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Taxes, Morals, and Legitimacy

Leo P. Martinez*

*"Morality is the herd instinct of the individual."*¹

*"[T]he dread of evil is a much more forcible principle of human actions than the prospect of good."*²

I. INTRODUCTION

The crime of tax evasion and the virtue of tax avoidance have always been viewed schizophrenically. On one hand we recognize the need for taxes and governments' dependence on revenue, while on the other we reflexively attempt to minimize our tax liability. Not surprisingly, the courts manifest and affirm our disparate approaches to taxation. One court tells us unequivocally, "[t]here is always a moral obligation to pay

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This Article is a direct result of the generous support provided by the Roger J. Traynor Fund for Scholarly Publications. Chief Justice Traynor believed that the tax laws should yield to transcendent concerns. In rejecting a loyalty oath as a precondition to tax exemption he stated: "Even in the face of a bona fide danger, the state has no power to embark on an unnecessary wholesale suppression of liberty." *First Unitarian Church v. County of Los Angeles*, 311 P.2d 508, 525 (Cal. 1957) (Traynor, J., dissenting), *rev'd*, 357 U.S. 545 (1958); see Adrian A. Kragen, *In Memoriam: Roger J. Traynor: Chief Justice Traynor and the Law of Taxation*, 35 HASTINGS L.J. 801, 811-12 (1984).

1. FRIEDRICH NIETZSCHE, *DIE FRÖHLICHE WISSENSCHAFT* bk. 3, § 108 (1882).

2. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *55-56 (William D. Lewis ed., 1900).

taxes."³ Other courts reject this interplay of morality and taxes.⁴

The interplay of morals and taxes is crucial to tax collection. If there is no moral obligation to pay taxes, the state can expect its citizens to weigh only the law or purely legal consequences in deciding whether compliance with tax laws makes sense as a matter of personal choice. The state, as a result, is almost forced to enact just tax laws or face a public increasingly willing to risk what is almost purely a legal price of tax evasion without moral sanction.

At the outset, it seems necessary to affirm that taxpayers have no a priori duty to pay a portion of their incomes as taxes. If they did, all citizens violated that duty until the Sixteenth Amendment permitted government to collect income taxes. Obviously, until that time no one would have asserted that citizens have either a legal or moral duty to pay income tax. Nor is the Internal Revenue Code an absolute determinant of a

3. *Snyder v. Routzahn*, 55 F.2d 396, 397 (N.D. Ohio 1931); see also *Jordan v. De George*, 341 U.S. 223, 229 (1951) (holding that tax evasion involving fraud is a crime of moral turpitude); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 315 (1937) (holding that a specific tax, the revenue of which was set aside for the Philippine's use, is "in discharge of a high moral obligation"); *Senior v. Braden*, 295 U.S. 422, 439 (1935) (Brandeis, Cardozo, Stone, JJ., dissenting) (recognizing use of taxes for purposes other than revenue generation); *Hill v. Wallace*, 259 U.S. 44 (1922) (rejecting the argument that use of the taxing power to promote social welfare is as old as the power); *United States ex rel. Berlandi v. Reimer*, 113 F.2d 429, 430-31 (2d Cir. 1940) ("[O]ne who conducts a business with intent to defraud the government of taxes . . . stands in [no] different position from that of a person who defrauds a private citizen of property.").

The Catholic Church supports the proposition that there is a moral obligation to obey the law and pay taxes. Its position is stated:

Obedience to authority and co-responsibility for the common good generate a moral obligation to pay taxes, exercise the right to vote, and share in the defense of the country:

Pay to all what is due them—taxes to whom taxes are due;
revenue to whom revenue is due; respect to whom respect is due;
honor to whom honor is due.

CATECHISM OF THE CATHOLIC CHURCH § 2240 (Libreria Editrice Vaticana, Provisional Draft 1992) (construing *Romans* 13:1-2). A Catholic theologian echoes the approach noting that those who "use fraud and other means to evade just taxes . . . sin mortally by committing the sin of theft." Rev. Martin T. Crowe, *The Moral Obligation of Paying Just Taxes* 42 (THE CATHOLIC UNIV. OF AM. STUD. IN SACRED THEOLOGY No. 84 (1944) (dissertation)).

4. *Commissioner v. Wilcox*, 327 U.S. 404, 408 (1946) ("Moral turpitude is not a touchstone of taxability."), *overruled on other grounds by* *James v. United States*, 366 U.S. 213, 220-22 (1961); *Mariensfeld v. United States*, 214 F.2d 632, 640 (8th Cir. 1954) (Johnsen, J., concurring specially) ("Tax liability necessarily is an economic not a moral question.").

taxpayer's duty, independent of the law, to pay a specified amount of tax. If it were, taxpayers would have a constant duty to pay that amount even if Congress changed the applicable rates. Similarly, if a taxpayer had an inherent and constant duty to contribute to society, the taxpayer could satisfy the duty by directly contributing to public service without paying taxes. Likewise, a taxpayer could violate this duty by paying less than an inherent fair share, even though she paid what the law required.⁵

It is also tempting to propose that tax evasion and tax avoidance are innate. Even trivial exercise of the power to tax, whether fair or unfair, inevitably results in resistance.⁶ The United States, for example, enjoys an extensive tradition of taxpayers avoiding the tax collector.⁷ Indeed, the birth of our nation is founded upon the evasion of a tax exacted and collected through the use of stamps.⁸ This tradition of evasion or avoidance, whatever the motive, however, begs the inquiry whether there is a moral component to the evasion of taxes.

5. Because legal rules such as tax laws are not logically deduced, Holmes could conclude, "the claim of our especial code to respect is simply that it exists, that it is the one to which we have become accustomed, and not that it represents an eternal principle." Oliver W. Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899). Similarly, "rights and duties" are not eternal principles. As Holmes put it:

If I . . . live with others they tell me that I must do and abstain from doing various things or they will put the screws on to me. I believe that they will, and being of the same mind as to their conduct I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights. But for legal purposes a right is only the hypostasis of a prophesy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it

Oliver W. Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918).

6. Doreen McBarnet defines tax resistance as an implicitly "intentional action," and examines compliance with tax laws as a means to escape tax liability without risking noncompliance. Doreen McBarnet, *The Construction of Compliance and the Challenge for Control: The Limits of Noncompliance Research*, in *WHY PEOPLE PAY TAXES* 333 (Joel Slemrod ed., 1992).

7. DALL W. FORSYTHE, *TAXATION AND POLITICAL CHANGE IN THE YOUNG NATION 1781-1833*, at 60 (1977).

8. See CAROLYN WEBBER & AARON WILDAVSKY, *A HISTORY OF TAXATION AND EXPENDITURE IN THE WESTERN WORLD* 361-66 (1986); Robert J. Haws, *A Brief History of American Resistance to Taxation*, in *INCOME TAX COMPLIANCE* 113 (Phillip Sawicki ed., 1983); see also CYRIL N. PARKINSON, *THE LAW AND THE PROFITS* 22-35 (1960) (discussing the history of taxation from ancient history to the French Revolution).

Oliver Wendell Holmes' often repeated idea that the life of the law is not logic but experience suggests that neither tax evasion nor tax enforcement implicates moral issues.⁹ 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.

Holmes' view was not new when announced. William Blackstone, whose treatise it is said topped Holmes' reading list,¹⁰ was of the opinion that violations of the tax law fell in the category of *mala prohibita* crimes which, by definition, carried no moral baggage.¹¹ Blackstone went so far as to assert that this lack of morality within *mala prohibita* laws was not only appropriate but was inherent, for it would be "a very wicked thing . . . if every such law were a snare for the conscience of the subject."¹² No moral consequence then would seem to flow from a simple act of tax evasion; in fact, evasion of taxes—either completely or in part—is almost a patriotic duty.¹³

9. In *THE COMMON LAW*, Holmes wrote:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.

O.W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

10. David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 *HOFSTRA L. REV.* 97, 107 n.50 (1982).

11. BLACKSTONE, *supra* note 2, at *54-55, *57 n.42, *317.

According to George Sharswood, an early editor of Blackstone, the criminality of *mala prohibita* violations is assessed solely by its consequences: "[H]e who saves a sum of money by evading the payment of a tax does exactly the same injury to society as he who steals so much from the treasury, and is therefore guilty of as great immorality, or as great an act of dishonesty." *Id.* at *58 n.45 (inserting Sharswood's opinion).

Another way of expressing the idea is through a neutral and definitely amoral view that the law simply does not require us to pay more taxes than are due. *E.g.*, *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934).

12. BLACKSTONE, *supra* note 2, at *58. According to Blackstone, *mala prohibita* laws merely present an "alternative . . . [to] 'either abstain from this, or submit to such a penalty:' and his conscience will be clear, whichever side of the alternative he thinks proper to embrace." *Id.*

13. *Cf. Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934) (Hand, J.) ("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."). In support of this proposition, Blackstone asserts that the "ill consequence" of high taxes on merchandise is that such taxes fall "heavier" on the consumer at the end of the chain of commerce and of taxation

If a taxpayer commits a moral wrong by violating the tax laws, it is not because she pays less than the morally proper amount but rather because she disobeys the government. So, if there is a moral duty to pay taxes, it must be a duty to pay whatever the government demands. But what if the government demands ninety percent of all income? Perhaps there is a moral duty to pay what the government demands provided that the government demand is fair. Because, however, taxpayers would likely differ as to what is fair, even assuming honesty on their part, it must be in the government's power to determine what is fair.¹⁴ Accepting this proposition, if the government determines that a flat ninety percent rate is fair, we would need to concede a moral duty to pay ninety percent.¹⁵

If tax laws served moral purposes, tax laws would be appropriate as a method of punishment solely to prohibit and penalize conduct.¹⁶ Retroactive tax law amendments, so-called "bait-and-switch taxation," would perhaps inspire more concern if the Supreme Court considered tax laws to be more than mere "economic legislation" with solely economic consequences that apportion "the cost of government among those who in some

because "every trader . . . must have a profit" not only on the product itself, and the labor and time to "prepar[e] it, but also upon the very tax itself which [the trader] advances to the government." BLACKSTONE, *supra* note 2, at *317.

14. Indeed, some taxpayers may argue no demand could ever be fair. Robert McGee suggests that if a "tax is extracted by force or by the threat of force, as in the case of the income tax, there seems to be no moral duty to give anything whatsoever, because the recipient is a thief." Only to the extent the amount given is directly proportional to the received value of services provided by the "thief," the government is there a moral duty to pay. Robert W. McGee, *Is Tax Evasion Unethical?*, 42 KAN. L. REV. 411, 423 (1994). Under this line of reasoning, the government could not fairly decide what it is due, and thus there would be no moral obligation to pay any amount. Not surprisingly, McGee concludes that taxation is theft by the state. *Id.* at 433-34.

15. One could argue there is a moral obligation to pay a ninety percent tax if it is just and has as its object to serve the common good. However, one of the tests of a just law is that it has stood the test of time and has not been overthrown by taxpayer disobedience. The argument that a ninety percent rate is just and that "since . . . the state need[s] constant support, it seems reasonable to maintain that piety demands this support to be given by the . . . citizen," would undoubtedly be unpersuasive to most taxpayers. Crowe, *supra* note 3, at 61, 157, 163.

16. *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1945 (1994) (tax laws are normally to raise revenue, and a tax with the sole purpose to deter or exact retribution for a prohibited taxpayer conduct is inappropriate and cannot stand).

measure are privileged to enjoy its benefits and must bear its burdens."¹⁷

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.¹⁸ 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 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.

This Article discusses the classical moral justifications for obeying the law, and how tax laws mesh, if at all, with traditional notions of morality. While the proposition that violation of tax laws is immoral seems at first glance a simplistic notion, the discussion that ensues demonstrates that this apparently self-evident proposition is an uneasy one. If one concludes that it is not immoral to disobey just laws, it cannot be immoral to disobey just tax laws. As a direct consequence, the tax evader is not perceived as breaching a moral duty. This seeming absence of moral considerations implicates the legitimacy of the tax system; it colors perceptions of the criminality of tax laws; and it directly affects punishment for the violation of the tax laws.

II. THE DUTY TO OBEY LAW

There is a widely held belief that obedience to just laws is moral.¹⁹ One of the earliest arguments for a moral obligation

17. *United States v. Carlton*, 114 S. Ct. 2018, 2023 (1994) (upholding retroactive taxation as "economic legislation" that, despite taxpayer reliance and detriment, is a reasonable attempt to prevent unanticipated revenue loss by denying a deduction to "purely tax-motivated" taxpayers). The "bait-and-switch" reference is Justice Scalia's. *Id.* at 2026 (Scalia, J., concurring).

18. *Cheek v. United States*, 498 U.S. 192, 202 (1991) (holding that a good-faith belief that one's conduct is not illegal negates willfulness); *Ratzlaf v. United States*, 114 S. Ct. 655, 663 (1994) (holding that willfulness requires that a taxpayer know his conduct violates the law).

19. The relationship between law and morality has its roots in the natural law philosophers of ancient Greece.

Law making is conceived as having two aspects, the selection of specific ends to achieve the overriding end of the common good of all people, and

to obey the law was advanced by Socrates in the *Crito*.²⁰ Condemned to death, Socrates refuses to escape and live in exile in another country because he believes he has an obligation to obey the laws of the state. In Socrates' view, a state imperils its existence if it allows its citizens to ignore either its laws or its judicial process.²¹ However, as is made plain below, it is not easy to argue that a moral obligation to obey the law exists. That we have a moral obligation to obey tax law is more tenuous still.

Although political and legal theorists disagree about the basis and scope of a moral duty to obey the law, few have doubted that such a duty exists.²² At the same time, most would concede that the moral duty to obey the law is subject to conditions and exceptions: it is not an absolute duty.²³ Despite near unanimous agreement as to this basic proposition, the debate over the relationship between moral and legal obligations is intense.²⁴

the selection of means to achieve these ends. . . . The discovery of those ends which are necessary for human happiness involves an analysis of human nature, and the ascertaining of those acts which will achieve these ends necessitates an analysis of the nature of the world in which we live. When a law is enacted in order to achieve ends necessary for human happiness, and the law requires acts which will achieve these ends, obedience to the law will be morally necessary or obligatory. A law which does not have such a means-end relationship is not obligatory and if it imposes no obligation then it is not true law.

J.C. SMITH, *LEGAL OBLIGATION* 5-6 (1976).

20. PLATO, *Crito*, in *THE COLLECTED DIALOGUES* (Edith Hamilton & Huntington Cairns eds. & Hugh Tredennik trans., 1961).

21. See HUNTINGTON CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 54 (1949).

22. John Rawls has written, "I shall assume, as requiring no argument, that there is, at least in a society such as ours, a moral obligation to obey the law, although it may, of course, be overridden in certain cases by other more stringent obligations." John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3, 3 (Sidney Hook ed., 1964); see George C. Christie, *On the Moral Obligation to Obey the Law*, 1990 *DUKE L.J.* 1311.

23. For instance, Weiss writes:

All disobedience to the state is justifiable so far as it is guided by principles and values superior to those now being illustrated or possible. In some cases the primary aim is to get a better functioning state, but one also has a right to disobey bad laws . . . because one is concerned with other values at least as comprehensive and vital as those that the state at its best might exhibit and promote.

Paul Weiss, *The Right to Disobey*, in *LAW AND PHILOSOPHY* 101 (Sidney Hook ed., 1964). Yet as Wolff points out, states typically claim an absolute right to command and require a corresponding absolute duty of citizens to obey. ROBERT P. WOLFF, *IN DEFENSE OF ANARCHISM* (1970).

24. See, e.g., ROSCOE POUND, *LAW AND MORALS* 117 (Oxford Univ. Press 1924)

A. *The Duty to Obey Just Laws*

If there is some moral duty to obey the law and if that duty is not absolute, then its proponents must prove that there is, at least, a *prima facie* moral duty to obey. Citizens have a *prima facie* moral obligation to obey the law if, and only if, their moral reason for obeying the law is stronger than a countervailing moral reason not to obey the law. Where the moral reason for obeying the law is stronger, failure to obey the law is wrong.²⁵

1. *Obligation based on consent*

Most arguments for a *prima facie* moral duty to obey the law are based on consent theory.²⁶ Because the state of nature is too violent and chaotic, individuals sacrifice their autonomy in a social contract through which they gain peace and security.²⁷ Inasmuch as such government is always preferable to the

(concluding that after twenty-four hundred years of philosophical and juristic discussion, no theory has yet been able to maintain itself); Richard Wasserstrom, *The Obligation to Obey the Law*, in *ESSAYS IN LEGAL PHILOSOPHY* 274 (Robert S. Summers ed., 1968) (recognizing that just as the nature and extent of one's obligation to obey the law demanded attention in Socrates' time, it is no less with us today in equally vexing and perplexing forms).

25. M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 *YALE L.J.* 950, 951 (1973). Feinberg, however, states that a

prima facie obligation is not in every case a decisive reason [to obey the law], but it is always a relevant one and one which would be conclusive if no other relevant reason of greater strength applied to the situation. Thus if Jones has a *prima facie* obligation to do A, then he has a moral reason to do A which is such that unless he has a moral reason *not* to do A that is at least as strong, then not doing A is wrong, and he has an actual obligation to do A.

Joel Feinberg, *Civil Disobedience in the Modern World*, in *PHILOSOPHY OF LAW* 119, 124 (Joel Feinberg & Hyman Gross eds., 4th ed. 1991).

26. As Greenawalt states:

Although theories differ on exactly why promises carry moral force, promise is widely regarded as the clearest way in which people voluntarily assume moral obligations. . . . [S]ince both the apposite linguistic conventions and the social practice of promise keeping exist in modern society, the power of promises to generate moral obligations is undisputed.

KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 64 (Tony Honoré & Joseph Raz eds., 1987).

27. According to Locke:

[T]he state of nature in reality is such an intolerable one that its inhabitants, however free, are willing to quit it. . . . Men therefore agree with other men to unite into a community for their comfortable, safe and peaceable living, and when they have so consented to make one community a government, they are thereby presently incorporated, and make one

state of nature, individuals continue to submit to state authority.²⁸ To maintain theoretical consistency, however, consent theory must show that individuals' consent is voluntarily and intentionally given.²⁹ Because few individuals explicitly consent to the state's authority, their tacit consent must be found in some voluntary conduct.

Participation in the government through voting is often given as an example of a citizen's tacit consent. However, an ever increasing number of citizens do not vote and those who do have a limited choice between a few candidates, none of whom can fully represent the interests and beliefs of any individual.³⁰ Moreover, nowhere is it clearly understood that vot-

body politic, in which the majority have a right to act and conclude the rest.

CAIRNS, *supra* note 21, at 346.

28. JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* 191 (2d ed. London, George Routledge & Sons 1887). Simmons explains the intuitive appeal of consent theory:

According to any theory of rights which places at its center the right to free pursuit of our life plans, only control by others that respects this freedom can be seen as legitimate. But the only kind of control by others that respects our freedom would seem to be control to which we have freely submitted. That is the appeal of consent theory, the view that political authority is morally legitimate only when its subjects freely choose to submit themselves to that authority. Competing theories of authority do not similarly respect our natural right to self government; for instance, if we supposed that another's wisdom, ability or divine appointment gave him the right to control us, we would have to concede that we had, after all, no natural right to control our own lives.

John Simmons, *Consent, Free Choice, and Democratic Government*, 18 GA. L. REV. 791, 792 (1984).

29. Greenawalt explains that

whether a government was actually created by a process involving consent or originated through an exercise of force is not central. What counts for an individual is whether he or she has promised to obey; neither the unanimous agreement of those originally subject to the legal order nor the agreement of most of one's fellow citizens can obligate an individual who has not agreed.

GREENAWALT, *supra* note 26, at 69.

30. Simmons, *supra* note 28, at 800.

[V]oting is often a way not of consenting to something, but merely of *expressing a preference*. If the state gives a group of condemned prisoners the choice of execution by firing squad or by lethal injection, and all of them vote for the firing squad, we cannot conclude that the prisoners *consent* to being executed by firing squad. They do, of course, choose this option; they approve of it, but only in the sense that they prefer it to their other option. They consent to neither option, despising both. Voting for a candidate in a democratic election sometimes has a depressingly similar structure.

ing constitutes consent to the authority of the government and the promise to obey its laws.³¹ To assume that a citizen equates voting with an obligation to obey the law is incorrect.

Plato and Locke, among others, found tacit consent in a citizens' continued residence in a state upon reaching majority.³² This assertion, however, also poses a number of difficulties. First, the implied choice to remain is illusory. If a citizen was required to choose citizenship upon reaching majority, rarely would that choice be voluntary. For most individuals, emigration is not a real option.³³ Because nearly all the world's habitable land is governed by some state, even those individuals with education and resources with which to make such a choice can only choose between existing governments. Such a choice is illusory. Only if citizens could choose to live outside any government's authority would their choice to live within a state amount to consent.

Second, if the state's authority rests on adults' tacit consent, a state's authority over minors cannot be legitimate. Minors have not freely consented but can be taxed, fined, and imprisoned.³⁴

Id. (emphasis added).

31. According to Greenawalt it is not

plausible to suppose that voting amounts to tacit consent, in the sense of a clear, though nonverbal, indication of an accepting attitude toward the government and its laws. In the United States and many other countries, avowed revolutionaries are permitted to vote; no one takes their efforts to manipulate the political processes as showing their approval of the government. Ordinary citizens are not told authoritatively that voting, . . . counts as approval of the government and a promise to obey its laws; no established social convention treats voting in political elections as a significant agreement.

GREENAWALT, *supra* note 26, at 71.

32. See Smith, *supra* note 25, at 960; Harry Beran, *In Defense of the Consent Theory of Political Obligation and Authority*, 87 ETHICS 260 (1977) (proposing that people who remain in the state accept full membership in community; failure to recognize the duty to obey that attaches to this acceptance is negligence).

33. David Hume, *Of the Original Contract*, in HUME'S MORAL AND POLITICAL PHILOSOPHY 363 (Henery D. Aiken ed., 1948). Hume asked:

Can we seriously say that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep, and must leap into the ocean and perish the moment he leaves her.

Id.

34. Simmons, *supra* note 28, at 808.

Third, if citizens consent by freely choosing to remain, why is there no acknowledgment of the seriousness of this choice, no rituals or formal pledges?³⁵ One would think that choosing obedience to a government and its laws would entail some type of official ceremony. Yet, only in the swearing in of aliens to the United States can this type of formal ceremony be found. Recitation of the Pledge of Allegiance or other school pledge can hardly be said to qualify.

The reality is "[p]eople stay in homelands because of language, culture, job, friends, and family; their inertia hardly indicates approval or acceptance of government and laws."³⁶ Those who advocate social contract theory as a moral reason for citizens' obedience of the laws thus fail to prove that an average citizen has given any actual or tacit consent by voting or remaining in the state upon majority.

2. *Obligation based on fairness and reciprocity*

Many theorists argue that a citizen's acceptance of the benefits implicitly received from living in a society generates a duty of fair play to fellow citizens which obligates one to abide by the rules of that society. As Hart explained:

[W]hen a number of persons conduct *any joint enterprise* according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefitted by their submission. The rules may provide that officials should have authority to enforce obedience and make further rules, and this will create a structure of legal rights and duties, but the moral obligation to obey the rules in such circumstances is *due to* the co-operating members of the society, and they have the correlative moral right to obedience.³⁷

35. *Id.* As Hume suggested:

It is strange that an act of the mind, which every individual is supposed to have formed, and after he came to the use of reason too, otherwise it could have no authority—that this act, I say, should be so much unknown to all of them that over the face of the whole earth there scarcely remain any traces or memory of it.

Hume, *supra* note 33, at 359.

36. GREENAWALT, *supra* note 26, at 73.

37. H.L.A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 185 (1955) (first emphasis added). Rawls wrote:

[The duty to obey the law] depends on our having accepted and our intention to continue accepting the benefits of a *just scheme of cooperation*

Like consent theory, the fairness argument has an intuitive appeal: it is unfair to benefit from others' compliance without reciprocating.³⁸ But the fairness argument suffers from the same problem of choice which troubles consent theory: most citizens cannot help but benefit from others' compliance and make no choice in that regard.³⁹ In order to survive in the modern state, one must participate in economic activities, travel on public roads, and interact with other citizens in a myriad of socially regulated exchanges. Individuals have no choice but to live within some state and benefit from its institutions. Contrary to this modern reality, the fairness argument dictates reciprocity only when one freely and voluntarily accepts benefits which one could have refused.⁴⁰

3. *Rawlsian obligation*

In his later works, Rawls shifted his analysis away from the duty of fair play and focused instead on the natural duty of

that the constitution defines. In this sense it depends on our own voluntary acts. Again, it is an obligation owed to our fellow citizens generally: that is, to those who cooperate with us in the working of the constitution.

JOHN RAWLS, *A THEORY OF JUSTICE* 10 (1971) (emphasis added).

38. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 27 (1965).

39. Greenawalt notes:

Some benefits provided by the state *are* accepted voluntarily; one may or may not use a state park or museum for which a fee is charged. Other benefits, such as military and general police protection, constitute public goods that are open, available to everyone whether they want them or not and regardless of their actions. Still other benefits, such as basic education, involve action by recipients but that action is compelled. Finally, some benefits may be refused, but the state's control over options leaves little real choice; people may not have to call the fire department when their homes are burning, but the state's monopoly over fire fighting forecloses other possibilities for relief.

GREENAWALT, *supra* note 26, at 124-25.

40. As Raz points out:

[T]he fairness argument is of dubious validity when one has no choice but to accept the benefits, or even more generally, when the benefits are given to one who doesn't request them, and in circumstances which do not imply an understanding concerning the conditions attached to their donation and receipt. Besides, even where it is unfair not to reciprocate for services received, or not to contribute one's share to the production of a good of general public value, it cannot be unfair to perform innocuous acts which neither harm any one, nor impede the provision of any public good. Many violations of law are such innocuous acts. Therefore, appeals to fairness can raise no general obligation to obey the law.

Joseph Raz, *The Obligation to Obey: Revision and Tradition*, 1 J. ETHICS & PUB. POL. 139, 152 (1984).

citizens to create and maintain just institutions. While Rawls continues to stress the duty of fair play incumbent upon those who derive special benefits from the political system through ongoing participation within it, "the most important natural duty is that to support and to further just institutions."⁴¹ Therefore, "if the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do what is required of him. Each is bound irrespective of his voluntary acts."⁴² Rawls contends that no voluntary acts are necessary to bind the citizen because rational individuals in a hypothetical original situation *would* voluntarily agree to be bound, even if no actual agreement took place.⁴³

Rawls' theory presupposes that some existing states are, at least, reasonably just. Yet nearly all existing states are hierarchically structured and promote the interests of advantaged groups at the expense of disadvantaged ones. Rawls acknowledges that individuals who are treated unjustly by institutions are not obligated to comply with those institutions.⁴⁴ In nearly all existing states, then, only the privileged minority would have a moral duty to obey while the majority of citizens would be free to disregard any laws which unjustly burden them. Such a limited duty would in all likelihood undermine state authority and result in a state of anarchy.

41. RAWLS, *supra* note 37, at 334. Rawls goes on to say:

This duty has two parts: first, we are to comply with and to do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves.

Id. See also JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

42. *Id.*

43. *Id.* at 13.

No society can, of course, be a scheme of cooperation which men enter voluntarily in a literal sense; each person finds himself placed at birth in some particular position in some particular society, and the nature of this position materially affects his life prospects. Yet a society satisfying the principles of justice as fairness comes as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair. In a sense its members are autonomous and the obligations they recognize self-imposed.

Id.

44. *Id.* at 383. See also Crowe, *supra* note 3, at 26 (the tax system is so complex that inequality is practically certain, and while this injustice in apparently "isolated cases" does not make the tax laws entirely unjust, it is conceded that "of course any individual who would certainly be taxed more than his just fair share, would be excused from complying with the law").

Furthermore, a moral duty to obey the law does not necessarily follow from a natural duty of justice: "if disobedience will advance justice or retard injustice, then natural justice requires disobedience, not obedience."⁴⁵ Individuals do have a moral obligation to act on the doctrine of justice and this they can do in any number of ways whether or not they comply with social and political institutions.

4. *Obligation grounded in utility*

The central principle of utilitarian doctrine is that social good lies in whatever brings the greatest benefit to the greatest number. Citizens balance competing individual and societal interests "to determine what will promote the most good or lead to the most desirable consequences."⁴⁶ Upon reflection, citizens must realize that the greatest advantages and highest good can necessarily be had within a community.⁴⁷ In effect, the morality of the law is derived from weighing the costs of obedience to disobedience; the law, and consequently obedience to the law, is morally right when it serves the needs of the greatest number of people.⁴⁸

45. David A.J. Richards, *Conscience, Human Rights, and the Anarchist Challenge to the Obligation to Obey the Law*, 18 GA. L. REV. 771, 784 (1984). As Raz explains:

The more just and valuable the law is . . . the more reason one has to conform to it, and the less to obey it. Since it is just, those considerations which establish its justice should be one's reasons for conforming with it, i.e., for acting as it requires. But in acting for these reasons one would not be obeying the law, one would not be conforming because that is what the law requires. Rather one would be acting on the doctrine of justice to which the law itself conforms.

Raz, *supra* note 40, at 141.

46. See GREENAWALT, *supra* note 26.

47. See, e.g., Hume, *supra* note 33, at 367.

Our primary instincts lead us either to indulge ourselves in unlimited freedom, or to seek dominion over others; and *it is reflection only* which engages us to sacrifice such strong passions to the interest of peace and public order. A small degree of experience and observation suffices to teach us that society cannot possibly be maintained without the authority of magistrates, and that this authority must soon fall into contempt where exact obedience is not paid to it. The observation of these general and obvious interests is the source of all allegiance and of that moral obligation which we attribute to it.

Id. (emphasis added).

48. See Kent Greenawalt, *Promise, Benefit, and Need: Ties that Bind Us to the Law*, 18 GA. L. REV. 727, 744 (1984).

Utilitarians analyze obedience from two diverging viewpoints. Act-utilitarians focus on the individual act: "[W]ill obedience or disobedience on this particular occasion be more likely to produce desirable consequences?"⁴⁹ Act-utilitarians do not place moral weight on the fact that a law was obeyed but rather on the consequence of the act and its overall good to society. On the other hand, rule-utilitarians hold that "an act is morally right if it can be justified by a moral rule that would have desirable consequences if followed. The person making a choice first considers desirable moral rules and then determines which act the appropriate rule indicates."⁵⁰

The utilitarian approach fails in many ways to explain why citizens have a moral obligation to obey the law. First, it is too broad and fails to "capture the strongly held reflective moral attitude that good laws have a moral claim upon us that goes beyond the negative consequences of disobedience."⁵¹ Second, weighing the consequences of our acts to determine their future utility is impractical and burdensome. Finally, placing the public's welfare as the primary objective is contrary to human nature which places the interests of self, family, and loved ones above the interest of the state.⁵² The latter argument does not say that utilitarianism is not a viable method for determining what is moral, rather it shows that even if utilitarianism indicates what is moral, people will act in a self-interested amoral manner.

Brandt proposes that there is a general prima facie duty to obey the law because, unless individuals are convinced that they have such a duty, widespread, indiscriminate disobedience will threaten life and property.⁵³ But Brandt assumes that individuals have no prior moral duty to refrain from acts which endanger others. Most people refrain from murder, rape, and theft because they believe these acts are morally wrong.⁵⁴ Moreover, those who refrain from such acts only because they are against the law are more likely motivated by fear of pun-

49. *Id.* at 745.

50. *Id.* at 745-46.

51. *Id.* at 749.

52. *Id.* at 749-53.

53. Richard B. Brandt, *Toward a Credible Utilitarianism*, in *MORALITY AND THE LANGUAGE OF CONDUCT* 107 (Hector-Neri Casteñeda & George Nakhnikian eds., 1963).

54. Smith, *supra* note 25.

ishment than by any perceived moral obligation to obey the law.

Brandt writes, "it is quite clear that there is a *prima facie* obligation to do some things that would not have been had not the law prescribed them: for example, driving on the right-hand side of the road or reporting one's income to the government."⁵⁵ This misses the point. Certainly, there is a legal obligation to obey the law, to drive on the right side of the road and to report one's income—not to mention the legal obligation to refrain from jaywalking and to pay parking meters. But to "prove" a moral obligation to obey by showing that there is a legal obligation begs the question.⁵⁶ Brandt never shows why there is a moral obligation to obey rather than a more basic obligation to promote utility.

B. *The Duty to Obey Unjust Laws*

If citizens do not have an absolute or *prima facie* moral obligation to obey just laws, it follows that their duty to obey unjust laws is even less obligatory.⁵⁷ However, democratic states enact laws which often prove to be unjust to some citizens within the community and these laws are nevertheless obeyed. The question of whether this obedience is part of a greater moral duty owed to the government, to the promotion of social utility, to fair play, or to a just society has spawned a

55. Richard C. Brandt, *Utility and the Obligation to Obey the Law*, in LAW AND PHILOSOPHY, *supra* note 22, at 43, 50.

56. For diverging views on utilitarian doctrine see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) and Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

57. Bertrand Russell argued that such unjust laws are not worthy of our obedience even in a democratic society. He stated:

There is one very large class of cases in which the law does not have the merit of being impartial This is when one of the disputants is the state. The state makes the laws and, unless there is a very vigilant public opinion in defence of justifiable liberties, the state will make the law such as suits its own convenience, which may not be what is for the public good.

Bertrand Russell, *A Matter of Life*, partially reprinted in THE BORZOI COLLEGE READER 340 (Charles Muscatine & Marlene Griffith eds., 1966).

Russell advocates disobedience as a form of protest against the state's enactment of self-beneficial, morally unsound laws because of a competing interest that does carry moral obligations. Russell provides the example of a citizen's right to disobey the law to protest against the buildup of nuclear arms. BERTRAND RUSSELL, WAR CRIMES IN VIET NAM 99-100 (1967).

considerable amount of controversy. Perhaps the answer lies somewhere in the middle; that is, a citizen's obedience exemplifies the inherent power of a just government to demand obedience from its citizens.

Legal positivists treat the validity of law and the morality of law as completely separate and advocate, as Socrates did, obedience to even unjust law. "All valid law is enacted law. So-called laws of nature may be standards for distinguishing good from bad law, but law is law, whether good or bad. It is the pedigree of a law (where it comes from) rather than its content (what it commands) that determines its validity."⁵⁸ The positivist doctrine also contends that valid law regardless of its content "deserves our respect and general fidelity. Even if valid law is bad law, we have some obligation to obey it simply because it is law."⁵⁹

Positivists advocate obedience based on the power given to the government to enact laws. If laws are enacted in accord with the rules set by the legislative body, then a law validly enacted demands our obedience. However, this argument goes too far in claiming citizens' obedience. If validly enacted legislation openly advocates the subjugation of a particular group's human rights, it has no moral or legal claim on our obedience.

Utilitarian proponents argue that if obedience to an unjust law maximizes overall human welfare, then citizens have a moral obligation to obey. If the law is unjust for a few, but beneficial for the majority, a citizen has an obligation to obey because the utility of obedience outweighs the individual benefits gained from disobedience.⁶⁰ The moral weight of obedience comes from weighing these consequences.

As addressed earlier, however, weighing the consequences of obedience or disobedience is impractical and ineffective since it is burdensome to weigh each individual act and often the consequences do not really affect anyone (e.g., speeding at night on a long, straight stretch of deserted road). Moreover, when it comes to obeying a law which is unjust to an individual but just to the majority, the individual will generally seek to

58. Feinberg, *supra* note 25, at 123 (explaining the divergent reasoning between natural law and positivist theorists).

59. *Id.*

60. See Brandt, *supra* note 55, at 53-55; Sidney Hook, *Law, Justice, and Obedience*, in *LAW AND PHILOSOPHY*, 56, 59-60 (Sidney Hook ed., 1964).

promote the welfare of herself and her loved ones over the general welfare of society. This underscores the schizophrenia associated with tax avoidance. The selfishness of tax avoidance is promoted, even admired, despite the fact that reduction of tax liability harms others.

Theorists who advocate obedience to just institutions would claim that if the overall governing body promotes equitable treatment, citizens have a moral obligation to obey even unjust laws. Rawls, for example, states that citizens would owe such a duty if the following two principles were upheld:

First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.

Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.⁶¹

When particular legislation fails to uphold either of these principles then a citizen's moral obligation to obey that law ends.⁶² However, the enactment of unjust laws is sometimes inevitable even when these two conditions are met. According to Rawls:

In practice, we must usually choose between several unjust, or second best, arrangements; and then we look to nonideal theory to find the least unjust scheme. Sometimes this scheme will include measures and policies that a perfectly just system would reject. Two wrongs can make a right in the sense that the best available arrangement may contain a balance of imperfections, an adjustment of compensating injustices.⁶³

61. RAWLS, *supra* note 37, at 60.

62. When the justice of the system is in question, Rawls maintains that a citizen should weigh the following considerations before deciding to obey or disobey: (1) the justness of the constitution and the possibility for reversal; (2) the depth of the injustice; (3) the intent of the majority who enacted the unjust law and the possibility of future unjust legislation; and (4) the political sociology of the situation and whether repeal could be hoped for. When these considerations are found to be minimal, then a citizen loses the obligation to obey the law because the system has failed to remain just. Rawls, *supra* note 22, at 15.

63. RAWLS, *supra* note 37, at 279. Taxpayers, however, must be wary of rejecting what they believe to be unjust arrangements. According to Rawls, conscientious disobedience of tax laws is inappropriate because reasonable minds may differ: it is never clear when such laws are unjust. *Id.* at 372. Konvitz and Thoreau consider tax laws in the context of other social institutions and permit conscientious refusal of tax assessments to protest other state actions. Milton R. Konvitz,

When it becomes necessary to enact unjust legislation, the moral obligation to obey derives from the duty to perpetuate the just institution notwithstanding the unjust law. However, it is questionable whether such a duty would be based on moral or legal obligations. It seems clear that when citizens are aware of the unjust nature of the law, if and when they obey it they do so more out of a sense of legal duty to maintain the system rather than from a sense of moral constraint.

In fact, democratically enacted legislation often fails to meet Rawls' second criteria since social and economic inequalities are not distributed equitably.⁶⁴ Laws are often enacted which favor governmental rights over individual rights and promote the welfare of the economically, socially, and politically advantaged over those who do not hold such power. Under these circumstances, some citizens may feel morally justified in disobedience.⁶⁵

Disobedience of an unjust law within an over-arching just political system is considered by many theorists to be a citizen's

Civil Disobedience and the Duty of Fair Play, in LAW AND PHILOSOPHY, 19, 23 (Sidney Hook ed., 1964); HENRY D. THOREAU, *Civil Disobedience*, in WALDEN AND CIVIL DISOBEDIENCE 235, 242 (Sherman Paul ed., 1960).

64. For example, in *Nordlinger* the Supreme Court acknowledged there may be legitimate and rational policy reasons to deny one taxpayer a tax-connected benefit in favor of another taxpayer, including "local neighborhood preservation, continuity, and stability." *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2333 (1992) (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)). The Court recognized, in analyzing California's scheme of property taxation that explicitly favors long-time homeowners, that taxes may reflect the fact that the state finds one taxpayer's expectations are "more deserving of protection" than another's. *Id.*

Both the *Nordlinger* dissent and majority explicitly conceded that this system of taxation is discriminatory and unfair. Justice Stevens, in his dissent, referred to California long-time homeowners as "Squires" and said such tax law creates "a privilege of a medieval character: Two families with equal needs and equal resources are treated differently solely because of their different heritage." *Id.* at 2342 (Stevens, J., dissenting). But the majority allowed the taxation to go forward even though it characterized the tax as a "grand experiment [that] appears to vest benefits in a broad, powerful, and entrenched segment of society, and . . . ordinary democratic processes may be unlikely to prompt its reconsideration or repeal." *Id.* at 2336. It seems that when it comes to taxes, the Court will not "second-guess[] state tax officials." *Id.* at 2339 (Thomas, J., concurring).

65. For example, California's infamous Proposition 13 tax revolt was born of supposed inequities in the tax system. Bill Wallace, *Prop. 13 Was Born of Anti-Tax Anger, Homeowner's Hit by Rise in Property Values*, S.F. CHRON., June 19, 1992, at A4. The recent Supreme Court challenge to Proposition 13 is similarly based on perceptions that the tax is inequitably applied. Carlyle W. Hall, Jr. & Ann E. Carlson, *California Commentary: The Supreme Court Decision Upholding Proposition 13 Makes Reform of its Inequities Even More of a Priority*, L.A. TIMES, June 19, 1992, at B7 (discussing need to bring the action culminating in *Nordlinger*).

moral right. However, it is also true that the state must have the authority to punish this form of conscientious disobedience since any disobedience is a threat to the stability of the system.⁶⁶ By accepting punishment, the conscientious citizen can disobey an unjust law without undermining the state's authority.

The soldier commanded to fight an unjust war and the citizen commanded to support that war by paying taxes can refuse to obey in order to do right.⁶⁷ This is so even if the laws governing military service and taxes are, themselves, reasonably just. Thus, according to Thoreau: "It is not desirable to cultivate a respect for the law, so much as for the right."⁶⁸ But when a citizen exercises a right which undermines the power of the state to govern, the state will require obedience or sanction the protestor without explicitly recognizing the moral right to disobey. Further, when citizens' disobedience of the law brings rights into conflict (e.g., freedom of speech and assembly versus private property rights) the state maintains the authority to determine which rights take precedence, separate from any consideration of moral rights and obligations.

C. *The Duty to Obey Tax Laws*

The power of the state to decide and to describe those exactions its citizens must pay is among the most fundamental and wide-reaching powers of government.⁶⁹ It is axiomatic that any government needs the financial support of its citizens, whether voluntarily or involuntarily obtained, to function efficiently or even to function at all.⁷⁰ Given the vital role of taxes to the perpetuation of government, Cicero aptly stated that

66. Konvitz, *supra* note 63, at 27. Konvitz explains this principle by observing: "[T]he individual conscience must have the last word: If that last word means civil disobedience, which entails the penalty of the law, then the penalty must be imposed, and in this way both conscience and law are vindicated." *Id.*

67. THOREAU, *supra* note 63, at 241-42.

68. *Id.* at 236.

69. See WEBBER & WILDAVSKY, *supra* note 8, at 38-147 (outlining ancient systems of taxation); Richard Epstein, *Taxation in a Lockean World*, 4 J. SOC. PHIL. & POL'Y 49, 149 (1986) ("One constant refrain of political and constitutional history treats taxation as an inherent and indispensable power of the sovereign.").

The United States Constitution expressly gives the Congress the "power to lay and collect taxes, duties, imposts and excises." U.S. CONST. art I, § 8, cl. 1.

70. *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 129 (1868) ("The prompt collection of the revenue, and its faithful application, is one of the most vital duties of government.").

"[t]axes are the sinews of the state."⁷¹ Indeed it has been observed that a "world without taxation is a world without government."⁷² The Supreme Court from the time of *McCulloch v. Maryland* to the present has affirmed this basic governmental power.⁷³ Its most recent pronouncement in *Barclays Bank PLC v. Franchise Tax Board*⁷⁴ is consistent with this idea. In *Barclays*, the Court recognized that along with the broad power to tax comes the equally wide latitude to prevent an affront to this power and to "guard against" taxpayer manipulations of tax laws that almost avoid taxes altogether. The Court acknowledged that if upholding the state's power to tax meant that some taxpayers were at risk for or would be subject to

71. BERNARD WOLFMAN & JAMES P. HOLDEN, *ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE* vii (1981) (quote by Marcus Tullius Cicero). Cicero believed nothing was more noble than the law of the State. Laws were "originally made for the security of the people, the preservation of the State, and the peace and happiness of human life." CAIRNS, *supra* note 21, at 142. Taxes helped to achieve that level of security. Holmes and Brandeis expressed a similar thought: "Taxes are what we pay for civilized society . . ." *Compañía General de Tabacos de Filipinas v. Collector*, 275 U.S. 87, 100 (1927) (Holmes & Brandeis, JJ., dissenting). The United States Supreme Court in 1934 also declared that "taxes are the life-blood of government." *Bull v. United States*, 295 U.S. 247, 259 (1934). A more recently expressed gloss on the matter is that "[o]n the budgetary base . . . rest the political pillars of society." WEBBER & WILDAVSKY, *supra* note 8, at 31.

72. Epstein, *supra* note 69, at 49. Epstein goes on to discuss the dilemma presented by the apparent fact that taxation involves institutional coercion. *Id.*

73. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436-37 (1819), the Supreme Court held that state taxes on Bank of United States state branch operations were unconstitutional. Chief Justice Marshall's celebrated *McCulloch* dictum about state taxation and sovereign immunity implicitly recognized the fundamental nature of taxation:

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

Id. at 431.

The basic nature of the power to tax has been widely recognized by the Court throughout its history. *See, e.g.,* *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (deferential taxation power is a "powerful weapon against the taxpayer selected"); *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874) ("The power to tax is . . . the most pervading of all the powers of government . . ."); *Society for Sav. v. Coite*, 73 U.S. (6 Wall.) 594, 606 (1867) (taxation power "resides in the government as a part of itself" and is "never presumed to be relinquished"); *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 563 (1830) (the power to tax "operates on all the persons and property belonging to the body politic" and "has its foundation in society itself").

74. 114 S. Ct. 2268 (1994).

"multiple taxation," so be it.⁷⁵ The taxpayer is sacrificed for the good of "state autonomy."⁷⁶

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.

1. *Social contract theory and taxes*

Consent theorists argue that as part of our promise to obey the laws of the state, we have a moral duty to obey the tax laws. In exchange for supplying the state with tax dollars, a citizen receives the benefits of peace and security made possible by the maintenance of a well-functioning political body. These benefits are available because almost everyone obeys the law. Locke and others regarded this exchange as necessary for the welfare of both the state and its citizens. In his hypothetical order, Locke presumed that citizens would voluntarily enter into a pact to obey the government because "the use of the sovereign power leaves him better off than he was with his natural endowments."⁷⁷ Voluntary compliance, however, has its limits. Many citizens would not voluntarily consent to the income tax set by the government or to the use of the dollars once collected.

"Taxation is the power to coerce other individuals to surrender their property *without* their consent."⁷⁸ Epstein has explored the apparent paradox of taxation based on Lockean political theory. Lockean theory rests on the proposition that liberty is good and coercion is evil.⁷⁹ Epstein explains the tension between liberty and coercive taxation by claiming that since taxation is necessary for government to function, and government is necessary for an individual's well being, government must possess an inherent but limited power to tax.⁸⁰

75. *Id.* at 2281.

76. *Id.* at 2286.

77. Epstein, *supra* note 69, at 53.

78. *Id.*; see also McGee, *supra* note 14, at 411.

79. Epstein, *supra* note 69, at 49.

80. *Id.* at 50. Epstein argues that Locke's theory is unworkable today because

The security and benefits provided by the government through tax collection are made possible by most citizens' compliance to the law.

However, under the present complex tax structure it is impossible to levy taxes in proportion to the benefits received by each citizen.⁸¹ Persons in the middle tax brackets pay a large percentage of their income into the tax coffers but receive fewer tax incentives than those in both the higher and lower income brackets. Moreover, the average citizen attempting to figure out the tax code encounters laws so complex that only a relatively small number of experts can understand them. Thus, only those who can afford the experts are able to take advantage of the loopholes that the laws may allow. The average taxpayer has not consented to such a bargain with the government and thus cannot break a moral obligation.

2. *Fairness, justice, reciprocity and taxes*

Perhaps a stronger argument could be made that one's duty to pay taxes arises out of a sense of a duty to deal justly and fairly with one's neighbor. The moral power of this assertion is based on the belief that tax evasion "does exploit unfairly the law-abidingness of others."⁸² In regard to paying personal income tax, the social consequences of one person not paying are unnoticeable to society but have a noticeable private gain to the individual. Rawls, however, claimed that the duty of fair play and the obligation to uphold just institutions bind us to pay the tax since we have accepted the benefits of the fiscal

of the unequal treatment of tax laws. When special tax regulations are passed that benefit one group over another, all taxpayers (or citizens, etc.) are not allowed to share pro rata in social gain. His solution is to simplify the tax scheme by implementing flat rates and eliminating special exemptions and subsidies. At the same time, government must restrict the expenditure side of the budget and restrict direct regulation of the economy. *Id.* at 53-54, 67-70.

Similarly, McGee notes two points overlooked by those who argue that coercion is needed to raise enough revenue in order for the government to function properly because voluntary tax payments would be insufficient: One, that "[f]airness, equity and property rights are totally absent from this line of reasoning;" and two, that "one must still ask 'how much is necessary?' If the goal of a free society is to minimize coercion and allow maximum room for individual choice, then government expenditures must be kept to a minimum at minimize the amount of coercion needed to raise funds. Thus, the role of the government must be minimized." McGee, *supra* note 14, at 431.

81. Epstein, *supra* note 69, at 49.

82. Feinberg, *supra* note 25, at 129.

system to which the tax belongs.⁸³ Theoretically, this is so because the system of cooperation consistently followed by everyone else produces advantages generally enjoyed by all. As such, there is no reason to exempt any one individual since that would unfairly exploit the law-abidingness of others.⁸⁴

Theories of fair play and justice are supportable if benefits and liberties are equitably distributed.⁸⁵ Tax laws are, however, discriminatory in nature and those who generally tend to benefit from the laws have access to tax experts who are not available to the majority. A system which is not working to the advantage of all citizens does not create a moral obligation since it is not promoting the maintenance of a just institution.⁸⁶

Moreover, a discharge of obligation does not necessarily require compliance with tax laws. Individuals might discharge any duty of contribution by assisting directly in the provision of needed goods and services. Only rarely would an individual, for example, be obligated to contribute tax dollars to national defense.⁸⁷ Indeed, why should tax dollars be used for government expenditures that do not promote the public good? In a complex democratic society it is impossible to pinpoint where tax monies are being spent, much less whether the revenue will promote equitable and social advantages for all.

3. *Utilitarianism and taxes*

The payment of taxes could be found morally obligatory if tax dollars work towards promoting the greatest good for the greatest number. Non-payment of taxes seems to produce a net

83. Rawls, *supra* note 22, at 15-16.

84. My colleague, William K.S. Wang, notes that this is related to the "commons" dilemma in which some overuse a free good or service available to all. He refers to Richard Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 978 (1985) and *MANAGING THE COMMONS* (Garrett Hardin & John Baden eds., 1977).

85. See *supra* part II.A-B.

86. See Crowe, *supra* note 3, at 23.

87. WOLFF, *supra* note 23, at 80. Wolff writes:

The army itself could be run on the basis of voluntary commitments and submission to orders. To be sure, the day might arrive when there were not enough volunteers to protect the freedom and security of the society. But if that were the case, then it would clearly be illegitimate to command the citizens to fight. Why should a nation continue to exist if its populace does not wish to defend it?

Id.

loss since it reduces the amount of money available for public expenditures and presumably increases the burden on other taxpayers. But the existence and extent of the loss depend on how the money is used. The taxpayer benefits from underpayment if the value of the use of the money owed exceeds the present value of the cost of payment later (including interest and penalties) considering the probability of detection.⁸⁸ Additionally, if unpaid taxes are used by the non-payer in a way that benefits the public either directly or indirectly, there may well be a net gain to society. Thus, tax evasion produces a net loss for society only if government spending, as funded by taxation, is the most efficient and economic use for the money.⁸⁹

If we are to judge our moral obligations by the consequences of our payment or lack of payment of tax dollars (as the act-utilitarians do) then it is far from clear when payment would be morally obligatory and when not. In a complex society it is impossible to trace the government's use of those tax dollars. Tax money that contributes to the buildup of nuclear weapons is just one example where taxpayers may believe that the consequence of paying tax dollars is immoral since there is a legitimate concern as to whether this promotes the general welfare of society. Tax payments based on utility clearly do not implicate moral obligations under all circumstances.

4. *Holmesian obligation*

The "duty" to obey tax laws seems particularly amenable to Holmes' analysis. Holmes explains the operation of law not in terms of rights and duties but in terms of power: the government has the power to enforce laws and citizens must obey or suffer the penalties.⁹⁰ At the same time, the government's

88. The probability of detection figures heavily in the tax evader's calculations. This idea is demonstrated easily in areas in which detection is unlikely. see Abt Assocs. Inc., *Unreported Taxable Income from Selected Illegal Activities* 62, 108, 147 (1984) (estimating that the unreported taxable income in 1982 related to drugs was \$22.15 billion, to gambling was \$2.39 billion and to prostitution was \$11.58 billion); Commission on Taxpayer Compliance, ABA, *Report and Recommendations on Taxpayer Compliance*, 41 TAX LAW. 329, 342 (1987) (opportunity to underreport income without detection a major factor affecting compliance); Steven E. Crane & Farrokh Nourzad, *Federal Income Tax Evasion*, in EXAMINATION OF BASIC WEAKNESSES OF INCOME AS THE MAJOR FEDERAL TAX BASE 140, 145 (Richard W. Lindholm ed., 1986). Here again is the coercive nature of taxing.

89. This proposition is defensible only so far as government provides public goods and services that ultimately benefit society.

90. Holmes defines law as "a statement of the circumstances in which the

power has limits. If a statute is so unpopular as to encourage widespread disobedience, government power to enforce the statute is diminished or undone.⁹¹ The law becomes "empty words," not through its immorality but through its perceived unpopularity which incites disobedience interfering with its enforcement. A tax rate of 90% would be empty words whether or not it was wrong because taxpayer disobedience would render it unenforceable. Thus, a tax rate which is fair could be said to implicate moral obligations whereas an obviously unfair tax rate would not.⁹² Many tax rates, however, fall in the middle, making taxpayers feel they are being taxed too much but still feel they should pay some. Taxpayers ease this burden by almost instinctual minimization efforts, not by disobedience.⁹³

To be effective, the law must, to some extent, respect the "instincts" of its subjects.⁹⁴ Perhaps the deepest human instinct is "a justifiable self-preference." Thus, the government accepts taxpayers' self-interested attempts to minimize tax

public force will be brought to bear upon men through the courts" Letter from Oliver Wendell Holmes to Frederick Pollock (January 19, 1928), in *THE ESSENTIAL HOLMES* 179 (Richard A. Posner ed., 1992). Thus, it is the fear of punishment, the power of the courts to sanction behavior, that spurs many people to obey the law.

91. "I once heard the late Professor Agassiz say that a German population would rise if you added two cents to the price of a glass of beer. A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced." Oliver W. Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 460 (1897). McGee takes the position that simply because a majority of taxpayers, approaching one hundred percent, thinks that something is just does not make it just. The vast majority of people in the pre-Civil War southern United States thought that slavery was just, and even in keeping with God's law. Even many slaves did not think slavery was unjust. What they thought, however, has nothing to do with the justice of the matter. Justice does not depend on opinion or on a majority vote. McGee, *supra* note 14, at 416 n.32.

92. As Plato observed, "Where there is an income tax, the just man will pay more, and the unjust less." WOLFMAN & HOLDEN, *supra* note 71, at vii (quoting Plato).

93. Indeed, the Court recently recognized and sanctioned this taxpayer instinct to ease the impact of tax burdens in *Ratzlaf v. United States*, 114 S. Ct. 655 (1994). The *Ratzlaf* majority's example of taxpayer maneuvers to avoid IRS audits or gift taxes to demonstrate legitimate tax avoidance lends credence to the suggestion that structuring transactions in order to avoid certain tax consequences is virtually an American tradition and usually is not considered criminal. See Stanley S. Arkin, "Ratzlaf" and the Meaning of Willfulness, *N.Y.L.J.*, Feb. 10, 1994, at 6.

94. For example the law recognizes property rights arising in adverse possession because "[a] thing which you have enjoyed and used as your own for a long time, whether property or opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it." Holmes, *supra* note 91, at 477.

liability: the Internal Revenue Service does not demand that individuals pay all their income as taxes or that individuals structure their affairs so as to maximize tax liability. However, "[i]f a man is on a plank in the deep sea which will only float one, and a stranger lays hold of it, he will thrust him off if he can. When the state finds itself in a similar position, it does the same thing."⁹⁵ Despite the government's ambivalence toward tax avoidance, if its authority or very existence is threatened by overzealous minimization efforts, it figuratively thrusts the taxpayer off the plank. While legal tax avoidance and illegal tax evasion are sometimes morally indistinguishable, the government draws the line to protect itself while respecting individuals' instincts for self preservation. Morality then plays little, if any, role in tax evasion; rather the driving force is the basic economic behavior of maximizing benefits.⁹⁶

Holmes' ideas suggest that, at least absent independently wrong conduct, tax evasion and enforcement do not implicate moral issues. Rather, they reflect economic choices by individuals to risk penalties and by government to enforce penalties while accommodating both individuals' and the state's instincts for self-preservation. As long as taxpayers otherwise intend to obey the law, tax evasion is a morally neutral economic proposition.

III. TAX MORALITY AND TAX COLLECTION

The relevance of morality to tax collection is more than an academic exercise inasmuch as morality figures prominently in the government's effort to curtail tax avoidance. When a taxpayer perceives that disobedience is morally wrong, she is more likely to comply with the tax laws. Compliance is the most effective method for insuring adequate tax collection and is less

95. HOLMES, *supra* note 9, at 44.

96. In support of this proposition, it has been said that "it is embedded in our culture, particularly as regards financial and tax-related regulations, that if one can arrange one's affairs so as not to implicate a rule that one wishes to avoid, that one has done no moral wrong." David Spears & Linda Imes, *Structuring Case Tests Meaning of 'Willfully'*, N.Y.L.J., Dec. 23, 1993, 2-4. (quoting Brief for Defendant-petitioner at 27, *Ratzlaf*, 114 S. Ct. at 655); see also Leo P. Martinez, *Federal Tax Amnesty: Crime and Punishment Revisited*, 10 VA. TAX REV. 535, 540, 578 (1991) (taxpayers are usually economically motivated to evade their tax obligations, and many "engage in a sophisticated cost-benefit analysis and conclude that the monetary rewards of avoiding tax obligations outweigh the potential cost of detection").

costly than any deterrence method.⁹⁷ Moral obligations, however, have not been found to be the primary reason that citizens pay their taxes; the power of the government and the threat of sanctions are much more effective in producing compliance.⁹⁸ As much as the government would like to instill a sense of moral obligation to fully obey the tax laws, many citizens do not associate morality with taxes and often cheat on their tax payments.⁹⁹ Because of the ongoing trend to avoid the payment of taxes, two important considerations must be addressed regarding the enforcement of tax laws: first the intersection of morality and punishment and second the intersection of morality and criminality.

A. Tax Morality and Punishment

On the one hand, perceptions that the present system of taxation is fundamentally unfair are cited as a root cause of avoidance of tax obligations.¹⁰⁰ On the other hand, lawmakers emphasize that fair distribution of the tax burden is a central concern in the enactment of tax legislation.¹⁰¹ The perceptions of unfairness, however, overshadow any moral obligations taxpayers may feel they owe to the government and may perpetuate noncompliance with tax laws. The competing percep-

97. Eugene Bardach, *Moral Suasion and Taxpayer Compliance*, 11 LAW & POL'Y 49 (1989). Bardach explains that moral rules are economic means of securing the benefits of cooperative action. Compliance based on morality would "(1) supplement the reach of legal enforcement, and (2) hold down the various costs—in auditors, private record-keeping, and intrusions on privacy—that legal enforcement machinery imposes on society." *Id.* at 54.

98. See *id.* at 62; Walter T. Henderson, Comment, *Criminal Liability Under the Internal Revenue Code: A Proposal to Make the "Voluntary" Compliance System a Little Less "Voluntary"*, 140 U. PA. L. REV. 1429 (1992). But see James P.F. Gordon, *Individual Morality and Reputation Costs as Deterrents to Tax Evasion*, 33 EUR. ECON. REV. 797, 798 (1989) (arguing that tax evasion might "induce anxiety, guilt, or a reduction of self-image").

99. Bardach, *supra* note 97, at 49.

100. See GERALD CARSON, *THE GOLDEN EGG* 13-14 (1977); Walter J. Bium & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952); Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259 (1983); Stanley Surrey, *Taxes Are a Moral Issue*, SAT. REV., Oct. 21, 1972, at 52.

101. See, e.g., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, H.R. CONF. REP. NO. 841, 99th Cong., 2d Sess. 7 (1986) (primary objective is to ensure that individuals with similar income pay similar amounts of tax); SENATE FINANCE COMM. REPORT ON THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, S. REP. NO. 494, 97th Cong., 2d Sess. 97 (1982) (Act is designed to improve tax equity).

tions of fairness in the tax laws are an important starting point in analyzing the punishment of tax violators.

Fairness remains fundamental to the formulation and administration of federal tax policy.¹⁰² Indeed, a postulate of any system of taxation is that the burden of paying the tax should be borne equally, or that the burden should at least be levied in a consistent and rational fashion.¹⁰³

The tax system in the United States is a major vehicle of social and economic policy.¹⁰⁴ The tax system exists to raise revenue and to ensure stable economic growth while maintaining vertical equity (distributing the incidence of tax fairly by income classes) and horizontal equity (treating those in similar economic circumstances equally).¹⁰⁵ Allowing taxpayers to es-

102. The primacy of both fairness and utility is underscored by a recent Internal Revenue Service study of reform of the penalty system. EXECUTIVE TASK FORCE, INTERNAL REVENUE SERVICE, REPORT ON CIVIL TAX PENALTIES, ch. III, at 3-4 (1989). The IRS labels the two components fairness and effectiveness, but the thrust of the effectiveness study is essentially utilitarian. Professor, now Judge, Sneed theorized that the two dominant criteria of federal tax policy are equity and practicality. Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567, 601 (1965).

103. See *Dane v. Jackson*, 256 U.S. 589, 598-99 (1920); *Tappan v. Merchants' Nat'l Bank*, 86 U.S. (19 Wall.) 490, 504 (1873); *Morton Salt Co. v. City of S. Hutchinson*, 159 F.2d 897, 901 (10th Cir. 1947); NEIL H. JACOBY, GUIDELINES OF INCOME TAX REFORM FOR THE 1960's, 1 TAX REVISION COMPENDIUM, HOUSE COMM. ON WAYS AND MEANS, 86th Cong., 1st Sess. 157, 158-60 (Comm. Print 1959); Sneed, *supra* note 102, at 567.

The Constitution prohibits direct taxes unless such taxes are levied in proportion to the populations of the states. U.S. CONST. art. I, § 9, cl. 4. The second United States federal income tax was held unconstitutional because, as a direct tax, it was not levied in proportion to the states' populations. *Pollack v. Farmers Loan & Trust Co.*, 157 U.S. 429 (1895), *on reh'g* 158 U.S. 601 (1895). The constitutional prohibition against disproportional direct taxes apparently had its genesis in the concern that the levy of taxes be fair and consistent. See *Pollack*, 157 U.S. at 553-586, 158 U.S. at 617-637. Of course, the Sixteenth Amendment overrules the result in *Pollack* by expressly providing for an income tax despite the Section 9 prohibition. *Pennsylvania Mut. Indem. Co. v. Commissioner*, 277 F.2d 16, 19-20 (3d Cir. 1960).

The Constitution requires that "all duties, impost and excises shall be uniform throughout the United States . . ." U.S. CONST. art. I, § 8, cl. 1. Literally absent from this uniformity requirement is the power to lay and collect taxes other than the indicated duties, imposts and excises. Despite the possibility that this apparent omission suggests inequity or unfairness, the Supreme Court has held that this omission is a recognition that as long as taxes are geographically uniform they may apply to particular individuals in a non-uniform manner. *Knowlton v. Moore*, 178 U.S. 41, 83-109 (1900); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 245 (1977); PARKINSON, *supra* note 8, at 45-46.

104. JOSEPH A. PECHMAN, FEDERAL TAX POLICY 5 (5th ed. 1987); see also Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

105. PECHMAN, *supra* note 104, at 2; see J.F. WITTE, THE POLITICS AND DEVEL-

cape liability for tax evasion would seem to do little to advance equity.¹⁰⁶

However, if tax evaders commit no moral wrong, one might suppose that punishment is inappropriate. It should suffice that the violator pay the tax owed, perhaps with interest and the government's enforcement costs. But Holmes' whole point is that moral duties do not necessarily coincide with legal ones, and legal rules need no moral justification. Thus, the law may punish individuals who commit no moral wrong if for no other reason than to avoid the social ills of private retribution.¹⁰⁷

A primary reason for enacting fair tax legislation is that it promotes in the taxpayer a *perception* that obedience of the tax laws, as well as punishment for violation of the tax laws, is morally grounded. This perception facilitates tax collection.¹⁰⁸ Thus, it follows that where there is perceived inconsistency or unfairness in the system, the public's reaction is strongly negative.¹⁰⁹ Fairness is essential to the system because it increases taxpayer morale and enhances voluntary compliance.¹¹⁰ This is shown in the system of criminal and civil penalties—the primary method of enforcement of the tax laws. Tax penalties are said to establish the fairness of the tax system by giving the noncompliant taxpayer what she deserves.¹¹¹ To the ex-

OPMENT OF THE FEDERAL INCOME TAX 31 (1985).

106. See John Stuart Mill, *Utilitarianism*, in JEREMY BENTHAM & JOHN STUART MILL, *THE UTILITARIANS* 446, 448-470 (1961) ("The precept of returning good for evil has never been regarded as a case of the fulfillment of justice . . .").

107. HOLMES, *supra* note 9, at 41-42.

108. Chief Justice Marshall was of the opinion that the power to tax required popular confidence that it would not be abused. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

109. Edmund Burke once noted that "[t]o tax and to please, no more than to love and be wise, is not given to men." Burke quoted in WEBBER & WILDAVSKY, *supra* note 8, at 1.

110. See Jonathon Skinner & Joel Slemrod, *An Economic Perspective on Tax Evasion*, 38 NAT'L TAX J. 345, 348-349 (1985); EXECUTIVE TASK FORCE, *supra* note 102, ch. II, at 2-3 (1989).

Even when the system is fair, the power to tax inevitably results in resistance. George Guttman, *IRS Tax Amnesty*, 22 TAX NOTES 1361 (March 26, 1984). This resistance has led some to suggest that "[a]n across the board attack on the budgetary base is equivalent to revolution." WEBBER & WILDAVSKY, *supra* note 8, at 31. Notwithstanding (or perhaps by reason of) the revolutionary aspect of resistance to taxation, the United States enjoys an extensive tradition of avoiding the tax collector. FORSYTHE, *supra* note 7, at 60; Haws, *supra* note 8, at 113; PARKINSON, *supra* note 8, at 22-35. Of course, one person's perception of tax equity is another's unfairness or inconsistency. See Boris I. Bittker, *Income Tax "Loopholes" and Political Rhetoric*, 71 MICH. L. REV. 1099 (1973).

111. EXECUTIVE TASK FORCE, *supra* note 102, ch. III, at 2; MICHAEL I.

tent that this retributive component of punishment is fair, the tax laws are fair.

Blackstone's commentary on taxation also appears to support the proposition that public perception of the government's power to tax bears vitally upon the power to enforce such taxes.¹¹² A retail or consumption tax, called an excise duty, was the most economical form of levying taxes and consequently resulted in lower prices than customs taxes. But, as Blackstone explained, the "rigor and arbitrary proceedings" in the case of tax law violations caused the tax to be so extremely unpopular that mere rumor of such a tax was dismissed by pundits as an outrageous sham.¹¹³

However, when the tax was levied gradually, the public became used to and accepted it; as the tax became more expansive, it was in turn necessary to gain public approval by allowing the public to become accustomed to it and accept it.¹¹⁴ In contrast, the public embraced a tax connected to the post office with "cheerfulness, as, instead of being a burden, it is a manifest advantage to the public," because in return for their tax dollars, the public gained an efficient mail system. Taking a demonstrably utilitarian or consent theory approach to taxation, Blackstone said:

There cannot be devised a more eligible method than this of raising money upon the subject: for therein both the government and the people find mutual benefit. The government acquires a large revenue; and the people do their business with greater ease, expedition, and cheapness, than they would be able to do if no such tax (and of course no such office) existed.¹¹⁵

Holmes' take was that the government had no legitimate interest in retribution absent public outrage.¹¹⁶ The tax crimi-

SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 12.01 (2d ed. 1991).

112. According to Blackstone, municipal law is the "rule of civil conduct prescribed by the supreme power in a state . . . commanding what is right, and prohibiting what is wrong," and one of its purposes is to define and lay down these rights and wrongs of society. BLACKSTONE, *supra* note 2, at *53-55 (emphasis omitted). Thus, "in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them." *Id.* at *55.

113. *Id.* at *318-19 (citing Com. Jur., Oct. 8, 1642).

114. *Id.* at *319-20 (citing Com. Jur., Oct. 8, 1642).

115. *Id.* at *321-23.

116. Holmes wrote:

nal should be punished only if the punishment expresses the outrage of the community.¹¹⁷ This presents a unique dilemma in the tax context as the public might feel more sympathy toward the defendant than outrage, especially if the defendant is a working person of modest means.¹¹⁸ Nevertheless, punishment of tax evaders may still be justified as necessary to deter the individual and others from future evasion. Unfortunately, deterrence is more complex because conduct may be legal one day and illegal the next.¹¹⁹ Moreover, the taxpayer's motive of minimizing tax liability does not make otherwise legal conduct illegal.

The more interesting question is whether deliberate or fraudulent evasion is morally wrong. Some of Holmes' comments about tort and criminal law might suggest that there is no independently wrongful conduct which transforms tax evasion into morally wrong conduct.¹²⁰ Holmes never denies that

[I]f the wrong . . . consisted of a breach of the revenue laws, and the government had been indemnified for the loss, we should [not] feel any internal necessity that a man who had thoroughly repented of his wrong should be punished for it, except on the ground that his act was known to others. If it was known, the law would have to verify its threats in order that others might believe and tremble. But if the fact was a secret between the sovereign and the subject, the sovereign, if wholly free from passion, would undoubtedly see that punishment in such a case was wholly without justification.

HOLMES, *supra* note 9, at 46.

117. See Leslie E. John, Note, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CAL. L. REV. 2033, 2039 (1986) (punitive damages justified as expression of community outrage).

118. The public might feel outrage toward a high-income taxpayer who engages in perfectly legal avoidance schemes, especially since opportunities for tax avoidance increase with income. See, e.g., *United States v. Helmsley*, 941 F.2d 71 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1162 (1992), *aff'd*, 985 F.2d 1202 (2d Cir. 1993).

119. This overstates the case. Obviously, a large part of the tax system is designed to encourage or discourage particular kinds of conduct whether economically motivated or not.

120. Thus, "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court . . ." Holmes, *supra* note 91, at 458; BLACKSTONE, *supra* note 2, at *58 (a *mala prohibita* violation is not "intrinsically wrong" in that *mala prohibita* laws "do not make the transgression a moral offense, or sin: the only obligation in conscience is to submit to the penalty, if levied," contrary to "disobedience to the law involv[ing] in it any degree of public mischief or private injury" which constitutes "an offense against conscience"); *Cheek v. United States*, 498 U.S. 192 (1991) (sincere belief, or mistaken belief due to the complexity of the Code, that one's conduct is not illegal is not an actionable offense, whereas a belief, formed after a presumably careful and thorough study, that tax laws are unconstitutional, thus invalid, is actionable as willful tax evasion).

moral duties exist, nor does he suggest what they might be. Rather he asks that we clearly distinguish between moral and legal duties. When studying the law, he asks us "for the moment to imagine [ourselves] indifferent to other and greater things."¹²¹ Whether those other and greater things include moral duties to pay taxes, to tell the truth or to keep our promises, Holmes does not say.

B. *Tax Morality and Criminality*

The question unanswered by Holmes is answered in part by the unique standard describing the mens rea required for conviction of tax crimes.¹²² One starting point is the classic distinction between crimes *mala in se* and *mala prohibita*.¹²³ *Mala in se* crimes are immoral independent of the law (i.e., murder, rape, arson) and carry harsh criminal penalties.¹²⁴ *Mala prohibita* offenses are petty, public welfare offenses that are not intrinsically wrong and which carry lesser criminal penalties.¹²⁵ According to Blackstone, municipal laws sanction *mala prohibita* crimes, which are "[c]rimes because forbidden," and consist of "things in themselves indifferent . . . either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislature sees proper . . ."¹²⁶ The slight penalties associated with violation of *mala prohibita* crimes also justify a simple resolution system and even warrant suspension of procedural safeguards.¹²⁷ Strict liability is acceptable in

121. Holmes, *supra* note 91, at 459.

122. Civil tax fraud differs in significant part in the lower standard of proof required and in the lesser consequence of violation (primarily avoiding imprisonment). SALTZMAN, *supra* note 111, ¶¶ 7B.01[3] (standard of proof), 7B.07[1] (civil penalties).

123. JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 338 (2d ed. 1960).

124. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 245 (1979). Blackstone's formulation is similar. Natural laws and duties, and crimes *mala in se* which are "[c]rimes in themselves," carry "no additional turpitude from being declared unlawful by the inferior legislature." BLACKSTONE, *supra* note 2, at *54, *57 n.41.

125. HALL, *supra* note 123, at 339-40. Professor Hall makes the point that the gravity of criminal harm can vary either according to the effect on the victim (e.g., a battery is less serious than death) or according to moral culpability (e.g., an unintentional killing is less serious than murder). *Id.* at 216-17.

126. BLACKSTONE, *supra* note 2, at *54-55, *57 n.42; Crowe, *supra* note 3, at 98 (enacted laws are concerned with matters inherently "harmful" or "beneficial," and inherently "indifferent to the common good").

127. HALL, *supra* note 123, at 342.

such circumstances because regulation is in order, but criminal liability is not.¹²⁸

The difficulty in applying this principle to the obedience or disobedience of tax laws is that the *mala in se/mala prohibita* distinction may not be up to the task of dealing substantively with tax evasion. At the same time, conviction of tax crimes can carry substantial penalties, including imprisonment, that correlate to *mala in se* offenses.¹²⁹ This is no accident. Obedience to these *mala prohibita* laws is not achieved through reward or apparently any sense of moral duty, but rather through punishment. As Blackstone intuited, "We must therefore observe, that the main strength and force of law consists in the penalty annexed to it."¹³⁰ The lack of moral component makes conduct tending to tax evasion almost acceptable.

Blackstone would probably agree that because there is no moral component in *mala prohibita* acts, such acts are not "intrinsically wrong," and an individual may perform the act so long as she pays the penalty.¹³¹ Indeed, Blackstone asserts that

128. *Id.*; JOHANNES ANDENAE, PUNISHMENT AND DETERRENCE 156-57 (1974); see also Timothy Lynch, *The Failure of a Flawed Maxim*, THE RECORDER, April 6, 1994, at 10 (strict liability for *mala prohibita* crimes is inappropriate since knowledge and diligence defenses are then rendered irrelevant, thus "it is vitally important for the government to draw a bright line around activity that is illegal simply because the government makes it illegal. If the government communicates the scope of its laws clearly and effectively, the individuals who sit in the jury box will exercise their common sense about claims of ignorance").

129. Criminal tax evasion carries a penalty for individuals which includes a fine not more than \$100,000 and imprisonment for not longer than five years. I.R.C. § 7201 (1988). See Henderson, *supra* note 98, at 1429.

Interestingly, the government's recent attempt to distinguish a structuring statute that prohibits breaking up a single transaction to avoid a bank's reporting requirement from a tax statute may exemplify the powerful effect of our seeming acceptance of conduct tending to tax evasion. *Ratzlaf v. United States*, 114 S. Ct. 655, 657 (1994) (citing 31 U.S.C.S. § 5324). In *Ratzlaf*, the government claimed that unlike structuring, tax statutes manifest only that "Congress has merely drawn a line that one is forbidden to overstep but that one is allowed and even encouraged to come near." *Criminal Law and Procedure: Currency Transactions; Structuring Transactions to Prevent Filing of Report; Mental Element of Offense*, 62 U.S.L.W. 3365, 3367 (Nov. 30, 1993) [hereinafter *Currency Transactions*]. Moreover, the government contended, "in contrast to tax cases, this is not one in which coming near the line can be defended as socially beneficial conduct." *Id.*

130. BLACKSTONE, *supra* note 2, at *57.

131. *Id.* at *57-58; see also Crowe, *supra* note 3, at 83 ("[C]ertain laws containing a penalty do not oblige the subjects under pain of sin to anything except unresisting submission to the justly inflicted penalty.").

these prohibitory laws do not make the transgression a moral offense, or sin: the only obligation in conscience is to submit to the penalty, if levied But where disobedience to the law involves in it any degree of public mischief or private injury, there it falls within our former distinction, and is also an offense against conscience.¹³²

As such, penalties take on added importance in securing enforcement of the Internal Revenue Code.¹³³ Blackstone notes the irony of this lack of moral component within mala prohibita tax laws as he links the absence of morality to the need for unusually harsh punishment in order to enforce tax laws. For example, Blackstone explains that when a tax, and consequently, the price of an item, was perceived "too heavy," trade suffered and the tax was evaded.¹³⁴ "Recourse must

132. BLACKSTONE, *supra* note 2, at *58. The opinion of George Sharswood, a previous Blackstone editor, is that criminality of positive law violations can only be measured by their consequences; and he who saves a sum of money by evading the payment of a tax does exactly the same injury to society as he who steals so much from the treasury, and is therefore guilty of as great immorality, or as great an act of dishonesty.

Id. at *58 n.45. This assertion echoes that of St. Anthony who claimed those who "use fraud and other means to evade taxes . . . sin mortally by committing the sin of theft." Crowe, *supra* note 3, at 42 (quoting ST. ANTONIUS, SUMMA SACRAE THEOLOGIAE 63 (1571)).

Sharswood believes every individual has a moral obligation to obey her community's laws, and that the "breach of any known law is a violation of that obligation." BLACKSTONE, *supra* note 2, at *58 n.45. However, in accord with the Court in *Ratzlaf* and *Cheek*, Sharswood acknowledges that the element of willfulness is an important factor:

[Ignorance of the law, excuses no one,] yet it is different *in foro conscientiae* [I]f the subject knows, or ought to know, the law, if he had exercised ordinary diligence, he has no right to set up his own judgment as to the indifference of the action which the legislature has prohibited or enjoined.

Id.; see also *Ratzlaf*, 114 S. Ct. at 663 ("ignorance of the law is generally no defense to a criminal charge," but knowledge of the illegality of one's acts is necessary to prove willfulness); *Cheek v. United States*, 498 U.S. 192, 205 (1991).

133. See ANDENAES, *supra* note 128, at 46; RAZ, *supra* note 124, at 246-47.

134. BLACKSTONE, *supra* note 2, at *317. Blackstone observed that "especially when the value of the commodity bears little or no proportion to the quantity of the duty imposed," smuggling arises

and its natural and most reasonable punishment, viz. confiscation of the commodity, is in such cases quite ineffectual; the intrinsic value of the goods, which is all that the smuggler has paid, and therefore all that he can lose, being very inconsiderable when compared to his prospect of advantage in evading the duty.

Id.

therefore be had to extraordinary punishments to prevent it [smuggling to evade taxes], perhaps even to capital ones; which destroys all proportion of punishment, and puts murderers upon an equal footing with such as are really guilty of no natural, but merely a positive, offense."¹³⁵

The Internal Revenue Code embodies the essence of *mala prohibita* crimes. As stated earlier, tax evasion falls into the class of public welfare offenses because there is no *a priori* duty to pay taxes.¹³⁶ Even theorists who assume a moral duty to obey these *mala prohibita* laws admit that at times the moral aspect is of "trifling weight."¹³⁷ To avoid this classification, some have suggested a dual component of morality requiring violation of an obligation to be both seriously wrong and to worsen an act which is already wrong on other grounds.¹³⁸ According to these views, running a stop sign at two o'clock in the morning with no one near is not morally wrong inasmuch as it does not break a promise, harm anyone, or create a chain reaction of copy-cats that would threaten an increase in disobedience.¹³⁹ Thus depending on the circumstances surrounding

135. BLACKSTONE, *supra* note 2, at *317 (citing MONTESQUIEU, *THE SPIRIT OF LAWS* bk. 13, ch. 8 (1748)).

136. *See supra* part I.

137. *See* Smith, *supra* note 25, at 971 (if no serious instance of wrongdoing, then any *prima facie* obligation to obey is at most of trifling weight); *but see* Christie, *supra* note 22, at 1331 (one cannot conclude no moral obligation exists on grounds that law breaking has trivial consequences).

138. Smith, *supra* note 25, at 970. Smith suggests two principles which should govern the weight of *prima facie* obligations:

First, that a *prima facie* obligation is a serious one if, and only if, an act which violates that obligation and fulfills no other is seriously wrong; and second, that a *prima facie* obligation is a serious one if, and only if, violation of it will make considerably worse an act which on other grounds is already wrong.

Id.

139. *See, e.g., id.* at 971. Smith applies these principles to the *prima facie* obligation to obey the law:

As for the first test, let us assume that while driving home at two o'clock in the morning I run a stop sign. There is no danger, for I can see clearly that there was no one approaching the intersection, nor is there any impressionable youth nearby to be inspired to a life of crime by my flouting of the traffic code. Finally, we may assume that I nevertheless had no specific *prima facie* obligation to run the stop sign. If, then, my *prima facie* obligation to obey the law is of substantial moral weight, my action must have been a fairly serious instance of wrongdoing. But clearly it was not. If it was wrong at all—and to me this seems dubious—it was at most a mere peccadillo. As for the second test, we may observe that acts

the harm, a mala prohibita act that may be immoral in one context is not necessarily immoral when the surrounding circumstances are changed. Moral overtones vary with the situation, often attaching to what is mandated by law. Because speeding on an open road does not carry the potential for obvious harm to others it is not in itself an immoral act. Similarly, even though it is harming one person, killing a tyrant would not necessarily be immoral because of its overall benefit to the community at large.¹⁴⁰ In effect, breaking the law under these or like circumstances does not carry any moral overtones.¹⁴¹

The astute reader will realize the weakness of this argument. It requires no great effort to document the "harm" caused by wholesale tax evasion. Kant realized that wholesale tax evasion "could occasion general refractoriness."¹⁴² At the same time, Kant also recognized that tax evasion is not nec-

which are otherwise wrong are not made more so—if they are made worse at all—by being illegal. If I defraud someone my act is hardly worse morally by being illegal than it would have been were it protected by some legal loophole.

Id.

140. HALL, *supra* note 123, at 340. The laws of the state seek to protect its citizens against harm, but punishment varies according to the seriousness of the harm and its overall effect on the community. As Hall suggests:

Criminal harms differ in gravity, first, because of the differential external effect upon the victim and the community, *e.g.* a battery is obviously less serious than a death; and secondly, by reference to the degree of moral culpability of the offender, *e.g.* a death caused by a motorist's reckless driving is a less serious harm than a death caused by a deliberate murderer.

Id. at 216-17.

141. See William K.S. Wang, *The Metaphysics of Punishment—An Exercise in Futility*, 13 SAN DIEGO L. REV. 306, 316-17 (1976). Wasserstrom argues that

even if it is correct that acting illegally logically implies acting *prima facie* immorally, this in no way shows that people may not often be morally justified in acting illegally. At most, it demands that they have some good reason for acting illegally; at best, it requires what has already been hypothesized, namely, that the action in question, while illegal, be morally justified.

Richard A. Wasserstrom, *The Obligation to Obey the Law*, 10 U.C.L.A. L. REV. 780, 790 (1963).

Blackstone clearly states that only in natural duties and mala in se crimes does conscience play any part. In contrast, laws which sanction "*positive duties*, and forbid only such things as are . . . *mala prohibita*," have no "intermixture of moral guilt . . . [and] conscience is no farther concerned." BLACKSTONE, *supra* note 2, at *57-58.

142. Thomas C. Grey, *Serpents and Doves: A Note on Kantian Legal Theory*, 87 COLUM. L. REV. 580, 586 n.36 (1987).

essarily "unvirtuous."¹⁴³ That is, violation of tax laws, despite the effect on the state's revenues, is not inherently wrong. The resulting "harm" is thus, in a sense, a state manufactured harm.

Any suggestion that there is an inherent moral duty to obey the law is both counterproductive and superfluous. It is counterproductive because it purports to release individuals from duties of conscience: as long as they comply with the letter of the law, they may pursue self interest without considering any burdens they impose on others. Government is left with the ungainly and constant task of searching for and closing all loopholes. The duty is superfluous because individuals have specific moral duties to act justly—to refrain from acts which harm others—whenever feasible. Acts which harm others are immoral whether or not they are illegal; acts which do not harm others do not become immoral when made illegal. Where "harm" is diffuse and those that are harmed are numerous, none may have adequate incentive to pursue claims and may thus have given in to a "rational apathy."¹⁴⁴ Moreover, to define "harm" in the tax context erroneously attributes an inherent immorality to failure to pay taxes.

Mala in se crimes, however, are founded on the basis of harm to others.¹⁴⁵ The harm resulting from tax law violations is often uncertain. One view, founded primarily on the utilitarian theory, holds that each individual has a moral duty to contribute to the welfare of others.¹⁴⁶ Those who believe tax evasion is immoral assume it results in economic loss to other taxpayers and the state.¹⁴⁷ The countervailing view is that society is well served by allowing tax evaders to continue evading taxes because such activity is wealth-generating and stimulates the economy.¹⁴⁸

143. *Id.*

144. Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 29 n.110 (1992).

145. HALL, *supra* note 123, at 213. Harm is the foundation of criminal conduct. *Id.* See also Smith, *supra* note 25, at 972.

146. RAZ, *supra* note 124, at 24.

147. K.D. Deane, *Law, Morality, and Tax Evasion*, 13 ANGLO-AM. L. REV. 1, 9 (1984).

148. *Id.* at 9, 11 (examining the argument that taxes should apply only to those activities taxpayers would engage in regardless of whether those activities are taxed, and no tax should apply to those activities taxpayers would conversely abstain from, if taxed).

This somewhat ambivalent view of the harm associated with tax evasion is reflected in the high mens rea necessary to find criminal liability for tax evasion. A heightened mens rea suggests that only a high degree of culpability merits criminal sanction. Conduct constituting violation of tax laws is not viewed as truly blameworthy, hence not immoral, until the high threshold is met. The Supreme Court's recent cases support this basic idea.

While the Court has used heavy and sinister adjectives to describe both tax evasion and tax evaders, it has not directly broached the subject of morality and tax evasion. Rather, the Court's judgment appears to be that tax evaders do not commit moral wrongs, thus suggesting there is no moral component to tax laws.¹⁴⁹

In *Ratzlaf v. United States*,¹⁵⁰ the Court considered conduct relating to "just avoiding the tax" or a possible risk of an IRS audit to be "no great sin."¹⁵¹ In *Ratzlaf*, Ratzlaf and his wife, with cash to satisfy a \$160,000 gambling debt, were told by casino and various banks' personnel that a cash transaction over \$10,000 requires filing a report. Not wanting a written report of the transaction, Ratzlaf purchased separate cashier's checks of \$9,500 from various banks. The Supreme Court held that to convict Ratzlaf of willfully structuring this transaction to avoid the reporting requirement, the government had to prove both that Ratzlaf knew of the reporting requirement and purposefully evaded it, and that he knew his conduct in evading such a requirement was illegal.¹⁵²

In both *Ratzlaf* and *Cheek v. United States*¹⁵³ (discussed below), punishment for tax evasion appears to require disobedience to tax laws intertwined with "some element of moral

149. Justice Ginsburg, writing for the majority in *Ratzlaf v. United States*, 114 S. Ct. 655 (1994), distinguished taxpayers who legitimately commit acts of tax avoidance such as giving \$10,000 in two payments, one on December 31 and the other the next day, to avoid the impact of a gift tax, or bringing in "\$9,500 in cash to the bank twice a week in lieu of transporting over \$10,000 once a week" to prevent triggering IRS reports and a possible audit, from tax evaders who are "bad men who attempt to elude" reporting requirements by "such criminal activity as tax evasion." *Ratzlaf*, 114 S. Ct. at 660.

150. 114 S. Ct. 655 (1994).

151. *Currency Transactions*, *supra* note 129, at 3366 (noting Justice Scalia's apparent contrast in oral argument of the conduct of a defendant who avoids a stamp tax and that of the defendant in *Ratzlaf*, who avoided a reporting requirement).

152. *Ratzlaf*, 114 S. Ct. at 657.

153. 498 U.S. 192 (1991).

blameworthiness" to conclusively show the evader's conduct evinced an "obviously evil" or inherently "bad" motive akin to mala in se crimes, or at least show the evader knowingly and deliberately disobeyed the state's authority.¹⁵⁴

The Supreme Court also placed the standard in sharp focus in *Cheek v. United States*. In *Cheek*, The Supreme Court placed the Seventh Circuit in line with other Courts of Appeal in holding that a tax evader who sincerely, and in good-faith, misunderstands or believes that she is not violating the tax laws escapes criminal liability for willful tax evasion.¹⁵⁵ Though *Cheek* did not raise the issue in his briefs, the Court decided that *Cheek's* secondary belief, formed after a careful investigation, that the tax laws are unconstitutional and thus invalid, does not negate willfulness.¹⁵⁶

The Court's explanation of why *Cheek's* good-faith belief that he is not violating the tax laws negates willfulness deviates from the common law presumption that citizens know the law: "[I]n our complex tax system, uncertainty often arises even

154. *Currency Transactions*, *supra* note 129 (quoting Ratzlaf's counsel's assertion in oral argument that "'evading' has been read as meaning avoiding" to extract moral considerations); *Ratzlaf*, 114 S. Ct. at 662; *Cheek*, 498 U.S. at 205-206. Despite Justice Scalia's conclusion that avoiding the IRS reporting requirement amounted to "avoidance of a non-burden and therefore avoidance with the smell of malefaction about it" for no apparent reason than to hide from the government "cash that came from God knows where because it wasn't reported on the income tax returns," he joined the *Ratzlaf* majority in holding that structuring cash transactions to avoid such requirements is not "so obviously 'evil' or inherently 'bad'" as to manifest a "purpose to do wrong, which suffices to show willfulness." *Currency Transactions*, *supra* note 129, at 3366 (quoting Justice Scalia at *Ratzlaf* oral argument); *Ratzlaf*, 114 S. Ct. at 666 n.6; *see also id.* at 662.

155. *Id.*; *see* Dwight W. Stone II, Note, *Cheek v. United States: Finally, A Precise Definition of the Willfulness Requirement in Federal Tax Crimes*, 51 MD. L. REV. 224 (1992).

156. *Cheek*, 498 U.S. at 206. At trial, *Cheek* testified that he was "indoctrinated" by others to believe the tax laws were unconstitutional, a belief he claimed was affirmed by his own study. *Id.* at 195-96. The Court distinguished *United States v. Murdock*, 290 U.S. 389 (1933), where the defendant faced criminal charges for refusing to answer an IRS examiner's questions. In *Murdock*, the defendant mistakenly believed his refusal was privileged under the Fifth Amendment. *Cheek*, 498 U.S. at 206 n.10. Unlike *Cheek's* constitutional claims, *Murdock's* claims negated willfulness because "it was a claim of privilege not to answer, not a claim that any provision of the tax laws were unconstitutional, and not a claim for which the tax laws provided procedures to entertain and resolve." *Id.* Justice White distinguishes *Murdock* on the basis that in *Murdock* the defendant wrongly believed he had a constitutional right to refuse to provide self-incriminating information. *Cheek's* belief that filing a return would violate his right against self incrimination apparently parallels *Murdock*, yet the result is different. It would seem that *Cheek* could not both protect his right and comply with the law.

among taxpayers who earnestly wish to follow the law. . . . [I]t is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care."¹⁵⁷

However, as to Cheek's secondary, studied belief that the tax laws are unconstitutional and thus invalid, the Court warned:

Claims that some of the provisions of the tax code are unconstitutional are submissions of a different order. They do not arise from innocent mistakes caused by the complexity of the IRC. Rather, they reveal full knowledge of the provisions at issue and a studied conclusion, however wrong, that those provisions are invalid and unenforceable.¹⁵⁸

Regarding this secondary belief, the Court said that if Cheek's sole defense was that he believed the tax laws were unconstitutional, he could have challenged the constitutionality of the tax laws without risk by paying the assessed taxes, filing for a refund, and appealing any denial. He could also have challenged the assessment in Tax Court without paying and appealing if necessary.¹⁵⁹ Otherwise, Cheek could raise the constitutionality of the laws as a defense to criminal prosecution "but like defendants in criminal cases in other contexts, who 'willfully' refuse to comply with the duties placed upon them by the law, he must take the risk of being wrong."¹⁶⁰

157. *Cheek*, 498 U.S. at 205 (citing *United States v. Bishop*, 412 U.S. 346, 360-61 (1973) (quoting *Spies v. United States*, 317 U.S. 492, 496 (1943))).

158. *Id.* at 205.

159. *Id.*

160. *Id.* at 206. Justice Scalia concurred in the Court's judgment. He agreed that a good faith misunderstanding of the law need not be reasonable to negate willfulness. He disagreed with the Court's decision that a defendant's good faith belief that a law is unconstitutional does not negate willfulness: "It is quite impossible to say that a statute which one believes unconstitutional represents a 'known legal duty.'" To impose a legal duty, a law must be valid. If a defendant believes that a law is invalid, then he believes it imposes no duty and he has not violated a "known legal duty." *Id.* at 207-08 (Scalia, J., concurring). Justice Scalia finds civil penalties for tax code violations to be adequate deterrents to taxpayer misconduct.

Justice Blackmun (with Marshall) dissented because the complexity of the tax laws did not cause the violations and Cheek's assertions of belief were so unreasonable as to be "incomprehensible." *Id.* at 209 (Blackmun & Marshall, JJ., dissenting). The dissent expressed concern that permitting unreasonable beliefs to negate willfulness will encourage frivolous claims and defenses. The dissent also claims that requiring reasonableness places an additional burden on the government (which must prove unreasonableness) rather than on the defendant. *Id.* at 210 (Blackmun & Marshall, JJ., dissenting).

The *Cheek* majority correctly rejects the notion that a good-faith misunderstanding must be reasonable to negate willfulness. Congress intended to impose criminal penalties only for knowing and intentional violations of federal tax law. If defendants do not know that their conduct violates the law and do not intend to violate the law, then their conduct is innocent even if unreasonable. Innocent violations should not subject defendants to criminal penalties. In other words, a belief in the morality (as opposed to the mere constitutionality) of one's beliefs may suspend criminal liability for violations of the tax laws.¹⁶¹

The majority makes a poor argument for placing the risk of error on the taxpayer who believes the tax laws are unconstitutional.¹⁶² Justice White quotes *Spies v. United States* as excusing tax law violations resulting from either innocent error or "frank difference of opinion," but he then ignores *Cheek's* frank difference of opinion excuse.¹⁶³ A good-faith but erroneous belief that a law is unconstitutional seems the essence of a frank difference of opinion.

Ratzlaf exemplifies the "trifling weight" of tax code violations inasmuch as *Ratzlaf's* conduct, while prohibited, did not sufficiently establish his "nefarious" intent.¹⁶⁴ Because the government could not prove that *Ratzlaf* knew where he stood—that his conduct challenged the state's power to regulate his behavior and demand obedience to its reporting requirements—*Ratzlaf's* behavior was not willful. In tax terminology, effectively, *Ratzlaf's* behavior manifested the natural taxpayer instinct of trying to avoid the harsh economic impact of a possible audit while still managing to remain within the scope of respect for the state's power. *Ratzlaf's* mens rea was either common, as in the desire to avoid a tax or an economic consequence, or absent altogether, thus distinguished from *Cheek's* careful and presumably well-informed study of tax laws and their unconstitutionality.

On the other hand, *Cheek's* primary claim that he avoided paying his taxes because he mistakenly interpreted tax laws due to the complexity of the Code, or that he had a good-faith, sincere belief that his conduct was not violating the law, negat-

161. *Id.* at 205-06.

162. *Id.* at 208 (Scalia, J., dissenting).

163. *Id.* at 205.

164. *Ratzlaf*, 114 S. Ct. at 656.

ed his willful intent to evade his taxes much like Ratzlaf's being unaware of the illegality of his conduct. This mens rea of unconsciousness of the illegality of one's conduct, and of conscious but mistaken interpretation of the legality of one's conduct, is in sharp contrast to Cheek's secondary mens rea. Cheek's mens rea was obviously defiant and consequently a danger to the state's power, as evidenced by his protest or deliberate disobedience sparked by his belief in the unconstitutionality of the tax laws. Unlike the *Ratzlaf* case, the government could prove Cheek knew where he stood in terms of challenging the state's power to decide the constitutionality of its laws since the issue had already been litigated and decided against him.

These cases strongly suggest that violation of the tax laws is not a moral proposition. If such violation implicated moral considerations, use of the taxing power to punish individuals would be appropriate. However, the Court in *Department of Revenue v. Kurth Ranch*¹⁶⁵ negates any suggestion of a moral component. In *Kurth*, the Supreme Court struck down a tax on drug possession and storage, levied independent and aside from criminal penalties, because such a tax, "imposed on criminals and no others, departs so far from normal revenue laws as to become a form of punishment."¹⁶⁶ Rejecting as inapplicable the approach which would allow such a tax statute if it "merely reimburses the government for its actual costs arising from the defendant's criminal conduct," the *Kurth* majority gave several examples of taxes that are legitimate.¹⁶⁷

165. 114 S. Ct. 1937 (1994).

166. *Id.* at 1948. That the tax was labeled civil as opposed to criminal was of no moment: a tax subsequent and in addition to criminal penalties is inappropriate if its purpose "may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 1945 (quoting *United States v. Halper*, 490 U.S. 435, 448-49 (1989)).

167. *Id.* (citing *Halper*, 490 U.S. at 449-50). The test, first articulated in *Halper*, provided that a penalty was punitive, thus inappropriate, if its purpose was not to reimburse the government. The *Kurth* Court distinguished *Halper* by characterizing its present task as analyzing whether a tax, as opposed to a penalty, is punitive. *Id.* Chief Justice Rehnquist dissented but agreed that *Halper* was inapplicable because "[t]ax statutes need not be based on any benefit accorded to the taxpayer or on any damage or cost incurred by the Government as a result of the taxpayer's activities." *Id.* at 1950 (Rehnquist, C.J., dissenting). Rehnquist noted that a drug tax has been held a "true tax" rather than a penalty since "[i]t is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activity taxed." *Id.* (Rehnquist, C.J., dissenting) (quoting *United States v. Sanchez*, 340 U.S. 42, 44 (1950) (uphold-

According to the Court in *Kurth*, taxes are legitimate if they are imposed under several theories. For example, legitimate taxes "generate government revenues, impose fiscal burdens on individuals, and deter certain behavior."¹⁶⁸ A tax with a particularly steep rate or an "obvious deterrent purpose" does not necessarily evince an inappropriate use of the power to tax.¹⁶⁹ Nor are "mixed-motive" taxes, such as high "sin taxes imposed on lawful products" like cigarettes to "reduce consumption and increase government revenue," an illegitimate use of the power to tax.¹⁷⁰

However, when taxes become prohibitive, and take on moral overtones in the context of this Article, the Court will not allow such taxes to be imposed: "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."¹⁷¹ The Court explained that "unusual features" distinguish a punitive tax from legitimate taxes.¹⁷²

For example, a tax is illegitimate if it "is conditioned on the commission of a crime. That condition is 'significant of penal and prohibitory intent, rather than the gathering of reve-

ing a tax on marijuana transfers as a civil sanction) and citing *Marchetti v. United States*, 390 U.S. 39, 44 (1968) (unlawful activity is taxable)); see also *First Unitarian Church v. County of Los Angeles*, 311 P.2d 508, 525 (1957) (Traynor, J., dissenting), *rev'd*, 357 U.S. 545 (1958) (refusing to uphold an oath of loyalty in connection with taxation: "Even in the face of a bona fide danger, the state has no power to embark on an unnecessary wholesale suppression of liberty"). Cf. *Crowe*, *supra* note 3, at 23 ("a tax on Mass wine for hindering or hampering its use, would be an unjust tax" in that it "interferes with rights which are outside the competence of the civil government").

The *Kurth* majority also refused to address whether "an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character" as that issue was not raised by the *Kurth* tax statute. *Kurth*, 114 S. Ct. at 1947 n.21.

168. *Id.* at 1945. According to dissenting Chief Justice Rehnquist, "[t]axes are customarily enacted to raise revenue to support the costs of government" but also "may be enacted to deter or even suppress the taxed activity." *Id.* at 1950 (Rehnquist, C.J., dissenting).

169. *Id.* at 1946.

170. *Id.* at 1951-52 (Rehnquist, C.J., dissenting); see also *id.* at 1947.

171. *Id.* at 1946 (citing *A. Magnano Co. v. Hamilton*, 292 U.S. 40, 46 (1934)) (quoting *Child Labor Tax Case*, 259 U.S. 20, 38 (1922)). The proposition that taxes are inappropriate if used as penalties is in accord with the opinion of some scholars who assert that "one is obligated to pay only those taxes that are not penal in nature," i.e., imposed for the commission or omission of an act. McGee, *supra* note 14, at 417 (citing *Crowe*, *supra* note 3, at 75).

172. *Kurth*, 114 S. Ct. at 1940.

nue.”¹⁷³ In addition, any economic and arguably morally-neutral purpose behind a mixed motive tax and the tax itself is rendered illegitimate, and “justifications [for such a tax] vanish when the activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction.”¹⁷⁴ A tax is also inappropriately punitive if it serves an apparent purpose that is either “arbitrary” or “shocking.”¹⁷⁵ In *Kurth*, the Court found the tax “has an unmistakable punitive character” because it is imposed at a high rate and for “‘possession’ of goods that no longer exist and that the taxpayer never lawfully possessed.”¹⁷⁶ These limitations the Court imposes on the power to tax are appropriate if violation of tax laws has no moral component.

A necessary corollary is that the circumstances under which a taxpayer deserves punishment, or at least must make good a tax obligation, for a violation of tax law must be circumscribed. For example, taxpayers should be able to enforce their constitutional rights without risking criminal penalties: civil penalties are daunting enough. The Court in *Cheek* stated that taxpayers, like criminal defendants, must bear the risk of being wrong. But Congress did not intend to treat errant taxpayers like other criminal defendants: it precluded imposition of criminal penalties for tax code violations unless those violations were willful.

The real problem here seems to be whether Cheek could have a good-faith belief that the tax laws are unconstitutional when the specific claims he raised had already been litigated and decided against him. At some point Cheek must accept the

173. *Id.* at 1947 (quoting *United States v. Constantine*, 296 U.S. 287, 295 (1935)).

174. *Id.*; see also *id.* at 1949-52 (Rehnquist, C.J., dissenting); *id.* at 1952-53 (O'Connor, J., dissenting) (citing *Halper*, 490 U.S. at 448-50) (“the power to tax illegal activity carries with it the danger that the legislature will use the tax to punish the participants for engaging in that activity,” and “a civil sanction will be considered punishment to the extent that it serves the purposes of retribution and deterrence, as opposed to furthering any nonpunitive objective”); *id.* at 1959-60 (Scalia, J., dissenting) (preferring to “put the *Halper* genie back in the bottle” and inquiring whether the “tax proceeding . . . constituted a second criminal prosecution,” but agreeing with the majority that *Kurth* does not present “an adjudicated fine that can be judicially reduced to a lower level, but rather a tax; and so we grapple with the different, though no less peculiar, inquiry: when is a tax so high (or so something else) that it is a punishment?”).

175. *Id.* at 1952 (Rehnquist, C.J., dissenting).

176. *Id.* at 1948.

courts' adverse decision. At the core of the Court's difficulty with *Cheek's* conduct is that *Cheek* seems to deny the Court's authority to decide the constitutionality of the tax laws.

Until a tax law is challenged in court, other taxpayers who believe in good faith that the law is unconstitutional should not be penalized for "willful" violations.¹⁷⁷ The Court could have reached the desired result by holding that a persistent personal belief that a law which the courts have held valid is unconstitutional is not a good-faith belief which negates willfulness. Once tax protesters fail to convince the courts of their beliefs, they must lobby the legislature for change.

If defendants' beliefs are clearly unreasonable and the defendants cannot adequately explain how they acquired those unreasonable beliefs, then, according to *Cheek*, juries should find that the beliefs were not held in good faith.¹⁷⁸ Perhaps the tax laws are only meant to deter independently "wrong" conduct like fraud and deliberate disobedience: as long as the taxpayer honestly attempts to comply with the Code's requirements, she will not be punished but need only compensate the government.¹⁷⁹ This interpretation comports with the Supreme Court's holding in *Cheek* that a taxpayer's good faith mistake of law, no matter how unreasonable, negates the statutory requirement of willfulness for criminal tax penalties. Without some independently wrong conduct, the tax law violator suffers only civil penalties.¹⁸⁰

The requirement of willfulness reflects not a moral duty to obey just laws, but rather a legal obligation to submit to the state's authority. In *Cheek*, the Supreme Court excused tax

177. This sounds uncomfortably close to the "every dog is entitled to one bite" axiom. The main point is that a prior unsuccessful challenge is a fact, among many, which tends to show a lack of good faith.

178. See *supra* text accompanying notes 152-161.

179. See *supra* text accompanying notes 163-174.

180. Even civil penalties, however, may so far exceed compensation as to be clearly punitive. But see Mark D. Yochum, *Ignorance of the Law is No Excuse Except For Tax Crimes*, 27 DUQ. L. REV. 221, 227-35 (1989) (mistake of law defense only protects the "crafty"; criminal penalties are needed to restore respect for the tax laws—the taxpayer should act at her peril).

The requirement of independently wrong conduct to justify criminal punishment of tax evaders may be analogous to the requirement of independently tortious conduct to justify punitive damages for breach of contract. Leslie E. John, Note, *Formulating Standards for Awards of Punitive Damages in the Borderland of Contract and Tort*, 74 CAL. L. REV. 2033, 2045-48 (1986). *Cheek* seems to require fraud or deliberate disobedience for criminal tax penalties. Similarly, tortious breach of contract entails fraud, malice or oppression. *Id.* at 2054-55.

violations resulting from a good-faith misunderstanding of the law even if the misunderstanding is unreasonable. Inadvertent errors, even if ridiculous, do not challenge the state's authority. The Court refused to excuse violations based on a good-faith but mistaken belief that the laws are unconstitutional: such violations reflect citizens' claims that they, and not the state, may decide when laws are unjust.¹⁸¹

Citizens who disobey on such grounds choose to challenge the state's authority and will be punished when their judgment conflicts with the state's. *Cheek's* and *Ratzlaf's* mens rea requirements do not imply a judgment as to when tax laws are unjust, but rather a judgment as to who may decide when they are unjust. According to the Supreme Court, the state will decide and citizens must obey or risk punishment. Many citizens will obey, not because the laws are just nor because they impose a moral obligation, but only because those citizens do not wish to risk punishment.

IV. CONCLUSION

The tax laws impose duties on all citizens and arguably create a right in taxpayers to the compliance of other citizens. But taxpayers' duties are voluntarily undertaken, at least in the sense that they arise only if individuals realize income or participate in an economic exchange. Citizens may forego such income and economic exchanges to avoid tax liability. If the tax laws create rights in third parties, it is only in the vague, emotional sense of requiring fairness in tax administration: taxpayers have no enforceable legal right to others' compliance. Individuals may refuse to pay taxes for any number of reasons. Some refuse simply out of self interest. Others may refuse on moral grounds. Of this second group, individuals may refuse for various reasons: they may believe the tax laws are unfairly structured; they may deny the state's legitimacy in general; they may object to the state's distribution of revenues; or they may feel so strongly about particular expenditures that they cannot, in good conscience, support those expenditures by paying their taxes.

Legal and political philosophers of all persuasions have failed to produce a convincing argument for a moral duty to obey the law. Some have shown good cause, however, to deny

181. *Cheek*, 498 U.S. at 205-06.

that such a duty exists. If individuals have no general moral obligation to obey the law, few will have a specific moral duty to obey tax laws.

The minimal support moral theorists have been able to muster for a moral duty to obey law evaporates in the context of taxation. Consent theories of social contract fail because few individuals would agree to be subject to the system of taxation in place. Theories of moral duty based on equitable principles are insupportable because the tax system is rife with inequity. Utilitarian theory fails because the act of not paying taxes is of greater utility to the taxpayer than payment. Moreover, rule-based utilitarian theory requires moral imprimatur, a circular argument.

The tension between a citizen's moral autonomy and the state's authority cannot be resolved by the assertion common to democratic political theory that unjust laws do not bind. Either the state or the citizen must have the authority to decide when laws are unjust. Since citizens are legally bound to follow a law even if their moral and political convictions indicate that the law is unsound, the state must assume this authority.

Any suggestion that there is an inherent moral duty to obey the law is both counterproductive and superfluous. It is counterproductive because it purports to release individuals from duties of conscience: as long as they comply with the letter of the law, they may pursue self interest without considering any burdens they impose on others. Government is left with the ungainly and constant task of searching for and closing all loopholes. The duty is superfluous because individuals have specific moral duties to act justly—to refrain from acts which harm others—whenever feasible.

The Supreme Court has never found moral absolutes with regard to taxation. Rather, the Court has recognized that a necessary corollary to the power to tax is the power to police affronts to the power. At the same time, law must pay heed to taxpayer inclinations to maintain any significant degree of effectiveness. Thus, the government accepts taxpayers' self-interested attempts to minimize tax liability. However, if government's authority or very existence is threatened by overzealous minimization efforts, it figuratively thrusts the taxpayer off the plank. Tax laws, by inference, do not implicate eternal principles.

A moral obligation to obey tax laws is found neither in harm done to others, nor simply because laws may compel us to

obey. The government is uniquely challenged when enforcing tax laws because, unlike other public welfare offenses, compliance is vital to its function, and the lack of a moral obligation to pay taxes ensures that compliance will not be readily obtained. Holmes' dictum, that "[t]he law can ask no better justification than the deepest instincts of man," remains undeniably true.¹⁸²

182. Holmes, *supra* note 91, at 477.