Racialized Frictions in Tax Administration

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Leslie Book, *Tax Administration and Racial Justice: The Illegal Denial of Tax Based Pandemic Relief to the Nation's Incarcerated Population*, 72 **S. Carolina L. Rev.** __ (2021), available at SSRN.

In *Tax Administration and Racial Justice: The Illegal Denial of Tax Based Pandemic Relief to the Nation's Incarcerated Population*, Leslie Book tells the remarkable story of the Coronavirus Aid, Relief, and Economic Security (CARES) Act emergency relief payments and the incarcerated population. In addition to having numerous plot twists and turns, the story underscores an important, underexamined issue: when the government administers the law, it imposes burdens (or frictions) on the public. These burdens may be borne disproportionately by different groups, including along racial dimensions. Anyone interested in agencies, tax administration, or race and the law would benefit from reading Book's paper.

As Book describes, when Congress passed the CARES Act, it authorized the IRS to pay out economic relief payments of $1,200 (for adults) and $500 (for dependent children) as "rapidly as possible." The IRS dutifully did so, including by making approximately $100 million in payments to federal, state, and local prisoners by April 2020. However, the IRS then inexplicably reversed course, deciding that prisoners were not eligible to receive the economic relief payments, but not providing any basis or explanation for its reversal. The IRS tried to recover the payments it had previously made to prisoners as allegedly erroneous and issued a Frequently Asked Question (FAQ) on the IRS website indicating that any incarcerated individual who had received a payment needed to return it to the IRS. Leiff Cabraser, a public interest law firm, brought a class action lawsuit on behalf of incarcerated individuals and eventually won in district court. The court ordered the IRS to change its position regarding prisoners' entitlement to the payments and ensure that eligible, incarcerated individuals received their payments. Notwithstanding this court victory for incarcerated individuals, difficulties in the IRS's administrative process prevented many from receiving the payments in 2020, undermining the IRS's ability to meet Congress's mandate of making the payments "as rapidly as possible."

The story Book tells is remarkable on a number of levels. First, it illustrates the power (and limitations) of the IRS's ability to effectively make law through tax administration, including through informal FAQs. Second, Book explains how the IRS's actions had a disproportionate impact on Black and Latino individuals, who comprise a disproportionate share of the prison population. He points out that the IRS's actions, which occurred in the wake of George Floyd's murder, are yet another example of how our laws systemically subordinate people of color. In so doing, he underscores how even technical corners of the law can be important sources of inequity.

In perhaps the most powerful part of his paper, Book describes, at a theoretical level, how the administration of the law in general can create racialized burdens. Book draws on the work of sociology and public administration scholars to explain that, as a general matter, individuals experience frictions, or burdens, when attempting to collect benefits from or otherwise interact with the government. This insight may be particularly interesting to tax scholars, who have long paid attention to frictions in the substantive tax law, but have paid less attention to how they also operate in tax administration. Even more importantly, as it turns out, these burdens in the law's administration are not equally distributed across the population, but rather tend to be concentrated on groups with fewer resources and less power, including groups that fit into these categories on the basis of race. Moreover, the government's

decisions can affect the amount and incidence of the burdens that people face. For instance, shortening voting hours in certain communities can raise the burdens incident to voting in such communities. Likewise, as Book powerfully demonstrates, publicly stating that incarcerated individuals were not eligible for economic impact payments, demanding repayment, requiring them to bring a lawsuit challenging the IRS's position, and even making receipt of payments difficult after they won the lawsuit, created high burdens for incarcerated individuals to receive such payments. While it is remarkable that prisoners were ultimately able to overcome such frictions in the story that Book tells, the broader lesson he draws is a sobering one: in its administration of the law, the IRS, like all other agencies, has an awesome power to increase burdens that can subordinate the goals of the law that Congress passes. In the process, agencies can marginalize communities of color in ways that compound existing power imbalances.

However, another lesson we can take away from Book's story is a more optimistic one. By recognizing the role of agencies in creating burdens in the administration of the law, we also can see a path to decreasing them. Book offers a number of good suggestions for the IRS at the end of his article, including that the IRS should use transparent and accountable guidance, the IRS should be mindful of the burdens that its administration of the law creates, and that the IRS should be particularly careful in considering how any such burdens disproportionately impact communities of color. Book's suggestions merit serious consideration by the IRS. Carefully considering frictions in tax administration, and being alert for racialized burdens, will make the agency better. Beyond tax administration, Book's article offers a useful, detailed story of why the details of the administration of the law matter, and how careful attention to the details of such administration can be critical to a more just society.

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