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Leak-Driven Law

Shu-Yi Oei & Diane Ring

ABSTRACT

Over the past decade, a number of well-publicized data leaks have revealed the secret offshore holdings of high-net-worth individuals and multinational taxpayers, leading to a sea change in cross-border tax enforcement. Spurred by leaked data, tax authorities have prosecuted offshore tax cheats, attempted to recoup lost revenues, enacted new laws, and signed international agreements that promote “sunshine” and exchange of financial information between countries.

The conventional wisdom is that data leaks enable tax authorities to detect and punish offshore tax evasion more effectively, and that leaks are therefore socially and economically beneficial. This Article argues, however, that the conventional wisdom is too simplistic. Leak-driven lawmaking has clear benefits, but it also carries distinctive risks, including agenda setting by third parties with specific interests and the leaks’ capacity to trigger nonrational responses. Even where leak-driven lawmaking is beneficial overall, it is important to appreciate its risks when determining how to utilize and respond to leaks.

This Article is the first to thoroughly examine both the important beneficial effects of tax leaks, and their risks. It provides suggestions and cautions for making and enforcing tax law, after a leak, in order to best tap into the benefits of leaks while managing their pitfalls.

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INTRODUCTION

A steady drip of data leaks has begun to exert an extraordinary influence on how international tax laws and policies are made.¹ Yet, tax scholars have so far failed to appreciate the profound impacts—and in particular the serious pitfalls—of such leak-driven lawmaking.

These well-publicized leaks of tax data, which have emerged over the last decade, have revealed the secret offshore financial holdings of high-net-worth individuals and the tax evasion and minimization practices of various taxpayers, financial institutions, and tax havens. The leaks have had a significant impact. Tax authorities have traditionally encountered difficulties in obtaining information about hidden offshore wealth and complex offshore tax-minimization structures employed by multinationals. Leaks have proven to be an incredibly useful tool in correcting these informational asymmetries between tax authorities and taxpayers. Spurred by leaked data, countries have prosecuted taxpayers, sanctioned tax advisors, recouped revenues from offshore tax cheats, and enacted new laws that create greater transparency and exchange of financial information in cross-border tax matters.² There have also been significant developments in coordinated global action to increase cross-border transparency and information exchange.

To take a prominent example, in 2008, leaked information about improprieties at Switzerland's UBS bank alerted the United States to the extensive use by American taxpayers of secret offshore bank accounts to hide assets and evade taxes.³ The UBS leak led the United States to prosecute these tax cheats and to develop voluntary disclosure programs to recoup revenue.

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1. See generally INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS, <http://www.icij.org> [<http://perma.cc/2SFL-4GP2>] (noting various leaks); Allison Christians, *Lux Leaks: Revealing the Law, One Plain Brown Envelope at a Time*, 76 TAX NOTES INT'L 1123, 1123–25 (2014); see also Stuart Gibson, *Drip, Drip, Drip . . .*, 84 TAX NOTES INT'L 115 (2016) ("The system that keeps individual and corporate tax and financial information secret has sprung a leak—more accurately, a series of leaks. They began in Switzerland, spread to nearby Luxembourg, crossed the ocean to Panama, and most recently popped up in the Bahamas.").
 2. See generally Itai Grinberg, *The Battle Over Taxing Offshore Accounts*, 60 UCLA L. REV. 304, 306–12 (2012); Ruth Mason, *Citizenship Taxation*, 89 S. CAL. L. REV. 169, 212–22 (2016); Shu-Yi Oei, *The Offshore Tax Enforcement Dragnet*, 67 EMORY L.J. (forthcoming 2018).
 3. See Randall Jackson, *Former UBS Banker Indicted in Tax Evasion Case*, 50 TAX NOTES INT'L 519, 520 (2008); Randall Jackson, *Swiss Bank Official Detained by U.S. Authorities*, 50 TAX NOTES INT'L 473, 473–74 (2008).

It also prompted the enactment of the Foreign Account Tax Compliance provisions of the Hiring Incentives to Restore Employment Act of 2010 (commonly referred to as FATCA).⁴ This major piece of legislation increased disclosure obligations and penalties for all American taxpayers with offshore assets and instituted a new mandatory information reporting regime for foreign financial institutions (FFIs) holding assets of U.S. taxpayers.⁵

More recently, the so-called “Panama Papers” leak illuminated how the world’s wealthy use Panama and other havens to hide wealth offshore.⁶ The fallout is still unfolding, but the consequences to date have included criminal and civil investigations, denials and dismissals by Vladimir Putin, censorship by China, and a global movement towards greater offshore tax transparency.⁷

The UBS and Panama Papers leaks are just two examples. Others include the Paradise Papers leak, the LuxLeaks scandal, the British Havens and Bahamas leaks, and client data leaks concerning LGT, HSBC, and Julius Baer banks.⁸ Thus, it is clear that tax leaks are recurrent rather than one-off events. They show no sign of abating, and they have started to play an undeniable role in the development of international tax law and policy.⁹

4. Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, §§ 501–535, 124 Stat. 71, 97-115 (2010) (codified at 26 U.S.C. §§ 1471–1474 (2012)).

5. *Id.*

6. See Reid K. Weisbord, *A Catharsis for U.S. Trust Law: American Reflections on the Panama Papers*, 116 COLUM. L. REV. ONLINE 93, 95–97 (2016); James O’Donovan, Hannes F. Wagner & Stefan Zeume, *The Value of Offshore Secrets: Evidence From the Panama Papers* (May 29, 2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2771095 [https://perma.cc/4JSE-FNTB]. See generally Lawrence J. Trautman, *Following the Money: Lessons From the Panama Papers, Part 1: Tip of the Iceberg*, 121 PA. ST. L. REV. 807 (2017).

7. On Vladimir’s denials and dismissals, see Alec Luhn & Luke Harding, *Putin Dismisses Panama Papers as an Attempt to Destabilise Russia*, GUARDIAN (Apr. 7, 2016, 9:50 AM), <http://www.theguardian.com/news/2016/apr/07/putin-dismisses-panama-papers-as-an-attempt-to-destabilise-russia> [http://perma.cc/2DR9-LJNE]. On censorship in China, see Tom Phillips, *China Steps Up Panama Papers Censorship After Leaders’ Relatives Named*, GUARDIAN (Apr. 7, 2016, 10:18 AM), <http://www.theguardian.com/world/2016/apr/07/china-ramps-up-panama-papers-censorship-after-leaders-relatives-named> [http://perma.cc/7PSB-MGTX]. On offshore tax transparency, see Robert Booth, Holly Watt & David Pegg, *David Cameron Admits He Profited From Father’s Panama Offshore Trust*, GUARDIAN (Apr. 7, 2016, 3:07 PM), <http://www.theguardian.com/news/2016/apr/07/david-cameron-admits-he-profited-fathers-offshore-fund-panama-papers> [http://perma.cc/2H55-AXT2].

8. See *infra* Subpart I.B.

9. Leaks are not the only drivers of international tax law and policy. For example, we cannot prove that the UBS leak was the *only* factor that caused the enactment of the 2010 FATCA legislation in the United States. See *infra* Subpart III.C. However, the causal links that we assert between leaks and developments in international tax law are regularly acknowledged by lawmakers, government officials, and tax professionals, so their existence is uncontested. See, e.g., Marina Walker Guevara, *ICIJ Releases Offshore*

Despite their prominence, the effects of data leaks on the actions of governments, taxpayers, and international organizations are not well-studied. The tax policy literature has not considered the question of how leaks drive tax law, nor has the literature considered whether leak-propelled legal change may carry underappreciated risks.¹⁰ This dearth of analysis is also true of the broader legal literature.¹¹ Recent convulsive political events have drawn generalized attention to both the benefits and the potentially adverse consequences of data leaks and hacks. However, their distinctive effects on law and the process of legal change have not been comprehensively examined.¹²

This Article is the first to thoroughly analyze both the important beneficial effects of tax leaks and their risks. The conventional wisdom among commentators is that data leaks enable tax authorities to understand offshore tax evasion and enforce tax compliance more effectively, and are

Leaks Database Revealing Names Behind Secret Companies, Trusts, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (June 14, 2013, 10:00 PM), <http://www.icij.org/offshore/icij-releases-offshore-leaks-database-revealing-names-behind-secret-companies-trusts> [<http://perma.cc/H4DN-XTZW>] (characterizing European Union (EU) Commissioner Algirdas Semeta's view that the International Consortium of Investigative Journalists's (ICIJ) offshore leaks investigation "transformed tax politics and amplified political will to tackle the problem of tax evasion" and directly quoting the Commissioner's claim that "Offshore Leaks could be identified as the most significant trigger behind these developments"); Andrew Rettman, *EU Commissioner: Offshore Leaks Transformed Tax Politics*, EU OBSERVER (June 5, 2013, 9:49 AM), <http://euobserver.com/economic/120382> [<http://perma.cc/W9NF-BH83>].

10. The few existing case studies of discrete tax leaks do not address these questions. See, e.g., Arthur J. Cockfield, *Big Data and Tax Haven Secrecy*, 18 FLA. TAX REV. 483 (2016); Omri Marian, *The State Administration of International Tax Avoidance*, 7 HARV. BUS. L. REV. 1 (2017). And while some tax scholars have examined the impacts of laws made in the aftermath of tax leaks, they have focused on the laws themselves, not on how those laws are driven by leaks. See, e.g., Allison Christians, *A Global Perspective on Citizenship Taxation*, 38 MICH. J. INT'L L. 193 (2017); Dhammika Dharmapala, *Cross-Border Tax Evasion Under a Unilateral FATCA Regime* 2 (CESifo, Working Paper No. 5863, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778453 [<https://perma.cc/8L2L-K6P2>].
11. The existing non-tax literature on leaks largely deals with leaks and hacks of government information and is thus inappropos to tax leaks, which are largely—though not exclusively—leaks of private taxpayer information. It also does not examine the effects of those leaks on systematic legal change. See, e.g., Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448 (2012); Margaret B. Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV. 1387 (2015); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013).
12. David P. Fidler, *U.S. Foreign Policy and the Snowden Leaks*, in THE SNOWDEN READER 52, 55–63 (David P. Fidler ed., 2015) (evaluating the impacts of the Snowden leaks on U.S. foreign policy); see *supra* note 10.

thus socially and economically beneficial.¹³ This Article argues that the conventional wisdom is too simplistic. In addition to its clear benefits, leak-driven lawmaking carries significant risks, most pertinently (1) the risk of agenda setting by third parties with specific interests, and (2) the risks associated with leaks' capacity to trigger nonrational responses. It is therefore possible that in some cases leak-driven lawmaking may do more harm than good. Even where leak-driven lawmaking is beneficial overall, it is important to appreciate its risks when determining how to utilize and respond to leaks.

This Article focuses on the effects of leaks on tax policy, but leaks are not purely a tax phenomenon. Leaks occurring outside the tax world, and the responses and developments they have triggered, provide stark evidence of the potentially negative impact of leaked data on politics, market behavior, and policy outcomes. It is naïve to think that these impacts could not occur in tax law and policymaking as well.

In Part I, we describe the current landscape of tax leaks and discuss their key characteristics and significance. We then investigate in Part II the benefits and the potential downsides of relying on leaks to drive tax policy. We show that data leaks can be a valuable source of information to governments and can function as a "free audit,"¹⁴ and that leaks can pressure governments, taxpayers, and elites to undertake systematic legal reform. We argue, however, that there are also distinctive hazards to relying on data leaks—which are exogenously generated and highly salient—in detecting cross-border abuses and in making tax policy.

In Part III, we illustrate these risks with three examples of how data leaks and responses to them have occurred in the real world. We examine (1) agenda-setting behaviors by leakers and media organizations such as WikiLeaks and the International Consortium of Investigative Journalists (ICIJ), which may be seeking to direct public reactions and policy outcomes

13. See, e.g., Murray Griffin, *No More Tax Secrets as Authorities Share Panama Papers' Data*, BLOOMBERG BNA INT'L TAX (Jan. 31, 2017), <http://www.bna.com/no-tax-secrets-n57982083079> [<http://perma.cc/EU2D-2PUQ>] (describing how data leaks and hacks help tax authorities discover offshore secrets and enforce compliance); *The 2009 Person of the Year*, 126 TAX NOTES 7, 8 (2010) (naming leaker Bradley Birkenfeld 2009 Person of the Year for his role in cracking bank secrecy). Tax authorities have effectively embraced this conventional wisdom by using and seeking out leaked data, using such data to generate more information, and even (in the case of Germany) purchasing leaked data from various sources. See *infra* notes 30–31.

14. Relatedly, information received from IRS information return matching programs (which compare taxpayer-provided data with other sources of information) has been characterized as "an invisible audit." Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 KAN. L. REV. 971, 975 (2003).

according to their own goals; (2) inefficiencies in data transmission between and within countries (such as those occurring between the Department of Justice (DOJ) and the IRS amid the negotiation and signing of the HSBC deferred prosecution agreement) and how this may be particularly problematic in the context of leaks; and (3) potentially controversial legislative responses to leaks (such as the U.S.'s FATCA legislation).¹⁵ There can be no guarantee that leaker and intermediary behavior, pathways of data transmission, levels of accuracy of leaked data, and government responses to leaks will not shift in more problematic directions in the future.

Based on our analysis, we provide in Part IV suggestions and cautions for formulating law and policy after a leak, in order to best utilize the strengths of leak-driven lawmaking while managing its downsides. We suggest that it is important for governments, international organizations, and other policymakers to be sophisticated consumers of leaked data, to avoid irrational responses, and to be clear about the enforcement "first principles" to which they are committed. Finally, we flag four open questions concerning the future impact of leaks on international tax law: (1) whether early rounds of leak-driven policy responses will become entrenched; (2) whether transparency will win out over privacy, both in tax and more generally; (3) whether the market for leaked data will develop competitive (as opposed to monopolistic) characteristics; and (4) whether there may be unanticipated shifts in the content, transmission, and responses to leaked data in the future. The answers to these questions are still unfolding, and they will determine the role data leaks play in international tax policy going forward.

This Article's analysis offers a firm theoretical handle by which to evaluate the dynamics of how tax law and policy take shape in the aftermath of a data leak. Our analysis also has application beyond tax law, even though parts of our analysis are tax specific. As recent experiences with Edward Snowden, Chelsea Manning, WikiLeaks, and "TrumpLeaks" demonstrate, leaks are playing an increasingly important role in influencing public opinion and thereby setting the direction of law and policy. In light of the continuing (and likely growing) significance of leaks and hacks in a variety of political and legal contexts,¹⁶ understanding the upsides and downsides of leak-driven lawmaking has never been more crucial.

15. See *infra* Part III.

16. Justina Crabtree, *The Tools Helping Facilitate Leaks From Trump's White House*, CNBC (Feb. 13, 2017, 6:22 AM), <http://www.cnbc.com/2017/02/09/the-tools-helping-facilitate-leaks-from-trumps-white-house.html> [<http://perma.cc/HDG3-NYK8>]; see, e.g., John Herrman, *The Media's Risky Love Affair With Leaks*, N.Y. TIMES MAG. (Feb. 6, 2017),

I. THE EMERGENCE OF TAX LEAKS

Broadly, a leak of tax data refers to a significant, unauthorized release of private taxpayer information through channels other than established protocols (such as protocols for treaty-based information exchange between countries). The leaked data usually comprises information about a cluster of taxpayers or activities, and describes activities pertaining to a secretive practice or jurisdiction. The data is usually obtained either from banks and law firms or from government authorities (such as corporate registries) and then released. A leak tends to be regarded as significant when it provides information about a behavior, jurisdiction, or strategy about which tax authorities have limited information and have been unable to obtain data through regular channels of international cooperation.

The leaked data is usually released by someone not acting in an official or institutional capacity, such as a former-employee-turned-whistleblower, a hacker, or a different anonymous source.¹⁷ The leaker¹⁸ may share the data with tax authorities, other government agencies, or the press. Regardless of who receives the data, its contents, or at least its existence, become known to

<http://www.nytimes.com/2017/02/06/magazine/the-medias-risky-love-affair-with-leaks.html>.

17. Until the Panama Papers episode, most tax leaks were by employees or former employees. See generally Dennis J. Ventry, Jr., *Stitches for Snitches: Lawyers as Whistleblowers*, 50 U.C. DAVIS L. REV. 1455 (2017) (considering the case of a lawyer who blew the whistle on his former employer's misconduct). The Panama Papers is the first tax leak widely believed to have resulted from a hack of a law firm's computer systems. See Pierluigi Paganini, *Panama Papers—How Hackers Breached the Mossack Fonseca Firm*, INFOSEC INST. (Apr. 20, 2016), <http://resources.infosecinstitute.com/panama-papers-how-hackers-breached-the-mossack-fonseca-firm/#gref> [http://perma.cc/YF3F-LHLX].
18. We use the term "leaker" loosely to encompass whistleblowers, data thieves, hackers, and others who engage in unauthorized data releases. The statutory term "whistleblower" typically refers to someone who calls attention to illegal activity, often by presenting information to management or enforcement agencies under some framework of regulatory protection. See, e.g., Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 2(a)(1), 103 Stat. 16, 16 (cross referencing 5 U.S.C. § 2302(b)(8) (2012)). Former assistant attorney general for the U.S. Department of Justice (DOJ) Tax Division, Kathryn Keneally, has contrasted whistleblowers and leakers, noting that both help tax enforcement but information from the former can be kept confidential during an investigation. Nathan J. Richman, *Panama Papers Raise Publicity for U.S. Tax Enforcement Efforts*, 82 TAX NOTES INT'L 461, 461 (2016). She notes that despite the inability to keep information obtained via leakers confidential, "you want a certain amount of disclosure out there, because from a tax system point of view you want people to come forward into voluntary compliance, get right with the government, and be good taxpayers going forward." *Id.*

the public either through the press or through government announcements, or both.

In this Part, we discuss the emergence of tax leaks. We first discuss why leaks have become a significant feature of the cross-border tax landscape (I.A). We then describe the important leaks that have occurred to date (I.B) and summarize principal observations that can be derived from these leaks (I.C). Our goal is not to build an absolute typology of leaks but rather to identify their key characteristics and how these characteristics vary.¹⁹

A. Understanding the Emergence of Tax Leaks

Large-scale leaks of offshore tax data have occurred since roughly 2008, but cross-border tax structuring and evasion have existed for much longer. Thus, leaks are a relatively recent addition to the international tax landscape, prompting the question of why they are just surfacing now. An important reason is technology and the centralization of data repositories, which make data easier to obtain, share, and disseminate to governments, the press, or the public. Another key factor contributing to the rise of tax leaks is the growing importance of cross-border transactions in tax law and policy.

1. Ease of Obtaining, Transferring, and Disseminating Data

In the age of centralized and computerized data storage, it has become easier for disgruntled employees, hackers, and other data thieves to obtain tax-related data from banks, law firms, and other sources and to leak it. There is more potential for data theft and hacks when the data is available in electronic format that is easy to download and disseminate.

In addition to being easier to download or steal, data available in electronic format is easier to transfer to governments, regulatory authorities, or the press.²⁰ Large quantities of data can be emailed, anonymously mailed, or dropped off in the form of a CD or hard drive. This ease of transfer has been a game changer in enabling high-impact data leaks.

19. Some privacy and technology scholars have attempted to articulate a taxonomy of data leaks and hacks. See, e.g., Kwoka, *supra* note 11, at 1394–1402; Pozen, *supra* note 11, at 532–34. Those non-tax frameworks do not translate comfortably into tax, because tax leaks and data dumps largely pertain to *private taxpayers*, not government secrets.

20. Relatedly, the vulnerability of electronic data may prompt a shift towards more low-tech data storage methods. See generally Kristen E. Eichensehr, *Giving Up on Cybersecurity*, 64 UCLA L. REV. DISCOURSE 320 (2016) (proposing that governments, businesses and individuals will tactically lessen their digital dependence due to cybersecurity concerns).

The advent of the internet has also made it easier to disseminate leaked data to the public and generate publicity about its existence. As discussed in Part III, journalists, NGOs, and other actors can now write commentary online that highlights tax abuses, publicizes identifying information about taxpayers, facilitators, and offshore entities, and puts pressure on public officials.

Given these technological developments, it is likely that leaks of tax data will continue to occur going forward. However, the actual volume will depend on the extent to which custodians can find better ways to safeguard electronic data.

2. The Growing Significance of Cross-Border Transactions

Technology aside, the growing importance of cross-border transactions also helps explain the emergence of tax leaks.

From the 1980s onward, there was notable growth in business expansion across borders.²¹ Several key factors contributed to this growth, including (1) the liberalization of currency and exchange controls in many countries;²² (2) the liberalization of foreign direct investment and trade (for example, through tariff reductions, quota eliminations, and reduced restrictions on foreign direct investment);²³ and (3) innovations that spurred and supported the

21. Eswar Prasad et al., *Effects of Financial Globalization on Developing Countries: Some Empirical Evidence*, in *INDIA'S AND CHINA'S RECENT EXPERIENCE WITH REFORM AND GROWTH* 201, 201–28 (Wanda Tseng & David Cowen eds., 2005); see Diane M. Ring, *Corporate Migrations and Tax Transparency and Disclosure*, 62 *ST. LOUIS U. L.J.* 175 (2017).

22. See Ring, *supra* note 21, at 179; Daisuke Ikemoto, *Re-examining the Removal of Exchange Control by the Thatcher Government in 1979* (unpublished manuscript), https://www.psa.ac.uk/sites/default/files/conference/papers/2016/Removal%20of%20exchange%20control%20by%20the%20Thatcher%20Government_0.pdf [<https://perma.cc/MSD6-K4L3>]; see also ERIC HELLEINER, *STATES AND THE REEMERGENCE OF GLOBAL FINANCE: FROM BRETTON WOODS TO THE 1990S* 25–80 (1994) (reviewing Bretton Woods, the role of capital controls and their implications); Oussama Kanaan, *Tanzania's Experience With Trade Liberalization*, *FIN. & DEV.*, June 2000, at 30, 33; Rei Masunaga, *The Deregulation Process of Foreign Exchange Control in Capital Transactions in Post-War Japan* (Jan. 1997), <http://www.jcif.or.jp/pdf/9701E.pdf> [<https://perma.cc/TMC4-JCGJ>] (discussing Japan's liberalization steps undertaken in the 1980s).

23. See, e.g., S.M. SHAFAEDDIN, U.N. CONFERENCE ON TRADE & DEV., *TRADE LIBERALIZATION AND ECONOMIC REFORM IN DEVELOPING COUNTRIES: STRUCTURAL CHANGE OR DE-INDUSTRIALIZATION?* (2005), http://unctad.org/en/docs/osgdp20053_en.pdf [<https://perma.cc/FL3W-YBUV>] (evaluating the impact of “[t]he process of trade liberalization and market-oriented economic reform that had started in many developing countries in [the] early 1980s [and that] intensified in the 1990s”); *Trade Liberalization: Why So Much Controversy?*, in *ECONOMIC GROWTH IN THE 1990S—LEARNING FROM A DECADE OF*

knowledge-based economy (such as microprocessors, communications, biotech, lighter materials, and a shift to intellectual factors of production).²⁴ Thus, although active cross-border commerce had thrived for centuries, the regulatory and technological changes that gathered steam in the 1980s fostered a new level of cross-border business investment, engagement, and commerce.

Accompanying this cross-border business expansion was a corresponding rise in the importance of cross-border taxation for both businesses and countries over the next decades. On the business side, the benefits of international tax planning—both legitimate tax minimization, as well as less legitimate tax avoidance using hybrid entities, structured transactions, and other techniques—began to attract serious attention and resources within companies. Governments and tax authorities in turn questioned their ability to effectively audit multinationals, grappling with the adequacy of existing substantive and procedural rules and the risk of tax base erosion through corporate tax avoidance strategies.²⁵ International tax and cross-border tax planning thus secured an increasingly high profile among not only multinationals, tax authorities, and tax advisors, but also among legislators and the public.²⁶ Thus, the backdrop against which tax leaks began to occur was

REFORM 131, 132, 134 Box 5.1 (2005) (“Reforms in the 1980s and 1990s were the origin of a strong expansion in international trade.”).

24. Ring, *supra* note 21, at 181; *see also* Raj Aggarwal, *Technology and Globalization as Mutual Reinforcers in Business: Reorienting Strategic Thinking for the New Millennium*, 39 MGMT. INT’L REV., no. 2, 1999, at 83, 84; Nicholas A. Ashford, Ralph P. Hall & Kyriakos Pierrakakis, *Globalization: Technology, Trade Regimes, Capital Flows, and International Economy*, in TECHNOLOGY, GLOBALIZATION, AND SUSTAINABLE DEVELOPMENT 183 (Nicholas A. Ashford & Ralph P. Hall eds., 2011).
25. For example, in the 1990s, the United States overhauled its transfer pricing regulations, introduced the Advance Pricing Agreement program and served as a major influence on the Organisation of Economic Co-operation and Development (OECD) transfer pricing guidelines. *See, e.g.*, WILLIAM W. CHIP, ROBERT E. CULBERTSON & SAMUEL M. MARUCA, TRANSFER PRICING: OECD TRANSFER PRICING GUIDELINES, pt.I.G. (BNA Tax Mgmt. Portfolio No. 6936-1st, 2017); SAMUEL M. MARUCA, IRS, ANNOUNCEMENT AND REPORT CONCERNING ADVANCE PRICING AGREEMENTS 2 (2012), <https://www.irs.gov/pub/irs-apa/2011apmastatutoryreport.pdf> [<https://perma.cc/L5XZ-HUNT>]. Additionally, in 1998, the OECD released its report and recommendations regarding harmful tax competition. OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 25–35 (1998), <http://www.oecd.org/tax/transparency/about-the-global-forum/publications/harmful-tax-competition-emerging-global-issue.pdf> [<https://perma.cc/9N8L-ZQHX>].
26. *See, e.g.*, Henry Tricks, *Business Fears Over Global Competitiveness*, FIN. TIMES, Mar. 17, 2005, at 7 (reviewing business reaction to Prime Minister Gordon Brown’s efforts to curtail tax avoidance); *see also* John Plender, *Counting the Cost of Globalization: How Companies Keep Taxes Low and Stay Within the Law*, FIN. TIMES, July 21, 2004, at 15 (assessing the ongoing challenge faced by tax authorities in combating cross-border tax arbitrage); Jonathan Weisman, *Patriotism Raining on Tax Paradise; Lawmakers Are*

one in which tax authorities, legislatures, the media, and the public were increasingly primed to appreciate information about international transactions and commerce and, correspondingly, cross-border tax minimization, avoidance, and evasion.²⁷

B. Significant Leaks of Tax Data

Since 2008, there have been several significant leaks of tax data. We describe the key ones here in roughly chronological order, noting their main impacts on international tax law and policy.²⁸

1. The UBS and LGT Leaks

Two whistleblower leaks in 2008 upended the landscape of U.S. offshore tax enforcement, revealing the secret foreign bank accounts used by U.S. and other taxpayers to hide assets offshore and evade taxes. One arose in Liechtenstein, when LGT, a leading bank, was found to have actively helped United States clients and others evade taxes by maintaining secret Liechtenstein bank accounts and using other structures to disguise asset transfers and hide the beneficial ownership of Liechtenstein assets.²⁹ The leak occurred in 2008 when Heinrich Kieber, a former employee of an LGT subsidiary, stole confidential bank client data concerning 1400 offshore

Chafing at Firms That Exist Offshore Only on Paper, WASH. POST, Aug. 21, 2002, at E01 (discussing the degree to which U.S. businesses saw “patriotism” as a constraint on their international tax planning).

27. Perceptions about the role of financial institutions and big businesses in the 2008 financial crisis may also have given rise to heightened interest in leaked information.
28. These leaks we describe are unlikely to be the only leaks of tax data. For example, a 2017 leak to the German newspaper, *Der Spiegel*, contained documents and information about Malta companies and their shareholders and shed light on Malta’s financial service industry. See Daphne Caruana Galizia, *Breaking Across Europe/Malta Files: The Tidal Wave Has Hit the “Panama of Europe”*, RUNNING COMMENTARY (May 20, 2017, 2:35 AM), <https://daphnecaruana galizia.com/2017/05/breaking-across-europemalta-files-tidal-wave-hit-panama-europe> [https://perma.cc/PY5B-G4BV]; *Malta Files*, EUROPEAN INVESTIGATIVE COLLABORATIONS, <https://eic.network/projects/malta-files> [https://perma.cc/TDZ3-Q8L9].
29. See STAFF OF PERMANENT SUBCOMM. ON INVESTIGATIONS, 110TH CONG., REP. ON TAX HAVEN BANKS AND U.S. TAX COMPLIANCE (Comm. Print 2008) [hereinafter 2008 SENATE REPORT]; see also Randall Jackson, *Bank Sells Trust Businesses in Wake of Tax Scandal*, 53 TAX NOTES INT’L 951, 951 (2009). For a fuller study of the UBS and LGT leaks and their impact on offshore tax compliance initiatives in the United States, see Oei, *supra* note 2.

clients and sold copies to foreign governments.³⁰ In January 2008, following Germany's purchase of the data and high profile tax investigations, the leak became widely known to the public.³¹ Other countries began investigating their own taxpayers,³² and in February 2008, the United States announced that it too was pursuing more than 100 U.S. taxpayers in connection with Liechtenstein accounts.³³ The LGT leak led to the eventual signing of a Tax Information Exchange Agreement (TIEA) between the United States and Liechtenstein in December 2008, which allowed the United States to request information relating to 2009 and later years.³⁴

The second, more significant leak involved UBS Bank in Switzerland. Bradley Birkenfeld, a former UBS banker, blew the whistle by sharing information about UBS clients with the U.S. DOJ, the U.S. Securities and Exchange Commission, the IRS, and the U.S. Senate.³⁵ Birkenfeld himself was arrested and charged by federal prosecutors on one count of conspiracy to defraud the United States, and was ultimately sentenced to 40 months in prison.³⁶ As a result of the publicity surrounding the arrest, the leak became widely known to the

30. See 2008 SENATE REPORT, *supra* note 29, at 2; Randall Jackson, *Germany Recovers Millions Through Liechtenstein Tax Investigations*, 58 TAX NOTES INT'L 113, 113 (2010); Lynnley Browning, *Banking Scandal Unfolds Like a Thriller*, N.Y. TIMES (Aug. 14, 2008), <http://www.nytimes.com/2008/08/15/business/worldbusiness/15kieber.html>.

31. 2008 SENATE REPORT, *supra* note 29, at 2 (citing LGT press release and N.Y. Times report).

32. Randall Jackson, *More Tax Cheats in Doghouse Over Liechtenstein Tax Evasion*, WORLDWIDE TAX DAILY, Mar. 31, 2008 (citing investigations by the United Kingdom, Italy, and France). Almost a dozen countries, including Australia, France, Italy, Spain, and the United Kingdom, announced plans to investigate taxpayers with Liechtenstein accounts. 2008 SENATE REPORT, *supra* note 29, at 2.

33. IRS News Release IR-2008-26 (Feb. 26, 2008), <https://www.irs.gov/pub/irs-news/ir-08-026.pdf> [<https://perma.cc/3GD6-XWZD>].

34. Joann M. Weiner, *The New TIEA: A Christmas Gift to Liechtenstein*, 52 TAX NOTES INT'L 831, 832 (2008). Liechtenstein subsequently signed Tax Information Exchange Agreements (TIEAs) with the United Kingdom (August 2009), Germany (September 2009), France (September 2009), the Netherlands (November 2009), Belgium (November 2009), and Sweden, Denmark, and Norway (all December 2010), among other countries. See *Tax Information Exchange Agreements (TIEAs)*, OECD, <http://www.oecd.org/tax/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm> [<https://perma.cc/C74R-6NTT>].

35. BRADLEY C. BIRKENFELD, LUCIFER'S BANKER: THE UNTOLD STORY OF HOW I DESTROYED SWISS BANK SECRECY (2016) (presenting Birkenfeld's own account of the UBS scandal); William Byrnes, *Background and Current Status of FATCA and CRS (Sept. 2017 Edition)*, in LEXISNEXIS GUIDE TO FATCA & CRS COMPLIANCE § 1.03[1] (Tex. A&M Univ. Sch. of Law Legal Studies Research Paper Series, Research Paper No. 17-75, 2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3045459; Oei, *supra* note 2.

36. David D. Stewart, *Former UBS Banker Sentenced to 40 Months in Prison*, 124 TAX NOTES 747 (2009); see also Motion for Sentence Reduction and Sentencing Memorandum, United States v. Birkenfeld, No. 08-60099-CR-ZLOCH (S.D. Fla. Aug. 18, 2009).

public.³⁷ Ironically, Birkenfeld was subsequently awarded a \$104 million whistleblower award by the IRS.³⁸

While it is difficult to know exactly what information Birkenfeld shared with the United States, he claimed in a district court sentencing memorandum to have provided (1) information about UBS's misconduct in conducting cross-border banking; (2) the names of bankers and offices that were involved; (3) data about the volume and size of customer accounts; (4) details about UBS's failure to abide by the "qualified intermediary" rules; and (5) internal documents, emails, and memos.³⁹

The UBS and LGT leaks had significant consequences in the United States, leading to Senate hearings and the issuance of a Senate report about tax havens and offshore banks.⁴⁰ The consequences to UBS were dramatic: On February 28, 2009, UBS entered into a deferred prosecution agreement (DPA) with the DOJ and agreed to pay \$780 million to the United States,⁴¹ including interest and penalties, and to surrender a small number of client names.⁴² Ultimately, through serving a John Doe summons and subsequent negotiations, the IRS and DOJ obtained the names of approximately 4000 Americans who hid assets using UBS accounts, a small fraction of the 52,000 names it had originally tried to obtain.⁴³ The United States used this

37. Lynnley Browning, *Ex-Banker From UBS Is Indicted in Tax Case*, N.Y. TIMES (May 14, 2008), <http://www.nytimes.com/2008/05/14/business/worldbusiness/14tax.html>; see also *Bradley Birkenfeld*, NAT'L WHISTLEBLOWER CTR., <http://www.whistleblowers.org/meet-the-whistleblowers/934-bradley-birkenfeld> [https://perma.cc/9U3U-L743].

38. See 26 U.S.C. § 7623 (2012). Birkenfeld was partially motivated by the whistleblower reward. See Ken Stier, *Why Is the UBS Whistle-Blower Headed to Prison?*, TIME (Oct. 6, 2009), <http://content.time.com/time/business/article/0,8599,1928897,00.html>.

39. Motion for Sentence Reduction and Sentencing Memorandum, *supra* note 36, at 6.

40. 2008 SENATE REPORT, *supra* note 29, at 4–14. For a fuller discussion of these consequences, see Oei, *supra* note 2.

41. Of this amount, \$380 million represented disgorgement of profits. The remainder represented unpaid withholding taxes, interest, penalties, and restitution for unpaid taxes. See Deferred Prosecution Agreement at 3, *United States v. UBS AG*, No. 09-60033-CR-COHN (S.D. Fla. 2009), https://www.justice.gov/sites/default/files/tax/legacy/2009/02/19/UBS_Signed_Deferred_Prosecution_Agreement.pdf [https://perma.cc/6XUZ-46BU].

42. *Id.* at 3. As of July 2017, UBS is set to stand trial in France for money laundering and tax fraud covering the period 2004 to 2012. The anticipated trial follows failed settlement talks in which UBS rejected the opportunity to pay a €1.1 billion fine under a deferred prosecution agreement. Reportedly, UBS objected to the amount, which was higher than what it had paid to the United States (\$780 million), and higher than what it had paid to Germany in 2014 (€300 million). Teri Sprackland, *UBS to Stand Trial After French Settlement Talks Fail*, 85 TAX NOTES INT'L 1136, 1136 (2017).

43. See Agreement Between the United States of America and the Swiss Confederation on the Request for Information From the Internal Revenue Service of the United States of America Regarding UBS AG, a Corporation Established Under the Laws of the Swiss Confederation, Switz.-U.S., Aug. 19, 2009, <https://www.irs.gov/pub/irs-drop/us->

data to prosecute tax offenders, push others to voluntarily report their offshore holdings in exchange for criminal amnesty, and develop a program to sanction Swiss banks by entering into deferred and nonprosecution agreements with offending banks.⁴⁴

Perhaps most significantly, the UBS and LGT leaks ultimately led to the enactment of the United States's FATCA legislation of 2010.⁴⁵ They also played a role in shaping subsequent developments in the automatic exchange of information more globally (including mini-FATCAs in other countries and the Organisation for Economic Co-operation and Development's (OECD) Common Reporting Standard (CRS) and automatic exchange of information projects). These developments represented a sea change in cross-border transparency regarding American and other taxpayers' foreign financial assets.⁴⁶ As further discussed in Subpart III.C, FATCA now requires information reporting by both foreign financial institutions and U.S. taxpayers with foreign financial holdings.⁴⁷

2. The HSBC Suisse Leak

The HSBC Suisse leak (SwissLeaks) episode is another example of a leak by a bank employee. Beginning around 2006, Hervé Falciani, a computer systems engineer at HSBC Private Bank (Suisse) S.A. (HSBC Suisse) obtained

swiss_government_agreement.pdf [https://perma.cc/4A5A-J4JL]; Order Authorizing IRS to File John Doe Summons, *In re Tax Liabilities of John Does*, No. 08-21864-MC-LENARD/GARBER (S.D. Fla. July 1, 2008), https://www.justice.gov/archive/tax/UBS_Order.pdf [https://perma.cc/NAF2-NHVZ]; IRS News Release IR-2009-75 (Aug. 19, 2009), <https://www.irs.gov/pub/irs-news/ir-09-075.pdf> [https://perma.cc/58QB-BH7K]; *UBS to Disclose Over 4,000 Client Names*, N.Y. TIMES: DEALBOOK (Aug. 19, 2009, 10:21 AM), <https://dealbook.nytimes.com/2009/08/19/ubs-to-disclose-over-4000-client-names> [https://perma.cc/U2CQ-7HJT].

44. See Lynnley Browning, *Wealthy Americans Under Scrutiny in UBS Case*, N.Y. TIMES (June 6, 2008), <http://www.nytimes.com/2008/06/06/business/worldbusiness/06tax.html>; *Offshore Compliance Initiative*, U.S. DEP'T JUSTICE, <https://www.justice.gov/tax/offshore-compliance-initiative> [https://perma.cc/2E54-NYHD] (listing convictions, guilty pleas, and agreements entered into under the DOJ's Swiss Bank Program for resolutions of offshore tax evasion issues with Swiss Banks); see also *infra* Subpart III.C.

45. Foreign Account Tax Compliance Act, Pub. L. No. 111-147, 124 Stat. 71 (2010) (codified at 26 U.S.C. §§ 1471-1474 (2012)). This statute is commonly referred to as "FATCA." For a fuller discussion of FATCA, see Oei, *supra* note 2 (outlining FATCA's provisions in Subpart II.A.3); Byrnes, *supra* note 35.

46. See generally Joshua D. Blank & Ruth Mason, *Exporting FATCA*, 142 TAX NOTES 1245, 1246-48 (2014); Grinberg, *supra* note 2; Itai Grinberg, *Taxing Capital Income in Emerging Countries: Will FATCA Open the Door?*, 5 WORLD TAX J. 325, 327 (2013); Susan C. Morse, *Ask for Help, Uncle Sam: The Future of Global Tax Reporting*, 57 VILL. L. REV. 529, 530-31 (2012).

47. See *infra* Subpart III.C.

and extracted a large quantity of client data from HSBC Suisse. Falciani fled to France, and France ultimately gained possession of the information. The data revealed that HSBC Suisse had helped clients conceal bank accounts from tax authorities, had promoted structures that enabled clients to avoid European Union (EU) taxes, and had allowed large cash withdrawals from accounts without inquiry.⁴⁸

Switzerland then requested that France extradite Falciani. France instead began to investigate the data.⁴⁹ In March 2015, the French financial state prosecutor requested that parent company HSBC Holdings PLC (HSBC) be tried criminally on tax evasion charges,⁵⁰ and in April 2015, HSBC filed an appeal to have the charges dropped.⁵¹ The French Appeals Court rejected HSBC's appeal in February 2016.⁵² French prosecutors subsequently indicated that HSBC should stand trial on tax evasion charges.⁵³

France also prosecuted some high-profile individuals, leading to an increase in voluntary disclosures of offshore accounts.⁵⁴ Meanwhile, Falciani, an Italian-French dual citizen, was tried in absentia in Switzerland and convicted of aggravated industrial espionage in November 2015, though he was acquitted on charges of data theft and violating Swiss bank secrecy laws.⁵⁵ He faces a five-year prison term if he ever returns to Switzerland.⁵⁶

48. See David Leigh et al., *Cash Pilgrims and Bricks of Money: HSBC Swiss Bank Operated Like Cash Machine for Rich Clients*, GUARDIAN (Feb. 9, 2015, 9:00 AM), <https://www.theguardian.com/business/2015/feb/09/hsbc-files-swiss-bank-cash-machine-rich-clients> [<https://perma.cc/9ZLF-FXVK>]; David Leigh et al., *HSBC Files Show How Swiss Bank Helped Clients Dodge Taxes and Hide Millions*, GUARDIAN (Feb. 8, 2015, 4:00 PM), <https://www.theguardian.com/business/2015/feb/08/hsbc-files-expose-swiss-bank-clients-dodge-taxes-hide-millions> [<https://perma.cc/5B2A-KGYP>] [hereinafter Leigh et al., *HSBC Files Show*].

49. See David Leigh et al., *HSBC Files Timeline: From Swiss Bank Leak to Fallout*, GUARDIAN (Mar. 13, 2015, 8:19 AM), <https://www.theguardian.com/business/2015/feb/11/hsbc-files-timeline-from-swiss-bank-leak-to-fallout> [<https://perma.cc/4PEY-UAAP>].

50. Angelique Chrisafis & Sean Farrell, *HSBC's Swiss Private Bank: French Prosecutor Formally Requests Trial*, GUARDIAN (Mar. 13, 2015, 7:54 AM), <https://www.theguardian.com/business/2015/mar/13/hsbc-swiss-private-bank-criminal-trial-request-france> [<https://perma.cc/YW7U-GQVJ>].

51. Stephanie Soong Johnston, *HSBC Loses Appeal in French Tax Evasion Probe*, 81 TAX NOTES INT'L 486, 486 (2016).

52. *Id.*

53. Noemie Bisserbe, *French Prosecutors Say HSBC Should Stand Trial for Alleged Tax Fraud*, WALL ST. J. (Nov. 3, 2016, 8:33 AM), <http://www.wsj.com/articles/french-prosecutors-say-hsbc-should-stand-trial-for-alleged-tax-fraud-1478168745>.

54. Stuart Gibson, *Four Pioneers in Tax Transparency*, 80 TAX NOTES INT'L 965, 965 (2015).

55. William Hoke, *Hervé Falciani—The SwissLeaks Whistleblower*, 80 TAX NOTES INT'L 972, 972 (2015) [hereinafter Hoke, *SwissLeaks*]; William Hoke, *Swiss Court Convicts Falciani*

As examined more extensively in Subpart III.B, the HSBC Suisse data was ultimately shared with other jurisdictions and portions of it were made public by the International Consortium of Investigative Journalists (ICIJ), which then led to further dissemination.⁵⁷ Many countries ultimately took action in one form or another against the tax evaders and the bank.⁵⁸ Switzerland itself fined HSBC for money laundering but did not file tax evasion charges, as tax evasion is not a crime in Switzerland.⁵⁹

Although the HSBC Suisse leak occurred in 2008, its consequences continue to reverberate to this day. Subsequent data leaks, including the Panama Papers leak, have provided tax authorities with additional information about the activities of HSBC and have led to further investigations of the bank.⁶⁰

3. The Julius Baer Leak

The story of the Julius Baer leak is slightly difficult to pin down, and its ultimate effects are rather inchoate. Former bank employee Rudolf Elmer took internal bank and client documents with him when he was fired in 2002.⁶¹ Elmer had worked in Switzerland and later the Cayman Islands, where he was chief

in *HSBC Leak*, 80 TAX NOTES INT'L 799, 799 (2015) [hereinafter Hoke, *Swiss Court Convicts*].

56. Simon Neville, *Hervé Falciani: HSBC Tax Leaker Gets Five-Year Sentence in Absentia*, INDEPENDENT (Nov. 28, 2015, 12:33 AM), <http://www.independent.co.uk/news/business/news/herve-falciani-hsbc-tax-leaker-gets-five-year-sentence-in-absentia-a6752401.html> [https://perma.cc/DR5N-Z26C].
57. Margaret Burow, *Secret Documents Reveal Billions Held in Swiss Accounts*, 77 TAX NOTES INT'L 555, 555 (2015); Leigh et al., *HSBC Files Show*, *supra* note 48; *see infra* Subpart III.B. For background on the ICIJ, see William E. Buzenberg, *Anatomy of a Global Investigation: Collaborative, Data-Driven, Without Borders*, HARV. KENNEDY SCH.: SHORENSTEIN CTR. ON MEDIA, POL. & PUB. POL'Y (July 6, 2015, 4:30 PM), <https://shorensteincenter.org/anatomy-of-a-global-investigation-william-buzenberg> [https://perma.cc/NM8Q-EU68].
58. *See infra* Subpart III.B.4; *see, e.g.*, William Hoke, *Belgium Accuses HSBC of Tax Fraud*, 76 TAX NOTES INT'L 652, 652 (2014); Teri Sprackland, *Italian High Court Allows Use of Stolen HSBC Data in Tax Cases*, 78 TAX NOTES INT'L 998, 998 (2015). But not all countries actively investigated. *See, e.g.*, Stephanie Soong Johnston, *HSBC Not Under Investigation for Tax Evasion*, HMRC SAYS, 81 TAX NOTES INT'L 230, 230 (2016); *see also infra* Subpart III.B.3.b (discussing Greece).
59. Teri Sprackland, *Geneva Prosecutor Drops HSBC Case*, 78 TAX NOTES INT'L 1014, 1014 (2015).
60. *See* William Hoke, *HSBC Receives Worldwide Requests After Panama Papers*, 83 TAX NOTES INT'L 496, 496–97 (2016).
61. William Hoke, *Whistleblower Elmer Guilty of Violating Swiss Bank Secrecy Law*, 77 TAX NOTES INT'L 324, 324 (2015).

operating officer of the bank's Grand Cayman office at the time he was fired.⁶² The precise nature of Elmer's motivations is disputed: Elmer claims that he was crusading against tax evasion; Julius Baer instead claims that Elmer was upset over not receiving a promotion and about (eventually) being fired, and had leaked the data in retaliation.

Elmer reportedly tried to get prosecutors and tax authorities in various countries to pay attention to his data but failed.⁶³ He then posted some of the data to WikiLeaks in 2008,⁶⁴ and also gave data to German tax authorities.⁶⁵ The WikiLeaks posting set off a battle between WikiLeaks and Julius Baer: The bank initially obtained an injunction requiring the WikiLeaks domain registrar to disable and lock the wikileaks.org domain name.⁶⁶ However, this was not effective in removing the data from the internet, and the judge subsequently dissolved the injunction.⁶⁷

The New York Times reported that Elmer had given the documents, which pertained to "more than 100 trusts, dozens of companies and hedge funds and more than 1,300 individuals, from 1997 through 2002," to the IRS, a Senate subcommittee investigating tax evasion, and investigators for the Manhattan district attorney.⁶⁸ Although the effects of Elmer's disclosures are unclear, we do know that on February 4, 2016, the DOJ entered into a DPA with Julius Baer requiring it to pay \$547 million.⁶⁹ It also secured the guilty pleas of two Julius Baer bankers.⁷⁰

62. Lynnley Browning, *Swiss Banker Blows Whistle on Tax Evasion*, N.Y. TIMES (Jan. 18, 2010), <http://www.nytimes.com/2010/01/19/business/19whistle.html>; Tax Gap Reporting Team, *Isles of Plenty*, GUARDIAN (Feb. 12, 2009, 7:01 PM), <https://www.theguardian.com/business/2009/feb/13/tax-gap-cayman-islands> [<https://perma.cc/P3FE-P93T>].

63. David D. Stewart, *Julius Baer Whistleblower Ambivalent Toward Reward*, 58 TAX NOTES INT'L 1014, 1015 (2010).

64. See Julian Assange & Daniel Schmitt, *Bank Julius Baer vs. Wikileaks*, WIKILEAKS (Jan. 23, 2008), https://wikileaks.org/wiki/Bank_Julius_Baer_vs._Wikileaks [<https://perma.cc/K5K7-HE76>].

65. Stewart, *supra* note 63, at 1015.

66. Plaintiff's Ex Parte Application for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction, *Bank Julius Baer & Co. Ltd. v. WikiLeaks*, 535 F. Supp. 2d 980 (N.D. Cal. 2008) (No. CV08-0824 JSW), 2008 WL 538830.

67. *Id.*; see also Philipp Gollner, *Judge Reverses Ruling in Julius Baer Leak Case*, REUTERS (Feb. 29, 2008, 3:22 PM), <http://www.reuters.com/article/us-baer-idUSN2927431720080229> [<https://perma.cc/V3W6-HJLG>] (detailing Judge White's decision to reverse prior ruling).

68. Browning, *supra* note 62.

69. *Criminal Charges Filed Against Bank Julius Baer of Switzerland With Deferred Prosecution Agreement Requiring Payment of \$547 Million, as Well as Guilty Pleas of Two Julius Baer Bankers*, U.S. DEP'T OF JUST. (Feb. 4, 2016), <https://www.justice.gov/opa/pr/criminal-charges-filed-against-bank-julius-baer-switzerland-deferred-prosecution-agreement> [<https://perma.cc/G8CC-ZN5T>].

70. *Id.*

On January 19, 2011, Elmer was convicted by a Zurich court of attempted blackmail, threats to Baer employees, and breach of bank secrecy laws and was handed a suspended fine of CHF 7200 along with CHF 4000 of court costs. Just two days earlier, on January 17, 2011, Elmer had held a press conference with Julian Assange, founder of WikiLeaks, at which he turned over two CDs, which he claimed held data on 2000 wealthy bank clients from at least three different banks.⁷¹ After returning home from the first trial, Elmer was rearrested on charges that he had provided confidential information to WikiLeaks.⁷² However, Elmer subsequently testified in December 2014 that the CDs had no data on them.⁷³ Elmer was found guilty of delivering Baer's confidential financial information to WikiLeaks and given a suspended fine of CHF 45,000.⁷⁴ In 2016, a Zurich court found him guilty of forgery and threatening his former employer and not guilty of violating Swiss bank secrecy laws.⁷⁵ In short, Elmer suffered nontrivial personal consequences as a result of leaking the data.

The Julius Baer data was stolen *before* the UBS/LGT scandals unfolded but the release of information to WikiLeaks and subsequent events occurred around the same time as or later than these other leaks. Thus, there was a long time lag between the theft of the Baer data and its dissemination and consequences. As one commentator notes, the Baer leak was the first leak to the general public (via WikiLeaks) rather than to a government agency.⁷⁶ The

71. Marie Sapirie, *WikiLeaks Obtains Swiss Bank Account Data*, 61 TAX NOTES INT'L 263, 263 (2011).

72. David D. Stewart, *Swiss Banker Rearrested for Violating Bank Secrecy*, 61 TAX NOTES INT'L 353, 353 (2011).

73. William Hoke, *Former Bank Employee on Trial for Violating Swiss Secrecy Law*, 76 TAX NOTES INT'L 994, 994 (2014). Notably, U.S. lawyers interviewed by *Tax Notes* warned U.S. clients that they might want to enter the Offshore Voluntary Disclosure Program (OVDP) in case their data had been leaked by Elmer. See Sapirie, *supra* note 71, at 263–64; see also Marie Sapirie, *WikiLeaks Announcement Points to Importance of Whistleblowers*, 130 TAX NOTES 363, 363 (2011).

74. Hoke, *supra* note 61, at 324; see also Browning, *supra* note 62.

75. He was found not to have violated bank secrecy laws because he was an employee of Baer's Cayman subsidiary. Matthew Allen, 'Whistleblower' Rudolf Elmer Given Suspended Sentence, SWI SWISSINFO.CH (Aug. 23, 2016, 2:28 PM), http://www.swissinfo.ch/eng/breaking-news_whistleblower-rudolf-elmer-given-suspended-sentence/42392846 [https://perma.cc/S3NH-BJGC]. The decision is on appeal to the Swiss Federal Court. See *Prosecutor to Appeal Whistleblower Elmer Verdict*, SWI SWISSINFO.CH (Nov. 25, 2016, 4:39 PM), http://www.swissinfo.ch/eng/bank-secrecy_prosecutor-to-appeal-whistleblower-elmer-verdict/42707464 [https://perma.cc/KD7G-ZVWE].

76. Reflecting on the novelty of the Baer leak, Scott Michel of Caplin & Drysdale said: What's extraordinary about this is that the disclosure is going to be a public event Up until now, there have been private bankers who have provided information to the IRS, and information has come through the

leak's actual effect on structural, legislative, and policy change is unclear, although there is some indication that Switzerland may have sought to tighten its bank secrecy laws in response to the leak.⁷⁷

4. The British Havens Leak

The British Havens tax leak actually consisted of two different leaks. The first was announced by the ICIJ in April 2013.⁷⁸ A few years earlier, the ICIJ had obtained a hard drive⁷⁹ containing more than 2.5 million documents detailing the secret offshore financial information of over 70,000 taxpayers and over 120,000 offshore entities in the British Virgin Islands, Singapore, the Cayman Islands, and the Cook Islands.⁸⁰ This data had come from the files of two offshore service providers: Singapore-based Portcullis TrustNet and British Virgin Islands-based Commonwealth Trust Ltd.⁸¹ The ICIJ then

voluntary disclosure program, but all of that has been conducted in a confidential environment.

Sapirie, *supra* note 71, at 264.

77. In September 2014, the Swiss parliament considered a bill that would impose greater restrictions on whistleblowers. Tom Miles, *Switzerland Prepares to Tighten Screws on Whistleblowers*, REUTERS (Sept. 19, 2014, 11:03 AM), <http://in.reuters.com/article/switzerland-whistleblower-idINL6N0RK4JG20140919> [<https://perma.cc/A74W-YZSM>]. The subsequent May, however, the Swiss National Council “referred the draft . . . back to the Federal Council for revision” seeking more protections for whistleblowers. Yasmine Motarjemi & Alison Glick, *Switzerland Could Now Lead the World on Whistleblowing Rules*, LE NEWS (May 15, 2015), <http://lenews.ch/2015/05/15/switzerland-could-now-lead-the-world-on-whistleblowing-rules> [<https://perma.cc/NZB8-VSWP>]; see also *Whistleblowing in Switzerland: Rough Terrain*, ECONOMIST (Dec. 5, 2015), <http://www.economist.com/news/business/21679456-two-court-cases-illustrate-struggles-employees-who-allege-wrongdoing-rough-terrain> [<https://perma.cc/4FYN-BEAB>] (describing the “meandering” path of proposed whistleblower legislation).
78. See Duncan Campbell, *How ICIJ's Project Team Analyzed the Offshore Files*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 3, 2013, 7:00 PM), <https://www.icij.org/offshore/how-icijs-project-team-analyzed-offshore-files> [<https://perma.cc/9GSG-F79U>].
79. *Mysterious Mail to Australian Journalist Triggers Global Tax Haven Expose*, SYDNEY MORNING HERALD (Apr. 5, 2013), <http://www.smh.com.au/business/world-business/mysterious-mail-to-australian-journalist-triggers-global-tax-haven-expose-20130404-2hak3.html> [<https://perma.cc/T5ND-G5CN>]. The hard drive had been sent to Australian reporter, Gerard Ryle, before he became ICIJ director in 2011. Ryle attempted to work with the data but technical difficulties impeded his access. Upon joining the ICIJ, he organized a group of over 80 journalists from various countries, which spent 15 months investigating the data. *Id.*
80. Cockfield, *supra* note 10, at 484–85; Campbell, *supra* note 78.
81. Cockfield, *supra* note 10, at 519; Arthur J. Cockfield, *Breaking Bad: What Does the First Major Tax Haven Leak Tell Us?*, 83 TAX NOTES INT'L 691, 692 (2016).

released a database containing information about the ownership of over 100,000 offshore tax haven entities and trusts.⁸²

The second leak occurred in July 2014, when the records of 20,000 individuals from the files of the Jersey Channel Islands branch of Kleinwort Benson, a London private banking and wealth management firm, were leaked to the ICIJ.⁸³ ICIJ allowed The Guardian to analyze the names of the clients, and The Guardian then published a series of articles detailing the identities of several prominent celebrities, politicians, British political donors, and other elites with offshore dealings whose names had appeared in the Jersey files.⁸⁴

The ICIJ also compiled a list of “impacts and responses” stemming from these leaks. The list includes: new commitments by Europe and the OECD to crack down on offshore tax evasion and undertake automatic information exchange of tax data (potentially ending bank secrecy); actions by tax authorities of various countries to investigate and punish offshore tax violations and challenge offshore havens; and new pushes for public registries of individual beneficial owners of offshore companies and trusts.⁸⁵

82. Guevara, *supra* note 9.

83. Michael Hennigan, *More Than 20,000 Client Names of Jersey Tax Haven Bank Leaked*, FINFACTS IR. (July 9, 2014, 8:02 AM), http://www.finfacts.ie/irishfinancenews/article_1027927.shtml [<https://perma.cc/2A5H-L8RU>].

84. See David Leigh, *Offshore Secrets of the UK's Wealthy Political Donors*, GUARDIAN (July 8, 2014, 3:44 PM), <https://www.theguardian.com/politics/2014/jul/08/offshore-secrets-wealthy-political-donors> [<https://perma.cc/BB9W-NKTS>]; David Leigh, James Ball & Leila Haddou, *Offshore Tax Dealings: Celebrities and Sportsmen in Leaked Jersey Files*, GUARDIAN (July 9, 2014, 10:46 AM) <https://www.theguardian.com/uk-news/2014/jul/09/offshore-tax-dealings-celebrities-sportsmen-leaked-jersey-files> [<https://perma.cc/C6MC-ME7P>]; David Leigh, James Ball & Leila Haddou, *Top Tory Has Family Link With Offshore Banker Who Gave Party £800,000*, GUARDIAN (July 8, 2014, 3:47 PM), <https://www.theguardian.com/politics/2014/jul/08/andrea-leadsom-family-links-offshore-bank-donations-tories> [<https://perma.cc/VQ6V-JC6F>]; David Leigh, *Tycoons Bruce Gyngell and Edward Lumley Set Up Offshore Tax Empires*, GUARDIAN (July 10, 2014, 8:10 PM), <https://www.theguardian.com/world/2014/jul/11/tycoons-bruce-gyngell-and-edward-lumley-set-up-offshore-tax-empires> [<https://perma.cc/Y53S-93D2>].

85. See Kimberley Porteous et al., *Release of Offshore Records Draws Worldwide Response*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 5, 2013), <https://www.icij.org/blog/2013/04/release-offshore-records-draws-worldwide-response> [<https://perma.cc/9VX8-KM9K>]; see also *Authorities Announce Tax Haven Investigation*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (May 9, 2013), <https://www.icij.org/blog/2013/05/authorities-announce-tax-haven-investigation> [<https://perma.cc/WC4M-5V62>] (reporting U.S., U.K., and Australian tax authorities' announcements of tax haven investigations based on leaked documents).

5. LuxLeaks

The Luxembourg tax leak (LuxLeaks) scandal also occurred due to an employee whistleblower.⁸⁶ However, unlike the other leaks, LuxLeaks concerned corporate tax avoidance using cross-border tax structuring, rather than individual evasion, and illuminated the actions of a nation (Luxembourg), rather than of private actors.

In October 2010, Antoine Deltour, a French citizen and PriceWaterhouse Coopers employee, copied a set of Luxembourg tax rulings (covering 2008–2010) from PwC computers upon quitting his job.⁸⁷ The theft was first publicized by French journalist Edouard Perrin in a TV documentary aired in 2012.⁸⁸ However, the full impact of the scandal was not felt until the ICIJ, working with Perrin, published a set of about 500 Luxembourg tax rulings regarding more than 300 multinational enterprise (MNE) taxpayers in November 2014.⁸⁹

The leaked material exposed the tax rulings practices of Luxembourg and highlighted the country's role in facilitating the tax avoidance and minimization strategies of MNEs worldwide.⁹⁰ As a result of the leak, the European Commission (EC) focused its attention on the rulings practices of Luxembourg and other member states.⁹¹ In October 2015, EU member states unanimously agreed to automatically exchange information on cross-border tax rulings every six months.⁹² Relatedly, in June 2015, the EC launched a

86. Marian, *supra* note 10, at 6.

87. Teri Sprackland, *Antoine Deltour—The LuxLeaks Whistleblower*, 80 TAX NOTES INT'L 967, 967–68 (2015).

88. Teri Sprackland, *French Journalist Charged With Theft for Role in LuxLeaks*, 78 TAX NOTES INT'L 351, 351 (2015).

89. See *Luxembourg Leaks: Global Companies' Secrets Exposed*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS, <https://www.icij.org/project/luxembourg-leaks> [<https://perma.cc/TR4R-J6AX>]. Raphael Halet, another PwC employee, stole a smaller cache of documents from PwC (sixteen corporate tax returns), which were obtained by Perrin. See Marian, *supra* note 10, at 8; Simon Marks, *The Silent Man of LuxLeaks Fights Back*, POLITICO (Dec. 7, 2016, 6:07 PM), <http://www.politico.eu/article/silent-man-of-luxleaks-fights-back-raphael-halet> [<https://perma.cc/ZW77-PT8J>].

90. Marian, *supra* note 10, at 6.

91. European Comm'n Press Release IP/15/4610, *Combatting Corp. Tax Avoidance: Comm'n Presents Tax Transparency Package* (Mar. 18, 2015), http://europa.eu/rapid/press-release_IP-15-4610_en.htm [<https://perma.cc/P523-3HCR>]. This council directive took effect in January 2016. *Id.*

92. European Comm'n Press Release IP/15/5780, *Tax Transparency: Comm'n Welcomes Agreement Reached by Member States on the Automatic Exch. of Info. on Tax Rulings* (Oct. 6, 2015), http://europa.eu/rapid/press-release_IP-15-5780_en.htm [<https://perma.cc/P4UA-UPVZ>]. There have also been bilateral agreements between states—for example,

consultation on corporate tax transparency, examining whether requiring MNEs to disclose more information about taxes paid (via public, country-by-country reporting (CbC) and/or public disclosure of tax rulings) would reduce tax avoidance and aggressive tax structuring by MNEs.⁹³

Parallel developments emerged in the European Parliament. During 2015, the European Parliament created two special committees on tax rulings (TAXE 1 and TAXE 2) charged with investigating rulings practices.⁹⁴ In their respective reports, the committees recommended heightened tax transparency, a common EU-wide corporate tax base,⁹⁵ proportional financial liability for financial institutions that facilitate tax haven transactions, creation of a beneficial ownership register, and a proposed framework for whistleblower protection.⁹⁶ In July 2015, the Members of the European Parliament voted in favor of a directive requiring CbC reporting of taxes paid.⁹⁷ Two years later, in July 2017, the European Parliament adopted a

between Germany and the Netherlands. Teri Sprackland, *Germany, Netherlands Agree to Share Tax Rulings*, 79 TAX NOTES INT'L 203, 204 (2015).

93. European Comm'n Press Release IP/15/5156, Comm'n Launches Pub. Consultation on Corp. Tax Transparency (June 17, 2015), http://europa.eu/rapid/press-release_IP-15-5156_en.htm [<https://perma.cc/FLB9-42YU>]; *Public Consultation on Further Corporate Tax Transparency*, EUR. COMMISSION, http://ec.europa.eu/finance/consultations/2015/further-corporate-tax-transparency/index_en.htm [<https://perma.cc/KD5F-TYUZ>] (last updated Jan. 18, 2017); see also Teri Sprackland, *European Parliament Backs CbC Reporting Measure*, 79 TAX NOTES INT'L 117, 117 (2015).
94. See Decision on Setting-up of a Special Committee on Tax Rulings and Other Measures Similar in Nature or Effect (TAXE 2), EUR. PARL. DOC. (B8-1335/2015) (2015), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0420+0+DOC+XML+V0//EN&language=EN> [<https://perma.cc/RM5H-RNX3>]; Marian, *supra* note 10, at 6; Teri Sprackland, *Finance Minister Defends Country Before EU Tax Panel*, 78 TAX NOTES INT'L 717, 717 (2015); see also *Latest News*, EUR. PARLIAMENT (Dec. 18, 2015, 1:29 PM), <http://www.europarl.europa.eu/committees/en/taxe/home.html> [<https://perma.cc/FC4U-4DRB>]; *Latest News*, EUR. PARLIAMENT (Sept. 11, 2016, 9:07 AM), <http://www.europarl.europa.eu/committees/en/tax2/home.html> [<https://perma.cc/52KG-YML6>].
95. See Alexander Lewis, *MEPs Seek Legislation on TAXE Committee Recommendations*, 80 TAX NOTES INT'L 805 (2015); see also Resolution of 25 November 2015 on Tax Rulings and Other Measures Similar in Nature or Effect, EUR. PARL. DOC. (A8-0317/2015) (2015), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0408+0+DOC+XML+V0//EN&language=EN> [<https://perma.cc/ZP59-U6DD>]. The final report was approved by the European Parliament. *Id.*
96. Resolution of 6 July 2016 on Tax Rulings and Other Measures Similar in Nature or Effect, EUR. PARL. DOC. (A8-0223/2016) (2016), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0310+0+DOC+XML+V0//EN&language=EN> [<https://perma.cc/CG5G-ZMUG>]. Like those of the TAXE 1 committee, the TAXE 2 recommendations were in response to LuxLeaks and also to the subsequent Panama Papers leak. *Id.* (referencing LuxLeaks and Panama Papers as background).
97. Sprackland, *supra* note 93.

position in favor of public CbC reporting for large corporations.⁹⁸ The LuxLeaks scandal has been identified as a factor in creating support for the CbC requirements⁹⁹ and inspiring the hope that transparency will lessen reliance on leaks for enforcement.¹⁰⁰

Substantive developments aside, the LuxLeaks scandal created consequences for specific taxpayers and other actors. The leak raised uncomfortable questions for Jean-Claude Juncker, the EC President, who was Luxembourg's finance minister during the period the rulings were issued.¹⁰¹ There were also consequences for the whistleblowers. In December 2014, Luxembourg charged Deltour with theft, breach of confidentiality, trade secrets violation, and fraudulent access to automated data processing systems. The journalist Perrin was charged in April 2015 for theft, complicity in theft, whitewashing (laundering), and accessing protected databases.¹⁰² Raphael Halet, another PwC employee who had stolen a smaller set of PwC documents, was charged as well. Perrin was eventually acquitted while Deltour and Halet received 12- and 9-month suspended sentences and were fined €1500 and €1000 respectively.¹⁰³ Upon appeal, Deltour and Halet had their sentences reduced to six and zero months, respectively, and Perrin's acquittal was affirmed.¹⁰⁴ In January 2018, Luxembourg's highest court

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98. Elodie Lamer, *European Parliament Establishes Position on Public CbC Reporting*, 87 TAX NOTES INT'L 113, 113 (2017). The proposal, which envisions an exemption period for commercially sensitive information, would require covered companies to publicly disclose number of employees, net turnover, stated capital, profit/loss before income tax, income tax paid, accumulated earnings, and "potential preferential tax treatment" from which they may benefit. *Id.*
 99. Stephanie Soong Johnston, *EU Parliamentary Committee Backs CbC Reporting Measure*, 78 TAX NOTES INT'L 525, 525–26 (2015) (quoting a Jones Day Brussels lawyer).
 100. See *European Parliament Committee Sets the Tone for Europe's Debate on Multinational Transparency*, TRANSPARENCY INT'L (May 7, 2015), http://www.transparency.org/news/pressrelease/european_parliament_committee_sets_the_tone_for_europes_debate_on_multinati [<https://perma.cc/F2KZ-A35T>] ("Up until now, we've had to rely on leaks, whistleblowers, and secret documents to learn if a multinational is engaging in aggressive tax planning and profit shifting But today's vote brings the transparency Europe needs closer to reality.").
 101. See, e.g., Stuart Gibson, *The Luxembourg Fox in the European Henhouse*, 85 TAX NOTES INT'L 123, 123 (2017) (discussing potential erosion of support for Juncker); Teri Sprackland, *Leaked Docs Show Juncker Obstructed EU Tax Reforms*, 85 TAX NOTES INT'L 137, 137 (2017) (describing renewed allegations faced by Juncker); see also Marian, *supra* note 10, at 6–8, 53 (despite defending its role, Luxembourg ultimately revised its rulings process).
 102. Sprackland, *supra* note 88.
 103. Teri Sprackland, *Luxembourg Prosecutor Requests Retrial in LuxLeaks Case*, 83 TAX NOTES INT'L 483, 483–84 (2016).
 104. Will Fitzgibbon, *LuxLeaks Trial Continues as Whistleblowers Fight Conviction*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Dec. 22, 2016, 12:30 PM),

overturned Deltour's sentence and fine, and ordered a new trial.¹⁰⁵ These events have led Members of the European Parliament, as well as journalists and other commentators, to push for more whistleblower protections.¹⁰⁶ The European Parliament awarded Deltour its European Citizen Award in 2015.¹⁰⁷ Thus, like the reactions of Switzerland and France to the HSBC leak, and the United States and Switzerland to the UBS leak, the reactions of Luxembourg and the European Parliament reflect competing perspectives on the desirability of leaks.¹⁰⁸

6. The Panama Papers

Unlike the leaks previously described, the Panama Papers episode originated not from an employee whistleblower but from an anonymous data source.¹⁰⁹ In 2014, that source contacted and gave the data to Bastian Obermayer, a journalist at German newspaper *Süddeutsche Zeitung*.¹¹⁰

<https://www.icij.org/blog/2016/12/luxleaks-trial-continues-whistleblowers-fight-conviction> [https://perma.cc/895F-KJ62]; Pierre Surlut, *LuxLeaks Whistleblowers Get Reduced Sentences on Appeal*, LUXEMBURGER WORT (Mar. 15, 2017, 3:31 PM), <https://www.wort.lu/en/luxembourg/luxembourg-court-luxleaks-whistleblowers-get-reduced-sentences-on-appeal-58c95045a5e74263e13ac089> [https://perma.cc/3PPC-CRD2]. Deltour and Halet still had to pay the monetary fines. *Id.*

105. Teri Sprackland, *LuxLeaks Whistleblower Wins Appeal, Retrial Ordered*, 89 TAX NOTES INT'L 224 (2018).
106. Stephanie Soong Johnston, *EU Lawmakers Push for More Tax Whistleblower Protection*, 78 TAX NOTES INT'L 437, 437–38 (2015); Stephanie Soong Johnston, *EU Must Protect Whistleblowers, Say LuxLeaks Journalists*, 78 TAX NOTES INT'L 592, 592–93 (2015); David Pegg, *MEPs Offer Support to Convicted LuxLeaks Whistleblowers*, GUARDIAN (Sept. 8, 2016, 12:26 PM), <https://www.theguardian.com/business/2016/sep/08/meeps-support-convicted-luxleaks-whistleblowers-luxembourg> [https://perma.cc/WFX9-6EDG]; Teri Sprackland, *European Parliament Votes for EU-Wide Whistleblower Protection*, 85 TAX NOTES INT'L 706, 706–07 (2017).
107. Sprackland, *supra* note 87, at 967.
108. In July 2017, Luxembourg (and Belgium) expressed opposition to a European Commission (EC) proposal to require that financial intermediaries disclose certain tax planning schemes. Elodie Lamer, *Moscovici Lashes Out at Belgium, Luxembourg for Resisting Transparency*, 87 TAX NOTES INT'L 200, 200 (2017). Interestingly, the EC president at this time is none other than Jean-Claude Juncker, who was president of Luxembourg during the period of the LuxLeaks transactions. Miles Dean, *Juncker Plans New Tax Transparency Rules From January 2019*, BLOOMBERG BNA, TAX PLANNING INT'L: EUR. TAX SERV., June 2017, at 2, 3.
109. See William Hoke, *'John Doe' Explains Reasons for Leaking Panama Papers*, 151 TAX NOTES 832, 832 (2016).
110. Paul Farhi, *'Hello. This Is John Doe': The Mysterious Message That Launched the Panama Papers*, WASH. POST (Apr. 6, 2016), https://www.washingtonpost.com/lifestyle/style/hello-this-is-john-doe-the-mysterious-message-that-launched-the-panama-papers/2016/04/06/59305838-fc0c-11e5-886f-a037dba38301_story.html?utm_term=.4b01c166004d [https://perma.cc/75B7-

Süddeutsche Zeitung in turn sought the assistance of the ICIJ and other news organizations in analyzing the data.¹¹¹ The ICIJ announced the leak on April 3, 2016 and released a database of names and entities implicated on May 9, 2016.¹¹² According to the ICIJ, more than 370 journalists from 76 countries reviewed and organized the data before it was released.¹¹³

The leaked data, comprising 11.5 million records, covered almost 40 years of data and records from Panamanian law firm Mossack Fonseca (spanning 1977–2015).¹¹⁴ More than 214,000 offshore entities were identified with connections to individuals in over 200 countries and territories.¹¹⁵ Several major banks have been implicated as working with Mossack Fonseca in creating these offshore entities, including HSBC, UBS, Credit Suisse, and Deutsche Bank.¹¹⁶ The Panama leak implicated many elites, including 140

GSAQ]; see Alex Spence, *Journalist at Center of Panama Leaks: 'Nobody Hiding Offshore is Safe'*, POLITICO (Apr. 5, 2016, 12:17 PM), <http://www.politico.eu/blogs/on-media/2016/04/journalist-at-center-of-panama-leaks-nobody-hiding-offshore-is-safe> [https://perma.cc/Y54C-R44E]; see also BASTIAN OBERMAYER & FREDERIK OBERMAIER, THE PANAMA PAPERS: BREAKING THE STORY OF HOW THE RICH & POWERFUL HIDE THEIR MONEY 33 (2016) (profiling the journalists' first-hand account of the Panama Papers investigation).

111. *Giant Leak of Offshore Financial Records Exposes Global Array of Crime and Corruption*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 3, 2016), <https://panamapapers.icij.org/20160403-panama-papers-global-overview.html> [https://perma.cc/8JDM-5MBZ] [hereinafter *Giant Leak*].
112. *See Offshore Leaks Database*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS, <https://offshoreleaks.icij.org> [https://perma.cc/4AS5-4TL8].
113. *Giant Leak*, *supra* note 111; see also *About This Project*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 3, 2016), <https://panamapapers.icij.org/about.html> [https://perma.cc/WVP7-MJKG] (providing the names of journalists and their home countries).
114. *Giant Leak*, *supra* note 111; *About This Project*, *supra* note 113. In the aftermath of the Panama Papers, Mossack Fonseca has announced that it will shut down. Will Fitzgibbon, *Panama Papers Law Firm Mossack Fonseca Closes its Doors*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Mar. 14, 2018), <https://www.icij.org/investigations/panama-papers/panama-papers-law-firm-mossack-fonseca-closes-doors/>.
115. *Giant Leak*, *supra* note 111; *About This Project*, *supra* note 113; see also William Hoke & Stephanie Soong Johnston, *Panama Papers Expose Thousands of Offshore Accounts*, 82 TAX NOTES INT'L 103, 103 (2016) (describing the widespread global impact of the Panama Papers). The leak revealed bank accounts and entities in 21 offshore jurisdictions. *Giant Leak*, *supra* note 111.
116. For example:
[M]ore than 500 banks, their subsidiaries and branches have worked with Mossack Fonseca since the 1970s to help clients manage offshore companies. . . . In all, the files indicate Mossack Fonseca worked with more than 14,000 banks, law firms, company incorporators and other middlemen to set up companies, foundations and trusts for customers, the records show.

Giant Leak, *supra* note 111; see also, e.g., Hamish Boland-Rudder & Martha M. Hamilton, NY Regulator Demands Details of Banks' Panama Dealings, INT'L CONSORTIUM INVESTIGATIVE

politicians and public officials.¹¹⁷ For example, it revealed links between offshore entities and the families of the Chinese and Ukrainian Presidents, Xi Jinping and Petro Poroshenko, and the U.K. and Pakistani Prime Ministers, David Cameron and Nawaz Sharif.¹¹⁸ It illuminated the offshore holdings and transactions of individual and business associates of Vladimir Putin, the Russian president.¹¹⁹ The leak also revealed the Argentine President, Mauricio Macri, as a director and vice president of a Bahamas company and the Icelandic Prime Minister, Sigmundur Davio Gunnlaugsson, as owner of an undeclared offshore entity holding \$4 million in bonds.¹²⁰

Although the Panama leak occurred relatively recently, already we are seeing divergent responses.¹²¹ Australia, France, the Netherlands, Canada, the United States, the United Kingdom, Germany, Indonesia, Denmark, Pakistan, Singapore, South Africa, Taiwan, and Thailand have announced their intention to investigate or have begun investigating.¹²² In Iceland, Prime Minister Gunnlaugsson resigned in the face of post-leak pressure.¹²³ The Prime Minister of Pakistan's family came under investigation by the Joint Investigation Team under the authority of the Supreme Court of Pakistan for

JOURNALISTS (Apr. 20, 2016), <https://www.icij.org/blog/2016/04/ny-regulator-demands-details-banks-panama-dealings> [https://perma.cc/22NN-EDH5] (noting investigation by the New York Department of Financial Services and data requests directed at various banks, including Deutsche Bank AG).

117. *Giant Leak*, *supra* note 111; *see also Offshore Links of More than 140 Politicians and Officials Exposed*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Apr. 3, 2016), <https://www.icij.org/blog/2016/04/offshore-links-more-140-politicians-and-officials-exposed/>.

118. *See* Hoke & Johnston, *supra* note 115, at 103–04; *see also Panama Papers: Pakistan PM Nawaz Sharif to Face Investigators*, BBC NEWS (Apr. 20, 2017), <http://www.bbc.com/news/world-asia-36092356> [https://perma.cc/WZH7-GPNN].

119. Hoke & Johnston, *supra* note 115.

120. *Id.* at 104; Alexander Lewis, *Iceland's Prime Minister Won't Resign Over Panama Papers*, 82 TAX NOTES INT'L 107, 107 (2016).

121. *See* Ryan Finley, *Governments' Reactions to Panama Papers Vary Widely*, 82 TAX NOTES INT'L 110, 110–11 (2016); *see also* PETRUS MARAIS & TERRY PESCE, KPMG, THE PANAMA PAPERS: A KPMG SURVEY OF INITIAL RESPONSES BY FINANCIAL INSTITUTIONS (2016), <https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2016/10/the-panama-papers.pdf> [https://perma.cc/7F8P-QUP6].

122. *See* Stuart Gibson, *Unleashing a Panamanian Tsunami*, 82 TAX NOTES INT'L 101, 101 (2016); Ariel S. Greenblum, *The Panama Papers Underscore Need for Transparency*, 151 TAX NOTES 133, 133 (2016); William Hoke, *Canada Gains Access to Thousands of Panama Papers Files*, 82 TAX NOTES INT'L 621, 621 (2016); Stephanie Soong Johnston, *Danish Tax Authority to Purchase Leaked Panama Papers Data*, 83 TAX NOTES INT'L 924, 924 (2016).

123. Steven Erlanger, Stephen Castle & Rick Gladstone, *Iceland's Prime Minister Steps Down Amid Panama Papers Scandal*, N.Y. TIMES (Apr. 5, 2016), http://www.nytimes.com/2016/04/06/world/europe/panama-papers-iceland.html?_r=0.

undisclosed offshore assets and money laundering.¹²⁴ France has added Panama back to its list of tax havens, having removed it in 2012.¹²⁵ The European Parliament has set up an inquiry committee charged with investigating whether there have been violations of EU law and what legislative solutions to recommend.¹²⁶ The committee made recommendations, which were ultimately adopted by the EU Parliament.¹²⁷

Meanwhile, China has begun censorship of internet mentions of its elites implicated in the leak, while Russia has denied wrongdoing by Putin's associates.¹²⁸ Panama itself has gone on the defensive but has also taken steps in the direction of tax transparency, for example by signing the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and agreeing to commit to the OECD's common reporting standard on information exchange.¹²⁹ Panama convened a commission to review the

124. F.M. Shakil, *D-Day for Sharif Family: Report Due on Money Laundering*, ASIA TIMES (July 8, 2017, 12:00 PM), <http://www.atimes.com/article/d-day-sharif-family-report-due-money-laundering>. In July 2017, Prime Minister Sharif resigned after the Supreme Court disqualified him from office. See, e.g., Salman Masood, *Nawaz Sharif, Pakistan's Prime Minister, Is Toppled by Corruption Case*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/2017/07/28/world/asia/pakistan-prime-minister-nawaz-sharif-removed.html>; *Pakistan PM Nawaz Sharif Resigns After Panama Papers Verdict*, BBC NEWS (July 28, 2017), <http://www.bbc.com/news/world-asia-40750671> [<https://perma.cc/G39N-AGNW>]. Sharif was subsequently indicted by an anti-corruption court. Martha M. Hamilton, *Former Pakistan PM Nawaz Sharif, Family Members Indicted*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Oct. 20, 2017), <https://www.icij.org/investigations/panama-papers/former-pakistan-pm-nawaz-sharif-family-members-indicted/>.

125. William Hoke, *France Reinstates Panama to List of Noncooperative Countries*, 82 TAX NOTES INT'L 104, 104 (2016).

126. 2016 O.J. (L 166) 10.

127. *MEPs Back Sweeping Recommendations of Special Inquiry into Tax Crimes*, EUR. PARLIAMENT (Dec. 13, 2017), <http://www.europarl.europa.eu/news/en/press-room/20171207IPR89759/meps-back-sweeping-recommendations-of-special-inquiry-into-tax-crimes>. With respect to the work of the committee, see generally Amanda Athanasiou, *EU's Panama Papers Committee Seeks Input on Draft Report*, WORLDWIDE TAX DAILY, July 18, 2017 (describing the "year-long" investigation of the committee and its resulting draft report); Teri Sprackland, *Panama Papers Panel Concludes Contentious Interviews in Malta*, 85 TAX NOTES INT'L 790 (2017) (reporting on European Parliament Panama Papers panel's closed-door meeting in Malta); Teri Sprackland, *Panama Papers Panel Gets Limited Response From Member States*, 85 TAX NOTES INT'L 705 (2017) (describing the continuing efforts of the European Parliament's Committee of Inquiry into Money Laundering, Tax Avoidance and Tax Evasion to secure information from member states).

128. See Finley, *supra* note 121, at 111; Gibson, *supra* note 122.

129. Stephanie Soong Johnston, *Panama Commits to OECD Standard on Information Exchange*, 82 TAX NOTES INT'L 616, 616 (2016) [hereinafter Johnston, *OECD Standard*]; Stephanie Soong Johnston, *Panama Takes Another Step on Tax Transparency*, 83 TAX NOTES INT'L 278, 278 (2016).

transparency of its financial and legal system;¹³⁰ the commission issued its final report and recommendations in November 2016.¹³¹

Substantively, the Panama leak has also focused attention on the importance of transparency regarding beneficial ownership of offshore entities.¹³² Various countries have turned their attention to these issues, with some (such as Germany, the United Kingdom, Australia, New Zealand, and Ireland) announcing steps to register the beneficial ownership of offshore trusts and other entities.¹³³ Within the United States, the leak has drawn attention to Wyoming and Nevada, which do not require disclosure of a corporation's beneficial ownership and therefore raise questions about the United States's potential status as a tax haven.¹³⁴ The G-5 countries have agreed in the leak's wake to develop a global multilateral system for automatic exchange of beneficial ownership information. In 2016, the EC adopted a proposal for full public access to beneficial ownership registries for certain legal entities.¹³⁵ The EC announced proposals for and ultimately reached agreement on new transparency rules aimed at intermediaries (such as tax

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130. William Hoke, *Commission Tells Panama to Beef up Transparency Measures*, WORLDWIDE TAX DAILY, Nov. 28, 2016, 2016 WTD 228-5 (LEXIS).
 131. ALBERTO ALEMÁN ZUBIETA ET AL., COMM. OF INDEP. EXPERTS, FINAL REPORT (2016), <https://www.presidencia.gob.pa/tmp/file/1503/INDEPENDENT%20EXPERT%20COMMITTEE.pdf> [<https://perma.cc/LV2P-CQNV>].
 132. See J.P. Finet & William Hoke, *Obama Addresses Tax Avoidance by Targeting Shell Companies*, 151 TAX NOTES 834, 835 (2016); cf. Mark Fenwick & Erik P.M. Vermeulen, *Disclosure of Beneficial Ownership After the Panama Papers* (Lex Res. Topics in Corp. L. & Econ, Working Paper No. 2016-3, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2777152 [<https://perma.cc/UZ5G-KVKB>] (discussing disclosure of beneficial ownership after the Panama Papers).
 133. See William Hoke, *Government to Review Trust Disclosures*, 82 TAX NOTES INT'L 242 (2016); Stephanie Soong Johnston, *More Countries Commit to Public Beneficial Ownership Registries*, 82 TAX NOTES INT'L 649 (2016); Stephanie Soong Johnston, *South Africa Commits to Public Beneficial Ownership Registry*, 82 TAX NOTES INT'L 653 (2016); Alexander Lewis, *Independent Inquiry Urges Foreign Trust Disclosure Rules Update*, 83 TAX NOTES INT'L 34 (2016); Alexander Lewis, *U.K. Setting up Panama Papers Task Force*, 82 TAX NOTES INT'L 249 (2016); Teri Sprackland, *German Transparency Registry Proposal Derided as 'Joke'*, 82 TAX NOTES INT'L 154 (2016).
 134. Amy Hamilton, *Panama Papers Include Nevada and Wyoming Among Tax Havens*, 82 TAX NOTES INT'L 114, 114–15 (2016); see also Jonathan Curry & Kat Lucero, *Wyden Asks Nevada, Wyoming to Turn Over Shell Company Info*, 151 TAX NOTES 836 (2016) (describing the efforts of U.S. Senate Finance Committee ranking minority member Senator Wyden to secure information from the secretaries of state of Nevada and Wyoming regarding businesses with links to the Panama law firm Mossack Fonseca & Co.).
 135. Stephanie Soong Johnston, *Netherlands to Propose Public Beneficial Ownership Registry in Autumn*, 87 TAX NOTES INT'L 214, 214–15 (2017); Alexander Lewis, *EU Adopts Public Registries of Beneficial Ownership Information*, 83 TAX NOTES INT'L 100, 100 (2016).

advisors, accountants, and lawyers) that require them to report potentially aggressive tax planning schemes they design and promote.¹³⁶ The EC identified “recent media leaks such as the Panama Papers” as drivers behind these suggested reforms.

7. The Bahamas Leak

In September 2016, several months after the Panama Papers leak, *Süddeutsche Zeitung* received a cache of 1.3 million files from the Bahamas corporate registry and shared it with the ICIJ.¹³⁷ *Süddeutsche Zeitung*, the ICIJ, and other news organizations then published the details on the ICIJ website, thereby making publicly available a database of offshore companies.¹³⁸ The database included the names of directors and owners of more than 175,000 companies, trusts, and foundations that were registered in the Bahamas between 1990 and early 2016.¹³⁹ Like the British Havens leaks, the Bahamas leak contained information about the activities of politicians and other elites.

The ICIJ combined the Bahamas data with data from the Panama Papers and BVI leaks to create “one of the largest public databases of offshore entities in history.”¹⁴⁰ While not all the entities in the Bahamas database are involved in illegal conduct, the ICIJ and other news sources appear to view their mission as the elimination of offshore financial and corporate secrecy regardless of actual wrongdoing.¹⁴¹

136. Dean, *supra* note 108, at 2–3 (internal quotations omitted); *Corporate Tax Avoidance: Agreement Reached on Tax Intermediaries*, EUR. COUNCIL, COUNCIL OF THE EUR. UNION (Mar. 13, 2018, 12:00 PM), <http://www.consilium.europa.eu/en/press/press-releases/2018/03/13/corporate-tax-avoidance-agreement-reached-on-tax-intermediaries/>.

137. *Bahamas Files: New Leak Exposes Offshore ‘Tax Haven’ Dealings of Politicians, Companies*, RT NEWS (Sept. 23, 2016, 1:49 PM), <https://www.rt.com/news/360217-bahamas-files-offshore-leak> [<https://perma.cc/ZPY7-WYY5>]; Juliette Garside, *Bahamas Files Leaks Expose Politicians’ Offshore Links*, GUARDIAN (Sept. 21, 2016, 2:00 PM), <https://www.theguardian.com/business/2016/sep/21/leaked-bahamas-files-expose-politicians-offshore-links> [<https://perma.cc/58JB-PBGP>].

138. Will Fitzgibbon, *ICIJ Publishes Leaked Bahamas Info to Offshore Database*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS (Sept. 21, 2016, 2:00 PM), <https://www.icij.org/blog/2016/09/icij-publishes-leaked-bahamas-info-offshore-database> [<https://perma.cc/673P-GTJH>].

139. *Id.*

140. *Id.*

141. *Id.* (“There is much evidence to suggest that where you have secrecy in the offshore world you have the potential for wrong doing. So let’s eliminate the secrecy.”); *Offshore Leaks Database—About*, INT’L CONSORTIUM INVESTIGATIVE JOURNALISTS, <https://offshoreleaks.icij.org/pages/about> [<https://perma.cc/MH8B-7NN4>] (presenting

The Bahamas leak has triggered strong reactions. The European Parliament has advocated sanctions against the Bahamas along with close examination of tax havens and those who use them.¹⁴² In particular, the EC and members of the European Parliament have called for scrutiny and sanctions of politicians linked to offshore havens, such as Neelie Kroes, a former Dutch minister and Europe's former commissioner for competition.¹⁴³ Some members of the European Parliament have urged authorities to act more forcefully to end offshore corporate secrecy.¹⁴⁴ The OECD has expressed concern that the Bahamas would not be able to meet its commitments to information exchange under the common reporting standard.¹⁴⁵ Meanwhile, Bahamian officials have defended their country and denounced the leaks, while also launching a review of Bahamas's tax policies and data security.¹⁴⁶ Other countries, including Mexico, have expressed an intention to investigate taxpayers linked to Bahamian entities.¹⁴⁷

8. The Paradise Papers

The most recent release of leaked data occurred in November 2017. This "Paradise Papers" leak comprised 13.4 million documents covering the years

a disclaimer noting that there are legal uses for offshore entities and that inclusion of individuals or entities in the ICIJ database is not a suggestion of wrongdoing); *see also infra* Subpart III.A (discussing some of the agendas and priorities embraced by these press actors).

142. Will Fitzgibbon & Emilia Díaz-Struck, *Bahamas Leaks Prompts Swift Reaction, Outrage in Europe*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Sept. 22, 2016, 1:00 PM), <https://www.icij.org/blog/2016/09/bahamas-leaks-prompts-swift-reaction-outrage-europe> [<https://perma.cc/N3HW-859E>]; Will Fitzgibbon & Cecile S. Gallego, *There Is a Need for Action: Europe Debates Bahamas Leaks*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Oct. 7, 2016, 1:00 PM), <https://www.icij.org/blog/2016/10/there-need-action-europe-debates-bahamas-leaks> [<https://perma.cc/V6KP-XUJJ>].

143. Fitzgibbon & Díaz-Struck, *supra* note 142. Kroes was discovered to have been listed as a director of Mint Holdings, a Bahamas registered entity from 2000 to 2009. Kroes claimed that she failed to declare her directorship because the company was never operational. Juliette Garside, *Ex-EU Commissioner Neelie Kroes Failed to Declare Directorship of Offshore Firm*, GUARDIAN (Sept. 21, 2016, 2:00 PM), <https://www.theguardian.com/business/2016/sep/21/ex-eu-commissioner-neelie-kroes-failed-to-declare-directorship-of-offshore-firm> [<https://perma.cc/SHD4-QA3B>].

144. *See* Fitzgibbon & Gallego, *supra* note 142.

145. Stephanie Soong Johnston, *OECD Concerned About the Bahamas on Information Exchange*, 83 TAX NOTES INT'L 1127, 1127 (2016).

146. Fitzgibbon & Gallego, *supra* note 142.

147. Fitzgibbon & Díaz-Struck, *supra* note 142; William Hoke, *Mexico to Investigate Taxpayers Included in Bahamas Leaks*, 83 TAX NOTES INT'L 1118, 1118 (2016).

1950–2016.¹⁴⁸ The bulk of the documents (approximately 6.8 million) came from Appleby, an offshore law firm founded in Bermuda.¹⁴⁹ An additional 6 million documents were from corporate registries in about 19 jurisdictions, mostly in the Caribbean.¹⁵⁰ The remaining documents came from Asiaciti Trust, a Singapore-based trust and corporate service provider. The documents were received by German newspaper *Süddeutsche Zeitung* from an unknown source, and Appleby has suggested that the data was obtained through a hack.¹⁵¹

As with the earlier Panama Papers leak, *Süddeutsche Zeitung* sought the assistance of the ICIJ in reviewing, organizing and ultimately publishing a portion of the data.¹⁵² The leak was first announced on November 5, 2017 by the ICIJ¹⁵³ and was disseminated through a series of news articles prepared by ICIJ and its media partners highlighting specific stories drawn from the data.¹⁵⁴ Approximately two weeks later, on November 17, 2017, the ICIJ issued the first public release of the Paradise Papers data.¹⁵⁵

The Paradise Papers data has revealed information about both individual holdings in offshore entities as well as tax, investment, and business planning strategies pursued by multinational entities. For example, the offshore holdings of political figures identified in the leak include those of

148. Emelia Díaz-Struck, *ICIJ Releases Paradise Papers Data From Appleby*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Nov. 17, 2017), <https://www.icij.org/investigations/paradise-papers/icij-releases-paradise-papers-data-appleby> [https://perma.cc/7JCF-W5WN].

149. *Id.*; *Paradise Papers: Everything You Need to Know About the Leak*, BBC NEWS (Nov 10, 2017), <http://www.bbc.com/news/world-41880153> [https://perma.cc/7DB4-WWT5].

150. See sources cited *supra* note 149.

151. Appleby reported in October 2017 that it had been the victim of a hack and that its client information was now held by the ICIJ. See Jake Bernstein, Opinion, *The Paradise Papers Hacking and the Consequences of Privacy*, N.Y. TIMES (Nov. 7, 2017), <https://www.nytimes.com/2017/11/07/opinion/paradise-papers-hacking-privacy.html>. The hack apparently occurred in 2016. See, e.g., Camilla Hodgson, *Panama Papers 2? The Financial Secrets of the Super-Rich May Be About to Be Leaked After an Offshore Law Firm Was Hacked*, BUS. INSIDER (Oct. 25, 2017, 5:53 AM), <http://www.businessinsider.com/financial-secrets-of-super-rich-stolen-offshore-appleby-2017-10>.

152. Apparently, by late February 2017, the ICIJ and its connected team of journalists worldwide had begun reviewing the leaked materials. Michael Forsythe, *Scouring the Paradise Papers, With the Help of Almost 400 New Friends*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/insider/paradise-papers-appleby-leak-icij.html>.

153. *About the Paradise Papers Investigation*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Nov. 5, 2017), <https://www.icij.org/investigations/paradise-papers/about> [https://perma.cc/PQ3H-UF9].

154. See, e.g., Forsythe, *supra* note 152; Mike McIntire et al., *Commerce Secretary's Offshore Ties to Putin 'Cronies'*, N.Y. TIMES (Nov. 5, 2017), <https://www.nytimes.com/2017/11/05/world/wilbur-ross-russia.html>.

155. Díaz-Struck, *supra* note 148.

Jean-Claude Bastos¹⁵⁶ (asset manager for Angola's sovereign wealth fund), Stephen Bronfman (close advisor to Canadian Prime Minister Justin Trudeau),¹⁵⁷ and U.S. Commerce Secretary Wilbur Ross.¹⁵⁸ The data revealed that Ross had connections to a shipping company with links to Russian President Vladimir Putin's son-in-law.¹⁵⁹ The Paradise Papers materials, which include emails, board minutes, tax-restructuring plans, and contracts, have also drawn attention to a variety of multinationals including global mining firm Glencore PLC,¹⁶⁰ Apple, Inc.,¹⁶¹ and Nike.¹⁶² The underlying conduct identified in the materials ranges from potential tax avoidance to possible corruption.¹⁶³ In the aftermath of the leak, some commenters have raised questions about whether much of the conduct highlighted in this leak is best understood as tax planning that is legal.¹⁶⁴ If so, then the questions raised by this leak may be ones of tax system design and

156. See, e.g., Anna Meisel & David Grossman, *Paradise Papers: Tycoon Made \$41m From 'People's Fund'*, BBC NEWS (Nov. 7, 2017), <http://www.bbc.com/news/world-africa-41906123> [<https://perma.cc/344J-BHJ3>].

157. See, e.g., Ed Pilkington, *Revealed: Justin Trudeau's Close Advisor Helped Move Huge Sums Offshore*, GUARDIAN (Nov. 5, 2017, 1:00 PM), <https://www.theguardian.com/news/2017/nov/05/justin-trudeau-adviser-stephen-bronfman-offshore-paradise-papers> [<https://perma.cc/7GHQ-URT7>].

158. Mike McIntire et al., *supra* note 154.

159. *Id.*

160. See, e.g., William Fitzgibbon et al., *Room of Secrets Reveals Glencore's Mysteries*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Nov. 5, 2017), <https://www.icij.org/investigations/paradise-papers/room-of-secrets-reveals-mysteries-of-glencore> [<https://perma.cc/85BG-ATAJ>].

161. See, e.g., Jesse 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?action=click&contentCollection=World&module=Trending&version=Full®ion=Marginalia&pgtype=article>.

162. See, e.g., *The Paradise Papers Shed New Light on Offshore Finance*, ECONOMIST (Nov. 9, 2017), <https://www.economist.com/news/finance-and-economics/21731165-data-leak-will-increase-pressure-clamp-down-tax-avoidance-paradise>.

163. See, e.g., Sasha Chavkin, *Arrest Warrants, Investigations, and More as World Responds to Paradise Papers*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Nov. 9, 2017), <https://www.icij.org/blog/2017/888/paradise-papers-response-arrest-investigation-audit> [<https://perma.cc/Y8DY-UU97>].

164. See, e.g., Trevor Johnson, *Fake News in Paradise*, 88 TAX NOTES INT'L 795, 798 (2017); Jeremy Cape, *The Paradise Papers Aren't the Smoking Gun for Offshore Reform*, LAWYER (Nov. 8, 2017), <https://www.thelawyer.com/paradise-papers-arent-smoking-gun-offshore-reform>; Rasmus Corlin Christensen, *Law and Morality in the Paradise Papers*, POL. ECON. INT'L TAX'N (Nov. 14, 2017), <https://phdskat.org/2017/11/14/law-and-morality-in-the-paradise-papers/> [<https://perma.cc/59PG-5UFQ>]; Maya Forstater, *Making Sense of the Paradise Papers*, HIYA MAYA (Nov. 15, 2017), <https://hiyamaya.wordpress.com/> [<https://perma.cc/4S2X-NHYW>].

strategic tax planning, rather than evasion or illegality, and it would be important to distinguish among the different types of conduct.

Various responses to the leak have emerged across the globe. Some countries have announced plans to investigate potential tax avoidance or other improprieties suggested by the released data. These include Jersey,¹⁶⁵ Canada,¹⁶⁶ Indonesia,¹⁶⁷ India,¹⁶⁸ and Singapore.¹⁶⁹ The Netherlands will reexamine 4000 advance tax rulings it had previously provided to foreign companies following the revelation of a Proctor & Gamble tax ruling that did not follow regulations.¹⁷⁰ The United Kingdom, in anticipation of investigations, has asked the ICIJ for the Paradise Papers data.¹⁷¹ Beyond the national level, members of the European Parliament condemned the EU Council and finance ministers for failure to pursue tax reform and argued for a new committee to examine the Paradise Papers.¹⁷² Additionally, African Finance Ministers relaunched their support for increased tax transparency and for their work with the Global Forum on Transparency and Exchange of Information for Tax Purposes.¹⁷³

Reaching beyond income taxation, the EC released new rules designed to curtail large-scale VAT fraud. As Commissioner for Economic and

165. *Jersey Announces Plans to Investigate Paradise Papers*, WORLDWIDE TAX DAILY, Nov. 7, 2017, 2017 WTD 215-13 (LEXIS).

166. See, e.g., David Pegg, 'Corruption Hardwired Into Our Financial System': Reactions to Paradise Papers, GUARDIAN (Nov. 6, 2017, 3:17 PM), <https://www.theguardian.com/news/2017/nov/06/corruption-hardwired-into-our-financial-system-reactions-to-paradise-papers> [<https://perma.cc/FH7P-RDTK>].

167. *Id.*

168. *Id.*

169. *MAS Reviewing Paradise Papers; Will Take Action If Breaches Found*, CHANNEL NEWS ASIA (Nov. 7, 2017, 8:00 PM), <http://www.channelnewsasia.com/news/business/mas-reviewing-paradise-papers-offshore-breaches-asiaciti-icij-9384038> [<https://perma.cc/VJ6C-CCTM>].

170. See, e.g., Mehreen Kahan, *Netherlands to Investigate 4,000 Corporate Tax Deals*, FIN. TIMES (Nov. 8, 2017), <https://www.ft.com/content/df1156dc-c497-11e7-a1d2-6786f39ef675>; see also, e.g., William Hoke, *Dutch Tax Agency Breaks Own Rules With Tax Ruling*, WORLDWIDE TAX DAILY, Nov. 8, 2017, 2017 WTD 215-7 (LEXIS); Janene Pieters, *Paradise Papers: Dutch Tax Inspector Allows U.S. Multinational to Evade \$169 Mil. in Taxes*, NL TIMES (Nov. 7, 2017), <https://nltimes.nl/2017/11/07/paradise-papers-dutch-tax-inspector-allows-us-multinational-evade-169-mil-taxes> [<https://perma.cc/FN6M-DRYT>].

171. See, e.g., Stephanie Soong Johnston, *Paradise Papers Leaks Prompt Action From Tax Authorities*, 88 TAX NOTES INT'L 625 (2017) (noting HM Revenue & Custom's "urgent[]" request to ICIJ for the Paradise Papers).

172. See, e.g., Teri Sprackland, *EU Parliament Members Condemn Council's Inaction on Tax Reforms*, WORLDWIDE TAX DAILY, Nov. 15, 2017, 2017 WTD 220-8 (LEXIS).

173. *African Ministers Discuss Tax Evasion at OECD Global Forum Meeting*, WORLDWIDE TAX DAILY, Nov. 15, 2017, 2017 WTD 221-16 (LEXIS).

Financial Affairs, Taxation and Customs Pierre Moscovici noted, “The Paradise Papers have again shown how some are taking advantage of lax application of EU VAT rules to get away with paying less VAT than others.”¹⁷⁴ Moscovici also urged the EU to act quickly on proposed rules requiring tax advisers to disclose certain tax-planning activities developed for clients, citing the Paradise Papers as evidence of the need for such legislation.¹⁷⁵ Given the scope and range of actors and data revealed in the Paradise Papers leak, the repercussions are likely to continue to develop.

C. Some Initial Observations

Drawing upon the discussion in Subpart I.B, it is possible to identify some notable characteristics of tax leaks. Our goal here is not to build a watertight typology but simply to identify some key descriptive parameters of these leaks, in order to appreciate their value and limitations.¹⁷⁶

1. Types of Information Leaked

First, leaks can reveal several different types of important information.

Information about specific taxpayers. Some leaks provide information about the identities of specific taxpayers and their offshore holdings. This provides tax authorities with easy enforcement targets. For example, the UBS and LGT leaks identified specific Americans with offshore accounts and enabled the United States to target those taxpayers for prosecution. The same was true with respect to the HSBC leak and French prosecutors.

174. *EU Commission Proposes New Measures to Combat VAT Fraud*, WORLDWIDE TAX DAILY, Nov. 30, 2017, 2017 WTD 230-18 (LEXIS).

175. See, e.g., Francesco Guarascio, *EU’s Moscovici Urges Fast Action Against Tax “Vampires” After Paradise Papers*, REUTERS (Nov. 14, 2017), <https://www.reuters.com/article/us-eu-tax-paradisepapers/eus-moscovici-urges-fast-action-against-tax-vampires-after-paradise-papers-idUSKBN1DE0UN> [<https://perma.cc/T7YY-XXSJ>]. The EC reached agreement on these rules in March 2018. See *supra* note 136 and accompanying text.

176. In the non-tax literature on government data leaks, others have tried to build leak typologies. For example, that literature has identified the seniority of the leaker within the government as a key factor in categorizing leaks. See, e.g., Kwoka, *supra* note 11, at 1394–1402; Pozen, *supra* note 11, at 521–44. That analysis informs our study of tax leaks only on the margin, because tax leaks are usually leaks of private information by private actors, rather than leaks by governments of government data. See also *supra* note 19. Cf. Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data Breach Harms*, 96 TEX. L. REV. (forthcoming 2018) (discussing how courts should take risk and anxiety into consideration in recognizing harms caused by certain data breaches by companies).

Information about facilitators and practices. Leaks may also identify key facilitators of suspect transactions or practices and may reveal information about their strategies and activities. For example, banks such as UBS, HSBC, and Credit Suisse, and law firms such as Mossack Fonseca and Appleby, have been identified as facilitators of offshore avoidance.

Information about governments. Leaks can also provide information about the policies, priorities, and practices of governments and their positions on tax minimization or evasion. For example, LuxLeaks highlighted the rulings practices of Luxembourg in facilitating MNE tax planning. The Bahamas and Panama leaks revealed these jurisdictions to be enablers of offshore secrecy.¹⁷⁷

The way a jurisdiction responds to a leak also provides information about the tax culture and economic priorities in that jurisdiction. For example, after the HSBC leak, the whistleblower Hervé Falciani faced criminal charges and extradition in Switzerland, despite being hailed as a hero elsewhere.¹⁷⁸ This highlights the differences between Switzerland and other countries in their respective approaches towards tax compliance and bank secrecy.

2. Imperfections in the Leaked Information

Incompleteness. Leaked information is usually incomplete.¹⁷⁹ Leaked data does not identify every single taxpayer who is evading taxes using offshore structures. Subsequent information derived from banks or other

177. See generally 'Bahamas Leaks' Puts Spotlight on UBS and Credit Suisse, SWI (Sept. 22, 2016, 8:54 AM), http://www.swissinfo.ch/eng/offshore-files_-bahamas-leaks—puts-spotlight-on-ubs-and-credit-suisse/42465208 [https://perma.cc/9M84-FHHW]; T.E., *Credit Suisse: The Limits of Guilt*, ECONOMIST: SCHUMPETER (May 20, 2014), <http://www.economist.com/blogs/schumpeter/2014/05/credit-suisse> [https://perma.cc/Q262-TZZ8].

178. See *supra* notes 55–56 and accompanying text.

179. It is also possible that leaked data may turn out to be false. Potential falsity of leaked tax data was an issue in the recent French presidential election. See Lauren Carroll, *Are the Clinton WikiLeaks Emails Doctored, or Are They Authentic?*, POLITIFACT (Oct. 23, 2016, 7:14 PM), <http://www.politifact.com/truth-o-meter/article/2016/oct/23/are-clinton-wikileaks-emails-doctored-or-are-they-> [https://perma.cc/ZJ7Y-6MQJ]; Alex Gibney, *Can We Trust Julian Assange and WikiLeaks?*, N.Y. TIMES (Aug. 8, 2016), <https://www.nytimes.com/2016/08/08/opinion/can-we-trust-julian-assange-and-wikileaks.html>. The falsity issue has also been raised with respect to non-tax data caches. See, e.g., Callum Borchers, *Rachel Maddow's Urgent Warning to the Rest of the Media*, WASH. POST: THE FIX (July 7, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/07/07/rachel-maddows-urgent-warning-to-the-rest-of-the-media/?utm_term=.07b6b62476c5 [https://perma.cc/B9UT-VM3K].

facilitators implicated in a leak will also not ensnare every single tax wrongdoer. Therefore, leaks may lead to consequences for some facilitators, jurisdictions, and taxpayers but not others. The incompleteness of leaked data may depend on what data the leaker is able and willing to take and leak, but it may also depend on what information the press or other information intermediaries are willing to share or publish.

Level of Specificity. Leaked data may not directly pinpoint the precise tax evasion or structuring activity in question. In some cases, such as the Panama Papers, Paradise Papers, and British Havens leaks, the information leaked was fairly broad and needed to be investigated in order to specifically identify the evasive activity that may have taken place. As Subpart III.A further describes, lack of specificity in leaked data may be exacerbated by the publication choices of media organizations and other information consumers.¹⁸⁰

False Positives and Different Levels of Wrongdoing. Leaked data may also contain false positives, that is, names of taxpayers who may not have been actually engaged in wrongdoing.¹⁸¹ False positives may include taxpayers with legitimate non-tax reasons for having offshore holdings,¹⁸² as well as taxpayers who engaged in legal tax planning via offshore structuring.¹⁸³ With respect to the Panama Papers and Bahamas leaks, the ICIJ has clarified that not all of the conduct and structures identified are illegal, even though they might be perceived to be unfair.¹⁸⁴ False positives are likely to be a problem both in the initial leak and with respect to subsequent initiatives to obtain information in light of the initial leak.¹⁸⁵

180. See *infra* Subpart III.A.

181. False positives are to be distinguished from falsity, in the sense of outright data falsification, which is also a possibility. See, e.g., *infra* notes 307, 331.

182. See Marina Walker Guevara, *Offshore Leaks Database FAQs*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (June 14, 2013) <https://www.icij.org/blog/2013/06/offshore-leaks-database-faqs> [<https://perma.cc/8K4V-E732>] (“There are legitimate reasons to use offshore companies and trusts. ICIJ does not intend to suggest or imply that the people and companies included in the database have broken the law or otherwise acted improperly.”).

183. Cf. *New Bank Leak Shows How Rich Exploit Tax Haven Loopholes*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (July 8, 2014, 3:45 PM), <https://www.icij.org/offshore/new-bank-leak-shows-how-rich-exploit-tax-haven-loopholes> [<https://perma.cc/DM2D-GT7T>] (“We make this information available not because what we found is illegal but because we think most people would think it unfair. Tax havens allow some people to play by different rules.”).

184. See *supra* notes 182–183; see also *Giant Leak*, *supra* note 111 (“As with many of Mossack Fonseca’s clients, there is no evidence that [Jackie] Chan used his companies for improper purposes. Having an offshore company isn’t illegal. For some international business transactions, it’s a logical choice.”).

185. See generally Luca Gattoni-Celli, ‘False Positives’ in *FATCA Data May Hamper Enforcement*, 153 TAX NOTES 514 (2016) (noting how false positives could limit FATCA

Imperfections in leaked data may present particular challenges where strong public sentiments have developed in response to high-impact leaks.¹⁸⁶ For example, it is possible that an irate public might not appropriately distinguish between illegal tax evasion and legal tax planning, or between wrongdoers and innocent persons.

3. Different Transmission Pathways

Finally, leaks have different transmission pathways.

Different points of origin. Some leaks, such as the UBS, LGT, and Luxembourg leaks, were initiated by employees of banks and accounting firms who were acting as whistleblowers. Others, such as the Panama Papers, Paradise Papers, British Havens, and Bahamas leaks are a result of data obtained from unknown sources (for example, a source that mails a hard drive to a newspaper) or an anonymous one (where a media organization may know the identity of the source but withholds it).¹⁸⁷ We do not know for sure why certain leakers choose to stay anonymous, but we can infer that there may be heterogeneous motivations among those who choose to leak.

Some of these leakers may have had access to the data but others may have hacked it. The Panama Papers episode was widely believed to have originated from a hack, but many of the other leaks described above were due to employee whistleblowers.¹⁸⁸

Different Disseminators. In some cases, the data was obtained by tax authorities and other government agencies. For example, in the case of the UBS and HSBC leaks, the data was obtained by the United States and France respectively.¹⁸⁹ In other cases, the data was given to newspapers or media organizations that then sorted the data and ultimately disseminated it. This was the case with respect to the Panama Papers, Paradise Papers, British Havens,

data's value to the IRS because FATCA's structure encourages foreign financial institutions to err on the side of overreporting).

186. See *infra* Subpart II.C.2.

187. The British Havens data was mailed by an unknown source. It is possible that reporting media organizations may know the identity of the Panama Papers leaker but have kept it confidential. Caroline Mortimer, *Panama Papers: Whistleblower Breaks Silence to Explain Why They Leaked the 11.5m Files*, INDEPENDENT (May 6, 2016, 6:56 PM), <http://www.independent.co.uk/news/world/politics/panama-papers-whistleblower-breaks-silence-to-explain-why-he-leaked-the-115m-files-a7017691.html> [<https://perma.cc/8ZLW-T9WD>].

188. See *supra* notes 17, 187 and accompanying text.

189. See *supra* Subparts I.B.1, I.B.2. As discussed, however, the HSBC data was subsequently published by the ICIJ. See *infra* Subpart III.B.4.

and Bahamas leaks. These different modes of transmission may lead to different degrees of access and availability, and possibly different impacts.¹⁹⁰

Time Lags in Dissemination. There is sometimes a significant time lag between when leaked data is obtained by the leaker and when it becomes available to governments or the public. The process of using the data and taking action against the persons or behavior revealed by the data also takes time. The HSBC and Julius Baer leaks, for example, featured long delays between the data theft and its transmission and subsequent impacts. As further discussed in Subpart III.B, these time lags raise questions about how the process of information transmission may influence the ultimate impacts of a leak and how these impacts are perceived.¹⁹¹

These initial observations provide a starting point for thinking about the dynamics that underlie the content and occurrence of leaks and their transmission and reception by tax authorities and the public.

II. THE BENEFITS AND RISKS OF TAX LEAKS

Tax commentators and policymakers have tended to assume that leaks of tax data are socially and economically beneficial for tax enforcement and administration, because they provide governments with a “free audit”¹⁹² of taxpayers, provide information not previously available, deter offshore tax evasion, and create impetus for governments to investigate tax misdeeds and enact new laws. We argue, however, that while leaks can certainly generate beneficial outcomes in some circumstances, there are also underappreciated risks inherent in relying on leaked data to make enforcement and policy decisions.

We first map the landscape in which cross-border tax enforcement and administration and taxpayer decisions about tax evasion and compliance take

190. See *infra* Subpart III.B.

191. See *infra* Subpart III.B.

192. This feature provided the impetus for the new Country-by-Country reporting requirements endorsed by the OECD. OECD, TRANSFER PRICING DOCUMENTATION AND COUNTRY-BY-COUNTRY REPORTING, ACTION 13–2015 FINAL REPORT (2015), <http://www.oecd-ilibrary.org/docserver/download/2315381e.pdf?expires=1484507215&id=id&accname=guest&checksum=AC38C62B897E23CF374ED32310482BB2> [https://perma.cc/3G2C-P6WM]. The provision of such data to tax authorities is expected to help them better allocate audit resources by identifying transactions and taxpayers that warrant further scrutiny. Diane Ring, *Transparency and Disclosure*, in UNITED NATIONS HANDBOOK ON SELECTED ISSUES IN PROTECTING THE TAX BASE OF DEVELOPING COUNTRIES 497, 511–12 (Alexander Trepelkov, Harry Tonino & Dominika Halka eds., 2015). See generally Lederman, *supra* note 14 (characterizing third-party reporting as an invisible audit).

place. We explore how the occurrence of a tax leak may yield benefits for tax compliance and enforcement by increasing tax authorities' access to information, lowering their enforcement costs, deterring noncompliance, and providing the impetus for tax reform. We then explore the distinctive risks that may be raised by reliance on leaked tax data to make legal policy and enforcement decisions.

A. Cross-Border Tax Administration and Enforcement

Broadly speaking, the cross-border tax enforcement and evasion game takes place in an environment of high-tax countries attempting to tax their taxpayers,¹⁹³ low- or no-tax haven countries enabling foreign taxpayers to hide assets or structure transactions in a manner that reduces or eliminates tax, and taxpayers deciding whether and how much to comply or evade. Taxpayers have traditionally been able to evade taxes by stashing assets offshore because the information available to the tax authorities of their home countries is imperfect: Tax authorities do not know about all offshore activities of taxpayers. On the other hand, taxpayer knowledge is also imperfect: In deciding whether to evade or comply, taxpayers have some, but not complete, knowledge about what tax authorities know.

Given the world as described, we might expect taxpayers to weigh the probability of detection and the size of the penalty in determining the expected cost or benefit of evasion.¹⁹⁴ If the net benefits from tax evasion (after accounting for structuring and planning costs) exceed the costs (i.e., the tax plus interest plus penalty), then the standard model predicts that the taxpayer will evade.¹⁹⁵

193. By "taxpayers," we generally mean taxpayers over whom countries impose "residence-based" tax jurisdiction. For example, the United States imposes residence-based tax jurisdiction over U.S. citizens, permanent residents, and certain long-term U.S. residents who meet the so-called "substantial presence" test. 26 U.S.C. § 7701(b) (2012). Countries may also impose source-based taxation on income from sources within that country. *Id.* §§ 871, 881, 882. For simplicity, we leave aside the question of source-based tax jurisdiction.

194. Michael G. Allingham & Agnar Sandmo, *Income Tax Evasion: A Theoretical Analysis*, 1 J. PUB. ECON. 323, 324 (1972); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176 (1968).

195. See sources cited *supra* note 194; see also Kyle D. Logue, *Optimal Tax Compliance and Penalties When the Law Is Uncertain*, 27 VA. TAX REV. 241, 262 (2007) ("[E]ven if the probability of success on the merits for a given tax position is extremely low, it can be socially optimal for [a] taxpayer to engage in [a] transaction [if] expected pre-tax profit from the transaction exceeds the expected tax liability.").

Correspondingly, we might expect a country's tax authority to maximize social welfare¹⁹⁶ (presumably defined to include the welfare of everyone in that country) in administering and enforcing cross-border tax compliance, given budget constraints.¹⁹⁷ This means tax authorities will strive to set enforcement parameters such that the marginal cost per dollar raised equals the marginal social benefit of the tax collected.¹⁹⁸ Assuming tax rates are fixed, tax authorities will face a choice between changing the detection rate (for example, by increasing audits or by broadening information reporting or exchange)¹⁹⁹ or changing the penalty for tax evasion.²⁰⁰ The welfare-maximizing tax authority will generally choose to set these enforcement parameters (i.e., audit rates and penalty levels) such that the marginal cost of each is the same, and so that overall, the marginal cost of enforcement equals the marginal social benefit.²⁰¹

In short, the cross-border tax enforcement and evasion landscape is one in which countries (both those attempting to tax and the tax havens) make decisions about how to enforce and taxpayers make decisions about whether

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196. Joel Slemrod & Shlomo Yitzhaki, *Tax Avoidance, Evasion, and Administration*, in 3 HANDBOOK OF PUBLIC ECONOMICS 1423, 1447 (Alan J. Auerbach & Martin Feldstein eds., 2002) ("In models with heterogeneous citizens, the standard objective function is a social welfare function which has as arguments the utility level of each citizen . . . where the shape of the social welfare function implicitly determines the social value placed on the distribution of utilities as opposed to the sum of utilities.").
 197. Janet G. McCubbin, *Optimal Tax Enforcement: A Review of the Literature and Practical Implications*, 96 PROC. ANN. CONF. ON TAX'N & MINUTES ANN. MEETING NAT'L TAX ASS'N 16 (2003). Social welfare, in our Article, is assessed on an individual country basis.
 198. Marginal benefit should be measured in terms of the public goods expenditures. *See id.* at 16–17; *see also* Joel Slemrod & Shlomo Yitzhaki, *The Optimal Size of a Tax Collection Agency*, 89 SCANDINAVIAN J. ECON. 183, 184 (1987) ("The tax collection agency . . . uses real resources to operate, and its size should be expanded to the point where its marginal costs equals its properly defined marginal social benefit . . ."). The components of marginal costs should be defined broadly. *See, e.g.,* Slemrod & Yitzhaki, *supra* note 196, at 1447 ("In the presence of avoidance and evasion, a broader concept of efficiency cost is needed.").
 199. *See supra* notes 194–195; *see also* Leandra Lederman, *Does Enforcement Crowd Out Voluntary Tax Compliance?* (2017) (unpublished manuscript), <https://spea.indiana.edu/doc/research/finance-conference/2017-papers/lederman.pdf> [<https://perma.cc/6D7T-S963>] (characterizing information reporting as a kind of audit).
 200. More granularly, the tax authority will want to set parameters so that the marginal cost of increasing each enforcement parameter (i.e., detection rate or penalty amount) is the same, and the overall marginal cost equals the marginal social benefit. *See* McCubbin, *supra* note 197; *see also* James Alm, Betty R. Jackson & Michael McKee, *Estimating the Determinants of Taxpayer Compliance With Experimental Data*, 45 NAT'L TAX J. 107, 108–10 (1992) (identifying other determinants of tax compliance, such as income level and level of government expenditure).
 201. Many optimal enforcement models suggest high tax and penalty rates and low audits, because audits are costly. *But see* Louis Kaplow, *Optimal Taxation With Costly Enforcement and Evasion* (Nat'l Bureau of Econ. Research, Working Paper No. 2996, 1989), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=463448 [<https://perma.cc/EW63-GJCS>].

to evade or comply given imperfect information, constrained resources, and their respective goals. The question, then, is whether a leak of tax information is beneficial to tax authorities in light of this backdrop.

B. The Benefits of Leaked Information

In an information-imperfect world in which havens exist, resource-constrained countries are trying to enforce, and taxpayers are trying to decide whether and how much to evade, it is easy to assume that a leak of tax information will always be beneficial. Leaked data can yield a host of benefits for enforcement-minded tax authorities.

1. Leaks as Free Information

Leaked data may lower a tax authority's marginal cost of raising revenue by gifting a "free audit" of certain taxpayers to the tax authority or, more broadly, free information regarding where to allocate enforcement resources. Free information effectively lowers the cost of enforcement, allowing the tax authority to pursue enforcement against the marginal evader, who was previously too costly (or impossible) to investigate.

Beyond its benefits for enforcement against specific taxpayers, leaked data can also provide a clearer picture of levels of cross-border compliance and evasion and can illuminate previously unnoticed phenomena. In this way, leaked information can facilitate improvements in international enforcement practices more broadly.²⁰² Thus, the informational benefits of a leak may extend beyond just the taxpayers or practices about which information is leaked.

A leak may also change the evasion calculus of taxpayers. A leak of a specific taxpayer's information effectively yields a probability of detection of 100 percent with respect to that taxpayer. Even a threatened leak raises the perceived probability of detection. Furthermore, a single leak may

202. At a more nuanced level, to the extent data leaks can illuminate the tax planning behavior of a society's elite, they can provide an important counterweight to the agendas advanced by established interest groups and lobbying factions and could benefit civil society and enhance democratic legitimacy. See generally ANTHONY J. NOWNES, *INTEREST GROUPS IN AMERICAN POLITICS: PRESSURE AND POWER* (2d ed. 2013) (discussing involvement of interest groups in the political system and the potential dangers of such interest group activity); CEES PETERS, ON THE LEGITIMACY OF INTERNATIONAL TAX LAW (2014); Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411 (2005) (exploring impact of interest groups on regulatory democracy).

iteratively raise the probability of detection for actors whose information has not been leaked. This may occur, for example, if taxpayers who have been caught in a leak provide information to tax authorities and such information implicates other taxpayers or intermediaries not yet named in the leak. An increased probability of detection raises taxpayers' expected cost of evasion, which should lead to a decline in the evasive behavior.

2. Highly Salient Leaks as an Impetus for Reform

Another important feature of leaked information is that it tends to be highly salient and trigger strong public reactions. Under a rational actor framework, leaked information should not have different impacts on the public than information obtained through more traditional sources, such as aggregated statistical data on tax compliance and evasion that is more systematically gathered. However, leaked information is arguably more salient and shocking to information consumers than those other types of data.²⁰³ This is particularly so if the behavior that is the subject of the leak is egregious and if the leaked data is well publicized, raising expectations on governments to act. This high impact nature of tax leaks may compel governments and taxing authorities to take firmer action against cross-border tax evasion, or it may provide governments with political cover or impetus to reform substantive tax laws and/or tax administration.

3. Leaked Data's Distributional Gains

The combination of the first two benefits of data leaks (free information and salience) may also lead to distributional gains. For example, the information obtained through leaks may enable tax authorities to gain ground on the abuses of sophisticated taxpayers who may have been

203. The behavioral psychology and behavioral economics literature provide significant evidence of the ways in which individuals and governments may make less than rational decisions, particularly when confronted with examples viewed as more salient. See generally BEHAVIORAL PUBLIC FINANCE (Edward J. McCaffery & Joel Slemrod eds., 2006); THOMAS C. SCHELLING, *The Life You Save May Be Your Own*, in CHOICE AND CONSEQUENCE: PERSPECTIVES OF AN ERRANT ECONOMIST 113 (1984) (distinguishing between reactions to identified lives and statistical lives); CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (2005) (exploring various factors shaping public perceptions of risk, including the distinction between perceived and real risk); Shane Frederick, George Loewenstein & Ted O'Donoghue, *Time Discounting and Time Preference: A Critical Review*, 40 J. ECON. LITERATURE 351, 351–401 (2002) (noting that the degree to which people experience anticipatory utility may vary and may be influenced by “visceral” factors).

disproportionately able to escape enforcement's grasp by keeping transactions and methods secret, such as those holding undeclared offshore assets or enaging in complex offshore structuring. In particular, public, high-impact, and unpredictable data leaks may act as a counterweight to powerful forces such as lobbyists that have traditionally safeguarded certain taxpayer interests.

C. The Distinctive Risks of Tax Leaks

Despite the clear benefits of leaked information to tax enforcement, reliance on leaked data comes with distinctive risks and potential costs. These costs are in addition to the more general costs that tax authorities and taxpayers may incur in the course of tax enforcement.²⁰⁴

1. The Dangers of Agenda Capture

Leaks do not happen in a vacuum. They are exogenously determined, in the sense that they are dependent on the threshold decisions of leakers and whistleblowers—actors outside the government—to leak information. Thus, leaked data may be manipulated to reflect the personal agendas of those individuals. As described in more detail in Part III, leakers and whistleblowers determine when to leak, what and how much information to leak, and (importantly) what information to withhold. The personal agendas of these leakers and whistleblowers may shape what information eventually ends up in the hands of taxing authorities and when.

For example, if a leaker or whistleblower has a political axe to grind against certain opponents, they may leak tax information to exact political consequences on them, rather than for purposes of tax enforcement.²⁰⁵ One might argue that such information is nonetheless valuable even if the underlying goals are questionable. However, tax leaks done for political

204. For example, in the course of performing tax enforcement, a tax authority may run into unanticipated enforcement costs (for example, costs that may arise in the course of filling in incomplete data or gathering necessary information), agency costs (such as costs that may arise as a result of employees seeking to advance individual agendas), or opportunity costs (that is, costs associated with foregone enforcement opportunities). Taxpayers, too, may be expected to incur costs as a result of tax enforcement, such as costs in responding to audit requests and costs of defending themselves against erroneous accusations.

205. See *infra* note 308 and accompanying discussion.

purposes carry other risks, such as the possibility of undermining democratic values.²⁰⁶

Another distinctive way in which leaks may be vulnerable to agendas of various actors is through the actions of the press and other information intermediaries. How, when, and whether a leak unfolds depends on the specific pathways by which leaked data is transmitted to tax authorities and the public, and the actions and interests of those who control those pathways. Thus, the agendas and interests of such information intermediaries may affect how leaked data is conveyed and how it is received.

In this sense, therefore, leaked data is not just unadulterated free information, but may in fact be free information that is particularly susceptible to the influences and agendas of leakers, investigative journalists, and other information providers and intermediaries. These agendas may lead these actors to put their own spin on leaked data, but in a worst-case scenario, may also lead them to falsify data, or selectively withhold data. In relying on leaked data, tax authorities and governments run the risk of being unduly influenced by the interests of and framings employed by these actors without genuine appreciation of the risks.

2. The Downsides of Heightened Salience

Another distinctive downside of relying on leaked data stems from precisely the fact that leaks tend to be high profile events. As discussed, the high impact of tax leaks may in some instances be a strength.²⁰⁷ However, this feature may also give rise to distinctive hazards.

Most notably, the potentially high salience of leaked data—particularly in contrast to other types of more systematically gathered data—may trigger reactions by government and the public that may be disproportionate or inadvisable given the underlying problem at stake.²⁰⁸

206. It is important not to assume that tax leaks of the type analyzed in this Article are simply an international extension of the tips with which the IRS has worked for decades. Tax leaks pose a risk distinctly different from the tips that the IRS has frequently received over the years. Although such tips have often been courtesy of individuals with a certain type of agenda, such as ex-spouses, fired workers, and business competitors, the potential impact of their agendas on overall government tax enforcement practices and decisions was likely limited in scope. The quantity of data they offered, the number of taxpayers on whom they provided data, and their ability to harness global attention and public response on a significant scale was much more limited as compared to the contemporary tax leaks at issue.

207. See *supra* Subpart II.B.2.

208. See *supra* note 203.

Governments may react more strongly to leaked data than systematically obtained data because (a) the leak shows that bad behavior is occurring, which may surprise or shock the government; (b) the leak suggests government failure and incompetence because it has not previously detected this bad behavior, and (c) the public is outraged by the leaked conduct and the government's failure to act. Likewise, the public may react more strongly to leaked data because (a) the leaked information shows that some taxpayers have been getting away with bad behavior; (b) the existence of such bad behavior maybe perceived to be egregious and shocking; and (c) the failure of government authorities to punish or even detect such behavior is also perceived to be egregious and shocking.

As noted, strong reactions may provide impetus for reform that might not otherwise exist.²⁰⁹ On the other hand, they may also lead to ill-advised legal and enforcement responses. For example, if a government engages in short-term thinking regarding allocation of enforcement resources, succumbs to public pressure, or otherwise makes nonrational decisions, then poor enforcement choices may take place after a leak.²¹⁰ In particular, if governments are capacity constrained, then a poor enforcement decision might mean fewer resources allocated to good choices.

The possibility of costly, overbroad, or poorly designed laws being enacted is not merely theoretical. Scholars in other fields, including securities regulation, financial regulation, and corporate governance, have observed that laws enacted in the aftermath of a crisis may be the product of overreaction.²¹¹ Both crises and

209. See *supra* Subpart II.B.2.

210. See *supra* Subpart II.C.2.

211. See, e.g., Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Governance Round II*, 95 MINN. L. REV. 1779, 1783 (2011) (adopting Romano's "quack corporate governance" characterization to describe the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)); Saule Omarova & Adam Feibelman, *Risk, Rules & Institutions: A Process for Reforming Financial Regulation*, 39 U. MEM. L. REV. 881, 930 (2009) (critiquing government reaction to the 2008 financial crisis and offering an approach to "redesigning the regulation of [the] financial services sector in a coherent and measured way" post-crisis); Larry E. Ribstein, *Bubble Laws*, 40 HOUS. L. REV. 77, 97 (2003) (reviewing the negative effects of post-bubble regulation); Usha R. Rodrigues, *Dictation and Delegation in Securities Regulation*, 92 IND. L.J. 435 (2017) (identifying a trend of Congress delegating significant securities regulation post-crisis); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1528–29 (2005) (exploring how the post-crisis environment led to the "ill-conceived" Sarbanes-Oxley reforms). The financial crisis literature addresses suboptimal government policies that were contrary to expert recommendations. In that sense, one might observe that governments were even *more* reactionary in the aftermath of the financial crisis than has been observed with respect to tax leaks to date.

leaks are highly salient events that may overemphasize the seriousness of the crisis or conduct, while giving insufficient weight to the later-occurring costs associated with a reactionary or subpar policy response.²¹² This outcome is possible with respect to tax laws as well.

Of course, there are risks and downsides to any course of enforcement action that a tax authority decides to take. Our point here is that in some situations, the high salience of data leaks may exacerbate these generic risks and costs by influencing the behaviors of both governments and the public. For example, any government enforcement action may be perceived as inadequate or ineffectual due to its actual content and execution, but a government's response to a leak may run the particular risk of being perceived as such, given the high public salience of leaked data.²¹³ Such negative perceptions and public pressures may drive governments to take subsequent enforcement actions that are reactionary or poorly advised. This outcome is particularly plausible if highly salient leaked information is known to the public. It may also occur if the public knows merely the existence of the leak, even if it does not know the content of the leaked data itself.

In short, data leaks have the potential to trigger strong and possibly disproportionate reactions by casting a spotlight on the behaviors and enforcement failures that are the subject of a leak. But they may fail to highlight the downsides of taking particular enforcement actions, or the more difficult and nuanced policy and resource allocation considerations that underlie any enforcement decision. This is problematic because not all government failures to act are necessarily bad decisions.²¹⁴ Some may be, but other failures to act may have occurred for sound tax enforcement or political reasons (such as a deliberate choice to focus scarce resources on another

212. Thus, for example, the combination of the 2008 financial crisis and the onslaught of tax leaks beginning in 2008 may have heightened the risk of overreaction by regulators.

213. For example, this may occur if the government decides to do nothing in response or takes too long in responding. See *infra* Subpart III.B.6.

214. One scenario in which governments might choose not to prosecute is if tax policy has become entrenched as a result of a previous leak. For example, once a government's or international organization's policy has been enacted in response to an initial leak, the government or organization may be less willing or able to pivot and respond to a later-occurring leak. This lack of response may resemble doing nothing and may lead to some of the costs just described. See, e.g., Matt Timms, *Luxleaks Scandal Puts Tax Avoidance Under the Microscope*, EUR. CEO (Mar. 28, 2015), <http://www.europeanceo.com/business-and-management/luxleaks-scandal-puts-tax-avoidance-under-the-microscope> [<https://perma.cc/49E6-MXM9>] (characterizing LuxLeaks as setting the EU agenda by "[leaving] EC officials with no option but to ramp up the rhetoric on tax fraud, evasion and avoidance").

area). Leaks do provide “free information” that may allow authorities to detect and punish certain behavior that was previously too costly to chase. The downside risk is that given the high salience of leaks and the reactions they may trigger, pre-leak government decisions not to act may be judged overly negatively, and post-leak enforcement choices may be correspondingly misunderstood or pushed in the wrong directions.

In a rational world, it is easy to assume that leaks of tax data will yield welfare benefits, because leaks are essentially free information that lower tax authorities’ enforcement costs. However, the world is not always rational. Intermediaries and information arbiters may select, withhold, falsify, or otherwise curate data in ways that render the timing of its release or its content suspect. Governments, taxpayers, and other actors may react in nonrational ways as a result of the high-impact nature of leaks. At the end of the day, the ultimate welfare effects of a leak will depend on whether these factors predominate to distort the provision of and responses to leaked data. Even if leaked data does generate a net welfare gain at the end of the day, it is important to be aware of the distinctive risks that accompany such leaks, in order that the tax authority may make better enforcement and legal design choices.

III. LEAK-DRIVEN LAWMAKING IN THE REAL WORLD

Part II has shown that there are clear benefits as well as distinctive downsides to relying on leaks to drive tax policy and guide enforcement. Part III explores some of these downsides in greater detail by presenting three illustrative examples, each highlighting an aspect of how leak-driven lawmaking has unfolded in the real world and how the distinctive risks of relying on tax leaks may arise in each case. We examine: (1) the ways in which agenda setters have dictated how governments and the public receive, access, and respond to leaked data; (2) the delays and inefficiencies that can arise in data transmission within and among countries; and (3) reactionary laws that may be enacted in response to highly salient data leaks. We discuss how the distinctive risks of leak-driven lawmaking that we identified in Part II—third-party agenda setting and the dangers of high salience—play out in each of these situations.

A. Agenda Setters

As noted in Part II, agenda setters have played an important role in dictating the timing and content of leaks and how they are framed.²¹⁵ Their actions shape how leaked data is received and acted upon by tax authorities and governments, and how they are perceived by the public. We discuss here three types of agenda setters that have played a major role in the framing of leaked data to date and the risks their existence poses for tax enforcement.

1. Media Organizations

The important role played by media organizations in disseminating leaked data has scarcely been analyzed in the tax literature to date. This is problematic. As Subpart I.B illustrates, leakers have in some instances provided data to platforms such as WikiLeaks or the ICIJ, rather than to governments. Practically speaking, this means that a few primary media organizations have exercised immense control over whether to release or withhold data, and when. Timing and content aside, journalists and media organizations have also commanded wide latitude in issuing commentary on tax leaks, thereby framing the terms of the debate.

One media organization that has played a powerful role in framing discussions about leaked data is the ICIJ. The ICIJ is a network of over 200 journalists in 70 countries that grew out of a project of the Center for Public Integrity.²¹⁶ It has played a significant role in the internet publication of the HSBC, Panama Papers, Paradise Papers, LuxLeaks, British Havens, and the Bahamas leaks. ICIJ journalists collaborate on stories that require in-depth

215. See *supra* Subpart II.C.1.

216. *About the ICIJ*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Feb. 13, 2012, 5:19 PM), <https://www.icij.org/about> [<https://perma.cc/VN2V-NTW6>]; see also *Center Spins Off International Arm*, CTR. PUB. INTEGRITY (Feb. 27, 2017, 12:01 AM), <https://www.publicintegrity.org/2017/02/27/20746/center-spins-international-arm> [<https://perma.cc/9DVT-VKPV>] (describing ICIJ's origin with the Center for Public Integrity). As of February 24, 2017, the ICIJ became an independent nonprofit news organization, separating from its founder, the Center for Public Integrity. Gerard Ryle, *After Panama Papers Success, ICIJ Goes Independent*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Feb. 27, 2017, 12:00 AM), <https://www.icij.org/blog/2017/02/after-panama-papers-success-icij-goes-independent> [<https://perma.cc/4E7R-X29L>] ("[The decision] was prompted by a strategic assessment of where we are and where we want to go next. We believe this new structure will allow us to extend our global reach and impact even farther and build on the lessons we've learned and the successes we've enjoyed.").

investigative journalism, particularly topics with a global focus.²¹⁷ The ICIJ is a nonprofit organization and provides its information to the public without charge. Its funding comes from a variety of sources, including charitable foundations such as the Ford Foundation and Pew Charitable Trusts.²¹⁸ ICIJ stories have been carried by a wide variety of partner newspapers including: BBC in the United Kingdom, Le Monde in France, Hong Kong's South China Morning Post, The Irish Times, Süddeutsche Zeitung in Germany, The Sydney Morning Herald, and the New York Times.

A look at how the ICIJ managed the Panama Papers leak offers a window onto the power of news organizations to control dissemination and shape the legal and policy response to leaks. When the ICIJ published the Panama Papers data on May 9, 2016, it described its release on its website as follows:

The International Consortium of Investigative Journalists publishes today a searchable database that strips away the secrecy of nearly 214,000 offshore entities created in 21 jurisdictions, from Nevada to Hong Kong and the British Virgin Islands.

The data, part of the Panama Papers investigation, is the largest ever release of information about offshore companies and the people behind them. This includes, when available, the names of the real owners of those opaque structures.

The database also displays information about more than 100,000 additional offshore entities ICIJ had already disclosed in its 2013 Offshore Leaks investigation.

ICIJ is publishing the information in the public interest.

The new data that ICIJ is now making public represents a fraction of the Panama Papers, a trove of more than 11.5 million leaked files from the Panama-based law firm Mossack Fonseca, one of the world's top creators of hard-to-trace companies, trusts and foundations.

217. See *About the ICIJ*, *supra* note 216. In 2017, the ICIJ won the Pulitzer Prize for Explanatory Reporting, along with McClatchy and Miami Herald, for their work on the Panama Papers investigation. *The 2017 Pulitzer Prize Winner in Explanatory Reporting*, PULITZER, <http://www.pulitzer.org/winners/international-consortium-investigative-journalists-mcclatchy-and-miami-herald>.

218. *Id.*; see also Barbara Raab, *Behind the Panama Papers: A Q&A With International Consortium of Investigative Journalists Director Gerard Ryle*, FORD FOUND. (Apr. 8, 2016), <https://www.fordfoundation.org/ideas/equals-change-blog/posts/behind-the-panama-papers-a-qa-with-international-consortium-of-investigative-journalists-director-gerard-ryle> [<https://perma.cc/6URK-KRVQ>].

ICIJ is not publishing the totality of the leak, and it is not disclosing raw documents or personal information en masse. The database contains a great deal of information about company owners, proxies and intermediaries in secrecy jurisdictions, but it doesn't disclose bank accounts, email exchanges and financial transactions contained in the documents.²¹⁹

This description reveals some key information about the ICIJ's power and decisionmaking: First, the ICIJ presented the material in a searchable internet database. This required it to format and organize the information and to specify search parameters. The ICIJ also combined the Panama data with data from the BVI leak, and later added the Bahamas and Paradise Papers data. This choice to combine the data may carry an implication that all of this leaked information falls under a broad rubric of "offshore secrets" or, perhaps more strongly, "offshore misconduct."

Second, the ICIJ released only "a fraction" of the leaked information. This suggests that ICIJ had an underlying metric for deciding what to release. Here, there are a number of possibilities. One might choose to publish the most sensational or shocking information (for example, the names of celebrities); the largest dollar value transactions; the most recently created entities; the entities from the largest countries or countries with the most transactions; or the entities most likely to be in violation of the law (as determined by the ICIJ). Regardless of the specific decisional metric, the important point is that the ICIJ has controlled what data was released and how to use data that was not released. It is possible that these decisions have been made in conjunction with the leaker, whose identity has been withheld from the public, though we do not know for sure.²²⁰

Third, the ICIJ did not release the underlying original documents. This decision, though perhaps supported by journalistic standards and a desire to avert unjustified harms from full disclosure of identifying information, means that the ICIJ's framing and characterization of data largely controls the picture received by the public.

Fourth, it is important to note that the ICIJ publication of the Panama Papers database happened some time after the newspaper *Süddeutsche Zeitung* obtained the data (which occurred in 2014). While *Süddeutsche Zeitung* announced in

219. Marina Walker Guevara, *ICIJ Releases Database Revealing Thousands of Secret Offshore Companies*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (May 9, 2016) <https://panamapapers.icij.org/blog/20160509-offshore-database-release.html> [<https://perma.cc/YK9L-NWGU>].

220. See Mortimer, *supra* note 187.

print that it was in possession of the data in February 2015, the database and accompanying stories were not released until April 2016.²²¹ As such, the ICIJ Panama Papers release was not breaking news but rather was a carefully curated piece of investigative journalism by ICIJ, *Süddeutsche Zeitung*, and their media partners. While there are clear advantages to comprehensively executed and in-depth investigative journalism stories, this time delay does raise questions about whether these media actors strategically timed the release of the databases, whether the delays were costly to certain countries, whether some actors named in the Panama Papers might have had time to prepare for and even avoid the fallout, and more generally, whether the information should have been released to tax authorities sooner.

These observations highlight the series of organizational, selection, and framing decisions that the ICIJ made leading up to the release of the Panama Papers database, and they clear the way for thinking critically about the power exercised by the press in dictating how and when subsequent responses have unfolded. These little-noticed decisions shape the ultimate delivery of the information to the public. And these choices cannot help but be informed by the disseminating organization's underlying agenda, no matter how benign.

The degree of control that ICIJ has exercised in publication of the Panama Papers data is likely to be replicated in other contexts. In an open statement to potential leakers and whistleblowers, the ICIJ notes:

The [ICIJ] encourages whistleblowers everywhere to securely submit all forms of content that might be of public concern—documents, photos, video clips as well as story tips.

We accept all information that relates to potential wrongdoing by corporate, government or public service entities in any country, anywhere in the world. We do our utmost to guarantee the confidentiality of our sources.

Our motives are squarely aimed at uncovering important government and corporate activities that might otherwise go unreported, from corruption involving public officials to systemic failure to protect the rights of individuals. Journalists from the relevant countries will evaluate and pursue all leads and content submitted and, if merited, report on these issues.²²²

221. See Juliette Garside, *Panama Papers: Inside the Guardian's Investigation Into Offshore Secrets*, *GUARDIAN* (Apr. 16, 2016, 4:00 AM), <https://www.theguardian.com/news/2016/apr/16/panama-papers-inside-the-guardians-investigation-into-offshore-secrets> [<https://perma.cc/7BD7-T494>].

222. *Leak to Us*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS, https://www.icij.org/securedrop#_ga=1.6167091.1650826081.1483477096 [<https://perma.cc/N5S2-PS29>].

This mission statement prioritizes confidentiality of sources, pledges to “evaluate” and “pursue” leads, and permits ICIJ to report on the issues “if merited,” all of which leaves much room for, and in fact absolutely *requires* the ICIJ to make important publication and framing decisions. The process creates costs for the ICIJ;²²³ therefore, it must necessarily allocate limited resources in accordance with its underlying vision.

Recognition that the ICIJ has a perspective or agenda is not a criticism. Rather it acknowledges the fact that the content of the leaked data *as publicly presented* and the resulting shifts in tax policy are neither random nor neutral. Media organizations like the ICIJ and WikiLeaks have immense power to influence the framing, timing, and content of a data leak, and thus exercise implicit control over the perceptions and responses of governments, international organizations, and the public. And if the priorities embraced by these media organizations shift, or are captured by certain interests, we can expect the impacts of their actions to also change.²²⁴

This power and control exercised by the media carries clear risks. Media framing and publication choices, including choices regarding the timing of leaked data’s publication, may distort policy responses by causing governments to over- or underreact to a leak. Furthermore, media organizations’ decisions regarding how much data to publish and what documents to release may also generate enforcement costs for tax authorities, like those incurred to supplement incomplete data. Media organizations may also exert ongoing control over data they choose to withhold and may use it in ways not visible to tax authorities or the public.

This is not to say that media intervention and intermediation is bad or harmful. It is possible, likely even, that the gains to tax enforcement from work done by media actors outstrips the potential downsides and risks. Our point, rather, is that these downsides, risks, and impacts inherent in the publication and editorial choices made by media intermediaries have not been sufficiently examined.

223. As the ICIJ explains:

The [ICIJ], together with the German newspaper *Süddeutsche Zeitung* and more than 100 other media partners, spent a year sifting through 11.5 million leaked files to expose the offshore holdings of world political leaders, links to global scandals, and details of the hidden financial dealings of fraudsters, drug traffickers, billionaires, celebrities, sports stars and more.

About This Project, *supra* note 113.

224. See Ryle, *supra* note 216 (discussing ICIJ’s separation from the Center for Public Integrity based on a “strategic assessment” of its forward-looking priorities).

2. Leakers

Even before information reaches media organizations, leakers must gather it.²²⁵ Leakers have obvious discretion over whose information to collect, what kinds of information to collect, what date ranges to capture, and when to collect it. These decisions may be driven by a variety of factors including the leaker's proximity or access to data, desire for retribution, risk of detection or punishment, nature of personal relationships, level of technical skill, or moral views. The decisional criteria employed by leakers effectively create the original data pool. Unlike media organizations and journalists, the identities of the leakers may be anonymous (protected by journalists) or secret, rendering it more difficult to divine or question the leaker's motivations.

While many of the tax leaks to date have come from former employee-whistleblowers, a few are by anonymous actors and at least two (Panama Papers and Paradise Papers) are widely thought to be the result of a hack. Hackers may be driven by different agendas than employee-whistleblowers. Thus, if hacks become more common with respect to tax data, tax authorities may need to be cognizant of a new array of hidden agendas that might start to drive leaked data.

Leakers also control whom to approach with the data. Currently, this is largely a choice between going to media organizations like ICIJ and WikiLeaks or to government agencies. To the extent governments and the media have different agendas, protocols, and levels of transparency, the leaker's choice of delivery may affect how leaked information is disseminated and consumed. For example, a leak to the ICIJ, a media organization that will post some of the data publicly on the internet, could potentially trigger a more widespread set of responses than a leak to a single government agency. In Subpart III.B, we outline one example of how the ICIJ's intervention in publicizing leaked data led to a surge of interest and activity by countries that had not previously acted, by examining the case of the HSBC leak.²²⁶

3. Secondary Users and Information Consumers

A third category of agenda setters consists of secondary consumers, editorialists, and users of information gathered by leakers and disseminated by governments or primary media organizations. Such consumers, including

225. See *supra* notes 17, 187 and accompanying text.

226. See Subpart III.B *infra*.

NGOs, nonprofits, international bodies, secondary media outlets, and the general public, also play an auxiliary role in controlling the agenda. These actors process, digest, interpret, and opine on leaked data and government responses to leaks, and this creates a public conversation that can impact governments' ultimate policy and enforcement reactions.

For example, the Tax Justice Network (TJN) is an independent international research and advocacy network. Its key activities include preparing reports, articles, and other materials, organizing research conferences, and engaging in advocacy work.²²⁷ One of the key topics attracting TJN's attention is the issue of financial secrecy, in particular beneficial ownership of offshore entities, information exchange, and the mechanisms underlying tax secrecy. TJN has written multiple blog posts and research reports on offshore evasion, covering the Panama Papers, Paradise Papers, HSBC, and UBS leaks.²²⁸ In doing so, TJN has relied on data released by ICIJ as well as its own research.

Oxfam, an international umbrella organization that works with local communities in over 90 countries to fight poverty, also episodically releases blog posts and updates about developments in the fight against tax evasion and its impacts on poverty and inequality.²²⁹ Organizations like TJN, Oxfam, and others such as Christian Aid and Global Financial Integrity play an influential role in shaping the public conversation about leaks and putting pressure on governments and tax authorities to respond.²³⁰

227. *Our Team and Structure*, TAX JUST. NETWORK, <http://www.taxjustice.net/about/who-we-are/team-structure> [<https://perma.cc/VPX8-PL9P>].

228. *HSBC Leaks*, TAX JUST. NETWORK, <http://www.taxjustice.net/tag/hsbc-leaks> [<https://perma.cc/5NHB-BFYB>] (publishing posts tagged "HSBC Leaks"); *Panama Papers*, TAX JUST. NETWORK, <http://www.taxjustice.net/tag/panama-papers> [<https://perma.cc/7P2G-T3GB>] (publishing posts tagged "Panama Papers"); *Secrecy*, TAX JUST. NETWORK, <http://www.taxjustice.net/topics/secrecy> [<https://perma.cc/3RAY-FLMF>] (publishing blog posts on offshore secrecy); *UBS*, TAX JUST. NETWORK, <http://www.taxjustice.net/tag/ubs> [<https://perma.cc/UPJ6-FF8F>] (publishing posts tagged "UBS"); George Turner, *TJN Responds to the #ParadisePapers*, TAX JUST. NETWORK (Nov. 5, 2017), <https://www.taxjustice.net/2017/11/05/press-release-tjn-responds-paradisepapers> [<https://perma.cc/KH29-2DRR>].

229. *Tax Avoidance*, OXFAM INT'L, <https://www.oxfam.org/en/tags/tax-avoidance> [<https://perma.cc/AMX3-RCJH>] (publishing posts tagged "tax avoidance"); *Tax Evasion*, OXFAM INT'L, <https://www.oxfam.org/en/tags/tax-evasion> [<https://perma.cc/EZK5-RRPT>] (publishing posts tagged "tax evasion"). Oxfam has 20 affiliates across countries. *Our Governance*, OXFAM INT'L, <https://www.oxfam.org/en/our-governance> [<https://perma.cc/Z9DC-C6N7>]; see also *Countries Where We Work*, OXFAM INT'L, <https://www.oxfam.org/en/worldwide> [<https://perma.cc/KZV3-ZVN8>] (listing the 90 countries in which Oxfam operates).

230. For examples, see CHRISTIAN AID, <https://www.christianaid.org.uk/search/gss?keys=leaks> [<https://perma.cc/PT7W-ARY6>], which displays search results for keyword "Leaks," and GLOBAL FINANCIAL INTEGRITY, <http://www.gfintegrity.org> [<https://perma.cc/2E3T-YNYP>].

These NGOs and nonprofits, together with secondary media outlets and reporters, raise public awareness about tax leaks and how governments have responded to them. This public discourse may ultimately shape government actions. For example, if journalists express outrage over offshore tax evasion, these sentiments may be passed on to the public, and may put pressure on governments to embrace strong (perhaps overly strong) policy responses.

Ultimately, the full array of agenda setters—from media organizations to leakers to NGOs and other secondary users of leaked data—may have independent and potentially conflicting agendas that may shift over time and that may not be primarily about optimizing tax compliance or enforcement.²³¹ For example, some agenda setters may be predominantly interested in transparency, poverty reduction, or perceived unfairness and may prioritize these concerns over the broader and more comprehensive goal of welfare-maximizing tax policy. Others may be driven by a broader mission to expose systemic flaws and drive fundamental legal or political change.

These disparate agendas may create agency costs for a country or tax authority that strives to optimize enforcement of existing tax laws but must rely on the work of media organizations and leakers to obtain information. To be sure, leaked data yields clear benefits to tax authorities and countries, who may be able to use leaked information concerning specific taxpayers and transactions to advance enforcement targets and reduce evasion.²³² In particular, the work of media intermediaries and other actors may help offset the effects of insiders such as powerful lobbyists, thereby yielding distributional gains. However, to the extent that the underlying agendas of external agents drive leaks, and leaks drive legal and regulatory responses, welfare-maximizing tax policymakers should be cognizant of how the agendas of various actors may inadvertently influence or consciously manipulate broader government priorities. While the underlying interests of agenda setters may well lead to socially beneficial legal change, the risk is that governments may enact law and policy responses without a full understanding of how these agenda setters and their complex motives have influenced outcomes.

231. See, e.g., PETERS, *supra* note 202, § 6.6.2.2 (exploring concerns regarding the limited accountability of NGOs in the international tax arena).

232. See *supra* Subpart II.B.2.

B. The Messy Transmission of Leaked Data

Leaked data does not necessarily reach governments and tax authorities quickly or effectively. Instead, the transmission of leaked data is imperfect and messy.

Transmission delays are by no means unique to leaks; they occur elsewhere in international tax information exchange and enforcement. However, there is reason to think that the exogenous nature of leaked data and the varied political interests and processing capabilities of the countries, intermediaries, and others that encounter it may exacerbate such delays in the context of leaks. Perhaps more pertinently, the high salience of leaked data means that time lags and transmission failures in the leak context create distinctive risks, for example, by exacerbating perceptions that authorities are “doing nothing.”

As discussed, there are currently two dominant transmission pathways by which data is leaked: First, data may be initially released to a government agency, after which its existence subsequently becomes known to the public. Second, data may be leaked directly to media organizations, which then publicize it broadly.²³³ These pathways are not mutually exclusive. There is often an interplay among the actions of the media organizations, government actors, and secondary commentators in the messy process of data transmission. Moreover, there is not necessarily uniformity in the approaches employed by either governments or the media. Governments, for example, may employ a diversity of approaches in either encouraging or discouraging transmission of leaked data. Some governments actively encourage leaks, for example, by expanding whistleblower protections or developing programs to leverage leaks into secondary information dumps.²³⁴ Others

233. See *supra* Subparts I.C., III.A.

234. For example, U.S. taxpayers who had engaged in offshore evasion could enter an OVDP and obtain protection against criminal prosecution by paying a penalty and agreeing to share information about other taxpayers, banks, and bankers. Leandra Lederman, *The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion*, 57 VILL. L. REV. 499 (2012). This strategy can be described as the facilitation of a secondary leak market. Another example of such secondary leak facilitation is the United States's pursuit of undeclared offshore assets in Singapore, Hong Kong, and Israel that may have moved to those jurisdictions from Switzerland after the UBS leak. Kara Scannell, *US Intensifies Fight Against Tax Evasion by Using Data Mining*, FIN. TIMES (June 18, 2017), <https://www.ft.com/content/719544f6-529b-11e7-bfb8-997009366969> [<https://perma.cc/EX9K-792Q>]. This follow-up government action reflects the strategy of using information received through the OVDPs to pursue offshore accounts in other jurisdictions. Publicity about these enforcement actions in turn provides further impetus for more taxpayers to come forward voluntarily. See Oei, *supra* note 2

engage in censorship and denial to protect elites. Still other governments, such as Germany, actively purchase leaked data from various sources, in order to use it in tax enforcement. And of course, some governments use leaks as the political impetus for stronger enforcement or law reform.²³⁵

The complicated interplay of how the actions of governments and media organizations interact to determine the ultimate transmission and use of leaked data on a global scale, and the costs and benefits of such transmission and use, are vividly illustrated in the tale of the HSBC “Swissleaks” scandal.

1. France and the HSBC “Swissleaks” Episode

The HSBC client data was originally obtained by bank employee Hervé Falciani in 2006–07.²³⁶ In January 2009, French authorities acquired the data in connection with a search of Falciani’s home (which had been requested by Swiss authorities) and began investigating it.²³⁷ This acquisition marks the first established transfer of the data from the leaker to someone else. Responding to Swiss criticisms of governments’ purchases of stolen data—a strategy employed by countries such as Germany—France maintained that they had not paid Falciani for the information.²³⁸

Switzerland asked France for the HSBC data, and in December 2009,²³⁹ the French agreed to share a copy but expressed their intent to continue using the data themselves.²⁴⁰ After receiving the leaked data from the French, the Swiss government shared the stolen data with HSBC in March 2010, reportedly assuring HSBC that it “[would] not support the use of the stolen

(discussing in Section II.B these “cascading compliance” mechanisms that facilitate compliance).

235. Examples include the United States’s FATCA legislation, the Common Reporting Standard, and the progress made towards exchange of tax rulings among EC member states. See generally Oei, *supra* note 2 (analyzing U.S. offshore compliance efforts).

236. See *supra* Subpart I.B.2.

237. David D. Stewart, *Swiss President Seeks to Delay Approval of French Treaty Protocol*, WORLDWIDE TAX DAILY, Dec. 18, 2009. Reportedly, in mid-2008, Falciani and another HSBC employee sent anonymous emails to tax authorities in multiple European countries claiming to possess a large client list for a Swiss private bank along with access to its computers. David Gauthier-Villars & Deborah Ball, *Mass Leak of Client Data Rattles Swiss Banking*, WALL ST. J. (July 8, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704629804575324510662164360>.

238. Stewart, *supra* note 237.

239. David D. Stewart, *HSBC Private Bank Admits Data Theft Affected 24,000 Swiss Accounts*, WORLDWIDE TAX DAILY, Mar. 12, 2010.

240. *Id.* (detailing events surrounding the leak of HSBC data); see also Gauthier-Villars & Ball, *supra* note 237 (also detailing events surrounding the leak of HSBC data).

data to answer requests from foreign authorities' and that the French government [would] not use the data it obtained 'inappropriately.'"²⁴¹

2. The German Purchase

While this leaked data was making a round trip from France back through Switzerland to HSBC, Germany expressed interest in purchasing the data from Falciani.²⁴² Ultimately, data on approximately 1500 German taxpayers was purchased not by the federal government but by the German state of North Rhine-Westphalia on February 26, 2010 for a reported price of €2.5 million.²⁴³

3. France Shares Data: The U.S. Mess and the "Lagarde List"

By April 2010, France had decrypted the data and identified a total of 127,000 accounts, representing 79,000 individuals from a variety of countries.²⁴⁴ Throughout 2010, France provided various countries with parts of the data pertaining to their taxpayers, including Italy, Spain, the United Kingdom,²⁴⁵ Canada,²⁴⁶ and the United States.²⁴⁷

241. Stewart, *supra* note 239.

242. See Randall Jackson, *Germany Poised to Buy Swiss Bank Data*, 57 TAX NOTES INT'L 487, 487 (2010); *Germany Will Buy 'Tax Evaders' List If Real*, BBC NEWS (Feb. 1, 2010, 3:26 PM), <http://news.bbc.co.uk/2/hi/business/8491552.stm> [<https://perma.cc/56J3-JB9S>].

243. Jackson, *supra* note 242; see also Hoke, *SwissLeaks*, *supra* note 55; Randall Jackson, *German State Buys Data on Tax Cheats*, 57 TAX NOTES INT'L 829 (2010). Rhine-Westphalia subsequently bought more HSBC data. Stephanie Soong Johnston, *German State Purchases More Data to Snare HSBC Account Holders*, 64 TAX NOTES INT'L 260 (2011). Apparently, the well-known fact that German tax authorities had and would be willing to buy Swiss financial account data to help identify tax evaders prompted an indirect response by the Swiss government. In 2017, Germany detained a Swiss man (reportedly working for the Swiss Federal Intelligence Service) for spying on German tax authorities and trying to ascertain the identities of the German authorities who had been buying data on the Swiss accounts of foreigners. William Hoke, *Germany Detains Swiss Man Allegedly Spying on German Tax Authorities*, 86 TAX NOTES INT'L 475, 475 (2017). As recently as July 4, 2017, Germany reported acquiring Panama Papers data for a fee that others have indicated reached approximately 5 million Euros. See William Hoke, *German Authorities Pay to Acquire Panama Papers*, 87 TAX NOTES INT'L 115, 115 (2017).

244. Randall Jackson, *France to Investigate Possible Tax Cheats Listed in Stolen HSBC Data*, WORLDWIDE TAX DAILY, Apr. 20, 2010.

245. Gauthier-Villars & Ball, *supra* note 237 (reporting that France provided data to Italy, Spain and the United Kingdom).

246. Kristen A. Parillo, U.K., *Canada Authorities Targeting HSBC Clients*, 60 TAX NOTES INT'L 74, 74 (2010) (indicating that the United Kingdom and Canada received HSBC data from France).

a. The United States Controversy

In the case of the United States, the timing of its receipt of the data and its internal dissemination between U.S. government agencies have created controversy: In 2012, the DOJ had entered into a deferred prosecution agreement (DPA) with HSBC Bank USA, NA and HSBC Holdings regarding violations of the Bank Secrecy Act, the International Emergency Powers Act, and the Trading with the Enemy Act, along with other charges. Although the DPA related to non-tax matters, the U.S. decision to enter into the DPA received significant criticism in light of the HSBC leak on grounds that it was too lenient.²⁴⁸ The main source of controversy was whether the DOJ knew of the HSBC data at the time it entered into the DPA. If so, there was a plausible argument that the terms of the DPA were inappropriately generous.

Loretta Lynch, who negotiated the DPA in her capacity as U.S. Attorney for the Eastern District of New York, later stated (when she was U.S. Attorney General): “To my knowledge, my office did not have access to the Falciani documents prior to the execution of the DPA.”²⁴⁹ She further observed: “I am not aware of whether or how the information was conveyed to the department, nor do I have information about why my office did not have access to it.”²⁵⁰ Given that the IRS reports having received the information in April 2010,²⁵¹ two years before the DPA, this raised questions about whether the information was shared with the DOJ, and if so, why Lynch’s office did not have it. Alternatively, if the information was not shared with DOJ, this would reflect a transmission failure between U.S. agencies and might raise questions about the validity or appropriateness of the DPA.

More broadly, the debate over who within the U.S. government knew what and when illustrates the transmission issues, enforcement and potential agency costs, and inefficiencies that continue to arise even after one agency in

247. Burow, *supra* note 57, at 556 (reporting that former deputy commissioner (international), IRS Large Business & International, Michael Danilack, stated that in April 2010, the IRS received information from France on U.S. taxpayers’ HSBC accounts via the France-U.S. treaty).

248. See Peter J. Henning, *HSBC Case Tests Transparency of Deferred Prosecution Agreements*, N.Y. TIMES: DEALBOOK (Feb. 8, 2016), <https://www.nytimes.com/2016/02/09/business/dealbook/hsbc-case-tests-transparency-of-deferred-prosecution-agreements.html> (noting Judge Gleeson was initially hesitant to approve the DPA, concerned that it was too lenient given the conduct’s seriousness).

249. Dan Roberts, *Loretta Lynch Confirmation as Attorney General Dogged by HSBC Scandal*, GUARDIAN (Feb. 20, 2015, 1:58 PM), <https://www.theguardian.com/business/2015/feb/20/loretta-lynch-confirmation-attorney-general-hsbc-scandal> [<https://perma.cc/R5MU-H3XH>].

250. *Id.*

251. See Burow, *supra* note 57.

a jurisdiction has received leaked data. For example, the DOJ's prosecutorial decisions, paired with public knowledge of the existence of the highly salient HSBC data and the possible transmission failures between agencies, risks creating the impression that DOJ was either soft on banks, inept, or not serious about enforcement.

b. Greece

Greece also received HSBC accountholder information. French Finance Minister Christine Lagarde shared information about Greek taxpayers with Greek Finance Minister George Papaconstantinou in 2010, the so-called "Lagarde list."²⁵² However, no action was taken, possibly because the list implicated some Greek elites.²⁵³ In 2012, Papaconstantinou's successors in the Greek Finance Ministry became aware of the information, and the "Lagarde list" reappeared, mysteriously minus the names of three individuals who were relatives of Papaconstantinou. As a result, Papaconstantinou was convicted in 2015 of tampering with evidence, although he was acquitted on charges of breach of duty for failing to take action on the Lagarde information.²⁵⁴

The case of Greece illustrates some countries' resistance to using leaked data to pursue tax offenders, as well as the agency costs that might arise where the interests of elites may not align with those of tax enforcement. Government officials may fail to act in order to protect certain interests (for example, politicians or their relatives named in a leak) or advance competing agendas (for example, international alliances with tax havens or other domestic priorities).²⁵⁵ In such cases, transmission and receipt of data may stall. If the data is salient and known to the public, stalled transmission may turn out to be particularly costly to governments in terms of public outrage and taxpayer morale.²⁵⁶

252. Philip Pangalos & Nektaria Stamouli, *Scandal Deepens Over Greece's 'Lagarde List'*, WALL ST. J. (Dec. 29, 2012, 5:36 AM), <http://www.wsj.com/articles/SB10001424127887323984704578207920210424446>.

253. Hoke, *SwissLeaks*, *supra* note 55, at 973.

254. *Id.*; see also Kerin Hope, *Former Greek Finance Minister Found Guilty in 'Lagarde List' Case*, FIN. TIMES (Mar. 24, 2015), <https://www.ft.com/content/3f284250-d257-11e4-ae91-00144feab7de>.

255. See, e.g., sources cited *supra* note 7 and accompanying text.

256. See *supra* Subpart II.C.2.

4. Enter the ICIJ

The next notable event in the dissemination of the HSBC data occurred on February 8, 2015, when the ICIJ published information on approximately 60,000 HSBC files.²⁵⁷ The data came to the ICIJ via the French newspaper, *Le Monde*, which had secured the files in early 2014 from French government sources.²⁵⁸ *Le Monde* shared the information with the ICIJ. Over the remainder of 2014, journalists from more than 60 media outlets, in cooperation and coordination with the ICIJ, reviewed and processed the files. The ICIJ sent letters to the named account holders stating that they would be publishing some of the data.²⁵⁹

a. Reverberations From ICIJ's Data Publication: Dissemination to New Countries

The ICIJ publication of significant amounts of HSBC data created a ripple effect across the global tax enforcement community. First, countries that had not yet received or sought the leaked data now made information requests. For example, Brazil, which does have a tax treaty with France, had not received any information directly from France. The information published by the ICIJ was the first information the Brazilian authorities received, and according to a March 3, 2015 statement, Brazil thereafter sought from France a full list of Brazilian taxpayers with HSBC accounts.²⁶⁰

Similarly, in February 2015, France provided information to Austria on 513 accounts held by Austrian taxpayers after Austria had made a direct request upon learning that the list included “data relating to Austria.”²⁶¹ Several months later, in September 2015, France delivered a list of 80,000 Cypriot taxpayers with HSBC accounts to Cyprus.²⁶² Danish authorities announced on February 9, 2015 (one day after the ICIJ publication of the

257. Burow, *supra* note 57, at 555.

258. *Id.*

259. *Id.*

260. Teri Sprackland, *Brazil Expands Tax Probe to 7,000 HSBC Account Holders*, 78 TAX NOTES INT'L 695, 695 (2015) (noting that the “worldwide distribution of [some of] the data by the ICIJ prompted calls for further investigations in countries that hadn’t been given prior access”); Teri Sprackland, *Brazil Opens Tax Investigation of HSBC Clients*, WORLDWIDE TAX DAILY, Mar. 4, 2015.

261. Teri Sprackland, *France Delivers Austrian HSBC Data*, 78 TAX NOTES INT'L 342, 342 (2015).

262. Teri Sprackland, *Cyprus Gets Its Share of Lagarde List*, 79 TAX NOTES INT'L 925, 925 (2015).

data), that they were seeking the names of Danish taxpayers who may have avoided taxes through the use of Swiss accounts.²⁶³ The ICIJ's publication had apparently triggered news reports of Danes with assets hidden in Swiss accounts, which spurred Danish authorities to act.²⁶⁴ Danish tax authorities confirmed that prior to February 2015, they had not requested the information from the French, even though the HSBC lists had been shared with other countries.²⁶⁵

In the case of India, although the government had received approximately 628 taxpayer names from France in 2011, the leaked files made available through the ICIJ and its network of news agencies (including the Indian newspaper, *The Indian Express*) resulted in the identification of almost double that number with HSBC accounts.²⁶⁶

b. Expanded Ability of Some Countries to Use the Data

A second collateral effect of the ICIJ's publication was that some countries that had previously obtained the information were able to expand their ability to effectively use it. For example, although the United Kingdom had obtained HSBC data concerning its taxpayers from France in 2010 via an exchange agreement, use of the data was apparently limited under the agreement to tax compliance purposes only.²⁶⁷ But in February 2015, Her Majesty's Revenue and Customs (HMRC) announced that French tax authorities had agreed to remove the "tax-only" restrictions on the United Kingdom's use of the data, and to permit the United Kingdom to share the

263. *Denmark Seeks Names of HSBC Swiss Account Holders*, REUTERS (Feb. 9, 2015, 8:15 AM), <http://www.reuters.com/article/hsbc-leak-denmark-idUSL5N0VJ3SB20150209> [https://perma.cc/CY72-NPJ3].

264. *Id.*

265. *Id.* Danish Tax Minister, Benny Engelbrecht, requested the list from France and ordered an investigation into why the data had not been sought earlier. *Denmark Ignored Hidden Swiss Fortunes for Years*, LOCAL DEN. (Feb. 9, 2015, 10:13 AM), <http://www.thelocal.dk/20150209/denmark-ignored-information-on-hidden-swiss-fortunes> [https://perma.cc/MMD5-T2EE].

266. See Stephanie Soong Johnston, *HSBC Faces Tax Evasion Charges in India*, 81 TAX NOTES INT'L 737 (2016); Jerin Mathew, *HSBC Leaked List: 1,195 Indians Including Country's Richest Mukesh Ambani Have Swiss Accounts*, INT'L BUS. TIMES (Feb. 9, 2015, 7:54 AM), <http://www.ibtimes.co.uk/hsbc-leaked-list-1195-indians-including-countrys-richest-mukesh-ambani-have-swiss-accounts-1487141> [https://perma.cc/936Z-ZBNC].

267. Margaret Burow, *HMRC Secures Agreement With French Tax Authorities to Share Stolen HSBC Data*, WORLDWIDE TAX DAILY, Feb. 26, 2015; HM Revenue & Customs, *HMRC Confirms HSBC Suisse Bank Data Can Now Be Shared*, GOV.UK (Feb. 25, 2015), <https://www.gov.uk/government/news/hmrc-confirms-hsbc-suisse-bank-data-can-now-be-shared> [https://perma.cc/3NRE-ZJNB].

information with other law enforcement agencies including the Serious Fraud Office, the Financial Conduct Authority, the City of London Police, the National Crime Agency, and Eurojust. This agreement came after ICIJ had publicly released much of the stolen HSBC data on February 8, 2015.²⁶⁸

5. Shifting Swiss Position

A notable constraint on countries' ability to effectively use data obtained by leak was Switzerland's historic refusal to entertain treaty information exchange requests that were based on stolen data.²⁶⁹ For example, if leaked data provided preliminary indications of potential tax evasion by a country's taxpayers using Swiss bank accounts, a standard course of action would be for that country to make a treaty request to Switzerland for further information based on the leaked data. The Swiss refusal to entertain these requests thwarted countries' ability to obtain more information and created barriers and costs to using leaked data.²⁷⁰

In September 2015, Switzerland signaled a possible shift in its position.²⁷¹ The Swiss Federal Council began a consultation process regarding a proposed amendment to its tax administration assistance act that would permit Switzerland to respond to those data requests that were based on

268. See *supra* note 267. French Finance Minister Michel Sapin has questioned the accuracy of the United Kingdom's claim that its ability to use the data had been restricted by France. See, e.g., Juliette Garside et al., *France Says It Did Not Restrict UK From Using HSBC Files to Pursue Bank and Criminals*, *GUARDIAN* (Feb. 13, 2015, 7:29 AM), <https://www.theguardian.com/business/2015/feb/13/france-says-it-did-not-restrict-uk-from-using-hsbc-files-to-pursue-bank-and-criminals> [<https://perma.cc/XT9N-NFNH>].

269. Hoke, *Swiss Court Convicts*, *supra* note 55; see also Burow, *supra* note 57 (noting Indian Finance Minister Arun Jaitley reported that Switzerland demanded evidence other than the stolen HSBC data before it would cooperate in an exchange of information request); Stewart, *supra* note 239 (reporting that Switzerland assured HSBC that it would not "support the use of the stolen data to answer requests from foreign authorities").

270. See, e.g., William Hoke, *Swiss Court Denies French Request for HSBC Data Based on Illegally Acquired Information*, 86 *TAX NOTES INT'L* 134 (2017) (discussing how French inability to request additional information from the Swiss government based on leaked information limits the usefulness of the leaked data).

271. See Hoke, *Swiss Court Convicts*, *supra* note 55; J.P. Finet, *Swiss Considering Limited Assistance on Requests Based on Stolen Data*, 2015 *WTD* 171-2 (LEXIS). We have seen a general shift in the Swiss perspective on information sharing. See, e.g., William Hoke, *Swiss Court Allows Sharing of HSBC Account Data With India*, 87 *TAX NOTES INT'L* 312 (2017) ("Swiss courts are increasingly in favor of information exchange."). For additional evidence of an evolving Swiss position, see *id.* (reporting that in deciding not to block India's request for account information under the India-Switzerland tax treaty, the Swiss court noted that India obtained the information from the Lagarde list and not directly from Falciani, who had stolen it).

stolen data obtained either through standard administrative channels or from public sources.²⁷² In June 2016, the Federal Council adopted the amendment, which is now continuing through the enactment process.²⁷³ The shifting Swiss position was no doubt triggered by the expanding march of the data across the globe, facilitated by France and the ICIJ.²⁷⁴ In July 2017, France and Switzerland ultimately reached agreement on the terms by which Switzerland will exchange financial account information (such as UBS account data) although some French account holders will likely challenge the agreement.²⁷⁵

6. Lessons From the HSBC Story

The foregoing description starkly illustrates how the HSBC data worked its way from the original data holder to multiple tax authorities and governments across the world, and to the public generally. The tale of HSBC's leaked data and the winding path it took across the globe shows that the transmission of leaked tax data is neither seamless nor costless.

a. Time Lags

Time lags at different stages in the process, including that experienced by various countries in obtaining the data, making treaty requests for information, bringing tax enforcement against evaders, and investigating financial intermediaries, resulted in limited action taken between 2010 and 2016. While time lags are not unique to leaks, the unique nature of leaked data may exacerbate such delays and transmission failures among countries and other stakeholders. For example, the arrival of leaked data may be unexpected, and countries may be unprepared to react to it. In addition, some countries may welcome the data (for example, France and the United

272. Hoke, *Swiss Court Convicts*, *supra* note 55.

273. *Administrative and Mutual Assistance in Tax Matters*, SWITZ. FED. DEP'T FIN. (July 2017), https://www.efd.admin.ch/efd/en/home/themen/steuern/steuern-international/administrative-and-mutual-assistance-in-tax-matters/fb-amts-und-rechtshilfe_steuerbereich.html [<https://perma.cc/8EAZ-CRHZ>]; *Federal Council Adopts Dispatch on Amending Tax Administrative Assistance Act*, FED. COUNCIL (June 10, 2016), <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-62129.html> [<https://perma.cc/5E44-FSDE>].

274. But in April 2017, a Swiss court rejected a request from France for HSBC data on the grounds that the request itself was based on information stolen by a bank employee working in Switzerland (and thus subject to Swiss law). Hoke, *supra* note 270.

275. William Hoke, *France and Switzerland Reach Agreement on Sharing UBS Account Details*, 87 TAX NOTES INT'L 208 (2017).

Kingdom) while others may condemn it (for example, Switzerland and Greece), triggering diplomatic negotiations and interactions that take time.

Extended time lags risk signaling to taxpayers that a government is not serious about tax enforcement, particularly in cases where the public is aware of the data and the data is perceived as high impact. Time lags may also signal to potential leakers and whistleblowers that authorities may not necessarily act on leaked information or data caches.

b. Intra-Jurisdictional Sharing

Intra-jurisdiction sharing of data was also an issue. For example, the United Kingdom's efforts to make the HSBC data available to its non-tax enforcement agencies initially faced potential legal hurdles based on the terms of the initial transfer of information from France.²⁷⁶ Another example is the unresolved questions surrounding the transmission of the HSBC data between the IRS and the DOJ in the United States, and its effects on the U.S.-HSBC DPA.²⁷⁷

Thus, inefficiencies in interagency transmission within a country can lead to failure to effectively share information between agencies. Even an efficient system of interagency cooperation can encounter transmission barriers and costs due to legal constraints. These barriers and inefficiencies constitute additional costs to using leaked data in tax enforcement and may create the perception of reduced benefits of leaking or blowing the whistle. While intra-jurisdictional information sharing failures are not unique to leaks, the high salience of leaked data may shine particular light on such failures in the context of leaks. This may be beneficial in terms of encouraging reform and improvement, but it may also be costly in terms of tax morale and trust in government.

c. Different Responses by Different Countries

Across jurisdictions, tax authorities exhibited vastly uneven conduct and levels of commitment with respect to their initial acquisition of data, efforts to build on the data, willingness to use the data in enforcement and/or policy actions, and willingness to ignore or alter data. This variety likely reflects a mix of factors including differing internal priorities, tax authority resources,

276. See *supra* notes 267–268 and accompanying text.

277. See *supra* notes 248–251 and accompanying text.

capture by agents with different agendas, and underlying national commitments to tax enforcement.

Once again, while heterogeneity of interests and capabilities across countries is not a feature unique to leaks, leaked data's salience is likely to illuminate these priorities and deficiencies. Such heightened salience may yield the benefit of illuminating government failures and internal agendas and of spurring corrective action. But it may also carry the risk of triggering less-than-rational reactions and unfair assessments of what might actually be reasoned policy choices.

d. The Role of Media Organizations in Data Transmission

Regardless of the specific mix of factors in play in each country, the very public nature of the 2015 ICIJ data publication led many countries to rethink their approach to the data's existence. Following the ICIJ's publication, some jurisdictions sought information for the first time, others pushed harder to get a full picture of the data or to obtain supporting information, and still others undertook investigations of their own governments to determine why the matter had not been meaningfully pursued to date.

The role played by media organization in widely disseminating the leaked HSBC data reveals the interplay between a tax or finance authority's calculus on enforcement decisions and the influential power of media actors such as the ICIJ. The ICIJ's intervention in this case certainly increased the salience and impact of the leaked data and served as a wake-up call to some countries, particularly given the weight of public opinion. But it is worth noting that ICIJ intervened on its own terms and timetable.

Moreover, the ICIJ's publication created a risk to some governments (for example, those that had not acquired the data or acted on it) of being perceived as incompetent or disinterested in punishing offshore offenders. While this might certainly have been true in some cases, government action in other cases (such as the United Kingdom) may have been stalled for legal or pragmatic reasons.²⁷⁸

The uneven transmission of information across jurisdictions in the HSBC case shows that the effects of a data leak will likely be messy, costly and different for different countries. Leaked data may yield clear and distinct benefits for some countries. However, just because one country can harness leaked data in a relatively costless manner does not mean that other countries

278. See *supra* notes 267–268 and accompanying text.

will be able to do so. Some jurisdictions will have to incur larger costs to obtain, verify, and effectively use the data. Others will incur costs due to time lags, declines in public confidence, or legal or political constraints on their ability to use the data. These costs may be exacerbated by the very public and salient character of data leaks. In summary, highly salient leaked data's bumpy transmission pathway means that additional costs and distortions may be incurred in the lengthy process of turning leaks into government action.

C. Leak-Driven Laws

As discussed in Part II, a benefit of leaks is that they may provide an impetus for desirable legal change. Conversely, though, a downside of leaks is that they may trigger reactionary responses by governments and other actors. We explore these dynamics in the context of the United States's enactment of the 2008 FATCA legislation and other related offshore tax enforcement provisions in the aftermath of the UBS and LGT tax leaks.²⁷⁹

1. U.S. Offshore Enforcement Responses to the UBS and LGT Leaks

As discussed in Part I, the UBS and LGT leaks focused the world's attention on high-net-worth American taxpayers who stashed assets offshore in Swiss bank accounts to avoid paying taxes.²⁸⁰ The United States responded by investigating and prosecuting the tax evaders and facilitators identified in the leak and by sanctioning UBS Bank, requiring it to enter into a deferred prosecution agreement under which it agreed to pay \$780 million to the United States.²⁸¹

But the United States also went further: The DOJ prosecuted a few Swiss banks and entered into deferred and nonprosecution agreements with others through the "Swiss Bank Program," waiving actual prosecution in exchange for certain concessions.²⁸² It also used the information extracted from these Swiss banks and from UBS clients identified in the leak to obtain more

279. 26 U.S.C. §§ 1471–1474 (2012). *See generally* Oei, *supra* note 2 (discussing U.S. offshore tax enforcement initiatives).

280. *See supra* Subpart I.B.1.

281. *See supra* Subpart I.B.1; *see also* Deferred Prosecution Agreement, *supra* note 41.

282. *Swiss Bank Program*, U.S. DEP'T JUST., <https://www.justice.gov/tax/swiss-bank-program> [<https://perma.cc/L6BG-VZE9>] (last updated Feb. 6, 2017).

information about the holdings of other taxpayers with assets in other offshore banks.²⁸³

By publicizing these investigatory and punitive strategies, the United States also pressured over 100,000 taxpayers to come forward and voluntarily disclose their non-compliance through the IRS's Offshore Voluntary Disclosure Programs (OVDPs), which allow taxpayers to resolve their offshore tax issues and declare previously undeclared offshore assets. Taxpayers in OVDP pay a penalty and provide information regarding their offshore holdings and financial institutions, in exchange for the United States's agreement not to prosecute them.²⁸⁴ Through these OVDPs, the United States has collected over \$11.1 billion of unpaid taxes to date.²⁸⁵

The United States also developed new legislation and tightened up enforcement of existing laws requiring foreign-asset reporting in the aftermath of the UBS and LGT leaks. For example, it increased scrutiny of taxpayers who had failed to file the so-called FBAR or "Report of Foreign Bank and Financial Accounts" and broadened the reporting required of taxpayers holding interests in certain offshore entities.²⁸⁶ The capstone of the United States's offshore tax enforcement initiatives was the enactment of the wide-reaching "Foreign Account Tax Compliance Act" or FATCA legislation in 2010.²⁸⁷ FATCA requires foreign financial institutions to conduct due diligence to identify and report to the United States (either directly or via their domestic tax authorities) the identities and account holdings of U.S.

283. See *supra* notes 44, 234 and accompanying text.

284. *Offshore Voluntary Disclosure Program*, IRS, <https://www.irs.gov/individuals/international-taxpayers/offshore-voluntary-disclosure-program> [<https://perma.cc/282V-YWW9>] (last updated Aug. 3, 2017). In March 2018, the IRS announced that the program will end on September 28, 2018. IRS News Release IR-2018-52 (Mar. 13, 2018), <https://www.irs.gov/newsroom/irs-to-end-offshore-voluntary-disclosure-program-taxpayers-with-undisclosed-foreign-assets-urged-to-come-forward-now>

285. IRS News Release IR-2018-52, *supra* note 284. See also *Offshore Voluntary Compliance Efforts Top \$10 Billion; More Than 100,000 Taxpayers Come Back Into Compliance*, IRS (Oct. 21, 2016), <https://www.irs.gov/uac/newsroom/offshore-voluntary-compliance-efforts-top-10-billion-more-than-100000-taxpayers-come-back-into-compliance> [<https://perma.cc/9NFH-JCKQ>] (reporting that as of October 2016, the regular and streamlined OVDPs had brought in \$10 billion of unpaid taxes).

286. See, e.g., Laura Saunders, *IRS Gets Tougher on Offshore Tax Evaders*, WALL STREET J. (July 20, 2009, 11:59 PM), <http://www.wsj.com/articles/SB124804796387763807> ("[Post-UBS] [t]he IRS [was] using a once-obscure tax form called the Foreign Bank Account Report, or FBAR, to force taxpayers to provide information on income they earn or bank accounts they hold overseas."); see also Patrick J. McCormick, *OVDP or Streamlined: Choosing an Offshore Disclosure Program*, 83 TAX NOTES INT'L 141 (2016) (exploring a taxpayer's options for dealing with PFIC issues under the IRS's OVDPs).

287. 26 U.S.C. §§ 1471–1474 (2012).

taxpayers who hold assets with them; failure to comply with this due diligence yields an onerous withholding tax.²⁸⁸ FATCA also imposes reporting and disclosure requirements on individual U.S. taxpayers, requiring those with foreign financial assets over a certain de minimis threshold to file Form 8938 annually with their tax return to disclose the assets.²⁸⁹ These new reporting requirements for individual taxpayers are in addition to the long-required FBAR filing.

FATCA and the other U.S. offshore tax enforcement initiatives adopted in response to the UBS leak are complex, and describing all of their nuances is beyond the scope of this Article.²⁹⁰ The question, for our purposes, is whether these initiatives are a policy improvement, and whether there are ways in which they may be problematic.

There is no doubt that the United States's offshore tax enforcement initiatives have increased offshore revenues collected and improved offshore tax compliance more generally, doubling the number of FBAR reports filed, and bringing many taxpayers into compliance via the OVDPs.²⁹¹ Thus, from a pure revenue perspective, FATCA has had benefits. Yet FATCA remains a controversial law. Many have criticized its costs and collateral consequences, as well as those generated by the other offshore tax enforcement initiatives.²⁹²

288. *Id.* § 1471. The FATCA withholding tax applies to all withholdable payments to that FFI, not just those related to U.S. account holders. *Id.*

289. *Id.* § 6038. Individuals must report foreign financial assets on the relevant forms if the aggregate value of such assets exceeds \$50,000 on the last day of the taxable year or \$75,000 at any time during the taxable year (\$100,000 and \$150,000 for married filing jointly). 26 C.F.R. § 1.6038D-2(a)(1), (2) (2016). The thresholds are higher for U.S. taxpayers living overseas: \$200,000 on the last day of the taxable year or \$300,000 at any time during the taxable year, or \$400,000 and \$600,000 for married filing jointly). *Id.* § 1.6038D-2(a)(3), (4).

290. For a more extensive discussion of FATCA, see Blank & Mason, *supra* note 46; Christians, *supra* note 10; Mason, *supra* note 2; Morse, *supra* note 46; and Oei, *supra* note 2. See also Tracy A. Kaye, *Tax Transparency: A Tale of Two Countries*, 39 FORDHAM INT'L L.J. 1153 (2016), which compares U.S. and Luxembourg responses to international tax evasion and avoidance. The critique of FACTA in this Subpart III.C draws on concurrent work by one of us. See Oei, *supra* note 2.

291. See generally Michael S. Kirsch, *Revisiting the Tax Treatment of Citizens Abroad: Reconciling Principle and Practice*, 16 FLA. TAX REV. 117, 146–61 (2014).

292. For examples of critiques of the costs and collateral consequences from U.S. offshore tax enforcement efforts, see Allison Christians, *The Dubious Legal Pedigree of IGAs (and Why It Matters)*, 69 TAX NOTES INT'L 565 (2013); Christians, *supra* note 10; Allison Christians, *Putting the Reign Back in Sovereign*, 40 PEPP. L. REV. 1373, 1403 (2013); Oei, *supra* note 2; Kirsch, *supra* note 291, at 161–70; Lee A. Sheppard, *FATCA Is a Drone: What to Do About Compliance*, 64 TAX NOTES INT'L 10 (2011); Frederic Behrens, Comment, *Using a Sledgehammer to Crack a Nut: Why FATCA Will Not Stand*, 2013 WIS. L. REV. 205; Melissa A. Dizdarevic, Comment, *The FATCA Provisions of the HIRE Act: Boldly Going Where No Withholding Has Gone Before*, 79 FORDHAM L. REV. 2967, 2987 (2011); Allison

For example, in enacting FATCA, the United States may have failed to appropriately sort among differently situated taxpayers with offshore assets and may have also underestimated the costs to both the IRS and others of the new legislation.²⁹³

2. Ensnaring the Wrong Taxpayers

Commentators have noted that FATCA and the other offshore tax enforcement initiatives have affected not only tax evaders who willfully hid income and moved it offshore to evade taxes but also other taxpayers, including (1) Americans living abroad, (2) so-called “accidental Americans” who may have never lived in the United States, and (3) immigrants to the United States, including green card holders and foreign citizens working in the United States on long-term visas, who may have been unaware of their obligation to report and pay U.S. taxes on offshore assets.²⁹⁴

All of these latter populations are U.S. taxpayers subject to U.S. tax on their worldwide income and to the reporting requirements of FATCA. Many have or have had lives, livelihoods, and bank accounts abroad. To be sure, some may not have complied with all of their tax reporting obligations perhaps out of ignorance or carelessness, for example, by failing to pay tax on interest earned in foreign bank accounts. However, because these taxpayers have legitimate reasons for holding assets offshore other than tax evasion, one might argue that they may, as a whole, be less willful in their noncompliance than Americans who affirmatively choose to hide assets in tax havens to avoid paying taxes. Some of these taxpayer populations and their representatives have complained about the high costs and burdens of FATCA compliance imposed on them since 2010.²⁹⁵ Some tax scholars have also noted the

Christians & Arthur Cockfield, Submission to Finance Department on Implementation of FATCA in Canada (Mar. 10, 2014) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2407264 [<https://perma.cc/WKR9-9YQJ>]; and Arthur J. Cockfield, FATCA and the Erosion of Canadian Taxpayer Privacy (Apr. 1, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2433198 [<https://perma.cc/M7BR-7G7X>].

293. Christians, *supra* note 10, at 209; Oei, *supra* note 2.

294. “Accidental Americans” refers to U.S. citizens who hold citizenship by birthright and are therefore subject to U.S. taxation, even if they have never lived in the United States. Christians, *supra* note 10, 193–94; *see also* Tessa Davis, *The Tax-Immigration Nexus*, 94 DENV. L. REV. 195, 244–46 (2017).

295. For example, the Democratic Party arm for Americans living abroad published in 2014 a research project documenting the hardships inflicted by FATCA on overseas Americans. DEMOCRATS ABROAD, FATCA: AFFECTING EVERYDAY AMERICANS EVERY DAY (2014),

potentially burdensome, unfair, or disproportionate impacts of FATCA reporting on those populations.²⁹⁶

An additional point that must be kept in mind is the potentially different behavioral elasticities of various groups. If the behaviors of willful taxpayers are elastic with respect to U.S. enforcement efforts (for example, if they find other ways to evade or simply stop holding foreign assets) then the burdens imposed by FATCA will ultimately not be borne by them. One might argue that this outcome is not problematic, because it means that FATCA has effectively deterred the willful offshoring of undeclared assets. A problem arises, however, if other taxpayer populations, including Americans living and working abroad and inbound immigrants with ties to other countries, are less able to readily divest themselves of their offshore holdings. If so, these taxpayers will be stuck with FATCA's onerous reporting requirements over the longer term.²⁹⁷ While FATCA's high costs may have effectively deterred willful evaders from holding offshore assets, it may have done so at the expense of onerous burdens on less culpable taxpayers whose holdings are less elastic.

The different impacts of FATCA and related provisions on heterogeneous taxpayer populations illustrate a possible downside of law driven by high salience tax leaks. In the dramatic aftermath of the UBS and LGT leaks, those responsible for punishing egregious and willful offshore tax offenses and formulating the new FATCA regime may not have adequately considered the collateral burdens on other populations. It is likely that the dominant issue of concern to tax authorities was the actions of those who willfully removed assets from the United States and hid them offshore. The

<https://www.finance.senate.gov/imo/media/doc/Att%202%20Democrats%20Abroad%202014%20FATCA%20Research%20Report1.pdf> [<https://perma.cc/6AXS-XPZR>]. The report was submitted to Congress, the IRS, and Treasury. Various nonprofit groups and other organizations representing the interests of Americans living abroad have also complained about FATCA's burdens. See, e.g., Joseph DiSciullo, *AICPA Seeks to End Duplicative Reporting for Americans Abroad*, 152 TAX NOTES 1237 (2016); *The Right Way to U.S. Tax Compliance*, AM. OVERSEAS, <https://americansoverseas.org/en/tax-liability> [<https://perma.cc/2M9F-XYDM>]; *Why FATCA Is Bad for America—Update*, AM. CITIZENS ABROAD, <https://www.americansabroad.org/why-fatca-is-bad-for-america-update> [<https://perma.cc/9FUS-6P42>].

296. See Christians, *supra* note 10 at 209; Davis, *supra* note 294, at 244–46; S. Bruce Hiran, *Overview of FATCA*, 152 TAX NOTES 1297, 1302–03 (2016); Mason, *supra* note 2, at 213–15; Oei, *supra* note 2.

297. FATCA requires reporting not just of foreign bank accounts but also life insurance policies with cash value, certain retirement accounts, mutual funds, foreign securities holdings, and other foreign financial assets. See 26 U.S.C. § 6038D(b) (2012); 26 C.F.R. § 1.6038D-3 (2016). U.S. taxpayers with ties abroad may be more likely to hold these types of assets for non-evasion reasons, and may have less capacity to easily divest. See Oei, *supra* note 2 at 142 (analyzing the elasticities).

collateral impacts of the legislation on those taxpayers with actual offshore lives may well have received insufficient attention in the immediate aftermath of the leaks.

3. FATCA's High Costs

Commentators have also pointed out that the costs to foreign financial institutions, foreign governments, and taxpayers of complying with FATCA's reporting requirements are high, and they may be higher than the roughly \$8.7 billion in revenue that FATCA was projected to raise over ten years.²⁹⁸ FATCA was not subject to a formal cost-benefit analysis upon enactment, and the precise costs are hard to pin down. However, some observers have ventured estimates. In terms of costs to financial institutions, one estimate suggests that costs are perhaps up to \$100 million per bank for major banks and could offset the revenue that FATCA is projected to raise.²⁹⁹ Other estimates are more modest.³⁰⁰ The compliance costs to individual taxpayers and the data-processing and enforcement costs to the United States must be factored in as well.³⁰¹ Once all of these costs have been included, it seems

298. JOINT COMM. ON TAXATION, ESTIMATED REVENUE EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN SENATE AMENDMENT 3310, THE "HIRING INCENTIVES TO RESTORE EMPLOYMENT ACT," UNDER CONSIDERATION BY THE SENATE: FISCAL YEARS 2010–2020, at 1 (2010), <https://www.jct.gov/publications.html?func=startdown&id=3649> [<https://perma.cc/Y25T-R838>]; see also Reuven S. Avi-Yonah & Gil Savir, *Find It and Tax It: From TIEAs to IGAs* (U. of Mich. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 443, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567646 [<https://perma.cc/BLV9-QE9V>] (explaining how costs of FATCA could outweigh revenues collected); see also Christians, *supra* note 10, at 208 n.61; Hiran, *supra* note 296, at 1297–1301. Many of FATCA's compliance costs do not necessarily yield addition revenue but are simply to do with asset reporting. See *id.*

299. See Avi-Yonah & Savir, *supra* note 298, at 7; Robert W. Wood, *FATCA Carries Fat Price Tag*, FORBES (Nov. 30, 2011, 6:12 AM), <http://www.forbes.com/sites/robertwood/2011/11/30/fatca-carries-fat-price-tag> [<https://perma.cc/JJ9C-FJN5>]; *US Tax Evasion Law 'Could Cost Big Banks \$100 Mln'*, REUTERS (Nov. 18, 2011, 7:46 AM), <http://www.reuters.com/article/usa-tax/us-tax-evasion-law-could-cost-big-banks-100-mln-idUSL5E7MI2DX20111118> [<https://perma.cc/KXZ8-43FF>].

300. A survey of senior executives showed that 40 percent of survey respondents planned to spend \$100,000 to \$1 million on FATCA compliance, and only 4 percent planned on spending between \$10 and \$20 million. *FATCA and CRS: How Ready Are You?*, THOMSON REUTERS, <https://tax.thomsonreuters.com/wp-content/pdf/onesource/fatca-crs-readiness-survey.pdf> [<https://perma.cc/QC4R-4VY7>].

301. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-484, FOREIGN ACCOUNT REPORTING REQUIREMENTS: IRS NEEDS TO FURTHER DEVELOP RISK, COMPLIANCE, AND COST PLANS 14 (2012), <http://www.gao.gov/assets/600/590142.pdf> [<https://perma.cc/U4T7-26K9>].

plausible that even if the revenues collected by FATCA outweigh its costs, the externalized costs of the legislation on various parties are quite high.³⁰²

Aggregate compliance costs aside, there are also questions about the distribution of costs and compliance burdens. Cost distribution has been an issue, for example, with respect to the OVDs. The National Taxpayer Advocate has noted that the 2009 and 2011 OVDs resulted in problematically regressive outcomes. Taxpayers with lower values of undeclared offshore assets and those who were not represented by counsel paid disproportionately large penalties compared to those with higher value accounts and/or advisors representing them in the OVD process.³⁰³

It remains to be seen which populations will ultimately bear the cost of FATCA compliance. For purposes of our discussion, it is sufficient to observe that the high costs of FATCA and the potentially problematic distribution of those costs may have paled in their salience as compared to the perception that there were egregious tax abuses that needed to be tackled. Thus, there may have been insufficient attention paid to the potentially high externalized costs of the legislation.

4. Proliferation of Flaws

Any potentially negative effects of FATCA will likely not be confined to the United States. The U.S. adoption of FATCA has led other countries to adopt FATCA-like laws as well, known as “mini-FATCAs.”³⁰⁴ Additionally, various countries, coordinating under OECD auspices, have agreed on a “Common Reporting Standard” that will require information

302. See 1 NAT'L TAXPAYER ADVOCATE, 2013 ANNUAL REPORT TO CONGRESS 243 (2013) (“By most measures, FATCA-related costs equal or exceed projected FATCA revenue.” (emphasis omitted)); see also Amanda Athanasiou, *FATCA: Swatting Flies With Atom Bombs*, 147 TAX NOTES 50, 51–52 (2015) (discussing large compliance costs to taxpayers); *Tax Evasion: Dropping the Bomb*, ECONOMIST (June 29, 2014), <http://www.economist.com/news/finance-and-economics/21605911-americas-fierce-campaign-against-tax-cheats-doing-more-harm-good-dropping> [<https://perma.cc/M9DN-3FHV>] (“America’s fierce campaign against tax cheats is doing more harm than good.”).

303. NAT'L TAXPAYER ADVOCATE, *supra* note 302, at 228–29 (noting that for taxpayers in the 2009 OVD, those with the smallest accounts paid offshore penalties six times the median unpaid tax (eight times for unrepresented taxpayers), but for those with largest accounts it was only three times); see also 1 NAT'L TAXPAYER ADVOCATE, 2014 ANNUAL REPORT TO CONGRESS 86–91 (2014) (including similar observations).

304. Blank & Mason, *supra* note 46, at 1247 (discussing adoption of “FATCA-like” legislation in other countries); see also Grinberg, *supra* note 46, at 364 (discussing emerging multilateral approaches).

exchange.³⁰⁵ Both the mini-FATCAs and CRS draw upon elements of FATCA in terms of design. Thus, it is likely that FATCA's flaws could be replicated internationally. This suggests that even more care needs to be exercised to understand the costs, benefits, and consequences of this major piece of legislation.

In summary, leaks may be credited with providing the impetus for the groundbreaking FATCA legislation. By creating such political impetus, leaks may have yielded distributional gains by exposing the tax evasion strategies employed by high-net-worth taxpayers and holding such taxpayers accountable. Yet, the high salience of the leaks and the egregious behaviors exposed may have simultaneously diverted attention away from the potential costs and pitfalls of FATCA, including the risks of ensnaring less willful populations, imposing high costs on various actors, and imposing such costs on persons not in the original target population.

We do not claim that FATCA and the other U.S. enforcement initiatives embraced after the UBS and LGT leaks should not have been implemented. What is clear, though, is that these measures are imperfect and controversial. While FATCA may be an example of the enforcement gains that can follow from a leak, it may also illustrate the hazards and downsides associated with swift and reactionary government responses to leaked data.

IV. LAW AFTER THE LEAK

Reliance on data leaks to make tax law and enforcement decisions carries distinctive risks. While the benefits and upsides of leaked data may outweigh these risks, it is nonetheless important to appreciate the downside hazards of reliance on leaked data, in order to avoid obvious pitfalls and make better policy decisions. This Part offers suggestions for managing these hazards and flags four open questions concerning the future of leak-driven lawmaking.

A. Suggestions for Managing Leak-Driven Lawmaking

How should governments and tax authorities guard against the downsides of leak-driven lawmaking and navigate its hazards? There are no

305. See OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL ACCOUNT INFORMATION IN TAX MATTERS (2014), http://www.oecd-ilibrary.org/taxation/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters_9789264216525-en [<https://perma.cc/KTA6-33D5>].

simple answers, but the following suggestions may point governments in the right direction.

1. Sophisticated Consumption of Leaked Data

At the most basic level, governments and tax authorities should become more sophisticated consumers of leaked data. This may seem obvious, but it requires a fundamental change in mindset: Rather than assuming that leaked data is simply a free audit or free information that lowers enforcement costs, tax authorities must be cognizant of the hidden risks inherent in using such data. Governments should verify leaked data's authenticity, understand how it has been curated and sorted, understand the motivations underlying the leak, and analyze the opportunity costs of responding to the particular data cache or issue highlighted by the leak.

Understand the Sources. Governments and tax authorities should become more informed about the motivations of the agenda setters behind a given leak and be more attuned to the politics and machinations behind the data's dissemination. As discussed, leakers and media platforms may have individual agendas that extend beyond optimizing tax enforcement, and they certainly have the ability to select, frame, and time data releases, thereby generating agency costs for policymakers seeking to use the data.³⁰⁶

Some actors in the dissemination of leaks may be repeat players: the ICIJ, The Guardian, and Süddeutsche Zeitung, for example. To the extent they are not already doing so, tax policymakers should familiarize themselves with the agendas and policy orientations of these actors, including how these agendas may have shifted, so that information or reporting that comes from these sources can be quickly parsed, evaluated, and used on a fast-track basis.

Anticipate Potential Falsity. Just because current releases of data have produced information that is widely viewed as accurate is no guarantee that future releases will also be accurate. It is entirely possible for wholly or partially false data to be disseminated to advance underlying goals. For example, leaked data may be falsified in the hope of creating short-term political or economic impacts.³⁰⁷

The use of tax leaks in the 2017 French presidential election offers a window into how powerful the strategic misuse of tax leaks could be. During the May 2017 French presidential election, documents were

306. See *supra* Subpart III.A.

307. See, e.g., *infra* note 308.

anonymously posted on the internet that purported to show that eventual winner Emmanuel Macron had a Bahamas bank account. Opponent Marine Le Pen then hinted during an election debate at the possibility that Macron had such an offshore bank account. Macron countered that the claim was defamatory and false, and lodged a complaint with the French prosecutor's office.³⁰⁸ In the immediate aftermath, France's electoral commission warned the press and internet users that publishing or reposting the documents carried the risk of criminal prosecution,³⁰⁹ and French prosecutors opened an investigation into the suspected attempt to smear Macron's name.³¹⁰

To be sure, the purported leak of the Macron documents did not cost Macron the election, and to the best of our knowledge, none of the other tax leaks that have occurred to date have consisted of data that was outright falsified. However, the Macron leak story highlights the importance of anticipating future leaks that might be deliberately misleading or might not be wholly accurate.

Anticipate Publicity. Governments should be aware that even if they initially receive leaked data exclusively, that is, data not yet posted on ICIJ or WikiLeaks, there is a non-trivial chance that such data will eventually find its way into the public domain. Thus, government responses to exclusively held data cannot be sloppy. As the HSBC/Loretta Lynch episode demonstrates,

308. See Jon Henley, *Emmanuel Macron Files Complaint Over Le Pen Debate 'Defamation'*, GUARDIAN (May 4, 2017, 1:51 PM), <https://www.theguardian.com/world/2017/may/04/emmanuel-macron-files-complaint-over-marine-le-pen-debate-remark> [<https://perma.cc/CRV9-J5JS>]; Sam Meredith, *France's Macron Takes Legal Action Over Le Pen 'Defamation' Debate Days Before Election*, CNBC (May 5, 2017, 4:24 AM), <http://www.cnbc.com/2017/05/05/macron-le-pen-france-election-debate-fake-news-legal-action-bank-bahamas.html> [<https://perma.cc/MX62-DARF>]. Macron and his campaign subsequently outlined the spread of this assertion on various internet sites and argued that some of them were connected to "Russian interests." Henley, *supra*; Meredith, *supra*.

309. Kim Willsher, *French Media Warned Not to Publish Emmanuel Macron Leaks*, GUARDIAN (May 6, 2017, 1:20 PM), <https://www.theguardian.com/world/2017/may/06/french-warned-not-to-publish-emmanuel-macron-leaks> [<https://perma.cc/Z2MA-BG4U>]; see also *Suites de L'attaque Informatique Qu'a Subie L'Équipe de Campagne de M. Macron* [Following the Computer Attack on Macron's Campaign Team], COMMISSION NATIONALE DE CONTRÔLE DE LA CAMPAGNE ÉLECTORALE EN VUE DE L'ÉLECTION PRÉSIDENTIELLE [NAT'L COMM'N CONTROL ELECTORAL CAMPAIGN PRESIDENTIAL ELECTION] (May 6, 2017), <http://www.cnccep.fr/communiqués/cp15.html> [<https://perma.cc/92AY-S2VF>] (calling on press and internet users to refrain from reposting or disseminating this leaked information).

310. Matthew Dalton, *French Open Probe Into Suspected Attempt to Tar Emmanuel Macron*, WALL ST. J. (May 4, 2017, 4:56 PM), <https://www.wsj.com/articles/french-open-probe-into-suspected-attempt-to-tar-emmanuel-macron-1493915360> [<https://perma.cc/PGE9-A8V2>].

slow or insufficient government responses will usually come to public notice in due course and are likely to have political consequences.³¹¹

2. Keeping Responses Rational

It is possible that publicly posted leaked data will create significant outrage and pressures for governments to take certain enforcement actions, which may result in populist or overreactionary policies.³¹² The legal and enforcement changes that occur in response to leaks may be socially and economically beneficial, but this is not guaranteed.

We therefore recommend that tax authorities carefully evaluate the impacts of any laws and enforcement policies they embrace in response to a tax leak. As noted, leaks may be motivated by agendas unrelated to a desire to optimize tax enforcement, such as normative commitments to transparency, perceptions of unfairness, or revenge. In addition, public outrage and populist sentiments generated by a leak may drive lawmakers to embrace socially costly policies. Fully analyzing the potential costs and downsides *ex ante* may prove an antidote to such unintended social costs. Some concrete safeguards a tax authority could adopt include: (1) conducting detailed analysis of the policy's collateral effects, including whether it will in fact catch the intended targets and who is likely to be hurt beyond the originally intended targets; (2) analyzing whether a given policy that makes expressive political sense is likely to achieve the stated goals; and (3) thinking through possible less costly or less invasive alternatives.

Because the conduct that is revealed by a leak may be more salient to tax authorities than the costs, impacts, or collateral consequences of a post-leak policy change, more comprehensive clarification of goals and analysis of impacts before passing laws may serve to check reactionary leak-driven lawmaking.

311. For discussion of a Canadian example of bureaucracy impeding effective use of whistleblower data in the tax leaks context, see William Hoke, *Whistleblower's Attempts to Aid Canadian Authorities Ignored*, 84 TAX NOTES INT'L 360 (2016).

312. Again, this risk is of a different magnitude than that encountered in the case of traditional information tips. Highly public and curated leaks can garner widespread, even global, support for specific responses, actions and reforms in a way that is less likely with discrete tips to government.

3. A Commitment to First Enforcement Principles

Tax authorities should also ensure that leaked data does not overwhelm broader enforcement agendas or principles. Due to the risks of agenda capture and heightened salience that we have flagged in this Article, leaks may drive government to deviate from pre-existing enforcement priorities and areas of focus that have been carefully developed and to reallocate scarce resources to high-salience areas illuminated by the leak. We urge, however, that tax authorities continue to independently assess their enforcement goals, paying attention to non-leak issues and not hyperfocusing on what has been leaked. This will ensure that sunshine in one place does not cast larger shadows in others.

To the extent that tax authorities have a pre-existing, well-reasoned enforcement approach to revenue collection, they should not be so quick to abandon those priorities. Tax policymakers should regularly revisit whether their overall enforcement agenda remains on track, notwithstanding the effects of high-salience leaks.

B. The Road Ahead: Four Open Questions

This Article's analysis is based on the tax data leaks and responses that have occurred so far. The landscape may change over time as the world becomes more familiar with data leaks. Here, we pose four open questions concerning how leak-driven lawmaking may unfold in the future.

1. Entrenchment vs. Upheaval

An important open question is whether later-occurring data leaks will have different impacts from earlier ones. Once a significant leak or cluster of leaks has occurred exposing a particular tax abuse, it is possible that the legislative or enforcement responses of a country or the EU will become entrenched and that subsequent leaks will generate fewer systemic changes in law and policy, though they may continue to affect individual taxpayers. Thus, later leaks may have less resonance than earlier ones due to entrenchment and path dependence. This may in turn impact the willingness of leakers to leak.

For example, leaks about secret offshore accounts have led to convulsive changes such as FATCA and the Common Reporting Standard.³¹³ It is unclear whether subsequent leaks of offshore accountholder data will have comparable impacts on legislation, or whether they will simply lead to sanctions against discrete individuals.

The degree to which later-occurring leaks continue to trigger dramatic legal change remains to be seen. The impact of a tax leak is unlikely ever to be zero, but if leaks do have less systematic impacts going forward, this will likely affect the decision of leakers, media platforms, and other actors.

2. Transparency vs. Privacy

Another open question is how the debate over transparency and privacy will play out and what this might mean for leaks going forward.³¹⁴ After a long period of tax privacy, there has been a recent push in international tax towards transparency and exchange of information to facilitate enforcement and compliance, with respect to both individuals and multinationals.³¹⁵ The push to transparency has not stopped at disclosure to governments. Controversially, some have argued that asset and tax return information should be transparent to the public.³¹⁶ However, there are risks to transparency, including concerns about privacy, cybersecurity, data and identity theft, fraud, and hacking.

The increase in transparency mechanisms has prompted concern by both individual and business taxpayers. For example, multinationals have actively raised confidentiality concerns in response to the CbC reporting embraced by the OECD³¹⁷ and its Base Erosion and Profit Shifting (BEPS)

313. See *supra* notes 3–5, 305.

314. See generally Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 EMORY L.J. 265 (2011) (examining effects of publication of tax return information); Joshua D. Blank, *Reconsidering Corporate Tax Privacy*, 11 N.Y.U. J.L. & BUS. 31 (2014) (offering guidelines for making corporate tax return information public); Joshua D. Blank, *The Timing of Tax Transparency*, 90 S. CAL. L. REV. 449 (2017) (advocating increased transparency for documents reflecting “ex ante tax administration” determinations by the IRS); Allison Christians, *How Nations Share*, 87 IND. L.J. 1407 (2012) (discussing role of taxpayer privacy in international tax).

315. William Hoke, *The Year in Review: Demands for Greater Tax Transparency Escalate in 2016*, 85 TAX NOTES INT’L 27 (2017) (noting developments in corporate and individual tax transparency).

316. *Id.*

317. OECD, *supra* note 192.

Project.³¹⁸ Moreover, as the EU has explored publication of CbC data and more public access to beneficial ownership registries, some taxpayers and jurisdictions have expressed disapproval.³¹⁹ In February 2016, the German Finance Ministry stated, despite criticism that Germany was not sufficiently engaged in combating tax evasion, that the country would not support such transparency measures.³²⁰ Instead, he noted Germany's concern for "personal and corporate privacy."³²¹ In contrast, the Swiss Federal Council announced in August 2015 its rejection of the "Yes to the protection of privacy" initiative that had received popular support.³²² The measure, promoted in 2013, would prevent third parties from sharing the tax data of individual and corporate taxpayers with the Swiss authorities in domestic tax contexts except in limited circumstances.

The future of tax transparency and privacy will not turn exclusively on the debates taking place within tax circles.³²³ Rather the tax debate will also be shaped by larger public conversations on transparency and privacy, and by leaks far beyond the tax world.³²⁴ Over the longer term, the questions will be whether we eventually reach an equilibrium between the dueling concerns of transparency and privacy, where that equilibrium will fall, and how stable it will be. If the equilibrium is more on the side of transparency, then leaks may become less relevant, because much information is already known.³²⁵

318. See, e.g., Letter from PWC, to OECD (Feb. 23, 2014) (arguing that the reporting template and obligations on tax authorities who receive data should be revised to better protect confidentiality).

319. See, e.g., Teri Sprackland, *MOF Defends Privacy Before Transparency Advocates*, 81 TAX NOTES INT'L 648 (2016).

320. *Id.* at 648.

321. *Id.*

322. Stephanie Soong Johnston, *Swiss Government Pushes to Scrap Popular Privacy Proposal*, WORLDWIDE TAX DAILY, Aug. 27, 2015.

323. For an example of debate within the tax field, see Teri Sprackland, *Privacy Concerns May Hinder Transparency Movement, Panelists Say*, TAX NOTES TODAY (Nov. 19, 2015), which discusses how "public demands for tax transparency have grown quickly in recent years" but also notes privacy rights may prove a constraint on implementation. For an example of a tax conference discussing taxpayer privacy in the transparency age, see 2015 Conference Materials: Washington, D.C., INT'L CONF. ON TAXPAYER RTS., <https://taxpayerrightsconference.com/2015-archive/2015-conference-materials> [<https://perma.cc/7N8T-R6EE>].

324. One commentator has questioned whether the trend toward tax transparency is "misguided," noting highly publicized non-tax data breaches including those by Edward Snowden and Chelsea Manning and the reality that "[w]e are living in a world where internal safeguards are easily undermined." Sprackland, *supra* note 323 (arguing that transferred data can be "exploit[ed] for political vendettas [or] other dangers").

325. See, e.g., Hugo Miller, *France Must Discourage Tax Data Theft, Macron Swiss MP Says*, BLOOMBERG (July 14, 2017, 6:22 AM), <https://www.bloomberg.com/news/articles/2017-07->

However, if the resting point tends towards privacy, then there may be a continued role for leaks as an enforcement tool for governments and as a behavioral control on taxpayers. The stability of the equilibrium point will also matter: If entrenchment impulses do not dominate, then any perceived equilibrium may be temporary and unstable, and it is possible that subsequent leaks may upset the equilibrium and once again lead to convulsive reform.

3. Monopolies vs. Competitive Markets for Leaked Data

A third open question is how markets for leaked data will change, and in particular whether they will trend towards information monopolies or become more competitive over time.

At present, there are two main pathways via which tax data is leaked: (1) directly to government authorities, and then subsequently to the public, or (2) through the ICIJ as media repository and disseminator (WikiLeaks functions as a distant second alternative). Thus, there is *some* market competition for leaked data, and there may be different reasons to choose one over the other. A leak to a government may yield a monetary reward (such as that available under the U.S. whistleblower law), asylum for the leaker (such as what the HSBC whistleblower extracted from France), or a more tangible pathway towards enforcement action by that government.³²⁶ A leak to the ICIJ may have a wider global impact, lead to swifter action, and create more pressure on multiple governments to act. Thus, it is possible that each pathway will yield systematic differences in the selection, transmission, reception, and thus the ultimate effects of the leak.

Looking forward, we must ask how market factors will affect the provision, transmission, and use of leaked data. One possibility is that markets may create competing alternatives to the two dominant existing pathways. For example, members of the European Parliament established a competing “EUleaks” website to allow whistleblowers another platform for submitting leaked information securely.³²⁷ Part of the impetus for EUleaks

14/france-must-discourage-bank-data-theft-macron-s-swiss-man-says

[<https://perma.cc/7GB8-ACVU>] (“France should discourage the theft of banking data on its own citizens who have kept money abroad and instead foster better legal exchanges of information with its neighbors, says . . . French Parliamentarian [Joachim Son-Forget].”).

326. See generally *supra* Subparts I.B, I.C (discussing notable characteristics of various leaks).

327. See Teri Sprackland, *European Parliament Group Sets Up Secure ‘EUleaks’ Website*, 84 TAX NOTES INT’L 27, 27 (2016); Nicholas Shaxson, *EU Leaks—A New Platform for Whistleblowers*, TAX JUST. NETWORK (Sept. 28, 2016), <https://www.taxjustice.net/2016/09/28/eu-leaks-new-platform-whistleblowers> [<https://perma.cc/LJE6-7CLD>].

and other platforms like it may be a desire to more effectively control data leaks rather than relying on WikiLeaks or ICIJ. Of course, it is also possible that markets for leaked data might disintegrate, either because heightened transparency has rendered leaks unnecessary, or because attempts at shutting down existing or potential pathways for leaks have been successful.³²⁸ On balance, though, it seems unlikely that the market for leaked data will disappear. It is worth noting that more news outlets are now actively soliciting leakers and whistleblowers through encrypted online submission systems and other avenues, such as SecureDrop.³²⁹ Though not tax specific, these invitations to leak may provide additional disclosure avenues for tax leakers and increase competition for leaked tax data.

Another possible market development is that each existing pathway will develop distinct and enhanced bundles of incentives to attract leakers to choose one over the other. For example, increased whistleblower rewards, government-sanctioned purchases of data, and government guarantees of criminal amnesty for the leaker may compete with carrots offered by media organizations, such as agreements to preserve anonymity more strongly, to disseminate data more widely, or to act more quickly.

How markets for leaked data change going forward—and in particular, whether they develop more competitive elements or whether a few key players continue to monopolize the release, transmission, and packaging of leaked data—will help determine the ultimate winners and losers of a data leak, the extent of continued leaks, and the ultimate impacts of leaks. It is possible, though certainly not assured, that the availability of multiple transmission pathways may create incentives for media organizations and governments to act swiftly

328. See, e.g., Miller, *supra* note 325 (discussing French MP's representation of French expatriates in Switzerland, expressing preference for legal information exchanges as opposed to data thefts).

329. SECUREDROP, <https://securedrop.org> [<https://perma.cc/D6EC-7V5S>] (describing itself as an “open-source whistleblower submission system that media organizations can use to securely accept documents from and communicate with anonymous sources”); see GLOBALEAKS, <https://www.globaleaks.org> [<https://perma.cc/PTQ7-K6H5>] (describing itself similarly); see also Philip Bump, *Here's How to Leak Government Documents to The Post*, WASH. POST (Jan. 25, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/01/25/heres-how-to-leak-government-documents-to-the-post> [<https://perma.cc/4YWP-LFA8>] (soliciting leaks via SecureDrop); Matthew Keys, *New York Times to Whistleblowers: Please Leak to Us*, THEBLOT MAG. (Jan. 30, 2015), <https://www.theblot.com/new-york-times-to-whistleblowers-please-leak-to-us-7734112> [<https://perma.cc/T25H-GK47>]; *How to Leak to ProPublica*, PROPUBLICA (Jan. 25, 2017, 5:47 PM), <https://www.propublica.org/article/how-to-leak-to-propublica> [<https://perma.cc/6ZXS-H92B>]; *To Federal Employees: If You See Something, Leak Something*, POPULAR RESISTANCE (Jan. 14, 2017), <https://popularresistance.org/to-federal-employees-if-you-see-something-leak-something> [<https://perma.cc/E8W8-C8NJ>].

and reduce time lags or provide more comprehensive data to the public. Policymakers might consider how to improve the design of existing markets for leaked data, in order to increase the probability that a leak will ultimately produce positive results.

4. Other Unanticipated Future Shifts

Finally, it bears emphasizing that tax leaks and their effects are not static. Even assuming that tax leaks as currently constituted are on the whole useful and beneficial from a tax policy and enforcement perspective, there is no guarantee that this outcome will persist. As technology, privacy, and data leaks evolve, it is entirely possible that data leaks may develop in different directions.

For example, future information brokers and intermediaries may have less established professional integrity than current intermediaries, or they may develop non-tax motives that are at odds with tax governance. Data provided may not always be as accurate or as unadulterated as current caches.³³⁰ Government actors may figure out different ways to spin or otherwise abuse leaked data to advance non-tax agendas (for example, by discrediting or persecuting political opponents).³³¹ Conversely, government actors may attempt to suppress leaks that some might otherwise find socially beneficial, for example, by prosecuting and investigating leakers.³³²

In short, any analysis of the effects of tax leaks must account for the possibility of future shifts. Developments in non-tax arenas have clearly illustrated the different directions in which data leaks can go. Tax scholars and policymakers should be attentive to these non-tax developments and how they can inform internal conversations in the tax field about data leaks.

330. In non-tax arenas, for example, others have alluded to the possibility that leaked data might have been doctored or modified. See, e.g., Carroll, *supra* note 179; Gibney, *supra* note 179.

331. See, e.g., *supra* note 308–310 and accompanying discussion (discussing the unfolding of the Macron tax leak during the French presidential election campaign).

332. See Charlie Savage & Eric Lichtblau, *Trump Directs Justice Department to Investigate 'Criminal Leaks'*, N.Y. TIMES (Feb. 16, 2017), <https://www.nytimes.com/2017/02/16/us/politics/justice-department-leak-investigation-trump.html>; Michael D. Shear, *After Election, Trump's Professed Love for Leaks Quickly Faded*, N.Y. TIMES (Feb. 15, 2017), <https://www.nytimes.com/2017/02/15/us/politics/leaks-donald-trump.html>.

CONCLUSION

Conventional wisdom has it that leaks are socially beneficial in the battle against cross-border tax evasion by individuals and abusive tax structuring by multinationals. This Article has shown, for the first time in the legal literature, that the conventional wisdom is too simplistic.

By providing tax authorities with information about tax evasion and abusive structuring, data leaks can serve an important function in cross-border tax law and policymaking and may well lead to positive enforcement outcomes. They can highlight disparities between different populations of taxpayers, force governments to confront rules and practices historically favorable to elites, help ferret out corruption and evasion by public officials and the wealthy, discourage tax evasion, and create political impetus for new laws and enforcement actions. But leaks also come with distinctive risks. They may allow leakers, hackers, media organizations, and other interests significant control over government enforcement agendas. And the high salience of leaked data may lead to less than rational responses by both governments and the public.

It is time for the scholarly conversation about tax and other leaks to advance beyond its current state. The question is not simply how governments can use information from leaks to sanction bad behavior, make decisions, and design laws. Rather, the question is how the actions and responses of leakers, private citizens, governments, and the media work together to create and promote certain policy outcomes, and how those outcomes should be evaluated, supported, or resisted.