Betwixt and Between: A Tax Lawyer's Dual Responsibility

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INTRODUCTION

Where the U.S. government and corporations differ on corporate tax policy, tax lawyers are uniquely positioned to bridge the gap.[1] When it comes to corporate tax strategy, tax lawyers appear to be entrusted with a dual responsibility. On one hand, tax lawyers are responsible for advising their corporate clients on how to comply with tax requirements issued by the U.S. government. These tax compliance requirements are primarily based in the Internal Revenue Code (IRC), which Congress enacted "in Title 26 of the United States Code (26 U.S.C.)."[2] On the other hand, tax lawyers are also responsible for seeking out and adhering to their clients' best interests.[3] For corporations, such client interests may include reducing tax liability as a part of a legitimate business strategy. This Note posits that tax lawyers are arguably the best positioned to lead in the corporate tax policy debate between the U.S. government and corporations. This is in no small part due to tax lawyers bearing an independent ethical responsibility to both the U.S. government and corporate clientele alike.[4] Part I examines Model Rules relevant to this argument, Part II examines the introduction and early development of the Federal Income Tax, Part III examines recent financial crises and the U.S. Government's response, Part IV examines tax avoidance, and Part V examines the merits of cooperation and other feasible alternatives to the corporate tax policy status quo.

I. MODEL RULES

While all business conducted in the U.S. is subject to provisions of U.S. law, lawyers practicing in the U.S. are—by their admission to the bar—held to professional conduct rules. The American Bar Association's (ABA) *Model Rules of Professional Conduct* articulates the standard of behavior to which lawyers are

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1. Tanina Rostrain, Sheltering Lawyers: The Organized Tax Bar and the Tax *Shelter Industry*, 23 YALE J. ON REG. 77, 82 (2006).

2. United States Census Bureau, Title 26, U.S. Code (2021), https://www.census.gov/history/www/reference/privacy_confidentiality/title_26_us_code_1.html [https://perma.cc/Q2LM-QWTG].

3. MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

4. MODEL RULES OF PROF'L CONDUCT R. 8.4(e).

held to account in its preamble.[5] The legal profession itself experiences "relative autonomy."[6] Even so, the legal profession has "special responsibilities of self-government" that require stewardly care and maintenance.[7] The preamble to the ABA's *Model Rules of Professional Conduct* offers a straightforward account of this self-governance responsibility. The preamble states (in part) that "Every lawyer is responsible for observance of the Rules of Professional Conduct . . . Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves."[8] These clauses place an emphasis on the professional responsibility that should accompany lawyers' use of professional discretion.[9] "Neglect" of professional responsibility has the potential to undermine lawyer's use of professional discretion because it "compromises the independence of the profession and the public interest which it serves."[10]

Lawyers must balance their responsibilities to their clients and to the legal system.[11] While these responsibilities are "usually harmonious," there may be times where "conflicting responsibilities are encountered."[12] This balance of responsibility between clients and the legal system seems particularly delicate for tax lawyers advising corporate clientele on aggressive tax planning strategies. For instance, some corporate clients may be interested in pursuing the most aggressive forms of tax avoidance available as a part of their tax planning strategy.[13] While there is a prima facie logic to paying "no more than the correct amount of tax," much of the corporate tax rate debate seems to hinge on normative questions concerning what the *correct* amount of tax should be.[14]

While the path to balancing client and legal system responsibilities is not always clear cut, lawyers are uniquely positioned to interpret judicial doctrines that demarcate "the normative distinction between legitimate business activity and tax planning for its own sake."[15] The *Model Rules* also appears to provide some guidance for lawyers. In particular, the *Model Rules* help articulate for lawyers what their client representation does not entail. For example, Model Rule 1.2 (b) states that, "A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or

5. MODEL RULES OF PROF'L CONDUCT pmbl.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *See* MODEL RULES OF PROF'L CONDUCT pmbl.
12. *Id.*
13. Rostrain, *supra* note 1, at 99.
14. Internal Revenue Service, Taxpayer Bill of Rights 3: The Right to Pay No More Than the Correct Amount of Tax (2021), https://www.irs.gov/newsroom/taxpayer-bill-of-rights-3 [https://perma.cc/E54R-H8E6].
15. *See* Rostrain, *supra* note 1, at 82.

activities."[16] But while lawyers may represent their clients independent of endorsing their views and activities, there are some views and activities that are strictly prohibited.[17] For example, a lawyer cannot knowingly promote fraudulent conduct in their counsel with clients.[18] Model Rule 1.2(d) provides the following:

> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal *or fraudulent*, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law (emphasis added).

Black's Law Dictionary (11th ed. 2019) defines a "fraudulent act" as "1. Conduct involving bad faith, dishonesty, a lack of integrity, or moral turpitude."[19]

Tax lawyers play an important role in providing counsel on corporate tax strategy.[20] They are dually responsible to the U.S. government and their corporate clientele.[21] On one hand, tax lawyers support the proper functioning of the legal system by aiding their clients' compliance with tax requirements issued by the U.S. government—in this sense, tax lawyers "not only serve as representatives of clients but also act as guardians of the tax system."[22] On the other hand, tax lawyers can also support the best interests of their clients through tax planning that reduces overall tax liability as a part of "legitimate economic activity."[23] Whether in their interactions with the U.S. government or with corporate clientele, tax lawyers are entrusted with interpreting the law in good faith.[24]

Among other things, the *Model Rules* require all lawyers practicing in the U.S. to "make a good faith effort to determine the validity, scope, meaning or application of the law."[25] Within the context of legal practice, this Model Rule 1.2(d) clause seems sufficiently clear. The clause suggests that lawyers must advise their clients within the bounds of the law. But while the bounds of the law are relatively definite, regulations within the law and wider public policy considerations are more flexible and subject to change.[26] For instance, regulation is arguably one of the underlying issues driving the corporate tax debate.[27] The history of

16. MODEL RULES OF PROF'L CONDUCT R. 1.2(b).
17. MODEL RULES OF PROF'L CONDUCT R. 1.2(d).
18. *Id.*
19. *Fraudulent Act*, BLACK'S LAW DICTIONARY (11th ed. 2019).
20. Rostrain, *supra* note 1, at 117.
21. *Id.* at 82.
22. *Id.*
23. *Id.* at 114.
24. MODEL RULES OF PROF'L CONDUCT R. 1.2(d).
25. *Id.*
26. HAROLD DUBROFF & BRANT J. HELLWIG, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 24 (2d ed. 2014).
27. Robert Bird & Karie Davis-Nozemack, *Tax Avoidance as a Sustainability Problem*, J. OF BUS. ETHICS 1009, 1015 (2018).

corporate tax law and the federal income tax more generally bring the debate between the U.S. government and corporations into full relief.[28]

On one hand, the U.S. government has an interest in securing tax revenue for its operations in an efficient and politically viable manner.[29] On the other hand, corporations have legitimate business interests in challenging and reducing their tax liability for their benefit of their shareholders, employees, and customers.[30] As such, the corporate tax policy debate between U.S. government and corporations is sometimes viewed as a zero-sum competition—"[b]oth sides see the issue as all or nothing."[31] This view is rather toxic and can lead to suboptimal outcomes for both parties.[32] The more constructive view theorizes the corporate tax policy debate between the U.S. government and corporations as nuanced conversation between partially interlocking incentive structures that occasionally run at variance with one another.[33] This is the perspective that tax lawyers are well positioned to conduct their work from.[34] While modern tax policy debates can seem hopelessly contentious at times,[35] the history of the federal income tax in the U.S. makes it quite clear that this should not be mistaken as a recent development.[36]

II. INTRODUCTION OF THE FEDERAL INCOME TAX

Corporations have had incentive to challenge or reduce their tax liability as early as the introduction of the corporate tax in the United States near the start of the 20th century.[37] The origin story of the corporate tax is, to some extent, rooted in the origin story of the federal income tax.[38] The earliest colonial attempts to impose income taxes in the mid-17th and 18th centuries were "rudimentary" at best, relying primarily on tariffs to meet public revenue needs.[39] These low levels of taxation corresponded with low levels of expenditure.[40] But the state of war

28. *See* DUBROFF & HELLWIG, *supra* note 26, at 1-4.

29. *See* Bird & Davis-Nozemack, *supra* note 27, at 1010.

30. Simone De Colle & Ann Marie Bennett, *State-induced, Strategic, or Toxic? An Ethical Analysis of Tax Avoidance Practices*, 33 BUS. & PROF. ETHICS J. 53, 63 (2014) ("This argument is rooted in the fundamental assumption that the managers of the corporation are 'agents' who have a fiduciary duty towards their 'principals' - the shareholders - and that is: to maximize profits by all legal means.").

31. Adam H. Rosenzweig, *A Corporate Tax for the Next One Hundred Years: A Proposal for a Dynamic, Self-Adjusting Corporate Tax Rate*, 108 NW. U. L. Rev. 1029, 1032 (2014).

32. *Id.*

33. *Id.* at 1034-35.

34. Rostrain, *supra* note 1, at 81 ("[T]he professional authority of elite tax lawyers . . . has traditionally been grounded in expertise in case law doctrines that take a purposive approach to interpreting the [Internal Revenue] Code").

35. Rosenzweig, *supra* note 31, at 1032.

36. *See* DUBROFF & HELLWIG, *supra* note 26, at 3-4.

37. *Id. at* 4.

38. Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L. J. 53, 53-4 (1990).

39. *See* DUBROFF & HELLWIG, *supra* note 26, at 2.

40. *Id.*

changed things in the second half of the 19th century.[41] Coinciding with the start of the Civil War, Congress passed the Revenue Act of 1861, which levied the first federal income tax on American citizens.[42] Implemented in 1862 as part of a wider taxation agenda, the federal income tax was "generally supported as a necessary step in solving the financial needs of the war."[43] Because the first federal income tax was modest, Congress passed subsequent legislation to increase the income tax (e.g., Revenue Act of 1862, Revenue Act of 1864).[44] Even with these adjustments, the Union was still unable to rely on income tax revenue to effectively counterbalance its soaring levels of government expenditure during the Civil War.[45]

Financing war was not only an urgent matter, but a costly government expenditure as well.[46] During the first year alone, there was a sevenfold increase in Union expenditures (1861-62).[47] Throughout the duration of the Civil War (1861-65), there was a total nineteen-fold increase—a surge from "$67 million in 1861 . . . [to] $1.3 billion in 1865."[48] Even with increasing the income tax rate throughout the Civil War, the U.S. government could not keep up with its growing expenditures and resorted to public debt financing—a form of government borrowing accomplished through issuing bonds and other securities—in order to fill federal budget deficits.[49] From 1862-65, more than two-thirds of the Union's total government spending was in excess of the federal budget, requiring significant levels of public debt financing.[50]

In 1872, Congress repealed the federal income tax in response to banking and commercial interests with "greater political power both as lobbyists and propagandists."[51] The 1872 repeal occurred after the Civil War had ended (in 1865) and regular surpluses had returned to the federal budget.[52] But the U.S. federal income tax has a complex history of endings and new beginnings. Like the fabled phoenix, it has risen from the ashes on more than one occasion. The 1872 repeal only concluded the first run of the federal income tax.[53]

The income tax was reintroduced a second time near the beginning of the Progressive Era (1890-1916) by the Wilson-Gorman Tariff Act, also known as the Income Tax Act of 1894.[54] The Progressive Era witnessed the ascendence of

41. *Id.*
42. *Id.* at 3.
43. *Id.* at 3-4.
44. *Id.*
45. *See* DUBROFF & HELLWIG, *supra* note 26, at 3.
46. *Id.* at 2.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *See* DUBROFF & HELLWIG, *supra* note 26, at 3-4.
52. *Id.* at 3.
53. *Id.*
54. *Id.* at 4.; *See* Kornhauser, *supra* note 38, at 55.

"corporate capitalism" through "rapid consolidation and merger."[55] These consolidated corporations amassed power and, in some cases, created near-monopolies that upended some small businesses through "overproduction" and "cut-throat" market competition.[56] The reintroduction of the income tax was, in part, a response to the Panic of 1893, a large-scale economic depression.[57] Some research suggests the reintroduction of the income tax was also an opportunity for the U.S. government to begin levying taxes on corporate income as part of an attempt to impose regulatory control.[58] But its reintroduction was short-lived—the Supreme Court struck down the 1894 income tax in *Pollock v. Farmers' Loan & Trust Co.* declaring it unconstitutionally because it was a direct tax not "apportioned among the states on the basis of population."[59] The Supreme Court decision in *Pollock* ended the second run of the federal income tax.[60]

The third run of the federal income tax began in 1913 with the ratification of the Sixteenth Amendment and subsequent income taxes levied on individual and corporate incomes.[61] The 1909 Corporate Excise Tax that predated the Sixteenth Amendment was absorbed into the Sixteenth Amendment and became the basis for the federal income tax's corporate requirements.[62] The Sixteenth Amendment changed a portion of U.S. Constitution, Article I, Section 9, Clause 4 by removing the apportionment requirement for income tax.[63] The Sixteenth Amendment provides: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[64] At the time the Sixteenth Amendment was ratified, corporations were held "to a flat rate of 1% on all their taxable income."[65] But as was the case during the Civil War, World War I brought on heavy U.S. government expenditures that led to spikes in the income tax.[66] By the end of World War I in 1918, the corporate tax rate had increased to "12% on net income, plus a profits tax escalating from 30% to 80% of so-called excess profits or war profits."[67] While the U.S. government has maintained the corporate income tax since the ratification of the Sixteenth Amendment, the

55. *See* Kornhauser, *supra* note 38, at 55-6.
56. *Id.* at 56.
57. *See* DUBROFF & HELLWIG, *supra* note 26.
58. *See* Kornhauser, *supra* note 38, at 56.
59. *See* DUBROFF & HELLWIG, *supra* note 26, at 5; Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601 (1895); U.S. CONST. art. I § 9.
60. *See* DUBROFF & HELLWIG, *supra* note 26, at 5.
61. *Id.* at 7.
62. *See* Kornhauser, *supra* note 38, at 54-6; DUBROFF & HELLWIG, *supra* note 26, at 7.
63. DUBROFF & HELLWIG, *supra* note 26, at 5.
64. U.S. Const. amend. XVI.
65. *See* DUBROFF & HELLWIG, *supra* note 26, at 8.
66. *Id.* at 9.
67. *Id.*

federal corporate tax rate remains subject to change and has done so several times since then.[68]

III. CRISIS AND U.S. GOVERNMENT RESPONSE

In reflecting on the history of economic thought before capitalism's triumph in his book, *The Passion and The Interests*, economist Albert Hirschman quipped that it may be said of George Santayana's maxim that "'those who do not remember the past are condemned to repeat it' is [in truth] more likely to hold rigorously for the history of *ideas* than for the history of events."[69] In other words, it is ideas —rather than events—that are likely to be repeated.[70] So, because no two events are identical, Hirschman posits that suboptimal *ideas* may be mistakenly perpetuated if their origins are not remembered or—likewise—not understood within their proper context.[71] But indeed, even when history is remembered and furthermore contextualized, there still remains opportunity for reasoned individuals to peer into history and arrive at different interpretations for present day headwinds and challenges.

Case in point, consider the COVID-19 global pandemic—a sea change that has affected everything. While the COVID-19 pandemic is a novel event, the idea of *crisis* more generally—and the U.S. government's response to it in particular—is a recurring phenomenon whose past can be instructional. Unlike the 2008 financial crisis that led to a global economic slowdown, the widespread response to the COVID-19 pandemic has produced several economic shutdowns that have affected nearly all sectors of the global economy.[72] As the global economy continues to buckle under the weight of climbing COVID-19 infections and deaths, resource-strapped governments around the world struggle to meet the demands of burgeoning public crises.[73]

Deficit spending is reaching record highs around the world in response of the pandemic.[74] In response, it appears the governments around the world are compelled by force of necessity to search for more ways to generate revenue.[75] In the U.S., one of the more salient issues in these perennial tax debates concerns the

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68. *Id.*

69. Albert O. Hirschman, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH 133 (1996).

70. *Id.*

71. *Id.* at 135.

72. Marnin Michaels, Greg Walsh, Christopher Murrer, Chelsea Hunter, Ida Varshavsky & Lyn Odom, *Tax Policy in a World POST COVID-19*, 31 J. OF INT'L TAX'N 47, 48 (2020).

73. *Id.*

74. Joseph Bankman, Mitchell A. Kane & Alan O. Sykes, *Collecting the Rent: The Global Battle to Capture MNE Profits*, 72 TAX L. REV. 197 (2019).

75. Michaels, Walsh, Murrer, Hunter, Varshavsky & Odom, *supra* note 72, at 51 ("Tax administrators around the globe will be forced to find new ways to restore the revenue lost to the COVID-19 pandemic, and increasing enforcement measures beyond the current norm likely will be one of the first options they explore.").

level of revenue governments raise from taxing corporations.[76] More specifically, scholars are interested in how little tax multinational corporations (MNCs) (also referred to as multinational enterprises (MNEs)) seem to pay in comparison to their sizable profits.[77] As part of a comprehensive business strategy, tax lawyers advise their MNC clients on how to legally structure their financial affairs in a manner that reduces their overall tax liability.[78]

Tax law scholars recognize the legality of tax planning strategies.[79] Nevertheless, some scholars raise the question of whether the most aggressive forms of tax avoidance can be considered ethical.[80] For example, some of the most profitable MNCs domiciled in the U.S. such as the Starbucks Coffee Company have adopted tax planning strategies that are so effective at reducing their tax liability that it has caught the attention of media outlets and has even incited public backlash.[81] Other MNCs such as Amazon, Apple, Facebook, Google, Microsoft, and Netflix have also caught media attention for their tax avoidance behavior.[82] If the 2008 global financial crisis brought more attention to corporate tax avoidance—shifting the debate from "a legal to a more ethical perspective"—how much more might the 2020 COVID-19 pandemic bring the issue of corporate tax avoidance into even starker relief?[83]

The most recent financial crises (in 2008 and 2020 respectively) seem to have been particularly impactful on the U.S. economy and are distinctly global in nature.[84] It appears that the U.S. and other governments around the world have taken renewed interest in capturing more tax revenue from corporations, even if that requires lowering their corporate tax rate with the prospect of reducing corporate tax avoidance and increasing long-run tax revenue.[85] While the U.S. has at times attempted to rein in more aggressive corporate tax avoidance strategies, previous efforts have been found wanting in efficacy.[86] Corporations have seemed to remain adept at locating and lobbying for new tax loopholes to legally reduce their tax liability.[87] Thus, in light of the ongoing economic impact of the COVID-19 virus, the U.S. government seem to be in a quandary, namely, it

76. *See* Bankman, Kane & Sykes, *supra* note 74.

77. *Id* at 197-8.

78. De Colle & Bennett, *supra* note 30, at 68.

79. *See* Bankman, Kane & Sykes, *supra* note 74.

80. Zoe Prebble & John Prebble, *The Morality of Tax Avoidance*, 43 CREIGHTON L. REV. 693 (2009).

81. Allison Christians, *How Starbucks Lost Its Social License—and Paid £20 Million to Get It Back*. 71 TAX NOTES INT'L 637, 637–9 (2013).

82. Chloe Taylor, *Silicon Valley giants accused of avoiding over $100 billion in taxes over the last decade*, CNBC (Dec. 2, 2019), https://www.cnbc.com/2019/12/02/silicon-valley-giants-accused-of-avoiding-100-billion-in-taxes.html [https://perma.cc/RWK4-7VUP].

83. De Colle & Bennett, *supra* note 30, at 54.

84. Michaels, Walsh, Murrer, Hunter, Varshavsky & Odom, *supra* note 72, at 48.

85. *Id*.

86. *See* Bankman, Kane & Sykes, *supra* note 74.

87. *Id*.

appears corporations lack sufficient business or legal incentives to paying any more in taxes than what is minimally required of them by the letter of the law.[88]

Questions concerning the ethics of tax avoidance and corporate social responsibility oftentimes appear to begin and end with corporations and the governments that attempt to regulate their behavior.[89] Within tax law literature, it seems too little attention has been paid to the central role that tax lawyers can play.[90] Tax lawyers may be best positioned to advise their MNC clients' tax planning practices in anticipation of growing public attention during the COVID-19 global pandemic.[91] While it is not the expressed responsibility of corporations to address public needs, the U.S. government is facing unprecedented economic challenges with unsustainable levels of deficit spending.[92] Tax lawyers can play a proactive role in better aligning incentive structures between corporations and the U.S. government where the corporate tax rate is concerned.[93]

IV. TAX AVOIDANCE

Tax avoidance is not the same as tax evasion.[94] Tax avoidance operates within the bounds of the law.[95] While certain forms of tax avoidance are flagged in tax law literature as more problematic than others, tax evasion is—by definition—illegal.[96] Lawyers are specially trained to provide legal advice that serves clients' interests within observation of the law.[97] Likewise, tax lawyers serve an important role in advising MNC clients' tax strategy.[98]

Tax lawyers share in the fiduciary duties of corporate leadership.[99] As such, tax lawyers are obligated to act in the best interest of their corporate clients.[100] Even in the face of potential controversy from the court of public opinion (e.g., media outlets), tax lawyers—like all lawyers—bear the duty to serve their clients' best interests within the bounds of the law with fidelity.[101] With tax lawyers' obligations to their clients in mind, it is not entirely clear when (as a rule) tax minimalization would ever fall outside the best interests of MNC's tax strategy.[102] Furthermore, if certain forms of tax avoidance seem unpalpable to the public's

88. *See* Bird & Davis-Nozemack, *supra* note 27, at 1009-10.
89. Rosenzweig, *supra* note 31, at 1032.
90. Rostrain, *supra* note 1, at 118-9.
91. *Id.*
92. Michaels, Walsh, Murrer, Hunter, Varshavsky & Odom, *supra* note 72, at 48.
93. Rostrain, *supra* note 1, at 118-20.
94. Prebble & Prebble, *supra* note 80.
95. *Id.*
96. *Id.*
97. Rostrain, *supra* note 1, at 118-20.
98. *Id.*
99. Prebble & Prebble, *supra* note 80.
100. *Id.*
101. *Id.*
102. *Id.*

taste and are even considered "toxic" by some legal scholars, what should the normative response from tax lawyers who represent MNCs ideally look like?[103]

Rather than addressing what MNC tax lawyers' normative response to toxic tax avoidance should look like, the literature instead offers suggestions on how government[104] and non-governmental[105] entities might boost the effectiveness of MNC corporate tax compliance. For governments, there is compelling research that suggests how they can optimize their tax- and policy-based instruments to more dependably capture MNC tax revenue.[106] This includes tax-based instruments such as "source-based income tax, unitary taxation with formulary apportionment, and destination-based consumption taxes," as well as policy-based instruments such as "price regulation, antitrust policy, and import duties."[107]

Governments can pursue a host of approaches for capturing MNC tax revenue using tax- or policy-based instruments.[108] Scholars have even identified the comparative "strengths and weaknesses of different instruments in different contexts"[109] In addition, there is also compelling research on how non-governmental entities like media outlets and the public at large have helped capture economic rent for government entities by requiring MNCs to maintain "what corporate social responsibility experts call a 'social license to operate.'"[110] In other words, non-governmental entities such as media outlets have publicly criticized corporate tax avoidance behaviors to the point where customers have responded by stagging protests and boycotts as forms of public outcry.[111] While the "social license" requirement (or similar public mandate) is in fact unofficial, it can pose real consequences in the form of mobilized activists and protestors who hold corporations like MNC accountable for "failure to pay taxes in that country."[112] These discussions in the literature offer high-level overviews and penetrating insights into how macro-level agents (e.g., governments and non-governmental entities such as media outlets) take action to ensure MNCs pay their "fair share" of economic rents.[113]

As the literature on "the ethics of tax avoidance" continues to develop, it typically assumes one of two main threads of argumentation.[114] Some scholars argue that tax planning strategies that reduce tax liability as a part of a comprehensive

103. De Colle & Bennett, *supra* note 30, at 64-7.
104. *See* Bankman, Kane & Sykes, *supra* note 74.
105. *See* Christians, *supra* note 81, at 637–9.
106. *See* Bankman, Kane & Sykes, *supra* note 74.
107. *Id*. at 206-29.
108. *Id*.
109. *Id*. at 199.
110. *See* Christians, *supra* note 81, at 637–9.
111. *Id*.
112. *Id*.
113. *See* Bankman, Kane & Sykes, *supra* note 74.
114. De Colle & Bennett, *supra* note 30.

business strategy are ethical (i.e., fully defensible) *because* they are legal.[115] Other scholars consider these tax planning strategies a form of tax avoidance and criticize such practices as unethical or immoral, even *despite* their legality.[116] On one hand, scholars have noted that for the ethical-legal stance, the argument is straightforward: tax avoidance is legal and should not be debated as a moral issue.[117] To put it another way, "To leave the crucial obligation to pay tax to be dealt with by such difficult and ill-defined concepts as morality and the spirit of the law would be an abdication by government of this key responsibility."[118] On the other hand, scholars have noted that for the unethical- or immoral-legal stance, the arguments can take a variety of different approaches to contend that tax avoidance practices are unethical.[119]

There is no shortage of scholarly criticism on corporate tax avoidance behaviors.[120] Some scholars examine corporate tax avoidance through the "complimentary domains of corporate social responsibility and sustainability."[121] They critique tax avoidance's cumulative effects on the sustainable-, public-, regulatory-, and organizational commons.[122] Some scholars have elevated the tax avoidance debate beyond the strictly binary (ethical or unethical) discussion to "a more nuanced approach."[123] These scholars have categorized three types of tax avoidance: "state-induced, strategic, and toxic avoidance."[124]

State-induced tax avoidance are government-sponsored arrangements that reduce tax liability for the primary benefit of the public interest.[125] Strategic tax avoidance are tax-reducing practices that are part of a more comprehensive and "commercially sound" business strategy.[126] Toxic tax avoidance "refers to all practices designed with the exclusive intention of reducing tax that have the following characteristics: (a) lack of transparency, (b) contradict the intention of the legislator, and (c) create artificial structures, valuations or transactions that have no specific business purpose."[127] These scholars have flagged several ethical issues explaining how the most aggressive forms of tax avoidance become "toxic" in nature, contributing to global socioeconomic inequity and a breakdown of trust between corporate and government entities.[128] With the added nuance,

115. *Id*.
116. *Id*.
117. De Colle & Bennett, *supra* note 30, at 53.
118. Judith Freedman, *Is Tax Avoidance Fair?*, in Fair Tax: Towards a Modern System 86-95 (Chris Wales 2008).
119. De Colle & Bennett, *supra* note 30, at 53.
120. *See* Prebble & Prebble, *supra* note 80.
121. *See* Bird & Davis-Nozemack, *supra* note 27, at 1009-25.
122. *Id*.
123. De Colle & Bennett, *supra* note 30.
124. *Id*.
125. *Id*. at 68.
126. *Id*.
127. *Id*.
128. *Id*. at 64-7.

this line of research appears to do a better job at isolating the most problematic tax avoidance behaviors that previous literature may have unwittingly bundled with more conventional tax minimalization practices.

V. COOPERATION AND FEASIBLE ALTERNATIVES

The development and implementation of stronger cooperation habits between the U.S. government and corporations is a worthwhile investment that could pay dividends in the long run. In addition to commercial goods and services, there are many other societal benefits that flow from large corporations, most notably the creation of jobs. Moreover, philanthropic efforts stemming from some of the wealthiest corporate business owners (e.g., Andrew Carnegie, the Rockefeller family, Bill & Melinda Gates Foundation) also benefit the U.S. public either directly or indirectly.[129] Nevertheless, war and financial crisis can shift public opinion and governmental priorities where corporate behavior is concerned. Historically, whenever the U.S. government encountered particularly trying economic times such as World Wars I and II, the Korean War, and several financial crises, increased government expenditures have led to subsequent increases in the income tax rate.[130] Furthermore, the end of a particular crisis does not immediately terminate income tax rate increases that were raised in an initial response to the crisis.[131]

While the U.S. continues to confront unprecedented challenges with the COVID-19 global pandemic and its widespread economic impact, scholars must theorize feasible alternatives to the traditional zero-sum treatment of the corporate tax debate. Proposals such as a "dynamic, self-adjusting corporate tax rate, or DST" seem to hold some promise.[132] DST could potentially decrease "tax-induced distortions" in corporate behavior by becoming more responsive to micro- and macroeconomic changes such as sudden spikes in domestic unemployment rates.[133] This could potentially work for corporations and the U.S. government alike because both parties stand to benefit from allaying high rates of unemployment. Other alternatives consider shifting strict liability to the taxpayer client in order to "affirm[] the authority of knowledgeable tax lawyers to dissuade clients from entering into overly aggressive transactions . . . [and] confer[] a competitive advantage over practitioners less expert in the application of judicial doctrines."[134]

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129. *See* DUBROFF & HELLWIG, *supra* note 26.
130. *Id.*
131. *Id.*
132. Rosenzweig, *supra* note 31.
133. *Id.*
134. Rostrain, *supra* note 1, at 115.

CONCLUSION

Lawyers are expected to "zealously" advocate for their clients in balance with their "honest dealings with others."[135] In exploring how tax lawyers may be well positioned to bridge the ideological divide between the U.S. government and corporations, this Note presents several perspectives. It identifies some of the relevant *Model Rules*, provides a brief history of the corporate tax and the federal income tax more generally, flags crisis as a recurring phenomenon and considered the U.S. government response, reviews literature on tax avoidance, and considers some cooperative strategies and feasible alternatives to the corporate tax policy status quo between the U.S. government and corporations. The COVID-19 global pandemic is a sea change that has affected nearly everything and everyone.[136] Tax lawyers have an important role to play in advising their corporate clients on how to best adapt to the current and post COVID-19 global pandemic environment.[137]

135. MODEL RULES OF PROF'L CONDUCT pmbl.
136. Michaels, Walsh, Murrer, Hunter, Varshavsky & Odom, *supra* note 72, at 48.
137. Rostrain, *supra* note 1, at 118-20.