Washington University Journal of Law & Policy

Volume 44 *Conceptualizing a New Institutional Framework for International Taxation*

2014

Avoidance, Evasion, and Taxpayer Morality

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INTRODUCTION

On April 1, 2013, the Washington University School of Law hosted a colloquium on the topic of "Conceptualizing a New Institutional Framework for International Taxation," inviting participants to consider the pressures on the current institutional tax governance structure and the prospects for reform. In my opening remarks, I sought to outline the pressures being brought upon national tax systems through media coverage of the observed tax behaviors of various multinationals and wealthy individuals, which have provoked social protest and sustained campaigns for tax justice by activist individuals and global nongovernmental organizations (NGOs).[1] I suggested that both the media and the activists were, in effect, combining tax evasion and tax avoidance into a single tax compliance framework with which to build a single message about the integral role of morality in taxpayer behavior.

However, a turn to morality to avoid delineating in law between that which is illegal (evasion) and that which is not (avoidance) is counterproductive to the pursuit of coherent tax policy in the long run. The turn to morality is understandable in that it attempts to define a space for social pressure to mount against ongoing perceived tax injustice. But the turn is dangerous in that it confirms the legitimacy of a century-old tradition of using non-legal, "soft law"

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1. *See also* Allison Christians, *Tax Activists and the Global Movement for Development through Transparency*, *in* TAX, LAW AND DEVELOPMENT 288 (Miranda Stewart & Yariv Brauner eds., 2013).

standards to push tax policy in a given direction.[2] Doing so has potentially grave consequences for the future of tax policy on a global scale.

Turning to soft law mechanisms to regulate taxpayer behavior implicitly accepts as appropriate an existing global system in which taxation in practice has involved little more than an inter-nation political contest situated fundamentally in the logic of "pay-to-play" and "might makes right." It is not a foregone conclusion that countering this dominant and entrenched structure must be done on its own terms. But accepting soft law terms without question suggests that failure *is* a foregone conclusion.

This Essay fleshes out the case for caution in employing morality as a stop-gap measure to avoid drawing a regulated line between tax evasion and tax avoidance, while still meting out punishment within the undefined space between these two poles. It suggests that the alternate view—that taxpayer behavior must be managed by law rather than social sanction—has the best chance of driving tax policy toward greater coherence in the long run.[3]

This alternate view, that tax policy must be contained in law, does not mean the public must be uninvolved in policy discourse; the opposite is clearly true. The public seems uniquely suited to the task of demanding transparency in governance as a mechanism for monitoring lawmaking and addressing tax policy problems. Transparency is of course an imperfect mechanism, but it seems to be the best hope for achieving justice across a wide variety of governance-related failures of which unjust taxation is a prominent example.[4] Transparency forms the central core of all contemporary treatments of the problem of governance, and there is no reason why

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2. *See generally* Allison Christians, *Hard Law & Soft Law in International Taxation*, 25 WISC. J. INT'L L. 325 (2007).

3. This is not to suggest that social sanction, such as through naming and shaming, has no place in policy discourse. As the corporate social responsibility literature attests, naming and shaming can have enormous impact on shaping behavior for the social good. Importantly, the strategy can lead to reforms that were otherwise effectively impossible due to uneven influence over lawmaking spheres. *See, e.g.*, JOHN RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS (2012).

4. Allison Christians, *Drawing the Boundaries of Tax Justice*, *in* THE QUEST FOR TAX REFORM CONTINUES: THE ROYAL COMMISSION ON TAXATION FIFTY YEARS LATER 53 (Kim Brooks ed., 2013).

it should not also define the contours of thinking about what behaviors should be acceptable when it comes to taxation. For this reason, this Essay concludes that the problem of distinguishing tax avoidance from tax evasion presents a base case for demanding transparency in both tax information and tax lawmaking, in the service of pursuing tax justice.

I. HOW DID WE GET HERE?

To understand how we got to a place where tax avoidance and tax evasion have been characterized as questions of morality, and why these concepts should instead lead us invariably toward the rule of law, a brief review of the contemporary tax policy landscape is required. Two media-based exposés of international taxation combine to produce the source material for this exploration. The first, involving the "offshore leaks" database obtained and reported on by the International Consortium of Investigative Journalists (ICIJ),[5] taught the public about an epidemic of tax evasion spreading across the globe. The second, the ongoing media coverage of single-digit effective tax rates paid on a global basis by household brand companies like GE, Google, Apple, Starbucks, and Amazon, taught the public about an epidemic of tax avoidance, often characterized as "aggressive" to move it conceptually closer to the concept of evasion.[6]

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5. *Secrecy for Sale: Inside the Global Offshore Money Maze*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS, http://www.icij.org/offshore (last visited Jan. 2, 2014).

6. *See* David Kocieniewski, *GE's Strategies Let It Avoid Taxes Altogether*, N.Y. TIMES, Mar. 24, 2011, *available at* http://www.nytimes.com/2011/03/25/business/economy/25tax.html?pagewanted=all&_r=0; Charles Duhigg & David Kocieniewski, *How Apple Sidesteps Billions in Taxes*, N. Y. TIMES, Apr. 28, 2012, *available at* http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html; Matt Warman, *Google Pays Just £6m UK Tax*, TELEGRAPH, Aug. 8, 2012, *available at* http://www.telegraph.co.uk/technology/google/9460950/Google-pays-just-6m-UK-tax.html; Christina Patterson, *Google, Starbucks, and Amazon . . . For These Multinationals Immorality is Now Standard Practice*, INDEPENDENT, Nov. 13, 2012, *available at* http://www.independent.co.uk/voices/comment/gogoog-starbucks-and-amazon-for-these-multinationals-immorality-is-now-standard-practice-8313038.html; Vanessa Barford & Gerry Holt, *Google, Amazon, Starbucks: The Rise of 'Tax Shaming'*, BBC NEWS (May 21, 2013), http://www.bbc.co.uk/news/magazine-20560359; *Tax Paid by Some Global Firms in UK 'An Insult'*, BBC NEWS (Dec. 3, 2012), http://www.bbc.co.uk/news/business-20559791.

A. The Evasion Story

The evasion story is a simple one, involving a clear question of governance failure for which the moral case seems virtually unambiguous.[7] Reporters who analyzed the ICIJ offshore leaks database found that "alongside perfectly legal transactions, the secrecy and lax oversight offered by the offshore world allows fraud, tax dodging and political corruption to thrive."[8] Related stories abound, including the ongoing saga between the United States and Switzerland with respect to marketing efforts by UBS to secrecy-seeking American customers,[9] a similar dispute between Germany and Liechtenstein,[10] and the "Lagarde list" furnished to Giorgios Papakonstantinou—then the Greek Finance Minister—with the names of some 2,000 Greek residents, many with top government credentials, who were holding cash in secret Swiss bank accounts.[11] The information contained in this steady stream of leaks produced a flood of media coverage that has moved activists to take issue with how governments manage the financial affairs of high-net-worth individuals.

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7. Leaving aside those for whom all taxation is simplistically viewed as either theft or slavery or both.

8. Abby Ohlheiser, *The Secret World of Tax Havens Just Got a Whole Lot Less Secret*, SLATE (Apr. 3, 2013), http://www.slate.com/blogs/the_slatest/2013/04/04/offshore_leaks_tax_haven_report_over_2_5_million_document_leak_reveals_details.html.

9. *See, e.g.*, Nick Mathiason, *Tax Scandal Leaves Swiss Giant Reeling*, OBSERVER, June 28, 2008, *available at* http://www.guardian.co.uk/business/2008/jun/29/ubs.banking.

10. *See Germans Admit Tax Evasion as Scandal Widens to US, Australia*, DEUTSCHE WELLE (Feb. 26, 2008), http://dw.de/p/DDmr. This scandal became so widespread that it became popularly known as the "Liechstenstein tax affair." *See 2008 Liechtenstein Tax Affair*, WIKIPEDIA, http://en.wikipedia.org/wiki/2008_Liechtenstein_tax_affair.

11. The story of the Lagarde list was broken by investigative journalist Kostas Vaxevanis, who published the list after learning that the Greek government had altered it to remove key names and was otherwise disinclined to pursue prosecutions based on its contents. *See* Editorial, *Greece Arrests the Messenger*, N.Y. TIMES, Oct. 29, 2012, *available at* http://www.nytimes.com/2012/10/30/opinion/greece-arrests-the-messenger.html. Vaxevanis was arrested for violating the privacy rights of those named in the list and is currently facing a second trial on the same issue after being acquitted in November 2012. *Greek Bank List Editor Costas Vaxevanis Acquitted*, BBC NEWS (Nov. 1, 2012), http://www.bbc.co.uk/news/world-europe-20172516; Helena Smith, *Greek Editor Kostas Vaxevanis Faces Retrial Over 'Lagarde List' Revelation*, GUARDIAN, Nov. 16, 2012, *available at* http://www.theguardian.com/world/2012/nov/16/greek-editor-kostas-vaxevanis-retrial; Helena Smith, *Greek Journalist's Retrial Over Lagarde List Postponed*, GUARDIAN, Oct. 8, 2013, *available at* http://www.theguardian.com/world/2013/oct/08/greek-retrial-kostas-vaxevanis-lagarde-list-postponed.

The question this story clearly raises is why governments cannot or will not prevent this patently illegal and obviously objectionable behavior. One possibility is that governments cannot prevent this behavior; the other is that they can do so but choose not to for political reasons. The media coverage itself, and the response of activists in using such coverage to rally for a very specific set of tax policy reforms, suggests that the clear answer to tax evasion is greater public oversight, to oversee the efforts (or lack thereof) of governments to fairly enforce their own laws and to pressure governments to remedy past practices of lax enforcement, if better enforcement is possible.[12]

One place where activists have sought avenues for such oversight is within the architecture of the Organization for Economic Cooperation and Development (OECD). Formed as part of the reconstruction effort in the post-war era, the OECD is not primarily a source of international law but rather a forum for consensus-building among its member nations, which include the United States, Canada, and EU countries, but not Brazil, China, or India. The OECD is thus a transnational network, and its tax division is a tightly knit epistemic community whose main purpose is to create spaces for government officials to collaborate with business and industry leaders to frame issues of international tax policy, formulate norms, and syndicate these norms globally through domestic lawmaking procedures.[13] This institutional structure has had tremendous consequences for the formation of global tax policy, and serves as a warning about the role of norms, non-state actors, and institutions in tax policy matters more generally.[14]

12. *See, e.g.*, ROBERT S. MCINTYRE ET AL., CORP. TAXPAYERS & CORP. TAX DODGERS 2008–10 (2011), *available at* http://www.ctj.org/corporatetaxdodgers/CorporateTaxDodgersReport.pdf; FACTCOALITION, TAX REFORM, *available at* http://tjn-usa.org/storage/documents/FACT_Tax_Policy_101911.pdf; FACTCOALITION, INCONVENIENT REALITIES ON CORP. TAX: LOOPHOLES, TAX BREAKS & SUBSIDIES TELL THE REAL STORY ON THE CORP. TAX RATE, *available at* http://tjn-usa.org/storage/documents/FACT_Sheet_CORPTAX_DRAFT.pdf.

13. Allison Christians, *Networks, Norms, and National Tax Policy*, 9 WASH. U. GLOBAL STUD. L. REV. 1, 22 (2010).

14. The OECD is capable of exercising centralized coercive authority even if it does not dispense international "law," and many commentators have gone so far as to accept OECD declarations in tax matters as largely equivalent to law in practice. *See* Christians, *Hard Law & Soft Law in International Taxation*, *supra* note 2, at 325–29.

The OECD began addressing the problem of offshore tax evasion in 1996, when it developed an appreciation of how tax havens—many of which are controlled possessions and territories of OECD member countries—were eroding the revenue-raising ability of many of the member countries.[15] Two years later, the OECD published a report that developed criteria to identify harmful tax competition, and recommended as a counteractive solution a proposed blacklist of countries that were to be targeted with various sanctions unless they started sharing tax information with leading OECD countries pursuant to OECD standards.

After extensive lobbying against the project by the United States, Switzerland, and Luxembourg, the OECD ultimately reduced its work to an easily attainable compliance threshold. A country would be removed from tax haven blacklists by having in place at least twelve tax information exchange agreements (TIEAs) pursuant to OECD-drafted model language.[16] These TIEAs arranged actual information exchange among countries in such a way as to continue the status quo unabated; indeed, evasion may have even increased in countries that had not been subjected to OECD scrutiny, such as the United States, the United Kingdom, and Switzerland.[17]

Consequently, despite aspirational declarations by world leaders that the OECD had ended the era of bank secrecy in 2009, in fact, the opposite was true.[18] Yet because the institution had set the parameters of its own success, little recourse was available. The Tax Justice

15. For a more thorough review of the OECD's work on tax evasion, see Allison Christians, *Sovereignty, Taxation, and Social Contract*, 18 MINN. J. INT'L L. 99 (2009).

16. Lee A. Sheppard, *News Analysis: Don't Ask, Don't Tell, Part 4: Ineffectual Information Sharing*, 53 TAX NOTES INT'L 1139 (2009) ("The standard OECD information exchange agreement is nearly worthless."); Michael McIntyre, *How to End the Charade of Information Exchange*, 56 TAX NOTES INT'L 255 (2009) (outlining why OECD exchange agreements are ineffective and the OECD list of tax havens a "joke").

17. *See, e.g.*, *TIEAs: A Norwegian Update*, TAX JUST. NETWORK (Apr. 20, 2011, 5:57 AM), http://taxjustice.blogspot.ca/2011/04/tieas-norwegian-update.html; *see also TIEAs: 23 is the Magic Number*, TAX JUST. NETWORK (Sept. 8, 2010, 9:24 AM), http://taxjustice.blogspot.com/2010/09/tieas-23-is-magic-number.html.

18. LONDON SUMMIT 2009, GLOBAL PLAN FOR RECOVERY & REFORM (Apr. 2, 2009), *available at* http://web.archive.org/web/20100310215453/http://www.londonsummit.gov.uk/resources/en/news/15766232/communique-020409 ("We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over."); McIntyre, *supra* note 16, at 255 ("Well, it's not over yet.").

Network—a Civil Society Organization formed from a coalition of researchers and activists focused on harmful tax practices—together with other NGOs and activists, took on the issue in various ways. Recent developments suggest their constant public criticism, combined with reports on the growing amount of cash believed to be hidden offshore, may be having some effect.[19] For instance, the United States has adopted punishing new rules for tax evaders and the institutions that enable them.[20] Other countries are considering similar legislation,[21] and the OECD has a similarly motivated project.[22]

Activists may see these developments as reasons for optimism, yet some glaring deficiencies remain in these regimes. The apparent unwillingness of leading nations to curb their own appeal as tax havens to the rest of the world continues to present obstacles to meaningful reform.[23]

One may well wonder if the same governments that produced the circumstances for global tax evasion, and then pronounced its death four years ago after a highly contested global battle that lasted over a decade, can be believed when they say that this time, things are

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19. JAMES HENRY, TAX JUST. NETWORK, THE PRICE OF OFFSHORE REVISITED: NEW ESTIMATES FOR 'MISSING' GLOBAL PRIVATE WEALTH, INCOME, INEQUALITY & LOST TAXES (July 2012), *available at* http://www.elcorreo.eu.org/IMG/pdf/Price_of_Offshore_Revisited_72612.pdf.

20. Foreign Account Tax Compliance Act, Pub. L. No. 111–147, § 501, 124 Stat. 71 (2010) (codified in scattered sections of 26 U.S.C.), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-111publ147/pdf/PLAW-111publ147.pdf.

21. Salman Shaheen, *UK to Impose Son of FATCA on Crown Dependencies, Despite Government's Denials*, INT'L TAX REV. (Nov. 23 2012), http://www.internationaltaxreview.com/Article/3121964/EXCLUSIVE-UK-to-impose-son-of-FATCA-on-Crown-Dependencies-despite-governments-denials.html.

22. *About the TRACE Project*, ORG. ECON. COOP. DEV., http://www.oecd.org/ctp/exchange-of-tax-information/aboutthetracegroup.htm (last visited Dec. 24, 2013); *see generally* ORG. ECON. COOP. DEV., TRACE IMPLEMENTATION PACKAGE (Jan. 23, 2013), *available at* http://www.oecd.org/ctp/exchange-of-tax-information/TRACE_Implementation_Package_Website.pdf.

23. *See, e.g*., Allison Christians, *Putting the Reign Back in Sovereign: Advice for the Second Obama Administration*, 40 PEPP. L. REV. 1373 (2013); Anna Edgerton, *Miami's International Banking Clients Move Money to Protect Financial Privacy*, MIAMI HERALD, July 29, 2012, *available at* http://www.miamiherald.com/2012/07/29/2920363/miamis-international-banking-clients.html; *Is the UK Serious About Tackling Tax Evasion?* (Channel 4 News (UK) television broadcast Feb. 2, 2012), *available at* http://www.channel4.com/news/is-the-uk-serious-about-tackling-tax-evasion.

different.[24] But perhaps the even more troubling inquiry is what this process says about the possibilities for tax justice or fairness, however it may be articulated. If the rich countries of the world, marshaling their full and ample resources and with apparently clear will and determination, have so much trouble just confronting—never mind solving—the problem of tax evasion, how much less should be expected when the behavior in question is not so unambiguously objectionable, while potentially being even more valuable to its architects? The rhetoric on tax avoidance demonstrates there are no straightforward answers to this question.

B. The Avoidance Story

The avoidance story is more difficult, and it is here the problem of ambiguity in the use of morality as a non-legal behavioral control arises. The issue is that the world's biggest multinational conglomerates manage to earn trillions of dollars around the world, yet many seem to pay virtually no tax anywhere. This is framed as a justice issue because it shifts the burden of taxpaying to those who cannot similarly avail themselves of sophisticated tax planning strategies, and it thereby delivers undue advantage to sprawling conglomerates over all other taxpaying members of society. In response to this injustice, tax justice advocates use the concept of morality to move some kinds of tax avoidance into the unambiguously immoral category of evasion, despite the failure of the law to do so.

But this is a difficult move strategically in that it confronts a long tradition of tolerance, and even celebration, of tax avoidance behavior by taxpayers that is at once political, cultural, and legal in nature. In the United States, this doctrine is famously stated by Learned Hand in *Helvering v. Gregory*, as follows:

> Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which

24. *See, e.g.*, Lee Sheppard, *News Analysis: OECD Tries to Fix Income Shifting*, 69 TAX NOTES INT'L 627 (2013).

> will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.[25]

The same sentiment is found in English common law, and has accordingly been adopted in the jurisprudence of other commonwealth countries, including Canada and Australia. Thus, in *IRC v. Duke of Westminster*, Baron Thomas Tomlin wrote:

> Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.[26]

Accordingly, when GE faced a public outcry over a media exposé of its global tax planning successes,[27] a company representative replied that the company is "committed to complying with tax rules and paying all legally obliged taxes. At the same time, we have a responsibility to our shareholders to legally minimize our costs."[28] Similarly, when Apple was criticized in the media for going to great lengths to avoid paying millions in taxes,[29] the company responded that, in addition to being a job creator and a contributor to charitable causes, it "has conducted all of its business with the highest of ethical standards, complying with applicable laws and accounting rules."[30] Generating public objection to tax avoidance in the face of a tradition of supportive legal jurisprudence and cultural understandings, including about the nature and the role of the corporation in society, is thus a potentially monumental task.

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25. 69 F.2d 809, 810 (2d Cir. 1934).

26. *See* Duke of Westminster v. IRC, [1936] 19 D.T.C. 490, 520 (Can.); *see also* Ayrshire Pullman Motor Services and Ritchie v. IRC, [1929] 14 D.T.C. 754, 763 (Can.) ("No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores.").

27. Kocieniewski, *supra* note 6.

28. *Id*.

29. Duhigg & Kocieniewski, *supra* note 6.

30. *Apple's Response on Its Tax Practices*, N.Y. TIMES, Apr. 28, 2012, *available at* http://www.nytimes.com/2012/04/29/business/apples-response-on-its-tax-practices.html?_r=0.

Making tax avoidance a question of morality is a difficult terrain for activists. It automatically invokes actual tax compliance as a ready defense. But it also involves the interplay of various legal rules enacted by sovereign (and often democratic) governments, as well as the kind of political malfunction that allows special interest groups to influence and directly author the laws that regulate themselves and their clients—at a high cost to broader society.[31] As a result, linking tax avoidance to morality seems to require telling a more complicated story about why an activity that is technically legal should nevertheless be publicly excoriated and ultimately punished.

Some have tried to overcome this challenge by categorizing avoidance into "acceptable" and "aggressive" or, alternatively, "intended" and "abusive" forms. It follows that some kinds of avoidance—such as putting money in a tax-deferred retirement savings account—are morally cleared because they are intended by government; but other kinds of tax avoidance—such as assigning low value to intangibles sold to corporate subsidiaries in order to assign profits to low-tax jurisdictions—must be immoral because the behavior was not intended by legislators.[32]

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31. The outsized influence wielded by business lobbyists is outlined in Raquel Alexander et al., *Measuring Rates of Return for Lobbying Expenditures: An Empirical Case Study of Tax Breaks for Multinational Corporations*, 25 J.L. & POL. 401, 441 (2009), which estimates the return on investment in political influence over tax policy matters to be as high as 22,000 percent. Concerning the ability to author laws, professional firms are not always shy about their ability to shape the law when it comes to creating promotional materials. Corporations also partner with lobbyist–think-tank hybrids like the American Legislative Exchange Council (ALEC) to advance their interest through legislative proposals. *See, e.g.*, AM. ASS'N FOR JUST., ALEC: GHOSTWRITING THE LAW FOR CORP. AM. (2010), *available at* http://www.justice.org/cps/rde/xbcr/justice/ALEC_Report.pdf; ALEC EXPOSED, http://www.alecexposed.org. For a discussion of political malfunction and its various forms, see Neil Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350 (1981); Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, 93 MICH. L. REV. 1559 (1994).

32. *See, e.g.*, Richard Murphy, *Amazon, and Starbucks are Struggling to Defend Their Tax Avoidance*, GUARDIAN, Nov. 13, 2012, *available at* http://www.guardian.co.uk/commentisfree/2012/nov/13/amazon-google-starbucks-tax-avoidance. Some commentators argue the transfer pricing issue is the crux of the problems surrounding the erosion of the corporate tax base. A unitary system of taxation, which would carve up a multinational corporation's profits in a more substantively accurate manner, is often cited as the ideal solution to this problem. *See, e.g.*, SOL PICCIOTTO, TAX JUST. NETWORK, TOWARDS UNITARY TAX. OF TRANSNAT'L CORPS. (2012), *available at* http://www.financialtransparency.org/wp-content/uploads/2012/12/Towards_Unitary_Taxation-1-1.pdf?80f948 (last visited Feb. 22, 2014).

This attempt to subcategorize an area of legal but objectionable tax avoidance is precarious. It involves drawing a line that governments themselves have failed to draw adequately, and places blame squarely on the taxpayer for behavior that is later deemed to have fallen on the wrong side of the line based on a rudimentary idea about what the politicians who wrote the law "intended." This ignores the complex problem of political malfunction (or capture); namely, the outsized influence on tax lawmaking that is wielded by taxpayers who can take advantage of global financial markets and decentralized regulatory schemes to render themselves difficult or impossible to tax.[33]

Thus, when Starbucks, GE, Apple, and countless other companies pledge their fidelity to all applicable laws, they fail to mention the many ways in which they influence the direction of tax law reform on a global basis.[34] This influence not only includes direct lobbying efforts in national lawmaking processes but also involves the much more obscure yet equally important role multinational companies play in influencing tax policy through a panoply of other mechanisms. These range from direct and indirect political spending to so-called "native advertising," pursuant to which promotional marketing is presented as journalism or even academic research. Such influence additionally extends to participation in various international

33. *See* Christians, *Drawing the Boundaries of Tax Justice*, *supra* note 4, at 72–77 (explaining that under pressures from a globally integrated market economy, sovereign states have engaged in a de facto tranching of taxpayers into three distinct pools: the relatively "easy-to-tax," the relatively "hard-to-tax," and the virtually "impossible-to-tax." The easy-to-tax are thus because they are easily monitored by the state via third parties who transfer value to them; namely, those who earn most of their income in wages and are subject to payroll and consumption taxes. The hard-to-tax includes those who have the means and the wherewithal to escape detection by regulators, who internationally are aided by bank secrecy, among other practices. They are hard to catch, but most states try more or less to catch at least some of them on a regular basis, if only to keep up taxpayer morale. The impossible-to-tax are extremely high-net-worth individuals and sprawling multinational corporations that can legally avoid taxation via complex structures marketed to them by sophisticated tax planners. States face enormous challenges, many of which involve politics rather than capacity, in keeping this category of taxpayer in the tax net.).

34. More recently, the UK government reprimanded the Big Four accounting firms for initially playing "gatekeeper" by lending assistance to draft anti-avoidance legislation, and then subsequently for being "poachers" by systemically abusing their position by finding ways to do the very things that said legislative provisions were supposed to stop. *See* Julie Martin, *UK Lawmakers Lambaste Big 4 Accounting Firms*, 69 TAX NOTES INT'L 518 (2013).

networks—most notably the OECD—where access to lawmakers can be had in informal, mostly unobservable ways. While direct lobbying and some forms of political spending are increasingly well-documented and subject to public scrutiny as well as systemic academic analysis,[35] the other forms of political influence are just as pervasive, yet most are rarely acknowledged in scholarship on tax policymaking.[36]

Because of this expansive influence on the legislative process, framing tax avoidance as a question of morality based on what legislators intend is therefore not only incapable of solving the problem of controlling taxpayer behavior, it is inviting a whole new host of interpretive barriers to designing such a solution. Determining lawmaker intent with respect to tax policy requires a holistic approach that is both pluralistic and globalized in nature. This adds tremendous difficulties to the already extensively documented problem of determining legislative intent in general.

The OECD's own role in articulating tax norms provides one example of the difficulty here. Lee Sheppard has argued that the OECD is principally responsible for at least three of the biggest tax base-eroding regimes in existence globally: the "treaty treatment of remote commerce . . . ; tax treatment of related-party financial transactions . . . ; [and] transfer pricing, especially separation of income from relevant activity . . . ."[37] If the lawmaker's intent marks the line between what is objectionable tax avoidance and what is not, these three regimes are problematic, to say the least.[38]

35. *See, e.g.*, OPEN SECRETS, http://www.opensecrets.org; Alexander et al., *supra* note 31.

36. For a discussion of native advertising, see, e.g., Eric Wemple, *Politico's Mike Allen, Native Advertising Pioneer*, WASH. POST BLOG (Nov. 20 2013, 4:00 PM), http://www.washingtonpost.com/blogs/erik-wemple/wp/2013/11/20/politicos-mike-allen-native-advertising-pioneer/. There appears to be no scholarship to date measuring the extent to which native advertising has been used to influence tax policy, so this is a topic that is ripe for further study. For an overview of the OECD's lobbying activities, in particular with relation to the G20, see Allison Christians, *Taxation in a Time of Crisis: Policy Leadership from the OECD to the G20*, 5 NW. J. L. & SOC. POL'Y 19 (2010).

37. Sheppard, *News Analysis: OECD Tries to Fix Income Shifting*, *supra* note 24.

38. *See, e.g.*, David Spencer, *Transfer Pricing: Will the OECD Adjust to Reality?*, TAX JUST. NETWORK (2012), *available at* http://www.taxjustice.net/cms/upload/pdf/Spencer_120524_OECD_.pdf; Michael Durst, *The Two Worlds of Transfer Pricing Policymaking*, 61 TAX NOTES INT'L 439 (2011).

Articulating exactly what a lawmaking body intended in enacting any one of these regimes would be difficult. Taken together, one could rationally conclude that lawmakers in many of the OECD member countries intend not to tax very much of anything that touches international markets at all. If that is true, then much of the tax avoidance sought to be moderated with a moral requirement to abide by an assumed spirit of the law could be perfectly in line with that spirit. Troublingly, this is the case even if the spirit is implied from legislative intentions that go unstated for reasons having to do with the politics of self-preservation. Like native advertising, special interest group protection through favorable legislation is best accomplished when it is not done so overtly.[39] Adjudicating taxpayer behavior on this basis provides no answer to the possibility that much tax legislation is in fact sponsored content.

The problem of interpreting legislative intent is further thwarted by the crowding-out of alternative policy influences caused by an entrenched policy monopoly. This happens, for example, to the extent that the OECD, self-described as the world's "market leader in tax policy,"[40] quashes policymaking attempts by rival institutions.[41] Crowding out alternative viewpoints ensures institutional rigidity and adherence to status quo interests. It also ensures ongoing isolation of the issues facing poor countries in the global tax order.[42] As Michael Durst, a former IRS official, puts it:

> I have frequently observed [lobbying at the OECD] at close hand, and I believe it has been influential. The effectiveness of lobbying efforts has been enhanced, I believe, by the absence of any financially interested constituency that might serve as

39. *See, e.g.*, Charlie Warzel, *The Real Problem with the Atlantic's Sponsored Post Debacle Proves that Above All Else, Native Ads Need to Feel Native*, ADWEEK (Jan. 15, 2013), http://www.adweek.com/news/technology/real-problem-atlantics-sponsored-post-146553.

40. *See, e.g.*, OECD'S CURRENT TAX AGENDA (2012), *available at* http://www.oecd.org/ctp/OECDCurrentTaxAgenda2012.pdf.

41. Richard Murphy, *OECD Should Step Down and Let UN Tackle Tax Havens Say Tax Justice Network and Action Aid*, TAX RESEARCH UK (Nov. 1, 2011), http://www.taxresearch.org.uk/Blog/2011/11/01/oecd-should-step-aside-and-let-un-tackle-tax-havens-say-tax-justice-network-and-action-aid/.

42. *See, e.g.*, Frances Horner, *Do We Need an International Tax Organization?*, 24 TAX NOTES INT'L 179 (2001).

> an effective counterweight and therefore as a political force for changes to current laws.[43]

Some activists have begun to point out the crisis for the rule of law on both a national and international level that is presented by this kind of political malfunction. For example, the Tax Justice Network has recently questioned the outsize influence on tax policy exercised by the OECD.[44] As activists begin to tie legal tax avoidance by multinational actors to the connection between the impenetrable forum of international tax lawmaking and the inability of the public to monitor the outcomes of such lawmaking in practice,[45] they will accordingly seek public accountability for the true cost of these regimes as a remedy.

II. PLURALISM AND THE SOFT LAW PATH

Because the message of legal tax avoidance is both complex and nuanced, and features behavior that is not obviously objectionable when compared to tax evasion, activists typically combine tax evasion and tax avoidance into a single category when presenting the problem to the public. For example, James Henry—an American tax justice activist who was formerly Director of Economic Research (chief economist) for McKinsey & Co.—states:

> Both evasion and avoidance have the same impact on the rest of us, which is, our tax burdens are greater because the truly rich are not paying their fair share: they are able to put their money abroad, and basically are able to take advantage of a system that allows a double non-taxation. And that's a real problem.[46]

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43. Durst, *supra* note 38, at 442.

44. *Taxcast Edition 14*, TAX JUST. NETWORK (Feb. 2013), *available at* http://www.tackletaxhavens.com/taxcast/.

45. For an anecdotal account of the difficulties related to observing OECD deliberations, see Allison Christians, *What an OECD 'Public Briefing' Teaches About The Rule Of Law*, TAX, SOC'Y & CULTURE (Feb. 18, 2013), http://taxpol.blogspot.com/2013/02/what-oecd-public-briefing-teaches-about.html.

46. Carroll Trust, *Gibraltar Offshore Accounts Tax Evasion Scandal*, YOUTUBE (Nov. 14, 2012), http://www.youtube.com/watch?v=Cv6d9b9Z9C4.

Henry thus combines tax avoidance, which is the product of either intentional or inept (or both) rulemaking, with tax evasion, which is the product of taxpayers flouting the rules and governments not stopping them. This allows a single message to permeate the public consciousness; namely, that whether it is avoidance or evasion, taxpayers are misbehaving and they must be stopped.

The intentionally pluralistic character of the last century of tax policy development serves as the basis for arguing that the rule of law must be central in the formulation of any solution to this problem. This pluralistic character is most clearly evidenced in the use by rich countries of non-legal methods to create and maintain the system in existence today, including facilitating the central role played by tax havens in the global financial system.[47] Because the institutional and regulatory status quo constrains the capacity of governments to respond unilaterally to problems involving international taxation, the OECD—as its chief architect—has been criticized for perpetuating a democratic deficit in tax lawmaking, for skewing tax policy to favor its members and their constituencies, and for advancing an agenda that is inconsistent with other global social goals within the safely ensconced parameters of black-box policymaking.[48]

Since the OECD is not a lawmaking body but instead deals in "norms" and "standards," there exist in law no remedies for any of its perceived misdeeds, no matter how far-reaching or damaging. Anyone who disagrees with the OECD's global grip over tax policy has little choice but to mount a challenge through another institution or mechanism that will inevitably be outmatched in financial and institutional support. Some may even be overtly thwarted in such an effort by those who seek to sustain the primacy of the OECD in preserving its own brand of tax policy against any would-be

47. Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles*, 35 TEX. INT'L L.J. 377, 429 (2009); Tony Freyer & Andrew P. Morriss, *Creating Cayman as an Offshore Financial Center: Structure & Strategy Since 1960*, ARIZ. ST. L.J. (Sept. 22, 2013); RICHARD ECCLESTON, THE DYNAMICS OF GLOBAL ECONOMIC GOVERNANCE: THE FINANCIAL CRISIS, THE OECD AND THE POLITICS OF INTERNATIONAL TAX COOPERATION 2 (2012); Christians, *Networks, Norms, and National Tax Policy*, *supra* note 13.

48. For a discussion of international constraints on national tax policy, see Allison Christians, *Global Trends and Constraints on Tax Policy in the Least Developed Countries*, 42 U.B.C. L. REV. 239 (2010).

competitors. The OECD's continued tax policy domination suggests that its member countries have to date been well served by using these non-legal methods to shape tax practices on the ground around the world.

Given the massive resource difference between tax justice advocates and the OECD member governments, it seems clear the latter will employ their well-resourced and highly motivated supporting constituencies to clear the way for OECD-based policy views to continue to prevail. This power difference must be acknowledged as real, even while it is vigorously protested as a fundamentally unjust way to decide how states can and should exercise taxation, and continuously countered with comprehensively justice-oriented policy alternatives. Starting from the premise that the status quo is a product of decades of soft law, a convincing case can be made that governments can and should contain the mechanisms for controlling inappropriate behavior within the structure of law instead.

III. USING LAW TO CONSTRAIN TAXPAYER BEHAVIOR

When a government determines how to commandeer resources from the private sector for the public good, it seems important that the rule of law be involved in drawing the line between evasion, which is illegal, and avoidance, which is not. The line between avoidance and evasion, like many line-drawing exercises in tax or otherwise, is fraught with difficulties.[49] But this is an argument for drawing this line not with soft law but rather with legal principles, continuously monitored and enforced through compliance with agreed-upon rules and standards, backed up by judicial review, to put the taxpayers on notice as to the behavioral expectations applicable to all.

49. *See, e.g.*, David Weisbach, *Line Drawing, Doctrine, and Efficiency in Tax Law* (Univ. of Chi. Law Sch. John M. Olin Law & Econ. Working Paper No. 62), *available at* http://www.law.uchicago.edu/files/files/62.Weisbach.Line_.complete.pdf (last visited Mar. 3, 2014).

This is not to say that governments are or should be helpless against formalistic or "sophisticated" tax planning.[50] Governments are clearly not helpless in this regard: this is the point and purpose of anti-abuse rules. These may be bright line rules, such as thin capitalization and beneficial ownership, or more flexible regimes that rely on weighing and balancing with judicial oversight as a backstop, such as general and specific anti-avoidance rules, sham and step transaction doctrines, and economic purpose tests.[51] All of these are admittedly cumbersome ways to solve complex problems, but they are at least capable of collectively moving the tax system toward more coherence and consistency of application.

In contrast, suggesting that the difference between illegal and legal cannot be established in law posits that while societies are incapable of articulating the parameters of acceptable conduct within the law, legal sanction will nevertheless be imposed for noncompliance. This implies that punishment can and will be meted out randomly, because judgments about taxpayer behavior will be made outside of the sphere of deliberative lawmaking and instead in the court of public opinion.

Bypassing the legislative sphere as the proper place for making and enforcing decisions about civic responsibility shifts the duty of oversight away from governments and toward civil society writ large, which includes not just NGOs, activists, and others who may be interested in promoting tax justice or fairness but also all of the lobbyists, consultants, paid marketers and promoters, and other political actors who have their own agendas and many resources and mechanisms to advance them.

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50. It is also not to suggest that tax advisors are themselves amoral actors, mere technicians, or automatons of any kind. They clearly are not, and professional standards are regularly set and enforced with respect to their behavior in statutory and administrative rulemaking, as well as private membership association regimes. *See* MICHAEL HATFIELD, THE ETHICS OF TAX LAWYERING (2d ed. 2011); Peter C. Canellos, *A Tax Practitioner's Perspective on Substance, Form and Business Purpose in Structuring Business Transactions and in Tax Shelters*, 54 S.M.U. L. REV. 47 (2001).

51. The literature is vast on this topic. *See, e.g.*, Leandra Lederman, *W(h)ither Economic Substance?*, 95 IOWA L. REV. 389 (2010); Christopher M. Pietruszkiewicz, *Economic Substance and the Standard of Review*, 60 ALA. L. REV. 339 (2009).

Assigning the problem of categorizing taxpayer behavior to the public in this manner has pernicious effects. The most troubling of these is that it releases legislators from responsibility too easily, allowing them to continue to benefit from sponsoring legislation that favors their constituencies while purporting to act in the interest of the public. But it also runs the serious risk of pushing against the path to good governance more systemically by turning too quickly to soft law without considering how to deal with the political influence problems that will inevitably persist, and may even worsen, in this scenario. Instead of turning to morality as a soft law backstop to an ongoing tax governance crisis, the better path seems to be the one most tax justice advocates recommend; namely, achieving expansive transparency in lawmaking processes so as to enable public monitoring of what the legal regime produces in terms of actual outcomes for taxpayers.

IV. AVOIDANCE VS. EVASION AS THE BASE CASE FOR TRANSPARENCY

Transparency has become a buzzword in international governance in general, so it is perhaps no surprise to see it mobilized by tax justice advocates. Given the technical complexity of the regimes in question, and how those regimes interact across borders to create the related yet distinct issues of evasion and avoidance, seeking transparency in international tax is no small feat. It will involve first a clear statement of the ills to be remedied—an elusive task, given the tradition of opacity and the prevalence of soft law, as well as non-legal processes and institutions. It must then overcome the institutional hurdles presented by a global tax policy regime that restricts influence from outside the business community.

But this is precisely where the intractable problem of drawing a line between tax avoidance and tax evasion may be viewed as an opportunity to achieve systemic reform. At least two systemic tax governance traditions could be challenged on the grounds that each leads to the public's inability to distinguish between tax evasion and tax avoidance, and therefore each breaks down the legitimacy of tax law in the court of public opinion, thus furthering a cycle of incoherent and uneven application of tax laws within and across societies.

The first of these systemic tax governance traditions is the outsize influence of well-resourced special interest groups over tax lawmaking processes in both domestic and international settings. There is little doubt that tax policy suffers because too much policy influence is wielded by one particular sector; namely, the business community in the influential OECD member countries and their worldwide network of lawyers, accountants, and other advisers who are well paid and therefore highly motivated to serving in this effort. Far too much of this influence is being exerted in institutions and processes that are inaccessible to public view. This suggests, at minimum, that governments have accepted, contrary to social policy goals, an inappropriate amount of obscurity around the many ways in which well-resourced actors control the design and maintenance of tax systems across the globe.

Many of the problems for tax policy posed by opacity in political influence are solvable as governance problems through the mechanism of transparency. In this case, the transparency contemplated includes the complete documentation with respect to all government officials—at all levels (national and international included)—of every meeting had with any person not in government, disclosing time spent, issues discussed, and every dollar received in the form of campaign support, issue support, or otherwise.

This is more or less the working principle of various countries' lobbying registries, as well as open meetings and access to information laws, but it envisions a more thorough public surveillance of interactions between government officials and the public, at all levels and in all capacities. This kind of transparency would enable public observation of the connection between political influence and fully compliant yet significantly low-taxed members of society, and therefore provide desperately needed data points for making the case for why full compliance with existing laws is not a benchmark for appropriate taxpayer behavior but rather a starting point for critical inquiry regarding the accountability of lawmakers to the broader public.

A second systemic tax governance tradition that impedes the ability of the public to distinguish between tax evasion and tax avoidance is the confidentiality accorded to taxpayers' tax information. This confidentiality prevents the public from observing how the law on the books plays out on the ground, and therefore sows the seeds for outrage when the media exposes the tax affairs of yet another high profile member of society.

Again, transparency is the obvious solution, this time in the form of public disclosure of certain kinds of tax information. While there is a case to be made for favoring confidentiality over publicity in the case of individuals,[52] the same case has not been made for corporations. Tax disclosure reforms, with respect to both pertinent annual tax information and beneficial ownership, have long been advocated by academics and other tax policy observers, and the tax evasion/avoidance problem could serve as the reason to finally embrace sunlight with respect to this kind of information.

Further bolstering the case for transparency, the uneven reputational risk of naming and shaming based on celebrity status or name brand visibility ought to motivate members of society whose tax affairs tell a different story to bring their governments to account for failing to delineate between tax avoidance and tax evasion in a comprehensive manner. To the extent that the targets of naming and shaming object to the charges of immorality and point to full compliance with all regulatory regimes, they should have no objection to a transparent system of governance that would allow the public to monitor tax policy outcomes on the ground.

CONCLUSION

The failure to coherently delineate between tax evasion and tax avoidance is not the product of legal impossibility but rather of governance failure. The answer to this governance failure is not to turn away from law by articulating a non-legal standard of behavior based in the language of morality, and then using this standard as a means to inflict legal sanctions. Instead, the answer is to demand more from the law, which means expecting more accountability in governance. This is not a revelation but a reminder of governance lessons already learned.

52. Joshua Blank, *In Defense of Individual Privacy*, 61 EMORY L.J. 265 (2011).

Transparency has always created pressure on governments to solve line-drawing problems; in tax policy, it is the same story. Tax transparency forces lawmakers to expand their engagement with society beyond their immediate sources of sponsorship by improving the feedback loop between lawmaking and policy monitoring. Mechanisms like public disclosure of tax-related data and broad public participation in tax law policymaking—at all levels and in all forms of governance—have the potential to dislodge rhetoric based on conjecture and deliver to the public the data needed for independent study of the tax system as it plays out in practice, rather than as it is suggested by the words placed in statutes by legislators whose intentions are ambiguous at best.

It is precisely within the act of drawing a line between tax avoidance and evasion that the dire need for transparency most reveals itself. The idea that taxpayer behavior must be managed by law, rather than social sanction, rests fundamentally on the premise that tax policy can move toward greater coherence over time if the public persistently demands a means of monitoring lawmaking. Transparency, therefore, becomes a tool for forcing governments to distinguish between legal and illegal behavior within a regime that is capable of sustained public observation as well as participation that is itself observable—namely, the rule of law. The desperate need for an articulation of the difference between tax avoidance and tax evasion accordingly illustrates why transparency is consistently viewed as an essential requirement for the pursuit of tax justice.