W. Lawson trans., 1916).

philosophical thought. In this way, tax policy could be categorized as one might categorize other tools used for research projects. Such an approach might dramatically improve the direction of tax research by revealing the larger picture of how ongoing tax research fits into the larger framework of human knowledge. This amounts to taking an inventory of the tools available for tax projects before embarking on a research project in taxation. But, to do so, it requires categories of philosophy relevant to tax policy and this is, in and of itself, problematic. One goal of this paper is to determine what labels to put on the categories of philosophy. The labels proposed here are the respective schools of philosophical thought to which the underlying tax research ostensibly relates, namely: Moral Philosophy, Legal Philosophy, Law and Economics, Philosophy of Science, Philosophy of Mind, Philosophy of Language, and Critical Legal Studies.

Skeptics of the potential relevance of philosophy to tax law should immediately ask why it is we should set out to categorize tax research in such a manner. After all, won't these new categories make tax research even more convoluted than it already is? One response to this question is that the categorization of tax theory renders philosophical thinking more accessible. Take for instance how important the organization of books in a library is to the library patrons. If books are just dumped in a pile on the floor, then finding a relevant book entails shifting through a lot of books that are not relevant to the research at hand. A modern electronic word search on a particular issue of taxation also does not help us very much in identifying research particular to a school of philosophical thought. Furthermore, if we think of tax knowledge in pluralistic terms, then we would want to explore it in an interdisciplinary fashion taking into account differing schools of thought which may not be reflected in a word search. And, if we think current and future tax scholars have the ability to choose the best method for tax research, then there is no harm in having pluralistic knowledge.

A second response to the question of why we ought to categorize tax research using philosophy is that philosophy constitutes not only a tool, but also instructions, for how to better employ existing tools that may already be in the tax lawyer's toolkit. Existing tax research appears to provide lots of excellent guidance on how to use the particular tools of Moral Philosophy and Law & Economics, in particular. But, such an intense doctrinal focus on these areas is bad for the field of tax law, if simply because these two fields do not work very well for all projects in tax law. Indeed, if one were to start setting out pertinent "crimes" against legal scholarship, one might start with the crime of "destruction of

intellectual evidence” in the failure to include other fields of philosophy in legal scholarship, and not “intellectual voyeurism” where philosophical citation in law is at times found to be substandard.²⁷ This is to say, the discipline of taxation should be willing to accept varied attempts by tax scholars to try out new tools for projects in tax law, even if many of these attempts turn out to be unsuccessful.

Another potential objection to this proposed systemization project is that “legal theory” is actually not necessary in the practice of law. Here, the word “theory” is used partly as a pejorative term for philosophy. Sometimes critics say that philosophy is not “practical” for law. This claim implies that the tax lawyer making such a claim does not comprehend how their thinking may already be unwittingly shaped by philosophy. Also, in some cases the tax lawyer may prefer to proceed without any tool (i.e., using their bare hands, so to speak). For example, Judge Sneed at one point simply listed the “criteria of Federal income tax policy” and then invited the reader to subjectively divine his or her own criteria.²⁸ The Chief Justice has also said that philosophy, as applied to law, is not relevant to the bar. As discussed in detail below, Daniel Farber referred to legal theory in a negative manner in his “case against brilliance” in which he found much of legal theory to be “too clever by half.”²⁹ According to Farber’s view, if there is such a thing as “tax jurisprudence,” it accordingly has nothing to do with philosophy but would be reflected in the written opinions of the respective judges deciding tax cases. Another version of this argument is that lawyers and judges simply solve problems that are all idiosyncratic. David Howarth argued along similar lines that transactional lawyers are akin to engineers that solve such problems.³⁰ And, tax lawyers represent perhaps the quintessential example of the transactional lawyers which Howarth had in mind.

To respond to the idea that legal theory is unnecessary, Howarth’s argument could be modified slightly to say tax lawyers are more like plumbers. The tax lawyer qua plumber has a metaphorical truckload full of tools. Each time the plumber encounters a new problem, he decides which tool to use for the job. One immediate means to identify a good

27. See Part III(a).

28. Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567 (1965).

29. See Part III(b).

30. DAVID ARMINE HOWARTH, *LAW AS ENGINEERING: THINKING ABOUT WHAT LAWYERS DO* (Edward Elgar 2013); see also Bret N. Bogenschneider, *Book Review: Law as Engineering by David Howarth*, 132:3 L. QUARTERLY REV. 518 (2016).

plumber is that a good plumber cheerfully appraises the leak when he arrives, pronounces what tool will be necessary, gets the tool from the truck, and the leak is soon fixed. So, that means, first and foremost, any good plumber has devised an organization system such that he can lay his hands on the appropriate tool when the need arises. A bad plumber despondently appraises the leak when he arrives, declares he does not have the appropriate tool for the job, and then ultimately takes a great deal of time and plumber's putty to complete the repair. If asked why the project took so long, the bad plumber will say that this was not his fault since the problem reflected an externality to his usual approach to plumbing repairs. A really devastating critique of a plumber is accordingly to say something like: *Don't you think you should be using an o'wrench on that pipe?* Similarly, trouble arises in taxation when lawyers and scholars fail to acknowledge how their thinking is inadvertently shaped by philosophy or when they draw upon a suboptimal theory for the particular job at hand. With the wrong tool, we need to start making excuses for why the theory doesn't work very well and need to apply a lot of lawyer's putty. As John Gardner wrote: "We must have respect for both our plumbers and our philosophers or neither our pipes nor our theories will hold water."³¹ So, it is not so much an engineering-type project to solve a specific problem that characterizes tax lawyers, but instead the specialized language (i.e., tools) we choose that identifies tax lawyers.

Another preliminary issue that deserves mention is that of Richard Rorty and his general objection to language as a "tool."³² Rorty's objection would be along the lines of the following: *It is actually impossible for you to give these categories of philosophy potentially relevant to taxation in anything other than language, and when you propose to use these categories as a tool, that just reflects on you.* Your categories for philosophy and taxation are therefore just like a mirror. So, all you could do with this project is to describe yourself and the

31. JOHN W. GARDNER, EXCELLENCE: CAN WE BE EQUAL AND EXCELLENT TOO? 102 (Revised ed., W. W. Norton & Co. 1995) (1961).

32. See Part II(f). For a discussion of a comprehensive view of economic theory as taking into account various types of "instruments" or "tools" see LOUIS KAPLOW, THE THEORY OF TAXATION AND PUBLIC ECONOMICS 13, 20 (2008) ("Comprehensiveness indicates the need to consider all pertinent policy instruments. One would not ordinarily want to use a screwdriver or a knife to pound nails if a hammer were available. Likewise, in considering how one might employ estate and gift taxation to raise revenue or increase redistribution, the availability of the income tax should be kept in mind. . . . Arguably the greatest modern contribution of economics in this field has been to broaden the focus with regard to the available tool set and to offer incisive analysis that indicates which tool or combination of tools is best depending on the particular characteristics of a given setting, such as the quality of the government's information.").

categories you think are important for tax law. In the best case, you would be merely describing the categories that other tax lawyers think are important in your community of tax professionals. This is then merely edifying philosophy and is a form of conversation among a localized community of tax experts. To wit, one response to Rorty is that tax law is not purely edifying. And, that non-edifying aspect of tax language represents a significant problem with his “post-analytic” philosophy in general. Tax language represents the means to solve problems that are very real for democracy and mankind in general. Practical knowledge about tax law is akin to knowledge about how to dig a well or how to build city walls. As Jürgen Habermas said in response to Rorty: “In the lifeworld actors depend on behavior certainties. They have to cope with a world presumed to be objective, and, for this reason, operate with the distinction between believing and knowing. There is a practical necessity to rely intuitively on what is unconditionally held to be true.”³³ Simply put, to derive tax policy in the modern day, we require technical expertise and language representing specialized discourse. This knowledge of how to use tax language is what tax lawyers know how to do.

Deconstructionists might also pose a further query as follows: *But, how do you know which language-“tool” works better or worse for tax law. Your criterion for judging results are not really objective.* Examples can be given where different tools work better in different contexts or do not work at all in some cases. However, in plumbing as in taxation, we are concerned with a particular repair job, not the objectivity of categories in general. In other words, tax law is a *Wirtschafts*-oriented inquiry, not metaphysics. For example, each of the philosophical methods described herein to include Moral Philosophy and Philosophy of Mind can bear directly on why a three-quarters wrench is better suited than an o’wrench for a particular plumbing repair job. The same is true for whether progressive taxation is a good tax policy.³⁴ A pluralistic knowledge of taxation is potentially essential to that sort of practical decision-making with respect to the *particular* problems that tax lawyers routinely encounter.

Philosophy is occasionally alleged to be “impractical” to tax law.³⁵

33. Jürgen Habermas, *Richard Rorty’s Pragmatic Turn*, in RORTY AND HIS CRITICS 31, 49 (Blackwell Publishers 2000).

34. See Richard A. Westin, *The Historical Origins of Progressive Taxation*, 23 J. JURIS. 203 (2014).

35. See Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

The idea is that tax lawyers should be looking solely to tax statutes or cases and not trying to divine an underlying theory of tax law. However, at least with respect to tax enforcement practices, the taxing authority increasingly seems to pick and choose winners when it comes to taxes.³⁶ To the extent that claim is true, the theories of enforcement practices are an important criteria for tax planning, which must depend on some philosophy of enforcement applied by the taxing authority. Furthermore, both tax research and adjudication are premised on theory, whether the tax practitioner is aware of it or not. So, when a practitioner calls philosophy and taxation “impractical,” it is analogous to a swordsmith calling gunpowder impractical.

II. THE PHILOSOPHICAL TOOLKIT FOR TAX LAWYERS

A favorite pastime of many philosophers is bickering about the respective categories for philosophy. Once the categories are agreed upon, then philosophers like to identify themselves within a particular category of philosophical thought. The categories are typically defined with respect to the name of a philosopher. For example, many philosophers identify as “Wittgensteinian,” meaning they see the role of language as predominant in philosophy. Philosophers also like to bicker about what famous philosophers *really* thought about a specific issue. Along these lines, much of doctrinal philosophy resembles a form of mind-reading of dead philosophers and what they likely would have thought about a contemporary issue. This aspect of doctrinal philosophy is fascinating at times, but from a tax law perspective it looks like something many philosophers do mostly for entertainment between and amongst themselves. This doctrinal approach also results in a form of intellectual authoritarianism where modern scholars determine who can speak and how to speak about philosophical issues. In the application of philosophy to tax law contemplated here, we have good reasons to reject these methods of doctrinal philosophy.

Importantly, if we think of tax law and jurisprudence as a form of entertainment for philosophers, then Rorty is correct in stating that philosophical discourse is merely edifying. But, in most cases, philosophy in the context of taxation is not merely edifying and therefore has a much larger role to play in tax law. In contrast, if we think of philosophy in the historical terms of GWF Hegel, as “philosophy is its own time wrapped up in thoughts,” then the study of

36. Leigh Osofsky, *Some Realism about Responsive Tax Administration*, 66 TAX L. REV. 121 (2012).

taxation may be just a historical progression.³⁷ And, in parallel fashion, in a democratic process taxation could be a manifestation of free-will.³⁸ Notably, the Greeks had ideas about taxation at the origin of democracy itself that were perhaps well suited to democracy in Ancient times.³⁹

The remainder of this paper is designed to identify and critique the respective schools of philosophy likely to be relevant to taxation. The strongest criticism of each school of philosophy is described. In addition, the prior claims from legal philosophers regarding “intellectual voyeurism” and impractical brilliance are rejected as forms of doctrinal authoritarianism. Interdisciplinarity in tax research is further identified as what amounts to tool-*making* by tax lawyers. Original source citation is also given to works by the great philosophers, which will hopefully be of use to future tax scholars.

A. *Moral Philosophy*

Here, Moral Philosophy refers to philosophy relating to the determination of right and wrong or justice in the context of taxation. Morality is of paramount importance to tax law, especially in Anglo-American tax jurisprudence. Any reference to moral categories in taxation implies natural law because the origins of justification are in something other than the positive law of taxation (i.e., the tax code).⁴⁰ As a simple example, tax jurisprudence premised on natural law means the teachings of the Old and New Testament (such as Romans 13:6-7) that illustrate principles of good behavior with respect to taxation.⁴¹ These principles of good behavior are then taken as embodied in the tax law. In that sense, tax law should embody moral principles of behavior, the source of which might be in religious texts or some other means of determining moral behavior, such as moral philosophy. However, this idea is strongly rejected in various jurisdictions around the world. In particular, Continental Europe and Latin America rely on positive

37. See generally HEGEL, *supra* note 6, at 21; HEGEL, LECTURES ON THE HISTORY OF PHILOSOPHY, VOL. I. (E. S. Haldane trans., London: Kegan Paul, Trench, Trübner & Co., Ltd. 1892).

38. See JEAN-PAUL SARTRE, BEING AND NOTHINGNESS: AN ESSAY ON PHENOMENOLOGICAL ONTOLOGY (Hazel Barnes trans., 1956).

39. See Maureen B. Cavanaugh, *Democracy, Equality, and Taxes*, 54 ALA. L. REV. 415 (2003).

40. See Roger Paul Peters, *Tax Law and Natural Law*, 26 NOTRE DAME L. REV. 29 (1950); see Bret N. Bogenschneider, *5 ½ Problems with Legal Positivism and Tax Law*, Pepperdine Law Review (forthcoming 2017) citing John Gardner, *Legal Positivism: 5 ½ Myths*, 46 AM. J. JURIS. 199, 199 (2001).

41. Romans 13:6-7.

methods of legal interpretation where principles arise from a civil code. This issue is addressed in detail in the subsequent section on Legal Philosophy where legal positivism is concerned with identifying what is referred to as “legal validity.”⁴²

Other ideas are also captured in the category of Moral Philosophy, such as ideas of “just,” “fair,” or “evil” taxes. Jeffrey Schoenblum famously went down the path of trying to identify objective “fairness” in taxation.⁴³ Schoenblum’s investigation ultimately ended with his feigned chagrin at the impossibility of the task of determining what fairness means in the context of taxation and then an argument for equal taxation due to such moral relativism. Likewise, economists are often opposed to any discussion of “fairness” in tax policy because there is no agreement on what that “fairness” means. So, where an economics professor complains of “normativity” in tax jurisprudence, the professor is also really objecting to Moral Philosophy apart from economic conceptions of morality as applied to taxation. Economists prefer to use other moral categories (e.g. efficiency) and sometimes refer to everything other than economics as “normative.”⁴⁴ This methodology is discussed in more detail in the section on Law & Economics below.⁴⁵

1. Moral Philosophy & Taxation

The most common use of Moral Philosophy in tax jurisprudence today is with the ubiquitous citation in law journals to John Rawls.⁴⁶ Tax scholars cite to Rawls when they want to compare competing moral arguments using a Rawlsian balancing approach. For example, a Rawlsian approach has been applied extensively in the context of social analysis of contemporary tax proposals.⁴⁷ Notably, a personal freedom to be free from taxation is *not* one of the core “freedoms” that comprise the Rawlsian “basic liberties” such as freedom of speech, person, or thought. And, since the freedom from taxation is not a “basic liberty,” the Rawlsian “difference principle” can be invoked to weigh the benefits of

42. See Part II(b).

43. Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. TAX POL’Y 221 (1995).

44. See, e.g., Ken Judge & Iain Paterson, *Poverty, Income Inequality and Health* (New Zealand Treasury, Working Paper 01/29, 2001), www.treasury.govt.nz/publications/research-policy/wp/2001/01-29/twp01-29.pdf.

45. See Part II(c)

46. See, e.g., Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 FORDHAM L. REV. 1991, 1994 (2004).

47. See, e.g., Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695 (2013).

taxation from redistributive taxation against the costs. Another common usage of Moral Philosophy in the context of taxation is by Libertarian theorists of various stripes where taxation is taken as a violation of liberty to varying degrees.⁴⁸ A common theme is the idea of the “social contract” or the relation of the individual to the state.⁴⁹ But, perhaps the most famous restatement of Moral Philosophy in tax terms was given by Richard Epstein in *Taxation in a Lockean World*.⁵⁰ Epstein’s work synthesized the purported philosophical foundations of tax jurisprudence with economic theory in many respects.

2. Critique of Moral Philosophy & Taxation

The problem of knowing what is “right” or “fair” is an old problem in legal philosophy.⁵¹ Any application of Moral Philosophy can accordingly be immediately critiqued by simply applying a different standard of morality. If there are multiple types of “right” in taxation then this seems to lead to “moral relativism.”⁵² Indeed, it is entirely plausible, and at times certain, that different moral outcomes could result from applying different iterations of moral philosophy. Such a methodological critique of moral philosophy has gradually been

48. See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); Randy E. Barnett, *Afterword: The Libertarian Middle Way*, 16 CHAP. L. REV. 349 (2013); Jennifer Bird-Pollan, *Death, Taxes, and Property (Rights): Nozick, Libertarianism, and the Estate Tax*, 66 ME. L. REV. 1 (2013).

49. See Geoffrey P. Miller, *Economic Efficiency and the Lockean Proviso*, 10 HARV. J.L. & PUB. POL’Y 401 (1987).

50. Richard A. Epstein, *Taxation in a Lockean World*, 4:1 SOC. PHIL. & POL. 49 (1986).

51. As Coleman & Leiter explained: “For a very long time, the leading analytic jurists, Ronald Dworkin, appears to have defended the claim that adjudication was about finding the right answer to legal disputes, although he no longer claims that there are right answers to all cases.” Coleman & Leiter, *supra* note 6, at 562, n.23 (“In his earlier work, including *Taking Rights Seriously*, Dworkin had a ‘rights-based’ political theory, according to which the point of adjudication was primarily to determine which of the litigants had the preexisting right. If there was a preexisting right in each case, then there was a right answer in each case: namely, that which answered the question: which litigant has the right? In his more recent work, especially *Law’s Empire*, adjudication is a practice within a differently conceived political morality—one that emphasizes the bonds of liberal community (citing RONALD DWORCKIN, *LAW’S EMPIRE* (1986)). In such an account, there is no need that adjudication settle on uniquely correct answers to all disputes, and thus Dworkin relaxes the constraint. That does not mean that he no longer believes that there are correct answers almost all the time. His continued use of the Hercules construct as a way of fixing right answers to legal disputes indicates that he is still committed to much more in the way of determinacy than most positivists.”).

52. Moral relativism is characteristic of Kelsenian legal theory. See Brand-Ballard, *supra* note 19, at 137-8 (“Although Kelsen adopts conclusions similar to those of Austin, he arrives at them by means of an argument premised on moral relativism. . . . Kelsen, by contrast, embraces the meta-ethical position known as moral relativism and argues that premise to the conclusion that law and morality are separable spheres.”).

undertaken in the context of taxation, with references to other moral standards including religious ethics.⁵³ The prior Libertarian analyses of taxation were sharply critiqued by David Duff in a seminal article of tax jurisprudence.⁵⁴ New applications of morality to tax jurisprudence are possible, and represent a worthy research project for any tax scholar because different moral standards might apply better or worse than the Rawlsian or Libertarian theory to future tax problems

But, the strongest critique of “Moral Philosophy” was given by Friedrich Nietzsche.⁵⁵ Nietzsche challenged the idea of morality *entirely*, which is different than Schoenblum’s claim that we just don’t know how to identify morality. This is also not a Rawlsian balancing of different moral aspects of a tax policy issue. To Nietzsche, morality is an artifice created by the herd to control the oberman, and so is tax law. The creation of morality, and also law itself, is really the exercise of the Will-to-Power over others.⁵⁶ Accordingly, there is no moral duty to obey moral standards. For example, the oberman might set out to create a tax law for other people and then defy it himself. The Nietzschean critique of morality also represents a form of “deconstructionism” as explained below in the section on Critical Legal Studies.⁵⁷ Notably, a Nietzschean critique of tax jurisprudence is not answerable on the grounds that tax law is not premised on liberalism,⁵⁸ since tax jurisprudence is expressly premised on liberalism.

B. *Legal Philosophy*

Legal Philosophy refers here to explanations of the theoretical and conceptual commitments of legal practices.⁵⁹ Much of the scholarship in

53. See, e.g., Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671 (2006); Susan Pace Hamill, *An Argument for Tax Reform Based on Judeo-Christian Ethics*, 54 ALA. L. REV. 1 (2002); Robert W. McGee, *Is Tax Evasion Unethical?* 42 U. KAN. L. REV. 411 (2004).

54. David Duff, *Private Property and Tax Policy in a Libertarian World: A Critical Review*, 18 CAN. J.L. & JURIS. 23 (2005).

55. FRIEDRICH NIETZSCHE, WILL TO POWER §§ 13, 259 (Walter Kaufmann ed., R.J. Hollingdale trans., Vintage Books 2011) (1901).

56. Since tax jurisprudence is premised expressly on political liberalism nearly all the time it is appropriate to use the classic criticism of liberalism in this context. See, e.g., Bret N. Bogenschneider, *The Will to Tax Avoidance: Nietzsche and Libertarian Jurisprudence*, 2014 J. JURIS. 321.

57. See Part II(g).

58. See Leiter & Coleman, *supra* note 6, at 553.

59. Note that it would also be theoretically possible for Legal Philosophy to be applied as an analytical critique of tax law from a purportedly “neutral” perspective of pure logic or the like. See Thomas Morawetz, *Understanding Disagreement, the Root Issue of Jurisprudence: Applying*

the field relates to explanations of how judges decide or ought to decide cases. As apart from taxation, Legal Philosophy is generally taken to comprise its own internal branch of philosophy. The foremost scholars in the field include HLA Hart,⁶⁰ Ronald Dworkin⁶¹ and Karl Llewellyn,⁶² among many others,⁶³ yet none of these great works are typically extended to tax law or jurisprudence. The reason for this was inadvertently given by Coleman & Leiter when they defended analytical legal philosophy against critiques given by Critical Legal Studies that law was not consistent with principles of “liberalism” since it was not determinative, objective, or neutral. Coleman & Leiter wrote:

The same can be said about liberal jurisprudence. No analytic jurist—not Dworkin, not Hart, not Fuller, not Raz, nor anyone else—has ever referred to his or her jurisprudence as “liberal.” This is so in spite of the fact that Dworkin, Hart, and Raz are arguably among the most important figures in political liberalism of the last half of this century.⁶⁴

But, with respect to tax jurisprudence, the disavowal of political liberalism just doesn’t seem appropriate—John Rawls’ second book was indeed entitled: *Political Liberalism*.⁶⁵ Perhaps the majority of all tax jurisprudence is expressly attributed to the concepts of political liberalism with a key concept of “tax neutrality” and a ubiquitous belief in the determinacy of the tax code. The general failure of contemporary scholars in the field of Legal Philosophy to address tax jurisprudence is further discussed below in the section on “Interdisciplinarity in Legal Scholarship.”⁶⁶

1. Legal Philosophy & Taxation

Here, “Legal Philosophy” refers to positive law approaches to the theory of taxation. First and foremost among these is the *Pure Theory of*

Wittgenstein to Positivism, Critical Theory and Judging, 141 U. PA. L. REV. 371, 393 (1992).

60. See H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

61. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

62. See Grant Gilmore, *Book Review: The Bramble Bush* (reviewing K. N. LLEWELLYN, *THE BRAMBLE BUSH* (1951)), 60 YALE L. REV. 1251 (1951).

63. See Brian Leiter, *Beyond the Hart-Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17 (2003); Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749 (2013); Dennis M. Patterson, *Law’s Pragmatism: Law as Practice and Narrative*, 76 VA. L. REV. 937 (1990).

64. Coleman & Leiter, *supra* note 6, at 553.

65. JOHN RAWLS, *POLITICAL LIBERALISM* (Columbia Univ. Press 1993).

66. See Part IV.

Law given by Hans Kelsen. Wolfgang Schön also recently referred to the “German method of tax interpretation” as akin to a focus on “black letter law.”⁶⁷ The reason why this methodology is particularly important relates to the distinction between common law and civil law jurisdictions. The fundamental idea is that law is comprised of “norms” encapsulated in the positive law. Positive legal scholars often refer to “principles,” meaning the legal norm extrapolated from the statute. The “pure” theory of law accordingly means that the principles are derived from the tax law itself. After the Vienna Convention on the Law of Treaties,⁶⁸ some Continental European tax scholars began to disparagingly refer to American tax jurisprudence as “sociology,” meaning that it is not “pure” legal interpretation derived solely from the tax statute.⁶⁹

2. Critique of Legal Philosophy & Taxation

A common challenge to positive law methods of legal interpretation is what is often referred to as the “indeterminacy critique.” Legal indeterminacy is defined here as the inability to determine legal outcomes based on the tax code itself. Indeterminacy critiques are directed against predominantly “black-letter law” methods of interpretation. Partly in an attempt to mitigate the problem of legal indeterminacy, the U.S. Treasury Department issues tax regulations (referred to as “Treasury Regulations”) to clarify the framework of the underlying positive tax code. Other nations often do not issue tax regulations, so in marginal cases it is relatively hard to see how a legal interpretation could be gleaned from the “framework” of the tax code itself. Nonetheless, this regularly occurs with respect to tax treaty interpretation, and even with tax treaties that are just a few pages in length. As part of its Base Erosion and Profit Shifting (“BEPS”) initiative,⁷⁰ the Organization for Economic Co-operation and Development (“OECD”) is now calling for reform in tax treaty interpretation and other similar aspects of international tax law that often lead to abuse through the filling in of “gaps” in positive tax law as part

67. Wolfgang Schön, *Tax Law Scholarship in Germany and the United States* (Max Planck Institute for Taxation and Public Finance, Working Paper 2016-07, 2016).

68. See Vienna Convention on the Law of Treaties, Article 31-2, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

69. See George Fitzmaurice, *Vae Victis or Woe to the Negotiator? Your Treaty of Our Interpretation of It*, 65 AM. J. INT’L L. 358 (1971).

70. See Yariv Brauner, *What the BEPS?*, 16 FLA. TAX REV. 55 (2014).

of aggressive tax planning.⁷¹

A further problem with Legal Philosophy as applied to tax law relates to the origin of “facts” to be used in the legal analysis in both common and civil law jurisdictions. For example, where a tax code provides “fact”—words or even definitions of “facts”—the question is how to know the content of these words; indeterminacy as to the fact content of words is referred to as “factual indeterminacy.”⁷² Coleman & Leiter described a similar concept as the determining of “legal facts;”⁷³ furthermore, the finding of “facts” may also be a function of legal custom or adjudicatory practice.⁷⁴ Although of crucial importance to tax law, such factual indeterminacy represents a subset of general legal indeterminacy particularly relevant to tax law. Michael Potács has argued in some areas of law the fact content of words is derived from everyday language.⁷⁵ Another idea, which was first developed by Ernst Mach in the debate over the fact content of words used in science, is that content is derived from theory.⁷⁶ In tax law, the content of “fact” words is known based on the theory of tax law comprised in significant part by the heuristics or special language of tax lawyers. This approach, as developed by Bogenschneider in a series of papers, explains how tax lawyers are able to proceed with a different understanding of the meaning of the word “hybrid,” for example, which refers to a type of legal entity in tax law and not an automobile as in everyday language.

C. *Law & Economics*

The foremost idea of Law and Economics is that human behavior either is both rational and self-interested, or, can be coherently understood as if it were rational and self-interested. In a series of articles, Thomas Ulen comprehensively developed this philosophical

71. *BEPS Action 6: Prevent Treaty Abuse* (2015), www.oecd.org/tax/treaties/revised-discussion-draft-beeps-action-6-prevent-treaty-abuse.pdf.

72. Bogenschneider, *Manufactured Factual Indeterminacy*, *supra* note 16, at 250-52.

73. Coleman & Leiter, *supra* note 6, at 559 (“Let us characterize [the concern over objectivity] as a worry about the metaphysical objectivity of ‘legal facts.’ Any time a judge renders a decision, she asserts the existence of what we are calling a legal fact; for example, ‘Coleman’s failure to inspect constitutes negligence,’ or ‘Leiter’s failure to deliver constitutes a breach of contract.’ The question about metaphysical objectivity, then, is the question about the status of these facts, that is, about whether they hold independently of what a particular judge happens to think, or perhaps independently of what all lawyers and judges would think.”).

74. *Id.* at 617 (“If legal facts are fixed by the practices of judges, then legal facts will reflect how judges regard them.”).

75. MICHAEL POTÁCS, *LEGAL THEORY* (Kluwer 2015).

76. ERNST MACH, *DIE ANALYSE DER EMPFINDUNGEN UND DAS VERHÄLTNISS DES PHYSISCHEN ZUM PSYCHISCHEN* (Jena: G. Fischer 1922).

approach, arguing:

[E]ven if there were consumers who behaved irrationally [sic] . . . the standard predictions of price theory would still hold. . . . Therefore, while irrationality might still be an issue with respect to the behavior of certain individuals, it is not an issue with respect to aggregate behavior in markets and may, as a result, be ignored.⁷⁷

Economic theory is premised on the work of Jeremy Bentham, who proposed the concept of “utility” to intersubjectively measure the pleasures and pains of persons.⁷⁸ So, individual persons are sometimes described in economic terms as “lightning appraisers of pleasure and pain.”⁷⁹ The measure of utility can accordingly be quantified for empirical analysis. One objective of economic analysis is to achieve Pareto Optimality where no person can be made better off without making another worse off.⁸⁰ Various aspects of the economic theory thus overlap as reflected in the work of Ronald Coase where “social cost” is an efficiency criteria measured by utility. However, the field of Law and Economics often relates law more directly to money, where wealth maximization is taken as a proxy for utility maximization.⁸¹ The methods and moral justification for such a wealth-maximization approach in law was significantly developed by Richard Posner and famously challenged by Ronald Dworkin.⁸²

1. Law and Economics & Taxation

The composite approach of Libertarian theory and economics is what many scholars take to be “tax jurisprudence” as relevant to tax law. However, many economic theories of taxation are disputed by scholars. The study of tax incidence on the question of who bears the burden of

77. Ulen, *supra* note 11, at 794 (citing Gary S. Becker, *Irrational Behavior and Economic Theory*, 70 J. POL. ECON. 1 (1962)).

78. See George J. Stigler, *The Development of Utility Theory. I*, 58:4 J. POL. ECON. 307 (1950).

79. See WILLIAM S. JEVONS, *THE THEORY OF POLITICAL ECONOMY* (Palgrave Macmillan UK 2013) (1871).

80. VILFREDO PARETO, *MANUAL OF POLITICAL ECONOMY* (Aldo Montesano et al. eds., Oxford Univ. Press 2014) (1906).

81. See Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980).

82. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). *But see* Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); *see also* Richard A. Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J. LAW, ETHICS & PUB. POL'Y 85 (1985).

taxation is particularly controversial.⁸³ Also, basic questions about how tax policy effects economic growth are highly controversial.⁸⁴ However, notwithstanding the inherent controversy, the research questions which economists choose to address are often of interest to non-economic scholars, thus rendering the analysis meaningful and relevant to the field of taxation. The tax literature relating to economic theory is the most comprehensive of any area of philosophy relevant to taxation. The research is so extensive that economists are sometimes said to have “colonized” other fields, including taxation.⁸⁵ The positing of a pluralistic framework for tax law undertaken in this paper is fundamentally inapposite to this understanding of tax jurisprudence. In identifying “tax jurisprudence” as limited to these exclusive methods, this excludes other epistemologies, or means of knowing things about taxation.⁸⁶

Economics, as applied to taxation, is premised on philosophy of the Enlightenment Era. A point of major confusion is the work of Richard Epstein in which he applied economic ideas to taxation taken in particular from Ronald Coase, as well as ideas about Pareto Optimality, but referred to these as “Lockean” theory.⁸⁷ The line between Moral Philosophy and law and economics was thereby blurred. The resulting confusion has rendered the philosophical foundations of economics unclear, so scholars engaged in economic theory often cite to moral philosophers.⁸⁸ Economics also proceeds at times through empirical methods premised on the observation of behavior of persons to be evaluated with statistical methods, broadly a type of “econometrics.”⁸⁹

83. See Arnold C. Harberger, *The Incidence of the Corporation Income Tax*, 70 J. POL. ECON. 215 (1962).

84. See JANE GRAVELLE & DONALD MAPLES, CONG. RESEARCH SERV., 7-5700, TAX RATES AND ECONOMIC GROWTH (2015) <https://www.fas.org/sgp/crs/misc/R42111.pdf>.

85. Donald N. McCloskey, *The Rhetoric of Economics*, 21:2 J. ECON. LIT. 513 (1983) (“[E]conomics has become imperialistic. There is now an economics of history, of sociology, of law, of anthropology, of politics, of political philosophy, of ethics. The flabby methodology of modernist economics simply makes this colonization more difficult, raising irrelevant methodological doubts in the minds of the colonized folk.”).

86. See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J. LEGAL STUD. 331 (2003). But see Christopher Taggart, *Fairness Versus Welfare: The Limits of Kaplow and Shavell’s Pareto Argument*, 99 MARQ. L. REV. 661 (2016).

87. See generally Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 933 (1992).

88. See, e.g., Takuo Dome, *Adam Smith’s Theory of Tax Incidence: An Interpretation of His Natural-Price System*, 22:1 CAMBRIDGE J. ECON. 79 (1998); Nava Ashraf, Colin F. Camerer & George Loewenstein, *Adam Smith, Behavioral Economist*, 19:3 J. ECON. PERSP. 131 (2005).

89. See MARY S. MORGAN, THE HISTORY OF ECONOMETRIC IDEAS: HISTORICAL

However, the gathering of data observations in respect of taxation (or anything else) is a theory-laden endeavor.⁹⁰ Furthermore, as Frank Ramsey (and also Karl Popper) explained, the use of probability to study observations comprises a measurement of the conformance of the experimental results to the expectation of the person conducting the experiment.⁹¹

2. Critique of Law & Economics and Taxation

Perhaps the most cogent critique of economics is simply that economic advice is rendered in what amounts to “fortune-teller style.”⁹² This method famously resulted in President Harry Truman’s request for a “one-armed economist.”⁹³ In some econometric studies, researchers run regression analysis on the dataset and then derive the hypothesis from the results, a process often referred to as “data-mining.”⁹⁴ This process now also referred to as “p-hacking” does not follow the “scientific method.”⁹⁵ Furthermore, we should not expect the results from data-mining methods to be meaningful descriptions of cause-and-effect because of the failure to control for spurious results which would otherwise occur via the *a priori* statement of hypotheses for testing.⁹⁶ Also, studies by the Federal Reserve have shown that most econometric

PERSPECTIVES ON MODERN ECONOMICS (Cambridge Univ. Press, 1990).

90. POPPER, *supra* note 7, at 90 (“[T]he theoretician must long before [experimentation] have done his work, or at least what is the most important part of his work: he must have formulated his question as sharply as possible. Thus it is he who shows the experimenter the way. But even the experimenter is not in the main engaged in making exact observations; his work, too, is largely of a theoretical kind. Theory dominates the experimental work from its initial planning up to the finishing touches in the laboratory.”).

91. BARRY GOWER, *SCIENTIFIC METHOD: AN HISTORICAL AND PHILOSOPHICAL INTRODUCTION* 187 (Routledge, 1997) (“For [Ramsey], probabilities as degrees of belief are subjective rather than objective; they represent psychological states. ‘There really do not seem to be any such things’, Ramsey declared, ‘as the probability relations he describes.’”) (citing *Frank Ramsey Truth and Probability*, in FP RAMSEY FOUNDATIONS: ESSAYS IN PHILOSOPHY, LOGIC, MATHEMATICS AND ECONOMICS (Routledge & Kegan Paul 1978)).

92. See Bret N. Bogenschneider, *How Helpful is Econometrics to Tax Research?* 21:3 NEW ZEALAND J. TAX L. & POL’Y 292, 301 (2015).

93. See ON THE THIRD HAND: HUMOR IN THE DISMAL SCIENCE, AN ANTHOLOGY (Caroline Postelle Clotfelter ed., Univ. Michigan Press 1996) (“As President Truman said, ‘I wish that I had a one-armed economist, so that he wouldn’t say on the one hand and on the other hand.’”).

94. Bogenschneider, *supra* note 92, at 305 (“Thesis 4: The use of statistical ‘data-mining’ (that is, test, re-test, re-re-test) as a research methodology does not follow the scientific method and applies it in reverse.”).

95. See Christie Aschwanden, *Science Isn’t Broken*, FIVETHIRTYEIGHT (Aug. 19, 2015) <http://fivethirtyeight.com/features/science-isnt-broken/#part1>.

96. For an example of spurious results in taxation, see James R Hines, Jr. & Eric M. Rice, *Fiscal Paradise: Foreign Tax Havens and American Business*, 109 QUART. J. ECON. 149 (1994).

analyses are not replicable.⁹⁷ Human preferences also change over time (referred to as “ergodicity”), so it is not clear that empirical methods alone can render predictions about economic events that will hold true for very long.

The use of Pareto Optimality (i.e., a situation where no person can be made better-off without making someone else worse-off) as an evaluative criterion in taxation has also turned out to be problematic for several reasons. First, utility maximization is not equivalent to wealth maximization (as the current growth in economic inequality in the United States makes abundantly clear).⁹⁸ Therefore, Pareto Optimal increases in aggregate wealth do not necessarily translate into overall welfare gains for society. Second, scholars have derived arguments that property taxation cannot be Pareto optimal.⁹⁹ However, these arguments depend on the idea of money as a form of property. Wealth taxes can be Pareto optimal where large accumulations of money are taxed proportionately and the relative standing of wealth holders in property is maintained relative to each other.¹⁰⁰

D. *Philosophy of Science*

Here, “Philosophy of Science” refers to the study of causation in the context of taxation; if tax policy and decisions are determined in part based on efficient outcomes (or other measures of consequences of taxation), then Philosophy of Science is critical to legal interpretation insofar as one must be able to predict the outcome of alternative options.¹⁰¹

A classic version of the philosophy of scientific discovery was given by Karl Popper.¹⁰² Popper’s work is often credited as the origin of “science” premised on the falsification of hypotheses as opposed to the confirmation of hypotheses by empirical observations.¹⁰³ Popper’s

97. See Richard G. Anderson & William G. Dewald, *Replication and Scientific Standards in Applied Economics a Decade After the Journal of Money, Credit and Banking Project*, 76:6 FED. RES. BANK OF ST. LOUIS REV. 79, 81 (1994).

98. See generally Thomas Piketty & Immanuel Saez, *Income Inequality in the United States, 1913-1998*, 118 QUART. J. ECON. 1 (2003).

99. See Daniel Attas, *Fragmenting Property*, 25 LAW & PHIL. 119, 147 (2006).

100. Bret N. Bogenschneider, *A Challenge to the Libertarian Challenge*, 2017 J. JURIS. 1.

101. Leiter once adopted such an approach to scientific theory as a criticism of legal realism, writing as follows: “And if no theory of the appropriate sort exists, then prediction is not possible; and if prediction is not possible, then we are back where we started—with liberal concerns and worries that are not met by existing practice.” Coleman & Leiter, *supra* note 6, at 584.

102. POPPER, *supra* note 7.

103. POPPER, *supra* note 7, at 66.

methodology entails the testing of theory by theory.¹⁰⁴ Popper's work was subsequently critiqued by Paul Feyerabend.¹⁰⁵ Feyerabend opposed in significant part the positivist import of Popper's method where an objective methodology of science could be known. However, Feyerabend allowed for an idea of "science" as scientific pluralism.¹⁰⁶ Tax research can be thought of in pluralistic terms where hypotheses are tested by falsification. Another common means of understanding the scientific method is the Bayesian theory of science where hypotheses are tweaked over time with the positing of auxiliary hypotheses.¹⁰⁷ Many natural scientists think of the scientific method in Bayesian terms because it is difficult to give examples where hypotheses are falsified outright in Popperian terms in the natural sciences; rather, most theories of natural science are augmented with auxiliary hypotheses. In the field of taxation, however, there do seem to be theories of taxation that appear to have been falsified outright, such as the "Laffer curve" and "small open economy" model.¹⁰⁸

1. Philosophy of Science and Taxation

The question of whether the study of tax law is in the nature of "science" depends on the applicable definition of "science" one wishes to apply, and the respective assessment of the current state of tax research. Of course, it is beyond any reasonable dispute that when it comes to taxation, many claims to "truth" or "science" are held out with respect to tax policy. The measurement of effective tax rates are a prime example.¹⁰⁹ However, even where components of tax research are performed in a subjective, biased, or non-scientific manner, that does not mean the overall field of taxation must be rendered non-scientific.

104. *Id.* at 91 ("We choose the theory which best holds its own in competition with other theories; the one which, by natural selection, proves itself the fittest to survive.").

105. FEYERABEND, *supra* note 22.

106. *Id.*

107. See Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875 (2002).

108. See Kimberly A. Clausing, *In Search of Corporate Tax Incidence*, 65 TAX L. REV. 433 (2012); Bret N. Bogenschneider, *The Tax Paradox of Capital Investment*, 33:1 J. TAX'N OF INV. 59 (2015).

109. E.g., Reuven Avi-Yonah & Yaron Lahav, *The Effective Tax Rate of the Largest US and EU Multinationals*, 65 TAX L. REV. 375 (2012); with Martin Sullivan, *The Truth About Corporate Tax Rates*, FORBES (March 25, 2015, 8:15 AM), www.forbes.com/sites/taxanalysts/2015/03/25/the-truth-about-corporate-tax-rates/#6a4565fa20a5 ("It's a rock-solid fact that the U.S. corporate statutory tax rate is the highest among developed nations and is significantly higher than the average. According to 2014 data from the OECD, the combined federal and state statutory corporate tax rate for the United States is 39.1 percent.").

“Science” in the context of taxation means the positing of hypotheses related to causation and falsification or augmentation thereof. It follows then that we want to gather as much information as possible about causation as it relates to taxation or tax policy. As such, the overall field of taxation is not necessarily improved by stamping out non-scientific methods in the study of taxation; we may learn something even from mistaken research. The scholars that are vehemently opposed to some idea or another in taxation have already arrived at an absolute truth about tax policy in their own mind and thereby pursue tax research as akin to a war.¹¹⁰ But, this is not a scientific approach, at least where we think of tax knowledge in pluralistic terms.

2. Critique of Philosophy of Science and Taxation

The foremost opponent of Philosophy of Science is not ignorance; rather, it is a countervailing idea of “science” as the use of numbers to empirically confirm ideas about taxation. Popper referred to this idea as “naïve empiricism.” For example, economists often begin tax papers as follows: “This is what we know about xyz.”¹¹¹ Such a statement amounts to an exclusive claim of knowledge about taxation premised on empirics. Much of the ongoing empirical research in taxation is premised on this alternate view of science where things can only be “known” with numbers. The value of theory in taxation is thereby diminished or eliminated entirely. The practical import to tax scholarship then is that since empirical data is usually of poor quality, we really cannot definitively “know” anything about taxation. Furthermore, the value of practitioners in the field (i.e., clinicians) including tax lawyers is thereby diminished or eliminated entirely. Under this countervailing approach to “science,” only the persons with access to data, namely economists, are able to draw hypothesis about taxation or to advise on tax policy.

110. REUVEN S AVI-YONAH ET AL., *COMPARATIVE FISCAL FEDERALISM: COMPARING THE EUROPEAN COURT OF JUSTICE AND THE US SUPREME COURT’S TAX JURISPRUDENCE* (Kluwer Law International 2007) (“The European and American federations are both survivors of past wars, and while it may be fairly said that tax policy itself is unrelenting warfare, the goal of sensible legal design is to constrain the belligerents in ways that lend these fights better tone and higher purpose than they might otherwise have had.”).

111. See, e.g., Dhammika Dharmapala, *What Do We Know About Base Erosion and Profit Shifting? A Review of the Empirical Literature* (Coase Sandor Institute for Law & Economics Working Paper No. 702, 2014); Alan J. Auerbach, *Who Bears the Corporate Tax: A Review of What We Know*, 20 *TAX POL’Y & ECON.* 1 (2006); Michael P. Devereux & Simon Loretz, *What do We Know about Corporate Tax Competition?* (Oxford Business School, Working Paper 12/29, 2012).

E. *Philosophy of Mind*

Here, “Philosophy of Mind” refers specifically to the *mentalese* version of Cartesian thought as often applied in the context of taxation.¹¹² The mentalese approach has often been applied to taxation reflecting a combination of “common-sense” (or “causal minimalism”)¹¹³ legal reasoning, combined with semantic formalism. The main idea is that tax law should match (or, refer to) ideas held by lawyers or judges in their minds (as a type of mental finger-pointing to legal concepts or empirical reality). Hence, the methodology is “what seems right is right;”¹¹⁴ as the foremost example, the Chief Justice concluded that the individual mandate of the Affordable Care Act was *obviously* not a capitation tax based on the idea that a capitation must apply equally to all taxpayers; hence, the provision did not match or refer to what the Chief Justice thought of as a capitation tax in his mind.¹¹⁵

1. Philosophy of Mind and Taxation

The mentalese approach to taxation was crystallized in a series of articles by John Prebble. Prebble’s idea is that law creates “fictions” apart from the empirical reality of tax and economics which he says are “incomprehensible;” in other words, the tax law does not seem to correspond to the “right” idea.¹¹⁶ The point is that tax law fails to correspond to an empirical reality and one cannot consistently point a finger to right tax interpretation out in the world.¹¹⁷ Thus, for Prebble

112. Other aspects of philosophy of mind related to free will, intentionality or consciousness are not included here but should also be linked to the theory of taxation in the future.

113. See H. L. A. HART & TONY HONORE, *CAUSATION IN THE LAW*, at xxxiv (2nd ed., Oxford Univ. Press, 2002) (“According to ‘causal minimalism’, genuine causal issues are of small importance in settling questions of legal responsibility. In most instances they are confined to the issue whether the harm would have occurred in the absence of the wrongful conduct, and even this factual-sounding question is often answered in a way which owes more to considerations of legal policy than to any genuine attempt to determine the facts of the case.”).

114. *Id.* at 607 (“At the other end of the continuum from subjectivism is the doctrine we will call ‘strong objectivism.’ According to this view, what ‘seems right’ never determines what ‘is right.’ According to the strong metaphysical objectivist, what is the case about the world never depends on what humans take there to be (even under ideal epistemic conditions). According to the strong semantic objectivist, the meaning of a sentence never depends on what any speaker or community of speakers takes it to mean.”).

115. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2599 (2012) (citing *Hylton v. United States*, 3 U.S. 171, 175 (1796)).

116. John Prebble, *Why Is Tax Law Incomprehensible?* 4 BRIT. TAX REV. 380 (1994).

117. In the terms of legal philosophy this is a type of “strong objectivism” or “metaphysical realism”. See Coleman & Leiter, *supra* note 6, at 601 (“[B]ecause of its conception of the

and tax law, positive word categories seem to entirely fail the test of knowability (i.e., transferred understanding) in praxis. So, in respect of “fictions,” this refers to tax law words Prebble thinks are not representative of tax reality when compared against economic reality. The idea of “incomprehensibility” further refers to ideas taken from the tax law that Prebble does not purport to understand. In either case, the Philosophy of Mind methodology is paramount in Prebble’s approach.

Perhaps the strongest argument for Philosophy of Mind to be used as the basis for tax law is where laws are designed to increase the confidence of the citizenry of the fairness or the functioning of the legal and tax system.¹¹⁸ The “idea” of the tax law reflected in the mental state of the taxpayer is then potentially more important than the actual substance of the tax law. In this context, tax scholars are concerned more with measuring behavior as a means to understanding it. The approach is linked to a “strong objectivity” approach characteristic of the hard sciences.¹¹⁹

In terms of economic psychology, “taxpayer morale” is thus taken as the fundamental concept and a significant amount of tax research is devoted to measuring it.¹²⁰ A significant aspect of behavioral research in economic psychology relates to “social norms.” The idea is for behavioral conformance in society. Such behavior is accordingly socially determinate rather than a rational individual calculation. This reflects the mental state of the taxpayer in the willingness to pay taxes to the state. For example, the United States enjoys the highest taxpayer morale in the world.¹²¹ The level of “taxpayer morale” appears to be the most significant factor for the success or failure of tax collections, not the law itself. Erich Kirchler has argued there is a “slippery slope” in the maintenance of taxpayer morale.¹²² A major debate within the tax

independence of the world, metaphysical realism is committed to the ‘strong objectivity’ of ‘what there is.’”).

118. Erich Kirchler, Erik Hoelzl, & Ingrid Wahl, *Enforced versus Voluntary Tax Compliance: The “Slippery Slope” Framework*, 29 J. ECON. PSYCH. 210 (2008).

119. See Coleman & Leiter, *supra* note 6, at 608 (“Strong objectivity, for example, figures in our conception of scientific inquiry. We view scientists as trying to uncover the way the world really is; and the way the world is is independent of anyone’s beliefs or theories about it, all of which could turn out to be false.”).

120. See James Alm & Benno Torgler, *Culture Differences and Tax Morale in the United States and in Europe*, 27 J. ECON. PSYCH. 224, 241 (2006); Ronald G. Cummings, Jorge Martinez-Vazquez, Michael McKee, & Benno Torgler, *Tax Morale Affects Tax Compliance: Evidence from Surveys and an Artefactual Field Experiment*, 70 J. ECON. BEHAV. & ORG. 447 (2009).

121. See Ronald Inglehart et al., *Codebook for World Values Survey* (Ann Arbor, MI: Institute for Social Research, 2000).

122. *Id.*

literature deals with the idea of “cooperative compliance” for large multinational firms where audit resources are allocated away from large firms that want to be compliant.¹²³

2. Critique of Philosophy of Mind and Taxation

Ludwig Wittgenstein shifted philosophy away from Cartesian ideas of knowing (“I think, therefore, I am”) toward linguistic analyses premised on agreement-in-use. This is often referred to as the “Linguistic Turn” in philosophy.¹²⁴ A defense of tax law against criticism from the paradigm of Philosophy of Mind is that the special words actually are the understanding; ergo, “I speak tax, therefore, I think tax.”

Separately, in terms of the methodology of behavioral empiricism now applied in behavioral psychology and taxation, famous criticisms against such an approach have been levied by Larry Summers, John Maynard Keynes, and Karl Popper. Summers argued that economists presume that the only meaningful questions are those which economists have set out to address, thereby excluding all other questions, for example, where empirical data may be unavailable.¹²⁵ Keynes argued that statistical methods were unknowable and a form of “black magic.”¹²⁶ Popper argued that empiricism reflects a form of inductive reasoning not suited to scientific inquiry.¹²⁷

F. *Philosophy of Language*

Here, the term “Philosophy of Language” refers to the use of

123. See OECD, COOPERATIVE COMPLIANCE: A FRAMEWORK: FROM ENHANCED RELATIONSHIP TO COOPERATIVE COMPLIANCE (OECD publishing 2013), www.oecd.org/ctp/administration/co-operative-compliance.htm; Valerie Braithwaite, *Responsive Regulation and Taxation: Introduction*, 29 LAW & POLICY 3 (2007); John Braithwaite, *The Essence of Responsive Regulation*, 44:3 UBC L. REV. 475 (2011); Mark Burton & Justin H. Dabner, *The Partnership Model of the Relationship between Tax Administrators and Tax Practitioners: Drivers, Challenges and Prospects*, 11 J. AUSTL. TAX. 108 (2008).

124. Habermas, *supra* note 33, at 39 (“Following the linguistic turn, however, all explanations take the primacy of a common language as their starting point.”).

125. Lawrence Summers, *The Scientific Illusion in Empirical Macroeconomics*, 93 SCANDINAVIAN J. ECON. 129, 145 (1991) (“Reliance on deductive reasoning rather than theory based on empirical evidence is particularly pernicious when economists insist that the only meaningful questions are the ones their most recent models are designed to address.”).

126. John Maynard Keynes, *On a Method of Statistical Business-Cycle Research. A Comment*, 50 ECON. J. 154, 156 (1940).

127. POPPER, *supra* note 7, at 88 (“Thus the real situation is quite different from the one visualized by the naïve empiricist, or the believer in inductive logic. He thinks that we begin by collecting and arranging our experiences, and so ascend the ladder of science.”).

linguistics in tax interpretation, particularly to the work of Ludwig Wittgenstein and Richard Rorty. The issue relates to the method of legal interpretation applied to determine the respective meaning of words in tax statutes.¹²⁸ Philosophy of Language has been described as a means to ascribe meaning to language including legal terms.¹²⁹ The basic idea of agreement-in-use in the context of law and legal judgements was explained by Dennis Patterson as follows:

Agreement is a necessary feature of the normativity of our practices, but the “agreement” must be a regularity in reaction to use. In short, when we say there must be “agreement in actions” what we are really saying is that there must be harmony in application, over time. This harmony in reaction and application is constitutive of all practices, including legal practices. It is the basis of our legal judgements.¹³⁰

The idea of “agreement-in-use” in interpreting the meaning of words is appealing to the field of taxation because the meaning of terms can be radically indeterminate. An example of indeterminacy in the tax context is where multinational firms intentionally foster factual or legal indeterminacy as part of aggressive tax avoidance planning, such as by using a hybrid legal entity to simultaneously assert that an entity exists for tax purposes, but not otherwise.¹³¹

1. Philosophy of Language and Taxation

Rorty argued (in contrast to Wittgenstein) that language was a form of intersubjective discourse taken as edifying.¹³² Hence, agreement-in-

128. See Bogenschneider, *supra* note 8.

129. Coleman & Leiter, *supra* note 6, at 555 (“[P]hilosophy of language provides an account of the conceptual and theoretical commitments of our linguistic practices, the central aspect of which is the ascription of meaning. As part of the practice of ascribing meaning to words and sentences, we intend that the meaning of the word or sentence serve to constrain the uses to which the word or sentence can be put. Linguistic constraint is a normative concept; thus, analysis of meaning will be partially normative, setting out the conditions of justifiable use of words or sentences. Accordingly, an account of meaning that focused entirely on the history of the use of a term would fail because it could not explain the sense in which the meaning was intended, not merely to describe customary practice, but to constrain future use.”).

130. Dennis Patterson, *Wittgenstein on Understanding and Interpretation (Comments on the Work of Thomas Morawetz)*, 29:2 PHIL. INVESTIGATIONS 129, 139 (2006).

131. See Bret N. Bogenschneider, *Factual Indeterminacy in International Tax Law*, 3:1 BRICS LAW J. 73 (2016).

132. RORTY, *supra* note 8, at 370-71 (“Edifying philosophers, unlike revolutionary systemic philosophers, are those who are abnormal at this meta-level. They refuse to present themselves as having found out any objective truth (about, say, what philosophy is). They present themselves as doing something different from, and more important than, offering accurate representations of how things are. It is important because, they say, the notion of “accurate representation” itself is not the

use for language was always local and there would be no objectively given idea that could be valid in every possible context. Rorty argued that it would be impossible to know what future contexts would look like. Under this view, all debates, including that of law and taxation, are but of a larger conversation among mankind that could go in any direction.¹³³ Habermas disagreed with Rorty on the point of the edifying use of language and argued that there exists practical usages of language which are universally valid.¹³⁴ However, in the philosophy of language the meaning of words is taken not to be given by definitions, as is often the case in positive law analysis. Nor is the meaning of words given by reference to external objects under a linguistic theory of “semantic formalism,” which can be understood in lay terms as “finger pointing.”¹³⁵ The rejection of either of these approaches to a law has major implications for legal theory.

A foremost issue related to Philosophy of Language and taxation is whether words that are defined in the tax code may begin to take on new factual meanings as new contexts arise in the tax law in response to aggressive tax avoidance planning. Craig Latham referred to this as a “shift” in the meaning of words.¹³⁶ If the factual meaning of words does not shift, then the tax code will become increasingly irrelevant as tax lawyers plan around the outdated meaning of defined terms with a concept that is slightly different. This issue of legal drafting and interpretation by principles or by definitions is perhaps the core issue of international tax law.¹³⁷ Legal philosophers also discuss this key issue in

proper way to think about what philosophy does.”).

133. *Id.* at 378 (“To see keeping a conversation going as a sufficient aim of philosophy, to see wisdom as consisting in the ability to sustain a conversation, is to see human beings as generators of new descriptions rather than being one hopes to be able to describe accurately.”).

134. Habermas, *supra* note 33, at 37 (“On the [Rortyan] linguistic view, the subjectivity of beliefs is no longer checked directly through confrontation with the world but rather through public agreement achieved in the communication community: a subjective consideration is one which has been, or would be, or should be, set aside by rational discussants.”).

135. See Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 GEO. L.J. 485, 501 (1996) (“The false picture described by Wittgenstein is, of course, the picture painted by semantic formalism – the theory that a word applies to particular items in the world because the word stands for an object that captures what the particular items have in common.”).

136. Craig Latham, *A Tax Perspective on the Infrastructure of Regulatory Language and a Principled Response*, 2012 BRIT. TAX REV. 65, 73; see also Coleman & Leiter, *supra* note 6, at 564 (“In law, these concerns have been addressed in HLA Hart’s discussion of the distinction between the ‘core’ and ‘penumbra’ of general terms.”).

137. See John Avery Jones, *Tax Law: Rules or Principles?*, 1996 BRIT. TAX REV. 580; Judith Freedman, *Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited*, 2010 BRIT. TAX REV. 717.

tax jurisprudence as a type of “semantic skepticism” associated with Wittgenstein’s Private Language argument.¹³⁸

2. Critique of Philosophy of Language and Taxation

The arguments against Philosophy of Language taken in the context of taxation are likely those of Hans Kelsen’s theory of public international law.¹³⁹ Kelsen’s countervailing approach is that the *norm* must be the source of legal principles.¹⁴⁰ So, where international tax law develops new words and concepts, these are not part of the positive law tax systems of nations. Brand-Ballard described the relevant part of Kelsenian theory (part of the Vienna Circle of the 1920s) as follows:

The logical positivists argued for moral relativism on the basis of one of their central tenants: the verification principle. According to this principle, a statement (meaning an indicative sentence) is literally meaningful if and only if it is either (1) true or false by definition (“analytic” or “analytically false,” respectively), or (2) empirically verifiable by means of sensory experience. The verification principle is a semantic thesis, according to which some statements are meaningful and other meaningless. “All bachelors are unmarried,” for example, is meaningful because it is true by definition. “Hans is in the bedroom” is also meaningful, but for the different reason that it can be confirmed or disconfirmed by empirical evidence: I can go to the bedroom and see whether Hans is there. Ethical statements such as “Killing is wrong” or “Promises ought to be kept,” however, are neither true-by-definition, false-by-definition, nor verifiable in experience. For this reason, the logical positivists deemed ethical statements to be not literally meaningful (i.e., non-cognitive).¹⁴¹

By this approach, all normative analyses of tax law (comprising perhaps the majority of Anglo-American jurisprudence generally) are sociology

138. See Coleman & Leiter, *supra* note 6, at 565-66 (“There are a variety of considerations normally associated with Wittgenstein’s Private Language Argument that we can capture under the rubric of semantic skepticism. The semantic skeptic denies that there are objective facts of a suitable sort that constitute or determine a word’s or a sentence’s meaning. Because there is no fact that is the meaning of a sentence, the meaning of a sentence, directive, command, or request invariably will be indeterminate. In other words, what a sentence means cannot be adduced by pointing to some fact that is its meaning. Thus, the meaning of a sentence is indeterminate because there are no objective facts that would render it determinate. If this is true of language generally, then it is true of law a fortiori.”).

139. See Joseph Raz, *Kelsen’s Theory of the Basic Norm*, 19 AM. J. JURIS. 94 (1974).

140. See JOCHEN BERNSTORFF & THOMAS DUNLAP, *THE PUBLIC INTERNATIONAL LAW THEORY OF HANS KELSEN* (Cambridge Univ. Press 2010).

141. Brand-Ballard, *supra* note 19, at 139.

and not comprised of meaningful statements about law. Philosophy of Language would make the situation worse because it does not apply the analytical method described above. Accordingly, the framework of international law should instead proceed by formal treaties at the sovereign level and not by substantive understandings of words as determined by international tax experts. For example, where various nations began to call a discount on a bond “original issue discount” and tax that discount as if it were interest income, this concept of “original issue discount” would have no validity in a nation that did not incorporate that concept into its local law. Then, if a multinational firm set out to issue a discounted bond in a nation without that concept in its law, it could categorize the discount for tax purposes as something other than interest. As the alternative view, if international tax terms were taken as universally valid, a judge even in that location might identify the discounted bond as “original issue discount” and treat it as taxable interest, notwithstanding that terminology was not part of the positive law of the jurisdiction in question.

G. *Critical Legal Studies*

Critical Legal Studies arose as an objection to the claimed “objectivity” of authoritative legal scholarship and is taken here as a type of “deconstructionism” directed against tax jurisprudence.¹⁴² The source of legal rules is taken instead as premised on power dynamics of society.¹⁴³ Deconstructive philosophy premised on an understanding of words taken in context is a possible foundation for Critical Legal Studies.¹⁴⁴ John Balkin has identified at least three reasons as to why deconstructive theory is relevant to law.¹⁴⁵ The same criteria reflect how Critical Tax Studies could be relevant to tax law. Balkin gave these as follows: (i) “First, deconstruction provides a method for critiquing existing legal doctrines”; (ii) “Second, deconstructive techniques can show how doctrinal arguments are informed by and disguise ideological thinking.”; (iii) “Third, deconstructive techniques offer both

142. See Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

143. See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

144. See JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1997). For a comprehensive list of Derrida works and citations see Balkin in the following note.

145. See J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987).

a new kind of interpretive strategy and a critique of conventional interpretations of legal texts.”¹⁴⁶ Critical scholars have also suggested that “a science of law is impossible, since legal norms are not descriptively factual.”¹⁴⁷

However, Critical Tax Theory has not been substantially linked to Critical Legal Studies. So, the project of setting forth the philosophical foundations of tax criticism as an alternative school of philosophy is in this respect largely incomplete.

1. Critical Tax Theory and Taxation

Much of what has been labeled “Critical Tax Studies” (hereafter, “Tax Crit”) relates primarily to fairness criticisms of the tax system premised on group identity.¹⁴⁸ Tax Crit challenges “traditional” tax terminology, such as the word “tax equity,” and then sets out to substitute its own vocabulary for tax scholars.¹⁴⁹ Numerous scholars argue that tax words are not acceptable because they reflect solely the experience of white,¹⁵⁰ heterosexual,¹⁵¹ men.¹⁵² Others have argued that all tax terminology is a form of rhetoric.¹⁵³ Tax Crit scholars then refuse to engage in tax discourse using such traditional tax words, essentially creating what amounts to tax *dis*-agreement in use. Storytelling is then proposed as the means to incorporate the experience of various groups with the tax system without using “traditional” tax words.¹⁵⁴ This raises several well-known philosophical problems relating to the philosophy of language and radical subjectivity.¹⁵⁵

146. *Id.* at 745-6.

147. Brand-Ballard, *supra* note 19, at 163.

148. *See, e.g.*, ANTHONY C. INFANTI & BRIDGETT J. CRAWFORD, *CRITICAL TAX THEORY: AN INTRODUCTION* (Cambridge Univ. Press, 2009).

149. Anthony C. Infanti, *Tax Equity*, 55 *BUFF. L. REV.* 1191 (2008).

150. *See, e.g.*, Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 *COLUM. L. REV.* 790 (2007); Beverly I. Moran, *Exploring the Mysteries: Can we ever know anything about Race and Tax?* 76 *N.C. L. REV.* 1629 (1998).

151. *See, e.g.*, Nancy Knauer, *Heteronormativity and Federal Tax Policy*, 101 *W. VA. L. REV.* 129, 135 (1998).

152. *See, e.g.*, Marjorie E. Kornhauser, *A Taxing Woman: The Relationship of Feminist Scholarship to Tax*, 6 *S. CAL. REV. L. & WOMEN'S STUD.* 301, 310-11 (1997).

153. Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 *MICH. L. REV.* 465 (1987).

154. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 589 (1990); Anthony C. Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity*, 26 *WHITTIER L. REV.* 707, 714-15 (2005).

155. *See* Michael A. Livingston, *Radical Scholars, Conservative Field: Putting “Critical Tax Scholarship” in Perspective*, 76 *N.C. L. REV.* 1791, 1798 (1998).

2. Critique of Critical Tax Theory and Taxation

In philosophical terms, the justification for storytelling as a method was given by Richard Rorty. However, neither Rorty nor Wittgenstein accepted the idea of incommensurability in language, or even conceived of intentional *dis*-agreement-in-use, where a tax lawyer intentionally refuses to speak in the terminology of tax lawyers as a form of “guerrilla warfare” against the underlying language of tax law.¹⁵⁶ As a matter of philosophy of language, the objectivity of words is premised on agreement-in-use often referred to as the usage of “common language.”¹⁵⁷ However, the problem of unintelligible language-use has been addressed by philosophers, particularly in the Max Black “inverted spectrum” problem.¹⁵⁸ As an illustration, imagine a child whose mother teaches the child that the color “red” is actually the color “green.” The child then goes into the world and claims red is green. The child is subjectively correct about the colors. But, the child is not *objectively* correct.

Thus, we can say that there are correct and incorrect usages of words, particularly with respect to taxation, even if these words are arbitrarily chosen by the local tax community of language users (or, even if the color red cannot be fully known without reference to green as illustration of what red is not). Jürgen Habermas has given an alternative defense of objectivity in language in general terms based on pragmatic necessity. However, none of this foundation for Critical Tax Studies has been significantly broached in the existing literature. A postmodern critique of Critical Tax Studies is possible, challenging the philosophical foundations of radical subjectivity in the context of taxation, as epitomized by storytelling as epistemology. In the usage of language, some agreement is at minimum required in order to tell the story. For example, one might reasonably ask why we choose to tell the story in the English language, and not German or French, or some other language in which philosophy is often conducted. Also, in the absence of any epistemology for how to use critical tax theory to “know” tax results, there is no possibility that we could administer a tax system using such a methodology. This is to say, in Rortyan terms, the discourse on Tax Crit is purely edifying. With an idea of philosophy-as-“tool” we would then

156. Anthony C. Infanti, *Homo Sacer, Homosexual: Some Thoughts on Waging Tax Guerrilla Warfare*, 2 UNBOUND: HARV. J. LEGAL LEFT 27 (2006).

157. Habermas, *supra* note 33, at 39.

158. RORTY, *supra* note 8, at 305 (citing Max Black, *Linguistic Method in Philosophy in LANGUAGE AND PHILOSOPHY* (Ithaca 1949)).

rightfully exclude ideas that have no “tool”-value for tax projects. The means to render Critical Tax Studies relevant in the future is to anchor it in Critical Legal Studies, or existing deconstructive philosophy.

III. CRITICISMS OF PHILOSOPHY AS APPLIED IN LEGAL SCHOLARSHIP

The value of philosophy to law is controversial. Four of the main critiques of the application of philosophy to law include: (i) “intellectual voyeurism”; (ii) the “case against brilliance”; (iii) philosophy as a sub-discipline of Legal Philosophy; and (iv) philosophy as irrelevant to adjudication. Brian Leiter, the eminent legal scholar in philosophy, published several articles positing a sharp divide, or what he referred to as “boundaries,” between philosophy and law.¹⁵⁹ Leiter went so far as to explain why “Philosophy of Science” is not relevant to law.¹⁶⁰ But, it turns out that “Philosophy of Science” is highly relevant to tax law and jurisprudence.¹⁶¹ Here, several notable criticisms of philosophy as applied to legal scholarship are discussed including intellectual voyeurism and “the case against brilliance.”

A. “Intellectual Voyeurism”

In the seminal article *Intellectual Voyeurism in Legal Scholarship*, Leiter also set out to essentially criminalize improper philosophy usage and citation in law journal articles.¹⁶² Leiter posited the “sub-standard interdisciplinary work of whose most striking feature is . . . ‘intellectual voyeurism’”¹⁶³ Leiter describes such “intellectual voyeurism” as a “cocktail party affection” for the works of Wittgenstein, Hegel, Rawls, Foucault, Rorty, Sartre, Habermas, Aristotle, and others, in law reviews. Leiter then attacked Jerry Frug’s interpretation of Nietzsche.¹⁶⁴ The scholarly lesson was proposed by Leiter as “ill-preparedness” breeds contempt and that the great philosophers should be utilized intelligently rather than squandered.¹⁶⁵

Leiter’s “intellectual voyeurism” can be countered on both

159. Brian Leiter, *The Boundaries of the Moral (and Legal) Community*, 64 ALA. L. REV. 511 (2013).

160. Brian Leiter, *The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make for Good Philosophy of Evidence*, 1997 B.Y.U. L. REV. 803 (1997).

161. See Part II(d).

162. Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J. LAW & HUMAN. 79 (1992).

163. *Id.* at 80.

164. *Id.* (citing Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869 (1988)).

165. *Id.* at 104.

technical and practical grounds. First, in terms of philosophy, the extraordinary problem with Leiter's approach is that the argument had a chilling effect on the use of philosophy in fields such as taxation; scholars are now scared to get something wrong and just rely on common sense. The common-sense approach excluding philosophy from tax jurisprudence is worse than the disease. A further problem is that any new ideas will always be opposed to the doctrinal "conventionalism" of prior legal theory, and therefore, presumptively be considered "bad" by conventional legal scholars. So, the "discovery" aspect in legal research is important to the welcoming of advances in any field, including law. Simply put, we ought not to devise a system that criminalizes *discovery* in law, since that approach effectively throws out the baby with the bathwater.

A second objection could be made on the practical grounds that many European universities already use Leiter's approach whereas U.S. law schools find it beneficial for law to focus more on creativity in scholarship than authority.¹⁶⁶ Martha Nussbaum further argued that legal scholars in the United States are not well educated in philosophy.¹⁶⁷ Kandel and Nussbaum likewise discount the potential value of creativity, especially by younger legal scholars. Deborah Rhode further assessed legal scholarship as follows: "[S]cholarship, like salmon breeding in the wild, is a high-risk, low-return activity. On average, it takes 6,000 eggs to get two fish capable of living to maturity. Does this mean that 5,998 eggs are wasted? Only if there is a more efficient means of perpetuating the species."¹⁶⁸ The practical question for legal scholarship is thus not whether Frug's description of Nietzsche was a "bad" egg in philosophy, but whether Frug somehow interfered with Leiter, for example, by publishing an article about Nietzsche that would be one of the two in 6,000 ostensibly "good" eggs.

166. See Randy Frances Kandel, *Whither the Legal Whale: Interdisciplinarity and the Socialization of Professional Identity*, 27 LOY. L.A. L. REV. 9, 18 (1993) ("Further, the decision to make law schools postgraduate institutions resulted in the study of law being separated from the study of philosophy, political science, economics, and other related subjects. Because the United States differs in this respect from almost every other nation, American law students do not absorb the law within an integrated intellectual matrix the way our international colleagues do.").

167. Martha C. Nussbaum, *The Use and Abuse of Philosophy in Legal Education*, 45 STAN. L. REV. 1627, 1644 (1993) ("How should we deal with this dilemma? I propose the following model. Law schools might employ one or two philosophers, preferably in a half time appointment. They would retain a strong connection to their disciplinary base in philosophy, and continue teaching regular philosophy students.").

168. Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1332 (2002).

B. *The Case Against “Brilliance” in Law and Philosophy*

Daniel Farber authored a series of essays critical of “novelty” in legal interpretation.¹⁶⁹ The first essay was famously entitled *The Case against Brilliance*. However, it might also have been entitled *The Case against Law and Philosophy*. Farber argued that the novelty of a legal argument was indicia of such argument’s invalidity where “invalidity” refers to the failure of the novel argument to correspond to the actual view of the judge as given in a legal ruling.¹⁷⁰ Farber subsequently clarified this position to refer to what he calls “common sense,”¹⁷¹ where the “brilliant” idea might be called *too-clever-by-half*.¹⁷² Brilliant arguments are “too brilliant to be true.”¹⁷³

The examples given by Farber were the celebrated works of Ronald Dworkin in legal theory and Ronald Coase in economic theory. Under Farber’s approach, the *uncommon sense* proposal is presumed not be “true,” or it would already be part of the conventional understanding of a subject (such as a legal opinion). With regards to legal theory, Farber avers that if only a few legal scholars can understand Dworkin’s “brilliant” theory, for example, then judges could not be expected to have used such a theory in rendering a decision.¹⁷⁴ Farber wrote: “The history of modern thought is largely about the defeat of common sense and its replacement by brilliant, counterintuitive theories.”¹⁷⁵ Farber argues that any “brilliant” or novel theory is not helpful in practical legal terms for understanding how a decision was rendered or how a decision might be rendered in the future.

One possible answer to Farber would be evident merely from the structure of this paper. Farber thinks there is a legal concept which needs

169. Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986); Daniel A. Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367 (1987).

170. Farber, *The Case Against Brilliance*, *supra* note 169, at 919 (“This line of argument suggests not only that brilliance is evidence of a theory’s invalidity, but also that it is likely cause of its invalidity.”).

171. *Id.* at 375 (“Common sense may seem a rather obvious virtue, but it is under heavy attack today as an enemy of both intellectual and social progress. Neither of these attacks is well founded.”).

172. Daniel A. Farber, *From the Stacks: “Too Clever By Half: The Case Against Brilliance”*, THE NEW REPUBLIC, Sept. 1, 1986, retrieved from <https://newrepublic.com/article/113904/daniel-farbers-too-clever-half-case-against-brilliance>.

173. Farber, *The Case Against Brilliance*, *supra* note 169, at 920.

174. *Id.* at 925-26 (“A brilliant theory is by definition one that would not occur to most people. It is hard to see how the vast majority of the population can be presumed to have agreed to something that they could not conceive of. . . . A related kind of brilliant argument is to show that some judicial opinion, or set of judicial opinions, has a dazzlingly unexpected meaning.”).

175. *Id.* at 376.

to be transferred from the cognition of one person to the cognition of another person. So, he understands the legal opinion as the explanation, which results in transference of the understanding from the judge to the audience. This might be described as a Cartesian approach (i.e., based on the philosophy of Descartes) to “Legal Philosophy.” However, there are other schools of philosophy that do not begin with the “separate idea” for cognition. From the perspective of Philosophy of Language, the pertinent question is language usage with respect to the “brilliant” idea as opposed merely to transference of understanding. Likewise, from the perspective of Philosophy of Science, a brilliant idea may be reflected in a new hypothesis as to causation.¹⁷⁶ Nonetheless, Farber is essentially correct from the perspective of Moral Philosophy where an individual person must be able to determine right and wrong by a known standard, even if the given moral standard is subjective. If the individual trying to make that determination is unable to cognize moral behavior, then he technically cannot engage in moral behavior. Indeed, the problem of legal right premised on moral standards as a theory of punishment was addressed by GWF Hegel and other legal scholars some time ago.¹⁷⁷

C. *Is Philosophy and Tax Law Merely a Sub-Discipline of Legal Philosophy?*

Legal Philosophy is a tool for lawyers in justifying laws or explaining why or how judges render decisions. Although these are possible projects for tax lawyers, they are not their only projects. Several differences of tax jurisprudence in comparison to legal jurisprudence are accordingly premised, in part, on different projects. Some of these differences are as follows: First, tax law has traditionally been considered related to natural law jurisprudence.¹⁷⁸ This differentiates from much of the modern legal analysis which has shifted away from natural law jurisprudence centuries ago. Second, tax lawyers are often transactional lawyers and, thus, more concerned with tax planning and less concerned with adjudicative methods than non-tax lawyers. Third, tax scholars are often engaged with economists in the derivation of tax

176. In the history of economic ideas, where Keynes proposed that monetary policy could be used to smooth economic cycles the problem was not at all with the understanding of the underlying idea. The issue was merely whether the Keynesian proposal for economic cause-and-effect represented an idea that could be tested by falsification.

177. See Peter G. Stillman, *Hegel's Idea of Punishment*, 14:2 HIST. OF PHIL. 169, 172 (1976); Michael Salter, *Justifying Private Property Rights: A Message from Hegel's Jurisprudential Writings*, 7 LEGAL STUD. 245, 246 (1987).

178. See Peters, *supra* note 40.

policy. Tax lawyers thereby function in the role of tax policymakers and not legal advisors. Fourth, tax laws in most jurisdictions are usually a composite of statutes plus common law authorities.

The internal debates of Legal Philosophy premised on one method or the other are accordingly less relevant to tax lawyers who are required to know both methods. Notwithstanding that all of these methods are plausible explanations why the philosophy of tax law is not a sub-discipline of Legal Philosophy, the most obvious explanation may be simply that legal philosophers have eschewed tax law. None of the great scholars focused on tax law in discussing legal philosophy. So, while Dworkin and Hart were having their famous debates on legal philosophy, tax lawyers were debating Locke and Nozick.

D. *Why is Chief Justice Roberts Opposed to Law and Philosophy?*

Perhaps the most visible criticism of Law and Philosophy in recent years came from the Chief Justice himself. Chief Justice Roberts famously wrote in the *Sebelius* opinion as follows: “To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were ‘practical statesmen,’ not metaphysical philosophers.”¹⁷⁹

For purposes of this paper, the comments of the Chief Justice are significant; if philosophy functions as a tool for lawyers, and the Chief Justice does not see philosophy as a useful tool in rendering judicial opinions, then this merits further explanation.

One explanation for why judges might reach the conclusion that philosophy is not helpful to law is that judges see their own decisions as *determinate*. And, the circumstance that judges might see particularly their own decisions as determinate is hardly surprising. Many judicial opinions openly state that the result of the decision was inevitable for some reason or another. But, that cannot be true in all cases, and probably isn't really true in many cases at all, since lawyers do not

179. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2589 (2012); see also John G. Roberts, Jr., C.J. U.S. Interview at Fourth Circuit Court of Appeals Annual Conference, at approx. 30:40 (June 25, 2011), www.c-span.org/video/?300203-1/conversation-chief-justice-roberts (“Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.”); see also Edwards, *supra* note 35; Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1326 (2002).

choose to litigate cases with inherently determinate outcomes. Litigation is by definition largely outcome indeterminate. Aggressive tax planning is generally even more indeterminate than litigation. But, if determinate results can always be imagined by the judge in deciding a case using *stare decisis* as Charles Collier has proposed, then there is clearly no need for philosophy in legal practice.¹⁸⁰ And, this is especially true in tax law where positivist tax scholars continually argue that “black letter law” is the only interpretational method available for tax law.

But, at least in Supreme Court decisions in the United States, the Court is called upon to decide a particular case on a novel set of facts. The *Sebelius* decision is a case in point where Chief Justice Roberts authorized the Obamacare penalty as a “tax.”¹⁸¹ Much of the tax law community was shocked by this holding from the Chief Justice and could not have predicted it in a million years. The privileging of determinate outcomes in judicial decisions may also entail an idea of the facts of cases as always essentially the same. Or determinant outcomes may stem from the idea that situations allow judges to distill (or, think they are able to distill) new cases down to a prior known set of facts to which judges already know the answer. Judges are, of course, perfectly able to *determinatively* adjudicate the same case over and over again. Yet, apart from the judge who is able to divine his own opinions on any imaginable future case, or the judge who is willing to argue that the facts of the case really were not distinguishable from a prior case, the rest of the world sees judicial adjudication under the common law as outcome *indeterminate*, and particularly, the tax-related decisions of the Roberts court.¹⁸² As Singer wrote:

Determinacy is necessary to the ideology of the rule of law, for both theorists and judges. It is the only way judges can appear to apply the law rather than make it. Determinate rules and arguments are desirable because they restrain arbitrary judicial power. At the same time, determinacy is threatening. A completely determinate set of rules would require judges to apply existing rules mechanically even in unforeseen circumstances where the policy underlying the rule might not apply.¹⁸³

Another explanation for the exclusion of philosophy from judicial opinions is that “philosophy” actually means policymaking. Neomi Rao

180. See Charles Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771 (1988).

181. *Sebelius*, 132 S. Ct. 2566.

182. See *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015).

183. Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 12 (1984).

wrote as follows:

The Court should . . . stay clear of philosophy and base its decisions on history, precedent, and a recognition of the limits of judicial authority. Three major distinctions between the philosophical and judicial enterprises compel this conclusion. First, judicial decision making is a practical activity Second, judges must work within institutional constraints in a political system that requires separation of powers. . . . Finally, judges in the Anglo-American legal system are bound by legal precedent, and draw legitimacy from references to cultural and political history.¹⁸⁴

Rao thus argues (similar to Schön) that tax adjudication using philosophy as opposed to “black letter” law is a form of what amounts to “sociology.”¹⁸⁵ Nonetheless, Philosophy of Language has the potential to be very helpful to legal interpretation.¹⁸⁶ That is, if there is an idea accepted as a matter of international tax law, with agreement-in-use as to particular tax terms, it is possible for the meaning of terms to shift to cover new situations. We know the shift in the meaning of words occurs based on the heuristics of the international tax profession. For example, a “resident” entitled to a treaty might be understood as a matter of international tax law not to include certain hybrid entities used in aggressive tax avoidance.¹⁸⁷ In that case, the meaning of tax treaties could perhaps be *objectively* known by the linguistic standards of international tax lawyers and not determined solely by the “interpreter.” The use of philosophy thereby informs the method of legal interpretation, which is not a form of “back-door” policymaking even though it may lead to different policy results. So, as it turned out, philosophy actually furthers, not hinders, all of the goals set by Rao for legal interpretation.¹⁸⁸

184. Neomi Rao, *A Backdoor to Policy Making: The Use of Philosophers by the Supreme Court*, 65 U. CHI. L. REV. 1371, 1371-72 (1998).

185. See Stephen Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (with an Emphasis on the Teague Rule against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046, 1087-88 (1994) (“Judges largely do not listen to or even care about what legal scholars write. On the other hand, normative language or discourse represents a manifestation of power itself. . . . By telling us that we must choose or this or that path, normative discourse consistently and repetitively reminds us that we are free to choose whichever path is the most appealing.”).

186. See Ulf Linderfalk, *Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making*, 26 EUR. J. INT’L L. 169, 175 (2015).

187. See AVI-YONAH, *supra* note 110, at 92 (“The French tax authorities generally deny residence when the recipient of income is not effectively subject to tax.”).

188. Rao, *supra* note 184.

IV. INTERDISCIPLINARITY IN LEGAL SCHOLARSHIP

Interdisciplinarity is present in legal scholarship. Tax law analysis typically includes the use of principles from accounting, economics, psychology, and perhaps other disciplines relevant to taxation.¹⁸⁹ An illustration of an interdisciplinary approach would be to use psychology to analyze tax law, which Kirchler clearly has done with the “slippery slope” framework, for example.¹⁹⁰ Notably, scholars have opposed interdisciplinary scholarship in law both on the grounds that law builds itself from other disciplines,¹⁹¹ and that law has been taken over by other disciplines.¹⁹² However, if tax legal analysis is performed with reference to the consequences, which is the method now applied by the U.S. Supreme Court after *Sebelius* and *Wynne*, then non-legal fields are surely relevant to legal analysis.

Yet, philosophy may be understood not so much as interdisciplinary scholarship but as instructions on how to better employ an existing tool, or even how not to use an existing tool. Thus, in the context of interdisciplinary work in philosophy and law, scholars have opposed the idea of using a philosophical source as authority in law.¹⁹³ The quintessential idea seems to be a hypothetical situation where a judge cites a philosopher as the authority for rendering a decision in a case, rather than applicable legal precedent, thereby violating the “rule of law.”¹⁹⁴ However, a citation to an actual case where that might have occurred in practice never seems to be provided (thus rendering the entirety of the discussion largely hypothetical).¹⁹⁵ In most cases arising in the real world, a judge, or even a tax lawyer engaged in tax planning, might be expected to use philosophy to augment interpretation of legal authority and not to substitute for it. Collier argued that because the

189. TAXATION: AN INTERDISCIPLINARY APPROACH TO RESEARCH (Margaret Lamb et al. eds. Oxford Univ. Press 2004).

190. Erich Kirchler, Erik Hoelzl, & Ingrid Wahl, *supra* note 118.

191. See Phillip Areeda, *Always a Borrower: Law and Other Disciplines*, 1988 DUKE L.J. 1029 (1988).

192. See McCloskey, *supra* note 85.

193. See Charles Collier, *Interdisciplinary Legal Scholarship in Search of a Paradigm*, 42 DUKE L.J. 840 (1993).

194. See Rebecca Prebble & John Prebble, *Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law?*, 55 SLU L.J. 21 (2010); see also Coleman & Leiter, *supra* note 6, at 580-83 (“There are at least three other motivations for attributing to liberalism (as a normative political theory) a commitment to determinacy as a political ideal. Two of these have to do with ‘rule-of-law’ considerations. First, legal outcomes must be determinate if individuals are to be put on notice as to their duties under the law and be provided with an opportunity to conform their behavior accordingly.”).

195. See, e.g., Rao, *supra* note 184.

humanities have little application to law and philosophers, they should not be cited as a source of “intellectual authority,” and also because they might imply an alternative to precedential authority in the common law.¹⁹⁶

Other scholars have focused on the quality of the knowledge of the lawyer as a means to criticize interdisciplinary law scholarship. Francis Mootz wrote: “Interdisciplinary research will yield no insight if the legal theorist (or philosopher) demonstrates an inadequate understanding of philosophy (or law).”¹⁹⁷ However, with respect to interdisciplinary research, the issue is not the respective skill of the craftsman in using the philosophical tool. Rather, the need for new methods arises based on the difficulty of the respective project. A tax lawyer that is interested in interdisciplinary scholarship most likely has a problem where the existing tool does not seem to work very well. Thus, in instances where the tax lawyer begins to make enhancements to tools, it is often done out of necessity with the intent to use the tool for some immediate and practical project in tax law; we should therefore expect to see interdisciplinary aspects arise within the actual practice of tax law.

Most of what tax lawyers are doing on a daily basis is some interdisciplinary combination of accounting, economics, or psychology. Examples might be financial reporting, transfer pricing, or drafting tax statutes. Philosophy bears on all these disciplines and, therefore, bears on law. If philosophy functions as a tool for tax lawyers, then interdisciplinary research represents the creation of an entirely new hybrid tool. This is distinguishable from *multidisciplinary* scholarship where multiple tools are applied, in turn to the same problem.¹⁹⁸ An example of this hybrid-“tool” effect is Critical Legal Studies. As Coleman & Leiter wrote in respect of Critical Legal Studies: “[L]iberalism is committed to the law being determinate, objective and neutral. According to CLS, the problem with liberalism is that none of these ideals obtain in legal practice. Law is neither determinate, objective, nor neutral.”¹⁹⁹ These arguments, including the assertion that law reflects power relations in society, represent a possible new “tool” in the toolkit for tax lawyers. The new tool is comprised of a combination of “deconstructive” philosophy and Legal Philosophy as a new approach

196. Charles Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Scholarship*, 41 DUKE L.J. 191 (1991).

197. Francis J. Mootz III, *Law and Philosophy, Philosophy and Law*, 26 U. TOL. L. REV. 127, 128 (1995).

198. See, e.g., AVI-YONAH, *supra* note 110.

199. Coleman & Leiter, *supra* note 6, at 549.

to the theory of law. And, particularly with respect to tax law, that method seems particularly suited to addressing questions of what tax scholars refer to as “equity,” both “vertical” and “horizontal” equity.²⁰⁰ The various scholars who have argued Critical Legal Studies has burned itself out are wrong because it need not be the tool exclusively chosen by tax lawyers all the time. In other words, the expectations that Critical Legal Studies would become the only tool lawyers would choose to use for all tax projects are misguided. Likewise, the idea of some Tax Crit scholars that new tax words could be proposed that would immediately cross-off (and thereby supplant) all existing tax words are misguided.²⁰¹

Yet, it is not impossible that over time a new hybrid tool derived from interdisciplinary scholarship could be found to be very useful as a “tool” and thereby become the *de-facto* tool-of-choice for tax lawyers in most projects. As it stands, Tax Crit has not achieved that level of utility, and functions now as akin to the claw on the backside of the hammer that is used to pull out a bent nail. However, other examples of interdisciplinary scholarship in tax law, reflecting the cross-over of other areas, such as economic psychology, or Philosophy of Language, do represent “tools” for tax scholars that can be broadly applied to a variety of projects.

V. CONCLUSION

Philosophy is highly beneficial to the practicing tax lawyer or scholar. Philosophy renders explicit the philosophical foundations that are implicit in the study of taxation and practice of tax law. The use of philosophy allows adjudication or tax policy-making to be approached in ways that are more transparent and intentional. As such, the working knowledge of philosophy provides what amounts to choice-of-tool to the tax lawyer. Such enhanced flexibility allows tax lawyers to do existing jobs better, but it also allows tax lawyers to take on other jobs that might not have seemed possible with a very limited toolset. Interdisciplinary scholarship is essentially the fashioning of a new tool by the tax lawyer,

200. Bret N. Bogenschneider, *Critical Legal Studies and Regressive Taxation in the United States*, 10 UNBOUND: HARV. J. LEGAL L. 98, 99 (2015); Livingston, *supra* note 155, at 1796 (“In practice, vertical equity tends to get less attention than the remaining categories, at least where academic lawyers are concerned.”). *But see* Infanti, *supra* note 149, at 1194-95 (“Yet, despite these critiques, all mention of horizontal and vertical equity has far from disappeared from the pages of law reviews. Both ‘mainstream’ and critical tax scholars have embraced horizontal and vertical equity in their contributions to the tax policy literature; indeed, there has been some debate about whether critical tax theory raises issues of horizontal as opposed to vertical equity.”).

201. *See, e.g.*, Infanti, *supra* note 149, at 1194.

usually out of necessity, in encountering a new project. The various criticisms rendered against law and philosophy, many with clever names such as “intellectual voyeurism”²⁰² or “case against brilliance” are objections both in respect to tax lawyers using new philosophical tools and also the fashioning of new interdisciplinary philosophical tools.

Leiter’s “voyeurism” argument against the use of philosophy in law amounts to the idea that lawyers are not trained to use philosophical power-tools and should just stick to conventional hammers. However, there are many ways to correctly use philosophy in respect of law that Leiter has not addressed, and many other ways to incorrectly use philosophy in respect of law, also not addressed.²⁰³ Furthermore, other usages for philosophy that future scholars will someday devise for the benefit of the field of law are impossible for us to anticipate today.

Tax law has been excluded thus far from Philosophy of Law. Accordingly, the foremost intellectual “crime” against law may not be not “intellectual voyeurism,” but rather this de-emphasis of *discovery* where new ideas in legal scholarship are discouraged. Karl Popper identified such forms of argumentation applied in defense of the *status quo* in his description of “conventionalism” with an emphasis on scientific *discovery*.²⁰⁴

Contrary to the idea that philosophy functions as a “back door” form of “policy,” a strict “letter of the law” interpretational method leaves a substantial discretion to the legal “interpreter” to potentially engage in “sociology” in the guise of legal interpretation. The further idea that philosophy actually *is* policy represents confusion with legal methods versus legal outcomes. Philosophy represents the *disclosure* of the theory upon which the policy outcome was premised. Yet, philosophy does not require one particular outcome. As Critical Legal Studies has shown, legal interpretations are unlikely to be given from a universal “objective” perspective.²⁰⁵ The proffered “normative” versus “objective” method of legal interpretation is not helpful with respect to tax law; whenever any scientist or legal scholar sets forth a new hypothesis or drafts a legal opinion, this generally does not reflect an objective analysis of a statute toward a *determinative* outcome. Furthermore, in tax law, multinational firms are continually

202. Leiter, *supra* note 162.

203. For example, Leiter does not address the displacement of tax law by economics or other disciplines which obviously do not proceed from the perspective of Legal Philosophy. See Peter Goodrich, *Social Science and the Displacement of Law*, 32 L. & SOC’Y REV. 473 (1998).

204. POPPER, *supra* note 7.

205. Kennedy, *supra* note 143.

“manufacturing” new sets of facts to test the boundaries of determinative outcomes in the positive law, and that must always go beyond situations anticipated by the legal drafters leading to indeterminacy.

Philosophy is the means to solve tax problems; so, when we say that Adam Smith’s, John Locke’s, or John Rawls’ ideas are applied by tax scholars to address issues arising under the tax law, that is to say that those philosophies function as *tools* that tax lawyers generally think are helpful tools. However, in a situation where particular philosophies do not work very well for tax lawyers, then scholars should consider the use of alternative philosophical tools. The descriptions of schools of philosophy given herein are illustrations of those tools that are currently being used both within and without the tax law. In addition to those tools, others are possible. Inevitably, tax lawyers will encounter “paradigm shifts,” such as the recent BEPS initiative by the OECD, and tax lawyers will need to learn to work with that new tool.²⁰⁶ Economic psychology is a good example of a new tool whereby “taxpayer morale” turns out to be perhaps the primary factor in the overall functioning of a tax system.

Interdisciplinary scholarship can produce new tools by employing the combination of methods to resolve some particular problem that tax lawyers are grappling with at a particular point in time. This does not require that tax lawyers stop using hammers to hammer nails. First and foremost, legal pluralism, as akin to scientific pluralism, means flexibility of the method and the use of various philosophies when the need arises.²⁰⁷ The use of a tool subject to “falsification” means that lawyers should apply familiar forms of philosophy as tools unless some other tool can be shown to work better for a given project. The ability to employ a variety of “tools” to solve a variety of problems that may arise in the practice of law is the best description of a quality lawyer, and particularly so with respect to tax lawyers.

206. See OECD BEPS Initiative.

207. See FEYERABEND, *supra* note 22.