

Just Taxation of Crime: Should the Commission of Crime Change One's Tax Liability?

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The tax law treats criminals differently from non-criminals. Should it? Under the public policy doctrine, for example, various tax deductions are disallowed if they are closely tied to criminal activity. Criminal activity is, in multiple ways, tax disadvantaged compared to non-criminal activity.

This Article considers a variety of possible justifications. (1) The tax disadvantage provides an incentive not to commit crime. (2) The tax disadvantage helps to bring deserved punishment to the criminal. (3) Criminals have given up their right not to be taxed. (4) Criminals have taken an unfair advantage and so must be stripped of that unfair advantage. (5) Criminals deserve to bear the costs that they culpably and wrongfully created.

This Article argues in favor of (5) as the best theory of taxing crime. Since taxpayers deserve to bear the costs they wrongfully created, the public policy doctrine should be expanded to prohibit all deductions and credits for costs that arise from criminal wrongdoing rather than just the ones which are currently prohibited.

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INTRODUCTION

Should the commission of crime change one's tax liability? If so, how? Consider the following case.

Labor Day weekend of 1980, Biltmore Blackman found out that his wife had been having an affair with another man while Biltmore was out of town for work.¹ Tensions in the household flared over the coming days, with multiple fights between the husband and wife.² On September 2nd, after a quarrel with his wife, the vindictive Biltmore put his wife's clothes on the kitchen stove and set them on fire.³ As luck would have it, however, the lit clothes started a much larger fire than Biltmore anticipated, eventually burning the house down.⁴

The following issue was put before the court in *Blackman v. Commissioner*: Should Biltmore Blackman be able to take a tax deduction for the decline in value of his house and his property inside (\$97,853 in total) resulting from his own malicious acts?⁵ The deduction, if he could get it, would serve as a tax benefit he could use to lower his tax liability for the year. Section 165 of the Internal Revenue Code explicitly permits taxpayers to take a deduction for personal losses arising from "fire, storm, shipwreck, or other casualty" (henceforth "casualty loss").⁶ Here, the taxpayer's *prima facie* case is clear: he had a personal loss arising from fire. And yet, despite Blackman's personal loss, the court declined to apply Section 165 and he was not permitted to take any deductions for the loss of his home.⁷

The rule denying deduction, the *public policy doctrine*, is one example of how the tax law treats certain financial consequences differently depending on whether those consequences arise from criminal activity.⁸ These rules uniformly increase tax liability for the taxpayers to whom they apply. Thus, the public policy doctrine will serve as a jumping off point to think carefully

1. These facts come from the case *Blackman v. Comm'r*, 88 T.C. 677 (1987).

2. *Id.* at 678.

3. *Id.* at 678–79.

4. *Id.* at 679.

5. *Id.* at 680. The amount of the loss is the lesser of either (1) the adjusted basis or (2) the decrease in value of the property. Treas. Reg. § 1.165-7(b).

6. I.R.C. § 165(c)(3). Blackman's case took place before the I.R.C. § 165(h)(5) moratorium on casualty losses had been enacted. This Article uses the term "tax benefit" to refer to tax rules that lower one's tax liability. In contrast, "tax subsidy" and "tax expenditure" will be used to refer to tax rules that are more advantageous than what one would receive in an ideal income tax.

7. *Blackman*, 88 T.C. at 682.

8. See generally Paul B. Stephan III, *Bob Jones University v. United States: Public Policy in Search of Tax Policy*, 1983 SUP. CT. REV. 33, 35–37 (1983) (defining the public policy doctrine as "requir[ing] the denial of any deduction, exclusion, or exemption otherwise permitted by tax law if allowance would frustrate sharply defined national or state policies").

about the central question of this article. Why should one's tax liability increase as a result of one's commission of crime?

On the traditional analysis, this increase in tax liability is justified because it serves as a deterrent against criminal activity by making criminal activity more expensive post-tax.⁹ Of course, deterring crime is not principally a function of tax law. Tax law's principal concern is raising revenue to fund government services in a fair and efficient manner.¹⁰ Putting the traditional view bluntly, rules like the public policy doctrine are essentially an extension of the criminal law rather than a pure tax provision.

This traditional analysis has two distinct components: (1) The public policy doctrine violates tax fairness principles.¹¹ (2) The public policy doctrine is justified by its role in deterring criminal behavior.¹² Consider each component in turn.

First, according to the traditional analysis, the denial of a deduction violates tax fairness principles. In our income tax system, the standard rule is to tax net income as opposed to gross income.¹³ The law places a tax liability on the money one makes, but allows for reductions in tax liability for, among other things, the money one loses.¹⁴ That is why the Internal Revenue Code has Section 165 in the first place.

The standard picture explains this feature of tax law by appealing to the notion of ability to pay as the measure of fairness in the distribution of tax burdens.¹⁵ Justice, on this standard picture of tax fairness, requires that we distribute tax liabilities according to each taxpayer's ability to pay.¹⁶ When one suffers losses—like losing money on a failed investment or one's home burning down—he has fewer resources with which to pay taxes and, so the standard picture claims, it would be unjust to levy on him the same tax burden as someone who did not suffer any such losses.¹⁷

9. *Tank Truck Rentals v. Comm'r*, 356 U.S. 30, 35 (1958).

10. MICHAEL J. GRAETZ ET AL., *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 28 (8th ed., 2018).

11. See discussion *infra* Section I.C.

12. See *Tank Truck Rentals*, 356 U.S. at 35.

13. *Comm'r v. Tellier*, 383 U.S. 687, 691 (1966) (“[T]he federal income tax is a tax on net income. . .”).

14. I.R.C. § 165(a).

15. See J. Clifton Fleming, Jr. et al., *Fairness in International Taxation: The Ability-to-Pay Case for Taxing Worldwide Income*, 5 FLA. TAX REV. 299, 301–02 (2001). For a critique of the notion of ability to pay, see Jeessoo Nam, *Taxing Option Luck*, 11 U.C. IRVINE L. REV. 1067, 1082–84 (2021).

16. See Alfred G. Buehler, *Ability to Pay*, 1 TAX L. REV. 243, 243 (1946).

17. *Id.* (“[T]here has been a growing tendency to relate ability [to pay] to the net income of the taxpayer. . .”).

Blackman suffered losses and, yet, must pay exactly the same amount of taxes to the government as if he had not suffered such losses.¹⁸ Insofar as his now-burnt house is concerned, Blackman is not permitted the deductions required for a net income tax system and thus faces a special burden on his casualty loss that others do not have to bear.¹⁹ The standard picture of justice in tax law thus comes to a head with the public policy doctrine. On the standard picture, under which we tax net income, Blackman has suffered losses; therefore, he has less ability to pay, and he should get a corresponding deduction for his losses to lower his tax liability. Since fairness requires tax liability to be distributed according to ability to pay, rules like the public policy doctrine move us away from what would be a just distribution of tax burdens.

If the public policy doctrine goes against the tax law's purposes of distributing tax burdens equitably, then it must have some other important justification. To violate tax fairness is no small sacrifice, so there needs to be some alternative benefit that justifies that sacrifice. This leads into the second proposition of the traditional analysis: the increase in tax liability is meant to deter wrongful behavior.²⁰ If we were to grant people like Blackman a deduction for the lost value of his house, the reasoning goes, it would encourage people to commit arson by making arson less "expensive" when it goes wrong.

This Article argues against both components of the traditional analysis. First, this Article offers reasons to be skeptical that the public policy doctrine has much of an effect on deterrence. Second, and perhaps more surprisingly, this Article will argue that rules like the public policy doctrine are required as a matter of tax fairness. To that end, this Article will derive a novel theory of fairly taxing criminal activity and analyze how that ideal theory can be carried out in practice. Contrary to traditional thinking on this topic, rules like the public policy doctrine are unlikely to serve any criminal law purpose, but are instead essential to distributing tax burdens fairly.

Part I examines the law governing taxation of criminal activity. Under the public policy doctrine, various deductions that are ordinarily considered necessary for a net income tax system are denied when they are closely connected to criminal activity.²¹ On the traditional analysis, fairness requires

18. *Blackman v. Comm'r*, 88 T.C. 677, 682 (1987).

19. See Donald H. Gordon, *The Public Policy Limitation on Deductions from Gross Income: A Conceptual Analysis*, 43 IND. L.J. 406, 408 (1968) ("The effect of the denial of a deduction for an expense incurred by the taxpayer in the course of generating includable income is pro tanto to levy the tax on 'gross' rather than 'net' income.").

20. *Tank Truck Rentals v. Comm'r*, 356 U.S. 30, 35 (1958).

21. See Stephan III, *supra* note 8.

that tax liabilities be distributed according to ability to pay, which is measured by net income.²² Thus, the public policy doctrine is thought to violate tax fairness.²³ If so, then why should one's commission of crime affect one's tax liability?

Part II explicates, then argues against, the traditional justification of the public policy doctrine. The public policy doctrine is a judicially created doctrine which goes against the literal language of the Internal Revenue Code, so its normative justification begins from the courts.²⁴ Interestingly, the courts have not stated that this rule of tax policy exists to serve the tax law's purposes of collecting government revenue fairly and efficiently. The court's own stated reasoning in *Blackman* is that allowing the deduction would instead frustrate the *criminal* law's public policy against arson.²⁵ That is, the criminal law sets out a certain punishment for arson, and providing a deduction for costs arising from arson would be a benefit that offsets the criminal law's punishment in a way that subverts the criminal law's purposes of retribution and deterrence. This line of reasoning is suspect.

Consider first the retributivist version of the argument. On this version, supplying Blackman the deduction would mean Blackman is punished less than he deserves. What good reason is there to think that criminal law's punishment coupled with a denial of the tax deduction is closer to the right level of penalty as opposed to criminal law's punishment coupled with a granting of the tax deduction? Academics often believe that the United States on the whole tends to be overly punitive.²⁶ If that is right, then giving criminals the tax benefit of a deduction should bring us closer to the right level of punishment rather than moving us farther away.

If the subversion of public policy argument is supposed to be about deterrence, as defenders of the doctrine most often say it is, the doctrine is even less justifiable. On this version, providing a deduction for casualty losses arising from arson is problematic because it would lessen the incentives against arson. The *Blackman* opinion explicitly expresses the worry that allowing a deduction would "encourage couples to settle their

22. GRAETZ ET AL., *supra* note 10.

23. See MILAN N. BALL, CONG. RSCH. SERV., R46709, THE APPLICATION OF INTERNAL REVENUE CODE SECTION 280E TO MARIJUANA BUSINESSES: SELECTED LEGAL ISSUES 6–7 (2021).

24. See *infra* Parts I & II.

25. *Blackman v. Comm'r*, 88 T.C. 677, 682–83 (1987).

26. DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3–6 (2008) ("Most commentators agree that many of the punishments imposed in the United States today are unjust because they are excessive . . ."); see, e.g., Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1430 (2018) ("The criminal justice system is often viewed largely as the product of overly punitive laws and excessive punishment.").

disputes with fire.”²⁷ What exactly is the mechanism by which the public policy doctrine is supposed to serve as an incentive against wrongdoing? Though the exact mechanism is implied by its defenders rather than made explicit, it plainly supposes that people like Blackman will take the public policy doctrine into account when weighing the costs and benefits of committing arson. In order for would-be criminals to take the doctrine into account in their considerations for committing arson, they must first know that Section 165 would ordinarily provide a deduction for casualty losses and also that the public policy doctrine (which, to add further complication, is a non-statutory judicial doctrine) serves as an exception to Section 165. None of this is likely to be true.²⁸ It is highly doubtful that the public policy doctrine will effectively serve as a disincentive.

Part III, moving away from the notion that increasing tax liability for crime serves the criminal law’s purposes, considers two theories that claim that harsh tax treatment of criminals better serves the tax law’s purposes.

A common libertarian perspective considers taxation to be a kind of impermissible coercion.²⁹ The state’s request that citizens pay the appropriate tax is a request backed by the force of the police and the army, so it is coercive. It is impermissible to the extent that one has a natural right to the property in his hands. On these grounds, philosopher Michael Otsuka argues that the tax law should be more comfortable collecting taxes from criminals.³⁰ When individuals commit crime, they give up the right not to be coerced.³¹ Thus, the state does not violate any rights when it collects taxes from them.

On an alternate theory, the harsh tax treatment of criminals is required to correct for the fact that criminals took an unfair advantage for themselves. Most of us practice restraint in that we think of criminal law’s proscribed acts as forbidden.³² Those that do not practice such restraint, thus, unfairly have an additional resource at their disposal.³³ In order to return to a fair distribution of resources, society should levy additional tax burden on criminals.

Though this Article ultimately rejects the above two theories, it gives careful consideration to each. By mapping out the logical space with respect

27. *Blackman*, 88 T.C. at 683.

28. *See infra* Section II.A (discussing that criminals do not take care to study the law or familiarize themselves with statutes).

29. MICHAEL OTSUKA, *LIBERTARIANISM WITHOUT INEQUALITY* 12–15 (2003).

30. *Id.* at 42.

31. *Id.*

32. *See* Wojciech Sadurski, *Distributive Justice and the Theory of Punishment*, 5 OXFORD J. LEGAL STUD. 47, 52–53 (1985).

33. *See id.*

to these theories, the analytic framework of this Article can serve as a comprehensive resource to anyone thinking about the relation between wrongdoing and tax liability rather than just those who agree with my favored theory set out below.

Part IV argues that the best principle to guide the taxation of crime is the principle that people deserve to bear the costs that they culpably and wrongfully created. The principle is quite intuitive. It would be patently unreasonable for someone to create harm through their own moral wrongdoing and claim that justice requires others to bear those costs. Call this the *Self-Created Harm Principle*. Though this principle is familiar in the philosophy literature,³⁴ it has received comparatively little attention in legal academia and this Article is the first to locate its implications for tax law.

Tax law is a system by which we share burdens and benefits across members of our society.³⁵ When the tax law provides a deduction for a given cost to a taxpayer, it amounts to a sharing of that cost between the taxpayer and the other members of society. Take Blackman's case for example. Blackman's wrongdoing led to a large cost, the destruction of his house.³⁶ If tax law were to grant him a deduction for that cost, the value of the tax benefit would offset the cost to Blackman so that he does not bear the full \$97,853 loss.³⁷ Instead, part of the cost would be borne as lost tax revenue by the government, which must either cut back the services it provides or raise additional revenue from the other members of society. Applying the Self-Created Harm Principle, it would be patently unreasonable for Blackman to demand that others bear the costs he culpably and wrongfully created, so the deduction must be denied.

The Self-Created Harm Principle thus entails that all tax deductions and credits for costs of wrongdoing ought to be barred since providing deductions and credits unfairly shifts costs from the harm creator onto the other members of society.

34. See, e.g., Daniel M. Farrell, *The Justification of General Deterrence*, 94 PHIL. REV. 367, 372 (1985); Jeff McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 ETHICS 252, 258–59 (1994); Phillip Montague, *Punishment and Societal Defense*, 2 CRIM. JUST. ETHICS 30, 32 (1983) (“Because the existence of harm is [the] [a]ggressor’s fault, it is quite appropriate—and appropriate as a matter of justice—that the harm should befall him rather than some innocent person.”).

35. See Nam, *supra* note 15, at 1082–83, 1114.

36. Blackman v. Comm’r, 88 T.C. 677, 679 (1987).

37. *Id.* The amount of the loss is the lesser of either (1) the adjusted basis or (2) the decrease in value of the property. Treas. Reg. § 1.165-7(b).

I. THE TAX LAW'S TREATMENT OF CRIME

The general rule in tax law is that criminal activities are treated just like non-criminal activities.³⁸ A dollar made from running an illegal money laundering enterprise is subject to taxation in a way similar to a dollar made from mowing lawns.³⁹ The primary exception to the general rule comes in the form of the public policy doctrine. The public policy doctrine limits in various ways the deductions available for criminal activities.

A. Public Policy Doctrine

As courts state the rule, tax law's public policy doctrine prohibits taxpayers from taking deductions when providing those deductions would "encourage" behaviors contrary to national or state public policy.⁴⁰

A tax deduction reduces one's taxable income one-for-one. This result mathematically arises from the fact that deductions are subtracted from gross income to arrive at taxable income.⁴¹ Gross income can be seen as the totality of the earnings of a business, while net income is just those profits, *i.e.* earnings minus expenses/losses.⁴² Deductions for losses and expenses thus play a central role in ensuring that we levy a tax on net income rather than gross income.⁴³

Though the courts' statements of the doctrine uses the broad phrase "public policy," the case law makes clear that the phrase is not meant to pick out merely regulatory public policies such as lowering greenhouse gas emissions. In one case, the Internal Revenue Service ("IRS") wanted to deny deductions to a pair of North Carolina opticians who paid kickbacks to doctors for referring clients to the opticians.⁴⁴ For clear regulatory purposes—doctors should refer patients to the best opticians, not the opticians who pay the doctors the largest kickbacks—contract law made such kickback agreements unenforceable.⁴⁵ When the case was brought before the

38. *Comm'r v. Tellier*, 383 U.S. 687, 691–92 (1966). Regarding deductibility specifically, see *Comm'r v. Heininger*, 320 U.S. 467, 474 (1943) ("It has never been thought . . . that the mere fact that an expenditure bears a remote relation to an illegal act makes it nondeductible.") and *DiFronzo v. Comm'r*, 75 T.C.M. (CCH) 1693, *4 (1998).

39. *Tellier*, 383 U.S. at 691 ("Income from a criminal enterprise is taxed at a rate no higher and no lower than income from more conventional sources.").

40. *Tank Truck Rentals v. Comm'r*, 356 U.S. 30, 35 (1958).

41. I.R.C. § 63(a).

42. See *Higgins v. Smith*, 308 U.S. 473, 477 (1940).

43. See *Comm'r v. Sullivan*, 356 U.S. 27, 29 (1958).

44. *Lilly v. Comm'r*, 343 U.S. 90, 91–92 (1952).

45. *Lilly v. Comm'r*, 188 F.2d 269 (4th Cir. 1951), *rev'd*, 343 U.S. 90 (1952).

Supreme Court, the Court noted that this type of regulatory public policy set out in local contract law was not enough to deny deductions.⁴⁶ Instead, the public policy doctrine is concerned with instances where the relevant behavior is directly prohibited by law, such as violations of criminal law.⁴⁷

Though the courts conceive of the public policy doctrine as one rule, such a unitary formulation is misleading. The doctrine actually houses two distinct rules. (1) Taxpayers are prohibited from taking deductions for losses that arise as a result of their wrongdoing, most often criminal wrongdoing. (2) They are prohibited from taking business expense deductions for their payment of fines and penalties.⁴⁸

Consider first the prohibition of deductions for losses that arise as a result of taxpayers' wrongdoing. By and large, the courts take the provision of a deduction for losses to be against public policy when such deduction would increase the pecuniary incentives to commit wrongful behavior prohibited by the law, primarily criminal law. The sort of acts which have been categorized as against public policy include drug dealing,⁴⁹ running gambling slot machines without proper payment of excise taxes,⁵⁰ arson,⁵¹ insurance fraud,⁵² and producing counterfeit currency.⁵³

This prohibition is a judicial (*i.e.*, non-statutory) exception to Section 165. Under Section 165, taxpayers are typically permitted to take deductions for certain losses.⁵⁴ Losses are permitted when incurred either as a result of profit-seeking activities or as a result of "fire, storm, shipwreck, or other casualty, or from theft."⁵⁵ This second category of losses is often called *casualty losses*.

Losses of both categories, profit-seeking and casualty, are prohibited under the public policy doctrine when they arise from moral wrongdoing by the taxpayer. *Blackman v. Commissioner*, in which Biltmore Blackman accidentally burned down his house while destroying his wife's clothing, is a

46. *See Lilly*, 343 U.S. at 94–97.

47. *See id.*

48. I.R.C. § 162(f) codifies and expands on the original public policy doctrine such that a greater sphere of deductions are prohibited. For ease of exposition, whenever there is a need to disambiguate between the two kinds of prohibitions, much of this Article will discuss (1), but those insights can be applied straightforwardly to (2) as well.

49. *Mack v. Comm'r*, 58 T.C.M. (CCH) 89 (1989).

50. Rev. Rul. 77-126, 1977-1 C.B. 47.

51. *Blackman v. Comm'r*, 88 T.C. 677, 680 (1987).

52. Rev. Rul. 81-24, 1981-1 C.B. 79.

53. *Mazzei v. Comm'r*, 61 T.C. 497 (1974).

54. I.R.C. § 165(h)(5) imposes a seven-year moratorium on casualty losses, but casualty losses are scheduled to come back into effect in 2026.

55. I.R.C. § 165(c).

prime example of the prohibition regarding casualty losses.⁵⁶ There, Biltmore was not engaged in a profit-seeking activity at all, he merely wanted to destroy the things his wife valued.⁵⁷ Losses from profit-seeking criminal activity are also prohibited. For instance, when law enforcement officers confiscated cash involved in illegal drug and gambling operations, the taxpayer had losses related to his profit-seeking business, but the Tax Court nevertheless forbid him from taking any deductions for such losses.⁵⁸

It is easy to miss how radical this judicial doctrine is from the perspective of statutory interpretation. Because tax law is a statutory area of law, courts have no authority to make new rules, but must merely interpret the statutes that they are given. The language of Section 165 makes it plain that Blackman is entitled to a deduction for the lost value of his house and property.⁵⁹ The court, then, is going directly against the express language of the statute by denying Blackman the tax deduction. When the public policy doctrine originated, the courts argued that they were permitted to ignore the language of the statute because it could not have been the intent of the legislature to approve a deduction for people like Biltmore Blackman.⁶⁰

The general rule in statutory interpretation, however, is that when a statute's meaning is clear, the court must apply the language of a statute as written.⁶¹ Courts can only look to the intent of the legislature when there is an ambiguity in the statute.⁶² With regard to Blackman's case, there is no ambiguity. The language of Section 165 is abundantly clear, even going so far as to explicitly specify "fire" as the cause of loss for which deductions are allowed.⁶³ It is, thus, highly unusual for the court to refuse to apply the plain and obvious meaning of the statute in favor of what they perceive to have been the contrary legislative intent. In order to explain the courts' willingness

56. *Blackman*, 88 T.C. at 680.

57. *Id.* at 678–79.

58. *Mack v. Comm'r*, 58 T.C.M. (CCH) 89 (1989).

59. I.R.C. § 165(c)(3).

60. *Tank Truck Rentals v. Comm'r*, 356 U.S. 30, 35 (1958).

61. *King v. Burwell*, 576 U.S. 473, 486 (2015) (“If the statutory language is plain, we must enforce it according to its terms.”).

62. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’”). This is sometimes understood as the *plain meaning rule*. William Baude & Ryan D. Doerfler, *The (Not So) Plain Meaning Rule*, 84 U. CHI. L. REV. 539, 541–44 (2017). A minority even believe that we should never look to legislative intent. WILLIAM N. ESKRIDGE, JR. ET AL., *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES* 302 (2014).

63. I.R.C. § 165(c).

to make this radical judicial maneuver, a legal realist must suspect that the courts were strongly opposed to the idea of permitting deductions for people like Blackman.⁶⁴

The second category of prohibitions are against fines and penalties. Under Section 162 of the Code, generally, taxpayers can deduct ordinary and necessary business expenses.⁶⁵ Some fines and penalties have the characteristics of ordinary and necessary business expenses. Consider, for instance, the facts of *Tank Truck Rentals v. Commissioner*.⁶⁶ The taxpayer, a corporation, ran a fleet of tank trucks on the east coast.⁶⁷ Although surrounding states had weight limits of 60,000 lbs., Pennsylvania had an unusually low weight limit of 45,000 lbs.⁶⁸ This made it prohibitively expensive to operate the business, which required trucking across multiple states, while following Pennsylvania's limit.⁶⁹ Thus, the taxpayer made a deliberate business decision to violate Pennsylvania's weight limit laws, racking up hundreds of fines in the process.⁷⁰ Pennsylvania's weight limit was, in fact, so burdensome that violation of the limit was standard practice in the tank truck industry.⁷¹ Given the above facts, the traditional "ordinary and necessary business expense" analysis would have concluded that the fines incurred in Pennsylvania were ordinary and necessary business expenses for any tank truck company because incurring the fines was essential to keeping the business profitable and incurring the fines was customary within the tank truck industry.⁷² Nevertheless, the Supreme Court prohibited the taxpayer from taking the deduction, since providing it would increase the pecuniary incentives to commit the crime.

Though the public policy doctrine was originally a judicial creation, the prohibition of deductions for fines and penalties has now been codified under

64. The argument here being that if courts did not feel strongly about permitting the deduction, they would just follow the ordinary rule under which one applies the plain meaning of the statute as written.

65. I.R.C. § 162.

66. *Tank Truck Rentals v. Comm'r*, 356 U.S. 30 (1958).

67. *Id.* at 32.

68. *Id.*

69. *Id.*

70. *Id.* at 32–33.

71. *Id.*

72. The payment of the fines would appear to easily clear the "ordinary and necessary" hurdles. See RIA, *Ordinary and Necessary Business Expenses*, FEDERAL TAX COORDINATOR ANALYSIS ¶ L-1201 (2022) ("An ordinary expense is one which is customary or usual. This does not mean customary or usual within the taxpayer's experience, but rather, customary or usual within the experience of a particular trade, industry or community A necessary expense is one that is appropriate and helpful, rather than necessarily essential to the taxpayer's business.").

Section 162(f) of the Code.⁷³ (Though the same section also prohibits other items from business expense deductions, this Article will only be concerned with prohibitions related to wrongdoing.)

Both categories of prohibitions require a direct connection between the item being deducted and the wrongful act.⁷⁴ This direct connection requirement is satisfied when the wrongful act was a direct cause of the item being deducted or some other “direct relationship” exists between the two.⁷⁵ If the item being deducted is only remotely related to the wrongful act, the deduction is not prohibited by the public policy doctrine.⁷⁶ For instance, a taxpayer who illegally built his own home without the necessary permits could still take a casualty loss when a forest fire destroyed the home since the loss of the home in the fire was only remotely related to the wrongful act.⁷⁷

B. Deductions for Drug Dealers

Strangely, despite the existence of the public policy doctrine, there is no limitation on the availability of deductions when the business expenses of a criminal enterprise are not themselves fines or penalties. For instance, John DiFronzo was the head of a crime syndicate involved in “bookmaking, loansharking, extortion, illegal gambling, and fraud.”⁷⁸ The Tax Court ruled that, despite his actions being clearly against public policy, there was no prohibition on DiFronzo taking a business expense deduction for his legal expenses.⁷⁹ As the court aptly notes, “Although it would seem contrary to public policy to allow a deduction in the conduct of an illegal and highly reprehensible criminal activity, it has been established [under the legal precedent] that such is not sufficient to deny a deduction otherwise allowable.”⁸⁰

Under the same principle, a drug dealer in a 1981 case, *Edmondson v. Commissioner*, was permitted to take deductions for business expenses such

73. Treas. Reg. § 1.162-21(a)(3)(i).

74. Chief Counsel Advice 201346009 (2013).

75. *Id.*

76. *Id.*

77. *Id.*

78. *DiFronzo v. Comm’r*, 75 T.C.M. (CCH) 1693 (1998).

79. *Id.*

80. *Id.* (citing *Comm’r v. Tellier*, 383 U.S. 687, 691–95 (1966); *Comm’r v. Sullivan*, 356 U.S. 27, 27–29 (1958); *Brizell v. Comm’r*, 93 T.C. 151, 166 (1989); *O’Malley v. Comm’r*, 91 T.C. 352, 362–66 (1988)). Steven F. Friedell, *Confidence Schemes: Theft Loss Deductions, Restitution, and Public Policy*, 90 ST. JOHN’S L. REV. 25, 30 (2016) makes a similar argument.

as purchasing a scale for weighing drugs, packaging expenses, telephone expenses, and automobile expenses.⁸¹

The legislature responded swiftly to *Edmondson* by introducing Section 280E to the Code.⁸² Under the new law, taxpayers are forbidden from receiving any deduction or credit for the costs of running their business if the business consists of trafficking controlled substances prohibited by law.⁸³ Section 280E is exclusive to drug trafficking and no parallel rule exists for other criminal activities.⁸⁴ As a result, though taxpayers can take a wide variety of deductions for, say, running an illegal gambling business, deductions are strictly curtailed for, say, selling cocaine.

C. Tax Penalty: An Exception to the Net Income Concept

The purpose of criminal law is typically understood to be deterrence or deserved punishment of bad behavior, a concept loosely called *retribution*.⁸⁵ The purpose of tax law is to collect tax revenue in a fair and efficient manner.⁸⁶ As the previous Section noted, the most common justification of denying various deductions related to wrongdoing is that providing such deductions would “encourage” wrongdoing.⁸⁷ Thus, the public policy doctrine is most often thought to support the criminal law’s purpose of deterrence. But since the rule is part of tax law, it is only natural to ask how the doctrine fares with regard to the tax law’s purposes. This Section explicates the traditional answer to this question: the public policy doctrine *thwarts* the tax law’s purpose of fairly distributing tax burdens among citizens.⁸⁸

81. *Edmondson v. Comm’r*, 42 T.C.M. (CCH) 1533 (1981).

82. STAFF OF THE JOINT COMM. ON TAX’N, 97TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982 264 (Comm. Print 1983).

83. I.R.C. § 280E.

84. *Id.*; see Freeman Law, *Section 280E and the Taxation of Cannabis Business*, JD SUPRA (Aug. 20, 2021), <https://www.jdsupra.com/legalnews/section-280e-and-the-taxation-of-5068426/> [<https://perma.cc/YEL6-D7JL>] (providing background on the enactment of Section 280E and noting that it applies only to controlled substance trafficking situations).

85. JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES AND MATERIALS 34–43 (8th ed. 2018).

86. Fritz Neumark et al., *Taxation*, BRITANNICA (Sept. 2, 2022), <https://www.britannica.com/topic/taxation> [<https://perma.cc/MSG2-PCNY>].

87. See discussion *supra* Section I.A.

88. See MILAN N. BALL, CONG. RSCH. SERV., R46709, THE APPLICATION OF INTERNAL REVENUE CODE SECTION 280E TO MARIJUANA BUSINESSES: SELECTED LEGAL ISSUES 6–8 (2021).

Under the orthodox view, fairness simply requires tax burdens to be distributed by ability to pay.⁸⁹ Ability to pay, standardly, is measured by the concept of pre-tax net income.⁹⁰ Net income is distinguished from gross income by the fact that it subtracts for expenses and losses.⁹¹ For instance, if Jim and Bob both make \$200,000 in the year as law firm associates but a burglar stole \$50,000 from Jim's safe, Jim and Bob would have the same gross income of \$200,000, Jim would have a net income of \$150,000, and Bob would have a net income of \$200,000. From this example, one can see why net income is used to track ability to pay rather than gross income. If someone has made more money in a given year, he should have the ability to pay greater amounts of taxes, and if someone has lost more money in a given year, he has less ability to pay taxes. Thus, we allow the individual to "use" his losses to set off against his gross income in order to lower his tax liability in the form of tax deductions. For instance, Jim would have a \$50,000 deduction for his losses that he can set off against his \$200,000 of gross income to arrive at a taxable net income of \$150,000 for the year. If the tax law instead forbid Jim from taking the deduction, then he would have taxable income of \$200,000, the same as Bob. As this example demonstrates, deductions for losses are at the center of our taxing net income rather than gross income.⁹²

89. *The Whys of Taxes, Theme 3: Fairness in Taxes, Lesson 1: How to Measure Fairness*, INTERNAL REVENUE SERV., https://apps.irs.gov/app/understandingTaxes/teacher/whys_thm03_les01.jsp [<https://perma.cc/9MHR-D29S>] (defining "ability to pay" as a concept of tax fairness stating that, "people with different amounts of wealth or different amounts of income should pay tax at different rates"); Buehler, *supra* note 16, at 243. For a critique of the notion of ability to pay, see Nam, *supra* note 15.

90. See Buehler, *supra* note 16, at 243.

91. Melanie Lockert, *Gross vs. Net Income: What's the Difference?*, BUS. INSIDER (July 12, 2022, 1:52 PM), <https://www.businessinsider.com/personal-finance/gross-vs-net-income> [<https://perma.cc/VL58-HM48>].

92. There are two arguments that providing a deduction for casualty losses, rather than accurately tracking income, is a tax subsidy/expenditure. First, for personal losses of non-cash property, there is a technical complication. The complication arises because imputed income from property is not taxed. See Richard Goode, *Imputed Rent of Owner-Occupied Dwellings Under the Income Tax*, 15 J. FINANCE 504, 505 (1960). My own view is that the non-taxation of imputed income is the aberration and that the deduction accurately tracks income. See George F. Break, *The Tax Expenditure Budget—The Need for a Fuller Accounting*, 38 NAT'L TAX J. 261, 264 (1985). That is, I would think that an ideal tax system taxes imputed income and gives a deduction for personal losses; the reason that we do not tax imputed income is merely due to the administrative difficulty of the task. For instance, suppose someone got paid his yearly salary of \$20,000 and on his way home, a pickpocket stole \$1,000 out of his pocket. (Theft is an explicitly

By denying deductions, then, the public policy doctrine moves us away from taxing net income towards taxing gross income.⁹³ It is the equivalent of requiring Jim to pay as though he had \$200,000 of taxable income rather than \$150,000 of taxable income. This deviation from the net income tax is called a *tax penalty*.⁹⁴ Since a tax penalty violates the standard principle of distributing tax burdens fairly, the traditional way of understanding the public policy doctrine is that it must be betraying the purposes of tax law in order to carry out some policy goal external to the tax law—namely, some policy related to proper punishment. Under this traditional analysis, the public policy doctrine is not too far from rules such as the home mortgage interest deduction⁹⁵ or the tax credit for electric vehicles⁹⁶. Both of these rules—

recognized personal casualty loss under Section 165. *See* I.R.C. § 165(e.) How could one deny that this individual's taxable income should be \$19,000 rather than \$20,000? Under the Haig-Simons view, income is composed of consumption plus accretion to wealth. Robert M. Haig, *The Concept of Income--Economic and Legal Aspects*, in *THE FEDERAL INCOME TAX* 1, 7 (Robert M. Haig ed., 1921), *reprinted in* AM. ECON. ASS'N, *READINGS IN THE ECONOMICS OF TAXATION* 54 (Richard A. Musgrave & Carl Shoup eds., 1959); HENRY C. SIMONS, *PERSONAL INCOME TAXATION* 50 (1938). Surely, that lost \$1,000 is not Haig-Simons income since it is neither accretion to wealth nor consumption. The deduction is needed to track income accurately.

This leads into the second argument that providing a deduction for casualty losses is a tax subsidy. This second argument claims that property lost in casualty, *e.g.*, fire, is consumed by the taxpayer; since Biltmore Blackman consumed his house when it went up in flames, it counts as Haig-Simons income. Under this argument, having \$1,000 stolen on your way home from work is no different from having spent the \$1,000 on a fancy seven-course meal at the French Laundry. *See* Boris I. Bittker, *Income Tax Deductions, Credits, and Subsidies for Personal Expenditures*, 16 J.L. & ECON. 193, 195 (1973) (setting out the argument in order to argue against it). Given that consumption implies a degree of personal satisfaction derived from one's expenditure, it is hard to see how this view could be right. *See id.* at 196–97. Surely, Blackman cannot be said to have gotten the same consumptive value out of his home as someone else who committed the same actions as Blackman did without burning the whole house down.

I relegate all this discussion to an all-too-brief footnote because, on my ultimate account, it will not be of any importance whether the deduction accurately tracks income or not. The tax subsidy/expenditure issue is merely definitional, and the definition of income is only important if one's foundational theory uses the concept of income. *See* Louis Kaplow, *The Income Tax as Insurance: The Casualty Loss and Medical Expense Deductions and the Exclusion of Medical Insurance Premiums*, 79 CALIF. L. REV. 1485, 1486–87 (“[D]ebates about definitions cannot give meaningful guidance to policy unless informed by the objectives underlying the definitions.”). My preferred foundational theory does not distribute tax burdens depending on whether some economic item is income or not.

93. Douglas A. Kahn & Howard Bromberg, *Provisions Denying a Deduction for Illegal Expenses and Expenses of an Illegal Business Should Be Repealed*, 18 FLA. TAX REV. 207, 216–17 (2016).

94. DANIEL L. SIMMONS ET AL., *FEDERAL INCOME TAXATION* 403 (7th ed. 2017).

95. I.R.C. § 163(h)(2)(D).

96. I.R.C. § 30D.

instead of prioritizing the accurate measurement of a taxpayer's net income—promote goals external to tax law, like home ownership or the purchase of environmentally friendly cars.

This sort of approach—thinking of the net income tax as a baseline and the denial of deduction as a tax penalty—leads to an interesting implication about the penalty. Because tax liability is calculated as Marginal Tax Rate * (Gross Income – Deductions), the value of the deduction (and, consequently, the harshness of denying the deduction) depends on the marginal tax rate of the taxpayer.⁹⁷ Marginal tax rates increase as one moves up the income bracket, so the dollar value of the tax penalty imposed by the public policy doctrine increases as well.⁹⁸

The varying value of the penalty can be illustrated by the following example. Taxpayer A making \$30,000 a year has a 12% marginal tax rate. Taxpayer B making \$600,000 a year has a 37% marginal tax rate. Suppose that both A and B run a tank truck business, and both have accumulated \$1,000 in fines. For A, the denial of her deduction will mean she has to pay \$120 more to the IRS than she otherwise would have.⁹⁹ For B, the denial of her deduction means she has to pay \$370 more to the IRS than she otherwise would have.¹⁰⁰

Interestingly, this difference in value of the penalty seems to run against the public policy doctrine itself. The public policy doctrine arose because courts were worried that federal tax law would subvert the criminal law's purposes.¹⁰¹ Both the federal government and the states, as a rule, do not vary the severity of a criminal fine by the income level of the convicted defendant.¹⁰² The public policy doctrine, if understood as a tax penalty that forms part of the criminal punishment, then betrays the universal public policy of criminal law that the rich and the poor will pay the same penalty for their crimes.

97. See generally BRENDAN McDERMOTT & MARK P. KEIGHTLEY, CONG. RSCH. SERV., RL3110, FEDERAL INDIVIDUAL INCOME TAX RETURNS: AN EXPLANATION (2022) (providing detail on tax liability and other tax terms related to the federal individual income tax).

98. *Marginal Tax Rate*, TAX FOUND., <https://taxfoundation.org/tax-basics/marginal-tax-rate/> [<https://perma.cc/8JFN-C2BM>] (“The marginal tax rate is the amount of additional tax paid for every *additional* dollar earned as income.”) (emphasis in original).

99. $\$1,000 * 12\% = \120 .

100. $\$1,000 * 37\% = \370 .

101. See, e.g., *Tank Truck Rentals v. Comm’r*, 356 U.S. 30, 35–36 (1958) (choosing not to allow a tax deduction for fear it would subvert the criminal’s law purpose).

102. There are, however, some minor exceptions to the rule. For an exposition of how criminal fines relate to income, see Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. CHI. L. REV. 1869, 1872–74 (2018).

In sum, the traditional analysis of the public policy doctrine can be broken up into two separate propositions. First, the public policy doctrine violates principles of tax fairness.¹⁰³ Second, the public policy doctrine is justified by the fact it serves the criminal law's goals of retribution or deterrence.¹⁰⁴ This Article aims to show that both propositions are incorrect. The next Part will argue that the public policy doctrine does not actually promote deterrence or retribution. Part IV will argue that the public policy doctrine does serve the tax law's goal of fairly distributing tax liabilities.

II. TAX LAW AS CRIMINAL LAW: ORTHODOX JUSTIFICATIONS FOR TAX LAW'S DIFFERENTIAL TREATMENT OF CRIME

Since the public policy doctrine originated from the courts, a line of judicial opinions built the traditional justification of the rule. Under the traditional view, the public policy doctrine is necessary because, otherwise, tax law would subvert non-tax public policies.¹⁰⁵ Take *Blackman* as an example. Maryland, the state in which Blackman committed arson, prohibits both arson and the malicious destruction of property.¹⁰⁶ The key argument of the court is that allowing Blackman to take a deduction for his house burning down would subvert Maryland's public policy against such behavior.¹⁰⁷

The notion that the tax law might subvert public policy could be interpreted multiple ways. On charitable interpretations, the courts' proposed justification is, roughly, that: allowing a deduction would motivate people to commit more crime, allowing a deduction would lead to less punishment than deserved, or, cross-cutting both previous explanations, allowing a deduction would subvert the level of punishment that the legislatures (state and federal) intended to set out in their criminal codes.¹⁰⁸ All of these justifications see the deductions as problematic because deductions would upset the criminal law's purposes. The courts essentially see the public policy doctrine as a handmaiden of the criminal law system. After explaining each proposed justification, I will attempt to demonstrate that none of the courts' justifications work.

103. See BALL, *supra* note 88, at 6–7.

104. See discussion *supra* Section I.A.

105. See, e.g., *Tank Truck Rentals v. Comm'r*, 356 U.S. 30 (1958) (applying public policy doctrine to disallow tax deduction for fear it would subvert the criminal's law purpose).

106. *Blackman v. Comm'r*, 88 T.C. 677, 679 (1987).

107. *Id.* at 680.

108. *Id.* at 682–83.

A. Deterrence and Retribution

The courts' own framing of the public policy doctrine is in the language of discouraging crime.¹⁰⁹ Under standard utilitarian punishment theory, the good of punishment is that it serves as an incentive for individuals to avoid the prohibited behavior.¹¹⁰ Would allowing Blackman the tax deduction subvert the utilitarian purposes of disincentivizing arson? In order for the public policy doctrine to motivate individuals to act one way or another, criminals would at least need to know that such a rule exists. Yet it is hard to see how this could be the case.

It is a proposition widely agreed upon that people do not take care to study the law.¹¹¹ They do not pore over the statutes and they certainly do not familiarize themselves with the case law. The public policy doctrine is a rather obscure rule of tax law. As it pertains to personal losses, there is no statutory formulation of the rule. It is a judicially created doctrine that serves as an exception to the general rule that individuals can take deductions for casualty losses.¹¹² Even the bare notion of a deduction is a term of art in tax law.¹¹³

Suppose the defenders of the public policy doctrine could get over this hump. That is, suppose, *arguendo*, that criminals do know of the public policy doctrine and would adjust their behavior in light of its consequences. Even with such suspension of disbelief, it is hard to follow the court's reasoning. The mere fact that the public policy doctrine would deter crime cannot be a conclusive reason to adopt the public policy doctrine. If that were right, we should tax crime at some infinite amount and have the death penalty for all crimes. This is because, for any finite amount of cost imposed for a crime,

109. See, e.g., *Tank Truck Rentals v. Comm'r*, 356 U.S. 30, 35 (1958) ("We will not presume that the Congress, in allowing deductions for income tax purposes, intended to encourage a business enterprise to violate the declared policy of a State.").

110. See generally JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in THE COLLECTED WORKS OF JEREMY BENTHAM (J. H. Burns & H. L. A. Hart eds., InteLex Corp. 2000) (1781) (discussing the general principles of utilitarian views on punishment).

111. Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1536, 1553 (2005). There may be a stronger argument for the deterrence theory if one focuses only on the prohibition of deductions for the payment of fines and penalties. Presumably, the tank truck companies are aware of, and care about, whether tax deductions are available for missing the Pennsylvania weight limit.

112. It is unclear whether criminals would change their behavior to account for the tax penalty even if they did know about it. Cf. Ariel Jurov Kleiman, *Nonmarket Criminal Justice Fees*, 72 HASTINGS L.J. 517, 539–41 (2021) (concluding that small fees on top of criminal punishment would have minimal deterrent effect).

113. The concept of a deduction is defined by its function under I.R.C. § 63.

we could always make the argument that imposing a greater penalty would increase deterrence. But this line of thinking is absurd.

Clearly, the benefits of deterrence must be balanced against the costs of punishment and the constraints of proportionality.¹¹⁴ The point of punishment is not to maximize the costs of committing crime, but rather to get at the optimal amount of punishment for a crime.¹¹⁵ It would be radically unjust to give someone the death penalty for littering, even if it were the case that such a punishment would maximize deterrence. Yet it is hard to see why adopting the public policy doctrine would result in more optimal punishment than not adopting the doctrine, and courts and commentators surprisingly do not provide any such argument.¹¹⁶

The very same point can be made against a retributivist justification of the public policy doctrine.¹¹⁷ Under retributivism, delivering deserved punishment is supposed to be good in and of itself, *i.e.* an intrinsic good, quite apart from whatever incentive effects might be produced.¹¹⁸ An important part of retributivism is proportionality—the proposition that there is a right level of punishment a wrongdoer deserves depending on factors such as the severity of his wrongdoing and his degree of culpability.¹¹⁹ Thus, the proponent of the public policy doctrine better have some argument that the doctrine brings punishment of the wrongdoer closer to the right level of punishment rather than further away, but it is hard to see why that would be the case, and no proponents have offered such an explanation.¹²⁰ If anything, the general agreement among experts in criminal law is that the U.S. criminal justice system tends to be overly punitive rather than not punitive enough.¹²¹ If that is true, then allowing criminals to take tax deductions would actually get us closer to the right level of punishment rather than further away.

114. BENTHAM, *supra* note 110; *see* A. M. Quinton, *On Punishment*, 14 ANALYSIS 133, 135 (1954).

115. *Id.*

116. The argument regarding proportionality is made by Kahn & Bromberg, *supra* note 93.

117. This is a plausible alternative interpretation of the commonly used language that allowing a deduction for payments of fines would reduce the “sting” of the penalty. *E.g.*, *Tank Truck Rentals v. Comm’r*, 356 U.S. 30, 35 (1958).

118. Mitchell N. Berman, *Punishment and Justification*, 118 ETHICS 258, 269 (2008).

119. *Id.*

120. This problem becomes particularly puzzling for the denial of deductions for expenses. How much expenses one has is not closely tied to retributivist desert. James W. Colliton, *The Tax Treatment of Criminal and Disapproved Payments*, 9 VA. TAX REV. 273, 309–10 (1989).

121. *See* HUSAK, *supra* note 26, at 3; *see, e.g.*, Jain, *supra* note 26, at 1382–84.

B. Subversion of State Legislatures' Intent

Alternatively, the subversion theory is about respecting the intent of the legislators who drafted the criminal statute the taxpayer violated.¹²² For instance, Blackman had violated a Maryland statute against arson.¹²³ If the Maryland legislators had a certain view about what the right level of punishment is for a given crime, then tax law ought not stand in the way. Implicit in such an argument is that legislators intended their punishments to be accompanied by a denial of a deduction rather than the provision of a deduction. After all, if legislators thought that the tax law was going to provide deductions and formed their punishment to take that into account, then the public policy doctrine denying a deduction to Blackman would actually frustrate the legislators' intent.

Given this implicit premise, the subversion thesis cannot be an argument for a society to introduce the public policy doctrine into law. Before the public policy doctrine was judicially introduced, it is hard to see why the legislature would think individuals would not get a deduction for their violations of law. After all, the statutes made no such exception, their plain language stated that deductions are permitted, and no courts had yet stated that deductions would be denied. To the extent that legislators had thought about this issue at all, they must have thought deductions related to wrongdoing would be permitted. So it cannot be that legislators' intentions justified creating a public policy doctrine.

Perhaps the intent argument is not supposed to be about creating a public policy doctrine, but rather continuing the public policy doctrine. The supporters of the doctrine might claim that because the public policy doctrine now exists, legislators aware of the tax case law have crafted punishments to be lighter than they would have without the doctrine. In this way, the doctrine's existence serves as an argument against its own repeal. It is, however, doubtful that legislators are aware of the public policy doctrine, a prerequisite for their having crafted punishment in light of it. The doctrine is in a separate area of law (tax, as opposed to criminal) and is not a statutory rule.¹²⁴ Additionally, if we are supposing that legislators are aware of the public policy doctrine because they keep up to date on new developments in tax law, it must also be reasonable to suppose that legislators would make punishments harsher in response to the abolishment of the public policy doctrine. Therefore, this argument cannot serve as a reason against getting rid

122. See *Tank Truck Rentals v. Comm'r*, 356 U.S. 30, 35 (1958) (expressing worry about the state legislature's intent in prescribing a penalty).

123. *Blackman v. Comm'r*, 88 T.C. 677, 679 (1987).

124. *Tank Truck Rentals*, 356 U.S. at 30.

of the public policy doctrine, other than that it would be somewhat costly (requiring legislators' time and attention) to change the level of punishment for crimes.

If my arguments thus far are sound, the public policy doctrine does not serve the purposes of criminal law, and its traditional defenders are incorrect to think that it does. This analysis of the public policy doctrine opens a much broader point about whether the purposes of criminal law militate in favor of any special tax treatment of criminal activity at all. As the analysis thus far demonstrates, it is unclear why any area of law outside of criminal law should try to double up on what the criminal law already does. The criminal law was carefully designed across centuries to serve the purposes of retribution and deterrence.¹²⁵ There is no reason to think the tax law must now haphazardly transform to carry out those purposes as well.

III. TAX LAW AS TAX LAW

If the courts' own justifications for making tax liability crime-dependent are inadequate, it is worth considering whether there may be other justifications that the courts have not considered. Thus, in the remainder of this Article, I will consider whether there is any justification at all to make tax liability crime-dependent.

As earlier shown, all of the courts' proposed justifications were focused on the idea that the public policy doctrine was supposed to serve the criminal law's purposes of deterrence and retribution. Given the failure of such justifications, we ought to consider whether giving differential treatment to criminal activity will serve the tax law's purposes of justly distributing the obligation to pay into the fisc.

This Part works through two such theories which are promising but ultimately unlikely to be right. Though I provide arguments against both theories, I also provide the arguments in favor of the theories and an explanation of the tax policies implicated by each theory. This detailed treatment is intended to both illuminate the theories and provide an analytic framework that can serve as a comprehensive resource for any reader examining the relation between wrongdoing and tax liability rather than just those who agree with my conclusion that the two theories examined in this Part are false.

125. See, e.g., Jeesoo Nam, *Lenity and the Meaning of Statutes*, 96 S. CAL. L. REV. (forthcoming 2022).

A. *Permissible Coercion*

On the *Permissible Coercion theory*, it is better to tax criminals because they have voluntarily given up their right not to be coerced, whereas non-criminals have not given up their right not to be coerced.

1. Theory and Application

From a libertarian framework, taxation involves the coercive taking of property. There are variations on this argument, but roughly put, libertarianism in the Lockean tradition commits itself to the proposition that one has a natural right to the fruits of one's labor and whatever benefits he may derive from voluntarily exchanging those "fruits" with others in the marketplace.¹²⁶ When the government demands payment of taxes from its citizens, it does so backed by the threat of police and military force *i.e.* through coercion.¹²⁷ Thus, taxation violates citizens' natural rights to property. Taxation is a kind of impermissible coercion.¹²⁸

The undesirability of coercion butts heads against pressing egalitarian concerns.¹²⁹ Take, for instance, the obligation of a society to take care of those individuals who cannot care for themselves. It is uncontroversial that young children and certain adults who are heavily disabled do not have the requisite ability to support themselves relying purely on voluntary market transactions in our society.¹³⁰ Their inability to successfully navigate the economy means that they must instead rely on either charitable giving or government aid. Wherever charitable giving fails to provide sufficient aid for the children and the disabled, government aid must step in to fill in the gaps lest we leave the disadvantaged to die. Financing such government support, at least at first glance, seems to run against libertarian principles just outlined against coercive taxation.

These conflicting concerns lead philosopher Michael Otsuka to propose that we raise money for the fisc by taxing convicted criminals.¹³¹ The central idea here is that criminals have given up their rights in such a way that coercive taking of their property is not as worrisome a violation of their

126. OTSUKA, *supra* note 29.

127. *Id.*

128. *Id.*

129. See also G. A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY 15, 105 (1995) ("[N]o egalitarian rule regarding external resources alone will . . . deliver equality of outcome, except, . . . at an unacceptable sacrifice of autonomy."); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 167–74, 232–38 (1974).

130. See, e.g., OTSUKA, *supra* note 29, at 41–42.

131. *Id.* at 42.

property rights as would be the coercive taking of innocents' property.¹³² Call such a view the *Permissible Coercion* theory. Otsuka argues that, although the tax still remains coercive since it is backed by the use of force, there is "an important respect in which [it] . . . is a voluntary scheme."¹³³ Namely, criminals have voluntarily chosen to do some morally impermissible act.¹³⁴

There is some immediate intuitive plausibility to the *Permissible Coercion* theory. It is an extremely common view that although innocent individuals have a right against harsh treatment by the state, criminals lose that right through their choice to commit morally wrong acts.¹³⁵ The loss of this right makes it permissible to, for instance, incarcerate criminals.

If Otsuka's theory is right, then it implies we ought to, to the extent we can, extract tax revenue from criminals before we collect from anyone else.¹³⁶ If we take criminals to be a serious source of revenue, then it would make sense to convert, as much as possible, prison sentences into monetary penalties. Though Otsuka himself only discusses examples of monetary fines, there does not appear to be any principled reason to limit the collection of taxes this way. If the end result desired is that criminals have greater tax liability, the system could institute any number of special policies for convicted criminals. Convicted criminals could face a higher tax rate, be taxed on new tax bases (e.g., face a wealth tax in addition to an income tax), and be prohibited from taking deductions and credits available to others.

2. Counterargument

One straightforward counterargument to the *Permissible Coercion* theory is to deny that there is any natural right to property. If individuals have no right to the property in their hands, then it would be permissible to coerce them to pay taxes. If you lend someone your bike and they refuse to give it back to you, surely it would not be wrong for the sheriff to forcibly take the bike from the borrower and give it back to you. The borrower had no right to the property, so the sheriff does not wrong him by taking it, even by force. Thus, taxation more generally is permissible coercion, not just those taxes that we levy on criminals.

Although this sort of argument is common, I suspect it would amount to using a cannon to kill a fly. Given the importance of property rights for Lockean libertarians, the counterargument would amount to a wholesale

132. *Id.* at 48.

133. *Id.* at 47–48.

134. *Id.*

135. *Id.* at 50.

136. *Id.* at 53.

rejection of the theoretical foundations that underlie the Permissible Coercion principle.¹³⁷ Hence, a narrower counterargument would be preferable. I will thus present a counterargument that, even on libertarian grounds, taxation of criminals would not be any more permissible than taxation of non-criminals.

A justification for criminal punishment that the libertarian would be happy to accept arises from the notion of self-defense.¹³⁸ Self-defense, under the common characterization, permits an innocent victim to use violent force in resisting an unjust aggressor.¹³⁹ Extending that idea to the state, the reason that the government can punish unjust aggressors is that citizens are acting collectively to protect themselves from harm.

Importantly, however, this sort of self-defense grounding for punishment places strict limits on the punishment. The most commonly discussed limitations on self-defense are proportionality and necessity. When one uses force in self-defense, one can only do so if the use of force is necessary to protect oneself,¹⁴⁰ and one must use the minimal amount of force necessary to protect oneself.¹⁴¹ Underlying the doctrines of proportionality and necessity is the clear (and perhaps obvious) notion that force used in self-defense must be used with the purpose of defending oneself. The mere fact that someone is an unjust aggressor does not mean that we can do anything we would like to him.¹⁴²

Michael Otsuka's argument for the Permissible Coercion thesis relies heavily on the notion that because criminals had a choice not to commit crime, their voluntary commission of crime entails the loss of their right to be used as a means to an end.¹⁴³ But, the analysis of self-defense shows, we do not ordinarily take the commission of wrongdoing to then license the use of any force whatsoever against wrongdoer. The wrongdoer's loss of his right

137. See John Christman, *Self-Ownership, Equality, and the Structure of Property Rights*, 19 POL. THEORY 28 (1991) (arguing against property rights from a libertarian framework).

138. See Farrell, *supra* note 34, at 369. Notice that anti-tax libertarians would have a difficult time accepting a retributivist theory of punishment. On the retributive theory of punishment, criminals are punished because it is what they deserve. Suppose, then, that a libertarian were to argue that the use of force by the government is permitted in giving citizens what they deserve. This would allow the government to use force in punishing criminals, but would it not also allow the government to redistribute wealth based on desert? Thus, the libertarian, in justifying punishment, would then also justify redistributive taxation.

139. *Id.*

140. *United States v. Peterson*, 483 F.2d 1222, 1229 (D.C. Cir. 1973).

141. MODEL PENAL CODE § 3.04 (AM. L. INST., Proposed Official Draft 1962); *State v. Wall*, 479 P.3d 355, 362 (Utah Ct. App. 2020) ("The law on self-defense does not allow for disproportionate use of defensive force.").

142. Farrell, *supra* note 34, at 371.

143. OTSUKA, *supra* note 29, at 50.

not to be used as a means is only a partial loss.¹⁴⁴ The permission to use force against criminals must be limited to the purpose of stopping crime. Thus, even on libertarian grounds, the Permissible Coercion theory must be rejected.

B. *Unfair Liberty*

The second extrajudicial theory to be examined argues that wrongdoing leads to a change in desert apart from direct cost to the wrongdoer. Suppose, for example, that Charles Claymore burned his wife's clothing, and, unlike Biltmore Blackman, no personal loss arose for Charles. His house remained intact and only the wife's property was destroyed. For Charles, there is no casualty loss, and, therefore, no casualty loss deduction to be denied. Have Charles's actions nevertheless changed his desert in society's distribution of benefits and burdens?

1. Theory

To set the background, let us start with two abstract theoretical propositions. A desert-based conception of distributive justice states that justice requires we distribute the benefits and burdens of a society according to what individuals deserve.¹⁴⁵ But what is it that we deserve? Conditional egalitarianism states that members of a society deserve an equal share of benefits and burdens unless an individual merits differential treatment.¹⁴⁶ The notions of equality and desert are deeply embedded in our sense of justice.¹⁴⁷ But conditional egalitarianism is abstract. It does not state how one might merit differential distribution of benefits and burdens.

One might believe, for example, that individuals merit differential outcomes as a result of effort but do not deserve differential outcomes as a result of luck.¹⁴⁸ The fact that someone was twice as lucky as another does not make that person deserving of twice the rewards. Someone who put in twice as much effort, *ceteris paribus*, does deserve greater benefits than someone who only put in half as much effort.

144. Farrell, *supra* note 34, at 371.

145. JOHN RAWLS, A THEORY OF JUSTICE 273 (rev. ed. 1999). As John Rawls notes, the desert-based conception of justice is so intuitive as to be "common sense."

146. Richard J. Arneson, *Luck Egalitarianism and Prioritarianism*, 110 ETHICS 339, 340 (2000).

147. See RONALD DWORKIN, SOVEREIGN VIRTUE, THE THEORY AND PRACTICE OF EQUALITY, 120–84 (2000).

148. Nam, *supra* note 15, at 1082–94.

Another way our decisions can influence what we deserve is through moral wrongdoing. This has been taken as central to the idea of retributive justice. Retributivists take culpable moral wrongdoing as both necessary and sufficient for deserving punishment.¹⁴⁹ But such theories concern themselves only with the application of punishment, which is a special type of burden in that it is created with specific intention to harm, i.e., it would not exist were government not to have created it with the purpose of inflicting harm on those individuals to whom it is directed.¹⁵⁰

What about the distribution of benefits and burdens outside of punishment? After all, punishment is only a very small proportion of the sum total of burdens in our society, and we need a theory about how all other burdens (and benefits) are to be distributed. One way—and some may consider as the primary way—distribution of benefits and burdens outside of punishment is administered is through the tax and transfer system.¹⁵¹ According to the following theory, even the distribution of benefits and burdens more generally depends on the moral wrongdoing of the taxpayer. The argument proceeds as follows.

When a perpetrator harms a victim through his morally culpable wrongful conduct, this criminal act creates three required responses that the state must oversee. (1) The criminal needs to compensate the victim for the harm that he did him; (2) the criminal should suffer punishment; and (3) the criminal must compensate his fellow members of society who dutifully bore their burdens. The first two required responses have been discussed at length in the areas of tort law and criminal law. The third response would be the domain of tax law insofar as tax law is the primary lever of distributive justice.¹⁵² I will call this third proposition the *Unfair Liberty* theory.

This third requirement is easiest to understand with a simple example. Suppose that the current distribution of benefits and burdens in our society is just. Later, Dimitri steals Victor's phone. We must surely agree that this act of theft upsets the distribution of benefits and burdens such that the distribution is no longer just. The first way in which the distribution is unjust is that Victor no longer has his phone. Dimitri must return Victor's phone. Second, according to the Unfair Liberty theory, Dimitri, through his actions,

149. See Mitchell N. Berman, *Punishment and Justification*, 118 *ETHICS* 258, 269 (2008). For the purposes of this Article, I will often refer to wrongdoing, but this should always be taken as a shorthand for culpable wrongdoing unless explicitly stated otherwise.

150. DAVID BOONIN, *THE PROBLEM OF PUNISHMENT*, CAMBRIDGE U. PRESS, 235–43 (2008).

151. Fritz Neumark et al., *Taxation*, *BRITANNICA* (Sept. 2, 2022), <https://www.britannica.com/topic/taxation> [<https://perma.cc/MSG2-PCNY>].

152. See Sadurski, *supra* note 32, at 12.

has shed himself of a burden that the rest of us continue to bear: the burden of self-restraint.¹⁵³ While the rest of us have limited our options for action as to exclude thievery, Dimitri has not. Thus, as a matter of distributive justice, Dimitri bore fewer burdens than the rest of us. Put another way, Dimitri took for himself an unfair advantage—greater liberty in action—that the rest of us do not share.¹⁵⁴ He has made an equal society unequal. This is the key claim of philosopher Wojciech Sadurski’s analysis of the connection between crime and distributive justice, “If unrestricted liberty gives me all these options that I have in the situation of self-restraining behavior plus some extra options, then it is an advantage To have a choice is better than not to have it.”¹⁵⁵ To correct for this imbalance in the distribution of burdens, it is the *prima facie* responsibility of the government to redistribute either some of our burdens onto Dimitri or redistribute some of Dimitri’s wealth to the rest of us. Criminals deserve to bear greater burdens because they were previously beneficiaries of an unfairly lighter burden.¹⁵⁶

2. Application: Stamp Taxes

With the Unfair Liberty theory set out, it is worthwhile to see what tax policy might best instantiate the principle. In effect, the public policy doctrine would be one way to instantiate the principle, but likely not very accurately. Although the public policy doctrine does treat criminals more harshly than non-criminals, the treatment they get depends on whether or not they have casualty losses arising from their wrongdoing and whether their payment of fines are ordinary and necessary business expenses.¹⁵⁷ If two people commit the same crime and one person suffers casualty losses and the other does not, then only the person who suffered casualty losses has the tax penalty that comes from a denial of deductions; the one who suffered no casualty losses has no claim for a deduction in the first place and so faces no tax penalty. If both took unfair liberty advantages for themselves, why should only one be treated harshly?

153. *Id.*

154. *See id.* at 53.

155. *Id.* at 54. Although I borrow much of Sadurski’s insights to form the argument here, it is not identical to Sadurski’s own. In the cited Article, Sadurski is attempting to justify criminal punishment on distributive justice grounds, whereas the argument I present here sees distributive justice as distinct from retributive justice.

156. *Id.* at 52–55.

157. *See generally* Stephan III, *supra* note 8 (explaining the punitive effect of the public policy doctrine on criminals and the tax policy basis for such treatment).

Instead, supporters of the Unfair Liberty theory should draw lessons from those states that tax the possession of illegal drugs. 24 states currently have or previously had “stamp taxes” on drugs.¹⁵⁸ For instance, if one comes into possession of marijuana in North Carolina, he must go to the North Carolina Department of Revenue and pay \$3.50 per gram of marijuana.¹⁵⁹ These taxes currently raise roughly \$10 million in revenue for North Carolina each year.¹⁶⁰ The tax is called a “stamp tax” because the taxpayer, by paying the tax, essentially purchases a stamp showing that the requisite taxes have been paid.¹⁶¹ If they avoid paying the tax, they can be subject to civil and criminal penalties as well as interest charges for the delayed payment.¹⁶²

Such stamp taxes are an appropriate response if there has been a miscarriage of distributive justice when individuals violate the law. To correct for the unfair liberty gained by the wrongdoers, they must compensate the rest of society by paying into the fisc. Stamp taxes should, in order to instantiate the Unfair Liberty theory be broadened to include crimes generally rather than its current limitation to drug crimes.

There is, however, a worry that such a tax might overreach. It may be the case that nearly all members of a society regard certain legal rules as non-binding. That is, they do not choose to restrict their liberties with respect to such rules. For instance, in New York City, it sometimes appears that those citizens who find the jaywalking laws to be non-binding are much greater in number than those citizens who find jaywalking laws to be binding.¹⁶³ If the Unfair Liberty theory is motivated by the notion that a criminal takes for himself liberty that others do not, then that notion is absent when society as a whole regards a rule as non-binding. One revision, then, would be to require

158. Nkhita Airi & Aravind Boddupalli, *Why Do States Tax Illegal Drugs?*, TAX POL’Y CTR. (Nov. 18, 2020), <https://www.taxpolicycenter.org/taxvox/why-do-states-tax-illegal-drugs> [<https://perma.cc/FR3Z-N7G7>].

159. *Id.*

160. N.C. DEP’T OF REVENUE, *Statistical Abstract of North Carolina Taxes 2022*, at tbl.15, <https://www.ncdor.gov/media/13431/open> [<https://perma.cc/9L3D-K3HZ>]; see also Hayes Holderness, *Crack Taxes and the Dangers of Insidious Regulatory Taxes*, 95 S. CAL. L. REV. 483 (2022).

161. Holderness, *supra* note 160.

162. Airi & Boddupalli, *supra* note 158.

163. See generally Peter D. Norton, *Street Rivals: Jaywalking and the Invention of the Motor Age Street*, 48 TECH. & CULTURE 331 (2007) (detailing the public’s response to jaywalking laws in New York).

the payment of stamp taxes for the commission of felonies, which are intended to mark out crimes that indicate serious wrongdoing.¹⁶⁴

Such stamps could be priced according to the maximum term of imprisonment. Thus, we might have very high prices for Class A felonies (maximum of life imprisonment) and lower prices for Class E felonies (maximum of less than five years but minimum of more than one year).¹⁶⁵

However, there is an important caveat. The Unfair Liberty theory does not apply to negligent crime and certainly does not apply to any case of strict criminal liability. *Mens rea* in criminal law ordinarily requires the defendant to have had the intent to do the act prohibited by law. However, negligence and strict liability crimes do away with such a requirement, thereby exposing defendants who only accidentally violated the law to criminal liability. If a defendant has *accidentally* tripped one or another wire of criminal prohibition, then he has not enjoyed any greater freedom of action.¹⁶⁶ Though a criminal may have committed negligent homicide, he cannot be held to have taken greater liberty for himself if he genuinely thought himself to be restrained from the killing of another and only did so by accident. For instance, suppose Devon was drag racing and ended up accidentally killing his hated foe who was merely crossing the street at the wrong time. Devon has continually, as a matter of his internal psychology, practiced self-restraint against killing his foe. There was never the *choice* to kill. Thus, though he may enjoy his foe's death, he never enjoyed greater liberty than the rest of us.

At this point, one may contest that Devon has enjoyed the liberty to participate in the dangerous activity of drag racing, which the rest of us avoid. Insofar as drag racing is criminalized, Devon should be taxed for his taking additional liberty, but only for his drag racing. Devon considers drag racing to be an option open to him but does not consider homicide to be an option open to him. For Devon to deserve taxation for homicide, he must also think that his drag racing may kill an individual and nevertheless consider himself free to engage in this possibly homicidal act. Such additional facts would raise his culpability to that of recklessness rather than mere negligence.¹⁶⁷

164. Shah Md. Omer Farque Jubaer et al., *The Legal Structure of Criminal Law in Terms of Determining To Discern Criminal Justice: A Proportional Assortment for an Easy Consciousness*, 3 AM. J. INTERDISC. RSCH. & DEV. 1, 5 (2022).

165. See, e.g., 18 U.S.C. § 3559.

166. See generally H.L.A. HART, *Legal Responsibility and Excuses*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28, 31–35 (2d ed. 2014) (describing how the law generally excuses criminal acts where the acts are involuntary or accidental, except where strict liability applies).

167. MODEL PENAL CODE § 2.02 (AM. L. INST., Proposed Official Draft 1962).

3. Counterargument: Unfair Liberty Without Criminal Action

In criminal law theory, there is a debate about whether what makes a person deserving of punishment is their bad act or their bad character.¹⁶⁸ Do we punish an individual because he punched someone (bad act) or because he is the sort of person who does not care about the rights and interests of others (bad character)? If one thinks that bad character is the right basis for punishment, such a theory has an unpalatable implication: we ought to punish those individuals with bad character regardless of whether they did anything wrong.¹⁶⁹ After all, if bad acts do not factor into the calculus for deserving punishment, then it does not matter whether individuals with bad character committed a crime or not. Even if the defendant never punched anybody, the fact that he does not care about the rights and interests of others was supposed to be the basis for punishment anyway. Thus, under the character theory, we must punish some people who have never done anything wrong, simply because they have bad character.¹⁷⁰ This counterintuitive implication of the character theory is thought to be highly problematic.¹⁷¹

A version of the problem that exists for the character theory of punishment will also apply to the Unfair Liberty theory. Earlier, I outlined Wojciech Sadurski's argument that to have an option is better than to not have it.¹⁷² For Sadurski, the value is not in doing the activity, but the value is instead in relieving oneself of a burden to which others are bound.¹⁷³ That is supposed to be why Biltmore Blackman, whose arson ended terribly bad for him, is nevertheless a recipient of the advantage of unfair liberty; he took himself to have an option for action that others considered to be restricted territory. Blackman's taking greater liberty for himself is what necessitates a distributive justice correction in the opposing direction.

The problem is that many people may ignore the law in guiding their actions but nevertheless not commit any crimes. Many, perhaps most of us, have no desire to do the sorts of acts that are subject to criminal punishment.¹⁷⁴ It may very plausibly be that an individual who has no interest in committing arson *also* has no respect for the law against arson. That is, he

168. See Michael S. Moore & Heidi M. Hurd, *Punishing the Awkward, the Stupid, the Weak, and the Selfish*, 5 CRIM. L. & PHIL. 147, 173–74 (2011).

169. *Id.* at 175.

170. *Id.*

171. *Id.*

172. See generally Sadurski, *supra* note 32.

173. *Id.* at 53.

174. There is a wide body of literature on this topic that extends back at least to Plato's discussion of the Ring of Gyges. PLATO, REPUBLIC, in PLATO: COMPLETE WORKS 971 (John M. Cooper ed., G.M.A. Grube & C.D.C. Reeve trans., 1997).

takes himself to have the option to commit arson though he chooses not to exercise that option. If merely having the option is the advantage that criminals take for themselves, then why should he not be taxed just the same as Blackman? After all, they both considered themselves to have the exact same option open to them.¹⁷⁵ And, yet, it is intuitively quite unpalatable that we would have a system in which people who did nothing wrong would be required to compensate other members of society for their supposed unfair advantage.

IV. THE SELF-CREATED HARM PRINCIPLE

Thus far, this Article has considered various theories on the connection between tax liability and criminal wrongdoing. Although all explanations have been plausible, I have attempted to show that they all face significant counterarguments and should therefore be rejected. This Part argues that the best principle to guide the taxation of crime is that people deserve to bear the costs of their own wrongdoing.

A. Theory

Consider the following principle about desert in the distribution of man-made harms.

Self-Created Harm Principle: If a harm-creator has directly, through his culpable wrongdoing, made it inevitable that either some innocent person will bear a harm or the harm-creator will bear a harm, then the harm-creator deserves to bear the harm.¹⁷⁶

Four analytical points about the Self-Created Harm Principle: First, the principle has an essentially comparative aspect. The harm-creator has made it inevitable that either he *or* some innocent person will bear the harm he created. This comparative aspect is critical to the principle's normative appeal. If someone culpably commits a moral wrong, why should anyone other than the wrongdoer have to be stuck with the costs of that wrongdoing?

175. See Sadurski, *supra* note 32, at 54 (“Even if one does not seriously consider taking advantage of the possibility of acting aggressively, the very existence of the choice is the advantage in itself.”).

176. Though this specific formulation is my own, the more general idea behind being liable for the harms one culpably creates is intuitive and different formulations can be found in other works. See Farrell, *supra* note 34; see McMahan, *supra* note 34; see Montague, *supra* note 34, at 32 (“When unavoidable harm is being distributed among a group of individuals, and when some members of the group are to blame for the predicament of all, then justice requires (*ceteris paribus*) that the harm be distributed among those who are blameworthy.”).

To have an innocent party bear the harm instead of the wrongdoer would be grossly unjust. Second, the principle sets out one sufficient condition for desert and not a necessary condition.¹⁷⁷ This principle is not intended to be exhaustive, so it is compatible with there being other sufficient conditions for desert. Third, I intend to use the term “harm” in a broad sense, in the same way we might use the phrase “negative consequence of an action.” Fourth, there are many ways in which a harm-creator can “[make] it inevitable that either some innocent person will bear a harm or the harm-creator will bear a harm,” which gives the principle wide applicability. This Part goes through these multiple ways in order to both illustrate the principle in action as well as illuminate its key normative features.

Cases of self-defense illustrate perhaps the most obvious way in which a harm-creator can make it inevitable that either some innocent person will bear a harm or the harm-creator will bear a harm.¹⁷⁸ Suppose an unjust aggressor points a gun at an innocent victim and is about to shoot. The innocent victim can stop the unjust aggressor, but only by killing the aggressor first. In such a situation, the Self-Created Harm Principle clearly comes into play. The unjust aggressor has made it inevitable that one of two things must happen: either the aggressor will succeed in killing his victim or the victim will succeed in killing the aggressor. Someone must bear the harm—in this case the grand harm of death—and the only question left is who should bear that harm. Furthermore, the only reason anyone has to bear this harm at all is that the unjust aggressor chose to try and kill the innocent victim, a wrongful and culpable choice. Surely, in such a situation, the superior outcome is for the innocent victim to kill the unjust aggressor first, and this is precisely what the Self-Created Harm Principle entails. If one of the two parties must bear the cost of death, it should be the unjust aggressor since the unjust aggressor is the one responsible for having wrongfully created a situation in which someone must die.

The criminal law reflects this moral judgment through its self-defense doctrine. Although the use of force against others is ordinarily prohibited by the criminal law, the use of force is permitted when an innocent individual is under the threat of harm.¹⁷⁹ Since self-defense is a justification, the law rightly categorizes such actions as morally permissible.¹⁸⁰

177. A sufficient condition for desert defines an instance when someone deserves something. In contrast, a necessary condition for desert defines an instance when someone does not deserve something. For an example of a necessary condition for desert, see Nam, *supra* note 15, at 1082–94.

178. See Farrell, *supra* note 34, at 372.

179. MODEL PENAL CODE § 3.04 (AM. L. INST., Proposed Official Draft 1962).

180. MODEL PENAL CODE § 3, Introduction (AM. L. INST., Proposed Official Draft 1962).

Further analyzing the criminal law's particular instantiation of the Self-Created Harm Principle, perhaps a skeptic might respond that the principle should make room for the following class of exceptions. The principle applies when there will be harm either to the wrongdoer or to an innocent person. But suppose the harm coming to the innocent person is quite small and the only way to avoid such a harm is to bring a very large harm to the wrongdoer. The skeptic would assert that, in such cases, it is not the case that the wrongdoer should bear the harm.¹⁸¹ For instance, the Model Penal Code only permits using deadly force in self-defense when the unjust aggressor threatens "death, serious bodily injury, kidnapping or sexual intercourse."¹⁸² One is not permitted to use deadly force as self-defense against, for example, mere battery. The Commentary to the Model Penal Code notes that "the amount of force used by the actor must bear a reasonable relation to the magnitude of the harm that he seeks to avert."¹⁸³ This is called the proportionality requirement in the theory of self-defense.¹⁸⁴

The criticism has some merit. There is some attractiveness to the idea that the harm threatened to an innocent victim could be so small that it would be unjust to kill the unjust aggressor, even if such killing were the only way to stop the aggressor. On the other hand, individualist views would find no such sympathy.¹⁸⁵ How could one be morally required to suffer a wrongful harm when one has the means to prevent it? As the German legal adage goes, "[r]ight need not yield to wrong."¹⁸⁶ Rather than resolve the tension between these competing viewpoints, this Article will remain theory-neutral with regard to whether the Self-Created Harm Principle should carve out an exception for cases in which small harm to an innocent is prevented only by laying large harm to a wrongdoer. As will become obvious later in this Part, both versions of the Self-Created Harm Principle have the same normative implications when it comes to tax law because the tax law concerns only those situations where the magnitude of the harm stays constant and the only question is who bears the harm.

181. Montague, *supra* note 34, at 32.

182. MODEL PENAL CODE § 3.04(2)(b) (AM. L. INST., Proposed Official Draft 1962).

183. MODEL PENAL CODE § 3.04 cmt. 4(a) (AM. L. INST., Proposed Official Draft 1962).

184. *E.g.*, Suzanne Uniacke, *Proportionality and Self-Defense*, 30 L. & PHIL. 253, 253–54 (2010).

185. See Larry Alexander, *Self-Defense, Punishment, and Proportionality*, 10 L. & PHIL. 323, 324–327 (1991) (arguing that preventing violation of one's rights is "not morally constrained by any requirement of proportional response"); Uwe Steinhoff, *Proportionality in Self-Defense*, 21 J. ETHICS 263, 264 (2017) ("German law in the Weimar republic deemed it permissible . . . to shoot at (and possibly kill) an apple thief if the defender (of the property) had no other means of stopping the thief.").

186. Steinhoff, *supra* note 185, at 264.

Another class of cases to which the Self-Created Harm Principle applies is covered by the domain of tort law. Whereas the principle applies to criminal law in cases where the harm-creator merely threatens harm on an innocent person (thereby leading to the possibility of self-defense), the principle applies to tort law in cases where the harm-creator has successfully harmed an innocent person. Consider, for example, the case of tortious battery in which the defendant has intentionally battered the plaintiff, causing serious injury. Here, the harm-creator is the defendant who has culpably wronged the plaintiff through his battery. Since the battery has injured the plaintiff, the wrongdoing has caused a harm. But, as tort law rightly recognizes, the harm need not lie on the plaintiff forever.¹⁸⁷ If the defendant is held liable in tort, then he will have to compensate the plaintiff for the damage done and make him whole.¹⁸⁸ This would amount to the defendant bearing the harm he himself created.¹⁸⁹ Thus, once everything is said and done, there are two people who could end up bearing the harm caused by the defendant: the plaintiff or the defendant.

Applying this idea, we can see the harm-creator (the defendant) has, through his culpable wrongdoing (battery), made it the case that either the plaintiff will bear the harms of the battery or the defendant will bear the harm by compensating the plaintiff for his damages. In such a situation, the Self-Created Harm Principle entails that the defendant ought to bear the costs of his own wrongdoing, not the innocent plaintiff. And that is exactly the result that tort law enforces. Battery is an intentional tort, and the defendant must compensate for any damage done to the plaintiff.¹⁹⁰ Intentional torts thus effectuate the Self-Created Harm Principle in cases where the harm-creator intended the harm as part of his wrongful act. These cover actions ranging from false imprisonment to intentional infliction of emotional distress.¹⁹¹ Clearly, in such cases, it would be unjust to let the harm lie on the innocent victim.

The possibility of compensation means that every instance of one person successfully harming another is an instance in which the harm-creator has made it inevitable that either he or his victim must bear the harm.¹⁹² If the harm-creator compensates the victim, then the harm-creator is actually the

187. HARRY SHULMAN ET AL., *CASES AND MATERIALS ON THE LAW OF TORTS*, 1 (6th ed. 2015).

188. *Id.*

189. See McMahan, *supra* note 34, at 253.

190. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM, § 5 (AM. L. INST. 2010).

191. RESTATEMENT (SECOND) OF TORTS §§ 18, 46 (AM. L. INST. 1965).

192. See McMahan, *supra* note 34, at 253.

one who ends up bearing his own harm and the victim is made whole; if no one compensates the victim, the victim ends up bearing the harm.¹⁹³ Thus, where culpably wrongful harm is done and the harm-creator could provide compensation for that harm, the Self-Created Harm Principle triggers and he must compensate for that harm.

The Self-Created Harm Principle does not apply only to cases where the harm was intended by the harm-creator. Often, wrongful acts can create unintentional or accidental harms. This is, as an analytic truth, the domain of negligence liability. Intentional torts govern those cases of harming where the harm was either desired by the defendant or the defendant knew that such harm was certain or substantially certain to occur.¹⁹⁴ Negligence governs those cases where the harm was not desired by the defendant and was merely a matter of probabilistic chance, even cases where the defendant himself did not know that he was risking such harm.¹⁹⁵

To ensure that unintentional harms caused by wrongdoing are still placed on the wrongdoer consistent with the Self-Created Harm Principle, the tort law would need to make wrongdoing sufficient to trigger negligence liability. And the tort law does just that. As was the case with intentional harms, the tort law accords with the Self-Created Harm Principle when it comes to unintentional harms. Criminal wrongdoing is, in the majority of jurisdictions, considered negligence *per se*—in minority jurisdictions, criminal wrongdoing either creates a rebuttable presumption of negligence or serves as evidence of negligence—and will trigger tort liability when such wrongdoing causes harm.¹⁹⁶ Since wrongdoing suffices for negligence, roughly speaking, the tort law thereby makes sure that both intentional and accidental harms from one's wrongdoing are placed on the wrongdoer.

Recall also that the Self-Created Harm Principle only kicks in when there is *culpable* wrongdoing. Likewise, many states make an exception to the rule that criminal wrongdoing is negligent when the actor has an excuse (*i.e.* is not culpable).¹⁹⁷ Through these doctrines, tort law effectuates the Self-Created Harm Principle when culpable wrongdoing leads to the harming of others.

193. *Id.*

194. RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (AM. L. INST. 1965).

195. *Id.*; see RESTATEMENT (SECOND) OF TORTS § 290 cmt. a (AM. L. INST. 1965) (noting that in determining negligence, “the actor is treated as though he knew” the various features of our world required for making a calculation of risk of harm that form our common knowledge).

196. HARRY SHULMAN ET AL., CASES AND MATERIALS ON THE LAW OF TORTS 217 (5th ed. 2010); see *Martin v. Herzog*, 228 N.Y. 164, 170 (N.Y. 1920).

197. KATHRYN KELLY & DAVID F. PARTLETT, TORTS 256–57 (14th ed. 2020).

Finally, the tort law also rightly reflects the notion that there be a direct connection between the wrongful act and the harm. In tort law, this direct connection takes the form of proximate causation between the wrongful act and the harm.¹⁹⁸ Proximate cause is satisfied when the wrongful act is either a direct cause of the harm or the harm was foreseeable at the time of the wrongful act.¹⁹⁹ Thus, when the harm that arises is aberrant or otherwise far removed from the wrongful act, no liability is entailed.²⁰⁰

B. Application to Tax Policy

Using the insights from the previous Section's analyses of compensation and accidental harming, we can now delve into how the Self-Created Harm Principle applies to the tax law. Recall my claim that the principle has wide applicability due to the many different ways in which a harm-creator can make it inevitable that either the harm-creator will be harmed or some innocent person will be harmed. The Self-Created Harm Principle came into play in the criminal law in cases where the harm-creator threatened harm on an innocent person, and the principle came into play in tort law in cases where the harm-creator successfully harmed an innocent person. This Section will demonstrate that the Self-Created Harm Principle applies to tax law in a third class of cases: cases where the harm-creator has harmed himself.

1. Public Policy Doctrine (Partly) Justified

Blackman presents a great example of a case in which a taxpayer harms himself. Recall that Biltmore Blackman, in culpably committing the wrongful act of burning his wife's clothing, brought great harm to himself by burning down his own house.²⁰¹ This is partially an unintentional harming—since Blackman did not intend to cause any damage to his own house—but recall from the earlier discussion of tort negligence that the Self-Created Harm Principle applies to both intentional and unintentional harms created by culpable wrongdoing. And when Blackman unintentionally harms himself, one possibility that opens up is that the other members of society could compensate Blackman to make him whole, *i.e.* pay Blackman \$97,853 for the lost value of his house. The conceptual possibility of compensation kicks in the Self-Created Harm Principle. Where such compensation is possible,

198. *Wagner v. Anzon, Inc.*, 684 A.2d 570, 574 (Pa. Super. Ct. 1996).

199. Mark A. Geistfeld, *Proximate Cause Untangled*, 80 MD. L. REV. 420, 422–23 (2021).

200. *Id.*

201. *Blackman v. Comm'r*, 88 T.C. 677, 679–80 (1987).

Blackman has made it inevitable that either he will bear the cost of his home destruction or some other innocent person will bear it, through the mechanism of compensation. This is where the tax law comes into play.

Tax law is a distribution system.²⁰² It determines how benefits and burdens in a society are shared among its members. Suppose, for example, that an individual finds a pot of gold in his backyard. He has no greater claim to it than others—one might reasonably believe—so he ought to share it with the rest of his fellow citizens. One way to effect such a redistribution would be to tax his gold income. A 100% tax on the individual's gold income transfers the gold from a private resource to a communal resource, thereby sharing one's undeserved benefits with the rest of society.²⁰³

Similarly, when one has undeserved burdens, the rest of society can compensate the burdened individual through the tax law. For instance, if someone is born with a cleft palate—leading to difficulty eating and speaking—that burden is no fault of his own.²⁰⁴ Society ought to restore him to equal status by offering to share in the costs of corrective surgery.²⁰⁵ This can be done directly, through government provided medical services, or through a reimbursement of the medical funds. For reimbursement, the government could either pay the citizen cash or it could offer him a decrease in tax liability through a deduction or credit. Both would transfer a community resource, namely government funds, to an individual to pay for the individual's costs.²⁰⁶ A 100% tax credit for a given cost means one's tax liability is reduced by 100% of that cost.²⁰⁷ For instance, if we permitted a 100% tax credit for amounts paid for cleft palate surgery, that would amount to all of the members of society jointly bearing the cost of the surgery. A tax deduction reduces one's tax liability by the amount of the deduction

202. See Nam, *supra* note 15, at 1070, 1082–83, 1114.

203. The same analysis goes for wrongdoing. A wrongdoer deserves none of the benefits that accrue from his wrongdoing. For example, a sex trafficker deserves no part of the revenue he earns from trafficking his victims. Thus, the law ought not allow him to keep any of that income. One way to strip the individual of such benefits would be a 100% confiscatory tax on his income. But this does not need to be done by the tax system. Criminal law already has rules of restitution and forfeiture, which strip criminals of wrongfully gained profits. *E.g.*, CAL. PENAL CODE § 598.1.

204. See Nam, *supra* note 15, at 1084–85.

205. *Id.*

206. Technically speaking, functional identity between giving a citizen cash and lowering the citizen's tax liability is predicated on refundability of the tax benefit because the citizen might end up having negative tax liability.

207. See *Tax Credit*, TAX FOUND., <https://taxfoundation.org/tax-basics/tax-credit/> [<https://perma.cc/BC57-DHUZ>] (explaining that tax credits reduce a taxpayer's bill "dollar-for-dollar").

multiplied by the taxpayer's tax rate.²⁰⁸ This product²⁰⁹ would be the amount of the cost borne by society.²¹⁰

Certain readers, even if they agree that a credit amounts to a sharing system, may have difficulty seeing how a deduction is a sharing system. Suppose, initially, that we agree about the 100% credit case. After all, it is hard to see how giving a 100% credit for a taxpayer's cost would not amount to the society paying for that cost in lieu of the taxpayer. If that's right, then it must be that an X% credit amounts to society bearing X% of a taxpayer's costs. If we gave a 60% credit for cleft-palate surgery, then the taxpayer bears 40% of the costs and society bears 60% of the costs. Recall that a tax deduction reduces one's tax liability by the amount of the deduction multiplied by the taxpayer's tax rate.²¹¹ Therefore, an X% credit for a given cost is financially equivalent to a deduction for that cost at a tax rate of X%. For instance, suppose that cleft-palate surgery costs \$100,000 and the taxpayer's marginal tax rate is 60%. Giving a 60% credit for the cost of cleft-palate surgery means the taxpayer gets \$60,000 from society to offset the cost of the surgery. Allowing the taxpayer to take a deduction for the cost of his cleft-palate surgery would mean the taxpayer's taxable income would reduce by \$100,000. At the taxpayer's marginal tax rate of 60%, his tax liability is thereby reduced by \$60,000. Therefore, a deduction is equivalent to a partial credit. Since partial credits are an instance of society sharing burdens, deductions must also be an instance of society sharing burdens. One can replace the cleft-palate surgery with casualty losses, business expenses, etc.

With the theoretical framework in place, we can now justify the proposition that Biltmore Blackman should not receive a deduction for his losses. Biltmore Blackman has, through his culpable wrongdoing, unintentionally caused harm to himself.²¹² If the government provided him a deduction for the amount of his loss, that would amount to the other innocent members of society bearing some portion of that harm. In other words, Blackman has made it inevitable that either he or the innocent members of

208. *What Are Tax Credits and How Do They Differ from Tax Deductions?*, TAX POL'Y CTR. (May 2020), <https://www.taxpolicycenter.org/briefing-book/what-are-tax-credits-and-how-do-they-differ-tax-deductions> [<https://perma.cc/L54X-ATQF>].

209. "Product" here is being used in the arithmetic sense of the term.

210. Tax scholars will already be familiar with the framework of taxation as the government sharing the benefits and burdens of financial activities. *E.g.*, Roger H. Gordon, *Can High Personal Tax Rates Encourage Entrepreneurial Activity?*, 45 IMF STAFF PAPERS 49, 63 (1998) (laying out the familiar view of government as co-investor of property under an income tax).

211. *What Are Tax Credits and How Do They Differ from Tax Deductions?*, *supra* note 208.

212. A complication in this case is that the Blackmans were married and Biltmore likely harmed not only himself but also his wife. Applying the Self-Created Harm Principle, it would be unjust for the wife to bear any of the harm.

society must bear the cost of his house burning down. And since the harm arose from Blackman's culpable wrongdoing, the Self-Created Harm Principle entails that Blackman ought to bear the cost. Therefore, Blackman should not be permitted a deduction for his personal losses. The public policy doctrine, in denying the deduction, serves tax law's distributive justice aims by allocating wrongfully created harms according to desert.

The public policy doctrine rightly extends also to cases where the malicious activity was entered into for the purpose of turning a profit. Deductions were denied when an arsonist set his own building on fire to collect insurance payments but failed to collect because the insurance company figured out the scam.²¹³ Similarly, taxpayers who lost their money trying to invest in a bill counterfeiting scam were not eligible to claim any deduction.²¹⁴ If one is running (or trying to run) an illicit enterprise for profit, the tax law ought not shift the burdens that arise in the course of such enterprise to the other, innocent members of society. The wrongdoer must bear the full brunt of his losses.

The analysis for losses also extends to expenses *mutatis mutandis*. When illicit enterprises have business expenses—for example, a drug trafficking business that must pay phone bills²¹⁵—these expenses arise because they are using limited resources for the purposes of wrongdoing. If the enterprises were denied deductions, they would have to pay for the costs of using these resources, quite literally the costs of wrongdoing, out of their own pocket. If they were granted a deduction or credit for business expenses, however, the costs of wrongdoing would at least partly be borne by the taxpayers. The Self-Created Harm Principle again entails that the wrongdoer ought to bear these costs, not the taxpayer.

Another variation on the facts concerns those expenses that arise from the government's imposition. As discussed earlier, Section 162(f) of the Internal Revenue Code prohibits criminals from taking business expense deductions for the fines they are assessed.²¹⁶ This is an exception to the general rule that allows businesses to deduct ordinary and necessary business expenses. Section 162(f) prohibits the criminal from spreading the cost of a fine to other members of society.²¹⁷ Again, the costs of wrongdoing are not

213. Rev. Rul. 81-24, 1981-1 C.B. 79.

214. Luther M. Richey, Jr. v. Comm'r, 33 T.C. 272, 276-77 (1959); Mazzei v. Comm'r, 61 T.C. 497, 502 (1974).

215. Edmondson v. Comm'r, 42 T.C.M. (CCH) 1533 (1981).

216. I.R.C. § 162(f).

217. When a criminal is permitted to offload the cost of punishment onto others, it is called *penal substitution*. DAVID LEWIS, *Do We Believe in Penal Substitution?*, in PHIL. PAPERS 203, 207 (1997).

the sort of thing that tax law should place on other members of society and that plainly includes those costs that the government imposes as punishment.

2. Other Costs Related to Wrongdoing

Although the public policy doctrine gives some life to the Self-Created Harm Principle, these provisions do not go far enough. Since either a deduction or credit for a taxpayer's costs amounts to the other members of society helping pay for those costs, any deduction or credit given for the costs of wrongdoing ought to be disallowed.

As it stands, however, expenses associated with criminal enterprise are, to a large degree, deductible. With only a few exceptions, most of which have been set out already in this Article, individuals can take deductions for their criminal enterprises in just the same way as they would for non-criminal enterprises. As affirmed by the Supreme Court, income from illicit sources is taxed, "with only a few limited and well-defined exceptions," the same as income from ordinary business activities.²¹⁸ Thus, suppose an individual starts a business, in the process renting out office space and hiring employees. It makes no difference to the deductibility of those expenses whether the taxpayer is selling baby clothes on Etsy or he is running an illegal gambling ring.²¹⁹ To the extent that any expenses arising from criminal enterprise is deductible, it violates the Self-Created Harm Principle.

To keep accordance with the Self-Created Harm Principle, the tax law should prohibit all tax deductions or credits for the expenses and losses that arise from wrongdoing.²²⁰

C. Crime as a Proxy for Moral Wrongdoing

The Self-Created Harm Principle entails that the tax law should not help taxpayers pay for the cost of their wrongdoing. Thus, the tax law should deny any deductions or credits for such costs. As mentioned earlier, the kind of wrongdoing at issue is culpable moral wrongdoing. But what exactly counts

218. *Comm'r v. Tellier*, 383 U.S. 687, 691 (1966). One important exception is the denial of deductions or credits for drug traffickers. I.R.C. § 280E.

219. *Comm'r v. Sullivan*, 356 U.S. 27, 29 (1958).

220. Here, I use the term "deduction" broadly to include subtractions for cost of goods sold and basis in calculating income under I.R.C. § 61. This is consistent with the government's use of the term "deduction" in, e.g., *Olive v. Comm'r*, 139 T.C. 19, 19 (2012) and *Californians Helping to Alleviate Med. Problems v. Comm'r*, 128 T.C. 173, 181 (2007). Other cases use the term "exclusion from gross income" (*Franklin v. Comm'r*, T.C. Memo. 1993-184, 12 n.3 (1993)) or "adjustment to gross receipts" (S. Rept. 97-494 (Vol.1), at 309 (1982)) for the same concept.

as culpable moral wrongdoing is contentious, so it would be difficult for judges to apply such a rule. This presents a formidable hurdle to instantiating the Self-Created Harm Principle in tax statutes. Rule of law principles require any law to use terms that citizens, administrators, and judges can apply with sufficient uniformity and certainty.

The closest relationship between law and morality appears in the criminal law.²²¹ Over the course of centuries, the criminal law has developed to guide individuals away from wrongful conduct.²²² (Though civil law often imposes financial liability, and sometimes even calls such liabilities “penalties,” it is nevertheless difficult to figure out when the imposition of financial liabilities on an individual are meant to be punishment for culpable wrongdoing as opposed to serving some other purpose such as restitution for non-culpable harming.)²²³ Thus, in order to make the rule prohibiting compensation for the cost of wrongdoing tractable, the law should take criminal activity as necessary and sufficient to constitute wrongdoing.

Even this policy, however, has a gap between the Self-Created Harm Principle and its application for there is a disequivalence in extension between moral wrongdoing and criminal law. Not all culpable moral wrongdoing is prohibited by law and not all criminal laws concern culpable moral wrongdoing. Of particular concern are criminal laws which impose minor punishments, misdemeanors, which sometimes do away with any culpability requirement altogether.²²⁴ To partially alleviate the problem caused by prohibiting compensation for costs of non-culpable behavior, we could prohibit compensation only on illegal activities that amount to felonies, which are meant to mark out serious moral wrongs.²²⁵ As a cost, any wrongdoing which is punished as a misdemeanor would not be captured by the policy.

In the remainder of this Section, I consider two counterarguments that have been raised against my proposal of using felony as a proxy for wrongdoing. The first counterargument states that criminal law is a sufficiently bad proxy for culpable wrongdoing that we ought not deny deductions and credits that arise from criminal activity. The second

221. Nam, *supra* note 125.

222. *See, e.g., id.*

223. The older language of § 162(f), for example, required figuring out whether civil penalties imposed by the government were done with punitive intent. This led to much litigation since statutes may not reveal their purpose on their face. *See, e.g., Zirolì v. Comm’r*, 124 T.C.M. (CCH) 33, 4–5 (T.C. 2022) (noting also that the use of the term “penalty” is not dispositive of the issue).

224. Claire D. Johnson, *Strict Liability Crimes*, 33 NEB. L. REV. 462, 462 (1954).

225. Jubaer et al., *supra* note 164.

counterargument states that we ought not deny such deductions and credits because criminals deserve more help from government than the government currently gives them.

1. Failures of the Criminal Justice System

Our criminal justice system is imperfect.²²⁶ The imperfections sometimes result in criminalizing behavior which is not culpable wrongdoing. For instance, even though we punish certain kinds of negligent behavior,²²⁷ negligence might not be a sufficiently good basis for culpability.²²⁸ In such an instance, someone who was not morally responsible for the resultant state of affairs is wrongly held responsible, so a tax deduction may be denied even where the Self-Created Harm Principle is not applicable. The imperfections sometimes result in failing to criminalize culpable wrongdoing. For instance, although lying is not always criminalized, one might think lying is always morally wrong.²²⁹ In that case, the opposite problem arises. Although the Self-Created Harm Principle would be applicable to a liar, his conduct is not criminalized, so he would not be prohibited from taking any deduction or credit.

This Article has already acknowledged that relying on criminal law to implement principles of distributive justice should be understood only as a heuristic.²³⁰ Taking that point to heart, one criticism of my proposal here is that making tax treatment contingent on the outcomes of the criminal justice system would replicate any problems that are a part of the criminal justice system at the level of the distribution of tax burdens. This criticism appears right at least in one respect, namely that one must agree that the criminal law does not track morality perfectly.²³¹ But how strong the criticism is depends on how many injustices lie in the criminal justice system. To detail every such injustice would be humanly infeasible, but we may perhaps appeal to the following considerations that show such injustices are limited.

226. *E.g.*, Jain, *supra* note 26.

227. MODEL PENAL CODE § 2.02(d) (AM. L. INST., Proposed Official Draft 1962).

228. Moore & Hurd, *supra* note 168, at 147.

229. The view that lying is always impermissible is often ascribed to Immanuel Kant. Christine M. Korsgaard, *The Right to Lie: Kant on Dealing with Evil*, 15 PHIL. & PUB. AFFS. 325, 326 (1986).

230. *See supra* Section IV.C.

231. *But see* TORBJÖRN TÄNNSJÖ, *Capital Punishment*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF DEATH 475, 480 (Ben Bradley et al. eds., 2013) (arguing that “the most obvious reaction to this argument is to call for social reform” to correct the discriminatory practices of the criminal justice system, rather than reject other reforms that would get the legal system close to the ideal).

First, a clarificatory point. In responding to this Article, several academics have framed their critique as follows: *mala prohibita* crimes are crimes in which there is no wrongdoing involved, so all *mala prohibita* crimes present problems for my proposal. This view, I will argue, is mistaken. Whereas *mala in se* crimes (e.g., homicide) involve actions that would be morally wrong independent of the law, *mala prohibita* crimes (e.g., tax evasion) involve actions which would not be morally wrong independent of the law.²³² But the fact that an action would be permissible independent of the law does not mean it continues to be permissible once the law has criminalized that conduct. *A fortiori*, a crime's being *malum prohibitum* does not entail it is morally permissible to commit that crime.

The general consensus among moral philosophers is that the existence of a law criminalizing conduct often makes that conduct wrongful. John Rawls, for example, argued that we have a general duty to obey the law, and our breaking the law thus counts as a *prima facie* moral wrong. On the Rawlsian view, *mala prohibita* are wrong precisely because the law has criminalized such behaviors.

For instance, tax evasion is standardly taken to be a *malum prohibitum* crime. The notion of tax evasion only exists when there are tax laws to be enforced, so its criminalization is essentially dependent on the law.²³³ But we would hardly think that someone who avoids paying taxes by hiding his income from the government is morally innocent. Once a society has set out a system of tax laws, it creates a moral obligation on citizens to contribute to that system by following the laws.²³⁴

For this reason, critics cannot simply point to the existence of *mala prohibita* crimes to argue against my proposal; they must instead show which felony laws are *mala prohibita* laws which it would not be wrongful to disobey.

This leads to my second point, which is a rough positive defense of my proposal. Most legal academics as well as most lay people are against abolishing the criminal justice system.²³⁵ Most of us take it that the criminal

232. Youngjae Lee, *Mala Prohibita, the Wrongfulness Constraint, and the Problem of Overcriminalization*, 41 L. & PHIL. 375, 376 (2022).

233. See *id.* at 385.

234. See Nam, *supra* note 15, at 1114–15.

235. See Eric Martínez & Kevin Tobia, *What Do Law Professors Believe About Law and the Legal Academy? An Empirical Inquiry* 47 (Aug. 8, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4182521 [<https://perma.cc/CX58-GY2U>]; Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1160 (2015); see also Steve Crabtree, *Most Americans Say Policing Needs 'Major Changes'*, GALLUP

justice system, though certainly not without serious flaws, is nevertheless accurate *enough* that its benefits largely trump its costs. The same kind of thinking appears to apply here. For all of its failures, the criminal law gets things right well enough that we can use it to implement laws concerning distributive justice in relation to moral wrongdoing.

Others may think that the current criminal justice system's costs outweigh its benefits, but that there are feasible corrections available to reverse the relative weight of costs and benefits. If that view is right, there is still a question of what laws we ought to have once we make such feasible corrections. The criticism under consideration gives no reason to think that in an ideal legal system, without the failures of the actual criminal justice system, we ought not to forbid deductions for costs arising from criminal wrongdoing.

2. Crime as a Marker of Unfair Disadvantage

A second counterargument alleges that, rather than giving criminals worse tax treatment than non-criminals, criminals should actually receive better tax treatment than non-criminals because criminals are a disadvantaged group. More specifically, the counterargument begins with the premise that criminals are, on average, those who have suffered some unfair disadvantage. The counterargument states further that such individuals have not been appropriately compensated for the unfair disadvantage that they bore. This uncompensated disadvantage is a kind of debt that society owes him—he should have been compensated, but he never was. Once all of these points are accepted, the counterargument concludes by noting that one way society could pay off their debt to these individuals is to permit them to deduct their losses and business expenses arising from criminal activities.

This counterargument is easier to understand using an example. Having poor early childhood education is a disadvantage in our society. Our earlier discussion of conditional egalitarianism concluded that one ought not be left worse off than others purely as a matter of luck.²³⁶ To the extent that having poor early childhood education is no fault of one's own—young children do not control the level of education they receive—they deserve some compensation so that they are not left worse off than others. Suppose that our society fails to properly compensate those who received poor education.

(July 22, 2020), <https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx> [<https://perma.cc/9Y2L-7M6K>] (finding only 15% of Americans support abolishing police departments).

236. See *supra* Section III.B.1.

Suppose further that there is a strong correlation between people who commit crimes and people who received poor early childhood education.²³⁷ The counterargument states that allowing criminals an undeserved tax benefit would, in a very rough way, actually bring us closer to a just distribution since the undeserved tax benefit could be thought of as belatedly compensating some people with poor early childhood education using crime as a proxy.

A tempting initial response to the counterargument is that using crime as a proxy in order to distribute benefits to criminals would create bad incentives. Recall, however, the earlier argument that it is unclear whether ordinary criminals will be aware of such incentives if we build them into the tax system. It may very well be that permitting loss deductions, for instance, would generate minimal increases in criminal activity. Instead, there is an interesting question about justice separate from incentives. If fairness requires treating criminals better than non-criminals, that would be quite an interesting result.

There is some initial plausibility that if one earlier bore an unjust disadvantage that was not compensated for, then that lack of compensation goes on the ledger of desert, so to speak. In fact, this idea is so intuitive that to state an example is almost too obvious. Suppose Jordan was supposed to pay James \$10 on Tuesday, but Jordan failed to do so. It is clearly the case that Jordan's failure on Tuesday does not evaporate his moral obligation. If James asks Jordan for \$10 on Wednesday, Jordan must still pay up given his failure to pay on Tuesday. (In fact, it is likely that Jordan may, on Wednesday, have a moral requirement to pay some interest charge to James as well since James deserved to be paid earlier.) A failure to meet an obligation to help goes on the ledger and the person who was supposed to be helped can continue to request the help he deserves.

But the plausibility ends there. The counterargument cannot show merely that there is some uncompensated disadvantage that correlates with crime. Instead, the counterargument must commit itself to a much more controversial proposition. Since the counterargument's claim is that those with an uncompensated disadvantage would be helped out by the government allowing deductions for criminal activity, the critics must allege that those with the uncompensated disadvantage have a greater amount of losses or business expenses which arise from their criminal activity than those who lack the uncompensated disadvantage. If the relevant disadvantage correlates with crime, but not the amount of losses/business expenses arising therefrom,

237. I take no position on the truth of these suppositions. I merely suppose them to be true *arguendo* since such claims would be necessary for my critics' counterargument.

then providing a deduction would not help the disadvantaged group. Whether that is true is surely controversial and, once pointed out, may lead critics to abandon the counterargument.

But suppose *arguendo* that there is some uncompensated disadvantage that correlates with the amount of losses/business expenses arising from crime. Even so, there is good reason not to use crime as a proxy for compensating previously uncompensated disadvantage, depending on whether such disadvantage is measurable or immeasurable. If the uncompensated disadvantage is measurable, then clearly the approach we ought to take is to compensate citizens for the unjust disadvantage using the measurement and then apply the Self-Created Harm Principle as normal.²³⁸ Suppose, going back to the previous example, that it is possible to measure how much early childhood education one received. Then the government ought to collect that data and set-up redistributive policies in favor of those who received poor early childhood education. It is not clear why we should use criminal behavior as a proxy for disadvantage when we can measure the disadvantage more accurately using other methods. To use criminality as a proxy would only rectify the distributive injustice for a very small portion of the relevant population and would do so in an unnecessarily obtuse way since it would also unjustly distribute benefits to criminals who do not share the uncompensated disadvantage.

Even if there is some strong correlation between an immeasurable uncompensated disadvantage and criminal activity, there remains still an in-principle objection to rectifying that disadvantage by giving criminals a tax deduction. The issue of applying this kind of reasoning as a supposed counterweight against the Self-Created Harm Principle is that moral wrongdoing has a special character such that no one is obligated to help. We cannot be obligated to help the criminal prepare to commit the crime, we cannot be obligated to help the commission of crime, and we cannot be obligated to help tie up loose ends for the criminal after the crime is committed. We are, at all times, permitted to keep our hands clean.

Consider the following example. Suppose that you earlier had an obligation to hold a ladder for your friend while your friend was painting his house, but you failed to do so. If he now requests that you hold the ladder for

238. It would be ideal if the relevant disadvantage was measurable in the whole population but, to respond to the counterargument, the relevant disadvantage need only be measurable in the criminal population. Since the worry is that some criminals have already “paid” the distributive justice costs by bearing unjust burdens, we merely need to know which of the criminals have paid.

him so that he can climb through his neighbor's upstairs window and steal her jewelry, you clearly have no obligation to help him. His pointing to his ledger by which you earlier failed to meet your ladder-holding duties is neither here nor there.

This idea of being permitted to keep one's hands clean is not only intuitive, but also bears pedigree in moral philosophy. Bernard Williams, for instance, endorsed a similar idea as essential to maintaining one's moral integrity.²³⁹ He argued that to require someone to involve himself in others' disagreeable conduct would be to "alienate him in a real sense from his actions and the source of his action in his own convictions."²⁴⁰ Moving these ideas from the individual level to the collective, it cannot be required for society to use criminal activity as a proxy to rectify uncompensated disadvantage.

CONCLUSION

This Article has analyzed a variety of explanations for why the tax law should treat criminals differently from non-criminals. The best principle to guide the taxation of criminal activity is the Self-Created Harm Principle. On the Self-Created Harm Principle, culpable wrongdoers deserve to bear the costs that accrue to them from their wrongdoing. The public policy doctrine is right to deny deductions in the cases that it currently does, but should go further to deny all deductions and credits for costs arising from moral wrongdoing.

239. J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 86 (1973) (arguing that moral integrity can trump consequentialist considerations).

240. *Id.* at 101.