

5½ Problems with Legal Positivism and Tax Law

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Abstract

*This essay is a reply to the famous paper by John Gardner, *Legal Positivism: 5½ Myths*, and the more recent paper by John Prebble, *Kelsen, the Principle of Exclusion of Contradictions, and General Anti-Avoidance Rules*. The reply is developed from the perspective of tax law where the respective issues are of major significance. The “5½ problems” correspond to Gardner’s arguments and are as follows: (#1) Legal Positivism centers on determining whether a tax law is legally valid based on its source (e.g., the legislature enacted a valid law applying tax at the rate of 25%). However, in the tax context, a second-stage assessment is nearly always necessary to determine whether the scope of the tax law extends to the particular factual situation at issue (e.g., the tax base includes xyz). The second-stage assessment means deciding a case on the merits and encompasses the vast majority of legal inquiry relevant to domestic and international tax practice; (#2) Logical Positivism is often endorsed by Legal Positivists as a method of legal interpretation in the tax context; (#3) Legal Positivism is not normatively inert where it is applied as a method of legal interpretation; furthermore, tax and legal practitioners are not committed to normative modes of legal analysis in evaluating cases on the merits; (#4) Legal Positivism has been applied to challenge the validity of General Anti-Avoidance Rules (GAARs) on the grounds that formalistic tax avoidance planning by multinational firms is justified by the rule of law; (#5) Legal Positivism has been applied to reach a “double non-taxation” outcome based on an overly-broad view of the valid scope of tax treaties; and (#5½) legal philosophy often lacks practical validity.*

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I. INTRODUCTION

As John Gardner explained so well in *Legal Positivism: 5½ Myths*, legal philosophers are concerned foremost with evaluating the validity of legal norms.¹ Gardner identified the distinctive proposition of legal positivism as follows: “[i]n any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits.”² Legal practitioners are guilty of misunderstanding Legal Positivism not as a means of assessing the validity of laws or legal norms,³ but as a formalistic mode of legal interpretation.⁴ However, legal practitioners, such as tax lawyers, generally presume that tax laws are legally valid, ironically, even in the situation where the taxing authority is exceeded and its rules are presumptively invalid. Tax lawyers are more typically concerned with determining the valid scope of tax law in situations not covered by existing legal norms. The determination of the valid scope of tax law nearly always depends on its merits, and not its source, even though the sources of tax law are relatively broad in scope.⁵ Hence, a definition of the practice of tax law is developed here as follows:

The Practice of Tax Law: The inquiry as to whether the scope of a presumptively valid tax law extends to a novel factual situation. This may also be referred to as deciding a case on the merits as a matter either of tax planning or adjudication. The decision of cases on the merits serves to expand the scope of legal norms of taxation

1. John Gardner, *Legal Positivism: 5 ½ Myths*, 46 AM. J. JURIS. 199, 200 (2001).

2. *Id.* at 199.

3. *Id.* at 202 (“They are problems of systematic misrepresentation by others. Have the members of any tradition of thought ever had their actual philosophical commitments so comprehensively mauled, twisted, second-guessed, crudely psychoanalyzed, and absurdly reinvented by ill-informed gossip and hearsay, as the legal positivists? Has any other thesis in the history of philosophy been so widely and so contemptuously misstated, misinterpreted, misapplied, and misappropriated as [Legal Positivism]?”).

4. John Prebble, *Kelsen, the Principle of Exclusion of Contradictions, and General Anti-Avoidance Rules in Tax Law* in PHILOSOPHICAL FOUNDATIONS OF TAX LAW 79, 79–98 (Bhandari ed., 2017); see also Rebecca Prebble and John Prebble, *Critical Issues in Comparative & International Taxation: Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law? A Comparative Study*, 55 ST. LOUIS L.J. 21, 21 (2010); Gardner, *supra* note 1, at 218.

5. Sources of tax law include, for example: constitutions, statutes, case law, treasury regulations, tax administration public rulings (e.g., revenue rulings), tax administration private rulings (PLRs), taxing authority notices and general counsel memoranda, and tax treaties. John T. Adney, *What are the Sources of the Federal Tax Law?*, 10 TAXING TIMES 9, 9–11 (2014).

under the laws of that system. Since most of the novel factual situations at issue in the tax context are essentially test cases manufactured by multinational firms,⁶ Ronald Dworkin's worry regarding the retroactive effect of the tax law is avoided.⁷

A ubiquitous situation in international tax practice is where existing legal norms are indeterminate with respect to factual situations manufactured by multinational firms. In these situations, the existing legal norms are incomplete or contradictory; hence, the results are null, meaning the legal norm does not yield a logical result.⁸ Gardner paraphrased such a concern over null legal results in positivist legal interpretation, as “[an argument that] there are necessarily some cases not decidable only by applying valid legal norms.”⁹ However, the broader argument developed here is that nearly all tax cases are not decidable by applying legal norms and that cases are in-

6. See Bret N. Bogenschneider, *Manufactured Factual Indeterminacy and the Globalisation of Tax Jurisprudence*, 4 U.C. LONDON J.L. & JURIS. 250, 250 (2015).

7. Gardner, *supra* note 1, at 217 (“Dworkin’s arguments were based respectively on the moral importance of the separation of powers, and the rule of law’s ban on retroactivity.”). The decision of a test case with a retroactive effect does not seem to raise any rule of law concerns because the possibility for such a test case under the tax law presupposes a rule of law. On the other hand, if we take the retroactive effect of the rule of law claim seriously, the further question arises of whether it requires a non-retroactive effect in all test cases, such that a multinational firm that raises a speculative tax interpretation would thus *not* be awarded the tax benefit retroactively *even if* successful. Furthermore, in the era of FIN48, which is a financial reporting standard that requires firms to account for uncertain tax positions, it is hard to imagine a tax issue raised as a genuine surprise to a multinational firm and its tax auditors. See *FASB Interpretation No. 48, “Accounting for Uncertainty in Income Taxes”*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/corporations/fasb-interpretation-no-48-accounting-for-uncertainty-in-income-taxes> (last visited Aug. 31, 2017). However, in the unlikely situation where a multinational firm enters into a transaction that is not done solely or primarily for tax avoidance, and a surprise issue of tax law subsequently arises that was genuinely not identified by the firm, then taxing authorities are typically authorized to abate penalties and interest.

8. As the term is used here, a decision “on the merits” means simply that a case is decided based on its specific facts. A case not decided on the merits is decided instead as a matter of legal procedure or occasionally on the grounds of a lack of legal validity. If tax cases were not generally resolved on the merits, we should indeed expect null results, meaning the lawyer or judge would conclude that tax law just does not provide a legal norm applicable to that particular factual situation. This does not occur in tax law because tax lawyers are charged to prospectively decide cases and do so. It is not necessary to say here how tax practitioners and judges decide cases on the merits. For example, this might involve a normative determination of right answers along the lines of Dworkin, or not at least some of the time, but it is enough to observe just that tax lawyers do decide cases on the merits, which is what the practice of law means. See Dennis J. Ventry, Jr. and Bradley T. Borden, *Probability, Professionalism, and Protecting Taxpayers*, 68 *Tax Law.* 83, 88–90 (2015); Rachele Y. Holmes, *The Tax Lawyer as Gatekeeper*, 49 *U. LOUISVILLE L. REV.* 185, 207 (2010).

9. Gardner, *supra* note 1, at 211.

stead decided on the merits.¹⁰ Indeed, the reference to logic does not help us very much in these ubiquitous situations of tax law analysis concerned with classifying novel sets of facts. Some positivist legal scholars have even made the hardline claim that the common law of taxation is subpar because tax results should be provided for by statute.¹¹ This flawed approach entails pretending that the scope of positive law encompasses all possible factual scenarios. The argument was rejected by G.W.F. Hegel all the way back in the year 1821 with the following statement: “It is misunderstanding which has given rise alike to the demand—a morbid craving of German scholars chiefly—that a legal code should be something absolutely complete, incapable of any fresh determination in detail”¹² This is not to say that some basic tax questions are not quickly and easily answered with legal norms. Rather, the point is solely that tax issues are notoriously difficult to resolve even on the merits. This explains the very legitimate concern of legal and tax practitioners that Logical Positivism may wrongly seep in as a means of deciding cases on the merits.¹³

Furthermore, although the content-independent analysis of legal validity as described by Gardner applies in very limited situations, most of the time tax cases do not hinge on the question of legal validity.¹⁴ For example, an analysis of legal validity would arise where a tax measure is found to be invalid on constitutional grounds. But this is a rare bird. As explained below, tax lawyers are more often concerned with a second-stage analysis of deciding cases on the merits and not legal validity.¹⁵ The analysis of the validity of legal norms described by Hans Kelsen is therefore rarely dispositive of

10. *See id.* at 211–12.

11. *See, e.g.*, Alex Easson, *Common Law Approaches to the Determination of the Source of Income: Pragmatism over Principle*, 60 BULLETIN INT’L TAX’N 495, 495 (2006) (“Common law tax statutes, however, tend not to be well drafted There seems to be a general reluctance to define the most basic concepts or terms – or, at any rate, to provide definitions that are of any use. Instead, it is left to the courts to declare what these terms means—often with surprising, and sometimes disastrous, results.”).

12. G.W.F. HEGEL, PHILOSOPHY OF RIGHT § 216 (T.M. Knox trans., Clarendon Press 1942).

13. *See* discussion *infra* Part II.

14. Gardner, *supra* note 1, at 208–09 (“Hart should have said, to get to the real point, that legal reasons (including legal norms) are reasons of a distinctively *merit*-independent type. They take their legal validity from their sources, not from their merits, and their merits for these purposes include not only the merits of their content but also the merits of their form”) (citing P. Markwick, *Law and Content-Independent Reasons*, 20 OXFORD J. LEGAL STUD. 579, 580 (2000)).

15. *See* discussion *infra* Part II.

cases in the tax context.¹⁶ Karl Llewellyn explained the tax situation very well as follows: “The *Bramble Bush*, as manifesto, tells us that the law is not a self-contained set of logical propositions; that rules of law do not explain results at law; . . . that facts are slippery things with a nasty habit of changing shape and color”¹⁷

Gardner is also keen to distinguish Legal Positivism from its erstwhile opponent in natural law.¹⁸ And, natural law seems to comprise much of the foundation of tax jurisprudence, or at least this was a line of discussion in the 1950’s, even though it is rarely discussed in these terms today.¹⁹ The natural law versus positive law debate has even been traced back to Romans 13:7, which says: “[p]ay every person what is owed to him: to whomever head tax, pay head tax, and to whomever a tribute tax, a tribute tax, and to whomever reverence, reverence, and to whomever honor, honor.”²⁰ This passage has typically been interpreted as if Paul was advising that Roman law on taxation was valid along the lines of Legal Positivism.²¹ A positivist critique of natural law and taxation would, accordingly, be the following:

Legal Positivism on Natural Law: Tax statutes passed by the legislature are potentially valid as tax law; the word of God is not valid as tax law.

However, Paul wrote that “reverence” (Greek tr. “deference”) should be given to the interpretation of the Roman taxing authority on the valid scope of the tax law.²² As a simple example, if the Roman tax collector determined that a person had 100 merchandisable livestock subject to tax, then one should not engage in unauthorized tax avoidance planning by excluding from the tax base the 40 of 100 livestock that are lame, sick, do not produce milk, and so forth. An application of the latter clauses of Romans 13:7 referencing “deference” to Roman findings of law are strictly necessary to the

16. HANS KELSEN, *THE PURE THEORY OF LAW* 10–15 (Max Knight trans., 2d ed., 1967).

17. Grant Gilmore, *Reviews: The Bramble Bush*, 60 *YALE L.J.* 1251, 1252 (1951) (discussing KARL LLEWELLYN, *THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY* (1930)).

18. Gardner, *supra* note 1, at 225–27.

19. Roger P. Peters, *Tax Law and Natural Law*, 26 *NOTRE DAME L. REV.* 29, 29 (1950).

20. *Romans* 13:7 (Original Aramaic New Testament).

21. See Bret N. Bogenschneider, *Professional Ethics for the Tax Lawyer to the Holmesian “Bad Man”*, 49 *CREIGHTON L. REV.* 775, 800 (2016).

22. See *id.* at 780.

taxing authorities in collecting tax revenue.²³ So, Romans 13:7 can also be interpreted as a first acknowledgement of legal realism in the tax context.²⁴

The remainder of this piece will address the additional 5½ problems with Legal Positivism.²⁵ The role of facts in legal analysis is covered in the first section, which serves as an introduction to the other problems.²⁶

II. THE #1 PROBLEM WITH LEGAL POSITIVISM AND TAX LAW: LEGAL POSITIVISM CENTERS ON DETERMINING WHETHER A TAX LAW IS LEGALLY VALID BASED ON ITS SOURCE. HOWEVER, IN THE TAX CONTEXT, A SECOND-STAGE ASSESSMENT IS NEARLY ALWAYS NECESSARY TO DETERMINE WHETHER THE SCOPE OF THE TAX LAW EXTENDS TO THE PARTICULAR FACTUAL SITUATION AT ISSUE. THE SECOND-STAGE ASSESSMENT MEANS DECIDING A CASE ON THE MERITS AND ENCOMPASSES THE VAST MAJORITY OF LEGAL INQUIRY RELEVANT TO DOMESTIC AND INTERNATIONAL TAX PRACTICE.

Tax planners and judges work most of the time on cases that need to be decided on the merits.²⁷ The decision of such cases serves to determine the valid scope of the tax law.²⁸ Tax lawyers are charged to resolve such cases where a case may be either a transactional issue of tax planning or an audit and litigation matter. Thus, the scope of the validity of legal norms are determined in part on the merits of individual cases premised on unique sets of facts. Tax law can then be described as characterized by two stages of inquiry:

- i. A first-stage evaluation of the general legal validity of the law; and
- ii. A second-stage evaluation of the merits of the particular case premised on factual analysis.

23. *See id.* at 800.

24. *See id.* at 785–90.

25. *See infra* Parts II–VI.

26. *See infra*, Part II.

27. *See* Gardner, *supra* note 1, at 214.

28. *Id.* (“For judge-made legal norms are no less posited than their enacted counterparts. This is acknowledged in the very idea that judge-made law is judge-made, i.e. is legally valid because some judge or judges at some relevant time and place announced it, practiced it, invoked it, enforced it, endorsed it, accepted it, or otherwise engaged with it.”).

As Gardner explained, Legal Positivism does not require any particular method of legal interpretation in the second-stage assessment of the merits of individual cases.²⁹ This may indeed be true, but it is also misleading, since Legal Positivists can still choose to apply one interpretive method or another in the second-stage, as Gardner himself did,³⁰ and it turns out that Gardner's choice of Logical Positivism is also ubiquitous in the tax context.³¹ Hence, confusion seems to arise from the conflation of the two prongs of legal analysis relating to a determination of legal validity versus an application of Logical Positivism as a method of legal interpretation to assist in deciding cases on the merits. The misuse of positivism as a means to decide cases seems to allow for some practical validity for legal philosophy, which seems to be at least tacitly encouraged by positivists, as discussed in further detail below.³² In any case, the tax literature reflects the latter approach of Logical Positivism applied as a method of legal interpretation.³³

Cynically, in applying such a logical method of legal interpretation, if the legal interpreter is aware that null logical results lead to one legal outcome, particularly the non-taxation of multinational firms, the logical method becomes the most normative method available. In that case, the presupposition of facts by mentalese determines the legal outcome under the tax law. Another common problem in taxation is illustrated by Prebble's "charge tax, or don't charge tax" dichotomy.³⁴ The flaw relates to the mischaracterization of tax law as simply setting a tax rate for charging provisions and not the legal process of determining a tax base. The determination of the tax base often requires the application of a multitude of tax code provisions and regulations in a dizzying array of possible interactions, which is essentially what tax lawyering is all about.

29. Gardner, *supra* note 1, at 213–14.

30. Gardner, *supra* note 1, at 212 n.29 (“Kelsen's denial of the possibility of legal gaps *in the sense of silences* in ‘On the Theory of Interpretation,’ *LEGAL STUDIES* 10 (1990) 127 at 132. As Kelsen rightly observes, deontic logic supplies automatic closure rules for cases in which the law fails to do so. Since these defaults are not valid on their sources but are necessary truths they are not valid as legal norms according to [Legal Positivism]. This reminds us that the view according to which judges should *only* apply legal norms is in one respect absurd. At the very least, they also need to apply the norms of logic, which are valid on their (intellectual) merits.”).

31. See Gardner, *supra* note 1, at 210.

32. See *infra* Part VI.

33. See *infra* Part III.

34. Prebble, *supra* note 4, at 84.

III. THE #2 PROBLEM WITH LEGAL POSITIVISM AND TAX LAW: LOGICAL POSITIVISM IS OFTEN ENDORSED BY LEGAL POSITIVISTS AS A METHOD OF LEGAL INTERPRETATION IN THE TAX CONTEXT.

John Prebble's description of tax law analysis is an excellent illustration of Logical Positivism applied in the tax context where one legal norm is comprised of a "charging provision" (i.e., a valid levy of tax) and another legal norm suggesting that tax should not apply (i.e., a limitation on the tax base).³⁵ Logical Positivism supposes that the method of tax law interpretation should comprise logical operation on objective categories, namely facts.³⁶ A logical contradiction can then be posited in the conflict of legal norms between the charging provision and the other legal norm, or similarly, between a GAAR and another tax law. Prebble writes, "[T]he tension between legal rules derived from GAARs and legal rules derived from relieving or other tax laws presents courts with contradictions that are in respects that are relevant for legal reasoning the same as true logical contradictions."³⁷ Logical Positivism in the tax context can then be defined here as follows:

Logical Positivism: A method of legal interpretation often applied in the tax context where the legal interpreter claims to be using logic levied on determinable categories comprising the respective facts. However, since facts are widely indeterminate in legal practice, a type of mentalese is applied within the methodology where the factual categories are verified by reference to worldly observations (i.e., finger-pointing). If pressed on the factual categories to be applied, the Logical Positivist will typically claim that facts are objectively known by some external standard, such as economics, incongruously citing a distinction between "is" versus "ought" claims.³⁸

A first immediate response to Logical Positivism is that the presupposi-

35. Prebble, *supra* note 4, at 80.

36. See Jeffrey Brand-Ballard, *Kelsen's Unstable Alternative to Natural Law: Recent Critiques*, 41 AM. J. JURIS. 133, 143 (1996).

37. Prebble, *supra* note 4, at 90.

38. See Brand-Ballard, *supra* note 36, at 142 ("Kelsen expresses the idea that law and fact are separate realms by arguing, abstractly, for the importance of separating the 'is' realm of fact from the 'ought' realm of norms, and emphasizing that law is a system of norms, and that the science of law is therefore a science of norms.").

tion of objectively-determined facts is not descriptive of the actual practice of tax law.³⁹ For example, Prebble writes, “Aristotle’s principle of non-contradiction is tolerably compelling in the field of facts. One can accept that it is at least improbable that something can at the same time both be a rabbit and not be a rabbit.”⁴⁰ Yet, it seems beyond any reasonable dispute that facts are not objectively determinate in the tax context.⁴¹ For example, hybrid legal entities are found to be both a corporation and not-a-corporation nearly all the time.⁴² Factual indeterminacy in the tax context has been defined more specifically as follows:

Factual indeterminacy in tax law is distinguishable from general legal indeterminacy. Indeterminate fact patterns often arise where a finding of a separate body of law, such as corporate law, is [to] be taken as a matter of *fact* for the application of tax law. Such situations are ubiquitous to tax practice and continuously arise in new and differing forms. An example is Original Issue Discount (OID) where a bond is issued at a discount to par value, which creates *factual* indeterminacy as to the characterization of such a discount as either interest income or capital gains (each with differing tax consequences). Other frequent examples as a matter of international taxation include hybrid debt-equity arrangements, transfer pricing of intangibles, and hybrid entity mismatches.⁴³

A second response to Legal Positivism incorporating this type of Logical Positivism relates to the legal norms derives from Kelsen’s “is” versus “ought” nomenclature adopted by Prebble.⁴⁴ The idea is that a “charging

39. Bret N. Bogenschneider, *A Philosophy Toolkit for Tax Lawyers*, 50 AKRON L. REV. 452, 491 (2016); Jules Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549, 549 (1993) (“Law is neither determinate, objective, nor neutral.”).

40. Prebble, *supra* note 4, at 83.

41. See Bret Bogenschneider, *Factual Indeterminacy in International Tax Law*, 3 BRICS L.J. 73, 77 (2016).

42. See *id.*

43. Bogenschneider, *supra* note 6, at 251 (citations omitted).

44. Prebble, *supra* note 4, at 94–95 (“What happens, as he explains there, is that without specific recognition by legal scientists (or by judges in the passage just quoted from the *Ben Nevis* case) arguments like the argument set out in the passage quoted from *Ben Nevis* move from ‘ought’ to ‘is’. There is no superior rule in the hierarchy of norms to resolve the conflict; in other words, the ‘ought’ of positive, man-made norms is exhausted. The court turns instead to the ‘is’ of the science of economics, a science that attempts to explain human behaviour causally, operating in the same manner as natural sciences and other social sciences. This invocation of ‘is’, of fact, is of course

provision” (i.e., setting the statutory tax rate) is an example of an ought claim premised on law, and therefore, is not an “is” claim premised in science or economics. If tax law does involve a finding-of-fact function, then according to Prebble it departs from legal or economic reality,⁴⁵ it becomes autopoietic⁴⁶ and may also become “incomprehensible.”⁴⁷ As Jeffrey Brand-Ballard explained: “Kelsen shares with earlier legal positivists a belief that law and morals occupy separable spheres. Kelsen breaks from earlier positivism, however, in his conviction that legal science must be purified also of factual components.”⁴⁸ This is also to say that factual categories in taxation should be determinable on an objective or verifiable basis. However, tax practice is the application of tax law to facts. Even if all sets of possible facts could be known in advance, which is surely impossible, then merely specifying a tax rate has not determined the legal issue of how or when to apply the tax. Furthermore, Prebble conspicuously does not discuss how to objectively-determine facts in positivist legal analysis other than finger-pointing to verify a factual claim, which is not an effective approach in the tax context, as discussed in further detail below.⁴⁹

To summarize, Logical Positivism is not often applicable to the actual practice of law, but is instead proposed as a means to decide the same case in the same way over and over again.⁵⁰ But, this is not what legal interpretation typically entails. The practice of tax law is concerned with classifying unique and novel sets of facts and generally not deciding the same case over and over again. Accordingly, the practice of tax law means catching on to the ways tax lawyering is conducted;⁵¹ a tax lawyer must learn the details of

anathema to the fundamental thesis of Kelsen’s pure theory of law.”).

45. John Prebble, *Ectopia, Formalism, and Anti-Avoidance Rules in Income Tax Law*, in PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS 367 (W. Krawiety, N. MacCormick & G.H. Wright ed., 1994).

46. John Prebble, *Ectopia, Tax Law and International Taxation*, 5 BRIT. TAX REV. 383–403 (1997).

47. John Prebble, *Why is Tax Law Incomprehensible?*, 4 BRIT. TAX REV. 380–93 (1994).

48. Brand-Ballard, *supra* note 36, at 141.

49. *See infra* VI.

50. *See* Jeffrey Owens, *The Role of Tax Administrations in the Current Political Climate*, INT’L TAX & INV. CTR. 6 (Sept. 2014), <http://www.iticnet.org/images/The%20Role%20of%20Tax%20Administrations%20in%20the%20Current%20Political%20Climate.pdf> (“Finally, for tax administration to effectively implement the tax laws and to ensure that MNEs and other taxpayers pay the right amount of tax, in the right jurisdiction and at the right time requires the governments provide a clear legal framework and the resources that they need to achieve this.”).

51. *See* Bret N. Bogenschneider, *Wittgenstein on Why Tax Law is Comprehensible*, 2 BRIT. TAX REV. 252, 254 (2015) (“Yet, the outsider transcendancy of the *Ectopia* theorem smells wrong to the

factual differentiation that determine legal and tax outcomes in order to decide future cases on novel sets of facts. This discussion of the epistemology of taxation will be developed more fully in the subsequent sections.⁵²

IV. THE #3 PROBLEM WITH LEGAL POSITIVISM AND TAX LAW: LEGAL POSITIVISM IS NOT NORMATIVELY “INERT” WHERE IT IS APPLIED AS A METHOD OF LEGAL INTERPRETATION; FURTHERMORE, TAX AND LEGAL PRACTITIONERS ARE NOT COMMITTED TO “NORMATIVE” MODES OF LEGAL ANALYSIS IN EVALUATING CASES ON THE MERITS.

Another prominent line of inquiry within Legal Positivism is the claim that non-positivist legal practitioners are committed to “normativity” in legal analysis. Here, the term “normative” means to include some moral content in legal analysis. Such normativity seems to be especially applicable to tax jurisprudence given its foundation in Enlightenment-era moral philosophy. However, as explained here, simply deciding a case on the merits does not render legal reasoning normative. The deciding of cases on the merits is rather the practice of law. In philosophical terms, we should say instead that legal practitioners are not committed to normativity as a method of analysis in cases any more so than Legal Positivists are committed to Logical Positivism as a method of legal interpretation. And, as Wilkie & Hogg identified, the non-“normative” approach can also be more broadly applied such that tax law can also be taken as subordinate to other areas of law.⁵³ This then pre-determines the tax law analysis based on the private law of contracts, and thereby eliminates the need for normative inquiry, however, at the cost of thereby also eliminating the discipline of tax law.

If the practice of law is taken to be inherently normative, then the real question is why Legal Positivists think that the practice of tax law could or should be non-normative.⁵⁴ As Prebble has helpfully explained in this re-

practicing tax lawyer. Tax issues are in fact resolved on a daily basis. In fact, Wittgenstein referred to ‘easy’ or routine questions of language. Tax law also gives rise to ‘easy’ or routine cases that can be resolved by the tax practitioner with little or no conscious effort at all. For example, the lawyer gives each of the following answers, reflexively and without deliberation: ‘Do I need to file a tax return to report my income?’ Answer: ‘Yes.’; ‘May I deduct my personal expenses as part of my business?’ Answer: ‘No’; ‘Is a corporation a taxpayer?’ Answer: ‘Yes’. As a practical matter, there exists ‘agreement in action’ amongst tax practitioners in many areas of the practice of tax law.”)

52. See *infra* Part IV.

53. J. Scott Wilkie & Peter Hogg, *Tax Law within the Larger Legal System*, 52 OSGOODE HALL L.J. 460, 460 (2015).

54. Gardner, *supra* note 1, at 213 (“[Legal Positivism] is normatively inert. It only tells us that,

gard, the idea seems to arise with Hans Kelsen,⁵⁵ and as Ballard has identified, Kelsen adopted it from lines of inquiry of the Vienna Circle of the 1920's.⁵⁶ Ballard writes:

For an intellectual in the Vienna of the 1920's, moral relativism was an unusually respectable premise . . . 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

insofar as judges should apply legal norms when they decide cases, the norms they should apply are source-based norms. But that leaves completely open the vexed questions of whether and when judges should only apply legal norms. Some legal positivists—one thinks particularly of Bentham—happen to be enthusiasts for limiting the role of judges in developing the law. It would be better, on this Benthamite view, if judges stuck to merely applying the law, so far as possible, and left law-making activities by and large to the legislature. Is [Legal Positivism] implicated in this view in any way? No. Bentham's preference for the legislature to make the law and judges to apply it is in fact totally independent of his legal positivism.”)

55. Prebble, *supra* note 4, at 85 (citing Kelsen, *supra* note 12, at 74 (“Since legal norms, being prescriptions (that is, commands, permissions, authorizations), can neither be true nor false, the question arises: how can logical principles, especially the Principle of the Exclusion of Contradiction . . . be applied to the relation between legal norms, if, according to traditional views these principles are applicable only to assertions that can be true or false? The answer is: logical principles are applicable, *indirectly*, to legal norms to the extent that they are applicable to the *rules of law which describe the legal norms* and which can be true or false. Two legal norms are contradictory and can therefore not both be valid at the same time, if the two rules that describe them are contradictory.”).

56. Brand-Ballard, *supra* note 38, at 140 (“There is good reason to suppose that Kelsen was a verificationist. And we can now see how the semantic thesis of verificationism supports the meta-ethical thesis of moral relativism. Since moral propositions cannot be empirically verified, they cannot be meaningful, which entails that they can be neither true nor false.”).

not literally meaningful (i.e., non-cognitive).⁵⁷

Prebble then takes the verification principle from Kelsenian theory and applies it to tax law, describing this as the “doctrine of choice” where the taxpayer determinately chooses the facts by pointing to them in a legal document created for tax planning purposes, such as a trust or transfer pricing study.⁵⁸ The doctrine of choice amounts to a denial that tax lawyers or adjudicators are authorized to make a finding of fact in tax cases according to tax law. Prebble then concludes from this in respect of GAARs as follows:

Broadly speaking, GAARs impugn the fiscal planning of taxpayers who avoid taxes without breaking the law The result is that tax applies not to the actual legal transactions that taxpayers have undertaken, that is, not to the avoidance transactions, but to notional transactions that are closer in legal form to the economic effect to what taxpayers have done.⁵⁹

Accordingly, this has the effect of eliminating the function of tax authorities or adjudicators to re-classify facts as a matter of law as part of tax law analysis, thereby once again effectively eliminating tax law analysis. Prebble’s argument to eliminate tax law is different than Wilkie & Hogg’s, however. Prebble says that tax law is not verifiable and therefore in violation of the rule of law, whereas Wilkie & Hogg argued that tax law could be supplanted by other areas of private law.⁶⁰

To summarize, the underlying concern of Legal Positivists in respect to non-normativity is the “moral relativism” concern taken from the Vienna Circle. In the tax context, the claim of moral relativism was also famously developed in principle by Jeffrey Schoenblum:

Fairness, in the sense of a just result, is not an easy concept to define. The problem of reaching an agreed upon meaning for the term is that people simply cannot agree on its meaning. Those commen-

57. *Id.* at 139.

58. Prebble, *supra* note 4, at 92 (“Broadly speaking, a GAAR may apply if (a) the taxpayer chooses the option that is fiscally cheaper and if (b) that option has some quality or other that may be impugned and that may thereby attract the GAAR: undue complexity, artificial valuations, and so on.”).

59. Prebble, *supra* note 4, at 79.

60. Wilkie & Hogg, *supra* note 53, at 462.

tators who *assume* a shared concept of fairness are manipulating the argument and should not be permitted to bypass this primary analytical step. “Fairness” connotes in day-to-day parlance what is “just,” “good,” and “right.” But these terms do not further the issue any more than does “fairness.”⁶¹

Schoenblum’s argument is essentially moral relativism applied directly in the tax context.⁶² The idea is that all moral claims about tax consequences each have equal merit, therefore, all moral claims are relative and thus invalid. For example, Rawls and Nozick both make good moral arguments about fairness in taxation; however, one cannot effectively distinguish between these arguments.⁶³ The extension of the idea not developed by Schoenblum is then that results at tax law cannot be justified based on moral theory and should be determined based on non-normative criteria contained solely within the positive law. However, Gardner gave a possible response to Schoenblum from the positivist perspective as follows:

Unlike moral and economic norms, their validity cannot be affected by their content. In saying this, Hart cooked up a red herring the scent of which still lingers. The validity of legal norms *can* depend on their content so long as it does not depend on the *merits* of their content.⁶⁴

To translate this to tax jurisprudence, a legal norm, for example, that capitation taxes are unlawful, may depend on an analysis of the content of laws, but legal analysis may not be premised on the belief that capitation taxes are morally wrong. This then leads directly into the familiar and classic debates of legal jurisprudence between Dworkin, Hart, and others, as extensively discussed by Gardner.⁶⁵ Nonetheless, the simpler argument devel-

61. 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, 258 (1995).

62. *See generally* PAUL FEYERABEND, REALISM, RATIONALISM AND SCIENTIFIC METHOD: PHILOSOPHICAL PAPERS VOLUME 1 (1981) (interpreting scientific theory and applying those views to problems in philosophy and physics).

63. JOHN RAWLS, A THEORY OF JUSTICE (Harvard Univ. Press rev. ed. 1999); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (Basic Books, 1974).

64. Gardner, *supra* note 1, at 208–09.

65. *Id.* at 214 (“If they did anything other than applying valid legal norms they would be part-time legislators, Dworkin said, and that would lay to waste the important doctrine of the separation of powers between the legislature and the judiciary. It would also condemn the law to violations of

oped here is simply that tax practitioners and judges do decide cases and it is not necessary to say how this must be done, except to say that there must be and is a positive epistemology of tax practice. The method turns out to be a malleable form of positivist inquiry based on the heuristics and practices of the tax profession. The epistemology of taxation does not include a philosophical commitment to normativity, but merely a commitment to decide cases on the merits when appropriate.

V. THE #4 PROBLEM WITH LEGAL POSITIVISM AND TAX LAW: LEGAL POSITIVISM HAS BEEN APPLIED TO CHALLENGE THE VALIDITY OF GAARS ON THE GROUNDS THAT FORMALISTIC TAX AVOIDANCE PLANNING BY MULTINATIONAL FIRMS IS JUSTIFIED BY THE “RULE OF LAW.”

As mentioned in the introductory section, a taxing authority will often issue rules that are presumptively invalid by being either flatly wrong or beyond the explicit rulemaking authority, yet to which taxpayers are well-advised to follow nonetheless;⁶⁶ at other times, a taxing authority may announce it will not enforce a valid tax law and taxpayers are thus well-advised not to follow a presumptively valid law.⁶⁷ Prebble has developed a critique of tax jurisprudence along these lines arguing that tax words and concepts are not consistently applied in practice, and that the GAAR comprises a means for tax adjudicators to decide cases by external criteria, which may be a violation of the rule of law.⁶⁸ He writes:

the rule-of-law ban on retroactive legislation, for the law made by judges would necessarily be applied by them retroactively to the cases before them. On these twin grounds Dworkin felt impelled to reject [Legal Positivism]. He famously concluded that the validity of *some* legal norms depends on their merits rather than their sources. It depends, in his view, on their merits as moral justifications for other (source-based) legal norms.”)

66. See, e.g., *Unilever Kenya Ltd. v. Commissioner of Income Tax* (2003) INCOME TAX APPEAL 753/2003 (involving a situation where transfer pricing adjustments were made without a specific transfer pricing statute). A similar issue relates to treaty override by domestic legislation which was debated in Canada recently. See Steve Suarez, *Canada to Unilaterally Override Tax Treaties With Proposed New Anti-Treaty-Shopping Rule*, 73 TAX NOTES INT’L 797, 797 (2014).

67. The foremost example of a valid law which is not enforced is the Accumulated Earnings Tax under Internal Revenue Code section 531, et seq., which is not enforced against large corporations in the United States. See Bret N. Bogenschneider, *A Proposal for Equal Enforcement of the AET*, 147 TAX NOTES 931, 933 (2015).

68. Prebble, *supra* note 4, at 91 (“Ultimately, it turns out that the criteria that have been mentioned—that is, criteria that are outside the conflicting provisions—are not criteria of law but criteria of economic substance, or sometimes of morality, as will be explained.”).

The reason is that conflict between a charging or relieving provision of tax law and a GAAR logically cannot be resolved by reasoning that is strictly legalistic; if there are conflicting provisions of law of similar status the conflict can be resolved, if at all, only by reference to criteria that are outside the conflicting provisions.⁶⁹

Prebble asserts from this that the rule of law requires disposition of cases without reference to external criteria, namely moral or economic standards.⁷⁰ However, Prebble's argument is distinguishable from modern Legal Positivism, such as described by Gardner, because of the differentiation between legal norms versus tax laws.⁷¹ Gardner explains the difference as follows: "[s]imilarly, the only morally credible rule of law ban on retroactive legislation is just that, namely a ban on retroactive *legislation*, not a ban on the retroactive change of legal norms even when that change is made in accordance with law."⁷² Thus, the answer to Prebble's rule of law critique is that legal norms may be retroactively determined based on GAARs, whereas laws may not.⁷³ Prebble also posits only a partial set in describing the hierarchy of legal norms. Prebble writes:

[a] court of final appeal may possibly resolve an issue of a contradiction between norms with a response that can hardly be called

69. *Id.*

70. *Id.* at 95 ("Principles of morality. As explained, when, together, the need to resolve conflicts between charging rules and GAARs, and the mandates of logic, require a departure from strictly legal rules, courts generally turn to economic reality, but occasionally they resort instead or as well to norms of morality."). Notably Gardner denies the rule of law critique was the position of Legal Positivism. Gardner, *supra* note 1, at 207–08 ("Legal positivists are sometimes identified as placing a particular emphasis on the ideal of the rule of law (or *Rechtsstaat*) as opposed to other ideals of government It is supposed to suggest that legal positivists insist on the evaluation of laws according to their form (e.g. their clarity, certainty, prospectivity, generality, and openness) as opposed to their content (e.g. what income tax rate they set, or what limits on freedom of speech they authorize). The label 'rule of law' is used to designate the former clutch of 'content-independent' evaluative criteria.").

71. Gardner, *supra* note 1, at 215. Gardner at one point also describes the potential for "null" results as relating to the professional duties of judges in deciding cases. However, since tax law analysis in respect of specific cases most often relates to tax planning by transactional lawyers, not judges, we are not concerned exclusively or even predominantly about the professional obligations of judges in deciding cases. *Id.*

72. *Id.* at 217.

73. *Id.* at 209 ("Thus, as Hart had correctly explained in his earlier engagements with Fuller, a legal norm that is retroactive, radically uncertain, and devoid of all generality, and hence dramatically deficient relative to the ideal of the rule of law, is no less valid *qua* legal, than one that is prospective, admirably certain, and perfectly general.").

‘law’. The decision will be binding on the parties, but it may not solve a deep conflict between norms. Such a result is indeed often the position for cases that turn on GAARs⁷⁴

But, other outcomes besides a conflict of norms are possible. As illustration, we might ask the following plausible question of tax law interpretation: What is the existing legal norm for the taxation of the online sale of eBooks? For example, if the eBook is taken as akin to a hard-copy book, then one tax norm might apply premised on the taxation of books, whereas if the eBook is taken as akin to a music download, then the tax norm for electronic purchases be thought to apply. In that case, the situation can be viewed as a conflict of norms. However, in the situation where the tax law was written long ago, before the invention of computers say, then it might more aptly be observed that the framework of the positive tax law requires a “fresh determination in detail,” to use Hegel’s terminology.⁷⁵ In other words, the positive law when drafted did not necessarily cover the taxation of eBooks. This issue can be further illustrated in the context of tax treaty interpretation.

VI. THE #5 PROBLEM WITH LEGAL POSITIVISM AND TAX LAW: LEGAL POSITIVISM HAS BEEN APPLIED TO REACH A “DOUBLE NON-TAXATION” OUTCOME BASED ON AN OVERLY-BROAD VIEW OF THE VALID SCOPE OF TAX TREATIES.

Perhaps the quintessential example of Legal Positivism applied as a method of legal interpretation is tax treaty interpretation. This method often yields a double non-taxation result for multinational firms where cross-border profits of multinational firms are taxed neither in the country of source nor residence. I have given detailed illustrations, analysis, and explanation of the concept of double non-taxation in other papers⁷⁶ and will not recapitulate that analysis here. The point is simply that as a matter of legal theory, double non-taxation can be described as a situation where a tax treaty enacted for the avoidance of double taxation (i.e., thus *not* for the achieve-

74. Prebble, *supra* note 4, at 91.

75. HEGEL, *supra* note 12 at § 216.

76. See Bret N. Bogenschneider, *The Professional Ethics of U.S. Tax Treaty Interpretation*, 8 S.J. BUS. ETHICS 237, 240–241 (2016).

ment of double non-taxation) is held to be doubly legally valid to defeat the taxing rights of *both* contracting states. This is an astonishing result because perhaps the foremost legal norm of taxation is that income should be taxed once. As I have written separately, “[a]n interpretational approach based on Kelsenian formalism ought to say that a treaty for the avoidance of double taxation covers only situations of possible *double taxation* within the framework of the treaty, and not, situations of Double Non-Taxation not covered by the framework of the treaty.”⁷⁷ However, that is not the case. The positivist analysis instead proceeds as summarized by Michael Lang in the 2004 IFA Report, as follows:

[I]t cannot generally be assumed that [Tax Treaties for the Avoidance of Double Taxation] aim at preventing double non-taxation. The reporters were accordingly critical as they pointed out each with a different emphasis that DTCs are by no means based on the idea of preventing double non-taxation and that this is true only for certain cases at the most In all these provisions, the contracting states not only intentionally tolerated but even pursued that the item of income is not taxed anywhere. A bilateral convention is based on the laws applicable in the two states at the time of its conclusion, which in correlation with the DTC leads to the emergence of double non-taxation.⁷⁸

In the context of tax treaties, an overly-broad presumption of the valid *scope* of the tax treaty analysis becomes the problem. As a matter of legal theory, where the factual inquiry is written out of legal analysis, typically pursuant to a strict Kelsenian method of legal interpretation, then legal validity becomes the only inquiry. There is then no legal inquiry regarding, as Hegel put it, a “fresh determination in detail” of novel factual situations.⁷⁹ Hence, finger-pointing to an item of income is presupposed in the interpretive method, and thus may include as facts things that did not even exist at the time the treaty was concluded, such as a hybrid debt instrument or an eBook. Hence, there is no legal analysis of scoping the legal norms to fill in the gaps. Rather, the legal analysis presupposes validity to all facts such that

77. *Id.* at 248.

78. Michael Lang, *Double Non-Taxation - General Report*, 89 CAHIERS DE DROIT FISCAL INT’L 73, 83 (2004).

79. HEGEL, *supra* note 12, at § 216.

there are no gaps in the framework of the treaty, exactly what Hegel described as the “morbid craving” of full validity.⁸⁰ Consequently, null results (where the finger-pointing does not work as a method to get consistent verification) still get classified under the treaty, thus leading to the potential for double non-taxation. This depends in practice on which article the item is then presupposed to fall under. Of course, this must be carefully planned out in practice to yield the double non-taxation result. Multinational firms are then quite clever at doing the presupposition, although it is not actually the practice of tax law as described here. The Organization for Economic Cooperation and Development has fortunately taken steps to block this type of formalistic legal interpretation.⁸¹

VII. THE #5½ PROBLEM WITH LEGAL POSITIVISM AND TAX LAW: LEGAL PHILOSOPHY OFTEN LACKS PRACTICAL VALIDITY.

The final ½ of a problem relates to the popular idea amongst philosophers that practical validity is not necessary for legal philosophy,⁸² or the corollary argument that philosophy does not bear on legal questions for various reasons.⁸³ However, as I have argued separately, philosophy does bear on legal questions⁸⁴ and legal philosophy must be relevant to law and legal practice. Otherwise, it is itself invalid or should be demoted to merely philosophy, not *legal* philosophy. The legitimate expectation among tax practitioners is accordingly that legal analysis should be both practical and salient. If legal philosophy is neither of those then it becomes unclear what legal philosophy is exactly. Gardner identified the importance of practical validity and responded as follows: “Philosophers who defend [Legal Positivism],

80. *Id.*

81. See ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, BEPS ACTION 6: PREVENT TREATY ABUSE (June 17, 2015), <http://www.oecd.org/tax/treaties/revise-discussion-draft-beps-action-6-prevent-treaty-abuse.pdf>.

82. Gardner, *supra* note 1, at 203 (“Lawyers and law teachers find this comprehensive normative inertness in [Legal Positivism] hard to swallow. They think (rightly) that legal practice is a practical business, and they expect the philosophy of law to be the backroom activity of telling front-line practitioners how to do it well, with their heads held high.”).

83. See, e.g., Brian Leiter, *The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make for Good Philosophy of Evidence*, 1997 BYU L. REV. 803, 805 (1997).

84. Bogenschneider, *supra* note 39, at 425 (“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.”).

like all other philosophers, are offering an interpretation of their subject matter that plays up the true and important and plays down the true but unimportant.”⁸⁵ Hence, a perceived lack of practical validity within Legal Positivism may amount to a difference of opinion as to what lines of inquiry are important for legal theory.

Notwithstanding its rarity in practice, an issue of pure legal validity did arise relatively recently in the tax context, which was whether the levy of an individual insurance mandate is valid as a Constitutional matter in the United States.⁸⁶ The Supreme Court held the insurance mandate not in the nature of a prohibited capitation tax and therefore valid.⁸⁷ The *Sebelius* decision has even led to some confusion since there is now legitimate doubt as to the constitutional limits of the valid scope of the Federal taxing power.⁸⁸ However, legal philosophers have not taken up the salient question of legal validity with respect to *Sebelius*. Nor have the leading doctrinal legal philosophers taken up the salient question of the legal validity of the British GAAR, which was extensively debated in tax circles.⁸⁹ Tax lawyers do find these issues important, so there is major disagreement with legal philosophers on what issues are important to the theory of tax law.

Legal philosophers are instead keenly and passionately interested in ensuring that philosophy not be misused in legal practice.⁹⁰ Philosophers consider this purity inquiry to be the most important of legal philosophy to the discipline of law. As illustration, each of *Sebelius* and the role of GAARs might be thought to be more important than the doctrinal purity of legal philosophy. Furthermore, the hyper-sensitivity of doctrinal philosophers to po-

85. Gardner, *supra* note 1, at 206.

86. Cf. Bret N. Bogenschneider, *The Taxing Power after Sebelius*, 51 WAKE FOREST L. REV. 941 (2016) (noting that despite the contention of the majority opinion in *Sebelius*, the individual mandate is a capitation tax, and by upholding it under Congress’s taxing power leaves in question the limits of that taxing power).

87. Nat’l Fed’n of Indep. Bus. v. *Sebelius*, 567 U.S. 519, 574 (2012).

88. ERIKA K. LUNDER & JENNIFER STAMAN, CONG. RESEARCH SERV., R42698, NFIB V. SEBELIUS: CONSTITUTIONALITY OF THE INDIVIDUAL MANDATE 10 (2012) (“Thus, until the Court speaks to this issue, it is not clear where that line [identifying a tax] is. Looking at those factors identified in the case as supporting the characterization of the mandate provision as a tax, some might be relatively easy to fulfill if the intent is to establish a required payment as a tax.”).

89. See Judith Freedman, *Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament*, 123 L. QUART. REV. 53, 54 (2007); Judith Freedman, *Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited*, 2010 BRIT. TAX REV. 718, 727–28 (2010); John Avery Jones, *Tax Law: Rules or Principles?*, 17 INST. FOR FISCAL STUDIES 63, 71–75 (1999).

90. Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. AND HUMAN. 79, 80 (1992).

tential misuses of legal philosophy leads to fear and trepidation amongst younger scholars. However, the view reflects a misunderstanding of the role of a university in comparison to a monastery. The fear of intellectual voyeurism then leads to the worst outcome possible, intellectual silence. For example, until very recently, Wittgenstein, Hegel, Nietzsche, Foucault, Kierkegaard, Sartre, and many others had never been applied in the tax context. The point is that the purity cure that legal philosophers offer for intellectual voyeurism is far worse than the disease.

VIII. CONCLUSION

The appropriate response to Legal Positivism today is the same answer that was given by Karl Popper to scientific positivism nearly a century ago. Popper's explanation can be modified slightly to apply to tax law as follows:

[Tax law] does not rest upon solid bedrock. The bold structure of its theories rises, as it were, above a swamp. It is like a building erected on piles. The piles are driven down from above into the swamp, but not down to any natural or "given" base; and if we stop driving the piles deeper, it is not because we have reached firm ground. We simply stop when we are satisfied that the piles are firm enough to carry the structure, at least for the time being.⁹¹

The theory of tax law serves to define the factual categories in actual practice. The theory of tax law is determined by international tax practitioners based on agreement-in-use of tax words qua Wittgenstein.⁹² Hence, tax practice amounts to a malleable positivism where the meaning of technical words are generally fixed, but subject to change based on improvements to the underlying theory, just as in science. As Popper explains:

[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 . . . Theory dominates the experimental work from its initial planning up to

91. KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 94 (Routledge Classics 2002).

92. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 242 (G.E.M. Anscombe trans., Basil Blackwell Ltd., 3d ed. 1986).

the finishing touches in the laboratory.”⁹³

This means that the “piles” must be driven ever-deeper into the “swamp” based on the theory of taxation.⁹⁴ Tax law interpretation entails knowledge of all the recent developments in tax planning and practice to which tax practitioners must accordingly be aware in order to practice law effectively. As multinational firms set out to continually manufacture novel sets of facts, this yields indeterminacy in the theory of tax law. Latham referred to the shifting of the meaning as tax lawyers work out the new problems posed by this type of tax avoidance planning.⁹⁵

The countervailing conceptions of tax law based on Legal Positivism as opposed to scientific positivism are not viable. For example, the idea of determinate factual categories to be used in tax law analysis by a presupposition of undisclosed fixed categories is a type of “mentalese” and not legal analysis. The imperialistic Legal Positivist idea based on the verification principle leads to null results in legal interpretation. The approach constitutes an extension of the 1920’s Vienna Circle idea of moral relativism where positivism is claimed to be the normatively inert alternative to normative analysis. This is wrong because tax interpretation depends on finding the respective facts, which involves deciding cases on the merits. For example, relativism leads to an “anything goes” approach where all legal practice would be seen as just whatever judges happen to decide to do in cases. To the contrary, there must be positivist “piles” in the “swamp” premised on existing theory of tax law.⁹⁶ This is why some legal questions can be quickly and easily answered, but the theory is always tentative. In the terms of legal theory, GAARs constitute the reservation of such a tentative aspect of legal theory.

We should also ask whether the Legal Positivists are correct that legal validity can always be determined in tax cases based on source and not merits. The answer to that question is no. In the tax context, the same tax result could be obtained with combinations of taxes ostensibly labelled as some

93. POPPER, *supra* note 91, at 90.

94. *Id.* at 94.

95. Craig Latham, *A Tax Perspective on the Infrastructure of Regulatory Language and a Principled Response*, 2012 BRIT. TAX REV. 65, 73 (2012); *see also* Menahem Pasternak & Cristophe Rico, *Tax Interpretation, Planning, and Avoidance: Some Linguistic Analysis*, 23 AKRON TAX J. 33, 38 (2008) (“Indeed, one person can use language wrongly, but a continuous and persistent ‘misuse’ is not a misuse, but rather language evolution.”).

96. POPPER, *supra* note 91, at 94.

other type of tax (e.g., poll, property, head, or capitation tax).⁹⁷ If one type of tax is legally invalid based on source (e.g., capitation taxes), and others valid based on source (e.g., property taxes), then combinations of valid types of taxes (e.g., property plus insurance mandate) might be (and have been) devised to achieve the invalid result. At the minimum, we must conclude that the content of the law, to include the consequences, must be a relevant factor in determining legal validity. A decision on the merits depends on how to measure the consequences, which is rightfully the source of much disagreement. Such an evaluation of the consequences is typically done using moral criteria, but not always, as the results often depend on raw accounting with a spreadsheet of debits and credits resulting from a particular tax law, for example, and occasionally the positive methods of science even sneak in to tax interpretation.

Accordingly, much of tax jurisprudence comprises a formal denial of the idea that legal validity can be established without reference to the effects or consequences of the legal interpretation, where the measure of consequences is typically given with reference to Locke,⁹⁸ Rawls,⁹⁹ economics,¹⁰⁰ behaviouralism,¹⁰¹ Libertarianism,¹⁰² utilitarianism,¹⁰³ natural law,¹⁰⁴ psycholo-

97. Bogenschneider, *supra* note 86, at 965–66 (“Furthermore, in tax analysis, we are not simply naming types of taxation with some proscribed dictionary definition. Such a formalist approach was, however, adopted in the Roberts opinion in its definition of ‘capitation’ tax. A similar approach might also be contemplated with regard to poll or property taxes. However, a substantive, non-formalist approach to the classification of tax types is actually strictly necessary to have a coherent legal methodology in respect to taxation. As a hypothetical, suppose a government imposed a voting mandate (as currently in force in Australia) and then levied a poll tax. A relevant question is accordingly whether a combination of mandate plus poll taxes would be a capitation tax. Probably so. What if the government imposed a capitation levied on persons actually registered to vote? Would that capitation also be a ‘poll’ tax? Probably so. What if the government gave the right to vote solely to property owners, and then levied a tax on registered voters? Would that be a ‘property’ tax? Probably so. The categories of taxation are clearly interchangeable in substantive effect. This aspect of tax law requires a substantive analysis, not a purely formal analysis as applied at least in the beginning sections of the *Sebelius* opinion.”).

98. See generally Richard A. Epstein, *Taxation in a Lockean World*, 4 SOC. PHIL. & POL. 49 (1986) (employing the philosophy of John Locke to contend that taxation is a form of coercion and that limitations of the state’s taxation power should protect the liberty of its citizens).

99. 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).

100. See, e.g., Arnold C. Harberger, *The Incidence of the Corporation Income Tax: A Lawyer’s View of a Problem in Economics*, 70 J. POL. ECON. 215, 578 (1962).

101. See generally Richard Thaler and Cass Sunstein, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003) (using behavioural economics to support the concept of steering people toward beneficial outcomes without removing their freedom of choice).

102. See, e.g., Jennifer Bird-Pollan, *Death, Taxes, and Property (Rights): Nozick, Libertarianism,*

gy,¹⁰⁵ scientific methods,¹⁰⁶ or even common-sense.¹⁰⁷ This debate on the consequences comprises a legitimate disagreement over how such effects of tax law should be measured and evaluated. This is to say that legal validity often cannot be determined without reference to external criteria of some sort.

In conclusion, tax law is indeed positivist, but that positivism is not what legal philosophers present as Legal Positivism. Legal Positivism does not achieve the goal that Gardner sets for it in determining legal validity based on source alone. The methodology of Legal Positivism is further subject to abuse where Logical Positivism wrongly seeps in as a method of legal interpretation, with the primary example being tax treaty interpretation. The relevant positivism within tax law is instead an epistemology of legal interpretation applied by tax lawyers, where the knowledge and practices of legal practitioners are the positivist aspect of tax law relevant in determining the classification of novel sets of facts. It is this epistemology within the practice of tax law that comprises its core feature and that must be preserved and defended by tax lawyers as the essence of what it means to practice tax law.

and the Estate Tax, 66 MAINE LAW REV. 1, 16–18 (2013).

103. *See, e.g.*, LOUIS KAPLOW, *THE THEORY OF TAXATION AND PUBLIC ECONOMICS* 45 (Princeton Univ. Press, 2011).

104. *See, e.g.*, Roger P. Peters, *Tax Law and Natural Law*, 26 NOTRE DAME L. REV. 29, 30 (1950).

105. *See generally* ERICH KIRCHLER, *THE ECONOMIC PSYCHOLOGY OF TAX BEHAVIOUR* 1, 3 (Cambridge Univ. Press, 2007) (examining the psychology behind taxing authority, taxpayer action, and the corresponding behavioral patterns).

106. *See, e.g.*, Bret N. Bogenschneider, *Tax Incidence and Scientific Inquiry*, 7 J. PHIL. INT'L L. 26, 29–30 (2017).

107. *See, e.g.*, ROBERT MCGEE, *THE PHILOSOPHY OF TAXATION AND PUBLIC FINANCE* 52 (Kluwer, 2003).