

SECRETS OF THE PANAMA PAPERS: HOW TAX HAVENS EXACERBATE INCOME INEQUALITY

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Abstract

Data leaks like the Panama Papers show how tax havens provide a secret offshore financial system that privileges three main actors: malefactors, millionaires, and multinational corporations. Such leaks have provided millions of documents detailing how certain taxpayers benefit from tax haven services. Wealthy criminals use the offshore world to anonymize their financial misdeeds and, in low-income countries, drain governments of valuable resources while citizens remain in dire circumstances. High-income taxpayers exploit the offshore world to legally reduce their tax bills, deploying techniques that are not available to ordinary-income taxpayers. The leaks also show how the wealthiest members of society—the top 0.01%—are more likely to engage in the criminal offense of offshore tax evasion by hiding their fortunes in tax havens. Finally, multinational corporations set up related corporations in tax havens to reduce global tax liabilities legally, providing higher returns for wealthier shareholders. By privileging the interests of criminals, millionaires, and corporations, the offshore world is exacerbating the growing income inequality found in much of the world. This Article considers legal and policy reforms to address this challenge.

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hey remember when the panama papers came out and revealed that all the rich people in the world are part of enormous [sic] criminal conspiracy to dodge taxes and hoard stolen wealth in offshore accounts and literally nothing happened

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I. INTRODUCTION

Tax haven data leaks like the Panama Papers show how tax havens provide a secret offshore financial system that privileges three main actors: malefactors, millionaires, and multinational corporations.² The leaks have provided millions of documents detailing how taxpayers use tax haven services. Wealthy criminals use the offshore world to anonymize their financial misdeeds and, in low-income countries and failed states, drain governments of valuable resources while most citizens live in desperate poverty.³ High-income taxpayers use the offshore world to reduce their tax bills legally, deploying techniques that are not available to ordinary-income taxpayers.⁴ The leaks also show how the wealthiest members of society—the top 0.01%—

¹ u/colopy, *The panama papers*, REDDIT (Jan 30, 2021), https://www.reddit.com/r/LateStageCapitalism/comments/18utb8/the_panama_papers/ [<https://perma.cc/ZFA9-HCHJ>].

² See Gerard Ryle et al., *Secret Files Expose Offshore's Global Impact*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 2, 2013), <https://www.icij.org/investigations/offshore/secret-files-expose-offshores-global-impact/> [<https://perma.cc/5TCG-5M6Z>] [hereinafter International Consortium of Investigative Journalists (ICIJ), *Offshore Leaks*]. For discussion of revelations from the leaks, see Arthur J. Cockfield, *Big Data and Tax Haven Secrecy*, 18 FLA. TAX REV. 483 (2016) (discussing revelations from tax haven data leaks) [hereinafter Cockfield, *Big Data*]; Shu-Yi Oei & Diane M. Ring, *Leak-Driven Law*, 65 UCLA L. REV. 532 (2018) (claiming leaks may distort legal and policy responses); Carmen Franchesca S. Del Mundo, *How Countries Seek to Strengthen Anti-Money Laundering Laws in Response to the Panama Papers, and the Ethical Implications of Incentivizing Whistleblowers*, 40 NW. J. INT'L L. & BUS. 87 (2019) (describing global responses to Panama Papers); Will Fitzgibbon & Michael Hudson, *Five years later, Panama Papers still having a big impact*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 3, 2021), <https://www.icij.org/investigations/panama-papers/five-years-later-panama-papers-still-having-a-big-impact/> [<https://perma.cc/X4E9-C76E>] (“Beyond individual countries, the Panama Papers has become a global touchstone of the debate around corruption, financial crime and inequality.”). The title of this Article refers to the Panama Papers, revealed to the public in 2016, because this leak gained the most media attention. But it also discusses a number of other tax haven data leaks such as the Offshore Leaks of 2013, the Paradise Papers of 2017, and the Pandora Papers of 2021.

³ See Nicholas Shaxson, *Tackling Tax Havens*, 56 FIN. & DEV., Sept. 2019, at 7 (highlighting how tax havens promote inequality).

⁴ See Deborah Hardoon, Sophia Ayele & Ricardo Fuentes-Nieva, *An Economy for the 1%*, OXFAM (Jan. 18, 2016), https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp210-economy-one-percent-tax-havens-180116-en_0.pdf [<https://perma.cc/9UK2-57XA>] (describing increasing rates of income and wealth inequality, particularly with respect to top 1%, and how wealthy class benefits from tax havens). See also the discussion in the text relating to notes 21 to 34.

are more likely to engage in the criminal offense of offshore tax evasion by hiding their fortunes in tax havens.⁵ Finally, multinational firms form related corporations in tax havens to reduce their global tax liabilities legally, providing higher returns for (normally) high-income investors.

By privileging the interests of criminals, millionaires, and corporations, the offshore world exacerbates growing income inequality.⁶ Over the last quarter-century, middle-class incomes have stagnated, growing at low rates throughout much of the Western world while high incomes have soared.⁷ In the United States, incomes in the top 5% rose while the share of American adults who live in middle-income households decreased from 61% in 1971 to 51% in 2019.⁸ Growing income inequality, in turn, is encouraging increased nationalism, nativism, anti-immigrant sentiment, and unhealthy forms of populism, along with the view that the system is rigged in favor of the wealthy and powerful.⁹ Income inequality is fueled by complex factors, including technological change, increased foreign competition, and the global pandemic.¹⁰ This Article focuses on the offshore world's role in enhancing the incomes of the very rich and/or the very corrupt at the expense of average-income citizens around the world.¹¹

Part II of the Article begins with a primer on tax havens and income inequality. It then describes how the offshore world, which normally shrouds financial transactions with secrecy, serves the interests of criminals, wealthy individual taxpayers, and multinational corporations. Part III reviews the main legal and policy responses that strive via international tax transparency

⁵ See Matthew Collin, *What Lies Beneath: Evidence from Leaked Account Data on How Elites Use Offshore Banking*, (Brookings Inst., Global Working Paper No. 156, 2021), https://www.brookings.edu/wp-content/uploads/2021/05/What-lies-beneath_Collin.pdf [<https://perma.cc/5ASX-NGQE>] (reviewing data leaked from Isle of Man bank).

⁶ For earlier studies of tax havens and the ways they assist criminals and high-net-worth individuals, see U.S. S. PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC. AND GOV'T AFF., MINORITY & MAJORITY STAFF REP., *TAX HAVEN ABUSES: THE ENABLERS, THE TOOLS AND SECRECY* (2006) [hereinafter SUBCOMM. ON INVESTIGATIONS, TAX HAVEN ABUSES]; Dmitry Gololobov, *The Yukos Money Laundering Case: A Never-Ending Story*, 28 MICH. J. INT'L L. 711 (2007); Jeffery Simser, *Tax Evasion and Avoidance Typologies*, 11 J. MONEY LAUNDERING CONTROL 123 (2008); Douglas J. Workman, *The Use of Offshore Tax Havens for the Purpose of Criminally Evading Income Taxes*, 73 J. CRIM. L. & CRIMINOLOGY 675 (1982).

⁷ The basic concern is that, over the last forty years, the incomes of the top 10% of taxpayers have increased while middle-class incomes have stagnated. Piketty maintains that the returns on capital enjoyed by the wealthier investor class exceed returns on labor, at least in the long run, which leads to ever-growing income inequality within liberal democracies. See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer, trans., 2014); CHRYSIA FREELAND, *PLUTOCRATS: THE RISE OF THE NEW GLOBAL SUPER-RICH AND THE FALL OF EVERYONE ELSE* (2012); see also the discussion in the text accompanying notes 28 to 34.

⁸ See, e.g., JULIANA MENASCE HOROWITZ ET AL., PEW RSCH. CENT., *TRENDS IN INCOME AND WEALTH INEQUALITY* (2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/> [<https://perma.cc/S7UP-WZJ4>] (“[U.S.] inequality, whether measured through the gaps in income or wealth between richer and poorer households, continues to widen.”).

⁹ See Arthur J. Cockfield, *Shaping International Tax Law and Policy in Challenging Times*, 54 STAN. J. INT'L L. 223, 236-38 (2018) [hereinafter Cockfield, *Shaping International Tax*] (discussing how tax leaks showed public that global financial system is “rigged” against average-income taxpayers).

¹⁰ See CREDIT SUISSE RSCH. INST., *GLOBAL WEALTH REPORT 2021* (2021), at 23 (“The repercussions of the COVID-19 pandemic led to widespread rises in wealth inequality in 2020.”).

¹¹ See Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000) (warning tax havens encourage wealth and income inequality, which could lead to anti-globalization reforms); Miranda Stewart, *Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries*, 44 HARV. INT'L L. J. 139 (2003) (describing how international tax discourse confronts challenges surrounding income inequality); Tsilly Dagan, *International Tax and Global Justice*, 18 THEORETICAL INQUIRIES L. 1 (2017) (claiming global tax cooperation is necessary to legitimize democratic governance to preserve a country's ability to redistribute wealth to low-income taxpayers).

measures to shed light on some of the more shadowy regions of the offshore world.¹² These measures, along with global minimum taxes, may reduce some of the tax haven services that exacerbate income inequality. Part IV discusses optimal laws and policies to address challenges presented by tax havens, including a framework to carve off a portion of the offshore world and impose gross withholding taxes on cross-border payments. Part IV also addresses how “onshoring” (the use of domestic law to provide tax haven-like benefits to taxpayers) and technology change represent additional challenges to reducing illicit flows within the global financial system. Part V concludes by noting how tax haven data leaks improve our theoretical, empirical, and methodological understanding of tax havens and the role they play within the global financial system.

II. PRIVILEGING MALEFACTORS, MILLIONAIRES, AND MULTINATIONALS

Governments generally tax their “tax residents” on their worldwide income; hence, residents who do not report the existence of offshore accounts along with any related investment income may be guilty of the crime of offshore tax evasion.¹³ In the late 2000s, U.S. tax authorities gained access to limited offshore account information about their residents. The U.S. Senate held hearings in 2008 with a focus on U.S. citizens engaged in offshore tax evasion via UBS Bank in Geneva, Switzerland.¹⁴ Unlike earlier leaks, beginning in 2012, a series of mega-leaks were ultimately obtained by the International Consortium of Investigative Journalists (“ICIJ”), a Washington, D.C.-based organization coordinating global reporting investigations. Instead of mere account information,¹⁵ the leaks contained millions of documents that provided highly detailed profiles of transactions by individuals and business entities (e.g., an offshore corporation) engaged in global financial crimes.

¹² The analysis focuses on recent global tax agreements while recognizing that some governments are considering unilateral action against tax havens. See Stop Tax Haven Abuse Act, H.R. 1712, 116th Cong. (2019) (proposing measures to inhibit use of tax havens by U.S.-based multinational corporations).

¹³ In the case of the United States, U.S. citizens are also taxed on their worldwide income. See I.R.C. § 61(a) (“gross income means all income from whatever source derived”); see also I.R.C. §§ 1 (individuals), 11 (corporations). With respect to tax evasion, see I.R.C. § 7201 (“Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.”). The penalties under the Currency and Foreign Transactions Reporting Act of 1970, 31 U.S.C. § 5311 (2018) (commonly referred to as the “Bank Secrecy Act”), for failure to file a foreign bank account report (“FBAR”) are more severe than the ones imposed by the Internal Revenue Code in some circumstances. For instance, a U.S. person who lives outside of the United States and fails to file an FBAR for one year can attract a penalty of up to 50% of the value of any undisclosed taxpayer assets. Two years of non-compliance with FBAR requirements can result in a penalty equalling 100% of the taxpayer’s undisclosed assets. See 31 U.S.C. § 5321 (2018).

¹⁴ For background, see, e.g., Lynnley Browning, *Tentative Resolution Set in UBS Tax Evasion Case*, N.Y. TIMES, July 31, 2009, at B2; SUBCOMM. ON INVESTIGATIONS, TAX HAVEN ABUSES, *supra* note 6, at 1 (reviewing evidence that suggests Americans “illegally evade between \$40 and \$70 billion in U.S. taxes each year”); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-318, OFFSHORE TAX EVASION: IRS HAS COLLECTED BILLIONS OF DOLLARS, BUT MAY BE MISSING CONTINUED EVASION 1 (2013); *Tax Haven Banks and U.S. Tax Compliance: Hearing Before the S. Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. and Gov’t Affairs*, 110th Cong. (2008) (estimating \$100 billion annual loss from both individual tax evasion and corporate tax planning “abuses”).

¹⁵ For instance, a 2007 leak from a bank in Liechtenstein only contained account information. See Mark Landler, *Liechtenstein Seeks Man Suspected of Selling Information that Led to Tax Scandal*, N.Y. TIMES, Mar. 13, 2008, at C3.

In terms of data size, the first leak obtained by the ICIJ, labeled “Offshore Leaks,” was revealed to the public in April 2013 and contained 2.5 million documents involving 70,000 taxpayers.¹⁶ Measured at 260 gigabytes, the total size of the leaked files obtained by the ICIJ was more than 160 times larger than the leak of U.S. State Department documents by WikiLeaks in 2010.¹⁷

After the ICIJ received this initial leak, I served as a legal consultant to explain to journalists what the leaked data meant. In the first media announcement of the leak, I said the documents reminded me of the scene in the movie classic *The Wizard of Oz* in which “they pull back the curtain and you see the wizard operating this secret machine.”¹⁸ For the first time, researchers and journalists were presented with tax haven documents that had previously been shrouded in secrecy.¹⁹ Over 600 ICIJ journalists working in 117 countries have now published hundreds of articles concerning the many leaks, for which they have been awarded the Pulitzer Prize.²⁰

A. A Primer on the Offshore World and Income Inequality

Before proceeding with an account of how the offshore world fuels inequality, I will briefly set the stage by defining the boundaries of the research topic under examination.

The offshore world is comprised of over thirty countries generally categorized as “tax havens.”²¹ While the definition of tax havens remains academically contentious, these countries normally provide: attractive tax and other benefits to non-resident investors; laws to mask the real human ownership of assets that are indirectly owned by business and legal entities (such as non-resident corporations or trusts); and the ability to reduce global tax liabilities by forming these entities within their jurisdictions.²² In essence, tax haven governments develop tax and legal

¹⁶ See ICIJ, *Offshore Leaks*, *supra* note 2.

¹⁷ See *id.*

¹⁸ *Id.*

¹⁹ Most tax haven countries pass financial secrecy laws that make it a criminal offense to disclose personal financial information to a third party. The tax haven data leaks, including the Offshore Leaks, were derived from individuals within the tax haven who violated these criminal laws by seizing the data and disclosing it to journalist organizations. The anonymous leaker of the Offshore Leaks, as well as subsequent leakers of the Panama Papers, the Paradise Papers, and the Pandora Papers, have never been revealed.

²⁰ See Michael Hudson, *Panama Papers Wins Pulitzer Prize*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (2017), <https://www.icij.org/investigations/panama-papers/panama-papers-wins-pulitzer-prize/> [<https://perma.cc/BF7S-ESY5>]. The number of reporters working on the more recent file of the Pandora Papers now exceeds 600. See Debbie Cenziper et al., *Post reporters answer your questions about the Pandora Papers*, WASH. POST (Oct. 4, 2021), <https://www.washingtonpost.com/world/2021/10/03/questions-answers-pandora-papers/> [<https://perma.cc/FKK2-8B9R>].

²¹ The modern attempt to classify some countries as tax havens emerged from the OECD’s project on harmful tax competition (later renamed the “harmful tax practices” project). See ORG. FOR ECON. CO-OP. AND DEV. (OECD), HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 26–30 (1998), <https://www.oecd.org/ctp/harmful/1904176.pdf> [<https://perma.cc/A2DW-W7KD>] [hereinafter OECD, HARMFUL TAX COMPETITION]; see also OECD, GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION, MOVING FORWARD ON THE GLOBAL STANDARDS OF TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES (2009), <http://www.oecd.org/ctp/harmful/43775637.pdf> [<https://perma.cc/2J27-9STH>].

²² In a series of communiqués, the G20 endorsed the OECD’s definition of tax havens. See, e.g., G20 SUMMIT INT’L ORG. COMM. ASS’N (G20), THE GLOBAL PLAN FOR RECOVERY AND REFORM (2009), <http://www.g20ys.org/upload/auto/9c0ee8439921b1032fba1b8ca960ba8be8ca4e0d.pdf> [<https://perma.cc/9LDY->

systems that provide services to foreign businesses and individuals with both legal and illegal income.

The offshore world is a legal construct that is linked to a nation's domestic laws as well as, increasingly, forms of international law. Governments enact laws that encourage companies to "go global" by basing a related corporation in a tax haven and reducing taxes owed vis à vis its competitors. For instance, U.S. tax laws effectively reduce taxes by half when a U.S. firm sets up a subsidiary corporation in a tax haven for foreign exports.²³

In terms of international law efforts, global organizations such as the Organization for Economic Cooperation and Development ("OECD") and the Financial Action Task Force ("FATF") promote the adoption of globally negotiated rules that nations are supposed to implement via domestic law.²⁴ For example, FATF-recommended "know your customer" rules, which force banks to ask questions to customers to discern whether deposited funds come from legal or non-legal means, are implemented by the United States through revisions to federal anti-money laundering and terrorist financing laws.²⁵ Tax havens are also connected to international law through recent global agreements that try to inhibit tax haven usage (see Part III.B).

The offshore world itself is managed by a professional class of lawyers, accountants, financial advisors, clerks, bookkeepers, and others who work within tax haven law firms or offshore service providers. These offshore service providers are companies that provide financial and corporate services like forming a trust under the laws of the tax haven.²⁶ In my experience working in tax havens, the majority of citizens within these countries normally do not work within the financial industry. Sometimes, research centers, such as the University of Luxembourg and the University of West Indies, are situated within tax havens and, at times, train workers for jobs within the tax haven's financial industry.²⁷

With respect to inequality, the primary concern for many countries is that middle-class incomes have stagnated or grown very little over the last generation, whereas incomes

MCJX]; G20, DECLARATION ON STRENGTHENING THE FINANCIAL SYSTEM (2009), https://www.treasury.gov/resource-center/international/g7g20/Documents/London%20April%202009%20Fin_Deps_Fin_Reg_Annex_020409_-_1615_final.pdf [<https://perma.cc/CVP8-CVNZ>].

²³ See Chris William Sanchirico, *The U.S.'s Hidden Export Subsidy*, THE HILL (Jan. 22, 2020), <https://thehill.com/opinion/finance/479293-the-uss-hidden-export-subsidy> [<https://perma.cc/T6U8-C33N>] (discussing how U.S. minimum taxes allow U.S. exporters to reduce foreign tax liabilities). Another example would be Canadian tax laws that permit a "double-dip" loan whereby one loan can generate two interest deductions when a company places a related corporation in a tax haven. See Income Tax Act R.S.C. 1985, c. 1, s. 95(1)(a) (Can.).

²⁴ See FIN. ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION (2012), <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/fatf%20recommendations%202012.pdf> [<https://perma.cc/F87L-RESY>].

²⁵ See 31 C.F.R. §§ 1010, 1020, 1023, 1024, 1026 (2021). For discussion, see Richard Gordon & Andrew P. Morriss, *Moving Money: International Financial Flows, Taxes and Money Laundering*, 37 HASTINGS INT'L & COMP. L. REV. 1 (2014).

²⁶ See NICHOLAS SHAXSON, TREASURE ISLANDS: TAX HAVENS AND THE MEN WHO STOLE THE WORLD (2011) (providing interviews with workers who toil in offshore world); Cockfield, *Big Data*, *supra* note 2, at 519-522 (discussing revelations from leaks concerning offshore workers and customer communications).

²⁷ The main campus for the University of West Indies is located in Cave Hill, Barbados and educates students in law, accounting, and finance. Many graduates work within the offshore financial industry. For a discussion concerning how developed countries appear to focus sanctions on more vulnerable Black-majority tax havens while not sanctioning more mature European tax havens like Switzerland, see Steven Dean & Attiva Waris, *Ten Truths About Tax Havens: Inclusion and the 'Liberia' Problem*, 70 EMORY L.J. 1657 (2021) (claiming international tax policy reforms must become more inclusive of needs of traditionally downplayed interests of certain tax havens).

within the top 10% have increased.²⁸ In turn, income inequality encourages unhealthy forms of populism, nationalism, nativism, and anti-immigrant sentiment.²⁹ Over the past fifty years, and particularly since 2000, U.S. incomes in the top 10%—and especially the top 1%—have increased significantly while middle-class incomes have enjoyed less growth.³⁰

Why is income inequality growing? Piketty suggests that, within liberal democracies, over time the investor class enjoys higher returns on their investments compared to the return enjoyed by workers through their wages, resulting in widening income inequality.³¹ For instance, while the shock of World War II flattened U.S. incomes and reduced income inequality, inequality has risen significantly since the 1970s.³²

Piketty's theory is bolstered with respect to studies that measure wealth inequality. Wealth inequality measures the differences between total assets owned by different individuals. The Netherlands, for instance, has the highest wealth inequality in the world, which may be attributable to the fact that it is one of the oldest liberal capitalist societies that has enabled the investor class to grow relatively larger than individuals who derive their returns mainly through wages.³³ The Dutch example, however, also demonstrates how tax policy can effectively address inequality in at least some circumstances: after accounting for tax subsidies and other government transfers, the Netherlands significantly reduces income inequality to the point that it is more equal than a majority of other OECD countries.³⁴

The following sections review how the offshore world contributes to income inequality by enhancing the wealth of criminals, high-income individuals, and multinational corporations. Indeed, various leaks such as the Paradise Papers of 2017 revealed that tax havens provide a veritable paradise for these three actors.

B. Gangster Paradise

Income inequality discussions by academics and policymakers normally focus on legitimate sources of income to show that, in real terms, top incomes have grown significantly while middle-class incomes have either stagnated or grown slowly. Yet, illegal income and its illegal transfer to tax haven bank accounts exacerbate inequality outcomes in many low-income

²⁸ See PIKETTY, *supra* note 7.

²⁹ See Cockfield, *Shaping International Tax*, *supra* note 9.

³⁰ See HOROWITZ ET AL., *supra* note 8.

³¹ See PIKETTY, *supra* note 7.

³² See Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 *Q. J. ECON.* 1 (2003). See also Christopher Kollmeyer, *Trade Union Decline, Deindustrialization, and Rising Income Inequality in the United States, 1947–2015*, 57 *RSCH. SOC. STRATIFICATION & MOBILITY* 1 (2018), https://aura.abdn.ac.uk/bitstream/handle/2164/12582/Final_Submission_for_Aberdeen_27s_Library_.pdf;jsessionid=86AB207C826B4C4C8F1A44FB6DC81FBE?sequence=1 [<https://perma.cc/95R5-XDS7>].

³³ See Wikipedia, *List of Countries by Wealth Inequality*, https://en.wikipedia.org/wiki/List_of_countries_by_wealth_inequality [<https://perma.cc/6XMM-YKJ9>] (describing how The Netherlands has highest Gini co-efficient and thus highest level of wealth inequality in world); James B. Davies, *The Level and Distribution of Global Household Wealth*, 121 *THE ECON. J.* 223 (Apr. 2008).

³⁴ See Wikipedia, *List of Countries by Income Equality*, https://en.wikipedia.org/wiki/List_of_countries_by_income_equality [<https://perma.cc/T32N-T5LK>]. See also RUUD MUFFELS, DIDIER FOUARGE & RONALD DEKKER, *LONGITUDINAL POVERTY AND INCOME INEQUALITY A COMPARATIVE PANEL STUDY FOR THE NETHERLANDS, GERMANY AND THE UK* (Tilburg Univ. OSA, Working Paper No. 2000-6, 2012).

countries (the impact of such flight on middle- and high-income countries is discussed in Part III.C).³⁵ In some countries, political and business elites drain the fiscal coffers of their nations by hiding their booty in tax havens while citizens remain in dire circumstances, now with fewer resources. Although the matter is often discussed in terms of its human rights implications, capital outflows by high-level politicians or other well-connected individuals have a severely deleterious impact on both income and wealth inequality.³⁶

In terms of crimes taking place within tax havens, the literature on the economics of money laundering estimates that up to \$3 trillion flows through the money laundering market every year, with much of these financial flows taking place within tax havens.³⁷ According to Vernier:³⁸

This money [in tax havens] comes from the worst forms of trafficking, in non-trivial proportions: drugs (over \$1 trillion), organs (10 percent of the transplants carried out in the world), child sex tourism (involving more and more countries, particularly in Africa, Asia and South America), the trafficking in women, crimes against the environment, counterfeiting of medical products (15 percent of medications), etc.

While these crimes wreak havoc throughout the world, the phenomenon of “capital flight,” whereby criminals transfer their stolen monies to tax havens, is the main contributor to income inequality. Capital flight is a global phenomenon whereby wealthy individuals in Europe, the Americas, Asia, and elsewhere move legally earned and crooked money offshore.³⁹ Certain countries in Africa, however, are suspected to be the most vulnerable to such activities. In a 2008 study on capital flight from sub-Saharan African countries, the authors concluded that a “narrow, relatively wealthy stratum” of the populations of the countries under study maintained assets in foreign countries that exceeded the national public debts of their own countries.⁴⁰ For a number of African countries, wealthy elites shift more monies to offshore tax havens than the total foreign

³⁵ For sources that discuss how tax policy can provoke poverty and income inequality, see Allison Christians, *Fair Taxation as a Basic Human Right*, 9 INT'L REV. CONST. 211 (2009) (suggesting tax policy should be evaluated against impact on human rights); María Magdalena Sepúlveda, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, U.N. Doc. A/HRC/26/28 (May 22, 2014); see also Int'l Bar Assoc., *Tax Abuses, Poverty and Human Rights: A Report of the International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights* (2013); PHILIP ALSTON & NIKKI REISCH, EDS., *TAX, INEQUALITY, AND HUMAN RIGHTS* (2019) (discussing relevance of human rights to tax law and policy).

³⁶ See John Guyton et al., *Tax Evasion at the Top of the Income Distribution: Theory and Evidence* 3-4, (NBER, Working Paper No. 28542, 2021) (“The result that accounting for tax evasion increases inequality is robust to a [wide range of tests].”).

³⁷ For a summary of estimates of the scale of the money laundering industry, see Killian J. McCarthy, *Why Do Some States Tolerate Money Laundering? On the Competition for Illegal Money*, in RESEARCH HANDBOOK ON MONEY LAUNDERING 127, 128–29 (Brigitte Unger & Dean van der Linde eds., 2013).

³⁸ ALAIN DENEAULT, *LEGALIZATION THEFT: A SHORT GUIDE TO TAX HAVENS* 24 (2016) (quoting Eric Vernier, French expert on money laundering).

³⁹ See Nathan Sheets, *Capital Flight from the Countries in Transition: Some Theory and Empirical Evidence* (Bd. of Governors of the Fed. Reserve Sys., Int'l Fin. Discussion Paper No. 514, 1995) (discussing capital flight from different parts of world).

⁴⁰ James K. Boyce & Léone Ndikumana, *New Estimates of Capital Flight from Sub-Saharan African Countries: Linkages with External Borrowing and Policy Options* (Univ. Mass. at Amherst Pol. Econ. Rsch. Inst., Working Paper No. 166, 2008). See also John Christensen, *Africa's Bane: Tax Havens, Capital Flight and the Corruption Interface* 1-2 (Madrid Real Instituto Elcano, Working Paper No. 1, 2009) (describing how certain African countries vulnerable to capital flight adopt preferential tax policies to compete with tax havens).

aid poured into the continent. In many cases, the situation resembles a revolving door: foreign countries provide aid, then the monies are seized by corrupt elites and hidden offshore.⁴¹

South Sudan, the world's youngest country, provides a distressing example of the costs associated with corruption facilitated by the offshore world.⁴² Two years after the country was founded in 2011, it became embroiled in a civil war.⁴³ The violence and conflict have taken a terrible toll on the South Sudanese, with an estimated 400,000 people killed and more than four million people displaced. Since 2017, approximately seven million of the country's ten million citizens are at risk of starvation, according to the United Nations.⁴⁴

A report by The Sentry, a journalist organization, revealed that the country's elites were stealing foreign aid pouring into the country and hiding it offshore.⁴⁵ The report quoted South Sudan's President as saying: "An estimated \$4 billion are unaccounted for or, simply put, stolen by former and current officials, as well as corrupt individuals with close ties to government officials."⁴⁶ The Sentry investigation also revealed that the President's family members as well as those of other government officials owned or lived in mansions in Kenya and Uganda.⁴⁷ Corrupt officials sometimes hide the ownership of these homes through a tax haven corporation although the Sentry's reporting did not dig up evidence this was taking place.

A 2020 tax haven data leak known as the Luanda Leaks also showed how Isabel dos Santos, Africa's wealthiest woman, stole billions and transferred the ill-gotten monies to tax havens, draining oil- and diamond-rich Angola of valuable resources and leaving its citizens among the poorest in the world.⁴⁸ Documents connect Ms. Dos Santos or her husband, Sindika Dokolo, to a network of more than 400 companies and subsidiaries in 41 countries, including 94 companies set up in tax havens such as Malta, Mauritius, and Hong Kong. Once the authorities began an investigation, Ms. Dos Santos absconded to Dubai, another tax haven. This outcome provides another example of illicit cross-border financial flows to tax haven-based entities (where the funds are normally in turn invested in financially stable OECD countries through, for instance, the purchase of condominiums in Miami or Vancouver).⁴⁹

The Pandora Papers revealed the King of Jordan shifted over \$100 million to tax haven companies that in turn own properties around the world, including three homes in Malibu worth

⁴¹ See Jorgen J. Anderson, Niels Johannesen & Bob Rijkers, *Elite Capture of Foreign Aid: Evidence from Offshore Bank Accounts* (World Bank, Working Paper No. 9150, 2020).

⁴² See Arthur J. Cockfield, *How Countries Should Share Tax Information*, in TAX, INEQUALITY & HUMAN RIGHTS 303 (Philip Alston & Nikki Reisch, eds., 2019) [hereinafter Cockfield, *Share Tax Information*].

⁴³ In neighboring Sudan, the Panama Papers revealed in 2016 that former Sudanese President Ahmad Al Mirghani was the owner of a British Virgin Islands company called Orange Star Corporation, created in 1995, that in turn purchased a long-term lease on a London apartment. See *Ahmad Ali al-Mirghani*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS, <https://offshoreleaks.icij.org/stories/ahmad-ali-al-mirghani> [<https://perma.cc/P8GP-LGZY>].

⁴⁴ See United Nations, *South Sudanese 'one step away from famine', as UN launches humanitarian response plan*, <https://news.un.org/en/story/2021/03/1087492> [<https://perma.cc/NY5Z-RZUQ>] (noting that roughly 7.2 million citizens suffer from severe food insecurity).

⁴⁵ See THE SENTRY, WAR CRIMES SHOULDN'T PAY: STOPPING THE LOOTING AND DESTRUCTION IN SOUTH SUDAN (Sept. 2016).

⁴⁶ *Id.* at 11.

⁴⁷ See *id.* at 5-6.

⁴⁸ See Sydney P. Freedberg et al., *How Africa's richest woman exploited family ties, shell companies and inside deals to build an empire*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Jan. 19, 2020), <https://www.icij.org/investigations/luanda-leaks/how-africas-richest-woman-exploited-family-ties-shell-companies-and-inside-deals-to-build-an-empire/> [<https://perma.cc/8426-AQVV>].

⁴⁹ For discussion, see McCarthy, *supra* note 37, at 128-31.

roughly \$70 million—at the same time as his country was receiving foreign aid.⁵⁰ With respect to other Middle Eastern countries, the Panama Papers also uncovered how former heads of state, including from Kuwait, Palestine, Saudi Arabia, and Qatar, use tax haven entities like corporations to move money offshore.⁵¹ After surveying the wealth held by these individuals, the German journalists who first received the Panama Papers noted: “They enjoy unimaginable luxury while at least part of the population is living a hand-to-mouth existence.”⁵²

Where do the looters go after they have impoverished their countries? There is always a friendly port in the storm. Dubai, in particular, serves as the last-stop destination for many of the world’s biggest financial crooks in part due to its unwillingness to extradite criminals back to their home countries to face charges. Al Khanani, the world’s biggest money launderer and a terrorist financier suspected of laundering billions of dollars, was based in Dubai.⁵³ After looting South Africa for decades, the Gupta brothers fled to Dubai.⁵⁴ As mentioned, after the Luanda leak revealed Africa’s richest woman stole billions of dollars from her own country, she also absconded to Dubai.⁵⁵ Dubai is filled with so many foreign gangsters and demimonde characters it resembles Rick’s Café Américain in the movie *Casablanca* or perhaps the Mos Eisley Cantina in *Star Wars Episode IV*.

C. Millionaire Paradise

The offshore world is also a paradise for millionaires, including a group of individuals who are referred to, in tax industry jargon, as “ultra-high-net-worth individuals”—those who own \$50

⁵⁰ See Will Fitzgibbon, *While foreign aid poured in, Jordan’s King Abdullah funnelled \$100m through secret companies to buy luxury homes*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Oct. 3, 2021), <https://www.icij.org/investigations/pandora-papers/jordan-king-abdullah-luxury-property/> [https://perma.cc/SC3V-HCK4]; Greg Miller, *While his Country Struggles, Jordan’s King Abdullah Secretly Splurges*, WASH. POST (Oct. 3, 2021), <https://www.washingtonpost.com/world/interactive/2021/jordan-abdullah-shell-companies-luxury-homes/> [https://perma.cc/6XSS-XRDZ].

⁵¹ See BASTIAN OBERMAYER & FREDERIK OBERMAIER, *THE PANAMA PAPERS: BREAKING THE STORY OF HOW THE RICH AND POWERFUL HIDE THEIR MONEY* 117-118 (2016) (Two German journalists, Bastian Obermayer and Frederik Obermaier, first gained access to Panama Papers tax haven data leak from Panamanian law firm Mossek Fonseca and then provided leaks to ICIJ). See also *Secret dealings of Middle East leaders exposed by Panama Papers leak*, MIDDLE EAST EYE (April 4, 2016), <https://www.middleeasteye.net/fr/news/huge-tax-leak-exposes-leaders-saudi-pakistan-1560802862> [https://perma.cc/3U4Y-TSKJ].

⁵² *Id.* at 117-18.

⁵³ U.S. authorities, with global partners from Australia to Canada, managed to lure Khanani from Dubai to Panama where he was promptly arrested. See Khurram Husain, *Khanani pleads guilty to money laundering in US court*, DAWN (Nov. 7, 2016), <https://www.dawn.com/news/1294812> [https://perma.cc/XQ72-MF7Q].

⁵⁴ The Gupta brothers are suspected of draining South Africa of \$7 billion in lost tax revenues. In one case, the South African Revenue Service (SARS) illegally gave certain Gupta companies Rand 420 million (roughly \$27 million) in tax refunds between 2016 and 2018. The SARS Commissioner Tom Moyane, a known Zuma crony, was suspended in 2018 for his suspected complicity in the corruption. See Press Trust of India, *South African court freezes assets of Gupta family and associate*, BUS. STANDARD (June 5, 2021), https://www.business-standard.com/article/international/south-african-court-freezes-assets-of-gupta-family-and-associate-121060500014_1.html [https://perma.cc/L6VA-PYVW].

⁵⁵ See Freedberg et al., *supra* note 48; see also Anisha Kohli, *Facing global pressure, the United Arab Emirates to begin fining violators of new corporate transparency rules*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (June 21, 2021), <https://www.icij.org/investigations/fincen-files/facing-global-pressure-the-united-arab-emirates-to-begin-fining-violators-of-new-corporate-transparency-rules/> [https://perma.cc/3NHA-AZRX] (discussing how United Arab Emirates has begun to cooperate with global financial laws targeting beneficial owners with glaring loophole that its two largest cities, Dubai and Abu Dhabi, are exempt from these laws).

million or more in assets. Even during the pandemic, this wealthy group grew by over 24% in one year.⁵⁶ The rise of these extraordinary well-to-doers was facilitated by the offshore world.⁵⁷

This group takes advantage of the laws within tax havens that allow them to hide their wealth from the scrutiny of governments. In fact, the offshore world is awash in their hidden cash—an estimated \$5 to \$33 trillion in private financial wealth is stashed away in tax havens.⁵⁸

This section begins by describing how wealthy Chinese investors move money out of their country and invest via tax haven entities like corporations in countries such as the United States. Next, the section sets out how wealthy individuals within liberal democracies also embrace the offshore world through legal and illegal means.

Consider the situation of China where the greatest amount of money has fled a country via capital flight. In a one-and-a-half-year period from 2016 to 2017, an estimated \$1 trillion was transferred offshore.⁵⁹ The first mega-tax haven leak also revealed family members connected to high-level officials maintained offshore corporations and assets.⁶⁰

Individuals in middle-income countries like China engage in capital flight via tax havens for three main reasons.⁶¹ First, they often wish to diversify their investments, including retirement savings, by putting their money in “safe” parts of the world where returns are stable. Under conventional financial theory, diversifying investment portfolios allows Chinese investors to earn higher returns with less risk.⁶² Second, they fear their government could one day take their money back—and they will not have recourse to a reliable dispute resolution system (due to a weak rule of law and/or government corruption). Third, in some cases Chinese investors also take out a second citizenship in a tax haven in case they have to flee their country.⁶³

⁵⁶ See CREDIT SUISSE RSCH. INST., *supra* note 10, at 22.

⁵⁷ See *id.*

⁵⁸ See JAMES HENRY, THE PRICE OF OFFSHORE REVISITED, TAX JUSTICE NETWORK 36 (2012); see also *The Missing \$20 Trillion*, ECONOMIST (Feb. 16, 2013), <https://www.economist.com/leaders/2013/02/16/the-missing-20-trillion> [<https://perma.cc/4RMQ-LFMK>]; ALAIN DENEAULT, OFFSHORE: TAX HAVENS AND THE ROLE OF GLOBAL CRIME 42-50 (2011) (reviewing estimates).

⁵⁹ See Keith Bradsher, *Chinese Start to Lose Confidence in Their Currency*, N.Y. TIMES (Feb. 13, 2016); Marina Walker Guevara et al., *Leaked Records Reveal Offshore Holdings of China's Elite*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Jan. 2014), <http://www.icij.org/offshore/leaked-records-reveal-offshore-holdings-chinas-elite> [<https://perma.cc/88TN-SBPX>] (“Every corner of China’s economy, from oil to green energy and from mining to arms trading, appears in the ICIJ data.”).

⁶⁰ Many of the individuals identified within the leaks were family members of the rulers of the Communist Party, including the Politburo Standing Committee. See Mar Cabra & Marina Walker Guevara, *Unlocking China's Secrets*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Jan. 23, 2014), <http://www.icij.org/offshore/unlocking-chinas-secrets> [<https://perma.cc/8GCT-YJP7>]; Guevara et al., *supra* note 59.

⁶¹ In the case of China, much of money transferred offshore comes from legitimate sources of income earned through work or business. Nevertheless, the transferors are often breaking domestic Chinese laws that prohibit cross-border transfers in excess of \$50,000. See, e.g., Michael Hudson et al., *Hidden in Plain Sight: New York Just Another Island Haven*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (April 8, 2014), <http://www.icij.org/offshore/hidden-plain-sight-new-york-just-another-island-haven> [<https://perma.cc/WN24-QTBJ>] [hereinafter Hudson, *New York*] (“High-end New York real estate is an alluring destination for corrupt politicians, tax dodgers and money launderers around the globe.”).

⁶² See Frank J. Fabozzi et al., *The Legacy of Modern Portfolio Theory*, 11(3) J. INVESTING 7 (2002), <https://doi.org/10.3905/joi.2002.319510> [<https://perma.cc/3YUA-VQAH>].

⁶³ Wealthy individuals have opportunities to purchase citizenship in a number of countries, including tax havens, at times to avoid taxation by their home countries. For instance, St. Kitts and Nevis in the Caribbean can grant citizenship within 60 days upon payment of a specified amount. In addition to tax avoidance, individuals may wish to hold a second citizenship as a backup plan in the event of political instability in their home countries. See Andy

Chinese capital flight leads to lower economic growth as resources are hidden and invested overseas instead of domestically, leading to lower employment and lost tax revenues. Wealthy Chinese individuals use tax haven to enhance their after-tax income by diversifying their investment portfolios and, at times, by escaping Chinese taxation on their income, which encourages income inequality because the bulk of Chinese people do not get such benefits. This process is taking place at a time of great inequality. For instance, one study estimates that China exceeded U.S. income inequality levels by 2012.⁶⁴ While average incomes have been steadily rising for the past thirty years, the growing Chinese economy has contributed to income and wealth inequality.

In liberal democracies, such as the United States, tax laws allow wealthy individuals to take advantage of offshore tax privileges that are not available to low- and middle-income taxpayers. For example, in 2005, the accounting firm KPMG admitted to marketing large-scale offshore tax shelters to wealthy clients. The firm's so-called Offshore Portfolio Investment Strategy cost the U.S. government hundreds of millions of dollars in lost revenue.⁶⁵ The U.S. government alleged the scheme violated tax law in part because it lacked economic substance—it amounted to nothing more than paper-shuffling investor funds to generate tax savings. Under a deferred prosecution agreement with the U.S., KPMG admitted criminal wrongdoing and agreed to a \$456 million fine, in addition to ongoing review of its tax practice.⁶⁶ Moreover, nine senior KPMG officers were criminally indicted for tax fraud and suspended from practicing accounting. Subsequent litigation resulted in both acquittals and convictions.⁶⁷

The Pandora Papers of 2021 revealed that Cherie Blair, wife of former U.K. Prime Minister Tony Blair, used a tax haven corporation to purchase a London building that was partially owned by the family of a Bahraini minister.⁶⁸ By purchasing the shares of the tax haven corporation, instead of buying the asset directly, Ms. Blair reportedly saved \$422,000 in taxes on the sale.

Semotiuk, *St Kitts And Nevis Possibly An Investor Immigrant's Best 2nd Passport*, FORBES (Aug. 17, 2020), <https://www.forbes.com/sites/andyjsemotiuk/2020/08/17/st-kitts-and-nevis-possibly-an-investor-immigrants-best-2nd-passport/?sh=70deedd3a61> [<https://perma.cc/9GF7-MZM4>] (indicating citizenship can be purchased for USD\$200,000). See Allison Christians, *Buying In: Citizenship and Residence by Investment*, 62 ST. LOUIS U. L.J. 51 (2018).

⁶⁴ See Yu Xie & Xiang Zhou, *Income Inequality in Today's China*, 111 PNAS, 6928, 6930 (Apr. 28, 2014), <https://doi.org/10.1073/pnas.1403158111> [<https://perma.cc/6NA8-7P2L>] (estimating a Gini coefficient of 0.55 for China in 2012 compared to 0.45 for the United States). See also Branko Milanovic, *China's Income Inequality Will Lead It to a Stark Choice*, FOREIGN AFF. (Feb. 11, 2021), <https://www.foreignaffairs.com/articles/china/2021-02-11/chinas-inequality-will-lead-it-stark-choice> [<https://perma.cc/RV7B-SN2M>].

⁶⁵ The Offshore Portfolio Investment Strategy is sometimes referred to as a “basis-shift cloned” tax shelter for high-net-worth individuals. The deal is “cloned” in that the same tax shelter is pitched to numerous potential clients. For discussion, see U.S. PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SEC. AND GOV'T AFFAIRS, S. REP. NO. 109-54, *THE ROLE OF PROFESSIONAL FIRMS IN THE U.S. TAX SHELTER INDUSTRY* (2005).

⁶⁶ For discussion, see Lynnley Browning, *3 Convicted in KPMG Tax Shelter Case*, N.Y. TIMES (Dec. 17, 2008), <https://www.nytimes.com/2008/12/18/business/18kpmg.html?mcubz=0> [<https://perma.cc/T2NT-PTBQ>]; Press Release, Department of Justice, *KPMG to Pay \$456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case* (Aug. 29, 2005), https://www.justice.gov/archive/opa/pr/2005/August/05_ag_433.html [<https://perma.cc/2FCR-LCGJ>].

⁶⁷ See *id.*

⁶⁸ See BBC Panorama, *Pandora Papers: Blairs saved £312,000 stamp duty in property deal*, BBC NEWS (Oct. 3, 2021), <https://www.bbc.com/news/uk-58780559> [<https://perma.cc/SD77-7RCJ>].

Consider also one of the exposés from the 2017 Paradise Papers, which revealed a tax perk available to the very wealthy.⁶⁹ Lewis Hamilton, a British Formula One racing star, purchased a jet for \$27 million—a “candy-apple-red Bombardier Challenger 605 with Armani curtains.”⁷⁰ He owed \$5.2 million in sales taxes (called value-added taxes in Europe and elsewhere). Unlike common consumer purchases, the wealthy can avoid paying these sales taxes on their jets entirely. Mr. Hamilton’s jet was briefly parked in the Isle of Man, a tax haven, and registered there. As a result, his \$5.2 million tax liability was reduced to \$0.

Finally, the Canadian government has held hearings to investigate a controversy whereby wealthy Canadians paid no income taxes on their wealth that they had “gifted” to a corporation based in the Isle of Man.⁷¹ The tax plan, which was supported by legal opinions from a Canadian and Isle of Man tax lawyer, involved transferring Canadian income to the offshore corporation. Because the monies were allegedly gifted, they were subject to the Isle of Man’s zero tax rules. At the time of this writing, audits and litigation remain underway.⁷²

Tax havens contribute to significant revenue losses in many countries. According to a recent working paper that was supported by Internal Revenue Service (I.R.S.) data, the United States loses an estimated \$175 billion in revenue per year due to its inability to track the top 1% of earners who engage in tax avoidance.⁷³ This revenue loss forces the I.R.S. to audit more low- and middle-income taxpayers, further reducing their after-tax income and amplifying income inequality.⁷⁴ Notably, an I.R.S. data leak revealed that many of the wealthiest individuals in the United States pay little to no taxes on their multi-billion dollar fortunes, largely because capital gains are not taxed until the stocks are sold.⁷⁵

In addition to the legal use of tax havens by the rich, data leaks reveal that illegal offshore tax evasion may be more extensive than previously thought. As will be discussed, there is some social science evidence—whereby leaked materials were matched with real taxpayers—that suggests many wealthy individuals and families in Western democracies engage in illegal offshore tax evasion.

⁶⁹ See Ryan Chittum & Juliette Garside, *Offshore Gurus Help Rich Avoid Taxes on Jets and Yacht*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Nov. 6, 2017), <https://www.icij.org/investigations/paradise-papers/offshore-gurus-help-rich-avoid-taxes-jets-yachts/> [https://perma.cc/78AH-3NGB].

⁷⁰ *Id.*

⁷¹ See HOUSE OF COMMONS, THE CANADA REVENUE AGENCY, TAX AVOIDANCE AND TAX EVASION: RECOMMENDED ACTIONS, REP. OF THE STANDING COMM. ON FIN., 42d Parl. (1st Sess., Oct. 2016).

⁷² See Harvey Cashore, *MPs braced for battle with global accounting firm over naming wealthy Canadians behind offshore tax shelters*, CAN. BROAD. CORP. (May 19, 2021), <https://www.cbc.ca/news/politics/kpmg-isle-of-man-tax-dodge-shelter-1.6031057> [https://perma.cc/9GFS-24M9].

⁷³ See Guyton et al., *supra* note 36, at 4.

⁷⁴ The I.R.S. is four times more likely to audit an individual who has applied for the Earned Income Tax Credit, a refundable tax credit that supports very low incomes, than taxpayers who earn \$400,000 or more per year. *See id.* at 3. *See also* Joel Slemrod, *Cheating Ourselves: The Economics of Tax Evasion*, 21 J. ECON. PERSP. 25 (2007) (discussing how decline in I.R.S. enforcement likely increases tax evasion and how “the rich avoid, and the poor evade taxes” because wealthy individuals have resources to engage in tax planning).

⁷⁵ See Jesse Eisinger et al., *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, PROPUBLICA (June 8, 2021), <https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax> [https://perma.cc/6TSG-RGBV] (noting that Jeff Bezos and Elon Musk paid no U.S. federal taxes in some years despite adding billions to their fortunes from stock appreciation). Under U.S. tax law, assets that appreciate in value are not taxed unless there is a “realization event,” such as a sale of the stock. *See* I.R.C. § 1001. Wealthy individuals who need money to spend typically take out a loan secured against the collateral of their stock holdings; this avoids a stock sale and taxable capital gains.

Prior to the data leaks, the offshore world was shrouded in secrecy. Researchers traditionally estimated offshore tax evasion indirectly by analyzing matters like cross-border financial flows and relying on data from sources such as the Bank of International Settlements.⁷⁶ Now equipped with real-world data from the tax haven data leaks, researchers analyzed Scandinavian taxpayers with a new methodology that suggests the traditional approach may be flawed.⁷⁷ The new approach estimates much higher revenue losses from offshore tax evasion.⁷⁸

The authors devised a novel way to test under-reporting of income and wealth by ultra-high-net-worth individuals and concluded that the top 0.01% of the wealthiest households in Scandinavia illegally evade taxes on roughly 25% of their wealth.⁷⁹ Prior studies have shown that the “regular rich” in the top 1% evade 5% of their income taxes. The general population, in contrast, is thought to evade only 0.6% of their taxes via offshore investments.⁸⁰

The paper’s data drew on two key tax haven data leaks. The first set of data was taken from HSBC Switzerland in 2007 and contained the names and bank records of 30,000 taxpayers. It is known as the Falciani List—after Hervé Falciani, the bank employee who initially obtained the list—or, alternatively, the Lagarde List—after Christine Lagarde, the French Minister of Finance who later received the list.⁸¹ The French government shared it with governments around the world, including the United States and various Scandinavian countries. Unusually, this list did not just specify the owners of bank accounts; it also set out the beneficial owners of business entities, like corporations, that in turn owned the bank accounts. The second set of data was obtained from the Panama Papers, which also revealed undisclosed offshore accounts maintained by ultra-wealthy Scandinavians.

Working with the study’s authors, tax authorities from Denmark, Sweden, and Norway matched the secret bank accounts to actual taxpayers in their countries. After a lengthy investigation, the Danish and Norwegian tax authorities concluded that 90-95% of taxpayers on the Lagarde List had not reported, or paid taxes on their income.⁸² The governments took the position that this non-reporting was a crime. The study also found that, in many cases, the wealthiest members of society were the real problem: the top 0.01% (in this case, individuals with \$45 million and over in wealth) was thirteen times more likely to hide assets in HSBC Switzerland than the bottom half of the top 1% (individuals with \$2–3 million in wealth).⁸³ In other words,

⁷⁶ See Collin, *supra* note 5 (noting that BIS data on offshore accounts that has been provided by banks is not reliable because banks only report the “immediate counterparty” that includes corporations based outside of tax havens).

⁷⁷ See Jannick Damgaard et al., *What Is Real and What Is Not in the Global FDI Network?* (Int’l Monetary Fund, Working Paper No. 19/274, 2019); Gabriel Zucman, *The Missing Wealth of Nations: Are Europe and the U.S. net Debtors or net Creditors?*, 128 Q. J. ECON. 1321 (2013); Lukas Menkhoff & Jakob Miethe, *Tax evasion in new disguise? Examining tax havens’ international bank deposits*, 176 J. PUB. ECON. 53 (2019).

⁷⁸ See Annette Alstadsæter et al., *Tax Evasion and Inequality*, 109 AM. ECON. REV. 2073, 2074–75 (2019).

⁷⁹ *Id.*

⁸⁰ See *id.* at 2093.

⁸¹ See Patrick Radden Keefe, *The Bank Robber*, NEW YORKER (May 23, 2016), <https://www.newyorker.com/magazine/2016/05/30/herve-falcianis-great-swiss-bank-heist> [<https://perma.cc/HHA9-T3L5>].

⁸² See Alstadsæter et al., *supra* note 78, at 2078.

⁸³ See *id.* at 2083. The authors also mention that 14% of the top 0.01% of the wealthiest households disclosed assets in a tax amnesty program offered by Scandinavian governments between 2009 and 2015. These tax dodgers, on average, hid almost one-third of their wealth, which is consistent with the study’s finding that they avoided taxes on 40% of their wealth.

ultra-high-net-worth taxpayers committed criminal tax evasion at a much higher rate than the merely rich.

The study is surprising because prior research has shown Scandinavian countries have some of the highest taxpayer compliance rates in the world.⁸⁴ If criminal tax evasion is so prevalent among ultra-high-net-worth Scandinavian individuals, it could be even worse in most other countries.

In fact, this is what the study's authors concluded in an earlier analysis of data on bank account deposits from the Bank for International Settlements (the data did not cover securities, like shares, in which most tax haven wealth is found).⁸⁵ This data is probably less reliable than tax haven data leaks, but nevertheless, it is helpful in estimating the frequency of illegal activity.

Through this earlier analysis, the authors estimate that tax havens hold hidden wealth equal to about 10% of global Gross Domestic Product.⁸⁶ In the United States, Great Britain, France, and Spain, the ultra-high-net-worth households (that is, the wealthiest 0.01%) hide approximately 30-40% of their wealth in tax havens.⁸⁷ As mentioned, a study suggests that taxing the top 1% of U.S. income earners would increase tax revenue by \$175 billion per year.⁸⁸

These findings are consistent with a 2018 study that reviewed taxpayer behavior in Colombia and found that the wealthiest 0.01% are twenty-four times more likely to be named in the Panama Papers than the wealthiest 5%.⁸⁹ Two-fifths of the top 0.01% of income earners disclosed illegal offshore assets after a voluntary disclosure program was announced, with a 900% increase in such disclosures after the release of the Panama Papers.⁹⁰ Again, the richest of the rich were far more likely to stash their monies offshore than other well-off taxpayers.

Some social science analysis to date suggests that many of the wealthiest members of society have hidden a portion of their fortunes offshore illegally where it grew tax-free, potentially for generations. The existence of two *de facto* financial systems—a domestic system for average taxpayers and a global, offshore system for wealthy taxpayers—exacerbates income inequality.

D. Multinational Firm Paradise

In addition to criminals and millionaires, the offshore world is a paradise for multinational firms legally to avoid an estimated \$240 billion in taxes per year.⁹¹ This section discusses how governments exacerbate income inequality by allowing companies to take advantage of tax

⁸⁴ See Henrik Jacobsen Kleven, *How Can Scandinavians Tax So Much?*, 28 J. ECON. PERSP. 77, 92–95 (2014) (discussing cultural and political factors that encourage high taxpayer morale and compliance).

⁸⁵ See Annette Alstadsæter et al., *Who owns the wealth in tax havens? Macro evidence and implications for global inequality*, 162 J. PUB. ECON. 89 (2018).

⁸⁶ See *id.*; see also GABRIEL ZUCMAN, *THE HIDDEN WEALTH OF NATIONS* 34–42 (2015).

⁸⁷ The study also revealed that many of the wealthiest individuals in Russia, Venezuela, Saudi Arabia, and the United Arab Emirates stash much greater amounts offshore. See Alstadsæter et al., *supra* note 85, at 95.

⁸⁸ See Guyton et al., *supra* note 36, at 4. The authors suggest that increasing I.R.S. resources would support tax administration at the top of the income distribution. See *id.* at 5.

⁸⁹ See Juliana Londoño-Vélez & Javier Ávila-Mahecha, *Can Wealth Taxation Work in Developing Countries? Quasi-Experimental Evidence from Colombia* 4 (Working Paper No. 482, 2018).

⁹⁰ See *id.* at 5.

⁹¹ See OECD, *ADDRESSING BASE EROSION AND PROFIT SHIFTING* 38 (2013). See also Javier Garcia-Bernardo & Petr Janský, *Profit Shifting of Multinational Corporations Worldwide* (Int'l Ctr. for Tax and Dev., Working Paper No. 119, 2021) (relying on OECD data, estimating multinational corporations shifted roughly \$1 trillion in profits to avoid between \$200 and \$300 billion in taxes).

havens.⁹² These governments pursue national interest objectives ostensibly to support companies in their efforts to compete in a global market-place.⁹³ Particularly since the 1980s, governments have been engaged in a “race to the bottom” as they have generally reduced corporate income tax rates and given other tax breaks to multinational firms.⁹⁴

International tax rules for corporations encourage three main income inequality outcomes.⁹⁵ First, the race to the bottom redistributes government tax burdens away from mobile capital to be focused exponentially more on immobile workers, leading to overall less after-tax income for laborers. Second, the reduced taxation on multinational firms enhances their after-tax profits, leading to a greater return for shareholders (that is, investors or capital owners).⁹⁶ Because capital owners tend to have higher incomes, the use of tax havens enhances the income and wealth of these high incomes while low- and middle-income taxpayers generally cannot avail themselves of such benefits.⁹⁷ Third, the inability to tax multinational firms effectively leads to revenue losses and a corresponding reduction in government services which harms middle- and low-income earners the most because they lose out on government services they would otherwise enjoy.

Governments were generally content to let this course of events continue until the global financial crisis of 2008 that left many governments in greater need for tax revenues from any possible sources. In 2013, the OECD and the G-20 began the most ambitious international tax reform effort in history called base erosion and profit shifting (“BEPS”).⁹⁸ Apart from some important administrative agreements like Country-by-Country Reporting (“CbCR”) (discussed in Part III.A) and a global agreement on minimum corporate income tax rates (discussed in Part III.B), the BEPS reforms have resulted in modest changes to the system while leaving most of its elements untouched.⁹⁹

⁹² While this Article focuses on income inequality, international tax can promote other forms of inequality, such as gendered outcomes. *See, e.g.,* Kathleen Lahey, *Missing Women: Gender-Impact Analysis and International Taxation*, in *GLOBALIZATION AND ITS TAX DISCONTENTS: TAX POLICY AND INTERNATIONAL INVESTMENTS* 153, 163 (Arthur Cockfield ed., 2010) (discussing how tax-haven based tax incentives for multinational corporations lead to revenue losses that disproportionately harm females).

⁹³ Critics of this view maintain that the use of the “competitiveness” concept is not grounded in any substantive tax policy and should not therefore be used as a guiding principle to develop international tax policy. Paul R. McDaniel, *Territorial vs Worldwide International Tax Systems: Which is Better for the U.S.?*, 8 *FLA. TAX REV.* 283, 301 (2007).

⁹⁴ *See* R. Altshuler and H. Grubert, *The Three Parties in the Race to the Bottom: Host Governments, Home Governments and Multinational Companies*, 7 *FLA. TAX REV.* 153 (2005).

⁹⁵ *See* Arthur J. Cockfield, *Purism and Contextualism with International Tax Law Analysis: How Traditional Analysis Fails Developing Countries*, *EJOURNAL TAX RSCH.* 199, 206-13 (2007).

⁹⁶ *See* PETER DIESTCH, *CATCHING CAPITAL: THE ETHICS OF TAX COMPETITION* (2015) (discussing how tax competition worsens income and wealth inequality and undermines a country’s fiscal autonomy). Who should bear the burden of corporate tax remains academically contentious as the tax burden may be imposed on shareholders, workers, or other stakeholders of the firm. *See* Li Liu and Rosanne Altshuler, *Measuring the Burden of the Corporate Income Tax Under Imperfect Competition*, 66(1) *NAT’L TAX J.* 215 (2013).

⁹⁷ *See* Thomas R Tørsløv, Ludvig S Wier & Gabriel Zucman, *The Missing Profits of Nations* (Nat’l Bur. of Econ. Rsch. Working Paper No. 24701, 2020) (discussing how multinational firms use tax havens to shift profits out of high tax countries to benefit the investor class).

⁹⁸ *See* OECD, BEPS project (2013); *see also* Rifat Azam, *Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS*, 50 *SUFFOLK U. L. REV.* 517 (2017).

⁹⁹ *See* Arthur J. Cockfield, *The Limits of the International Tax Regime as a Commitment Projector*, 33 *VA. TAX REV.* 59-113 (2013); *see also* Arthur J. Cockfield, *Tax Wars: How to End the Conflict over Taxing Global Digital Commerce*, 17 *BERKELEY BUS. L.J.* 353, 358-63 (2020) [hereinafter Cockfield, *Tax Wars*].

In particular, the Paradise Papers of 2017 contained data that revealed tax planning efforts by corporate taxpayers.¹⁰⁰ The documents came from the internal files of an offshore law firm called Appleby, mainly based in Bermuda, and an offshore service provider named Estera.¹⁰¹ Offshore service providers, also called offshore financial centers, provide financial and other services to foreign investors. These services include forming offshore corporations and other entities and drafting contracts between these entities and the investor. In this case, the files demonstrated how Appleby's lawyers as well as staff members at Estera helped corporate taxpayers use tax havens to reduce their global tax liabilities.

The leak showed how, four years after the BEPS process was initiated, the offshore world continued to offer tax perks to Apple, Nike, Uber, and other multinational corporations. In some cases, these corporations used tax haven services to engage in aggressive tax avoidance techniques, including assisting these taxpayers in legally exploiting gaps between different tax laws around the world (a phenomenon referred to as "international tax arbitrage").¹⁰² The Paradise Papers showed how the ownership of all-important intangible assets—such as the rights to Nike's Swoosh trademark, Uber's taxi-hailing app, and medical patents covering such treatment options as Botox—could all be traced to a five-story office block in Bermuda occupied by Appleby and Estera.¹⁰³

Similarly, the ownership of Facebook's user database and rights to use its platform technology was held by companies in a small office building, used by Appleby and Estera, on Grand Cayman, a Caribbean tax haven.¹⁰⁴ In other words, the legal ownership of the database was traced to shell corporations that had registered addresses at this location.

Multinational firms like Facebook create tax plans that base or transfer intangible assets such as databases, copyrights, or patents within an offshore corporation so that cross-border royalties will be paid to the tax-haven-based company and taxed at the tax haven's income tax rate, which is normally zero.¹⁰⁵ These intangible assets are mobile in the sense their ownership can be shifted "on paper" to tax havens while still complying with all tax laws.¹⁰⁶

¹⁰⁰ See ICIJ, *About the Paradise Papers Investigation*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Nov. 5, 2017), <https://www.icij.org/investigations/paradise-papers/about/> [<https://perma.cc/V8F2-SLPR>].

¹⁰¹ The two businesses operated together under the Appleby name until Estera became independent in 2016. Like the Panama Papers, the German newspaper *Süddeutsche Zeitung* first obtained the records then shared them with the International Consortium of Investigative Journalists and its media partners, including *The New York Times*, *BBC* in the United Kingdom, *Le Monde* in France, and *CBC* in Canada. *See id.*

¹⁰² See Simon Bowers, *Nike Shifted Billions in Profits from Europe to Tax-free Bermuda, Paradise Papers Leak Shows*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Nov. 4, 2017) [hereinafter Bowers, *Nike*]; Simon Bowers, *Leaked Documents Expose Secret Tale of Apple's Offshore Island Hop*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Nov. 6, 2017), <https://www.icij.org/investigations/paradise-papers/apples-secret-offshore-island-hop-revealed-by-paradise-papers-leak-icij/> [<https://perma.cc/H4BB-M7L2>] [hereinafter Bowers, *Leaked Documents*].

¹⁰³ *See id.*

¹⁰⁴ *See id.*; see also Matthew Gardner, *Amazon in Its Prime: Doubles Profits, Pays \$0 in Federal Income Taxes*, INST. TAX'N ECON. POL'Y (Feb. 13, 2019) (describing Amazon's avoidance of U.S. federal income taxes).

¹⁰⁵ See ARTHUR COCKFIELD & DAVID KERZNER, INTERNATIONAL TAXATION CORE CONCEPTS 58-62, 141-47 (2d ed., 2017).

¹⁰⁶ *See* Subpart F 951-965 I.R.C. § 2017 (providing for current (accrual) taxation of foreign source passive income). Co-ownership or co-development of intellectual property by entities or individuals within tax havens allows taxpayers to avoid the application of Subpart F in some contexts. *See id.*

The Paradise Papers revealed how Apple, the world's largest multinational firm measured by market capitalization,¹⁰⁷ aggressively sought out new offshore tax savings after suffering bad media about prior tax plans. At an earlier point, Apple deployed a form of international tax planning with the memorable name "Double Irish with a Dutch Sandwich." The plan involved setting up two corporations in Ireland (a tax haven) so that neither corporation was a resident anywhere in the world under Irish tax law, and then siphoning off the untaxed income to another corporation residing in The Netherlands, another tax haven.¹⁰⁸ Through its Double Irish with a Dutch Sandwich tax plan, Apple reduced its rate on profits outside of the United States to 5% in most years, dipping to 0.005% in others.¹⁰⁹

The Paradise Papers revealed that, in light of the bad media surrounding the Double Irish with a Dutch Sandwich, Apple restructured its global tax plan.¹¹⁰ The documents showed how Apple shifted the two Irish corporations to Jersey, a tax haven located off the coast of Great Britain.¹¹¹ One of these corporations was Apple Sales International and had been Apple's biggest profit-maker, generating \$120 billion in revenue or almost 60% of Apple's global earnings.¹¹² As a result of these moves, Apple managed once again to reduce its global tax liability greatly.

Similarly, a data leak known as LuxLeaks revealed how Luxembourg, a land-locked European tax haven, engages in predatory tax competition by offering private rulings to multinational corporations to reduce their global tax liabilities legally.¹¹³ LuxLeaks was derived from a database taken from PricewaterhouseCoopers and included the accounting firm's application for private rulings that were granted to its corporate clients by Luxembourgian tax officials, although these rulings were never provided to any foreign tax authorities. These rulings

¹⁰⁷ See STATISTICA, *The 100 largest companies in the world by market capitalization in 2021* (2021), <https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/> [<https://perma.cc/F84P-9TAL>].

¹⁰⁸ See Jeremy Kahn, *Google's 'Dutch Sandwich' Shielded 16 Billion Euros from Tax*, BLOOMBERG (Jan. 2, 2018), <https://www.independent.co.uk/news/business/news/google-alphabet-tax-netherlands-dutch-sandwich-bermuda-ireland-a8138466.html> [<https://perma.cc/ELH8-B3NQ>].

¹⁰⁹ The tax plan was also (unsuccessfully) attacked by European Commission (EC) regulators. The EC alleged Apple's plan was an illegal subsidy (more technically, illegal state aid) that improperly reduced Irish tax revenues by around \$16 billion. The European Commission calculated the tax rate for one of Apple's Irish companies for one year to be 0.005%. While a court initially supported the EC, the European General Court overturned the decision and ruled in favor of Apple. See Case T-778/16, *Ireland v. Comm'n*, ECLI:EU:T:2020:338 (July 15, 2020); Case T-892/16, *Apple Sales Int'l v. Comm'n*, ECLI:EU:T:2020:338 (July 15, 2020).

¹¹⁰ See *id.*

¹¹¹ The leaked documents allowed journalists to trace Apple's money trail to a building used by Appleby and Eстера in Jersey, a tax haven and U.K. Crown dependency with zero corporate taxes for foreign companies. See Jessie Drucker & Simon Bowers, *After a Tax Crackdown, Apple Found a New Shelter for Its Profits*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/world/apple-taxes-jersey.html> [<https://perma.cc/J5W8-W2LQ>]; Bowers, *Nike*, *supra* note 102.

¹¹² See Bowers, *Leaked Documents*, *supra* note 102.

¹¹³ See Matthew Caruana Galizia et al., *Explore the Documents: Luxembourg Leaks Database*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Dec. 9, 2014), <http://www.icij.org/project/luxembourg-leaks/explore-documents>

-luxembourg-leaks-database [<https://perma.cc/U7EH-6E85>]. See also Omri Y. Marian, *The State Administration of International Tax Avoidance*, 7 HARV. BUS. L. REV. 1, 6–8 (2017) (discussing revelations from LuxLeaks, which revealed Luxembourg was undermining international tax system by providing significant tax breaks to multinational firms); B. Huesecken et al., *Effects of Disclosing Tax Avoidance: Capital Market Reaction to LuxLeaks* (University of Cologne Working Paper, 2018), <http://doi.org/10.2139/ssrn.2848757> [<https://perma.cc/G38A-U96D>] (providing big data analysis to show how firms had positive abnormal returns after being identified in LuxLeaks).

offered tax breaks that allowed the companies legally to reduce global tax liabilities in ways that were not transparent to other tax authorities. LuxLeaks spurred international tax transparency reforms to encourage governments to exchange tax rulings with each other (see Part III.A).

E. Summary

Over the course of the last century, tax benefits offered by the offshore world increasingly privileged the interests of three main groups: criminals, wealthy taxpayers, and multinational corporations.

Criminals benefit from the opacity of the offshore world where offshore entities are deployed to launder dirty money and mask the identity of beneficial owners (that is, the human being who actually owns assets held by the entities). Trillions of dirty dollars flow through the offshore system each year, primarily as a result of drug trafficking and government corruption. For some low- and middle-income countries, corrupt elites and politicians steal foreign aid and hide the funds within secret tax haven bank accounts, exacerbating existing inequalities and, at times, leaving citizens with insufficient resources like food.

From a more global perspective, wealthy taxpayers, especially the new gilded class of ultra-high-net-worth individuals with \$50 million or more, increasingly take advantage of tax havens to engage in tax planning. If the taxpayers have global income, then a portion of this income is diverted to tax havens where it remains untaxed. There is also some social science evidence based on the tax haven leaks that shows ultra-high-net-worth individuals are far more likely to use tax havens to engage in the criminal offense of offshore tax evasion. By allowing taxpayers to stash a significant portion of their fortunes offshore, potentially for generations, tax havens may have fueled the rise of ultra-high-net-worth families by allowing the returns on the hidden monies to escape taxation altogether.

Finally, multinational corporations have long benefited from the rules that allow them legally to allocate global profits to tax havens where these profits are normally taxed at a rate of zero, reducing overall global tax liabilities and enhancing returns for shareholders. These shareholders—who tend to have higher incomes than average taxpayers—benefit from higher after-tax returns when they receive more dividends (that is, the multinational corporation distributes its enhanced after-tax profits to its shareholders) or when their share price appreciates (which occurs when firms retain earnings, instead of, for example, distributing them via dividends).

In addition, the race to the bottom—whereby corporate income tax burdens have gradually been reduced for mobile capital over the past half-century—leads to revenue losses, a reduction in government services, and a greater focus on taxing immobile labor, thus reducing the after-tax return for workers. Over time, such tax breaks have enhanced income inequality between wealthier shareholders (capital owners) and workers.

III. LEGAL AND POLICY REFORMS

This Part examines some of the main legal and policy responses to address challenges created by the offshore world, including the fact that it encourages income and wealth inequality.

A. Tax Transparency Initiatives to Counter Multinational Firm Tax Avoidance

While there are many different proposed solutions, this section briefly touches on tax transparency measures used to inhibit aggressive tax avoidance.¹¹⁴

There is normally an information imbalance between taxpayers and tax authorities. While taxpayers know exactly how they calculate their tax liabilities, tax authorities often know little to nothing, at least with respect to business or illegal income. As a result, it can be hard for these tax authorities to detect taxpayers' financial activities that do not comply with tax laws. The solution: Pass laws or policies to force the taxpayer or some third party to provide more and better information to tax authorities, so they can accurately assess a taxpayer's tax liability.¹¹⁵

As mentioned, the 2008 global financial crisis and the subsequent financial distress felt by many governments made them take a closer look at tax revenue losses associated with non-compliant aggressive international tax planning. In 2013, the OECD and G-20 launched the BEPS reforms to counter this planning.¹¹⁶ One of the main innovations to come out of the BEPS project was a proposal to force multinational firms to disclose tax and other payments in every country where they operate: the new Country-by-Country Reporting (CbCR) system. Before this reform took place, most countries, such as the United States, did not force their multinational firms to disclose tax dealings with other countries (although securities laws sometimes prompt public companies to disclose geographic earnings, which can provide some information to tax authorities concerning foreign operations).

Under CbCR, participating governments, including the United States, are supposed to pass domestic tax laws that force multinational firm taxpayers to disclose tax payments in every country where they operate, which should assist with transfer pricing audits.¹¹⁷ Under CbCR, large multinational firms with over EUR750 million (or \$850 million) in annual global income must disclose all tax and similar payments they have made to every country where they operate.¹¹⁸ Now, these large firms provide detailed information on all tax payments to the parent company's jurisdiction, and this information will be shared with tax authorities in all countries where the firm operates.

As mentioned, LuxLeaks revealed that a government was giving private tax rulings to corporate taxpayers that allowed them to reduce global tax liabilities.¹¹⁹ In response to LuxLeaks, governments have, under BEPS Action 5, additionally promised they will exchange tax rulings to make this system more transparent. Under this reform, governments have agreed to provide tax rulings, or summaries of tax rulings, to their exchange partners.¹²⁰ In this way, governments will

¹¹⁴ See Arthur J. Cockfield, *International Tax Transparency*, 1 PERSP. TAX L. & POL'Y 1 (2020).

¹¹⁵ See Leandra Lederman & Joseph Dugan, *Information Matters in Tax Enforcement*, 2020 BYU L. REV. 145 (2020) (describing how third-party information flows continue to play critical role in tax enforcement); Petr Jansky et al., *The Corporate Tax Haven Index: A New Geography of Profit Shifting* (IES, Working Paper, 2019) (discussing need for better information concerning corporate foreign profits).

¹¹⁶ See OECD, *supra* note 91.

¹¹⁷ See Arthur J. Cockfield & Carl MacArthur, *Country-by-Country Reporting and Commercial Confidentiality*, 63 CAN. TAX J. 627 (2015). For a discussion of how CbCR works, see generally OECD, COUNTRY-BY-COUNTRY REPORTING: HANDBOOK ON EFFECTIVE TAX RISK ASSESSMENT (2017); OECD, HANDBOOK ON EFFECTIVE IMPLEMENTATION (2017).

¹¹⁸ See Cockfield & MacArthur, *supra* note 117, at 636-637. In the U.S., CbCR is implemented through section 6038 of the Internal Revenue Code as well as accompanying regulations.

¹¹⁹ See the discussion accompanying note 113.

¹²⁰ See OECD, COUNTERING HARMFUL TAX PRACTICES MORE EFFECTIVELY, TAKING INTO ACCOUNT TRANSPARENCY AND SUBSTANCE (Action 5 - 2015 Final Report, 2015).

have more information concerning how their multinational firms use tax havens such as Luxembourg to reduce taxes owed.

B. Other Global Tax Agreements to Counter Firm Tax Avoidance

In addition to transparency measures, the BEPS reforms led to other initiatives to inhibit the ability of multinational firms to avoid taxes.¹²¹ In particular, in 2021 over 130 countries, including the United States, agreed to a framework to implement two important measures.¹²²

First, new tax rules will apply to large corporations with over EUR750 million in annual global income that have cross-border sales of digital goods and services.¹²³ Under the proposed approach, firms such as Facebook and Google will have to pay taxes to countries where their customers are located.¹²⁴ This is an entirely new approach to taxing global income because traditional rules and principles emphasize the need to tax cross-border profits where value is added to a cross-border transaction, which was normally where the head office of the firm was based.¹²⁵

The rule change was motivated by the view that, under the older rules, governments were unable to tax significant profits despite the fact that millions of their consumers contributed to this profit-making.¹²⁶ The United States, which serves as a base for many of the world's largest technology firms, is likely disadvantaged by the proposed new rules (since its firms could pay more tax in foreign countries) but nonetheless signed the global agreement, mainly to end a brewing "tax war" as countries developed new uncoordinated taxes like France's Digital Services Tax to tax the technology firms.¹²⁷ If the new approach is ultimately implemented, it would likely reduce the ability of these firms to shift cross-border profits to tax havens because consumer countries would now be able to tax the profits.

¹²¹ See Ruth Mason, *The Transformation of International Tax*, 114 AM. J. INT'L L. 353 (July 2020) (claiming, in contrast to critics of OECD BEPS project, that international tax law and reform has been fundamentally changed); Eduardo A. Baistrocchi, *The International Tax Regime and Global Power Shifts*, 40 VA. TAX REV. 219, 271 (2021) (describing how global political developments are fundamentally changing international tax reform processes).

¹²² See Paul Hannon & Kate Davidson, *U.S. Wins Backing for a Global Minimum Tax*, WALL ST. J. (July 1, 2021); Daniel Shaviro, *What Are Minimum Taxes, and Why Might One Favor or Disfavor Them?* 40 VA. TAX REV. 395 (2021) (supporting minimum taxes while cautioning against apparent weaknesses); Yariv Brauner, *Thinking Like a Source State in a Digital Economy*, 18 PITT. TAX REV. 225 (2021) (advocating reforms to U.S. taxation to strengthen source and residence-based taxation through measures akin to minimum tax proposals).

¹²³ See OECD, STATEMENT ON A TWO PILLAR SOLUTION TO ADDRESS THE TAX CHALLENGES ARISING FROM DIGITALISATION OF THE ECONOMY (July 1, 2021).

¹²⁴ A formula will be used with factors such as the amount of sales taking place within a consumer to determine global tax liabilities instead of using the traditional arm's-length transfer pricing approach. For discussion, see Michael P. Devereux et al., *Residual Profit Allocation by Income* (Oxford Univ. Ctr. for Business Taxation Working Paper 19/01, 2019). For support, see Cockfield, *Tax Wars*, *supra* note 99, at 389-94.

¹²⁵ See ARVID A. SKAAR, PERMANENT ESTABLISHMENT: DILUTION OF A TAX TREATY PRINCIPLE 24-38 (1991).

¹²⁶ See OECD, ADDRESSING THE TAX CHALLENGES OF THE DIGITAL ECONOMY, ACTION 1: FINAL REPORT 3 (2015); see also Klaus Vogel, *Worldwide vs. Source Taxation of Income – A Review and Re-evaluation of Arguments*, 11 INTERTAX 393, 400 (1988). Vogel credits Georg von Schanz with focusing on the need to support taxation by the country where consumers reside. Von Schanz proposed that the source state should levy its tax at three-quarters of the normal rate and proposed that the residence state should levy its tax at one-quarter the normal rate. See George von Schanz, *Zur Frage der Steuerpflicht*, 9 FINANZARCHIV 356 (1892).

¹²⁷ The United States threatened trade sanctions against France due to its digital services tax until the countries reached a tentative settlement. See Luke Baker, *France, U.S. agree on method for global digital-tax reform*, GLOBE & MAIL (Jan. 24, 2020), at B3. For a comprehensive discussion, see Cockfield, *Tax Wars*, *supra* note 99, at 358-79.

Second, governments agreed to accept a minimum corporate income tax rate of 15% for cross-border profits.¹²⁸ This move followed the enactment of minimum taxes by the United States and other governments in recent years. Under the U.S. approach, minimum taxes are applied both to inbound foreign direct investment (via the Base Erosion and Anti-Abuse Tax (“BEAT”)) and outbound foreign direct investment (via the Global Intangible Low Taxed Income (“GILTI”)).¹²⁹

In a typical global structure, a related party within a multinational firm is situated in a low or nil tax jurisdiction, so the income inclusion will be subject to low or nil tax rates.¹³⁰ BEAT denies expense deductions for payments to tax-haven-based entities such as corporations that are not subject to a minimum tax.¹³¹ GILTI seeks to ensure that U.S. multinational corporations are taxed at a minimum rate on their outbound transactions with other countries.¹³² The purpose of GILTI is to make sure that the United States can continue to tax its multinational firms’ foreign profits even if a taxpayer tries to shift these profits to a tax haven (e.g., a taxpayer may try to shift ownership of intellectual property such as a patent to a tax haven corporation so that future cross-border royalty payments will be taxed by the tax haven government, which normally does not have an income tax).

Under the new global tax agreement, if participating countries adopt minimum taxes like BEAT or GILTI then the other signatories must accept the minimum tax rate.¹³³ For the first time, these governments agreed in principle to give up political control over aspects of their income tax systems such as corporate tax rates.¹³⁴ Overall, minimum taxes are intended to thwart the ability of multinational firms to divert profits to tax havens and away from countries like the United States

¹²⁸ See Arthur Cockfield, *Globalization is alive and well and made healthier by the worldwide minimum tax agreement*, TORONTO STAR (July 30, 2021), <https://www.thestar.com/business/opinion/2021/07/31/globalization-is-alive-and-well-and-made-healthier-by-the-worldwide-minimum-tax-agreement.html> [https://perma.cc/396G-LGVV]. But see Wei Cui, *Will New Global Tax Co-operation Benefit the World?*, GLOBE & MAIL (July 11, 2021) (claiming global agreement does not really create minimum corporate tax).

¹²⁹ For discussion, see Cockfield, *Tax Wars*, *supra* note 99, at 370-71.

¹³⁰ See *id.*

¹³¹ The United States adopted BEAT, which became effective on January 1, 2018, as part of the tax law known as the *Tax Cuts and Jobs Act*. BEAT applies to U.S. resident corporations and permanent establishments of non-residents that are members of a multinational group with over \$500 million in annual sales (over a three-year period). If a tax liability arises as a result of BEAT, then it is payable in addition to any liabilities for regular corporate income. If applicable, BEAT applies at a rate of 10% of the taxpayer’s ‘modified taxable income’ (5% for 2018 and 12.5% after 2025), less a portion of certain tax credits. See *id.*

¹³² It applies corporate tax on the excess of a shareholder’s net CFC income over an ordinary return (that is, a deemed tangible income return). Under this approach, an excess return beyond the deemed tangible income return is normally considered GILTI, regardless of the actual character of the earnings. This GILTI is then subjected to a 10.5% tax rate—as long as no tax is paid abroad. To the extent GILTI has been taxed at a rate of that exceeds 13.125%, then no U.S. tax will be applied. The innovation here arises from the rule’s initial focus on returns generated by tangible assets to arrive at a measure of ostensible returns generated by intangible assets. Unlike traditional CFC rules, GILTI seeks to impose a minimum tax on foreign-source profits—regardless of the characterization of such income as being active or passive. See *id.* GILTI has been criticized on the basis that it only ensures roughly half the tax burden on exports, compared to tax rates imposed on domestic activities. See Sanchirico, *supra* note 23.

¹³³ See OECD, *supra* note 120.

¹³⁴ After World War I, countries began to negotiate bilateral tax treaties to smooth over the problems caused by the interaction of their different national tax systems—without ever mandating the same income tax rates for treaty partners. And despite over two decades of reform efforts, European Union countries have never agreed on adopting the same corporate income tax base or rates. See Michael Devereux & Clemens Fuest, *Corporate Income Tax Coordination in the European Union*, 16(1) TRANSFER: EUR. REV. LAB. & RSCH. 23 (2010), <https://doi.org/10.1177/1024258909357699> [https://perma.cc/MES4-B3UW].

that impose corporate income taxes: cross-border profits should be subject to at least a 15% tax rate, which should enable governments to raise more tax revenues.

If these initiatives are implemented and work as planned, they would inhibit the race to the bottom that occurs when governments compete for cross-border capital by continually lowering their corporate income tax rates. Such rate-lowering reduces global tax burdens on multinational firms, which benefits mainly the firm's shareholders who tend to have higher incomes. To the extent the minimum taxes increase firm tax liabilities, this will have a redistributive effect by increasing tax burdens on these shareholders. In turn, this could also relieve the pressure to focus taxation on immobile factors of production like labor. Moreover, if minimum tax measures raise more revenues, governments will be in a better position to support more vulnerable citizens.

C. Tax Transparency Measures against Offshore Tax Evasion

Assume Joe Criminal lives in Brooklyn and makes \$100 million, held in cryptocurrencies, by selling illicit drugs on the dark web. He converts his cryptocurrencies to U.S. dollars and deposits them in an offshore corporation based in a tax haven. Joe has engaged in the criminal offense of offshore tax evasion by not disclosing these transfers or any resulting investment income to the U.S. government.¹³⁵ The U.S. government will probably never be able to find out about Joe's criminal activities unless they can gain access to information concerning Joe's tax haven dealings. One way to obtain this information is to force the tax haven government to provide cross-border tax information concerning U.S. citizens or residents to the U.S. government.

While governments have negotiated tax treaties to exchange limited cross-border tax information with each other since after World War I, modern measures date back to the late 1990s when the OECD tried to inhibit "harmful tax competition" and created a blacklist of tax haven countries.¹³⁶ The OECD identified a lack of effective tax information sharing from these tax havens to OECD countries as the main culprit. In 2002, the OECD created a model tax information exchange agreement (TIEA), which envisioned agreements between OECD countries and tax haven countries.¹³⁷ But the "information on request" basis of this model was soon found deficient:¹³⁸ the resident country usually does not have sufficient information to make the request in the first place.¹³⁹

Beginning around 2007 the revelation of tax information leaks from Liechtenstein and Swiss banks turned the world's attention to revenue losses associated with offshore tax evasion. The U.S. Senate held hearings that influenced the passing of a law that came to be known as the *Foreign Account Tax Compliance Act* (FATCA), which seeks to force foreign banks to divulge

¹³⁵ See *supra* note 13 and accompanying text.

¹³⁶ OECD, HARMFUL TAX COMPETITION, *supra* note 21. For discussion, see Joann M. Weiner & Hugh J. Ault, *The OECD's Report on Harmful Tax Competition*, 51 NAT'L TAX J. 601, 608 (1998) (concluding that project is important first step in inhibiting race to bottom where countries keep lowering income tax rates on corporations and focus heavier taxation on workers).

¹³⁷ See OECD, MODEL AGREEMENT ON EXCHANGE OF INFORMATION FOR TAX MATTERS (Paris, 2002).

¹³⁸ For discussion, see DAVID KERZNER & DAVID W. CHODIKOFF, INTERNATIONAL TAX EVASION IN THE GLOBAL INFORMATION AGE 316 (2016).

¹³⁹ The OECD model protocol to the TIEA, published in 2015, contemplates the addition of automatic and spontaneous tax exchanges. The Protocol is available at <https://www.oecd.org/ctp/exchange-of-tax-information/Model-Protocol-TIEA.pdf> [<https://perma.cc/2DTH-BBJD>].

information concerning the deposits of “U.S. persons,” which includes tax residents in addition to U.S. citizens.¹⁴⁰

From 2013 onward, the OECD and the G-20 emphasized that the automatic exchange of tax information needed to be the new global standard, and this standard is being implemented through the Common Reporting Standard (CRS).¹⁴¹ The CRS mandates an “internationally agreed standard” by which countries require their financial institutions to obtain information on accounts held by non-residents and—under applicable TIEAs or bilateral treaties—to automatically report that information to the account holders’ local authorities.¹⁴²

In turn, these tax authorities share this information with their counterparts based in countries where the investors reside.¹⁴³ Armed with this information, tax authorities could check to see if their resident taxpayers had disclosed any income connected to their offshore holdings.¹⁴⁴

Most developed countries participate in the CRS, with the exception of the United States.¹⁴⁵ A payee agent or trust agent can therefore operate in the United States without the need to comply with the CRS’s mandate to identify beneficial owners of criminal assets that may be derived via money laundering. This is one of the loopholes that undermines the CRS.¹⁴⁶

¹⁴⁰ See *Foreign Account Tax Compliance Act of 2009* (FACTA), H.R. 3933, 111th Cong. (1st Sess. 2009). FATCA initially failed to be enacted. The legislation was subsequently passed within a large omnibus legislative package that was mainly directed at job creation. See *Hiring Incentives to Restore Employment Act*, H.R. 2847, 111th Cong. § 501 (2d Sess. 2010). The provisions to implement FATCA are now contained in sections 1471 to 1474 of the Internal Revenue Code.

¹⁴¹ The main current focus of the OECD is a common standard for participating governments to exchange cross-border tax information to identify whether resident taxpayers are not disclosing offshore accounts to their domestic tax authorities. See OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL INFORMATION IN TAX MATTERS (2014), <http://dx.doi.org/10.1787/9789264216525-en> [<https://perma.cc/99HM-T8MK>] [hereinafter OECD, STANDARD FOR AUTOMATIC EXCHANGE].

¹⁴² *Id.*

¹⁴³ The proposal had to overcome significant concerns about taxpayer privacy. See, e.g., Cynthia Blum, *Sharing Bank Deposit Information with Other Countries: Should Tax Compliance or Privacy Claims Prevail?*, 6 FLA. TAX REV. 579 (2004).

¹⁴⁴ These exchanges are governed by the provisions, including taxpayer privacy protections, within the CRS Multilateral Competent Authority Agreement, the OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters, and the relevant TIEA or bilateral tax treaty (that typically includes an exchange of information provision based on Article 26 of the OECD model tax treaty). Despite these measures, the increase in the collection and cross-border sharing of taxpayers’ big data raises concerns, including concerns that transferred information (1) will not be protected to the extent provided by the law of the transferring country; (2) may be misused for political purposes, such as helping domestic companies compete against foreign competitors; (3) may be misused to sanction taxpayers for political reasons, which could lead to human rights violations; (4) may be illegally accessed or altered by third parties; and (5) may be inaccurate, which could lead to foreign investigations that target innocent taxpayers. For discussion, see Arthur J. Cockfield, *Cross-border Big Data Flows and Taxpayer Privacy*, in ETHICS & TAX’N 379 (Robert F. van Brederode, ed., 2020).

¹⁴⁵ See OECD, SIGNATORIES OF THE MULTILATERAL COMPETENT AUTHORITY AGREEMENT ON AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION AND INTENDED FIRST INFORMATION EXCHANGE DATE (Aug. 12, 2021) (noting that 112 countries, with the exception of the United States, have agreed to implement the CRS).

¹⁴⁶ Another apparent loophole involves setting up structures so that non-residents can use foreign trusts as long as these trusts hold assets outside of the country where the trust is formed; domestic legal implementation of CRS normally does not require beneficial owner disclosure in this circumstance. See ANDRES KNOBEL, TRUSTS: WEAPONS OF MASS INJUSTICE? (2017); see also Chris Jones, *Tax Haven Networks and the Role of the Big 4 Accountancy Firms*, 53 J. WORLD BUS. 177 (2018) (describing how tax havens develop illegitimate forms of trust laws to attract investment and system benefits only those who can afford tax planning).

Despite this obvious problem, there is evidence that these global transparency initiatives directed at tax havens have reduced investment flows to some parts of the offshore world.¹⁴⁷ On the other hand, investors may simply be shifting their monies to tax havens that are not cooperating with the transparency measures.¹⁴⁸

D. Summary

Governments have been long aware that tax havens are used to facilitate offshore tax evasion and aggressive international tax avoidance. OECD and G-20 governments have most recently emphasized the need to promote tax transparency so that they can better assess the global licit and illicit earnings by individual taxpayers as well as multinational firms.

With respect to international tax avoidance, governments have begun limited efforts to force multinational companies to disclose revenues and profits in every country where they operate, which should give tax authorities more ammunition to audit how these firms shift profits to tax havens. So far, the new CbCR measures apply only to large corporations (that is, those with over \$850 million in global revenues). In addition, governments have agreed in principle to adopt a minimum corporate tax rate for these large corporations to inhibit profit shifting to tax havens.

With respect to offshore tax evasion, the main global response is the Common Reporting Standard, which contemplates the exchange of taxpayer account information across borders to help tax authorities identify and audit their resident tax cheats. The United States, so far, prefers to rely on its own domestic measures under FATCA, instead of engaging in multilateral negotiations via the CRS. This has left a glaring loophole in the system because taxpayers can set up cross-border structures with U.S. entities to dodge CRS compliance requirements.

While the jury is still out, these reforms ought to inhibit the use of tax havens to hide wealth and/or significantly reduce global tax liabilities. Accordingly, the reforms should also inhibit the ability of tax havens to encourage income inequality.

IV. THE WAY FORWARD

This Part considers additional legal and policy reforms to inhibit tax haven abuses that lead to income inequality.

A. Creating a Framework to Withhold Taxes on Tax Haven Investments

A cross-border withholding tax on global investments could assist tax authorities in enforcing their tax laws.¹⁴⁹ The idea here is to create a modified version of gross withholding taxes

¹⁴⁷ See S. BEER & COELHO S. LEDUC, HIDDEN TREASURE: THE IMPACT OF AUTOMATIC EXCHANGE OF INFORMATION ON CROSS-BORDER TAX EVASION (2019); see also Niels Johannesen et al., *Taxing Hidden Wealth: The Consequences of US Enforcement Initiatives on Evasive Foreign Accounts*, 12 AM. ECON. J. ECON. POL'Y 312 (2020); Elisa Casi et al., *Cross-border Tax Evasion After the Common Reporting Standard: Game Over?*, 190 J. PUB. ECON. 1042 (2020).

¹⁴⁸ See Niels Johannesen & Gabriel Zucman, *The End of Bank Secrecy?: An Evaluation of the G20 Tax Haven Crackdown*, 6 AM. ECON. J. 65 (2014) (describing how, in light of new bank regulations, investors shifted deposits to tax havens that do not comply with international regulations against bank secrecy laws). As subsequently touched on, investors are also increasingly transferring their deposits to domestic bank accounts protected by “onshore” rules within the United States and elsewhere. See Part IV.C.

¹⁴⁹ See Cockfield, *supra* note 144.

that are imposed on cross-border payments for global investments within uncooperative tax havens or rogue onshore governments. Investments in countries with proper tracking mechanisms for taxing foreign investments will not be subject to the tax.

As the new international reforms like the Common Reporting Standard gain steam, a challenge is that certain countries either refuse to participate or agree to the tax exchange initiatives but will not meaningfully implement them. As Reuven Avi-Yonah has discussed, provided that there is one non-participating country, undisclosed investment monies can flow to this outlier.¹⁵⁰ His proposed solution calls for the automatic exchange information of bank account information from a tax authority to the home country of the investor. If no automatic exchange takes place, then a tax can be assessed against the transferred assets and/or any subsequent investment income.

Hypothetically, if Joe, a U.S. citizen, deposits \$1 million into a bank account based in Haven, a non-cooperative tax haven, Haven will not share any information with foreign tax authorities, and therefore, there is no automatic reporting of Joe's initial transfer of the money or any subsequent investment income. Law and policies could be developed to impose, for example, a 30% gross withholding tax collected by payors (e.g., banks) based in participating jurisdictions. Accordingly, any bank in the United States that assisted Joe with the transfer would have a legal obligation to withhold and remit \$300,000 to the I.R.S. because the money is being sent to Haven.

This measure ensures tax payment via withholding and provides the government with another source of information to contrast against the taxpayer's tax filings. Building on these views, I previously outlined how tax authorities could administrate such a withholding tax through online technologies such as an extranet.¹⁵¹

B. Global Financial Registry

A major challenge is that governments often cannot identify the ultimate (or beneficial) human owners of cross-border investments because corporate laws provide ownership anonymity by permitting business entities to own investments without disclosing the true human owners of these entities. The previously discussed Common Reporting Standard is one effort in this direction as participating countries have agreed to pass laws that mandate the identification of beneficial owners.

In recent years, academics and governments have discussed the need for financial registries that mandate the disclosure of beneficial owners of business entities like corporations and legal entities such as trusts and foundations.¹⁵² If governments knew who owned what, then they could pursue offshore tax cheats and other global financial criminals.

This would also help to stop kleptocrats and others from hiding their ill-gotten gains in an offshore tax haven. As discussed in Part III.B, powerful individuals within low-income countries or failed states manage to pilfer government resources and hide their ownership of any assets by setting up secret offshore bank accounts—then using these accounts to purchase assets such as Swiss villas. As revealed by the tax haven data leaks, offshore corporations and trusts were used

¹⁵⁰ See Avi-Yonah, *supra* note 11, at 1583.

¹⁵¹ See Arthur J. Cockfield, *Transforming the Internet into a Taxable Forum: A Case Study in E-Commerce Taxation*, 85 MINN. L. REV. 1171, 1237-44 (2001) [hereinafter *Transforming the Internet*].

¹⁵² See, e.g., Gabriel Zucman, *Taxing Across Borders: Tracking Personal Wealth and Corporate Profits*, 28 J. ECON. PERSP. 121, 136-37 (2014) (advocating a “world financial registry” to respond to ongoing increases in offshore tax evasion and aggressive international tax avoidance).

to obscure the real identity of the owners of the underlying assets. This problem contributes to income and wealth inequality.

Even if one supports the notion of a global financial registry, a contentious issue has arisen surrounding whether governments alone should gain access to this personal financial information or whether members of the public should also be able to do so. Observers claim that public access is necessary for individuals to be able to identify problem areas and then hold their governments accountable to pursue the alleged financial criminals.¹⁵³

A fully searchable public financial registry, however, would be highly problematic because it would overly intrude on taxpayer privacy rights and potentially inhibit global capital flows, reducing overall economic growth. Even wealthy taxpayers need to be afforded privacy protections. Otherwise, they may not invest in foreign economies even when they could earn a higher return. Allowing investors to diversify their investments to achieve the highest returns contributes to global capital productivity (that is, the investment dollars have the biggest impact on returns) and enhances global wealth.

Nevertheless, a global financial registry accessible only by government tax authorities might be politically feasible. Such a registry would help government investigators by addressing the information disadvantage facing governments, namely their inability to identify the human beneficial owners of cross-border investments. Additionally, the registry could help governments determine if their resident firms had paid tax on worldwide income.

Governments might consider inter-government exchange of entity and ownership information if they were provided with sufficient privacy safeguards, including a multilateral taxpayer bill of rights.¹⁵⁴ The European Union has similarly decided to start with a non-public centralized registry with plans to transition to public registries.¹⁵⁵ Under this “tiered access” approach, law enforcement is being provided with full access to the registry while members of the public will only have access to limited personal information such as the beneficial owner’s name and country of residence. The goal is to provide law enforcement with accurate and verifiable information concerning investment ownership, which would improve tax enforcement as well as anti-money laundering and anti-terrorist financing efforts.

C. Addressing the Problem of Onshoring

Problematically, powerful governments such as the United States and Japan maintain “onshore” laws that offer tax-haven-like benefits via domestic law. For instance, domestic corporate laws can mask beneficial owner identities (that is, the laws hide the ultimate human owner of the asset). According to the 2020 Global Financial Secrecy Index published by Tax Justice Network, U.S. laws provide the second-most financial secrecy in the world, whereas Japan ranks number seven (the number one secrecy zone is the Cayman Islands, and the rest of the top ten are all tax havens.)¹⁵⁶

¹⁵³ See Maya Forstater, *Beneficial openness? Weighing the Costs and Benefits of Financial Transparency* (CMI Working Paper No. 3, 2017) (reviewing pros and cons of public disclosures).

¹⁵⁴ See Arthur J. Cockfield, *Protecting Taxpayer Privacy Rights Under Enhanced Cross-Border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights*, 42 U. B.C. L. Rev. 420 (2010).

¹⁵⁵ See EUROPEAN COMMISSION, REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT ON THE COUNCIL ON THE INTERCONNECTION OF NATIONAL CENTRALISED AUTOMATED MECHANISMS (CENTRAL REGISTRIES OR CENTRAL ELECTRONIC DATA RETRIEVAL SYSTEMS) OF THE MEMBER STATES ON BANK ACCOUNTS (Brussels, July 24, 2019 COM 372 final 2019).

¹⁵⁶ See TAX JUSTICE NETWORK, FINANCIAL SECRECY INDEX 2020 (2020).

Other countries that are ostensibly “good players” maintain laws that make it hard or impossible to identify who owns what: the United Kingdom is ranked the twelfth most financial secret jurisdiction in the world; Germany is ranked fourteenth, and Canada is ranked nineteenth. By comparison, the Bahamas, a Caribbean tax haven, ranks twenty-two, and Russia ranks forty-four: both of these countries have laws that provide more fiscal transparency than their higher-ranked counterparts.¹⁵⁷ Wealthy democracies have enacted laws that allow foreign investors to conceal their identities because these countries came to depend on illicit financial flows, trillions of dollars over the decades, from these investors to buoy their economies.¹⁵⁸

Consider one example from Luanda Leaks, which revealed how Africa’s wealthiest woman stole from her home country of Angola and hid her loot within tax havens.¹⁵⁹ The leaks disclosed that she set up a corporation in Delaware to hold title to a \$1.8 million home in Lisbon, Portugal.¹⁶⁰ Her advisors presumably chose Delaware because the state’s corporate laws permit investors to hide the real human owner of assets.

The more recent Pandora Papers revealed that South Dakota has become a “go-to destination” for individuals trying to reduce taxes and/or hide their ownership of assets. In 2020, South Dakota’s growing trust industry held an estimated \$367 billion in assets, which were mainly owned by non-residents who may be using trusts to mask ownership so that their home governments never find out.¹⁶¹

Any anti-tax haven initiative needs to take into account and overcome the incentives that promote global fiscal opacity when monies are transferred to, and often hidden within, tax havens.¹⁶² Tax havens themselves wish to maintain financial secrecy as it brings in more business.¹⁶³ Non-democratic countries tolerate (or promote the use of) tax havens because they allow wealthy elites to hide and invest monies offshore, hence incentivizing them to create new wealth. OECD countries often benefit from financial secrecy because it has allowed trillions of dollars from global investors to be invested in their economies, generating new wealth and employment. As governments around the world crack down on tax havens, some may be tempted to create new onshore rules that provide tax-haven-like benefits under domestic law. Increasing global cooperation is required so that countries agree to prohibit or restrict their onshoring laws.

¹⁵⁷ See Dave Seglins, ‘Tax Haven’ Canada Being Used by Offshore Cheats, *Panama Papers Show*, CBCNEWS (Jan. 24, 2017), <http://www.cbc.ca/news/investigates/panama-papers-canada-tax-haven-1.3950552> [<https://perma.cc/KZ77-X72L>] (discussing how Canadian federal and provincial corporate laws permit anonymous foreign investments).

¹⁵⁸ See Michelle Hanlon et al., *Taking the Long Way Home: U.S. Tax Evasion and Offshore Investments in U.S. Equity and Debt Markets*, 70 J. FIN. 257 (2015) (discussing how U.S. taxpayers engage in “round-tripping” tax evasion by hiding funds in entities within tax havens and then using the capital to invest in U.S. public securities).

¹⁵⁹ See *supra* note 48.

¹⁶⁰ See Will Fitzgibbon et al., *The world’s biggest tax haven lurked behind a dos Santos penthouse*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Feb. 24, 2020), <https://www.icij.org/investigations/luanda-leaks/the-worlds-biggest-tax-haven-lurked-behind-a-dos-santos-penthouse/> [<https://perma.cc/P5R8-JPPZ>] (discussing how Delaware does not publish information about owners or shareholders of Delaware corporations).

¹⁶¹ David Pegg & Dominique Rushe, *Pandora papers reveal South Dakota’s role as \$367bn tax haven*, *The Guardian* (Oct. 4, 2021), <https://www.theguardian.com/news/2021/oct/04/pandora-papers-reveal-south-dakotas-role-as-367bn-tax-haven> [<https://perma.cc/XD4U-47ND>].

¹⁶² See Cockfield, *Big Data*, *supra* note 2, at 535.

¹⁶³ See *id.* at 536.

D. Fighting Back Through Technology

Governments are increasingly embracing new technologies such as big data and data analytics to reduce fraud and other forms of financial crime. For instance, some U.S. state tax authorities are analyzing large amounts of data to determine if taxpayers have filed fraudulent tax refund applications. State tax authorities cross-reference a taxpayer's refund request against billions of records from public and commercial databases to catch the tax avoiders. In 2010, the New York Department of Taxation and Finance, for instance, decreased revenue losses by \$1.2 billion through this approach.¹⁶⁴

In 2017, the Australian financial intelligence unit formed the Financial Intelligence Alliance, a partnership between government and the financial sector to fight money laundering and terrorism financing.¹⁶⁵ Collaboration is promoted by having government and bank staff physically located in the same place to solve problems together, including by investigating innovative technological approaches.

In a recent report, we set out in detail how governments can make better use of data analytics to provide better and more timely information to tax authorities and other government regulators.¹⁶⁶ Many conventional approaches to detecting crimes or regulatory violations rely on analysts querying data, looking for patterns of activity that are known or thought to associate with these crimes and violations. In contrast, data analytics reviews large data sets and computes patterns of activity that are consistent with the data and presents these to analysts. In other words, data analytics can recognize patterns of activity that would otherwise evade human detection.¹⁶⁷ Privacy challenges surrounding this approach are addressed below.

Much as governments can embrace new technologies, so too can criminals. Cryptocurrencies, for instance, can be used for criminal purposes because the use of these

¹⁶⁴ See JoAnne Bourquard & Cassandra Kirsch, *Big Data = Big Benefits*, NAT'L CONF. OF ST. LEGISLATURES (Sep. 1, 2014), <https://www.ncsl.org/research/telecommunications-and-information-technology/big-data-big-benefits.aspx> [<https://perma.cc/7786-54ZG>].

¹⁶⁵ AUSTRAC, *Fintel Alliance*, <https://www.austrac.gov.au/about-us/fintel-alliance> [<https://perma.cc/ATN8-C9ZX>].

¹⁶⁶ In Canada, the British Columbian provincial government has an ongoing investigation (known as the Cullen Commission) into money laundering and other financial crimes due to the view that Vancouver is the global base for such crime. Our report for the Commission proposes new laws and policies to inhibit financial crime. See Christian Lepreucht et al., *Detect, Disrupt and Deter: Domestic and Global Financial Crime – A Roadmap for British Columbia* (Commission of Inquiry into Money Laundering in British Columbia) (Mar. 2021). We also testified before the Commission on April 9, 2021. For the recording and transcript, see *Proceedings at Hearing* (Commission on Inquiry into Money Laundering in British Columbia) (Apr. 9, 2021), <https://cullencommission.ca/data/transcripts/Transcript%20April%209,%202021.pdf> [<https://perma.cc/TK9N-J2JD>].

¹⁶⁷ See Christian Lepreucht et al., *supra* note 166, at 10. It has three main roles in detecting violations of laws for crimes such as money laundering or tax evasion. First, criminal activities normally contain particular patterns of activity because they have proven to be effective. These are often called typologies. When these patterns of activity are already known, they can be found by querying the data, but novel and unexpected patterns can be found automatically by data analytic algorithms. Second, data analytics can search for anomalies. In large financial datasets, activities associated with money laundering or regulatory violation are typically rare. These can be detected using techniques tuned to look for data and patterns that are sharply different from the remainder of the data. Third, data analytics can help to understand (social) networks. Relationships among individuals and organizations naturally form networks, and so do financial flows. Social network techniques can be used to analyze such network data, for example, by looking for network anomalies or unusual pathways and discovering a rogue bank is helping terrorist financiers. For discussion of this latter approach, see Christian Lepreucht et al., *Tracking Transnational Terrorist Resourcing Nodes*, 36 FLA. ST. L. REV. 289 (2019).

currencies is quasi-anonymous.¹⁶⁸ The dark web, which is accessible only by specially configured internet browsers, also allows criminals to engage in illegal activities such as the purchase of weapons or illegal narcotics.

The tax haven data leaks so far have not revealed the widespread usage of these technologies for criminal purposes. Global financial criminals may have yet to embrace these new technologies fully simply because they are so new.¹⁶⁹ In addition, crooks might be nervous to move, for example, hundreds of millions of dollars through cryptocurrencies or some other form of digital cash because the currencies can be quite volatile, raising the risk that the dirty money will be devalued if the currency crashes. As the technologies mature, it seems likely that criminals will increasingly embrace them to transfer, hide, and legitimize dirty money.

This changing technological landscape will no doubt pose increasingly difficult enforcement challenges for governments. Governmental suppression of traditional tax havens may encourage the rise of what could be called “digital tax havens.” These digital tax havens will not exist or be affiliated with any one country. Rather, the digital tax haven will be spread over a cloud of thousands of computer servers based in a variety of different countries. Using cryptocurrencies and the dark web, the digital tax haven will avoid detection and regulation by any central government.

If a physical base is needed, criminals can set up servers on unregulated offshore bases like Sealand, a World War II anti-aircraft platform off the coast of England and outside of the territorial jurisdiction of the United Kingdom.¹⁷⁰ At one point, Sealand operated a series of secure servers that downloaded and uploaded data to satellites. Crooks used these servers to exchange and clean illicit financial flows.¹⁷¹

In summary, while governments can deploy policy solutions that use technologies to help investigate, arrest, and prosecute offshore tax cheats, criminals are embracing other digital technologies to better mask money trails so that they remain undetected.

E. Other Policy Recommendations

The ongoing fight against global financial crimes like international money laundering and offshore tax evasion is complex and optimal laws and policies will vary according to country-specific factors such as the political or bureaucratic environment, and culture of tax compliance.¹⁷²

Nevertheless, at the more granular level there exists some unity among experts in terms of recurring policy recommendations, including the need for whistleblower protections for any

¹⁶⁸ For discussion on the use of cryptocurrencies and global financial crimes, see Sarah Gruber, Note, *Trust, Identity, and Disclosure: Are Bitcoin Exchanges the Next Virtual Havens for Money Laundering and Tax Evasion?*, 32 QUINNIPIAC L. REV. 135 (2013); Thomas Slattery, *Taking a Bit Out of Crime: Bitcoin and Cross-Border Tax Evasion*, 39 BROOK. J. INT'L L. 829 (2014).

¹⁶⁹ I never came across any references to cryptocurrencies or the dark web in the tax haven data leak materials I reviewed. Nor are there any reports by ICIJ journalists about such high-tech usage. This might be explained by the time lag between the tax haven data and the growing usage of the new technologies. For instance, *Offshore Leaks*, which was revealed to the public in April 2013, contained data that ended in 2010. Bitcoin was only released as open-source software in 2009.

¹⁷⁰ See Johannesen & Zucman, *supra* note 148, at 1194-98; James Grimmelmann, *Sealand, HavenCo, and the Rule of Law*, 2012 U. ILL. L. REV. 405, 405-06 (2012).

¹⁷¹ See *id.*

¹⁷² For instance, the laws of some countries require the separation of government agencies into an information collection and investigation agency and a prosecution agency to ensure evidence disclosure rules are followed. See Lepreucht et al., *supra* note 166.

individual who provides information leading to tax and financial crime prosecutions; the need to embed lawyers within tax authority audit teams to ensure proper evidence is provided to prosecutors; the need for prosecutorial incentives to pursue significant penalties against “white collar” criminals who have often attracted lenient sentences; better information sharing among government agencies when each agency sees only one part of the overall criminal financial scheme; and bureaucratic incentives to retain police, tax officials, and prosecutors in the long run, so they can gain a necessary understanding of the complexities.¹⁷³

Many of these proposals necessarily implicate financial privacy. For instance, a greater sharing of information among government agencies may violate existing prohibitions against such sharing (e.g., U.S. federal laws that prohibit federal agencies from sharing tax and other information with other agencies) under the view they unduly inhibit privacy interests. These privacy interests in turn must necessarily be protected within a free and democratic society for reasons that include the need to protect freedom of expression and freedom to engage in political dissent. Moreover, in an age of big data, government use of opaque algorithms to scrutinize taxpayers, and increasing data collection, taxpayer privacy rights arguably need stronger protection.¹⁷⁴

Nevertheless, and as explored elsewhere, from a distributional justice perspective, the granting of strong privacy protections to corporations or offshore bank accounts protects the interests of wealthy individuals and criminals at the expense of ordinary citizens who cannot take advantage of the benefits offered by the offshore world.¹⁷⁵ In other words, the current system of strong financial privacy protection harms the public interest and contributes to income inequality.

V. CONCLUSION

The offshore world was designed to favor the interests of the wealthiest members of society. Offshore havens provide wealthy individual taxpayers with a safe place to hoard wealth and avoid taxes. In the last quarter-century, the offshore world has facilitated the rise of a new gilded class of ultra-high-net-worth individuals. They live a life of private banks, high-priced tax lawyers and financial advisors, and multiple homes around the world, including residences within tax havens. In middle-income countries, like China and Russia, this class is responsible for significant capital outflows that exacerbate already-distressing income inequality levels. Tax planners for the very rich within liberal democracies often deploy entities like corporations and trusts based in tax havens to reduce global tax liabilities legally—here too, the rich get richer while average-income taxpayers are never provided with similar tax benefits.

The offshore world was also expressly designed, at least in most cases, to favor the interests of multinational corporations and their (normally) wealthy owners/investors. Tax planning and offshore havens enhance the return that capital owners enjoy by providing special corporate tax breaks tied to the use of entities based within tax havens. In other words, individuals with higher incomes and corresponding investments based in tax havens grow wealthier while most middle-income taxpayers do not similarly benefit. Again, permitting this situation to persist is an express

¹⁷³ My prior Parliamentary testimony, as well as views from others concerning needed reforms, have been summarized in two different federal government reports. See CANADA, HOUSE OF COMMONS, 41ST PARL.-REPORT NO. 17, 2013; CANADA, HOUSE OF COMMONS, 42D PARL.-REPORT NO. 6, 2016.

¹⁷⁴ See Adam B. Thimmesch, *Tax Privacy?*, 90 TEMP. L. REV. 375 (2017-2018) (claiming technological and political developments call for stronger taxpayer privacy protections)

¹⁷⁵ See Cockfield, *Share Tax Information*, *supra* note 42, at 314-15 (discussing distributive justice concerns raised by existing privacy laws and policies).

choice that, at least in theory, could be addressed via legal reforms. An example of a cooperative approach is the recent OECD agreement in principle for a global minimum corporate tax rate.

In other cases, the offshore world provides secrecy and tax benefits that were likely never intended. For low-income countries, tax havens allow war profiteers and corrupt politicians and businesspeople to loot their countries and hide the stolen monies offshore, leaving citizens behind in often-dire circumstances. These outcomes—which contribute to drained treasuries of poor and middle-income countries, narco-states, and human rights violations—are all enabled by the offshore world and drive deep inequality within many countries around the world. In wealthy democracies, there is emerging evidence, based on the leaks, that ultra-high-net-worth individuals have been criminally hiding portions of their fortunes offshore, potentially for generations.

The fact that there are two parallel financial worlds—one for the haves and one for the have nots—threatens the legitimacy of the democratic world, which is premised on the ideal of meritocracy and equal opportunity. Accordingly, governments must pursue policies to reduce offshore tax benefits for the wealthy to reduce income inequality and to legitimize democratic state governance.

Governments can revisit lavish tax haven tax breaks bestowed on their corporate champions that have contributed to forty years of ongoing reductions of corporate income tax burdens and boost the after-tax income of shareholders. Additionally, governments can continue bolstering efforts to make the global financial system more transparent so that tax and law authorities can better understand what is taking place in the offshore world.

To promote transparency, governments can also negotiate a global registry that shows ownership along with a withholding tax imposed on cross-border investment transfers to non-participating countries. In the fight against global financial crimes, there are a host of additional factors to consider that are tailored to the unique legal, political, and cultural aspects of each nation.

These measures would help to inhibit the use of tax havens by malefactors, millionaires, and multinational corporations. They would work against the *status quo* whereby the interests of the wealthy and powerful are privileged over those of the less well off.

This Article also demonstrates that large tax haven data leaks like the Panama Papers have improved our theoretical, empirical, and methodological understanding of tax havens and their ties to the global financial system.

From a theoretical perspective, the leaks provide a more holistic perspective on global financial crimes, such as offshore tax evasion and international money laundering, that are traditionally examined as separate legal spheres (when in fact, they are significantly intertwined). From an empirical perspective, the data is so rich and detailed that it has provided the foundation for a series of “big data” empirical studies, mainly by economists, to understand how legal and illegal money flows around the world. Finally, the leaks provide methodological advances because they allow researchers to match real-world taxpayers with tax haven dealings, instead of the traditional reliance on indirectly observing data such as the amount of foreign investor deposits compiled by the Bank of International Settlements.

Thus, the growing number of recent data leaks has contributed to a burgeoning mosaic of knowledge that has succeeded in piercing the secrecy that traditionally cloaked tax havens. Such leaks have shed new light on previously obscure, abusive tax practices, provoked media and governmental outcry, and inspired new efforts to remedy the inequitable effects of tax havens on countries around the world.