BUREAUCRATIC PRAXIS

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INTRODUCTION

This Article describes bureaucratic applications of tax law in terms of social theory. As a matter of statutory design, tax law traditionally imposes penalties to deter noncompliance, implicitly

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adopting a neoclassical cost-benefit model.[1] With increasing influence, behavioral economics has called this model into question.[2] Rather, a variety of social and psychological factors contribute to a taxpayer's compliance decision. At the same time, there is a dearth of literature on the corresponding behavior of those charged with enforcing compliance.[3] A myope would view the collector's work as mere assessment of an amount certain, given the complexity of the tax law as well as the practical hermeneutics inherent in applying this law to the vagaries of social and economic life.

A detailed, sympathetic, if not wholly ethnographic approach to the real behavior of tax collectors (so to speak) as well as taxpayers can fill gaps in the standard model. A resulting post-realist question would be: what does the tax agency do in practice? While taxpayers may arrive at practical solutions to exegetical conundra under the tax Code, tax administrators, in turn, may countenance, condone, or "tolerate" practices, as authorized by statute. Tolerance preserves formal legal rationality, as conceived in classic terms of social theory, by allowing bureaucrats to act as if the rules were gapless. In particular, this Article sets forth cases in which tax law may be culturally if not financially counterintuitive to taxpayers, who arrive at practical resolutions tolerated by bureaucratic agents. While these resolutions may depart from the letter of the law under certain provisions, they are not unaccounted for by social theory.

Part I of this Article supplies background for an interdisciplinary perspective on tax law that focuses on practical application, rather than statutory analysis or revenue policy. Part II identifies social theories that inform this particular inquiry. Part III sets forth general legal rules and policies in the context of hypothetical or exemplary cases concerning certain tax provisions.

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[1] *See* Marjorie E. Kornhauser, *A Tax Morale Approach to Compliance: Recommendations for the IRS*, 8 FLA. TAX REV. 599 (2007) (surveying literature).

[2] *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008); Daniel Kahneman & Amos Tversky, Prospect Theory: An Analysis of Decisions Under Risk, 47 ECONOMETRICA 263 (1979).

[3] While it is difficult to prove a negative, Prof. Brownlee has lamented that *"[w]e do not have a scholarly history of the Internal Revenue Service."* W. ELLIOT BROWNLEE, *Federal Taxation in America: A Short History* 2nd ed. 125 n. 20 (Cambridge Univ. Press, 2004).

Part IV applies the theories to the cases. Ideally, a legal system may form an internally coherent whole, while realistically, bureaucrats and other legal practitioners informally countenance or formally "tolerate" inconsistencies to preserve a gapless effect. This maneuver creates space for practical resolution of taxpayer claims.

Moreover, the social theories applied to taxation in this Article are general propositions about bureaucracy. Consequently, this Article suggests bureaucratic praxis as a topic for further research throughout administrative law. Bureaucratic praxis is the counterpart to taxpayer decision-making as rendered by behavioral economics. The Article concludes that terms of classical and post-modern social theory can illuminate government administrators' construction of tax law.

I. INTERDISCIPLINARY BACKGROUND

This Part explains how tax compliance was traditionally framed as a question of deterrence. Then behavioral economics pointed out that the rational actor model could not account for compliance in the real world, especially where penalties would not outweigh benefits of noncompliance. Consequently, the traditional framework gives way to interdisciplinary approaches under the umbrella of fiscal sociology, which in turn is broad enough to encompass fiscal operation as well as taxpayer compliance.

A. Tax Law

Traditionally, compliance with the law, and tax law in particular, has been a matter of a cost-benefit analysis in a neoclassical mode, resulting in deterrence. Thus,

> standard economic analysis frames a tax compliance decision as a comparison between (1) the cost of paying tax and (2) the difference between the benefit of avoiding the tax and the cost of the imposition of tax, interest, and penalties, risk-adjusted for the possibility that the government will successfully challenge the tax avoidance strategy.[4]

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[4] Susan Cleary Morse, Stewart Karlinsky & Joseph Bankman, *Cash Businesses and Tax Evasion,* 20 STAN. L. & POL'Y REV. 38, 39 (2009) (fn. omitted).

However, the penalty for ordinary tax transgressions is small; "the probability of detection is trivial; so the expected sanction is small. Yet large numbers of Americans pay their taxes."[5] Since the traditional "model does not provide a complete picture of taxpayer compliance or the reasons for variations in taxpayer compliance ... Substantial behavioral research, including contributions from sociology and psychology, deepens the analysis".[6] Consequently, the question of actual taxpayer behavior is open to alternative approaches.

Moreover, traditional deterrence analysis calls to mind "the technique of power"[7] observed by post-modern historians after the British philosopher Jeremy Bentham of the eighteenth-century Enlightenment period, when many principles of Anglo-American law were enunciated. To assure "the automatic functioning of power … Bentham laid down the principle that power should be visible and unverifiable."[8] Foreshadowing deterrence by apparently arbitrary audit selection techniques, Bentham suggested that a subject "must never know whether he is being looked at at any one moment; but he must be sure that he may always be so."[9] Not only does the traditional deterrence model occlude real behavior, but it also focuses exclusively on the taxpayer as the subject of a legal regime. The model thereby obscures the technicians of power, so to speak.

B. Behavioral Economics

As noted, behavioral economics has expanded beyond the rational actor model by emphasizing social and psychological reasons for individuals' choices. In the case of taxation, two exemplary provisions are cited in the popular yet authoritative behavioral economic monograph *Nudge.*[10] On deterrence, the Minnesota tax agency increased compliance by informing taxpayers that most Minnesotans fully complied with their tax

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[5] Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1782 (2000) (fn. omitted).
[6] Morse, *et al., supra* n. 4.
[7] MICHEL FOUCAULT, DISCIPLINE & PUNISH 199 (1979).
[8] *Id*. at 201.
[9] *Id*.
[10] *See* THALER & SUNSTEIN, *supra* n. 2.

obligations.[11] On incentives, enrollment by default in tax-favored pension plans has been championed by a particular Tax Policy official in the Clinton and Obama Treasury Departments.[12] Now that behavioral economics has gone beyond the neoclassical model, the path is clear for further steps.

C. Fiscal Sociology

An interdisciplinary rubric for further inquiry into bureaucratic praxis in tax law is offered by fiscal sociology.[13] Focusing on tax history, this nomenclature is both broad and narrow. Literally, fiscal policy could extend to appropriation and budget execution, while sociology may be synechdoche for social science in general. Nonetheless, tax history is core to the study of socio-economic structure because taxation "establishes one of the most widely and persistently experienced relationships that individuals have with their government and – through their government – with their society as a whole."[14] Fiscal sociology restores a discourse on "questions about the social or institutional roots or consequences of taxation" that twentieth-century

"historians, sociologists, legal scholars, and political scientists … had surrendered … to economists," who in turn excluded those questions from "the study of public finance."[15] Thus, fiscal sociology is poised to address questions unanswered by the neoclassical model that has been problematized by behavioral economics.

Assuming a focus on taxation, history may trace discrepancies between doctrine and event, or connections between organizations and people. History can explain results over time, accomplishing diachronically what sociology, psychology, or anthropology may do synchronically. Anthropologists, especially those of a post-modern orientation, have found explanatory power

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[11] THALER & SUNSTEIN, *supra* n. 2, at 66.

[12] *Id.* at 115.

[13] Joseph Schumpeter, *The Crisis of the Tax State*, 4 INT'L ECON. PAPERS 5 (1954). The term "fiscal sociology" was coined or at least elaborated by the illustrious economist.

[14] ISAAC WM. MARTIN, AJAY K. MEHROTRA & MONICA PRASAD, *The Thunder of History: The Origins and Development of the New Fiscal Sociology*, THE NEW FISCAL SOCIOLOGY: TAXATION IN COMPARATIVE AND HISTORICAL PERSPECTIVE 3 (2009).

[15] *Id.* at 6.

in making social life strange, *viz*. questioning premises.[16] Similarly, legal scholars have recommended imitating "the artist who makes the familiar strange, restoring to our understanding of our situation some of the lost and repressed sense of transformative opportunity."[17] To those who must apply them in concrete cases, rules can present an opportunity. For the law, and particularly tax law, performs both descriptive and prescriptive functions, constituting a richly textured ideology of everything from account ownership to domestic relations.

To make an apparently monolithic regulatory bureaucracy strange, imagine how historians of the future will diagnose its failures as well as successes yet to come. In short, the methodologies evoked by fiscal sociology could encompass bureaucratic practice as well as taxpayer economic behavior.

II. SOCIAL THEORY

Given the interdisciplinary rubric of fiscal sociology, this Part situates the instant inquiry into tax bureaucracy as one of ethnographic reality, within classic terms of social theory. These terms characterize a modern legal system not with respect to substantive discretion but rather formal rationality, in which bureaucrats should be interchangeable. In what is described below as praxis, bureaucrats nevertheless make unique if interstitial decisions in a manner of the sort traditionally described by the micro-social science methodology known as ethnography. Thus, this Part explains the concept of bureaucratic praxis as intended in this Article.[18]

A. Bureaucracy, Formality & Realism

Classic terms of social theory come from the work of turn-of-the-century German legal scholar Max Weber, who made a number of relevant observations about bureaucracy that were to form part of the foundation of the discipline of sociology, which in

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[16] GEORGE E. MARCUS, LIVES IN TRUST: THE FORTUNES OF DYNASTIC FAMILIES IN LATE TWENTIETH-CENTURY AMERICA 3 (1992).

[17] ROBERTO M. UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 133 (1996).

[18] For a complementary sociological perspective, *see* Richard Harvey Brown, *Bureaucracy as Praxis: Toward a Political Phenomenology of Formal Organizations*, 23 ADMIN. SCI. Q. 365 (1978).

turn would give rise to fiscal sociology. In pertinent part, he observed that formal standardization allowed government offices to administer a large volume of cases efficiently and dispassionately but at a cost of substantive discretion, *i.e.* "without regard for persons" in a "dehumanized" manner.[19] Furthermore, Weber characterized modern, formal, legal reasoning in terms of "a 'gapless' system of legal propositions, or … at least," one "treated as if it were such a gapless system" in which "every social action of human beings must always be visualized as either an 'application' or 'execution' of legal propositions, or as an 'infringement' thereof."[20] Whether or not a case fits the law, bureaucrats act as if it does.

At the same time, legal realists in America reacted against legal formalism with the theory that "an accurate statement of law is equivalent to an accurate prediction of what the court will do."[21] Paradoxically, a theoretical conception of bureaucratic law as formality may facilitate realistic if tacit acceptance of practical resolutions.

B. Praxis

The post-realist question would be: what does the tax agency do in practice? In the case of the U.S. Government, the IRS has a variety of authorities to settle disputes short of a judicial decision, *e.g.* closing agreements, offers-in-compromise, and alternative dispute resolution (ADR).[22] Since settlements and ADR are not unique to taxation, the concept of bureaucratic praxis explained below should apply to other areas of administrative law, although these lie beyond the scope of this Article. As behavioral economics discerns individual taxpayers' real motivations, ethnographic or otherwise realistic observation would reveal the actual workings of the bureaucratic apparatus.

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[19] Max Weber, *Bureaucracy* [1913], FROM MAX WEBER: ESSAYS IN SOCIOLOGY, trans. H.H. Gerth & C. Wright Mills (Oxford Univ. Press, 1946) 215-16; *see also* JOHN R. SUTTON, LAW/SOCIETY: ORIGINS, INTERACTIONS, AND CHANGE (2001).

[20] MAX WEBER, E*conomy & Law (Sociology of Law)* [1925], 2 ECONOMY & SOCIETY, 657-58 (Guenther Roth et al. eds., 1978).

[21] Brian Leiter, *Legal Realism*, *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 1996) 261, 262; *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY ch. 8 (1992).

[22] *See* 26 U.S.C. §§ 7121-7123 (2006).

To address the actual conduct of bureaucrats, consider the term *praxis,* meaning "practice, as distinguished from theory" or "accepted practice or custom."[23] A particular usage of this term was coined by the Italian writer Antonio Gramsci, who addressed questions of doctrine and consciousness among the populace during the early twentieth-century development of the bureaucratic state.[24] In particular, Gramsci criticized contemporary scientific management attributed to the American engineer Frederick Winslow Taylor, who led the way to routinization of office work as well as manufacturing.[25] Taylorism requires a scrivener to "'forget' or not think about the intellectual content of the text he is reproducing."[26] Nevertheless, Gramsci insisted on the intellectual content of routine praxis.

Gramsci's terms can suggest insight into the mind of a bureaucrat who mediates between formality and reality.[27] That is,

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[23] *Praxis Definition,* OXFORDDICTIONARIES.COM, http://perma.cc/T5S3-CKYN (last visited Sep. 24, 2013).

[24] *See* Antonio Gramsci, PRISON NOTEBOOKS [1929-35] (NY: Colum. Univ. Press, 2007); *see also* Attilio Monasta, *Antonio Gramsci (1891-1937),* 23 PROSPECTS: Q. REV. COMP. EDUC'N 597 (Paris: UNESCO, 1993).

[25] "Under the old type of management success depends almost entirely upon getting the 'initiative' of the workmen, and it is indeed a rare case in which this initiative is really attained. Under scientific management the 'initiative' of the workmen (that is, their hard work, their good-will, and their ingenuity) is obtained with absolute uniformity and to a greater extent than is possible under the old system

… The managers assume … the burden of gathering together all of the traditional knowledge which in the past has been possessed by the workmen and then of classifying, tabulating, and reducing this knowledge to rules, laws, and formulae". FREDERICK W. TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911); *see also*

Robert Kanigel, *Taylor-made*, 37 THE SCIENCES 18 (NY Acad. of Sci. 1997); MICHAEL MACCOBY, THE LEADERS WE NEED 22-23 (2007).

[26] *Taylorism and the Mechanization of the Worker*, ANTONIO GRAMSCI READER: SELECTED WRITINGS, 1916-1935 (David Forgacs et. al. eds. 2000).

[27] While the cited sources may be eclectic, an exhaustive intellectual genealogy of bureaucrats' role in society lies beyond the scope of this paper. Suffice it to say that basic texts of great civilizations could be adduced to this point. *See e.g.* Confucius, ANALECTS (trans. James Legge, 2002) 2:3 ("If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by the rules of propriety, they will have the sense of shame, and moreover will become good."); DANIEL 1:4, 8 ("skilful in all wisdom, endowed with knowledge, understanding learning, and competent to serve in the king's palace … But Daniel resolved that he would not defile himself with the king's rich food, or with the wine which he drank"); *see also* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989); CORNELIUS KERWIN, RULEMAKING (1994).

a bureaucrat or other practitioner may have a "thin" description that justifies his or her actions.[28] Gramsci's terms would be generous enough to encompass the bureaucrat's self-conception. Gramsci referred to "a fusion, a making into one, of 'philosophy and politics,' of thinking and acting, in other words … a philosophy of praxis … the only 'philosophy' is history in action."[29] As a practitioner, the bureaucrat lacks time for formal philosophy, yet needs enough rationalization to ensure consistency.

An organic usage of the term "intellectual" like Gramsci's captures the sentience of a bureaucrat. Everyone, even those who do not "have in society the function of intellectuals,"[30] Gramsci wrote, "carries on some form of intellectual activity, that is, he is a 'philosopher,' an artist, a man of taste, he participates in a particular conception of the world, has a conscious line of moral conduct, and therefore contributes to sustain a conception of the world or to modify it."[31] Although assigned to a routinized task, a bureaucrat is nonetheless a thinking human being to whom work must make sense.

C. Ethnographic Reality

The post-realist question may make sense in terms of the difference between formality and reality, rule and practice, or in a word, praxis. As a practical matter, bureaucrats are thrust into the position of reconciling law with fact in the first instance. They must act, and their actions would afford conscientious observation of when people say one thing yet do another. Naturally, this makes for an ethnographic exercise or simply a "reality check" within organizational behavior or government.[32] Canonically, ethnography was "the study by direct observation of the rules of custom as they function in actual life."[33] More generally,

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[28] MARCUS, LIVES IN TRUST, *supra* n. 16, at 71.

[29] GRAMSCI, *Notebook 7*, PRISON NOTEBOOKS.

[30] GRAMSCI, *Formation of Intellectuals,* NORTON ANTHOLOGY OF THEORY & CRITICISM 1140 (Vincent Leitch et. al. eds. 2001).

[31] *Id.* at 1141.

[32] On ethnography, *see* HANDBOOK OF METHOD IN CULTURAL ANTHROPOLOGY (R. Naroll et. al. eds., 1970).

[33] BRONISLAW MALINOWSKI, CRIME & CUSTOM IN SAVAGE SOCIETY 125 (1926) (recommending certain anthropological field-work to ethnographers of law).

ethnography evokes holistic participant observation of social action in the context of cultural symbols.[34]

Methodologically, there is precedent for this exercise. A particular brand of political anthropology known as "ethnography of the state" takes as a distinguishing concern the generation of culture by civic administrations. For instance, anthropologists, following Emile Durkheim, the seminal nineteenth-century social scientist, have observed how civil bureaucrats refer to their employer as a super-ordinate entity.[35]

More recently, anthropologists have coined the term "para-ethnography" for the observations of participants in their own societies. They are

> reflexive subjects whose intellectual practices assume real or figurative interlocutors. We can find a preexisting ethnographic consciousness or curiosity, which we term para-ethnography, nested in alternative art space in Tokyo or São Paolo, at an environmental nongovernmental organization (NGO) in Costa Rica, the central bank of Chile and the headquarters of the major pharmaceutical firm in Zurich or Mumbai.[36]

Para-ethnography aims "to integrate fully our subjects' analytical acumen and insights to define the issues at stake in our projects as well as the means by which we explore them."[37] Encompassing subjects in modern institutions, para-ethnography would not only apply to bureaucrats but would share with Gramsci an organic sense of their inherent intellect as reflexive interlocutors.

In short, bureaucratic praxis is a routine yet meaningful activity of the sort that would constitute ethnographic reality. This Article does not propose to create an empirical ethnography but rather to suggest that published rulings and other cases,

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[34] *See generally* CLIFFORD GEERTZ, INTERPRETATION OF CULTURES (1973).

[35] *See generally* Michael Herzfeld, THE SOCIAL PRODUCTION OF INDIFFERENCE: EXPLORING THE SYMBOLIC ROOTS OF WESTERN BUREAUCRACY (Chicago Univ. Press 1992); Emile Durkheim, DIVISION OF LABOR IN SOCIETY [1893] 56 (Free Press 1984).

[36] Douglas R. Holmes & George E. Marcus, *Collaboration Today and the Re-Imagination of the Classic Scene of Fieldwork Encounter*, 1 COLLABORATIVE ANTHRO. 81, 82-3 (2008).

[37] *Id.* at 86.

discussed below, are the archival evidence of what must have been a social process of the same sort that ethnographers record. This process of bureaucratic praxis would be the counterpart to taxpayer decision-making contemplated by behavioral economics as discussed above.

III. RULES, POLICIES & EXAMPLES

Statutory, administrative, and hypothetical examples illustrate the practicalities of tax administration. The examples proceed in the context of statutory rules and administrative policies by which bureaucrats may resolve certain controversies.

A. Tit. 26, Ch. 74

The tax law grants authority for closing agreements in which the IRS and taxpayers settle differences,[38] compromises in which the IRS accepts an amount offered by a taxpayer in an uncertain case,[39] and ADR by mediation or arbitration.[40] These three statutes, contained in Chapter 74 of the Internal Revenue Code, underscore the power of the tax collector to make practical judgments. While there are requirements, caveats, and conditions on this power, at the end of the day, someone in the IRS can split the difference.[41]

B. Tolerances

As a practical matter, the Government cannot examine every tax return. As a matter of public knowledge, only about 1 percent of 143 million tax returns of individual taxpayers are audited by the IRS.[42] Audit selection is accomplished by algorithms that identify returns likely to yield significant additional tax upon examination.[43] Obversely, minimal discrepancies are subject to

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[38] *See* 26 U.S.C. § 7121 (2006).

[39] *See* 26 U.S.C. § 7122 (2006).

[40] *See* 26 U.S.C. § 7123 (2006).

[41] *See* 26 C.F.R. §§ 301.7121-1, 301.7122-1, Proc. & Admin. Regs. (2012); Michael I. Saltzman & Leslie Book, IRS PRACTICE & PROC. (Thomson/Res. Inst. of Amer. 2010), ch. 9.

[42] IRS Pub. 55B, *Internal Revenue Service Data Book* (2012), Table 9a at 22.

[43] *See* Int. Rev. Man. 4.1.1.3 (Oct. 24, 2006); Saltzman & Book, IRS PRACTICE & PROC., *supra* n. 40, ¶ 8.03.

"tolerances." As the Treasury Inspector General for Tax Administration (TIGTA) explains:

> The IRS does not have the resources to address every identified case of potential taxpayer noncompliance and must apply its limited resources to areas in which noncompliance is greatest, while still maintaining adequate coverage in other areas. Therefore, the IRS sets tolerance levels to control the volume of cases requiring follow-up actions by IRS employees so that all selected cases can be handled. * * * * * Tolerance levels are dollar figures established by the IRS that trigger an action such as corresponding with taxpayers for forms and schedules.[44]

As both a practical and formal matter, then, noncompliance may fall within a level of "tolerance." To be sure, a violation that falls within a tolerance is nevertheless a violation.

C. Cases

The following examples are practical illustrations of disjunctures between tax rules and social reality focusing on familiar or domestic fact patterns. Similar hypothetical cases could apply to business or corporate taxes.[45]

1. Marriage

In general, taxpayers who are married on December 31 cannot come under the tax rates, standard deduction, and other provisions for single individuals.[46] Newlyweds may not be aware of this Federal tax law, especially in the year of marriage. In the

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[44] TIGTA, *The Internal Revenue Service Needs to Evaluate Tolerance Levels to Ensure that Program Objectives Are Met*, No. 2008-30-158 at 1 n.1, 2 (Sept. 16, 2008).

[45] While extensive elaboration is beyond the scope of this Article, corporate tax planning would be couched in a rhetoric of ethics and tax shelters. In the financial districts of major cities, tax law practice comprises an art of drafting opinion letters to the effect that a tax plan (well-advised avoidance) would not amount to a tax shelter (improper evasion). What may be "nudges" for individuals would be choreography for corporations. *See generally* Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859, 862 (1982) ("there is a living to be made by aligning the interests of clients with the movements of the Code, however jagged or circuitous these turn out to be").

[46] *See* 26 U.S.C. § 7703 (2006).

United States, marriage is a matter of State law, registered in municipalities or counties around the country.

Newlyweds, especially those who would be subject to a marriage penalty, may neglect to file jointly, especially in the year of marriage. While an examiner could ask to see a marriage license upon identifying a tax return for audit, historically no centralized marriage registry in the U.S. facilitated mass verification of filing status. As a practical matter, improper filing status could go unchecked given innocuous circumstances. In unusual circumstances, marital filing status could be a subject of examination and even litigation.[47] Thus, a gap emerges between tax administration *de facto* and the tax Code *de jure.*

2. Catch-22 Deadlines

Commonly, employers withhold from wages payroll taxes for Social Security and Medicare contributions.[48] For withholding in excess of ultimate liability, employees claim a refundable credit on their individual tax returns, resulting in tax refunds ubiquitous in the American experience of personal finance.[49] Generally, individuals file these returns on April 15 following the calendar year of employment, yet under a statute of limitations have up to three years to claim a refund.[50] Likewise, the IRS generally has three years to assess additional tax, but six years in case of certain omissions.[51]

Suppose that an individual, who for whatever reason feels a delayed compulsion into compliance, reports additional earnings four years *post hoc*. The IRS still may assess additional tax, but the individual would be precluded from claiming a corollary withholding credit. This Catch-22 may be a disincentive to reporting income late. This disincentive challenges the practical logic of tax administration. Depending on the circumstances, it is

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[47] *See Boyter v. Comm'r of Int. Rev. Serv.,* 74 T.C. 989 (1980) remanded by 668 F.2d 1382 (4th Cir. 1981) (denying relief to couple who before successive remarriages serially divorced at year-end to avoid marriage penalty).

[48] *See* 26 U.S.C. § 3402 (2006).

[49] *See* 26 U.S.C. § 31 (2006).

[50] *See* 26 U.S.C. § 6511 (2006).

[51] *See* 26 U.S.C. § 6501 (2006).

conceivable that a withholding credit could be allowed even in a case of a late-reported omission.

For example, in an unpublished case, the U.S. Tax Court decided as follows. In the context of many other issues, the taxpayer in that case filed his 1984 return late on Nov. 3, 1987, whence the IRS contended that the six-year statute of limitation on assessment applied due to the prior substantial omission of reporting. Nevertheless, the Tax Court credited withholding on a Form 1099 information return from a third-party payer against income on that Form 1099.[52] This common-sensical solution, in the face of seemingly contradictory technical rules, by the Tax Court, a tribunal whose judges are confirmed by the U.S. Senate for technical expertise, serves as a model for what comparatively low-level IRS employees may do in practically resolving everyday problems that never will become publicly reported or have precedential effect.[53]

3. Joint Interest

In general, a Treasury Regulation requires a taxpayer who receives an information report on interest from a joint account to issue a Form 1099-INT, *Interest Income,* as to the joint owner, unless he or she is a spouse.[54] This regulation may be unrealistic for various types of joint owners, such as adult children who access accounts for elderly parents. Moreover, the tax law's characterization of couples as either single or married may not adequately capture the economic reality of innocent spouses, domestic partners, or persons of the opposite sex sharing living quarters.[55]

As a practical matter, individuals who do not have the skills to file information returns may not find it worthwhile to acquire those skills only for a personal asset owned with another member of the household. As the applicable regulation waives penalties on a taxpayer who never before had to file the information report,

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[52] *Hall v. Comm'r of Int. Rev.*, T.C. Memo. 1996-27, 71 T.C.M. 1869 (CCH) (1996).

[53] *See* 26 U.S.C. § 7443(b) (2006) (on the Presidential appointment of Tax Court judges).

[54] *See* 26 C.F.R. § 1.6049-4(f)(4)(i), Income Tax Regs. (2013).

[55] *See* Anthony Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 STA. CLARA L. REV. 763 (2004).

anecdotally, information reporting penalties are rarely imposed on individuals.[56] Thus, the joint interest regulation presents another case where the law may go routinely unobserved.

4. Reported Conspiracy

In general, individual taxpayers report their own income, or if married filing jointly, their joint incomes. Taxpayers who are married filing separately (MFS) report their own income, but if they live in a community property State, they may have to split income. These rules are memorialized in the Internal Revenue Manual (IRM), a handbook for IRS employees.[57]

In recent years, California granted community property rights to registered domestic partners (RDPs) who are not married. Consequently, a revision to the community property IRM,[58] based on a Memo from the IRS Office of Chief Counsel (CC),[59] indicated that RDPs file individually but split community income. Nevertheless, there was no parallel update to the applicable Error Resolution IRM.[60]

Income-splitting on a tax return other than one of a taxpayer who is MFS generally would be an "invalid condition" within the meaning of the Error Resolution IRM. Until California (along with the States of Washington and Nevada) granted these rights to RDPs, it had been impossible for unmarried individuals to have community property. Assuming that employees performing the Error Resolution function at the IRS literally had not gotten the legal Memo that was to be incorporated into their IRM, this function duly rejected income-splitting RDP returns as invalid. That is, the submission processing of invalid returns, which may be subject to summary assessment to correct errors on their face, was suspended during correspondence with taxpayers to resolve

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[56] *See* 26 C.F.R. § 301.6724-1(b)(1), Proc. & Admin. Regs. (2012).

[57] *See* Int. Rev. Man. 25.18 (2013).

[58] *See* Int. Rev. Man. 25.18.1.2.3 (Mar. 4, 2011); *see also* Int. Rev. Man. 21.6.1.4.10 (Oct. 1, 2010).

[59] *See* C.C.A. 2010-21-050 (issued May 5, released May 28, 2010).

[60] *See* Int. Rev. Man. 3.12.3 (Jan. 1, 2011).

the error.[61] These form letters flagging apparent errors raised taxpayer ire.

"Tax experts who brought the letters to the attention of the I.R.S. weeks ago had wondered if anti-gay I.R.S. employees were acting out of malice," reported the *New York Times.*[62] Given the charged nature of RDP status, taxpayers and their advisors were understandably suspicious. At the same time, no line item on a tax return would enter gender into IRS data-bases, precluding systematic targeting of gay taxpayers. Perhaps critics gave IRS employees too much credit. Even if an errant IRS employee had tried to act maliciously, it would have been difficult to do so. By the same token, it was difficult for the IRS to address the problem, lacking systematic identification of RDPs versus all other taxpayers who had received form letters due to various and sundry errors. Publicly, the IRS "said that the letters had been 'incorrectly sent' because of a processing error and that it 'apologizes for this mistake and sincerely regrets any inconvenience to taxpayers'" who were RDPs.[63]

IV. FORMALIZED UNCERTAINTY

This Part discusses implications of the cases. Theoretically, a legal system forms an internally coherent whole, but realistically, the rules may be too picayune, complex, or otherwise impracticable to apply to the facts. Consequently, bureaucrats along with other legal practitioners informally countenance or formally "tolerate" inconsistencies to preserve a gapless effect. Tolerance or otherwise tacit acceptance creates space for practical resolutions or rough justice. Yet bureaucratic praxis leaves uncertain whether any particular result will be characterized better as rough or as just.

While charting road-maps to noncompliance would be unethical, there is a logic to tax administration that practitioners, attorneys and accountants, internalize over years of experience. As a practical matter, laws go unenforced in a variety of cases or

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[61] *See generally* Int. Rev. Man. 3.17.244.4 (Feb. 1, 2011) (Corrections of Math Errors).

[62] Scott James, *From IRS to Gay Couples, Headaches and Expenses*, N.Y. TIMES, June 12, 2011), at A35.

[63] *Id.*

circumstances because they are: (A) negligible, as in the case of newlyweds who neglect to file jointly in the year of marriage; (B) too complex, as for example when reporting deadlines have an inconsistent effect; or (C) impracticable, as in the case of the joint account regulation. Certain issues are more likely to justify a bureaucratic reaction than others.

The cases set forth above exemplify situations in which formal rules are at variance with factual reality. Taxpayers may arrive at practical solutions, which bureaucrats, in turn, may countenance, condone, or "tolerate." Tolerance preserves formal legal rationality by allowing bureaucrats to act as if the rules were gapless. For critical legal scholars who observed that law "is out of touch with reality . . . that is precisely, if counterintuitively, its promise."[64] Perhaps the promise is that the gap creates space for praxis.

As noted, behavioral economics explained taxpayer behavior as that of a socio-psychological being, rather than a rational actor. An individual may not necessarily choose the benefit that outweighs the cost, narrowly conceived. Similarly, bureaucrats act within the parameters of their own ethnographic reality, rather than formal rationality or rules per se. Just as compliance choices of taxpayers are embedded in their individual context, tax collectors' decisions arise within bureaucratic praxis. To taxpayers' chagrin, the ultimate effect on them may not be within the bureaucratic purview. Instead, bureaucrats may respond, for instance, to employee performance goals, such as processing a given number of cases within a limited time, imposed as a management measure, harking back to Taylorism.[65] The ultimate results may or may not be viewed as justice under law by later critics, but that was not the bureaucratic goal. A bureaucratic determination will not necessarily follow legal prescription, especially when social reality is not aptly described by rules and regulations. While legal realism hinged on what a lawmaker would do in practice, the post-realist question would encompass the parameters of practical resolution, thus bureaucratic praxis.

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[64] Annelise Riles, COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS 25 (2011).

[65] *See* 26 C.F.R. § 801.6 (2013) (listing "cycle time" among other IRS business result measures).

Put another way, taxpayer choices may entail, if not (A) potential IRS detection of negligible transgressions that might go unnoticed, then (B) so-called uncertain tax positions (UTP) in "grey areas" of the law muddled by complexity or impracticability. For the latter, the IRS now promulgates Schedule UTP, a form appended to the corporate tax return, to collect information on these cases (popularly glossed as "tax shelters").[66] The first kind of choice, invoking the neoclassical calculus to discount the benefit of trangression against the probability of detection, raises the familiar question about compliance with the rule of law. The second kind of choice goes to uncertainty inherent in the law. Where the law is inherently uncertain, bureaucrats collect information, investigating their own reality in the reflexive manner anticipated by para-ethnography, discussed above.

For its part, the Government too may make mistakes, as in the case of functionaries who did not get the memo, so to speak. Mistakes, miscommunications, and misunderstandings beg the question whether legal rules can ever capture reality so closely as to become gapless. While a realist approach would "lift the veil of legal Form to reveal living essences of power and need," a critical approach would "lift the veil of power and need to expose the legal elements in their composition."[67] Again, a gap between legal elements and social reality leaves room for rough justice.

In short, the richly textured ideology of social life codified within the tax law – which can contain competing policies that range from enforcement to settlement – is overwhelming to the human beings, taxpayers and tax collectors alike, who must contend with it. As a practical matter, they cope using mental and social mechanisms identified by behavioral economics and para-ethnography, respectively. These mechanisms may explain as much about tax determinations, and by extension administrative law, as rational action or formal rationality.

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[66] *See* Ken Kuykendall, *Reflections on the True Impact of the IRS' Schedule UTP Reporting Requirements*, 3 COLUM. J. TAX L. TAX MATTERS 10 (2012), *available at* http://www.columbiataxjournal.org/tax-matters-vol-3-no-2-4; J. Richard Harvey Jr. *Schedule UTP: An Insider's Summary of the Background, Key Concepts, and Major Issues*, 9 DEPAUL BUSINESS & COMMERCIAL L.J. 349 (2011); Jeremiah Coder, *Commenters Ask IRS to Abandon UTP Reporting Proposal*, TAX NOTES (June 3, 2010).

[67] Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984).

CONCLUSION

While practitioners through experience develop an instinct for which laws trigger enforcement, their bureaucratic counterparts have a statistical level of "tolerance" backed by codified authority to settle, compromise, or resolve disputes. The result is not lawless but rather a choreographed gapless effect. Government actors achieve this effect not as mere instruments of formal rationality but through a sentient social exercise that this Article has glossed as bureaucratic praxis. To the extent that other areas of administrative law contain parallel settlement authority, bureaucratic praxis there would be a fruitful topic for socio-legal research.

Para-ethnography, a particularly reflexive brand of micro-social science methodology, would be to bureaucratic praxis as behavioral economics is to the decision-making of taxpayers who are not merely rational actors but rather are informed by a sociological and psychological process. Likewise, administrative law is not merely what bureaucrats do in practice, to put it in a crude version of legal realism. Rather, bureaucratic praxis operates within nuanced parameters of both rules and reality.

By illuminating the ethnographic level of fiscal operation, bureaucratic praxis falls within fiscal sociology, a broad, interdisciplinary rubric for the study of tax history and related fields. In conclusion, bureaucratic praxis, a term derived from classical and modern social theory, can account for interpretations of tax law by government administrators.