

## WHAT IS WRONG WITH TAX EVASION?

*By Stuart P. Green \**

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## I. INTRODUCTION

The question posed in the title of this talk can be understood in two distinct, but related, senses. The first is: why exactly is it wrong, from a moral perspective, to evade taxes?; what is the underlying moral wrong or set of wrongs that informs the crime of tax evasion? Having addressed that question in an earlier work,<sup>1</sup> I will have only a few comments to make on the subject here. Instead, I intend to focus most of my attention on a second sense in which the question in the title can be understood—namely, what exactly is wrong with the *crime* of tax evasion? Here I mean to ask why the rate of tax evasion is so high, why there is so much apparent skepticism about the wrongfulness of evading taxes, and why the enforcement of our laws against tax evasion is so irregular. I also want to say something about how the two senses of my question are linked. In particular, I want to suggest that the high rate of evasion is, at least in part, the result of widespread confusion over exactly why tax evasion is morally wrong.

## II. DEFINITIONS AND DISTINCTIONS

It will be helpful at the outset to offer some initial definitions and distinctions. By “tax,” I mean a compulsory, non-punitive exaction of money from a private person or entity by a public authority for public purposes.<sup>2</sup> There are many different kinds of tax, including income tax, consumption tax, corporate tax, capital gains tax, property tax, sales tax, inheritance tax, value added tax, excise tax, poll tax, tariffs, tolls, and transfer tax. For present purposes, I will not attempt to distinguish among them except where specifically noted.

By “tax evasion,” I mean the unlawful and intentional nonpayment or avoidance of tax owed. My usage thus differs from federal law, which distinguishes between the willful nonpayment of taxes or failure to file a return, both of which are generally treated as a misdemeanor under I.R.C. § 7203; and tax evasion proper, which carries a penalty of five years in prison under § 7201, and requires not only the willful nonpayment of taxes but also some additional concealment of one’s activities.<sup>3</sup> Both such forms of illegality can be distinguished from tax “avoidance” or “mitigation,” which consists of using *legal* means to reduce the amount of taxes owed

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1. STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE COLLAR CRIME 246-48 (2006).

2. Curiously, the question of what exactly is a “tax” does not seem to have been one that has occupied tax scholars, though the issue occasionally arises in more practical contexts. One example is that of foreign tax credits. In order to avoid double taxation, a U.S. citizen must establish that a payment made abroad was a “tax,” defined as a “compulsory payment pursuant to the authority of a foreign country to levy taxes.” Treas. Reg. § 1.901-2(a)(2)(i) (2008).

3. See I.R.C. § 7203 (2003); *Id.* § 7201.

(though I recognize that distinguishing between tax evasion and tax avoidance is not always easy in practice).

### III. UNSTABLE FOUNDATIONS OF THE NORM AGAINST TAX EVASION

In earlier work, I argued that what distinguishes “white-collar” offenses such as bribery, obstruction of justice, perjury, and insider trading from core “blue collar” offenses such as murder, rape, and assault is that the white-collar crimes tend to be more “morally ambiguous” than the core crimes.<sup>4</sup> That is, in a surprisingly large number of cases there is genuine doubt as to whether what the defendant did was in fact morally wrong. In such cases, the issue is not, as it is with necessity, whether the defendant was confronted with some extraordinary choice between either obeying the law, and allowing significant harm to occur, or violating the law, and preventing such harm. Rather, the question is whether the conduct engaged in was more or less acceptable behavior that should not have been subject to criminal sanctions in the first place.

Tax evasion reflects this pattern in spades. Indeed, the affliction of moral ambiguity seems to plague tax evasion even more than it plagues other white-collar offenses.

My first piece of evidence is the shockingly low level of compliance with the tax laws. For about twenty years, the Internal Revenue Service (“I.R.S.”) has measured what it calls the tax gap, the difference between the amount of tax owed and the amount of taxes paid.<sup>5</sup> The gap can be attributed to three sources: (1) underreporting, which occurs when taxpayers understate their income, overstate their deductions, overstate business expenses, or erroneously claim credits (accounting for about 80% of the gap); (2) non-filing, which occurs when taxpayers who are required to file a return fail to do so; (3) and underpayment, which occurs when taxpayers file returns but fail to remit the amount due.<sup>6</sup>

According to I.R.S. estimates, the tax gap for 2001 (the latest year for which comprehensive data are available) was \$290 billion,<sup>7</sup> or about 14% of federal revenues for the year.<sup>8</sup> This gap represents approximately 16.3% of total revenues owed.<sup>9</sup> And because much of the tax gap is produced by relatively low earners, the number of taxpayers who fail to pay the full

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4. GREEN, *supra* note 1, at 1.

5. I.R.S. News Release FS-2005-14 (Mar. 2005), available at <http://www.irs.gov/newsroom/article/0,,id=137246,00.html>.

6. *Id.*

7. This figure represents the overall gross tax gap of \$345 billion less the \$55 billion the I.R.S. was able to recover. I.R.S. News Release IR-2006-28 (Feb. 14, 2006), available at <http://www.irs.gov/newsroom/article/0,,id=154496,00.html>.

8. *Id.*

9. Tax Year 2001 Federal Tax Gap, I.R.S., Feb. 14, 2006, [http://www.irs.gov/pub/irs-news/tax\\_gap\\_figures.pdf](http://www.irs.gov/pub/irs-news/tax_gap_figures.pdf) (last visited Mar. 7, 2009).

amount of money they owe is estimated to be considerably higher, perhaps as high as thirty or forty percent.<sup>10</sup>

While the I.R.S. does not publish statistics on how much of the tax gap is the result of nonpayment that is willful or intentional,<sup>11</sup> various independent researchers have looked into the question. One such recent study reports that approximately 25% of U.S. taxpayers admitted to deliberately cheating on their taxes.<sup>12</sup> Imagine how our society would react if we discovered that a quarter of our citizens were committing theft, rape, insider trading, or bribery. In light of how little we spend on enforcing the tax laws, it seems that the tax gap is more or less tolerated.<sup>13</sup> The level of noncompliance is all the more astonishing given the fact that most income taxes are paid through third-party withholdings by employers. It is hard to imagine how much higher the level of evasion would be if the payment of taxes were truly “voluntary.”<sup>14</sup>

The figures are even more striking when one looks outside the U.S. The level of noncompliance with tax laws is higher in much of Europe, and higher still in the developing world.<sup>15</sup> And data concerning so-called “tax morale” obtained through the World Values Survey indicates that a significantly higher percentage of citizens outside the U.S. also believe that cheating on one’s taxes is not wrong.<sup>16</sup>

There is also a significant variation in tax compliance depending on the taxpayer’s occupation and the specific kind of tax in question.<sup>17</sup> For example, there is evidence that evasion is more common among the young, among males, and among those in certain occupations, such as car dealers,

10. Patricia Sabatini, *Tax Cheats Cost U.S. Hundreds of Billions*, PITTSBURGH POST-GAZETTE, Mar. 25, 2007, available at <http://www.post-gazette.com/pg/07084/772106-28.stm>.

11. U.S. DEP’T OF THE TREASURY, OFFICE OF TAX POLICY, A COMPREHENSIVE STRATEGY FOR REDUCING THE TAX GAP 8 (2006), <http://www.ustreas.gov/press/releases/reports/otptaxgapstrategy%20final.pdf> (last visited Mar. 7, 2009).

12. James A. Tackett et al., *A Criminological Perspective of Tax Evasion*, 110 TAX NOTES 654, 654 (Feb. 6, 2006), available in TAX NOTES TODAY, 2006 LEXIS TNT 25-73 (citing John Hasseldine & Zhouhong Li, *More Evasion Research Required in New Millennium*, 31 CRIME, L. & SOC. CHANGE 91 (1999)).

13. Tackett et al., *supra* note 12, at 656.

14. Even apart from the question of whether they pay the taxes they owe, a significant percentage of Americans admit to believing that cheating on taxes is acceptable. In the most recent Taxpayer Attitude Survey conducted by the I.R.S. Oversight Board, sixteen percent of taxpayers disagreed with the statement that they should cheat “not at all” on their taxes. Eight percent said it was acceptable to cheat “a little here and there,” and five percent said that people could cheat “as much as possible.” See IRS Oversight Board, Taxpayer Attitude Survey 2007 (Feb. 2008), [http://www.treas.gov/irsob/reports/2008/2007\\_Taxpayer-Attitude-Survey.pdf](http://www.treas.gov/irsob/reports/2008/2007_Taxpayer-Attitude-Survey.pdf).

15. See JAMES ALM & BENNO TORGLER, CULTURE DIFFERENCES AND TAX MORALE IN THE UNITED STATES AND EUROPE 2 (2004), [http://aysps.gsu.edu/publications/2004/alm/culture\\_taxmorale.pdf](http://aysps.gsu.edu/publications/2004/alm/culture_taxmorale.pdf); John Hasseldine & Zhouhong Li, *More Tax Evasion Research in New Millennium*, 31 CRIME, L. & SOC. CHANGE 91, 91 (1999); Marta Orviska & John Hudson, *Tax Evasion, Civic Duty and the Law Abiding Citizen*, 19 EUR. J. POL. ECON. 83, 83 (2002).

16. 2005 World Values Survey, <http://www.worldvaluessurvey.org> (last visited 4 Mar. 2009).

17. Orviska & Hudson, *supra* note 15, at 84.

merchants, and restaurateurs.<sup>18</sup> Similarly, Americans are more likely to evade, say, nanny taxes than taxes on income, and even more likely to believe that such evasion is not wrong.<sup>19</sup>

A final indication of the shaky foundations of the norm against tax evasion is the persistence of the so-called tax protest, or tax defiance, movement. The movement involves people who do not merely fail to pay their taxes; they challenge the legal authority of the I.R.S. to collect taxes in the first place, typically claiming that the Internal Revenue Code is unconstitutional.<sup>20</sup> Despite repeated losses in the courts,<sup>21</sup> and nearly universal criticism by government officials and academics, the tax protest movement continues to spawn an outpouring of pseudo-academic literature, websites, and conferences. Can one imagine a similarly overt protest movement against the laws concerning theft or fraud or even insider trading?

#### IV. WHY WE SHOULD BE CONCERNED ABOUT THE INSTABILITY OF SUCH NORMS

Most criminal law scholars agree that the reason people generally do not go around murdering and raping each other is that they believe murder and rape are morally wrong, and they fear the disapproval of their fellow citizens they would suffer if they engaged in such conduct.<sup>22</sup> Criminal penalties deter only to the extent that a citizen does not believe, or care, that such acts are morally wrong.

Given that the penalties for tax evasion are fairly low in comparison to other crimes, that most cases in any event are dealt with civilly, and that the level of resources devoted to the enforcement of the tax laws is anemic in comparison to other law enforcement priorities, one might expect that the system of tax laws would be especially reliant on strong moral norms. As we have just seen, however, just the opposite seems to be true: the norms that underlie the laws against tax evasion are surprisingly weak. The question to be considered now is why this is so.

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18. *Id.*

19. David Cay Johnston, *Despite Easing of Rules, Millions Evade "Nanny Tax,"* N.Y. TIMES, April 5, 1998, <http://www.nytimes.com/1998/04/05/business/despite-an-easing-of-rules-millions-evade-nanny-tax.html?sec=&spon=&pagewanted=all>.

20. See Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819 (2002).

21. One peculiar exception is *Murphy v. I.R.S.*, 460 F.3d 79, 81 (D.C. Cir. 2006) (holding that section 104(a)(2) of the Internal Revenue Code is unconstitutional by failing to exclude from gross income damages for emotional distress and injury to professional reputation that, according to *Murphy*, do not count as income under the Sixteenth Amendment to the U.S. Constitution), vacated on rehearing by 493 F.3d 170 (D.C. Cir. 2007).

22. See, e.g., Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468 (1997).

## V. SOME EXPLANATIONS FOR THE INSTABILITY OF THE NORM AGAINST TAX EVASION

Why are the moral foundations that underlie the crime of tax evasion so seemingly unstable? Why, in Dan Kahan's term, are its norms so "sticky"?<sup>23</sup> Why are we as individual citizens and as a society seemingly so ambivalent about these norms? Let me suggest ten possible reasons:

### A. *Difficulty of Distinguishing Between Evasion and Avoidance*

A leading reason for the instability of the norm against tax evasion is the difficulty of distinguishing between tax evasion and mere tax avoidance. Even those who acknowledge the importance of the obligation to pay taxes nevertheless regularly take steps to minimize their tax liability.<sup>24</sup> Almost everyone tries to reduce his or her taxes through tax avoidance strategies—taking deductions, claiming exemptions, reducing taxable income. Often, it is hard to discern exactly where the line between legality and illegality is crossed. In this, tax evasion resembles other white-collar crimes, such as obstruction of justice (which can be hard to distinguish from "zealous advocacy"), bribery (which can resemble campaign contributions), and extortion (which can look a lot like "hard bargaining").

### B. *Complexity of Underlying Conduct*

Closely related to the avoidance/evasion problem is the fact that tax evasion often involves more complex forms of underlying conduct than other forms of criminal conduct. The tax code is enormously complicated. Even sophisticated taxpayers hire specialized professionals to prepare their returns and offer tax planning advice. It is hard enough to know how our tax system is supposed to work when taxpayers comply with the law; it is all the more difficult to understand how it functions when they cheat. The complexity of the conduct underlying tax evasion is also apparent if one tries to assess its harms, which can be difficult to discern, and determine its victims, who can be hard to identify. Part of the problem is that, like other white-collar offenses such as price fixing, environmental violations, and

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23. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000).

24. The *loci classici* are Judge Learned Hand's opinion in *Helvering v. Gregory*, 69 F.2d 809, 810 (1934) ("Any one may arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which best pays the treasury. There is not even a patriotic duty to increase one's taxes."); and dissent in *Comm'r v. Newman*, 159 F.2d 848, 850-51 (1947) ("Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich and poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.").

bribery, tax evasion causes small harms to a large number of victims, which are significant only in the aggregate.

### C. *Conflation of Choate and Inchoate Liability*

A corollary of the point regarding harms concerns the conflation of liability for choate and inchoate offenses. Traditionally, the criminal law has distinguished between the two categories, the former often being subject to higher penalties than the latter (though there is a lively scholarly debate about whether this should be so).<sup>25</sup> Like other white-collar offenses, such as bribery, fraud, and perjury, tax evasion statutes tend to merge complete and incomplete conduct into a single undifferentiated offense. For example, section 7201 makes it a crime to “willfully *attempt*[ ] in any matter to evade or defeat any tax imposed by” the Code.<sup>26</sup>

Tax evasion is thus a crime regardless of whether any tax is actually evaded, just as fraud is a crime regardless of whether anyone’s property is taken; perjury is a crime regardless of whether a lying witness is believed; and obstruction of justice is a crime regardless of whether any proceedings are obstructed.<sup>27</sup> By repeatedly using the label of a completed offense to refer to what is actually an attempt, it is possible that the system dilutes the seriousness with which tax evasion is perceived.

### D. *Requirement of Willfulness*

Another factor that helps explain our apparent ambivalence about the wrongfulness of tax evasion is the unusual form of *mens rea* the crime requires. Tax evasion is one of a handful of crimes that require a showing of “willfulness,” understood to mean a “voluntary, intentional violation of a known legal duty.”<sup>28</sup> Such a form of culpability is highly unusual in criminal law in that it allows mistake or ignorance of the law to be a defense in a much broader array of circumstances than is usually permitted.<sup>29</sup> The result is that while “willfully” failing to pay taxes is a crime, merely doing so “intentionally” or “knowingly” is not. Such a doctrinal scheme is bound to cause confusion about the wrongfulness of the basic offense.

25. See generally R.A. DUFF, *CRIMINAL ATTEMPTS* 116-27 (1996).

26. I.R.C. § 7201 (emphasis added).

27. Compare *id.* with 18 U.S.C. §§ 1001-1039 (fraud); 18 U.S.C. § 1621 (perjury); 18 U.S.C. §§ 1501-1520 (obstruction of justice).

28. *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (internal quotation marks omitted) (quoting *United States v. Bishop*, 412 U.S. 346, 360 (1973)).

29. See generally Mark C. Winings, *Ignorance is Bliss, Especially for the Tax Evader*, 84 J. CRIM. L. & CRIMINOLOGY 575 (1993) (discussing the problems with allowing an ignorance of law defense for tax crimes). In *Cheek v. United States*, the Court famously held that a tax evader who sincerely and in good faith believes that he is not violating the tax laws can avoid liability for willful tax evasion. 498 U.S. 192 (1991).

### E. *Inadequacy of Enforcement Practices*

A fifth factor in explaining the instability of the norms against tax evasion is the role taken by the government in enforcing the laws concerning tax evasion. According to the I.R.S.'s Citizen Oversight Board, the agency is so understaffed and underfunded that it cannot keep pace with increases in tax evasion.<sup>30</sup> For example, in 2007, the I.R.S. examined less than 1% of the approximately 179.4 million returns filed.<sup>31</sup> It initiated criminal prosecutions in a total of only 4,211 cases, and obtained indictments in only 2,322 cases.<sup>32</sup> The level of enforcement is far lower than for crimes such as drug dealing, terrorism, and political corruption. As the economist Jeffrey Dubin has suggested, even modest increases in enforcement would result in huge decreases in the tax gap.<sup>33</sup> The point, however, is not simply that a low level of enforcement activity leaves people undeterred (which it surely does), but that it sends a message that the obligation to pay taxes is not really that important.<sup>34</sup>

### F. *Arbitrariness of Enforcement*

Closely related to the low level of tax law enforcement are its unevenness and seeming arbitrariness. There are disparities both geographically and according to the type and wealth of the taxpayer. According to the latest report of the Independent Transactional Records Clearinghouse, the fiscal year 2007 audit rate for the nation's largest corporations plunged to its lowest level in the last twenty years—approximately 26%—less than half what it was in 1988.<sup>35</sup> And the thoroughness of these audits has been dropping as well. According to the ITRC, the typical amount of time auditors spend on large corporate audits has gone “down by twenty percent over the last five years.”<sup>36</sup> Meanwhile, taxes and penalties have declined for the rich and increased for the poor

30. See IRS OVERSIGHT BOARD, ANNUAL REPORT 2007 3-6 (2008), [http://www.treas.gov/irsob/reports/2008/IRSOB\\_Annual-Report\\_2007.pdf](http://www.treas.gov/irsob/reports/2008/IRSOB_Annual-Report_2007.pdf); see also David Cay Johnston, *Tax Enforcement Seen as Underfinanced*, N.Y. TIMES, Mar. 30, 2004, at C2.

31. Internal Revenue Service, *Enforcement: Examinations, Table 9*, in INTERNAL REVENUE SERVICE DATA BOOK 2007, DEPARTMENT OF TREASURY, available at <http://www.irs.gov/taxstats/article/0,,id=168593,00.html>.

32. Internal Revenue Service, *Enforcement: Collections, Penalties, and Criminal Investigation, Table 18*, in INTERNAL REVENUE SERVICE DATA BOOK 2007, DEPARTMENT OF TREASURY, available at, <http://www.irs.gov/taxstats/article/0,,id=168593,00.html>.

33. See Jeffrey A. Dubin, *Criminal Investigation Enforcement Activities and Taxpayer Noncompliance*, 35 PUB. FIN. REV. 500 (2007).

34. I do not mean to suggest by this that a certain restraint in enforcement policy is wrong or improper. Certainly, tax audits are intrusive, and none of us wants to live in a police state in which our financial activities are routinely subject to government scrutiny. Nevertheless, compared to other areas of the criminal law, the low level of enforcement is striking.

35. Transactional Records Access Clearinghouse, *Audits of Largest Corporations Slide to All Time Low*, <http://trac.syr.edu/tracirs/newfindings/current/> (last visited Mar. 7, 2009).

36. *Id.*

and middle class.<sup>37</sup> There are also huge disparities from district to district, with residents in the New York metropolitan area, for example, being subject to relatively low rates of audits and prosecution, and residents of California subject to much higher rates.<sup>38</sup>

#### G. *Distinguishing Criminal from Civil Violations*

A seventh reason for our ambivalence about the wrongfulness of tax evasion is a lack of clarity about which tax violations should be treated as worthy of criminal sanctions, and which as merely civil. As in other areas of white-collar crime, the exact same conduct can give rise to both kinds of penalty.<sup>39</sup> The decision of which remedies to pursue is entirely within the discretion of the prosecutor. Given that such decisions are typically made in secret, without any public explanation, this state of affairs is likely to contribute to the atmosphere of confusion and skepticism.

#### H. *The Sense that “Everyone is Doing it”*

Eighth is a sense among many citizens that since everyone else is cheating on their taxes—*così fan tutte*, as the Italians say—it is okay for them to do so too. Indeed, even higher than the percentage of taxpayers who actually cheat on their taxes is the percentage that is believed to be cheating on their taxes. For example, in a 1998 Louis Harris survey, “participants estimated that 38% of their fellow taxpayers claim deductions that they’re not entitled to, and 38% of tax filers fail to declare all of their income.”<sup>40</sup> Whether true or false, the belief that norms are widely being violated is likely to lead to their weakening.

Nowhere has the sense that everyone is cheating on their taxes been more evident than in connection with recent revelations regarding two nominees to high level Obama Administration posts. The first was Obama’s choice to head the Department of Health & Human Services, former Senate Majority Leader Tom Daschle, whose failure to pay \$128,000 in taxes for the use of a friend’s chauffeur and car service led him to withdraw his name from consideration.<sup>41</sup> The second nominee was Timothy Geithner, who despite his admission that he failed to pay \$34,000

37. David Cay Johnston, *Audits Spread Unevenly Across U.S.*, N.Y. TIMES, Apr. 12, 1998, available at <http://query.nytimes.com/gst/fullpage.html?res=9E0CE4D7133DF931A25757C0A96E958260&sec=&spon=&pagewanted=print>.

38. Transactional Records Access Clearinghouse, District Enforcement, <http://trac.syr.edu/tracirs/findings/07/index.html> (last visited Mar. 7, 2009).

39. See GREEN, *supra* note 1, at 27.

40. Richard S. Dunham, *Maybe Those Meanies at the IRS Aren’t so Bad After All*, BUS. WK. ONLINE, Apr. 15, 1998, available at <http://www.businessweek.com/bwdaily/dnflash/apr1998/nf80415e.htm>.

41. Jeff Zeleny, *Daschle Ends Bid for Post; Obama Concedes Mistake*, N.Y. TIMES (Feb. 3, 2009), <http://www.nytimes.com/2009/02/04/us/politics/04obama.html?scp=6&sq=daschle%20tax&st=cse>.

in Social Security and Medicare taxes while employed at the International Monetary Fund in the early 2000s, was nevertheless confirmed as Secretary of the Treasury, in which role, of course, he will oversee the Internal Revenue Service.<sup>42</sup>

### I. *Demonization of Taxes*

At least some segment of the population regards even the basic obligation to pay taxes as somehow non-binding. Taxes have been demonized in our political culture to such an extent that many citizens seem to regard taxation itself as wrongful.<sup>43</sup> Indeed, some have gone so far as to attach the label “theft” to taxation itself (as opposed to the evasion of taxes).<sup>44</sup> And if many people believe that taxation itself is wrongful, then it would seem to follow that such people would also believe that the failure to pay taxes is not wrongful.

### J. *Perceived Unfairness of the Tax Code and Dissatisfaction with Use of Revenues*

The final factor that helps explain the weakness of the norms against tax evasion is the widely felt sense that the tax code is unfair and that revenues are being used for misguided or even corrupt purposes. With respect to unfairness, consider the case of billionaire Warren Buffet, who recently gave a speech in which he criticized the U.S. tax system for allowing him to pay a lower rate than his secretary and house cleaner. Buffet said he was taxed at an average tax rate of 17.7% on the \$46 million he earned in 2006, while his secretary, who earned \$60,000, was taxed at an average tax rate of 30%.<sup>45</sup> With respect to dissatisfaction over the use of revenues, consider the appropriation of funds to pay for a costly and misguided war in Iraq or for outrageous earmarked projects like Alaska’s proposed Bridge to Nowhere. When asked why they fail to pay taxes, many taxpayers rationalize their evasion by pointing to the supposed unfairness of the system and misuse of revenues. They say they believe they are righting a wrong, balancing the scales, leveling the playing field; they say they want to punish the government for misusing their money and

42. Jackie Calmes, *Senate Confirms Geithner for Treasury*, N.Y. TIMES (Jan. 26, 2009), <http://www.nytimes.com/2009/01/27/us/politics/27geithner.html?scp=2&sq=geithner%20confirmed%20secretary&st=Search>.

43. See, e.g., Thomas L. Friedman, *Palin’s Kind of Patriotism*, N.Y. TIMES, Oct. 7, 2008, available at <http://www.nytimes.com/2008/10/08/opinion/08friedman.html?ref=opinion> (criticizing remarks made by vice-presidential candidate Sarah Palin to the effect that paying taxes is not patriotic).

44. See, e.g., ROBERT W. MCGEE, *THE PHILOSOPHY OF TAXATION AND PUBLIC FINANCE* 37 (2004).

45. Tim Bawden, *Buffett Blasts System That Lets Him Pay Less Tax Than Secretary*, TIMES (LONDON) ONLINE, June 28, 2007, <http://www.timesonline.co.uk/tol/money/tax/article1996735.ece?print=yes&randnum=1230>.

deprive it of funds to use for unjust purposes.<sup>46</sup> In such a system, it is not surprising that many people believe that nonpayment of taxes is not wrongful.

#### VI. THE NEED TO “RECONSTRUCT” THE NORM AGAINST TAX EVASION

There are presumably many potential fixes for the just-described state of affairs. We could: (1) simplify the tax code, making clearer the distinction between lawful and unlawful behavior (though we should recognize how difficult this would be, particularly in the context of taxes paid by large businesses); (2) distinguish more clearly between what constitute criminal and civil violations of the code; (3) change our political rhetoric, attempting to educate people about the importance of tax revenues; (4) modify our priorities for government spending; (5) make the Code more equitable, from both a vertical and horizontal perspective; (6) distinguish more clearly between choate and inchoate violations; (7) rethink the requirements of *mens rea*; and (8) increase enforcement and make the level of enforcement more uniform.

All of these steps are certainly worth considering. For the moment, however, I want to suggest that there is a pervasive instability in the underlying norms themselves. If I am right that the norms underlying the rule against tax evasion are unstable, then it seems a worthwhile project to ask what those norms are, or should be, and to try to shore them up from a conceptual standpoint. Perhaps, if we could articulate more clearly why tax evasion is wrong, we would be in a better position to create a system of tax laws that was widely respected.

In earlier work, I suggested three forms of moral wrongfulness we might consider as informing the rule against tax evasion: (1) stealing, (2) breach of the duty to obey the law, and (3) cheating.<sup>47</sup> I would now like to reconsider and expand slightly on my views. Going beyond my previous consideration of this issue, I want to argue that the extent to which tax evasion should be viewed as wrongful depends in large part on the underlying justice of the tax code and its enforcement.

##### A. *Tax Evasion as Stealing*

Some commentators have suggested that the moral wrongfulness of tax evasion should be understood in terms of stealing.<sup>48</sup> I previously critiqued this approach in the following terms: I said that we need to distinguish between two different kinds of taxes: on the one hand, income tax, sales tax, estate tax, capital gains tax, and real estate tax (which I referred to as “taxes proper”); and, on the other hand, fees, licenses,

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46. Tackett et al., *supra* note 12, at 656.

47. See GREEN, *supra* note 1, at 246.

48. See, e.g., MARTIN T. CROWE, *THE MORAL OBLIGATION OF PAYING JUST TAXES* 42 (1944).

permits, franchises, and special assessments.<sup>49</sup> With the first kind of tax, the taxpayer has no automatic right to any of the proceeds. With the second kind, by contrast, the payor pays a fee in order to receive some specific benefit, such as the right to fish or import goods or have a road in front of her business paved. I said that only evasion of taxes of the second kind should be understood as a form of stealing, because only in such cases is the tax evader getting something for nothing. By contrast, those who pay taxes proper frequently get nothing for their tax dollars. The example I gave was of a federal taxpayer in Maine who has his tax dollars used to build a road in New Mexico, on which he never has occasion to drive. Moreover, tax revenues are sometimes used for purposes that the taxpayer is entirely opposed to, such as unjust wars and publicly subsidized professional football stadiums. I said that in such circumstances, it makes no sense to say that a tax evader has “stolen” anything.

Having given more thought to the concept of stealing in the interim,<sup>50</sup> I continue to think that it does not provide a particularly helpful way to characterize the underlying wrongfulness of tax evasion. But my reasons for thinking so have changed. Stealing consists in the wrongful taking of another’s property, with “wrongful” variously understood as “unlawfully” or “dishonestly” or “without right or consent.” Tax evasion is certainly unlawful and dishonest and without right, but it does not involve the taking of something that has already become the property of the state. Rather, it seems to involve a failure to provide something to which the state is merely entitled. In that sense, tax evasion is more like a breach of contract than it is like theft.<sup>51</sup>

#### B. *Tax Evasion as a Breach of the Moral Obligation to Obey the Law*

A number of authorities, including the Catechism of the Catholic Church, identify obedience to authority as the principal ground upon which the obligation to pay taxes is grounded.<sup>52</sup> Under this approach, the wrong in failing to pay taxes arises out of the wrong in failing to obey authority.

In earlier work, I expressed two reservations with respect to this view of the wrongfulness in tax evasion.<sup>53</sup> The first was that, as stated, it fails to explain what is distinctive about the moral content of tax evasion—in particular, how it differs from other forms of disobedience to the

49. GREEN, *supra* note 1, at 246.

50. I am writing a book with the working title THIRTEEN WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE.

51. It is an interesting question why theft should be treated as a crime and breach of contract as merely a civil wrong. I plan to deal with that issue in future work. For the moment, I think we can at least say that tax evasion proper and stealing reflect different forms of moral wrongfulness.

52. CATECHISM OF THE CATHOLIC CHURCH § 2240 (Libreria Editrice Vatican 1994).

53. GREEN, *supra* note 1, at 246.

government, such as those that occur in the case of trivial regulatory violations. The second was that, by focusing on the breach of the vertical relationship between tax evader and state, it loses sight of the horizontal relationship between tax evader and fellow citizen.

I continue to believe that the tax evasion-as-breach-of-the-obligation-to-obey-the-law theory is at best incomplete. Nevertheless, I now think that I underestimated the significance of disobedience in assessing the moral content of tax evasion. I believe we need to recognize that failing to pay taxes constitutes disobedience in a sense that merely failing to comply with other laws does not. Taxes are the fuel that runs the engine of liberal democracy. Paying taxes may or may not be a patriotic act—that depends on how one defines patriotism. But it is certainly a duty of citizenship, one with arguably more significance than complying with many regulatory laws. As Stephen Holmes and Cass Sunstein have argued, if legal rights are to be considered meaningful, the existence of a government is required first to establish and then to enforce those rights.<sup>54</sup> Running a government is costly; paying taxes is necessary in order to support the communal infrastructure by which individual rights are upheld.<sup>55</sup>

Focus on the moral obligation to obey the law also helps explain why the norm against tax evasion is so unstable. Most of us would agree that the moral obligation to obey the law is limited to laws that are just.<sup>56</sup> For example, we believe that those who harbored escaped slaves did nothing morally wrong in violating the Fugitive Slave Laws precisely because those laws were unjust.

I think this point provides an important insight into our attitudes towards tax evasion. As we have seen, many people are ambivalent, or worse, about their obligation to pay taxes because they believe that the tax code is unfair, that enforcement is uneven, and that tax revenues are put to poor use. There are few other areas of criminal law in which there is so much uncertainty about the justness of the underlying penal law.<sup>57</sup>

### C. *Tax Evasion as Cheating*

In addition to stealing and violating the moral obligation to obey the law, I also offered a third way of conceptualizing the moral wrongfulness of tax evasion—namely, tax evasion as a form of cheating, which I defined as the violation of a fair and fairly enforced rule with the intent to obtain an

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54. See STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 18-19 (1999).

55. Cf. *id.* at 75-76 (explaining the costs involved in supporting markets and source of the funds).

56. See, e.g., M.B.E. Smith, *The Duty to Obey*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 465 (Dennis Patterson ed., 1999).

57. A few candidates are harmless morals offenses such as drug possession, prostitution, and obscenity.

advantage over some party with whom the rule-breaker is in a cooperative, rule-governed relationship.<sup>58</sup> This account squared well with our common way of speaking of tax evasion as “cheating on one’s taxes.” It also reflected the fact that evading tax causes harm not just to the government but also to one’s fellow citizens, who are forced to bear a heavier burden as a result of one’s conduct. Indeed, I endorsed this way of thinking of the moral wrongfulness of tax evasion as the best approach of the three.

Once again, we can see the importance that the justice or injustice of a tax code will have in determining whether evasion of taxes is viewed as wrongful. As I have argued, violation of a rule is wrongful only if the rule itself is fair and administered in a fair manner. Under the tax evasion-as-cheating view, violation of a fundamentally unfair and unfairly enforced tax code would not be viewed as morally wrongful. Thus, under at least two of the three theories I have offered for why tax evasion is morally wrong, such wrongfulness depends on contingent facts about the justice of the underlying system of taxation itself.<sup>59</sup> Unless and until we can make our tax laws just, citizens will doubt the wrongfulness of their evasion, and compliance will be hard to achieve.

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58. GREEN, *supra* note 1, at 247.

59. For a discussion of the differences between just and unjust tax systems, see LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002); see also *TAX JUSTICE: THE ONGOING DEBATE* (Joseph J. Thorndike & Dennis J. Ventry, Jr. eds., 2002).