PROFESSIONAL ETHICS FOR THE TAX LAWYER TO THE HOLMESIAN “BAD MAN”

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ABSTRACT

The “manufacture” of factual indeterminacy in furtherance of tax avoidance activity constitutes potentially unethical attorney conduct. The structuring of facts toward tax avoidance is not merely the rendering of legal advice as contemplated by the Model Code of Professional Conduct, and instead may assist the Holmesian “bad man” client toward conduct that is normatively prohibited under the tax laws. As such, only tax planning via factual structuring, which results in determinative tax avoidance, is ethical attorney conduct. Since a purely formalistic method of legal interpretation is not applied in the United States, the circumstance of determinative tax avoidance is extraordinarily rare in the modern era. The moral aspects of legal representation in furtherance of tax evasion are also re-evaluated from both the parochial and postmodern perspectives.

Keywords: Oliver Wendell Holmes; “bad man”; formalism; economic substance; Romans 13:7.

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I. INTRODUCTION

For the tax attorney acting in the role of the tax “planner,” the ethical and moral considerations for the practice of tax law are generally not given as a matter of legal ethics in the Model Code of Professional Conduct (the “Model Code”). The “Model Code gives scant attention to resolving the [tax] adviser’s peculiar ethical dilemmas” and is by no means an exhaustive statement of the law governing professional conduct in the field of taxation. Indeed, “[m]any tax law-

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1. See Rachelle Y. Holmes, The Tax Lawyer as Gatekeeper, 49 U. LOUISVILLE L. REV. 185, 188-89 (2010) [hereinafter “R. Holmes I”] (“Yet, under the current tax regime, it is not unusual for the tax lawyer to play the roles of advisor, advocate, endorser, insurer, engineer, and even adversary. It can be a tricky business wearing all of these hats, particularly when tax lawyers are facing mounting pressures from powerful clients aggressively pushing to minimize their tax liabilities.”).

2. See Michael C. Durst, The Tax Lawyer’s Professional Responsibility, 39 U. FLA. L. REV. 1027, 1030 (1987) (“It is likely that disciplinary constraints on tax practitioners will remain, to a surprising extent, within the unregulated discretion of the practitioner.”); David J. Moraine, Loyalty Divided: Duties to Clients and Duties to Others – the Civil Liability of Tax Attorneys Made Possible by the Acceptance of a Duty to the System, 63 TAX L. 169, 169 (2009) (“While all lawyers are subject to ethical constraints promulgated by the profession tax lawyers are additionally confronted with regulation by laymen through standards of practice promulgated by nonlawyers.”).

3. See Ann Southworth, Redefining the Attorney’s Role in Abusive Tax Shelters, 37 STAN. L. REV. 889, 911 (1985) (“Differences between lawyers’ roles as advocates and advisers have only recently received formal recognition from the ABA, and the Model Code gives scant attention to resolving the adviser’s peculiar ethical dilemmas.”).

4. See Geoffrey C. Hazard, Jr., How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?, 35 U. MIAm L. REV. 669, 676 (1981) (“Although it may seem obvious that interpretation of a lawyer’s legal duty frequently requires reference to general law as distinct from the rules of legal ethics, many lawyers seem to assume that the text of the Model Code is an exhaustive statement of the law governing their professional conduct. The Code is not exhaustive, however, for it does not purport to be pre-
yers suggest that the idea of ethical or moral considerations impinging on the tax-planning domain is simply absurd. The current phenomenon of Holmesian “bad man” tax lawyering is thus not a question of “zealous advocacy” by the tax attorney on behalf of a corporate client. Rather, the pertinent question is whether the tax lawyer engaged in the structuring of facts actually assists a multinational firm toward conduct that the lawyer knows is “criminal” or “fraudulent.”

emptive. On the contrary, the rules of professional ethics presuppose and supplement the law at large . . . .”); Anthony C. Infanti, Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar, 22 VA. TAX REV. 589, 605 (2003) (“The Model Rules do not, however, purport to be an exhaustive compendium of the ethical norms that lawyers must consider when deciding upon an appropriate course of professional conduct. It is expected that lawyers will also be guided by their own moral compass and by the norms imposed on them by their peers. For tax lawyers, the uncodified norms that guide professional conduct have generally been acknowledged to include a duty to the revenue system.”).


6. See Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 460-61 (1897) (“[If we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”); see also Bret N. Bogenschneider, Manufactured Factual Indeterminacy and the Globalization of Tax Jurisprudence, 4 U. C. LONDON J.L. & JURIS. 250, 251 (2015) (“Such manufactured factual indeterminacy represents an aspect of Oliver Wendell Holmes’ ‘bad man’ problem where multinational firms are able to engage in tax planning to intentionally create factual indeterminacy and thereby benefit from formalistic interpretation of tax laws. This subset of legal indeterminacy is often observed in the context of tax treaty interpretation and related tax planning by multinational firms.”).


8. See Simone de Colle & Ann Marie Bennett, State-induced, Strategic, or Toxic? An Ethical Analysis of Tax Avoidance Practices, BUS. & PROF. ETHICS J. 33:1 (2014); Sheldon D. Pollack & Jay A. Soled, Tax Professionals Behaving Badly, 105 TAX NOTES 201, 202 (2004) (“[W]e could not have been more wrong in placing our trust in corporate counsel and their tax advisors.”); but see James P. Holden, Practitioners’ Standard of Practice and the Taxpayer’s Reporting Position, 20 CAP. U. L. REV. 327, 327 (1991) (“The tax law defines the taxpayer’s rights and duties; the practitioner’s role is to advise the taxpayer with respect to those rights and duties. Accordingly, the taxpayer is the primary actor, and the practitioner only advisor. Recognizing this, we first address the taxpayer standard of conduct and then the practitioner standard.”).

9. See Camilla E. Watson, Tax Lawyers, Ethical Obligations, and the Duty to the System, 47 U. KAN. L. REV. 847, 852 (1999) (“[A] client can put a lawyer at risk if the client has committed tax fraud and the tax lawyer’s advice might assist in furthering the fraud.”); MODEL RULES OF PROF’L CONDUCT pmbl. & scope § 3 (AM. BAR ASS’N 2013) (“For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.”).
Notably, in the context of professional conduct, the word “fraudulent” does not refer to “criminal tax fraud,” with its specific connotations and rare applicability in the Internal Revenue Code, but refers instead to conduct to which is substantively or “normatively” prohibited under applicable law. Geoffrey Hazard referred to this as conduct to which is in some degree illegal by reference to prescriptions of the general tax law. The tax lawyer when acting as factual tax “planner” must also comply with the substantive aspects of tax law. The word “normative” means in this context, at minimum, that a purely formalistic understanding of given tax laws (i.e., the Internal Revenue Code and Treasury Regulations) will not suffice to determine the ethical standard of behavior for a tax lawyer. It is, therefore, not enough from an ethical perspective for the tax lawyer to merely structure facts that appear to meet the literal language of the tax code.

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10. Watson, supra note 9, at 882 (“This presents the first hurdle for the attorney: determining whether the noncompliance, error, or omission amounts to fraud. Tax fraud is not specifically defined under the Internal Revenue Code, (“the Code”), and may include a variety of offenses.”); Durst, supra note 2, at 1055 (“Nevertheless, this behavior does not necessarily constitute ‘fraud,’ which has a special meaning under the Code and is addressed by severe criminal and civil penalties . . . . [a]n attempt to measure the standards under sections 6653(a) and 6661 against the ‘crime or fraud’ prohibition of Model Rule 1.2(d) requires a somewhat closer review of the hierarchy of penalties in the Code, as well as consideration of the social goals the Congress has addressed . . . .”).

11. MODEL RULES OF PROF’L CONDUCT preamble & scope § 16 (AM. BAR ASS’N 2013) (“The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.”); Durst, supra note 2, at 1055 n. 92 (“[Hazard] would seek to identify, and prohibit lawyer assistance in, conduct in which the client is normatively prohibited (by reference to prescriptions in the “general” law) from engaging. Professor Hazard recognized that this would entail distinguishing among legal provisions that do, and do not, establish normative prescriptions.”).

12. Hazard, supra note 4, at 672 (“[T]he question concerns action by the client that is in some degree illegal. ‘Illegality’ is itself a matter of degree.”).

13. R. Holmes I, supra note 1, at 201 (“It should be noted, however, that tax lawyers primarily act as transaction engineers and rarely appear in court or have direct contact with litigation. Rather, the bulk of their work involves planning, structuring, and compliance work.”).

14. See William H. Simon, After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer, 75 FORHAM L. REV. 1453, 1457 (2006) (“Some lawyers, however, are formalists all the time, or at least, they are always ready to be formalists when doing so would serve client interests. They will invoke the public interest when that helps the client, but they do not feel constrained by any public interest that is not fully articulated in positive rules. They thus stand ready to exploit ‘loopholes’ and ‘technicalities’—formal interpretations of rules that thwart their underlying purposes.”).


16. Prebble & Prebble, supra note 5, at 713 (“There is a strong tradition of construing tax statutes literally . . . . This strict interpretation approach is important for the success of tax avoidance schemes . . . . A tax avoidance scheme can succeed then if the
Of course, from such a “normative” perspective of the tax laws, tax avoidance planning is usually by some degree illegal. For example, tax planning performed on behalf of the “bad man” typically involves the “manufacture” of a factually indeterminate transaction. That is, the corporate tax “planner” takes one set of given facts, where the application of tax law appears to determinatively result in the payment of tax under the law, and prospectively changes these facts to a second set of facts, where the application of the tax law is indeterminate. The “manufactured” facts are thus presumably not within the boundaries of settled law, and are by some degree potentially illegal because the application of law to the new set of facts is unknown. In these circumstances, the tax attorney thus acts to transition the situation toward indeterminacy. This push toward indeterminacy is unusual in the practice of law since most of the time lawyers act to enhance or foster determinative legal outcomes, and not vice versa. In the case where the manufactured facts are wholly artificial, the United States Department of Treasury has already acted to limit the scope of tax lawyer assistance.

Under the classical interpretation of the rules for professional conduct, the tax attorney, engaged in such manufacture of factual indeterminacy, relies on the idea that this second set of manufactured facts constitutes a novel and “good faith” effort to test the bounds of applicable tax law. A highly profitable side-effect of this arrangement is what is referred to as the “audit lottery” where such a “good faith” challenge to existing law is often never tested in an adversarial proceeding with the taxing authority. However, this reliance on ac-
tively testing the boundaries of applicable tax law as the sole basis for the ethical standard of the tax lawyer is flawed irrespective of whether the tax lawyer acts with the primary goal of participating in the audit lottery. Rather, the manufacture of factual indeterminacy typically does not render a determinative legal result, and simply creates an unknown (i.e., indeterminate) application of tax law. This conduct is separately prohibited since an attorney may not affirmatively act to undermine the application of laws. Furthermore, as a matter of legal methodology, the tax attorney in this context often fails to act within the substantive requirements of the tax law, where reliance is placed on a formalistic interpretive method, which has been expressly rejected in the tax context.

The moral considerations as to tax avoidance activity are often given as determinable by literal compliance with the applicable tax law. Such view relates in part to Judeo-Christian moral values in the historical payment of tax under Roman law in the first century. However, tax avoidance behavior is generally not rendered moral merely because it may be lawful. Rather, the New Testament passage dealing with taxation, Romans 13:6-7, is re-translated (from Greek) indicating that Paul called for “deference” to interpretation of tax law by the Roman taxing authorities. Postmodern considerations of morality given as an existential view of the effect to the human subject, such as that of Søren Kierkegaard, are also applied here in the tax context in lieu of libertarian or utilitarian moral theory.

This Article is structured as follows: first, formalistic legal interpretation and its predominant role in the context of tax ethics is discussed in detail. Second, the Organisation for Economic Co-operation and Development (“OECD”) initiative with large corporate taxpayers toward “cooperative compliance” is discussed from the perspective of professional ethics, suggesting that if the taxing authority is cooperative with large corporate taxpayers then the relationship is

22. Watson, supra note 9, at 886-87 (“[T]he attorney also must be careful not to use the audit lottery to justify the client’s illegal position.”); see also Dennis J. Ventry, Jr. & Bradley T. Borden, Probability, Professionalism, and Protecting Taxpayers, 68 Tax Law 83, 107 (2014) (“In addition, the practitioner must ascertain and consider all relevant facts, relate the applicable law—including potentially applicable judicial doctrines—to the relevant facts, and never, in evaluating the merits of a tax position or transaction, ‘take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.’”).

23. See R. Holmes I, supra note 1, at 196 (“[C]lients want to push the limits of textualist interpretations in order to capitalize on loopholes that are created.”); see also Tanina Rostain, Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry, 23 Yale J. on Reg. 77, 88 (2006) (“Consistent with an emphasis on return preparation, the dominant interpretive approach of tax accountancy has historically been textualist.”).

24. See infra notes 28-53 and accompanying text.
not adversarial and may fall outside ABA Opinion 85-352. Third, several ethical dilemmas of tax lawyering are explored reflecting the inherent indeterminacy in the tax law. Finally, the underlying moral considerations of legal representation of the Holmesian “bad man” are discussed.

II. FORMALISM & TAX ETHICS

The ethics of tax lawyering are historically predicated on a formalistic (i.e., determinative) view of tax law. A determinative view of the law means that by reading the text of the tax provision one should be able to determine a conclusive result based on the law itself. The Model Code, for the most part, contemplates the ethical requirements of tax lawyers in these determinative terms. However, this determinative approach does not sync particularly well with tax law in the United States. That is, a realist view of the law is commonly referred to as “legal realism.” Under this understanding of the law, tax laws are not taken as logically determinative. Rather, legal outcomes may depend on what the judge in a particular case is likely to decide. Furthermore, in the context of taxation, laws are often inconsistently enforced against large corporations (but are strictly enforced against small businesses), thus rendering the law indeterminate as a matter of enforcement practice.

A formalistic method of legal interpretation is in fact applied in Continental Europe and Latin America. This is particularly true in the context of tax treaty interpretation. As such, the approach of legal “formalism” gives rise to a major inconsistency in international taxa-

25. See infra notes 54-73 and accompanying text.
26. See infra notes 74-91 and accompanying text.
27. See infra notes 92-123 and accompanying text.
28. For a detailed discussion of the determinacy of tax law in the context of taxation see Bogenschneider, supra note 6 (“As such, Dworkin shares with the formalists a belief that the law is determinate but he differs as to why. For him, determinate answers are possible through the application of moral principles because political morality holds determinate truths.”).
29. See, e.g., MODEL RULES OF PRO'F'L CONDUCT pmbl. § 5 (AM. BAR ASS’N 2013) (“A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.”).
30. See generally Frederick Schauer, Legal Realism Untamed, 91 Tex. L. Rev. 749 (2013); Michael Steven Green, Legal Realism as a Theory of Law, 46 Wm. & Mary L. Rev. 1915 (2005).
31. See Brian Leiter, Rethinking Legal Realism: Toward a Naturalized Jurisprudence, 76 Tex. L. Rev. 267, 277-78 (1997) (“‘Formalism’—is committed to the descriptive claim that judges respond primarily—indeed, perhaps exclusively—to the rational demands of the applicable rules of law and modes of legal reasoning.”).
tion depending on the jurisdiction at issue. For example, under the Vienna Convention on the Law of Treaties, if the form of the tax treaty does not render a determinative result, then the result may be considered effectively a “null” (i.e., yielding double non-taxation). On the other side of the spectrum, in the United States a “null” result in the tax context is rare. The codified economic substance doctrine (along with various judicial anti-abuse principles) does cause tax decisions to be affirmatively decided. However, a mere observation of legal indeterminacy does not reach the full substance of what tax lawyers and accountants actually do in the role of tax planners — and that is to manipulate facts and not merely to “interpret” laws. As such, when the lawyer advises as a matter of fact in the role of tax planner such is not a question of rendering legal advice, but is a question of fact. Indeed, the determination of whether a specific tax arrangement is designed to undermine the law is generally determined by tax lawyers as a matter of application of law-to-fact and not solely as a matter of legal interpretation. The bottom line is that the ethical requirements of tax lawyers in the United States must take into account the possibility of non-formalistic indeterminacy in the context of tax law.

The potential for indeterminacy in the tax law is generally not taken into account as a matter of professional ethics. For example, any reference to “criminal” tax evasion presumes that the tax lawyer

34. Judith Herdin & Michael Schilcher, Avoidance of Double Non-Taxation in Austria, at 15-16, in AVOIDANCE OF DOUBLE NON-TAXATION (Michael Lang ed., 2003) (“As mentioned above the tax authorities believe the object and purpose of tax treaties is to avoid double taxation and double non-taxation in general. This is in accordance with the Commentaries on Art. 23 of the Organisation for Economic Co-operation and Development (“OECD”) Model Convention which states that the basic function of Art. 23 would be to eliminate double taxation. This view cannot be shared fully. The tax treaties restrict the taxing rights of the contracting states in the areas they are regulating. A further purpose cannot be deduced . . . . If the contracting states want to exclude non-taxation, they have to insert subject-to-tax clauses. If they do not stipulate this clause, there is no legal basis to assume that the states wanted to prevent double non-taxation.”).

35. For the alternative view, see Prebble & Prebble, supra note 5, at 727 (“[T]he difference between evasion and avoidance is essentially a matter of law, not of relevant fact.”).

36. Richard Lavoie, Analyzing the Schizoid Agency: Achieving the Proper Balance in Enforcing the Internal Revenue Code, 23 AKRON TAX J. 1, 5 (2008) [hereinafter “Lavoie II”] (“Preparing tax returns requires taxpayers to understand the relevant provisions of the Code and apply them to their particular factual circumstances. Every tax return thus requires legal judgments regarding both the meaning of the Code and its application to specific situations.”).

is able to determine what constitutes criminal conduct. This is not a matter of degree.  

A reference to the *Gregory v. Helvering* decision is customarily given for the assertion that the taxpayer may structure his affairs to avoid the payment of tax. The reference is 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 will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes.” Learned Hand dissented along similar lines in a subsequent case, *Commissioner v. Newman*, as follows:

> Over and over again the Courts have said that there is nothing sinister in so arranging affairs as to keep taxes as low as possible . . . . Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands.

Yet, the formalistic tax planning at issue in *Gregory*, or similar seminal tax avoidance cases, would not fly today. The *Gregory* decision was made under a formalistic legal methodology to reach a determinative result of tax avoidance under the terms of the statute. In the modern era, this would not be the legal methodology generally applied in the United States, nor would it yield a determinative result under the applicable statute. Tax law does not strictly involve a formal method of legal interpretation. The case would probably not now be decided in favor of the taxpayer at all. Accordingly, it may be unethical for a tax lawyer to engineer a transaction under *Gregory*, not because the audit lottery might fail, but because the transaction does not

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38. Prebble & Prebble, * supra* note 5, at 702 (“Tax evasion is illegal. It consists of the willful violation or circumvention of applicable tax laws in order to minimize tax liability. Tax evasion generally involves either deliberate under-reporting or non-reporting of receipts, or false claims to deductions. This conduct is legally straightforward to identify; a taxpayer has committed tax evasion only if he or she has breached a relevant law. Indeed, evasion ordinarily involves criminal fraud.”).
40. Rick Taylor, *Rusty Pipes is Simply Rusty, Says Tax Practitioner*, TAX NOTES TODAY, July 11, 1994, LEXIS 94 TNT 135-46 (“I will do everything that I can to be absolutely certain that my clients do not pay one dime more tax than is absolutely required! That is what I was trained to do and that is what my clients pay me to do. To accuse me or anyone else in the tax community of not ‘playing fair’ and to demand that I somehow overlook planning ideas in the name of morals is, in the words of Judge Learned Hand, ‘mere cant.’”).
42. *Gregory*, 69 F.2d at 810.
44. See Prebble & Prebble, * supra* note 5, at 712 (“But if a taxpayer were to repeat the Mangin scheme today and were challenged by the Commissioner of Inland Revenue, the courts would certainly hold the scheme to be void for tax purposes[].”).
yield a formal determinative result of lawful tax avoidance. In the best case, the likely result is indeterminacy (i.e., to some degree illegal), and for an attorney to structure this is not ethical conduct. However, it would of course be ethical for an attorney to issue a legal opinion on the likely merits of exactly the same transaction (consistent with Circular 230) for the purpose of penalty avoidance. This scenario of whether and how to issue a legal opinion – where the tax lawyer wears solely a lawyer’s hat – does not address the ethical “dilemmas” faced by most tax lawyers engaged in actual tax planning practice.

In jurisprudential terms, subsequent to the decision in Gregory, the United States codified an “economic substance” doctrine, and other nations codified a comparable General Anti-Avoidance Rule (“GAAR”). The statutory framework of the United States thus expressly states that a purely formalistic approach may not be applied as a method of tax analysis in some cases. The tax lawyer cannot rely solely on the formalism of the statute to determine her ethical responsibility. Notably, the addition of the “economic substance” doctrine effectively mandates this “normative” assessment process as an ethical requirement of the tax lawyer in the United States. As such, the ethical responsibility of the tax lawyer in a non-formalist tax jurisdiction generally depends on her assessment of the law as applied to a particular factual situation.

However, with the oft-given citation to Learned Hand or Lord Tomlin, the idea is that professional ethics can be discerned simply

45. See id. (“If an avoidance scheme cannot achieve a reduction in tax liability without secrecy, it is hard to see it as legal in any robust sense. A scheme that will clearly be struck down if it should ever be challenged seems to be only weakly or contemptuously within the law.”).

46. See Lavoie I, supra note 7, at 823 (“The questions become harder when a tax lawyer is consulted in the planning stages of a transaction, where the legal questions presented rarely have clear-cut answers. The role of the tax lawyer is to sort through the extant authorities and utilize her experience and judgment in determining the legal strength of a given tax position.”).

47. I.R.C. § 7701(a)(1) (2015) (“In the case of any transaction to which the economic substance doctrine is relevant, such transaction shall be treated as having economic substance only if: (A) the transaction changes in a meaningful way (apart from Federal income tax effects) the taxpayer’s economic position, and (B) the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction.”); see also Finance Act 2013, c. 29, § 5, sch. 43 (UK); Council Directive 16435/14 amending Council Directive 2011/96/EU of November 30, 2011 on the Common System of Taxation Applicable in Case of Parent Companies and Subsidiaries of Different Member States, annex I, 2011 O.J. (L345) 8; Romero J.S. Tavares & Bret N. Bogenschneider, The New De Minimis Anti-abuse Rule in the Parent-Subsidiary Directive: Validating EU Tax Competition and Corporate Tax Avoidance?, 43 IN TERTAX 495 (2015).

48. Duke of Westminster v. Commissioners of Inland Revenue [1936] AC 1 at 19-21 (Eng.) (“Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be. If he succeeds in ordering
by reading the law itself. Tax lawyers are thus presumed to always act in a formalized manner where the application of tax law always yields a determinative result. In the actual practice of tax law, however, tax lawyers often manufacture factual indeterminacy on behalf of the client.\textsuperscript{49} The “legal realist” nature of tax practice is reflected in the various thresholds for the issuance of tax opinions mandated by the Treasury Department for penalty avoidance (i.e., “more likely than not,” “substantial authority” and so forth).\textsuperscript{50} Nonetheless, a formalist approach to tax ethics may indeed be possible, as evidenced in Latin America or Continental Europe, which actually apply a formalistic method of legal interpretation in the tax context.\textsuperscript{51} That is, if the tax statutes are internally complete then the tax lawyer need not look to the substance of the transaction to determine her ethical requirements, since the outcome is always determinate by operation of law. The question of whether determinacy by law is even possible is an ongoing matter of debate in legal circles, but certainly after the implementation of the economic substance doctrine that debate is ongoing only outside the taxing jurisdiction of the United States.\textsuperscript{52} Thus, within the United States, the ethical requirements of lawyers are relative based on the particular facts at issue. The tax attorney must apply judgment relative to each individual tax situation.\textsuperscript{53}

Under this view, the decision in \textit{Gregory} is limited to tax planning which yields a determinative legal result by operation of law. The issue in that case \textit{determinatively} resulted in the non-payment of tax by the practitioner. However, if a reasonable and well-informed analysis by a person knowledgeable in the tax law would lead such a person to conclude that the position has approximately a one in three, or greater, likelihood of being sustained on its merits."


\textsuperscript{50} See Ventry & Borden, \textit{supra} note 22, at 172 (“New 31 C.F.R. § 10.34 prohibited practitioners from advising a taxpayer-client to take an undisclosed position without a ‘realistic possibility of the position being sustained on its merits.’ A position met the ‘realistic possibility’ standard, moreover, if ‘a reasonable and well-informed analysis by a person knowledgeable in the tax law would lead such a person to conclude that the position has approximately a one in three, or greater, likelihood of being sustained on its merits.”).


\textsuperscript{52} I.R.C. § 7701. Clarification of Economic Substance Doctrine. (1) Application of the doctrine in the case of any transaction to which the economic substance doctrine is relevant, such transaction shall be treated as having economic substance only if: (A) the transaction changes in a meaningful way (apart from Federal income tax effects) the taxpayer's economic position, and (B) the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction.

\textsuperscript{53} Lavoie II, \textit{supra} note 36, at 5.
operation of the statute. Accordingly, to say that Gregory would probably not fly today implies that the tax result under the modern statute and method of legal interpretation is indeterminate. Moreover, although it is certainly possible that a taxpayer might re-structure his affairs so as to obtain a determinative legal outcome, in the modern era, this outcome is a rare bird. In the more prototypical situation, the tax lawyer intentionally manufactures a second set of facts to cause an indeterminate application of the tax laws, and, conveniently, the potential for non-detection via the “audit lottery.” The re-structuring thus yields indeterminacy, not determinative tax avoidance. Accordingly, the creation of factual indeterminacy toward tax avoidance is always by some degree illegal exactly because the “scheme” is indeterminate as to the outcome.

III. IS CORPORATE TAX PLANNING “ADVERSARIAL” IN THE MODERN ERA OF “COOPERATIVE COMPLIANCE?”

Professional tax ethics is premised on the idea of tax compliance and, by extension tax planning, as an adversarial proceeding similar to civil litigation. As explained by Prescott: “the tax compliance process involves a dispute between two adversaries – the taxpayer and the IRS – and should be treated as an adversarial proceeding warranting partisan advocacy on the part of the taxpayer's lawyer.”54 Accordingly, in the context of such an adversarial proceeding “a lawyer owes to his client a complete loyalty that precludes any duty to the government or the tax system.”55 The duty of the lawyer is often referred to as “zealous” advocacy.56 From this perspective, the manufacture of factual indeterminacy by the tax lawyer seems less objectionable because it is the responsibility of the opposing party in the adversarial proceeding to uncover and challenge the indeterminacy within the tax planning. Notably, the manufacturing of a second set of facts by the tax attorney and presenting these revised facts to the taxing authority seems akin to misrepresentation, at least if the first set of facts is given as also true. In that case, the tax lawyer would seem to have a duty not to remain silent and at least to disclose the first version of truth to the taxing authority. Indeed, apart from the context of actual litigation, the idea of multiple factual truths is, at minimum, problematic.57 Yet, this is a moral problem in the tax context, and not technically an issue of professional ethics, but only so as long as tax

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54. Prescott, supra note 21, at 693-94.
56. Prescott, supra note 21, at 701 (“The lawyer’s ethical duty of loyalty to the client creates an obligation to represent the client’s interests ‘zealously within the bounds of the law.’”).
57. See generally Dennis M. Patterson, Law and Truth (1999).
compliance and planning is taken as akin to an “adversarial” proceeding.

The issue of whether the context of tax planning constitutes an “adversarial” proceeding was openly questioned during an “unsuccessful effort during the 1980s to characterize the return preparation process as nonadversarial.” The adversarial approach to professional ethics was endorsed by the American Bar Association (“ABA”) Ethics Committee in the Formal Opinion 85-352.

The Committee began its reconsideration of the lawyer’s duties as tax return advisor by implicitly endorsing the conclusion of Formal Opinion 314 that the return preparation process should be treated as an adversarial proceeding and that the tax lawyer’s duties are those of an advocate. The Committee concluded that a lawyer can have a good faith belief in the validity of a position only if there is “some realistic possibility of success if the matter is litigated,” but acknowledged that “[a] lawyer can have a good faith belief in this context even if the lawyer believes the client’s position probably will not prevail.”

Yet, following the ABA’s approach, once one accepts the nature of tax practice as generally adversarial, then the “duty” of loyalty (or “zealous” representation) to the client is of paramount importance, but still potentially limited because of the nature of tax practice. As explained by Galler:

Tax practice differs from other areas because the client’s adversary is always the government. The question has long been debated whether this distinction implies that attorneys engaging in the tax practice are subject to different standards than attorneys who practice in other areas of the law.

In classical terminology, to challenge that “duty” to the client may require the positing of a competing set of duties. These competing sets of duties of the tax attorney have been characterized as a duty to

59. See Prescott, supra note 21, at 721 n. 124 (“Following the release of Formal Opinion 85-352 in 1985, the Treasury Department issued a proposal to amend its Rules of Practice that included an endorsement of a nonadversarial approach to the preparation of tax returns .... The proposal met with considerable resistance from professional groups and eventually was withdrawn in favor of the litigation-based standard endorsed by the legal profession.”).
60. Prescott, supra note 21, at 719-21.
61. Galler, supra note 18, at 694.
62. See Watson, supra note 9, at 884 (“The problem is that the attorney owes a legal duty to the client to represent the client in the manner in which the attorney accepted employment. Thus, first and foremost, the attorney must consider the interests of the client. But the attorney also has distinct duties that may conflict with the client’s interests. For example, according to the ABA, an attorney has a duty to avoid deliberately misleading the IRS and to prevent the client from doing so.”).
the revenue system, a duty to act honestly and ethically, and a duty to
the government.63 However, the interaction of these duties is signifi-
cantly different in the context of a “cooperative,” or non-adversarial,
tax compliance process upon which the ABA Formal Opinion 85-532
was premised.64

A. THE INTERNAL REVENUE SERVICE AND ORGANISATION FOR
ECONOMIC CO-OPERATION AND DEVELOPMENT INITIATIVE
ON “CO-OPERATIVE COMPLIANCE”

In the period after the American Bar Association (“ABA”) ruled
that the tax preparation process should be treated as an adversarial
proceeding, the Internal Revenue Service (“IRS”) changed its tax en-
forcement process vis-à-vis large corporate taxpayers. The IRS gener-
ally does not apply an adversarial audit strategy with large
corporations.65 The non-adversarial enforcement program was piloted
in a program referred to by the acronym “CAP.”66 As summarized by
Leviner: “The IRS has engaged in a revolutionary renovation of large
business tax administration in a manner that, in many ways, is con-
sistent with responsive tax administration theory. Fundamentally,
the IRS has shifted toward cooperative tax regulation with large busi-
ness taxpayers.”67 As these cooperative programs were implemented,
the audit rate for large corporations also dropped dramatically.68

Similarly, outside the United States, the Organisation for Eco-
nomic Co-operation and Development (“OECD”) has developed a
model of “co-operative compliance” which is currently implemented in

63. Galler, supra note 18, at 693-97; see generally Bernard Wolfsman, James
Holden & Deborah Schenk, Ethical Problems in Federal Tax Practice (3d ed.
1995).


65. Sagit Leviner, A New Era of Tax Enforcement: From “Big Stick” to Responsive
Regulation, 42 U. Mich. J.L. Reform 381, 411-12 (2011) (“Five key motivational pos-
tures have been identified as relevant to the realm of tax compliance. These are: (1)
commitment, (2) capitulation, (3) resistance, (4) disengagement, and (5) game playing.
The first two postures, commitment and capitulation, are compliant in nature, the for-
mer more than the latter.”).

66. Leigh Osofsky, Some Realism about Responsive Tax Administration, 66 Tax L.
Rev. 121, 123 (2012) (“The most significant and transformative is the Compliance As-
surance Process (“CAP”), which began as a pilot program for large business taxpayers in
2005. CAP is a real-time compliance review process, whereby large business taxpayers
work with the IRS to resolve all tax positions prior to tax return filing.”).

67. Id. at 122.

68. Rachelle Y. Holmes, Forcing Cooperation: A Strategy for Improving Tax Com-
pliance, 79 U. Cin. L. Rev. 1415, 1423 [hereinafter “R. Holmes II”] (“[T]he audit rate for
corporate LBEs has been dropping dramatically over the past five years and is signifi-
cantly down from the 44% rate in the 2005 fiscal year. Even among the largest of these
corporations—those with assets of $5 billion or more—the audit rate has declined 17%
over the last two years, from 78% in 2007 to 64% in 2009.”).
The OECD model is closely related to what is commonly referred to as “responsive regulation.” The non-adversarial strategy of responsive regulation was described as follows:

For taxpayers demonstrating good faith, the carrot of a less heavy-handed enforcement approach would generate goodwill and encourage their inclination toward public-regarding behavior. For uncooperative taxpayers, deploying the stick of aggressive enforcement would overcome their reluctance to adhere to the arm’s-length standard. In effect, taxpayers are forced to identify themselves as what Raskolnikov labels gamers and non-gamers.

In light of these developments, a pertinent question is whether the ABA Formal Opinion 85-532 remains relevant to tax planning practice of corporate tax lawyers subject to merely Internal Revenue Service co-operative compliance enforcement, as opposed to adversarial-style tax enforcement.

B. CORPORATE TAX LAWYER ETHICAL RESPONSIBILITIES WITH “COOPERATIVE COMPLIANCE”

Prior to implementation of the aforementioned co-operative compliance initiatives, the idea of general cooperation between the taxpayer and the taxing authority was discussed in the tax literature only as a hypothetical. Notably, the “co-operative compliance” model is typically presented under a formalistic and determinative view of the tax law, where the goal of tax enforcement is given as ensuring that large corporations “pay the right amount of tax, in the right jurisdiction and at the right time.” Accordingly, Prescott described taxpayer cooperation with the taxing authority in the compliance process with the following:

If taxpayers cooperate by sharing relevant information with the IRS, the agency can better select for examination those returns most in need of review. Conversely, if taxpayers refuse to cooperate with the IRS by minimizing disclosure of the information needed by the government to assess the need for

72. Jeffrey Owens, The Role of Tax Administrations in the Current Political Climate, Bulletin for Int’l Tax’n 67:3, 6 (2014) (“Finally, for tax administration to effectively implement the tax laws and to ensure that MNEs and other taxpayers pay the right amount of tax, in the right jurisdiction and at the right time requires the governments to provide a clear legal framework and the resources that they need to achieve this.”).
review of returns, tax compliance suffers . . . . These taxpayers limit disclosure of information relating to aggressive return positions in an effort to handicap IRS efforts to identify and debate the issues raised by these return positions during examination of the return.\footnote{Prescott, supra note 21, at 712-13.}

In such cases, where the taxpayer and the taxing authority agree that the tax assessment can be identified as part of a formalized, determinative process, then it follows that the role of the tax lawyer, under those circumstances, is presumptively not to manufacture factual indeterminacy without full disclosure to the taxing authority. To create indeterminacy when the client has agreed to a deterministic assessment of tax (e.g., under a co-operative compliance program) would violate the duty of the taxpayer to the taxing authority in entering into the cooperative compliance program in the first place. That is, under these circumstances, the word “cooperation” in tax assessment conclusively requires that the tax lawyer may only engage in tax planning which is determinate as a matter of law, as opposed to intentionally indeterminate. As such, where the large corporate taxpayer enters into a cooperative compliance program (or where cooperative compliance is the general standard of compliance in a particular taxing jurisdiction), then the tax lawyer is ethically required not to manufacture factual patterns with merely “some realistic possibility of success” without full disclosure to the taxing authority. In other words, the IRS and OECD “co-operative compliance” initiatives effectively void the result in ABA Formal Opinion 85-532. Accordingly, under these circumstances, the tax lawyer engaged in structuring indeterminate fact patterns would potentially violate both the objective requirements of the Model Code as well as the substantive requirements under the general tax laws.

IV. VARIOUS ETHICAL DILEMMAS IN TAX LAWYERING

The manufacturing of factual indeterminacy by a tax lawyer amounts to unethical attorney conduct in most circumstances. However, various practical dilemmas can be posited that seemingly justify indeterminate applications of fact to tax law as ethical attorney conduct. A few of these practical dilemmas are the following: (i) tax avoidance via indeterminacy may only be civil tax avoidance and not criminal fraud; (ii) the manufacture of indeterminate factual transactions on behalf of a client can be done in “good faith” as a challenge to tax laws; and (iii) the Holmesian “bad man” is entitled to “zealous” representation, and as such, the tax lawyer operates for the better-
ment of society in the representation of the Holmesian “bad man.” Ac-
cordingly, each of these practical dilemmas are discussed in detail.

A. The View of Tax Planning as Civil Tax Avoidance Not Criminal Fraud

The traditional approach in professional ethics in tax lawyering is
to posit a “crisp” line as between tax avoidance of the “civil” variety
and “criminal” tax fraud.74 The distinction is given as if tax lawyers
will always know the difference.75 Perhaps this distinction is helpful
in “easy” cases, or under a formalistic method of legal interpretation.76
For example, intentional violation of the advance transfer pricing
rules under Internal Revenue Code section 482 in some cases might
constitute tax fraud under egregious circumstances, not just civil tax
avoidance.77 Everyone agrees a tax lawyer cannot assist in this sort of
criminal corporate tax planning. But, such brazen determinate tax
fraud is relatively rare. The difference between civil tax avoidance
and criminal tax fraud is generally unknown.78 At least in the tax
context, the distinction between civil tax avoidance and criminal fraud
is a matter of degree just as described by Hazard.79

Notwithstanding such practical difficulties in the identification of
criminal tax fraud, the tax lawyer counseling toward “civil” tax avoid-
ance may believe that the attorney is allowed to engage in
nondeceitful conduct in which the client openly breaches a contractual
obligation.80 As explained by Durst:

74. Prebble & Prebble, supra note 5, at 711-12 (“The law draws a line’ between tax
avoidance and tax evasion. This line may be fine, but it is supposed to be crisp, such
that any set of facts will fall ‘on one side of it or the other.’ By definition, tax avoidance
falls on the ‘safe side,’ whereas tax evasion is on the ‘wrong side’ of the line. In practice,
however, the line can become blurred in a way that definition alone does not suggest.”).
75. Prescott, supra note 21, at 754-55 (“Taxpayers are entitled to seek any lawful
objective defined by the internal revenue laws. The lawyer serving as taxpayer advisor
and representative is ethically obligated to advise and assist clients in seeking those
lawful objectives. When the law is unclear, the tax lawyer may resolve doubt in favor of
the taxpayer. But unlike lawyers engaged in other areas of practice, tax lawyers may
not take client loyalty to its logical extreme by recommending any nonfrivolous position.
Rather, lawyers representing taxpayers may recommend only those positions satisfying
the higher ‘realistic possibility of success’ standard adopted by the ABA Ethics Commit-
tee in Formal Opinion 85-352.”).
76. Galler, supra note 18, at 692 (“Some cases are easy.”).
77. Section 482 refers to the transfer pricing rules for intercompany related party
transactions for corporations. For further detail see I.R.C. § 6662(e)(3) (2015); Treas.
78. Hazard, supra note 4, at 672.
79. Id.
80. See Watson, supra note 9, at 890 (“The attorney’s primary consideration is to
avoid being a party to the fraud . . . . There are two general ways in which an attorney
may be considered a party to the fraud. First, when she is perceived to be counsel-
ing the client to commit tax fraud, or to conceal the fact of the fraud. Second, when the
In most instances, the modern contract simply represents an undertaking by the parties that if they do not perform, they will pay appropriate damages. The party who decides to breach, and thereby incur liability for damages, may act within the realm of normal commercial expectation and does not necessarily breach a normative obligation.\textsuperscript{81}

However, compliance with the tax laws is not exclusively a “civil” matter. The payment of taxes is not just a contractual requirement. Furthermore, simply because “damages” upon noncompliance with a tax law might be paid as a dollar judgment to the taxing authority (as opposed to imprisonment) does not bear on the question of noncompliance as a “civil” versus “criminal” (i.e., tax “evasion”) matter. The assertion that the tax lawyer may counsel tax avoidance of the “civil” variety simply because any deficiency may be recovered as a matter of quasi-contractual rights may raise a host of other potential issues, and at the very least, does not resolve the issue.

B. **Manufactured Factual Indeterminacy as “Good Faith” Challenge to Tax Laws**

A “good faith challenge” to the tax law means that the position must be disclosed by the taxpayer presumably on the face of the tax return. American Bar Association (“ABA”) Formal Opinion 85-532 contemplates a non-frivolous argument by the tax lawyer as part of an adversarial proceeding.\textsuperscript{82} The rule is as follows:

[The lawyer’s] conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.\textsuperscript{83}

A secretive tax position is, by definition, not a good faith challenge to the law. Indeed, a secretive tax position is not even a “bad faith” challenge to existing law since such does not constitute a challenge to the law at all. The idea of such secretive indeterminacy tax planning attorney has knowledge of the fraud, continues to represent the client, and subsequently gives false or fraudulent information to a third party.”).\textsuperscript{84}

\textsuperscript{81} Durst, supra note 2, at 1054.

\textsuperscript{82} See Myron C. Grauer, *What's Wrong with this Picture?: The Tension Between Analytical Premises and Appropriate Standards for Tax Practitioners*, 20 *Cap. U. L. Rev.* 353, 360 (1991) (“First, the italicized language indicates that the definition of ‘not frivolous’ in the litigation context, as including ‘a good faith argument for an extension, modification, or reversal of existing law,’ does not include a requirement that there be a realistic possibility of success if the matter is litigated. Thus, the realistic possibility of success standard found in Opinion 85-352 appears to be higher than a non-frivolous standard.”).

\textsuperscript{83} Model Code of Prof’l Responsibility EC 7-4 (Am. Bar Ass’n 1980).
was previously identified by the Prebbles as “hard” to justify.\textsuperscript{84} But, this view contemplates only “bad faith” positions not disclosed on the tax return. To the contrary, a determinate tax position may ethically not be disclosed on the tax return in “good faith” because the law is presumptively settled,\textsuperscript{85} but an indeterminate tax position intended as a “challenge” to existing law must be disclosed on the tax return (or in an appropriate factual disclosure) in order for it to have any potential to benefit the tax system. This interpretation is consistent with the role of a tax attorney in an adversarial proceeding where legal arguments would be at least presented to the court (or, here the IRS) for review.\textsuperscript{86} Furthermore, for the reasons set forth above, in the context of co-operative compliance regimes, then both determinate and indeterminate tax structuring transactions should be disclosed to the taxing authority.

C. \textbf{Even a Holmesian “Bad Man” is Entitled to Engage in Tax Planning}

The definition of a Holmesian “bad man” is a taxpayer with no regard for the law and simply wants to determine what he can get away with. In the tax context, the “bad man” is often referred to as a “gamer.”\textsuperscript{87} With co-operative compliance, the goal of tax administration is to efficiently distinguish the “bad man” from other taxpayers, and devote more substantial enforcement resources to these taxpayers. Notably, a Holmesian “bad man” would actually thus be precluded from raising a “good faith” challenge to existing law because he does not act with “good faith” by definition. A problem for professional ethics, not yet acknowledged by the American Bar Association (“ABA”), is whether a tax lawyer acts in “good faith” to raise such a challenge where the client would be prohibited from doing so directly, and where the lawyer knows the client would be prohibited from doing so. The issue was further explained by Watson:

\begin{itemize}
\item \textsuperscript{84} Prebble & Prebble, \textit{supra} note 5, at 712.
\item \textsuperscript{85} Galler, \textit{supra} note 18, at 697 (“She may advise the statement of positions most favorable to the client, even if she believes that the positions probably will not prevail, so long as she has a good faith belief that those positions are warranted in existing law or can be supported by a good faith argument for an extension, modification, or reversal of existing law.”).
\item \textsuperscript{86} \textit{See generally} Lee A. Sheppard, \textit{What Are Penalties For?}, 85 Tax Notes 709 (1999).
\item \textsuperscript{87} Valerie Braithwaite & John Braithwaite, \textit{An Evolving Compliance Model for Tax Enforcement}, in CRIMES OF PRIVILEGE: READINGS IN WHITE-COLLAR CRIME, 405 (Neal Shover & John Paul Wright, eds., 2000); \textit{see} Dean, \textit{supra} note 71, at 428 (citing Alex Raskolnikov, \textit{Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement}, 109 COLUM. L. REV. 689, 704 (2009)).
\end{itemize}
Another troublesome issue for the attorney is whether the client can be trusted. If the client is unwilling to file an amended return, by definition that client has demonstrated a willingness to commit a federal crime. In tax practice, an attorney is entitled to rely on information furnished by a client without having to verify the accuracy of every piece of information the client furnishes, unless the attorney has reason to question that information.\(^8\)

Nonetheless, tax avoidance planning by a tax attorney designed to assist the Holmesian “bad man” to avoid the tax laws, may be seen as different only as a matter of degree from planning by an attorney relating to the avoidance of any other law. That is, any lawyer is certainly able to advise the client that one fact pattern results in tax and another not, just as any lawyer is able to advise a client that one course of action is lawful and another not. And, this reflects the prior scholarly literature on the ethical requirements for tax planning, which hinges on the idea that tax planning is a determinative process.\(^9\)

For example, in the easy case, the lawyer (as tax planner) simply presents various lawful courses of action to the “bad man” client to choose from (i.e., the “bad man” client wants to know how much he can get away with and not break the law). However, in tax law, the “bad man” wants the tax lawyer to present potentially unlawful courses of action to choose from instead of lawful options. And, everyone agrees the tax lawyer cannot affirmatively create unlawful options for the client. So, the ethics of tax law hinges entirely on the significance of “potentially” unlawful (i.e., indeterminate) as opposed to determinatively lawful if the attorney is to assist at all.\(^{10}\)

A further situation arises where the “bad man” has already been informed of a determinative legal option, then asks the tax lawyer whether there is any other scenario where the law might not apply determinatively but which could result in less taxation. The “bad man” client now seeks out factual indeterminacy. Any lawyer may play this game only so long as the client does not appear to be intending to circumvent the application of law, i.e., if the purpose of the planning is not to benefit from the indeterminacy of the law itself. From a less cynical perspective, perhaps the lawyer ought to never

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88. Watson, supra note 9, at 891.
89. Lavoie I, supra note 7, at 827 (“Note that the taxpayer has the legal duty to report her correct tax based on the facts and the relevant law.”); Owens, supra note 72.
90. See Watson, supra note 9, at 892 (“When the attorney discovers in advance that her client intends to mislead or defraud the government or any other third party, under the Model Rules the attorney may inform the client of the consequences and must advise the client not to undertake the action. If the client persists, the attorney must withdraw from representing the client in order to avoid being a party to the fraud.”).
presume such an intention on the part of the client. But, in the situation where the lawyer then offers to develop the indeterminate factual scenario independently, (i.e., to engage in indeterminacy planning) that is a new issue entirely. In that case, the lawyer has taken on himself the intentional seeking out of factual indeterminacy, which is the prohibited element. The tax lawyer cannot take on the role of the Holmesian “bad man” and advise potentially unlawful activity simply because the tax lawyer knows that the “bad man” wants to determine just what he can get away with under the tax laws. Much of the prior scholarly literature refers to the role of the attorney in this context as tax “adviser,” as opposed to tax “planner,” to avoid discussion of this very problem, since the traditional approach presumes the tax lawyer merely renders legal advice and is not engaged in the creation of facts.

The question then arises as to why any tax lawyer would think they might be able to counsel toward potentially unlawful tax avoidance. The justification has previously been given under the idea that manufactured indeterminacy can be categorized as lawful or unlawful by specifically analyzing discreet fact patterns and never looking to the larger picture.91 But, the Model Code says this is not the case in the context of professional ethics. The lawyer must conduct a reasonable investigation into the applicable facts and circumstances at issue. If the law is determinate, then presumably tax advice given by the lawyer could be given on a “yes or no” basis.92 Accordingly, where the client asks about various potentially unlawful scenarios, when already aware of the lawful scenario, then presumably the lawyer can continue to answer such questions, but only to a degree. Separately, in the situation where the tax lawyer is charged with creating a potentially unlawful structure, then she must decline.

V. PREMODERN AND POSTMODERN MORAL CONSIDERATION FOR THE TAX LAWYER

The existing literature on the morality of tax avoidance is relatively scant. In the seminal article, *The Morality of Tax Avoidance*, Zoe and John Prebble argued that tax avoidance behavior may be immoral irrespective of whether it is legal.93 This is a surprising claim in the tax context, since the moral question prior to the Prebbles’ article was if criminal tax evasion was *de facto* immoral on the basis of whether it should be considered *malum in se* versus *malum prohib-

91. See United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964) (noting that lawyers should not violate the law, and they have an ethical duty to not “shut their eyes to what was plainly to be seen.”).
93. Prebble & Prebble, supra note 5, at 732.
慕容。例如，Robert McGee 推导出这些线，即即使刑事税欺诈也不是 malum in se 也不道德。McGee 写道:

如果没有什么不道德的与税欺诈，它似乎要遵循，即律师、会计师和财务规划者不应被罚款，甚至为了帮助他们的客户逃税。... 如果欺诈税不道德，它似乎不，然后一个道德的，即，如果倡导他们的客户逃税也不道德，它可能自己成为一种不公正，因为它惩罚了某人倡导不道德的东西。94

Prebbles 的焦点在于认为正式遵循税法与道德本身是一致的。95 然而，从哲学分析中明显缺少对后现代道德或道德的任何参考。96 例如，众所周知，低收入者倾向于进行慈善捐赠相对于收入要远远高于富人，无论这些捐赠是否可以抵税。97 从一个后现代视角，这种对帮助的倾向性表明对于富人的健康，因为人类是社会的。

在任何情况下，以前对税避税活动的道德性分析都是根据适用的哲学标准来确定的。98 例如，Prebbles 应用著名的康德的“绝对命令”在税法的语境中，99 并将进一步的“福利国家”通过税收收集作为主要的道德。

95. See Moraine, supra note 2, at 169 (“Whether because of popular myth, history, or misconception, the public expects attorneys to act as unfettered advocates on behalf of their clients. Indeed, many attorneys believe that so long as they avoid basic wrongs such as conflicts, lying, cheating, or stealing, they are serving as proper advocates.”).
98. Notably, the Prebbles also made a reference to “deontological” philosophy as related to the applicable moral standard. For a detailed discussion of this topic in the context of taxation, see Richard Baron, The Ethics of Taxation, Philosophy Now, May/June 2012.
99. Prebble & Prebble, supra note 5, at 726.
However, this in fact does premise the morality of tax avoidance (either entirely or in part) on its presumptive fiscal effects on society. McGee then gave a plausible response to the Prebbles regarding application of the Kantian “categorical imperative” in the tax context as follows:

Kant's categorical imperative asks the question, “What would happen if everyone did it?” Kant would conclude that if the universal practice of some act results in something bad, then the act is unethical. If nothing bad results from the universal practice of the act, then it is not unethical. The weakness of this line of reasoning is highlighted when it is applied to the question of tax evasion. If taxation is theft—the taking of property without the owner’s consent—one might ask, “What would happen if everyone refused to allow their property to be taken without their consent?” One result would be a marked decline in the amount of theft (taxation) and an increase in the amount of justice.

This approach is incomplete. Tax avoidance should not be viewed as immoral merely because of a weak ontological philosophical argument regarding its potential indirect effects on others through the redistributive transfer from rich to poor (i.e., based on loose “welfare state” claims arising in the tax literature). In the United States the overall tax system is regressive, thus rendering the modernist analysis of the “welfare state” factually inapplicable. To the extent the Enlightenment era ethical theory applies strictly individualistic moral claims (or property rights) to justify tax avoidance in such libertarian terms, that view is inapplicable based on the facts of modern society. Rather, the secular morality of tax avoidance may depend on application of moral theory developed after the Enlightenment era (i.e., postmodern moral theory). In philosophical terms, the Enlightenment era was not the end-stage in the development of ideas about moral behavior, even though it is often separately taken as the end-stage in the jurisprudence of taxation.

100. Id. at 735-36.
102. See Christopher Todd Meredith, The Ethical Basis for Taxation in the Thought of Thomas Aquinas, 11 J. Mtrs. & Morality 41, 53 (2008) (“This view of the taxing power of the civil authority is quite narrowly circumscribed when compared with the understanding of taxation that underlies the modern welfare state, but it stands in a venerable tradition of Christian moral and political thought represented by such other luminaries as Martin Luther and John Calvin.”).
A. **THE PAROCHIAL (PRE-MODERN) INTERPRETATION OF TAX MORALITY AS LAWFULNESS**

Judeo-Christian scholarship is also concerned with the morality of taxation, and particularly the Roman tax practices in occupied Judea.\(^{105}\) Perhaps not surprisingly then the seminal statement of morality and taxes from the Christian perspective is often taken from the writings of Paul in the New Testament, Romans 13:6-7, which provides as follows: This is also why you pay taxes, for the authorities are God’s servants, who give their full time to governing. Give to everyone what you owe them: If you owe taxes, pay taxes; if revenue, then revenue; if respect, then respect; if honor, then honor.\(^ {106}\) From this passage, along with the oft-quoted: “Then give back to Caesar what is Caesar’s, and to God what is God’s,”\(^ {107}\) is derived an oft-stated view of Christian scholars that taxes are owed only to the extent of the tax law.\(^ {108}\) Similarly, the Judeo view toward tax avoidance was generally given along the lines of *malum in se* jurisprudence, or ontological arguments related to the consequences of violating the law to the wider religious community.\(^ {109}\) Another noted Christian scholar goes so far as to say that, in the passage of Romans 13:7, Paul may have used “irony” (i.e., sarcasm) as a rhetorical technique in suggesting that Christians should pay the Roman taxes.\(^ {110}\) In either case, this leaves open the door to *lawful* tax avoidance planning as moral behavior from the parochial perspective. However, in a highly-regarded series of articles, Susan Pace Hamill gave a Christian response to regressive tax policies in the United States.\(^ {111}\) As I have also written separately,


\(^{106}\) Romans 13:6, 7.

\(^{107}\) Luke 20:25. This statement is paraphrased in several of the books of the New Testament. See also Mark 12:16; Matthew 22:21.


\(^{109}\) See McGee & Gelman, supra note 51, at 71 n. 14-15.

\(^{110}\) T.L. Carter, *The Irony of Romans 13*, NOVUM TESTAMENTUM, 46: 209 ( 2004) (“The way to stay out of trouble and keep a clear conscience is to submit to the authorities (13:5). One should also pay taxes, since those who collect them are God’s servants (13:6).”).

the presumptive immorality of regressive taxation from a Protestant perspective might be further supplemented by Thesis Number 86 of Martin Luther’s 95 Theses.112

Even with this general background on tax avoidance, the moral question of tax avoidance has not been answered because the method of legal interpretation from the Judeo-Christian perspective remains as yet, unknown. Stated most directly, the pertinent and foremost question remains the following: What was the method of legal interpretation in determining the amount of tax due by both Christian and Jewish taxpayers in paying Roman taxes under applicable tax laws? Both Christian and Jewish taxpayers were subject to direct and indirect forms of taxation as a matter of Roman tax law and as an occupied province. This form of indirect taxation would at minimum have required a de facto determination of the level of the taxpayer’s taxable activity. In other words, obviously, the tax collector and the taxpayer were unlikely to agree on the amount of the tax to be paid under Roman law even in ancient times.


Much of the New Testament was first written in Greek. Accordingly, the novel translation of the Greek word ψευδος113 taken from Paul’s writing in the book of Romans, proposed here is that in the tax context “respect” means obedience to the legal interpretation of the secular tax collector (i.e., the Roman collections authority).114 This translation might also alternately be given in the English language as “deference.”115 Under this interpretation, the translation of “respect” had a tangible meaning and was not merely a ceremonial implication of bow, nod, and so forth. Accordingly, the meaning of Paul’s writing in Greek as part of Romans 13:7 is that the finding by the secular Roman tax authority as to the amount of tax which was to be paid by

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112. Bret N. Bogenschneider, How Helpful is Econometrics to Tax Research?, 21:3 NEW ZEALAND J. OF TAX LAW AND POL’Y 292, 301 (2015) (“Thesis 86: “Why does the pope, whose wealth today is greater than the wealth of the richest Crassus, build the basilica of Saint Peter with the money of poor believers rather than with his own money?”).  
114. Id. at 315. “Paul exhorts the Roman Christians not to contribute to the civil upheaval, but be good citizens, showing their obedience to the authorities by paying tax to whom tax is due.” Id.  
115. Id. “Just as it was clear that the Christians had an obligation to pay tribute and taxes, so it was their obligation to give ψευδος to whom ψευδος is due.” Id.
the Christian authority, was to be respected as one might respect a judicial decision.116

The modern implication is that from a Christian moral perspective a formalist interpretation of law may not suffice as to the amount of tax to be paid. The tax law is partly what is written, but also under a realist approach the tax law is what the tax enforcement authority says it is. The deference to the tax collections authority is necessary to make the tax system function. For example, if Christian taxpayers agreed to pay only the amount of tax in their own self-assessment, as opposed to the assessment by the Roman tax authority, then the tax system would fail. This would of course be the outcome even if Christians agreed to pay tax, but only under their interpretation of the tax law. Hence, the novel interpretation proposed here is that Romans 13:7 is essentially Paul instructing early Christians to apply an interpretive approach of legal realism to the tax law in the payment of Roman tax. In other words, the interpretation and application of tax laws was as important in ancient times as in modern times, and Paul’s intent with the Greek word ψόβος was to limit the tax avoidance activity of Christian taxpayers.

2. The Nietzschean Gambit and the Morality of Tax Avoidance

Another seminal article regarding the morality of tax avoidance was by Leo Martinez: Taxes, Morals, and Legitimacy.117 Martinez gave, effectively, a Nietzschean response to moral claims about tax avoidance, citing Oliver Wendell Holmes.118 He wrote:

Holmes might well have agreed that, at least in the absence of independently wrongful conduct, tax code violations are merely manufactured economic propositions, not moral ones . . . . An ordinary taxpayer’s response to the state’s decisional and enforcement power—the desire to avoid a tax or an audit, or the good-faith or mistaken belief (due to the complexity of the Code) in the legality of conduct—is neither punished nor considered morally wrong. This may be explained by our instinctual aversion to the existence of a supposed moral duty to pay what the government decides is fair. Punishment is considered appropriate only when a taxpayer’s disobedience amounts to willful tax evasion. Such defiance is not a breach

116. Id. at 325. “It is our contention that Paul’s letter to the Romans was written during a time of increasing dissatisfaction over the burden of taxation in the Neronian Principate (A.D. 54-68), contrary to the general consensus among scholars that the background of Romans 13:1-7 has its genesis primarily in the reign of Claudius (A.D. 41-54).” Id.
118. Id. at 524.
of a moral duty, but rather an affront to the existence of the state’s power to regulate her behavior and to demand she obey its requirements.\footnote{Id. at 524, 526.}

This passage is potentially very significant to the morality of tax avoidance because if laws are merely the “will to power” ("Will to Power"), as Nietzsche claimed, then it would be theoretically possible to avoid any moral claims about tax avoidance whatsoever. All levies of taxation and tax avoidance activity could be understood as simply a Will to Power.\footnote{Friedrich Nietzsche, \textit{Beyond Good and Evil} § 13 (1967); see also Bret N. Bogenschneider, \textit{The Will to Tax Avoidance: Nietzsche and Libertarian Jurisprudence}, 2014 J. JURIS. 321, 322 (2014) ("[I]t is the accumulation of money as a human activity that represents the exercise of power from a Nietzschean perspective, and particularly as an aspect of Libertarian ideology. From this fundamental distinction it follows that the Libertarian worldview centers on the Will to Power through tax avoidance.").} Specifically, with regard to the first claim by Martinez, the shoe-horning of the Holmesian view is mistaken because it is one permutation of an interpretation of adjudication as "legal realism." This is an issue of legal methodology and not morality. Simply put, an argument that legal decisions are made based on realist considerations, as opposed to formalism, is distinct from the Nietzschean Will to Power.”

However, as to Martinez’s apparent claim that morality cannot be applied to taxation because tax avoidance is merely the Will to Power, the answer is, of course.\footnote{Martinez, supra note 117, at 542 ("However, the state’s need for tax dollars does not necessarily coincide with a citizen’s moral obligation to obey the tax laws. After all, a despotic regime also collects tax dollars and few would say that a citizen living under such a regime has a moral obligation to obey. Moral implications certainly result from the payment and use of tax revenue, but our obligation to obey the tax laws stems more from the power of the government to demand obedience, particularly through the threat of punishment, than from a moral duty to obey.").} Libertarian tax theory appears to proceed along such Nietzschean lines because the defense of property rights is merely an exercise of the Will to Power over other persons.\footnote{Bogenschneider, supra note 120, at 335 ("Within the tax laws, therefore, it is not only necessary for the Libertarian not to pay taxes. This is simply the defiance of the power of the state. More is required. To fully exercise the Nietzschean Will to Power, the Libertarian must also cause someone else to pay.").} However, the morality of tax avoidance understood as such a Will to Power by the taxpayer does not resolve the relation of the human subject to society. Hence, the Hegelian and Kierkegaardian existential approach survives the Nietzschean critique of morality, although libertarian or utilitarian theory as applied to tax avoidance, succumbs to Nietzsche by default.\footnote{See Robert W. McGee, \textit{Duty to Whom?}, in \textit{THE ETHICS OF TAX EVASION: PERSPECTIVES IN THEORY AND PRACTICE}, 43 (Robert McGee ed., 2011) ("One might also apply utilitarian ethics to conclude that there is a duty not to pay. The argument goes something like this. The state is not as efficient as the private sector. We have a duty not to}}
B. A POSTMODERN APPROACH TO TAX MORALITY IN THE REPRESENTATION OF THE “BAD MAN”

An application of postmodern ethics requires a reference to “other” people as part of an existential moral analysis. This is, in part, the rejection of pure “individualism” as the basis of the underlying moral framework. As such, neither the positing of a Lockean “natural man” entering into society, nor a rational utilitarian decision-maker debiting and crediting utiles of pleasure reflect postmodern moral thought. The respective postmodern moral analysis thus requires a consideration of the impact to the human subject as a taxpayer. For the tax lawyer engaged in the representation of the Holmesian “bad man,” the postmodern ethical perspective might also be applied as an aspect of moral self-reflection.

The “bad man” expects, even requires, the tax lawyer to “manufacture” factual indeterminacy under the tax laws. This allows for the avoidance of the payment of tax. Hence, under these circumstances, the tax lawyer might evaluate the moral considerations specifically with regard to the “manufacture” of indeterminacy under the law. Clearly, from the libertarian perspective, the tax lawyer should act in the defense of property rights, which is given as the moral responsibility, apart from the impact to other people. However, from a postmodern perspective that is exactly the point. The primary moral dilemma is whether the behavior at issue recognizes “others” as human subjects even if they are not property owners. In the subservience to property rights, as opposed to other people, libertarian theory might thus be viewed as expressly immoral.

The moral issue might be given as whether the lawyer properly regards “other” taxpayers by acknowledging the functioning of the tax system as a whole. The “manufacture” of factual indeterminacy as tax avoidance planning does not regard “other” taxpayers or the tax system. This is exactly because “other” taxpayers cannot engage in this sort of tax planning likely at all. In that case, the lawyer is acting neither as a classical lawyer nor advisor, but as a tax “planner” with the factual re-structuring of transactions. If this is done secretly and on behalf of a large corporation subject to a cooperative compliance regime, even the lawyer who wishes to apply the minimum American Bar Association standard for ethical professional conduct would need

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to have serious concern over the propriety of her conduct. As such, to create indeterminacy is to undermine or corrupt the application of tax laws. One potential indicator of the immorality of this conduct is that, from a psychological perspective, the tax lawyer is unlikely to feel good about what she does for a living. From a postmodern perspective this impact to the conscience of the tax lawyer qua planner is a potentially significant consideration as well.

VI. CONCLUSION

If perpetually indeterminate, the tax law would simply favor the class of taxpayers able to engage in the manufacturing of factual indeterminacy, thus constantly reinventing the tax law as it goes along. A lawyer that is actually unable to identify any determinative outcome under the tax law cannot be a competent tax lawyer. Hence, the presumption is that tax lawyers who plan toward indeterminacy also have the potential to identify determinacy. To act in the interest of the law requires that the tax lawyer (as planner) seek out determinate legal outcomes in favor of the client.125 To this end, the tax lawyer ought to generally reduce the degree of factual indeterminacy in tax planning, and not increase it. To presumptively seek out indeterminacy as a lawyer also indicates that the tax lawyer is not acting in the role of lawyer as legal advisor instead of solely as tax planner.

The growing length and complexity of the Internal Revenue Code and Treasury Regulations in the United States is a symptom of the failure by the American Bar Association to enforce basic ethical requirements for the practice of tax lawyers. Accordingly, this complexity does not necessarily reflect a problem with the drafting of the tax law itself. As such, where a tax attorney assists in the intentional “manufacture” of artificial factual indeterminacy on behalf of the Holmesian “bad man,” thereby increasing the uncertainty of application of the tax law, this constitutes presumptively unethical attorney conduct by undermining written tax laws.126

125. Model Rules of Prof’l Conduct pmbl. & scope § 9 (Am. Bar Ass’n 2013) (“Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.”).

126. See generally Infanti, supra note 4, at 610 (“As was the case with the corporate inversion technique, the tax lawyers who developed and/or assisted their clients in implementing the life insurance technique breached their duty to the revenue system by undermining the integrity of that system. Other tax lawyers have perceived the technique as being contrary to the spirit of, and the policies underlying, the tax laws. The technique also undermines public confidence in the revenue system by making it appear that those with sufficient wealth need not pay their fair share of the overall tax burden.”).
Furthermore, any attorney assistance with tax planning for a client is not rendered ethical merely because it is (or might conceivably be) legal.\textsuperscript{127} The Internal Revenue Service ("IRS") has said as much with regard to penalty avoidance for the client under Circular 230.\textsuperscript{128} But, the IRS guidance on penalty avoidance does not address the ethical requirements of the attorney rendering the advice. For example, within the existing literature on tax "compliance," the perception of the overall tax system is referred to as "taxpayer morale."\textsuperscript{129} Many experts believe that taxpayer morale is the fundamental measure of the success or failure of tax systems generally.\textsuperscript{130} The practice of tax administration is concerned generally with the influence of tax policy on taxpayer morale.\textsuperscript{131} The United States currently enjoys the highest taxpayer morale in the world.\textsuperscript{132} Thus, to say that "bad man" tax planning is a "corrupting" influence on the tax law is to say that such behavior tends to undermine taxpayer morale. Obviously, if "bad men" with access to tax attorneys are solely able to "manufacture" factual indeterminacy, this behavior has the potential to undermine tax morale vis-à-vis other taxpayers not being able to engage in this sort of planning behavior.\textsuperscript{133} Where the tax lawyer acts to undermine taxpayer morale, this also potentially undermines administration of the entire tax system.

The global profession of taxation is now focused on the tax base erosion effects of tax planning conducted by multinational firms. This effort is led in part by the Organisation for Economic Co-operation and Development ("OECD") in what is referred to as the Base Erosion and

\textsuperscript{127} Prebble & Prebble, supra note 5, at 716 ("While it is true by definition that tax avoidance is legal and evasion is illegal, it is a logical confusion to draw moral conclusions from legal facts . . . . It is this logical error that many judges, lawyers, and commentators make when they assert that there is nothing illegal or immoral about tax avoidance.").


\textsuperscript{129} ERICH KIRCHLER, THE ECONOMIC PSYCHOLOGY OF TAX BEHAVIOUR (2007); see Ronald G. Cummings, Jorge Martinez-Vazquez, Michael McKee & Benno Torgler, Tax morale affects tax compliance: Evidence from surveys and an artefactual field experiment, 70 J. ECON. BEHAV. & ORG. 447 (2009).

\textsuperscript{130} Id.

\textsuperscript{131} See Marjorie E. Kornhauser, A Tax Morale Approach to Compliance: Recommendations for the IRS, 8 FLA. TAX REV. 599, 601 (2007).


\textsuperscript{133} Kornhauser, supra note 131, at 603 ("Non-compliance among other taxpayers can decrease an individual's own tax moral and compliance.").
Profit Shifting (“BEPS”) initiative. The means available to multinational firms to achieve tax “erosion” are many, but most involve the “manufacturing” of factual indeterminacy or the intentional creation of an artificial set of facts that does not quite match the existing tax laws. As such, depending on the legal method, this indeterminacy may result in non-taxation of multinational profits. The non-taxation of multinational firms can also be achieved more simply by the selective or non-enforcement of the tax laws with regard to favored multinational firms, as is often the case in the United States. And, irrespective of the means of such tax planning, accounting firms now act as the international “gatekeepers” toward the creation of such “manufactured” factual indeterminacy. To the extent tax planning of this nature is done by accounting firms, this constitutes the practice of law which potentially would be unethical if performed by a licensed attorney. Hence, the difference between the professional ethics of tax lawyers in comparison to tax accountants may become a critical issue in the near future. In either case, the “manufacture” of factual indeterminacy constitutes a corrupting influence on the tax law because the number of new factual scenarios is presumably infinite.

Attorney conduct in furtherance of tax avoidance by the “bad man” is also presumptively immoral, as well as unethical, given its tendency to undermine and corrupt the legal system. A moral analysis of attorney behavior should not be based on libertarian theory premising morality exclusively on the defense of property rights.

134. See generally OECD, Aggressive Tax Planning (last visited March 1, 2016, 6:10 PM), available at http://www.oecd.org/tax/aggressive/ (“Base erosion and profit shifting (BEPS) refers to tax planning strategies that exploit gaps in the architecture of the international tax system to artificially shift profits to places where there is little or no economic activity or taxation.”).

135. Bogenschneider, supra note 32, at 931 (“Today, however, the IRS enforces the AET only against small and medium corporations, leaving U.S. multinationals effectively exempt.”).

136. See Stefan F. Tucker, The Evolving Nature of Tax Practice, 196 Wm. & Mary Ann. Tax Conf. Paper 1, 6 (2000) (“In her testimony (on November 13, 1998), Professor Linda Galler, of Hofstra University, addressed the differences in the standards of professional conduct that apply to accountants and lawyers . . . . [I]t is evident that Circular 230 needs far more teeth in it today when we are facing the proliferation of investment firm-formulated tax shelters for multinational corporations utilizing the interplay of Internal Revenue Code Sections intended to apply, independently, to quite different facts and circumstances.”).

137. Infanti, supra note 4, at 603 (“A variety of provisions in the Model Rules evince the legal profession's commitment to serving the public good. Indeed, the first paragraph of the preamble to the Model Rules makes clear that a lawyer is not only a representative of clients, but also 'an officer of the legal system and a public citizen having special responsibility for the quality of justice.' The preamble goes on to specify that, in her role as a public citizen, 'a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession.'”).

nor tortured re-interpretations of the Kantian “Categorical Imperative” seeking to balance utiles gained versus lost.\textsuperscript{139} Rather, postmodern ethical theory, taken as approaches flavored by Kierkegaard, Hegel, Foucault, Sartre or other works by the great theorists, indicates that the manufacture of factual indeterminacy by the tax lawyer as part of legal representation is potentially immoral not solely because of the anticipated negative consequences to society of tax avoidance behavior viewed in Rawlsian terms. The immorality of this conduct potentially remains even where the conduct may be held to be lawful and consistent with professional ethical standards. Finally, the widely-held view of Christian ethics, particularly as given in Romans 13:6, that tax evasion is not presumptively immoral as long as it complies with the law, does not apply to undisclosed “manufactured” factual indeterminacy planning, at least where the Greek word ψάχνεις is translated as deference to the taxing authority in the interpretation of tax laws.

\textsuperscript{139} McGee, \textit{supra} note 123.