Leak-Driven Law

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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. In addition to its clear benefits, leak-driven lawmaking carries distinctive risks, including the risk of agenda setting by third parties with specific interests and the risk associated with leaks’ capacity to trigger non-rational responses. Even where leak-driven lawmaking is beneficial overall, it is important to appreciate its distinctive downside risks, in order to best design policy responses.

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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# TABLE OF CONTENTS

INTRODUCTION .............................................................................................................4

I. THE EMERGENCE OF TAX LEAKS .................................................................9
   A. Understanding the Emergence of Tax Leaks .............................................10
      1. Ease of Obtaining, Transferring, and Disseminating Data 10
      2. The Growing Significance of Cross-Border Transactions 11
   B. Seven Significant Leaks .............................................................................13
      1. The UBS and LGT Leaks 13
      2. The HSBC Suisse Leak (“SwissLeaks”) 16
      3. Julius Baer 18
      4. The British Havens Leak 20
      5. LuxLeaks 22
      6. The “Panama Papers” 25
      7. Bahamas 29
   C. Some Initial Observations ........................................................................30
      1. Types of Information Leaked 31
      2. Imperfections in the Leaked Information 31
      3. Different Transmission Pathways 33

II. THE BENEFITS AND RISKS OF TAX LEAKS ........................................34
   A. Cross-Border Tax Administration and Enforcement ..........................35
   B. The Benefits of Leaked Information .......................................................37
      1. Leaks as Free Information 37
      2. Highly Salient Leaks as an Impetus for Reform 38
      3. Leaked Data’s Distributional Gains 38
   C. The Distinctive Risks of Tax Leaks .........................................................39
      1. The Dangers of Agenda Capture 39
      2. The Downsides of Heightened Salience 40

III. LEAK-DRIVEN LAWMAKING IN THE REAL WORLD ..........................43
   A. Agenda Setters ......................................................................................43
      1. Media Organizations 44
      2. Leakers 48
      3. Secondary Users and Information Consumers 49
   B. The Messy Transmission of Leaked Data ............................................51
      1. France and the HSBC “Swissleaks” Episode 52
      2. The German Purchase 53
      3. France Shares Data: The U.S. Mess and the “Lagarde List” 54
      4. Enter the ICIJ 56
      5. Shifting Swiss Position 58
      6. Lessons from the HSBC Story 59
   C. Leak-Driven Laws ...............................................................................62
1. The UBS Leak and U.S. Offshore Enforcement Responses  62
2. Ensnaring the “Wrong” Taxpayers  65
3. FATCA’s High Costs  67
4. Proliferation of Flaws  68

IV. LAW, AFTER THE LEAK ...........................................................................69
   A. Suggestions for Optimal Leak-Driven Lawmaking ..........................69
      1. Sophisticated Consumption of Leaked Data  69
      2. Keeping Responses Rational  71
      3. A Commitment to First Enforcement Principles  73
   B. The Road Ahead: Three Open Questions.................................73
      1. Entrenchment vs. Upheaval  73
      2. Transparency vs. Privacy  74
      3. Monopolies vs. Competitive Markets for Leaked Data  76
      4. Other Unanticipated Future Shifts  77

CONCLUSION..........................................................................................79
INTRODUCTION

A steady drip of data leaks has begun to exert an extraordinary influence on how international tax laws and policies are made. 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. They 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 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.

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. The UBS leak led the U.S. to prosecute tax cheats and to develop voluntary disclosure programs to recoup revenue. It also prompted the enactment of the Foreign Account Tax Compliance Act of 2010 ("FATCA"), a major piece of legislation that increased disclosure

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1 International Consortium of Investigative Journalists, https://www.icij.org/ (last visited Jan. 11, 2017); see also Stuart Gibson, Drip, Drip, Drip..., 84 Tax Notes Int’l 115 (Oct. 10, 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."); Allison Christians, Lux Leaks: Revealing the Law, One Plain Brown Envelope at a Time, 76 Tax Notes Int’l 1123 (2014).


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.4

More recently, the so-called “Panama Papers” leak illuminated how the world’s wealthy use Panama and other haven jurisdictions to hide wealth offshore.5 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.6

The UBS and Panama Papers leaks are just two examples. Others include the LuxLeaks scandal, the British Havens and Bahamas leaks, and client data leaks concerning LGT, HSBC, and Julius Baer banks.7 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.8

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See infra Part I.B.

8 We do not claim that leaks are 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 U.S. See infra Part 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 Leaks Database Revealing Names Behind Secret Companies, Trusts, ICIJ (Jun. 14, 2013), https://www.icij.org/offshore/icij-releases-offshore-leaks-database-revealing-names-behind-secret-companies-trusts (quoting EU Commissioner as saying that “the ICIJ’s offshore leaks] investigation has transformed tax politics and amplified political will to tackle the problem of tax evasion” and that “[he] personally think[s] Offshore Leaks could be identified as the most significant trigger behind these developments”); Andrew Rettman,
Despite their prominence, the effects of data leaks on the actions of governments, taxpayers, and international organizations are not a well-studied phenomenon. 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. This dearth of analysis is also true of the broader legal literature. Recent convulsive political events have drawn generalized attention to the 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.

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

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See, e.g., Patricia L. Bellia, WikiLeaks and the Institutional Framework for National Security Disclosures, 121 YALE L.J. 1448 (2012); David E. Pozen, The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information, 127 HARV. L. REV. 512 (2013); Margaret B. Kwoka, Leaking and Legitimacy, 48 U.C. DAVIS L. REV. 1387 (2015). The existing non-tax literature on leaks largely deals with leaks and hacks of government information and is thus inapppropos 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., Murray Griffin, No More Tax Secrets as Authorities Share Panama Papers' Data, INT’L TAX MONITOR (Jan. 26, 2017) (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 (Jan. 4, 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 27 and 28.
economically beneficial. 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 non-rational 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 distinctive downsides, in order to best design policy responses.

This Article focuses on the effects of leaks on tax policy, but leaks are not purely a tax phenomenon. Developments in leaks, privacy, and transparency outside the tax world provide stark evidence of the potentially negative impact of leaked data on politics, market behavior, and policy outcomes, in addition to its benefits. It is naïve to think that these impacts could not occur in tax law and policymaking as well.

We first describe the current landscape of tax leaks and discuss their key characteristics and significance. We then investigate both 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”\(^\text{13}\) 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 exogenously generated and highly salient data leaks in detecting cross-border abuses and making tax policy.

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 according to their own goals, (2) inefficiencies in data transmission between and within countries (such as those occurring between the 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).\(^\text{14}\) While policymakers and commentators have largely assumed that leaks are a net positive in the global fight against offshore tax evasion, this Article shows, for the first time in the legal

\(^{13}\) Relatedly, information received from information-return matching has been characterized as “an invisible audit.” Leandra Lederman, Tax Compliance and the Reformed IRS, 51 KANSAS L. REV. 971, 975 (2003).

\(^{14}\) See infra Part III.
literature, that leaks also carry unnoticed risks. Furthermore, there are no
guarantees 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 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 in 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.

Part I describes seven significant tax leaks to date and summarizes their
key characteristics. Part II outlines the clear benefits, as well as the
significant risks, associated with leak-driven lawmaking. Part III discusses
three examples of the real-world risks and costs inherent in leak-driven
lawmaking. Finally, Part IV provides suggestions and cautions for
formulating laws and policies after a data leak in order to best tap into the
benefits of leaks while managing their pitfalls.

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, understanding the upsides and

15 See, e.g., John Herman, The Media’s Risky Love Affair with Leaks, THE NYT
MAGAZINE (Feb. 6, 2017), https://www.nytimes.com/2017/02/06/magazine/the-mediass
risky-love-affair-with-leaks.html; Justina Crabtree, The Tools Helping Facilitate Leaks
from Trump’s White House, CNBC (Feb. 9, 2017), http://www.cnbc.com/2017/02/09/the
tools-helping-facilitate-leaks-from-trumps-white-house.html.
downsides of leak-driven lawmaking has never been more crucial.

I. THE EMERGENCE OF TAX LEAKS

What is a leak? We define a leak of tax data broadly to mean a significant, unauthorized release of private taxpayer information that is done 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 usually describes activities pertaining to a highly 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 or an anonymous source who may or may not be a hacker. The leaker 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 becomes known to the public, either through the press or through high-profile government announcements or both.

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16 Until the Panama Papers episode, most previous tax leaks were by employees or former employees. See also generally, Dennis Ventry, Stitches for Snitches: Lawyers as Whistleblowers, 50 U.C. DAVIS L. REV. (forthcoming 2017) (considering whether lawyers may blow the whistle on their clients’ 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 Piergluigi Paganini, Panama Papers – How Hackers Breached the Mossack Fonseca Firm, INFOSEC INSTITUTE (Apr. 20, 2016), http://resources.infosecinstitute.com/panama-papers-how-hackers-breached-the-mossack-fonseca-firm/#gref.

17 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. 5 U.S.C. §§ 1201 et seq. (Federal Whistleblower Protection Act). Former assistant attorney general for the U.S. 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 Richman, Panama Papers Raise Publicity for U.S. Tax Enforcement Efforts, 82 TAX NOTES INT’L 461 (May 2, 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.
In this Part I, 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.18

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, begging the question of “why now?” An important reason is technology and the centralization of data repositories. These features make data easier to obtain, share, and disseminate to governments, the press, or the public. However, another key factor 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, data thieves and hackers to obtain tax-related data from banks, law firms, and other sources and to leak it. Needless to say, there is more potential for data theft and hacks when the data is available in electronic format that is easy to download and disseminate. Thus, with the reality of centralized computer- and “cloud-based” data storage, information can be taken more easily than before.

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.19 Ease of transferring data speaks not only to speed of transmission but also anonymity. Large quantities of data can be emailed, anonymously mailed, or dropped off on a CD or hard drive. This ease of transfer has been a game changer in enabling high-impact data leaks.

The advent of the internet has also made it easier to widely and swiftly disseminate leaked data to the public. As discussed in Part III, journalists,

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18 Some privacy and technology scholars have attempted to articulate a taxonomy of data leaks and hacks. See, e.g., Kwoka, supra note 9; Pozen, supra note 9. Those non-tax frameworks do not translate comfortably into tax, because tax leaks and data dumps largely pertain to private taxpayers, not government secrets.

19 See generally Kristen Eichensehr, Giving up on Cybersecurity, 64 UCLA L. REV. DISCOURSE 320 (2016).
NGOs, and other actors can now write commentary highlighting tax abuses, publicize identifying information about taxpayers, facilitators, and offshore entities, and bring pressure on public officials, simply through the internet.

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 whether 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 has also contributed to and helps explain the emergence of tax leaks.

From the 1980s onward, there was a notable growth in business expansion across borders. Several key factors contributed to this growth, including: (1) liberalization of currency and exchange controls in many countries; (2) liberalization of foreign direct investment and trade (for example, through tariff reductions, quota eliminations, and reduced restrictions on foreign direct investment); and (3) innovations that spurred...
and supported the knowledge-based economy (such as microprocessors, communications, biotech, lighter materials, and a shift to intellectual factors of production). 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 hybrids, structured transactions and other features—began to attract serious attention and resources within companies. On the other side, governments and tax authorities 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. International tax and international tax planning thus secured an increasingly high profile among not only multinationals, tax authorities, and tax advisors—but also among legislators and the public.

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Thus, the backdrop against which the tax leaks began to occur was 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.

B. Seven Significant Leaks

Since 2008, there have been at least seven significant leaks of tax data. We describe them here in roughly chronological order, noting their main impacts on international tax law and policy.

1. The UBS and LGT Leaks

Two whistleblower leaks in 2008 upended the landscape of United States offshore tax enforcement by revealing the secret foreign bank accounts of U.S. and other taxpayers that were used to hide assets offshore and evade taxes. One arose in Liechtenstein, when LGT, a leading bank, was found to have actively helped U.S. and other clients evade taxes by maintaining secret Liechtenstein bank accounts and using other structures to disguise asset transfers and hide beneficial ownership of Liechtenstein assets.\(^{26}\) The leak arose in 2008 when Heinrich Kieber, a former LGT subsidiary employee, stole confidential bank client data concerning 1,400 offshore clients and sold copies to foreign governments.\(^{27}\) In January 2008, following Germany’s purchase of the data and high profile tax investigations, the leak became widely known to the public.\(^{28}\) Other countries began investigating,\(^{29}\) and in February 2008, the U.S. announced that it, too, was pursuing more than 100 U.S. taxpayers in connection with

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The LGT leak led to the eventual signing of a Tax Information Exchange Agreement between the U.S. and Liechtenstein in December 2008, which entered into force on January 1, 2010. 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. Department of Justice (“DOJ”), the SEC, the IRS, and the U.S. Senate. For his troubles, Birkenfeld was arrested and charged by federal prosecutors on one count of conspiracy to defraud the U.S., to which he pled guilty and was sentenced to 40 months in prison. As a result of publicity surrounding the arrest, the leak became widely known to the public. Ironically, Birkenfeld was subsequently awarded a $104 million whistleblower award.

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.

The UBS and LGT leaks had significant consequences in the United

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32 Randall Jackson, Former UBS Banker Indicted in Tax Evasion Case, supra note 3; see also BRADLEY C. BIRKENFELD, LUCIFER’S BANKER: THE UNTOLD STORY OF HOW I DESTROYED SWISS BANK SECRECY (Greenleaf Book Group Press 2016).
33 David Stewart, Former UBS Banker Sentenced to 40 Months in Prison, 124 TAX NOTES 747 (Aug. 24, 2009); United States v. Birkenfeld, Case No. 08-60099-CR-ZLOCH (S.D. Fla.) (Motion for Sentence Reduction and Sentencing Memorandum (filed Aug. 18, 2009)).
States, leading to hearings before the U.S. Senate and the issuance of a Senate report about tax havens and offshore banks. With respect to UBS itself, the consequences were dramatic: On February 28, 2009, UBS entered into a deferred prosecution agreement (“DPA”) with the DOJ pursuant to which the bank agreed to pay $780 million to the U.S., including interest and penalties, and to surrender a small number of client names. Ultimately, through serving a John Doe summons and subsequent negotiations, the IRS and DOJ obtained approximately 4,000 names of Americans who had hidden assets using UBS accounts (far less than the 52,000 names it had originally sought). Using this data, the U.S. prosecuted tax offenders, pressured others into voluntarily reporting their offshore holdings in exchange for criminal amnesty, and developed a program to sanction Swiss banks by entering into deferred and non-prosecution agreements with offending banks.

Perhaps most significantly, the UBS and LGT leaks ultimately led to the

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38 Of this amount, $380 million represented disgorgement of profits. The remainder represented unpaid withholding taxes, interest, penalties, and restitution for unpaid taxes. See United States vs. UBS, AG, Deferred Prosecution Agreement, Case No. 09-60033-CRH-COHN (S.D. Fla. 2009), https://www.justice.gov/sites/default/files/tax/legacy/2009/02/19/UBS_Signed_Defered_Prosecution_Agreement.pdf.
39 Id. As of July 2017, UBS is set to stand trial in France for money laundering and tax fraud covering the period 2004-2012. 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 U.S. ($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 (Mar. 27, 2017).
41 See United States Department of Justice, Offshore Compliance Initiative, https://www.justice.gov/tax/offshore-compliance-initiative (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); Lynnley Browning, Wealthy Americans Under Scrutiny in UBS Case, NY Times (Jun. 6, 2008), http://www.nytimes.com/2008/06/06/business/worldbusiness/06tax.html; see also infra Part III.C.
enactment of the United States’ FATCA legislation of 2010. 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 OECD’s Common Reporting Standard (CRS) and automatic exchange of information project). These developments represented a sea change in cross-border transparency regarding American and other taxpayers’ foreign financial assets. As further discussed in Part III.C, FATCA now requires information reporting by both foreign financial institutions and U.S. taxpayers with foreign financial holdings.

2. The HSBC Suisse Leak (“SwissLeaks”)

The HSBC “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) (“HSBC Suisse”) obtained 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 EU taxes, and had allowed large cash withdrawals from accounts without inquiry.

Switzerland then requested that France extradite Falciani. France instead began to investigate the data. In March 2015, the French financial state prosecutor requested that parent company HSBC Holdings PLC be tried criminally on tax evasion charges, and in April 2015, HSBC filed an

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42 See supra note 4.
44 See infra Part III.C.
appeal to have the charges dropped.48 The French Appeals Court rejected HSBC’s appeal in February 2016.49 Most recently, French prosecutors have indicated that HSBC should stand trial on tax evasion charges.50

France also prosecuted some high-profile individuals, leading to an increase in voluntary disclosures of offshore accounts.51 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 of data theft and violating Swiss bank secrecy laws.52 He faces a five-year prison term if he ever returns to Switzerland.53

As examined more extensively in Part III.B, the HSBC 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.54 Many countries ultimately took action in one form or another against the tax evaders and the bank.55 Switzerland itself fined HSBC for money laundering but did not file tax

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48 Stephanie Soong Johnston, HSBC Loses Appeal in French Tax Evasion Probe, 81 TAX NOTES INT’L 486 (Feb. 8, 2016).
49 Id.
evasion charges, tax evasion not being a crime in Switzerland.\textsuperscript{56}

Although the HSBC leak occurred in 2008, its consequences continue to reverberate, albeit slowly. 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.\textsuperscript{57}

3. Julius Baer

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.\textsuperscript{58} Elmer had worked in Switzerland and later the Cayman Islands, where he was Chief Operating Officer of the bank’s Grand Cayman office at the time he was fired.\textsuperscript{59} 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 out of revenge.

Elmer reportedly tried to get prosecutors and tax authorities in various countries to pay attention to his data but failed.\textsuperscript{60} He then posted some of the data to WikiLeaks in 2008,\textsuperscript{61} and also gave data to German tax authorities.\textsuperscript{62} The WikiLeaks posting set off a battle between WikiLeaks and Julius Baer—the bank initially obtained an injunction requiring WikiLeaks to lock its domain name, but this was not effective in removing the data from the internet, so the injunction was reversed on appeal.\textsuperscript{63}

\textsuperscript{56} Teri Sprackland, \textit{Geneva Prosecutor Drops HSBC Case}, 78 \textsc{Tax Notes Int’l} 1014 (Jun. 15, 2015).
\textsuperscript{57} William Hoke, \textit{HSBC Receives Worldwide Requests after Panama Papers}, 83 \textsc{Tax Notes Int’l} 496 (Aug. 8, 2016).
\textsuperscript{58} William Hoke, \textit{Whistleblower Elmer Guilty of Violating Swiss Bank Secrecy Law}, 77 \textsc{Tax Notes Int’l} 324 (Jan. 26, 2015).
\textsuperscript{60} David Stewart, \textit{Julius Baer Whistleblower Ambivalent Towards Reward}, 54 \textsc{Tax Notes Int’l} 1014 (Jun. 28, 2010).
\textsuperscript{61} WikiLeaks, \url{https://wikileaks.org/wiki/Bank_Julius_Baer}.
\textsuperscript{62} See Stewart, supra note 60.
\textsuperscript{63} Bank Julius Baer & Co. v. WikiLeaks, Amended Temporary Restraining Order and Order to Show Cause re Preliminary Injunction, No. 3:08-cv-00824 (Feb. 15, 2008, N.D. Cal.); Bank Julius Baer & Co. v. WikiLeaks, Order Denying Motion for Preliminary Injunction; Dissolving Permanent Injunction; and Setting Briefing and Hearing Schedule, No. 3:08-cv-00824 (Feb. 29, 2008, N.D. Cal.); see also Philipp Gollner, \textit{Judge Reverses Ruling in Julius Baer Leak Case} (Feb. 29, 2008), \url{http://www.reuters.com/article/us-baer-}
With respect to the United States, the New York Times reported that Elmer had given the documents—pertaining 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. The ultimate effects of Elmer’s disclosures are unclear. What we do know is that on Feb 4, 2016, the DOJ entered into a DPA with Julius Baer requiring the bank to pay $547 million. It also secured the guilty pleas of two Julius Baer bankers.

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 handed a suspended fine of CHF 7,200 along with CHF 4,000 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 2,000 wealthy Swiss bank clients from three different banks. Elmer was rearrested (after returning home from the first trial) on charges that he had provided confidential information to WikiLeaks. However, Elmer subsequently testified in December 2014 that the CDs had no data on them. On Jan 19, 2015 Elmer was found guilty of delivering Baer’s confidential financial information to WikiLeaks and given a suspended fine of CHR 45,000. In 2016, a Zurich court found him guilty of forgery and threatening his former employer although not guilty of violating Swiss Bank Secrecy Laws (because he was an employee of Baer’s Cayman subsidiary). In short,

idUSN29274317200808229.

64 Browning, supra note 59.


66 Id.


70 Hoke, supra note 58; Browning, supra note 59.

Elmer suffered non-trivial 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 or later than these 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.72 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.73

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 2013.74 The ICIJ had obtained data via a hard drive a few years earlier,75 which contained more than 2.5

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72 Marie Sapirie, *WikiLeaks Obtains Swiss Bank Account Data*, 61 TAX NOTES INT’L 263 (Jan. 24, 2011) (“What's extraordinary about this is that the disclosure is going to be a public event," said [Scott Michel of Caplin & Drysdale]. "Up until now, there have been private bankers who have provided information to the IRS, and information has come through the voluntary disclosure program, but all of that has been conducted in a confidential environment.").


75 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
21-Jul-17] LEAK-DRIVEN LAW

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 Cook Islands.76 This data had come from the files of two offshore service providers: Singapore-based Portcullis TrustNet and British Virgin Islands-based Commonwealth Trust Ltd.77 The ICIJ then released a database containing information about the ownership of over 100,000 offshore tax haven entities and trusts.78

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.79 ICIJ allowed The Guardian to analyze the names of the clients, and The Guardian then published a series of news 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.80

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


76 Cockfield, supra note 9, at 484-85; Campbell, supra note 74.


78 Guevara, supra note 8.


5. LuxLeaks

The Luxembourg tax leak (or “LuxLeaks”) scandal also occurred due to an employee whistleblower.\footnote{Kimberley Porteus, Michael Hudson & Sasha Chavkin, Release of Offshore Records Draws Worldwide Response, ICJI (Dec. 4, 2014), https://www.icij.org/blog/2013/04/release-offshore-records-draws-worldwide-response; see also Authorities Announce Tax Haven Investigation, ICJI (May 9, 2013), https://www.icij.org/blog/2013/05/authorities-announce-tax-haven-investigation.} 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.\footnote{Teri Sprackland, Antoine Deltour – The LuxLeaks Whistleblower, 80 TAX NOTES INT’L 967 (Oct. 21, 2015).} The theft was first publicized by French journalist Edouard Perrin in a TV documentary aired in 2012.\footnote{Teri Sprackland, French Journalist Charged with Theft for Role in LuxLeaks, 78 TAX NOTES INT’L 351 (Apr. 27, 2015).} 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.\footnote{See Luxembourg Leaks: Global Companies’ Secrets Exposed, ICJI, https://www.icij.org/project/luxembourg-leaks. Raphael Halet, another PwC employee, stole a smaller cache of documents from PwC (16 corporate tax returns), which were obtained by Perrin. See Simon Marks, The Silent Man of LuxLeaks Fights Back, POLITICO (Dec. 7, 2016), http://www.politico.eu/article/silent-man-of-luxleaks-fights-back-raphael-halet; Marian, supra note 9, at 7.}

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.\footnote{Marian, supra note 9, at 7-8.} As a result of the leak, the European Commission focused its attention on the rulings practices of Luxembourg and other member states.\footnote{Combatting Corporate Tax Avoidance: Commission Presents Tax Transparency Package, EUROPEAN COMMISSION PRESS RELEASE (Mar. 18, 2015), http://europa.eu/rapid/press-release_IP-15-4610_en.htm. This council directive took effect in January 2016.} In October 2015, EU member
states unanimously agreed to automatically exchange information on cross-border tax rulings every six months.  Relatively, in June 2015, the European Commission launched a 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.  

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.  In their respective reports, the committees recommended heightened tax transparency, a common EU-wide corporate tax base, proportional financial liability for financial institutions that facilitate tax haven transactions, creation of a beneficial ownership register, and a proposed framework for whistleblower protection. In July 2015, the Members of the European Parliament voted in favor of a directive requiring

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92 EUROPEAN PARLIAMENT RESOLUTION OF 6 JULY 2016 ON TAX RULINGS AND OTHER MEASURES SIMILAR IN NATURE OR EFFECT, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0310+0+DOC+XML+V0//EN&language=EN. 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 Panama Papers as background).
CbC reporting of taxes paid.\textsuperscript{93} Two years later, in July 2017, the European Parliament adopted a position in favor of public CbC reporting for large corporations.\textsuperscript{94} The LuxLeaks scandal has been identified as a factor in creating support for the CbC requirements\textsuperscript{95} and inspiring the hope that transparency will lessen reliance on leaks for enforcement.\textsuperscript{96}

Substantive developments aside, the LuxLeaks scandal created consequences for specific taxpayers and other actors. The leak raised uncomfortable questions for Jean-Claude Juncker, the European Commission President, who was Luxembourg’s finance minister during the period the rulings were issued.\textsuperscript{97} 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, and accessing protected databases. And in January 2015, Raphael Halet, 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 ordered to pay fines of €1,500 and €1,000 respectively.\textsuperscript{98} Upon appeal, Deltour and Halet had their sentences reduced

\begin{itemize}
\item \textsuperscript{93} Sprackland, supra note 89.
\item \textsuperscript{94} See Elodie Lamer, \textit{EP Establishes Position on Public CbC Reporting}, 87 TAX NOTES INT’L 113 (Jul. 10, 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. \textit{Id.}
\item \textsuperscript{95} Stephanie Soong Johnston, \textit{EU Parliamentary Committee Backs CbC Reporting Measures}, 78 TAX NOTES INT’L 525 (May 11, 2015) (quoting a Jones-Day Brussels lawyer).
\item \textsuperscript{96} \textit{Parliament Committee Sets Tone for Europe’s Debate on Multinational Transparency}, TRANSPARENCY INTERNATIONAL PRESS RELEASE, Worldwide Tax Daily, 2015 WTD 89-20 (May 7, 2015), http://www.transparency.org/news/pressrelease/european_parliament_committee_sets_the_tone_for_europes_debate_on_multinat\textunderscore i (quoting Koen Roovers, Lead EU Advocate for the Financial Transparency Coalition: “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.”).
\item \textsuperscript{97} See, e.g., Teri Sprackland, \textit{Leaked Documents Show Juncker Obstructed EU Tax Reforms}, 85 TAX NOTES INT’L 137 (Jan. 9, 2017); Stuart Gibson, \textit{The Luxembourg Fox in the European Henhouse}, 85 TAX NOTES INT’L 123 (Jan. 9, 2017); Marian, supra note 9, at 8-9, 54 (despite defending its role, Luxembourg ultimately revised its rulings process).
\item \textsuperscript{98} Teri Sprackland, \textit{Luxembourg Prosecutor Requests Retrial in LuxLeaks Case}, 83 TAX NOTES INT’L 483 (Aug. 8, 2016).
\end{itemize}
to 6 and zero months, respectively, and Perrin’s acquittal was affirmed.\textsuperscript{99} These events have led Members of the European Parliament, as well as journalists and other commentators, to push for more whistleblower protections.\textsuperscript{100} The European Parliament awarded Deltour its European Citizen Award in 2015.\textsuperscript{101} Thus, like the reactions of Switzerland and France to the HSBC leak, and the U.S. and Switzerland to the UBS leak, the reactions of Luxembourg and the European Parliament reflect competing perspectives on the desirability of leaks.\textsuperscript{102}

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.\textsuperscript{103} In 2014, that source contacted and gave the data to Bastian Obermayer, a journalist at German newspaper Süddeutsche Zeitung.\textsuperscript{104}


\textsuperscript{101} Sprackland, \textit{supra} note 83.

\textsuperscript{102} In July 2017, Luxembourg (and Belgium) expressed opposition to a recent EC proposal to require that financial intermediaries disclose certain tax planning schemes. Elodie Lamer, \textit{Moscovici Lashes Out at Belgium, Luxembourg for Resisting Transparency}, 87 \textit{TAX NOTES INT’L} 200 (July 17, 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, \textit{Juncker Plans New Tax Transparency Rules from January 2019}, \textit{Bloomberg BNA Tax Planning INT’L Europe Tax Service} (July 3, 2017).

\textsuperscript{103} William Hoke, “\textit{John Doe}” Explains Reasons for Leaking Panama Papers, 151 \textit{TAX NOTES} 832 (May 16, 2016).

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

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). More than 214,000 offshore entities were identified with connections to individuals in over 200 countries and territories. Several major banks have been implicated as working with Mossack Fonseca in creating these offshore entities, including HSBC, UBS, Credit Suisse, and Deutsche Bank. The Panama leak exposed the names of many elites, including 140 politicians and public officials. 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 Pakistan Prime Ministers (David Cameron and Nawaz Sharif). It illuminated the offshore holdings and transactions of individual and business associates of Vladimir Putin, the Russian president. 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.

107 Giant Leak, supra note 105; see also About this Project, ICIJ (Apr. 3, 2016), https://panamapapers.icij.org/about.html;
108 See supra note 107.
110 Giant Leak, supra note 105 (noting that “more 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.”).
111 Id.
113 Hoke & Soong Johnston, supra note 109.
114 Id.; Alexander Lewis, Iceland’s Prime Minister Won’t Resign over Panama Papers, 82 TAX NOTES INT’L 107 (Apr. 11, 2016).
Although the Panama leak occurred quite recently, already we are seeing divergent responses.\footnote{Ryan Finley, Governments’ Reactions to Panama Papers Vary Widely, 82 TAX NOTES INT’L 110 (Apr. 11, 2016); The Panama Papers: A KPMG Survey of Initial Responses by Financial Institutions, KPMG (Oct. 2016), https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2016/10/the-panama-papers.pdf.} Australia, France, the Netherlands, Canada, the U.S., the U.K., Germany, Indonesia, Denmark, Pakistan, Singapore, South Africa, Taiwan, and Thailand have announced their intention to investigate (and some have begun investigations).\footnote{Ariel Greenblum, The Panama Papers Underscore Need for Transparency, 151 TAX NOTES 133 (Apr. 11 2016); Stuart Gibson, Unleashing a Panamanian Tsunami, 82 TAX NOTES INT’L 101 (Apr. 1, 2016); Stephanie Soong Johnston, Danish Tax Authority to Purchase Leaked Panama Papers Data, 83 TAX NOTES INT’L 924 (Sept. 12, 2016); William Hoke, Canada Gains Access to Thousands of Panama Papers Files, 82 TAX NOTES INT’L 621 (May 16, 2016).} In Iceland, Prime Minister Gunnlaugsson resigned in the face of post-leak pressure.\footnote{Steven Erlanger, Stephen Castle & Rick Gladstone, Iceland’s Prime Minister Steps Down Amid Panama Papers Scandal, NY TIMES (Apr. 5, 2016), http://www.nytimes.com/2016/04/06/world/europe/panama-papers-iceland.html?r=0.} The Prime Minister of Pakistan’s family is under investigation by the Joint Investigation Team under the authority of the Supreme Court of Pakistan for undisclosed offshore assets and money laundering.\footnote{See F.M. Shakil, D-Day for Sharif family: report due on money laundering, Asia Times (July 8, 2017), http://www.atimes.com/article/d-day-sharif-family-report-due-money-laundering/.} France has added Panama back to its list of tax havens, having removed it in 2012.\footnote{William Hoke, France Reinstates Panama to List of Noncooperative Countries, 82 TAX NOTES INT’L 104 (Apr. 11, 2016).} 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.\footnote{European Parliament decision of 8 June 2016 on setting up a Committee of Inquiry to investigate alleged contraventions and maladministration in the application of Union law in relation to money laundering, tax avoidance and tax evasion, its powers, numerical strength and term of office, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0253+0+DOC+XML+V0//EN&LANGUAGE=EN.} That committee’s work is ongoing.\footnote{See generally Teri Sprackland, Panama Papers Panel Concludes Contentious Interviews in Malta, 85 TAX NOTES INT’L 790 (Feb. 27, 2017); Teri Sprackland, Panama Papers Panel Gets Limited Response from Member States, 85 TAX NOTES INT’L 705 (Feb 20, 2017)’ Amanda Athanasiou, EU’s Panama Papers Committee Seeks Input on Draft Report, 2017 Worldwide Tax Daily 136-4 (July 18, 2017).}

Meanwhile, China has begun censorship of internet mentions of its elites implicated in the leak, while Russia has denied wrongdoing by Putin’s...
associates. 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. Panama convened a commission to review the transparency of its financial and legal system; the commission issued its final report and recommendations in November 2016.

Substantively, the Panama leak has also focused attention on the importance of transparency regarding beneficial ownership of offshore entities. Various countries have turned their attention to these issues, with some (such as Germany, the U.K., Australia, New Zealand, and Ireland) announcing steps to register the beneficial ownership of offshore trusts and other entities. Within the U.S., 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 U.S.’s role as itself a tax haven. 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.

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122 Gibson, supra note 116; Finley, supra note 115.
123 Stephanie Soong Johnston, Panama Takes Another Step on Tax Transparency, 83 TAX NOTES INT’L 278 (Jul. 25, 2016); Stephanie Soong Johnston, Panama Commits to OECD Standard on Information Exchange, 82 TAX NOTES INT’L 616 (May 16, 2016).
129 Ryan Finley, EU Countries Announce Beneficial Ownership Exchange Plan, 82
EC announced proposals for “tough new transparency rules for intermediaries—such as tax advisors, accountants, banks and lawyers—who design and promote tax planning schemes for their clients.” The EC identified “recent media leaks such as the Panama Papers” as drivers behind these suggested reforms.

7. Bahamas

The most recent major tax leak occurred in September 2016, when Süddeutsche Zeitung received a cache of 1.3 million files from the Bahamas corporate registry and shared it with the ICIJ. 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 set up in the Bahamas. The database include the names of directors and owners of more than 175,000 Bahamas companies, trusts and foundations that were registered between 1990 and early 2016. 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.” The combined database contains information about “close to 500,000 entities linked to 200 countries and territories.” 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

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133 Id.
134 Id.
wrongdoing.\textsuperscript{136}

It is early days yet, but already the 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.\textsuperscript{137} In particular, the European Commission 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.\textsuperscript{138} Some members of the European Parliament have urged authorities to act more forcefully to end offshore corporate secrecy.\textsuperscript{139} The OECD has expressed concern that the Bahamas would not be able to meet its commitments to information exchange under the common reporting standard.\textsuperscript{140} Meanwhile, Bahamian officials have defended their country and denounced the leaks, while also launching a review of Bahamas’ tax policies and data security.\textsuperscript{141} Other countries, including Mexico, have expressed an intention to investigate taxpayers linked to Bahamian entities.\textsuperscript{142}

\textbf{C. Some Initial Observations}

From the discussion in Part 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.\textsuperscript{143}

\textsuperscript{136} Fitzgibbon, supra note 132 (quoting ICIJ director Ryle: “There is much evidence to suggest that where you have secrecy in the offshore world you have potential for wrong doing. So let’s eliminate the secrecy.”); see also infra Part III.A.


\textsuperscript{138} Fitzgibbon, \textit{Bahamas Leaks Prompts Swift Reaction,} supra note 137. Kroes was discovered to have been listed as a director of Mint Holdings, a Bahamas registered entity from 2000-2009. Kroes claimed that she failed to declare her directorship because the company was never operational. \textit{Id.}

\textsuperscript{139} Fitzgibbon, \textit{\textit{There is a Need for Action,} supra note 137.}

\textsuperscript{140} Stephanie Soong Johnston, \textit{OECD Concerned About the Bahamas on Information Exchange,} 83 TAX NOTES INT’L 1127 (Sept. 26, 2016).

\textsuperscript{141} Fitzgibbon, \textit{\textit{There is a Need for Action,} supra note 137.}

\textsuperscript{142} William Hoke, \textit{Mexico to Investigate Taxpayers Included in Bahamas Leaks,} 83 TAX NOTES INT’L 1118 (Sept. 26, 2016).

\textsuperscript{143} 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., Pozen, supra note 9; Kwoka,
1. Types of Information Leaked

First, leaks can reveal several different types of information, all of which may be significant.

*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 U.S. to target those taxpayers for prosecution. The same was true with respect to the HSBC leak and French prosecutors.

*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, leaks have identified banks such as UBS, HSBC, and Credit Suisse and law firms such as Mossack Fonseca as facilitators of offshore avoidance.

*Information about governments.* Leaks can also provide information about the policies, priorities, and practices of governments and their policy 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.

The way a jurisdiction responds to a leak also provides information about 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. This highlights the differences between Switzerland and other countries in its approach towards tax compliance and bank secrecy.

2. Imperfections in the Leaked Information

Leaked information is imperfect.

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145 *See supra* notes 52 and 53 and accompanying text.
Incompleteness. First, leaked information is usually incomplete.\textsuperscript{146} Leaked data does not identify every single taxpayer who is evading taxes using offshore structures. Subsequent information derived from banks or other 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. Second, leaked data may not be wholly specific as to the tax evasion or structuring activity in question. In some cases—such as the Panama papers and British Havens leaks—the information leaked has been fairly random and needed to be processed in order to pinpoint the evasive activity that may have taken place. As Part III.A further describes, lack of specificity in leaked data may be exacerbated by the publication decisions of media organizations and other information consumers.\textsuperscript{147}

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.\textsuperscript{148} False positives may encompass taxpayers with legitimate non-tax reasons for having offshore holdings,\textsuperscript{149} as well as taxpayers who engaged in legal tax planning via offshore structuring.\textsuperscript{150} 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.\textsuperscript{151} False positives

\textsuperscript{146} 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 sources cited infra notes 296. The falsity issue has also been raised with respect to non-tax data caches.

\textsuperscript{147} See infra Part III.A.

\textsuperscript{148} 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 273 and 297.

\textsuperscript{149} Marina Walker Guevara, \textit{Offshore Leaks Database FAQs}, ICIJ (Jun. 14, 2013) \url{https://www.icij.org/blog/2013/06/offshore-leaks-database-faqs} (“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.”)

\textsuperscript{150} New Bank Leak Shows How Rich Exploit Tax Haven Loopholes, ICIJ (Jul. 8, 2014), \url{https://www.icij.org/offshore/new-bank-leak-shows-how-rich-exploit-tax-haven-loopholes} (ICIJ director notes that “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.”).

\textsuperscript{151} See supra notes 149 and 150; see also Giant Leak, supra note 105 (“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.”).
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.\footnote{152 See generally Luca Gattoni-Celli, “False Positives” in FATCA Data May Hamper Enforcement, 153 TAX NOTES 514 (Oct. 24, 2016).}

Imperfections in leaked data may present particular challenges where strong public sentiments have developed in response to high-impact leaks.\footnote{153 See infra Part II.C.2. For example, it is possible that members of an irate public may 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.

\textit{Different points of origin.} Some leaks, such as the UBS, LGT, and Luxembourg leaks, were undertaken by employees of banks and accounting firms who were acting as whistleblowers. Others, such as the Panama 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).\footnote{154 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, \textit{Panama Papers: Whistleblower Breaks Silence to Explain Why They Leaked the 11.5m Files}, THE INDEPENDENT (May 6, 2016), \url{http://www.independent.co.uk/news/world/politics/panama-papers-whistleblower-breaks-silence-to-explain-why-he-leaked-the-115m-files-a7017691.html}.} 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.\footnote{155 See supra notes 16 and 154 and accompanying text.}

\textit{Different modes of transmission.} 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.\footnote{156 See supra Parts I.B.1 and I.B.2. As discussed, however, that the HSBC data was subsequently published by the ICIJ. See infra Part III.B.4.} 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, British Havens, and Bahamas leaks. These different modes of transmission may lead to different degrees of access and availability, and possibly different impacts.  

_Time Lags in Dissemination._ An important point to note is that there is sometimes a significant time lag between when leaked data is obtained, 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 Part 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.  

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" of taxpayers, provide information not previously available, deter offshore tax evasion, and create impetus for the investigation of tax misdeeds and the enactment of 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.

\[157 \text{ See infra Part III.B.} \]  
\[158 \text{ See infra Part III.B.} \]  
\[159 \text{ This feature provided the impetus for the new Country-by-Country reporting requirements endorsed by the OECD. OECD, TRANSFER PRICING DOCUMENTATION AND COUNTRY-BY-COUNTRY REPORTING – ACTION 13: 2015 FINAL REPORT, OECD/G20 BASE EROSION AND PROFIT SHIFTING PROJECT (OECD PUBLISHING 5 OCT. 2015), INTERNATIONAL ORGANIZATIONS’ DOCUMENTATION IBFD, available at http://www.oecd-ilibrary.org/docserver/download/2315381e.pdf?expires=1484507215&id=id&accname=guest&checksum=AC38C62B897E23CF374ED32310482BB2. The provision of such data to tax authorities is expected to help them better allocate audit resources by identifying transactions and taxpayers that warrant further scrutiny. Diane Ring, Transparency and Disclosure, in UNITED NATIONS HANDBOOK ON SELECTED ISSUES IN PROTECTING THE TAX BASE FOR DEVELOPING COUNTRIES (2015) at 511. See generally Lederman, supra note 13 (characterizing third-party reporting as an invisible audit).} \]
We first map the landscape in which cross-border tax enforcement and administration and taxpayer decisions about tax evasion and compliance take 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 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 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, low- or no-tax countries (havens) that enable taxpayers of other countries to hide assets offshore (or to structure transactions in a manner that reduces or eliminates tax), and taxpayers who are 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 of the 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. 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.

Correspondingly, we might generally expect a country’s tax authority to act rationally to maximize a social welfare function (presumably defined

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160 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(a)(3), (b). Countries may also impose source-based taxation on income from sources within that country. For simplicity, we leave aside the question of source-based tax jurisdiction.


162 See supra note 161; see also Kyle Logue, Optimal Tax Compliance and Penalties When the Law is Uncertain, 21 VA. TAX REV. 241 (2007).

163 Joel Slemrod & Shlomo Yitzhaki, Tax Avoidance, Evasion, and Administration,
to include the welfare of everyone in that country) in administering and enforcing cross-border tax compliance, given budget constraints. 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. 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) or changing the penalty for tax evasion upon detection. 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.

In short, the cross-border tax enforcement and evasion landscape is one in which countries (both those attempting to tax and tax havens) and taxpayers made decisions about how to enforce and whether to evade or comply given imperfect information, constrained resources, and their respective goals. The question, then, is whether a leak of tax information if beneficial to tax authorities in light of this backdrop.


165 Marginal benefit should be measured in terms of the public goods expenditures. See McCubbin, *supra* note 164, at 17; see also Joel Slemrod & Shlomo Yitzhaki, *The Optimal Size of a Tax Collection Agency*, 89 SCANDINAVIAN J. OF ECON. 183 (1987). The components of marginal costs should be defined broadly. See, e.g., Slemrod & Yitzhaki, *supra* note 163, at 35-36 (“In the presence of avoidance and evasion, a broader concept of efficiency cost is needed.”).

166 See *supra* notes 161 and 162; see also Lederman, *Auditing the Crowding Out Hypothesis* (on file with author) (characterizing information reporting as a kind of audit).

167 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. McCubbin, *supra* note 164. James Alm, Betty Jackson & Michael McKee, *Estimating the Determinants of Taxpayer Compliance with Experimental Data*, 45 NAT’L TAX J. 107 (1992) (identifying other determinants of tax compliance, such as income level and level of government expenditure).

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—the evader who was previously too costly (or impossible) to investigate but against whom enforcement now makes sense in light of the leak.

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.\(^\text{169}\) 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% with respect to that taxpayer. Even a threatened leak raises the perceived probability of detection. Furthermore, a single leak may 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

\(^{169}\) 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 Cees Peters, ON THE LEGITIMACY OF INTERNATIONAL TAX LAW (Int’l Bureau of Fiscal Documentation 2014); Mariano-Florentino Cuellar, Rethinking Regulatory Democracy 57 ADMIN. L. REV. 411 (2005) (exploring impact of interest groups on regulatory democracy); Anthony J. Nownes, INTEREST GROUPS IN AMERICAN POLITICS: PRESSURE AND POWER (New York: Routledge 2013).
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 than information obtained through more traditional sources. In actuality, however, leaked information is arguably more salient and “shocking” to information consumers than information obtained through other means. 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 act as a valuable impetus for governments and taxing authorities to take firmer action against cross-border tax evasion, or may provide governments with political cover or impetus to reform substantive tax laws and/or how they are administered.

The salience and high impact of leaked data may distinguish it from statistical data that is more systematically gathered. Leaked data may have the potential to generate more and faster legal change than conventionally gathered information (such as information obtained about taxpayers through audit, which may be subject to government-imposed confidentiality restrictions).

3. Leaked Data’s Distributional Gains

Related to the first two points, the combination of the informational and salience benefits of data leaks 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—such as those holding undeclared offshore assets, or corporate taxpayers engaged in complex offshore structuring—who may have been disproportionately able to escape enforcement’s grasp by keeping transactions and methods secret. 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 for 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.\footnote{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 willing in incomplete data or gathering necessary information), agency costs (such as cost 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.}

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 decision of leakers and whistleblowers—actors outside the government—to leak information and 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 with the goal of exacting political consequences on certain individuals, rather than for purposes of tax enforcement.\footnote{See infra notes 273 and 297.} One might argue that such information is nonetheless valuable even if the underlying goals are questionable. However, tax leaks done for political purposes carry other risks, such as the
possibility of undermining democratic values.\textsuperscript{174}

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 will depend on the specific transmission pathways along which leaked data becomes known 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 thus 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 particular 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 “spins” 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 impact, high profile events. As discussed, the high impact of tax leaks may in some instances be a strength.\textsuperscript{175} 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.\textsuperscript{176} Governments may react more strongly to leaked data as compared to systematically obtained

\textsuperscript{174} It is important not to assume that tax leaks of the type analyzed in this article are simply an international extension of the familiar “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 an “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 leak at issue.

\textsuperscript{175} See supra Part II.B.2.

\textsuperscript{176} See supra note 170.
data because (a) the leak shows that bad behavior is occurring (whose existence may come as a surprise or shock to government), (b) the leak suggests government failure and incompetence because it has not 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. 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, or succumbs to public pressure, or otherwise makes non-rational decisions, then poor enforcement choices may take place after a leak. 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. Both crises and leaks are high-salience events that may over-emphasize the seriousness of the crisis or conduct, while giving insufficient weight to the later-occurring costs associated with a reactionary

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177 See supra Part II.B.2.
178 See supra note 170.
or subpar policy response. 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 a particular risk of being perceived as such, given the high public salience of leaked data. Such negative perceptions and public pressures may drive governments to take subsequent enforcement actions that might 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 of the existence of the leak, even if they do 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 bright 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. 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 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 be pushed in the wrong directions.

180 For example, this may occur if the government decides to do nothing in response or takes too long in responding. See infra Part III.B.6.
181 One scenario in which governments might “do nothing” 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 pathway is set (for example, once a law or 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, European CEO (Mar. 28, 2015), http://www.europeanceo.com/business-and-management/luxleaks-scandal-puts-tax-avoidance-under-the-microscope/ (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.”).
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 its timing or content suspect by the time it reaches the government or the public. Governments, taxpayers, and other actors may react in non-rational ways as a result of the nature of leaks as high impact events. 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.\textsuperscript{182} 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 main 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.

\textsuperscript{182} See supra Part II.C.1.
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 a problematic gap. As the discussion in Part I.B illustrates, leakers have in some instances provided data to platforms such as WikiLeaks or the International Consortium of Investigative Journalists (“ICIJ”), rather than to governments. Practically speaking, this has meant 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 about 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 journalists in over 65 countries that grew out of a project of the Center for Public Integrity.183 It has played a significant role in the internet publication of the HSBC, Panama Papers, LuxLeaks, British havens, and the Bahamas leaks. ICIJ journalists collaborate on stories that require in-depth investigative journalism, particularly topics with a global focus.184 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.185 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

183 About the ICIJ, ICIJ, https://www.icij.org/about. See also About the International Consortium of Investigative Journalists, THE CENTER FOR PUBLIC INTEGRITY, https://www.publicintegrity.org/icij/about (overview of the ICIJ, including its origin with the Center for Public Integrity). As of February 24, 2017, the ICIJ became an independent nonprofit news organization, separating from it founder, the Center for Public Integrity. After Panama Papers Success, ICIJ Goes Independent, ICIJ (Feb. 27, 2017), https://www.icij.org/blog/2017/02/after-panama-papers-success-icij-goes-independent (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.”).

184 See About the ICIJ, supra note 183.

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 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.

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.\(^{186}\)

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This description reveals some key information about the ICIJ’s power and decision making:

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 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 must have had an underlying metric for deciding what to release. Here, there are a number of possible publication choices, including: the most “exciting” 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.\(^{187}\)

Third, the ICIJ did not release the underlying original documents. This decision, though perhaps supported by journalistic standards and a desire to avert disproportionate harms from full disclosure, 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 quite some time after the newspaper Süddeutsche Zeitung actually obtained the data (which occurred in 2014). While Süddeutsche Zeitung announced in print that it was in possession of the data in February 2015, the actual database and accompanying stories were not released until April 2016.\(^{188}\) 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

\(^{187}\) See Mortimer, supra note 154.

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 they 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.¹⁸⁹

This mission statement—which prioritizes confidentiality of sources, pledges to “evaluate” and “pursue” leads, and permits ICIJ to report on the issues “if merited”—leaves much room for, and in fact absolutely requires

¹⁸⁹ Leak to Us, ICJI
the ICIJ to make important publication and framing decisions. The process creates costs for the ICIJ;\textsuperscript{190} 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 \textit{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.\textsuperscript{191}

This power and control exercised by the media carries clear risks. Media framing and publication choices (including choices regarding the \textit{timing} of publication of leaked data) may distort policy responses by causing governments to over- or under-react 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 (for example, costs 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 (even likely) 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 and risks inherent in the publication and editorial choices made by media intermediaries have not been sufficiently examined.

2. Leakers

Even before information reaches media organizations, leakers must

\textsuperscript{190} \textit{About this Project}, ICIJ (Apr. 3, 2016), \url{https://panamapapers.icij.org/about.html} (“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.”).

\textsuperscript{191} See supra note 183 (discussing ICIJ’s separation from the Center for Public Integrity based on a “strategic assessment” of its forward-looking priorities).
gather it. Leakers have obvious discretion over whose information to collect, when to collect, what kinds of information to collect, and what date ranges to capture. 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 (i.e., 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 one (Panama) is widely thought to be the result of a hack. Hackers may be driven by different agendas than employee-whistleblowers. Thus, if hacks were to becomes 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 (e.g., 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 swifter and more widespread set of responses than a leak to a single government agency. In Part III.B, we outline one example (the HSBC case) 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.

3. Secondary Users and Information Consumers

A third category of agenda setters consists of secondary consumers, editorializers, and users of information gathered by leakers and disseminated by governments or primary media organizations. Such consumers—NGOs, non-profits, 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

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192 See supra notes 16, 154 and 155 and accompanying text.
193 See Part III.B infra.
can impact governments’ ultimate policy and enforcement reactions.

For example, the Tax Justice Network ("TJN") is an independent international network that works in research and advocacy. Its key activities include preparing reports, articles, and other materials, organizing research conferences, and engaging in advocacy work. One of the key topics attracting TJN 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, HSBC, and UBS leaks. 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. Organizations like TJN and 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.

These NGOs and non-profits—together with secondary media outlets and reporters writing about offshore evasion, bank secrecy and similar topics—play an important role in raising public awareness about tax leaks and how governments have responded to them. This creates pressures that 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.

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194 TAX JUSTICE NETWORK, Our Team and Structure, http://www.taxjustice.net/about/who-we-are/team-structure/.
and that may not be primarily about optimizing tax compliance or enforcement. For example, some agenda setters may be primarily interested in transparency, poverty reduction, or “unfairness” and may prioritize these 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 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. 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 substantive 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.

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

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198 See supra Part II.A.2.
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. These pathways are not a binary choice. 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). Others 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.

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—is 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. In January 2009, French authorities acquired the data in connection with a search of Falciani’s home (which had been

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199 See supra Parts I.C and III.A.
200 For example, U.S. taxpayers who had engaged in offshore evasion could enter an offshore voluntary disclosure program (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 VILLANOVA L. REV. 499 (2012); see also Boise, supra note 2. This strategy can be described as the facilitation of a secondary-leak market. Another example of such secondary-leak facilitation is the U.S.’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. 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.
201 Examples include the United States’ FATCA legislation, the Common Reporting Standard, and the progress made towards exchange of tax rulings among EC member states.
202 See supra Part II.B.2.
requested by Swiss authorities) and began investigating it. 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.

Switzerland asked France for the HSBC data, and in December 2009, the French agreed to share a copy but expressed their intent to continue using the data themselves. 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 data to answer requests from foreign authorities and that the French government [would] not use the data it obtained ‘inappropriately’.”

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. Ultimately, data on approximately 1,500 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.

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204 Stewart, supra note 203.


206 Id.; see also Gauthier-Villars & Ball, supra note 203.

207 Stewart, supra note 205.


209 Jackson, supra note 208; Hoke, *Herve Falciani—The SwissLeaks Whistleblower*, supra note 52. The seller’s name was not revealed. Id. 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 (May 18, 2017). As recently as July 4, 2017, Germany reported acquiring
3. France Shares Data: The U.S. Mess and the “Lagarde List”

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

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 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. 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

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, 2017 Worldwide Tax Daily 128-4 (July 6, 2017).

Randall Jackson, France to Investigate Possible Tax Cheats Listed in Stolen HSBC Data, WORLDWIDE TAX DAILY, 2010 WTD 75-2 (Apr. 20, 2010).

Gauthier-Villars & Ball, supra note 203 (reporting that France provided data to Italy, Spain and the United Kingdom).


Margaret Burow, Secret Documents Reveal Over $100 Billion Held in Swiss Accounts, WORLDWIDE TAX DAILY, 2015 WTD 27-4 (Feb. 10, 2015) (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 treaty).

Peter J. Henning, HSBC Case Tests Transparency of Deferred Prosecution Agreements, N.Y. TIMES, (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).
U.S. Attorney General): “To my knowledge, my office did not have access to the Falciani documents prior to the execution of the DPA.”215 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.”216 Given that the IRS reports having received the information in April 2010,217 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 were 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 knew what and when within the U.S. government illustrates the transmission issues, enforcement and potential agency costs, and inefficiencies that continue to arise even after one agency in 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.”218 However, no action was taken, possibly because the list implicated some Greek elites.219 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...

216 Id.
217 See Burow, supra note 213.
219 Hoke, Herve Falciani—The SwissLeaks Whistleblower, supra note 52.
action on Lagarde information.\footnote{Id.; see also Kerin Hope, Former Greek Finance Minister Found Guilty in ‘Lagarde List’ Case, \textit{Financial Times} (Mar. 24, 2015), https://www.ft.com/content/3f284250-d257-11e4-ae91-00144feab7de.}

The case of Greece illustrates the resistance of some countries 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).\footnote{See supra note 6 and accompanying text.} 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.\footnote{See supra Part II.A.3.}

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.\footnote{Burow, supra note 213.} The data came to the ICIJ via the French newspaper, \textit{Le Monde}, which had secured the files in early 2014 from French government sources.\footnote{Id. Part II.A.3.} \textit{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.\footnote{Id. supra note 213.}

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.226

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.”227 Several months later, in September 2015, France delivered a list of 80,000 Cypriot taxpayers with HSBC accounts to Cyprus.228 Danish authorities announced on February 9, 2015 (one day after the ICIJ publication of the data) that they were seeking the names of Danish taxpayers who may have avoided taxes through the use of Swiss accounts.229 The ICIJ’s publication had apparently triggered news reports of Danes with assets hidden in Swiss accounts, which spurred Danish authorities to act.230 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.231

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.232

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226 Teri Sprackland, Brazil Opens Tax Investigation of HSBC Clients, WORLDWIDE TAX DAILY, WTD 42-2 (March 4, 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 Expands Tax Probe to 7,000 HSBC Account Holders, 78 TAX NOTES INT’L 695 (May 25, 2015).
227 Teri Sprackland, France Delivers Austrian HSBC Data, WORLDWIDE TAX DAILY, WTD 75-7 (Apr. 20, 2015).
228 Teri Sprackland, Cyprus Gets its Share of Lagarde List, WORLDWIDE TAX DAILY, WTD 176-4 (Sept. 11, 2015).
230 Id.
231 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, THE LOCAL SWITZERLAND (Feb. 9, 2015), http://www.thelocal.dk/20150209/denmark-ignored-information-on-hidden-swiss fortunes.
232 Stephanie Soong Johnston, HSBC Faces Tax Evasion Charges in India, 81 TAX NOTES INT’L 737 (Feb. 29, 2016); Jerin Mathew, HSBC leaked list: 1,195 Indians including country’s richest Mukesh Ambani have Swiss accounts, INTERNATIONAL BUSINESS TIMES (Feb. 9, 2015), http://www.ibtimes.co.uk/hsbc-leaked-list-1195-indians-including-country-s-richest-mukesh-ambani-have-swiss-accounts-1487141.
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 U.K. 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. But in February 2015, HMRC announced that French tax authorities had agreed to remove the “tax-only” restrictions on the U.K.’s use of the data, and to permit the U.K. to share the information with other law enforcement agencies including the Serious Fraud Office, the Financial Conduct Authority, the City of London Policy, the National Crime Agency, and Eurojust. This agreement came after ICIJ had publicly released much of the stolen HSBC data on February 18, 2015.

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. 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


235 William Hoke, Swiss Court Convicts Falciani in HSBC Leak, Worldwide Tax Daily, 2015 WTD 230-4 (Dec. 1, 2015); see also Stewart, supra note 205 (Switzerland assured HSBC that it would not “support the use of the stolen data to answer requests from foreign authorities”); Margaret Burow, supra note 213 (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).
information and created barriers and costs to using leaked data.236

In September 2015, Switzerland signaled a possible shift in its position237: 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 stolen data obtained either through standard administrative channels or from public sources.238 In June 2016, the Federal Council adopted the amendment, which is now continuing through the enactment process.239 The shifting Swiss position was no doubt triggered by the expanding march of the data across the globe, facilitated by France and the ICIJ.240 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.241

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

\[\text{236 See, e.g., William Hoke, Swiss Court Denies French Request for HSBC Data Based on Illegally Acquired Information, 86 Tax Notes Int’l 134 (April 10, 2017).}\]
\[\text{237 Generally, Swiss tax authorities see a shift in the Swiss perspective on information sharing. See, e.g., William Hoke, Swiss Court Allows Sharing of HSBC Account Data with Indian Tax Authorities, 2017 WORLDWIDE TAX DAILY 135-9 (July 17, 2017) (quoting a Swiss tax expert: “Swiss courts are increasingly in favor of information exchange.”). For additional evidence of an evolving Swiss position, see id. (in its decision not to block India’s request for account information under the treaty, the Swiss court noted that India obtained the information from the Lagarde list and not directly from Falciani who stole it).}\]
\[\text{238 Hoke, supra note 235.}\]
\[\text{240 But in April 2017, a Swiss court rejected a request from France for HSBC data on the grounds that the request itself was based on information stolen by a bank employee working in Switzerland (and thus subject to Swiss law). William Hoke, Swiss Court Denies French Request for HSBC Data, 86 Tax Notes Int’l 134 (April 10, 2017).}\]
\[\text{241 William Hoke, France and Switzerland Reach Agreement on Sharing UBS Account Details, 87 Tax Notes Int’l 208 (July 17, 2017).}\]
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 U.K.) 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.\(^\text{242}\) 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.\(^\text{243}\)

Thus, inefficiencies in inter-agency transmission within a country can lead to failure to effectively share information between agencies. Even an efficient system of inter-agency 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, on the flip side, 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

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\(^{242}\) See supra notes 233–234 and accompanying text.

\(^{243}\) See supra notes 214–217 and accompanying text.
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, capture by agents with different agendas, and underlying national commitments to tax enforcement.

Once again, while heterogeneous interests and capabilities across countries is not 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 spurring corrective action. But it may also carry the risk of triggering less than rational reactions and unfair assessments of what might actually be well thought out 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 re-adjusted the calculus of many countries. 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 more 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 of some governments (for example, governments that had not acquired the data or acted on it) 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 U.K.) may have been stalled
for legal or pragmatic reasons.\textsuperscript{244}

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 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.

\textbf{C. Leak-Driven Laws}

As discussed in Part II, a benefit of leaks is that they may provide impetus for desirable legal change, as tax authorities and the public become aware of problematic opportunities and abuses. 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’ enactment of the 2008 FATCA legislation and other related offshore tax enforcement provisions in the aftermath of the UBS and LGT tax leaks.\textsuperscript{245}

1. The UBS Leak and U.S. Offshore Enforcement Responses

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.\textsuperscript{246} 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.\textsuperscript{247}

\textsuperscript{244} See supra notes 233–234 and accompanying text.
\textsuperscript{245} 26 U.S.C. §§ 1471–1474 (2012); see also Oei, supra note 2 (discussing U.S. offshore tax enforcement initiatives).
\textsuperscript{246} See supra Part I.B.1.
\textsuperscript{247} Id.; see also United States. v. UBS, Deferred Prosecution Agreement, Case No. 09-60033-CR-COHN (S.D. Fla.),
But the U.S. also went further: the DOJ prosecuted a few Swiss banks and entered into deferred and non-prosecution agreements with others through the so-called “Swiss Bank Program,” waiving actual prosecution in exchange for certain concessions.\(^{248}\) It also used the information extracted from these Swiss banks and from UBS clients identified in the leak to obtain more information about the holdings of other taxpayers with assets in other offshore banks.\(^{249}\)

By publicizing these investigatory and punitive strategies, the U.S. 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 are programs that 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’ agreement not to prosecute them.\(^{250}\) Through these OVDPs, the U.S. has collected over $10 billion of unpaid taxes to date.\(^{251}\)

The U.S. 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 on 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.\(^{252}\) The capstone of the United States’ offshore tax enforcement initiatives was the enactment of the wide-

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\(^{249}\) See supra notes 41 and 200 and accompanying text.  
\(^{251}\) Offshore Voluntary Compliance Efforts Top $10 Billion; More than 100,000 Taxpayers Come Back into Compliance, Internal Revenue Service, https://www.irs.gov/uac/newsroom/offshore-voluntary-compliance-efforts-top-10-billion-more-than-100000-taxpayers-come-back-into-compliance. The 100,000 and $10 billion number includes both regular and streamlined OVDP participants. Id.  
\(^{252}\) See, e.g., Laura Saunders, IRS Gets Tougher on Offshore Tax Evaders, Wall St. J. (July 20, 2009) (noting that post-UBS, “[t]he IRS [wa]s 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.”) http://www.wsj.com/articles/SB124804796387763807. See also Patrick J. McCormick, OVDP or Streamlined: Choosing and Offshore Disclosure Program, 83 Tax Notes INT’L 141 (July 11, 2016) (exploring a taxpayer’s options for dealing with PFIC issues under the IRS’s OVDPs).
reaching “Foreign Account Tax Compliance Act” or FATCA legislation in 2010.\textsuperscript{253} 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. taxpayers who hold assets with them; failure to comply with this due diligence yields an onerous withholding tax.\textsuperscript{254} FATCA also imposes reporting and disclosure requirements on individual U.S. taxpayers, requiring those with foreign financial assets over a certain \textit{de minimis} threshold to file Form 8938 annually with their tax return to disclose the assets.\textsuperscript{255} These new reporting requirements for individual taxpayers are in addition to the previously 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.\textsuperscript{256} 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’ 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.\textsuperscript{257} 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.\textsuperscript{258} For example, in enacting FATCA,

\begin{itemize}
\item 253 26 U.S.C. §§ 1471–1474.
\item 254 26 U.S.C. § 1471. The FATCA withholding tax applies to all withholdable payments to that FFI, not just those related to U.S. account holders.
\item 255 26 U.S.C. § 6038D. Individuals must report foreign financial assets on Form 8938 (and other 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). Treas. Reg. § 1.6038D-2(a)(1), (2). For U.S. taxpayers living abroad, the thresholds are higher: $200,000 on the last day of the taxable year or $300,000 at any time during the taxable year ($400,000 and $600,000 for married filing jointly). Treas. Reg. § 1.6038D-2(a)(3), (4).
\item 256 For a more extensive treatment, see Christians, \textit{supra} note 9; Oei, \textit{supra} note 2; Morse, \textit{supra} note 43; Mason, \textit{supra} note 2; Blank & Mason, \textit{supra} note 43. See also generally Tracy A. Kaye, \textit{Tax Transparency: A Tale of Two Countries}, 39 FORDHAM INT’L L. J. 1153 (2016) (comparing U.S. and Luxembourg responses to international tax evasion and avoidance).
\item 258 See, e.g., Frederic Behrens, \textit{Using a Sledgehammer to Crack a Nut: Why FATCA Will Not Stand}, 2013 WISC. L. REV. 205 (2013); Christians, \textit{supra} note 9; Allison Christians, \textit{The Dubious Legal Pedigree of IGAs (and Why It Matters)}, 69 TAX NOTES
the U.S. 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.\textsuperscript{259}

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 U.S., and (3) immigrants to the United States (including green card holders and foreign citizens working in the U.S. on long-term visas) who may have been unaware of their obligation to report and pay U.S. taxes on offshore assets.\textsuperscript{260}

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 substantive reasons for holding assets offshore other than tax evasion, one might argue that they may, as a whole, be less willful in their tax noncompliance than Americans who affirmatively choose to hide assets in tax havens for no other reason than 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.\textsuperscript{261} Some tax scholars have also noted the potentially burdensome,

\textsuperscript{259} Christians, \textit{supra} note 9; Oei, \textit{supra} note 2.

\textsuperscript{260} “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 U.S. Christians, \textit{supra} note 9.

\textsuperscript{261} 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. \textit{FATCA: Affecting Everyday Americans Every Day}, \textsc{Democrats Abroad}
unfair, or disproportionate impacts of FATCA reporting on those populations.\(^\text{262}\)

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 (e.g., 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 actually living and working abroad, and inbound immigrants with ties to other countries—are less able to easily extricate themselves from their offshore holdings. If so, these latter taxpayers will be stuck with of FATCA’s onerous reporting requirements over the longer term.\(^\text{263}\) 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 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 U.S. and hid them offshore. The collateral impacts of the legislation on those taxpayers with actual offshore lives may


\(^{263}\) 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. 26 U.S.C. § 6038D(b); Treas. Reg. § 1.6038D-3. 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.
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 may be higher than the roughly $8.7 billion in revenue that FATCA was projected to raise over 10 years.\(^{264}\) 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 that FATCA may cost up to $8 billion a year.\(^{265}\) Other estimates are more modest.\(^{266}\) The compliance costs to individual taxpayers and the data-processing and enforcement costs to the U.S. must be factored in as well.\(^{267}\) Once all of these costs have been included, it seems plausible that even if the revenues collected by FATCA outweigh its costs, the externalized costs of the legislation on various parties is quite high.\(^{268}\)

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\(^{264}\) Joint Committee 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, JCX-5-10 (Feb. 23, 2010), https://www.jct.gov/publications.html?func=startdown&id=3649; see also Reuven S. Avi-Yonah & Gil Savir, Find It and Tax It: From TIEAs to IGAs (Feb 20, 2015) available at https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2567646 (explaining how costs of FATCA could outweigh revenues collected); Christians, supra note 9; Hiran, supra note 262. Many of FATCA’s compliance costs do not necessarily yield addition revenue but are simply to do with asset reporting.


\(^{266}\) FATCA and CRS: How Ready Are You?, Thomson Reuters, https://tax.thomsonreuters.com/wp-content/pdf/onesource/fatca-crs-readiness-survey.pdf (May 31, 2016) (survey of senior executives yielded more modest cost estimates: 40% of survey respondents planned to spend $100,000 to $1 million on FATCA compliance, with only 4% planning to spend between $10 and $20 million).


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 OVDPs. The National Taxpayer Advocate has noted that the 2009 and 2011 OVDPs 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 OVDP process. 269

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 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—so-called “mini-FATCAs.” 270 Additionally, various countries (coordinating under OECD auspices) have agreed on a “Common Reporting Standard” (“CRS”) that will require information exchange. 271 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

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269 2013 NTA ANNUAL REPORT, supra note 268, at 228–29 (2013) (noting that for taxpayers in the 2009 OVDP, 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); NAT’L TAXPAYER ADVOCATE 2014 REPORT TO CONGRESS 86–91 (2014) (similar observations).

270 Itai Grinberg, Taxing Capital in Emerging Countries: Will FATCA Open the Door?, 5 WORLD TAX J. 325 (2013); Blank & Mason, supra note 43.

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 risk of ensnaring less willful populations, the risk of high costs on various actors, and the risk that such costs may have been imposed on the “wrong” persons.

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

This Article has shown that 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.

A. Suggestions for Optimal Leak-Driven Lawmaking

How should governments and tax authorities guard against the downsides of leak-driven lawmaking and navigate its hazards? There are no simple answers, but the following are some core suggestions that may move 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 leak 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.

Some concrete suggestions:
Understanding the Sources. In particular, governments and tax authorities might consider becoming more informed about the motivations of the agenda setters behind the instant leak and 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.272

Some actors in the dissemination of leaks may be repeat players (for example, the ICIJ, The Guardian, and Süddeutsche Zeitung). To the extent they are not already doing so, tax policymakers might consider familiarizing 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.

Anticipating 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.273

The use of tax leaks in the 2017 French presidential election offers a window into the potentially powerful and strategic misuse of tax leaks in the future. During the May 2017 French presidential election, documents were 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 prosecutors office.274 In the immediate aftermath, France’s electoral commission warned the press and internet users that publishing or

272 See supra Part III.A.
273 See infra note 274.
274 See, e.g., Jon Henley, Emmanuel Macron Files Complaint over Le Pen Debate “Defamation,” THE GUARDIAN (May 4, 2017), https://www.theguardian.com/world/2017/may/04/emmanuel-macron-files-complaint-over-marine-le-pen-debate-remark; Sam Meredith, France’s Macron Takes Legal Action over Le Pen “Defamation” Debate Days before Election, CNBC (May 5, 2017), http://www.cnbc.com/2017/05/05/macron-le-pen-france-election-debate-fake-news-legal-action-bahamas.html. 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.”
reposting the hacked documents carried the risk of criminal prosecution, and French prosecutors opened an investigation into the suspected attempted to smear Macron’s name.

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 Leaks” vignette highlights the importance of guarding against future leaks that might be deliberately misleading or might not be wholly accurate.

Anticipating Publicity. Governments should be aware that even if they initially receive leaked data exclusively (i.e., it is not yet publicly 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, slow or insufficient government responses will usually come to public notice in due course and are likely to have political consequences.

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. 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

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277 See, e.g., William Hoke, Whistleblower’s Attempts to Aid Canadian Authorities Ignored, 84 TAX NOTES INT’L 360 (Oct. 24, 2016).

278 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.
to optimize tax enforcement—such as normative commitments to transparency, perceptions of unfairness, revenge, and other motivations. 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: 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; analyzing whether a given policy that makes expressive political sense is likely to plausibly achieve the stated goals; and 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, *ex ante* clarification of goals and analysis of impacts can serve as a brake on reactionary leak-driven lawmaking.

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: Three Open Questions

This Article’s analysis has been 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 three 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 covering a particular tax abuse, it is possible that the legislative or enforcement responses of a country or the European Union 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.\textsuperscript{279} It is unclear whether subsequent leaks of offshore account holder 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 vs. privacy will play out and what this might mean for leaks going forward.\textsuperscript{280} 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.\textsuperscript{281} 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.\textsuperscript{282} 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\textsuperscript{283} by the OECD and its Base Erosion and Profit Shifting (“BEPS”) Project.\textsuperscript{284} Moreover, as the EU explored publication of CbC data and more public access to beneficial ownership registries, some taxpayers...

\textsuperscript{279} See supra notes 4 and 271.
\textsuperscript{282} Id.
\textsuperscript{283} OECD, supra note 159.
\textsuperscript{284} See, e.g., PWC, Comments to the OECD on Behalf of U.S. Multinationals, (Feb. 23, 2014), WORLDWIDE TAX DAILY, 2014 WTD 41-319 (arguing that the reporting template and obligations on tax authorities who receive data should be revised to better protect confidentiality).
and jurisdictions have expressed disapproval. 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. Instead, he noted Germany’s concern for “personal and corporate privacy.” 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. 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. Rather the tax debate will also be shaped by larger public conversations on transparency and privacy, and by leaks far beyond the tax world, such as those by Edward Snowden and Chelsea Manning. 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. However, if the “resting point” tends towards privacy, then there may be a continued role for leaks, both as an enforcement tool for governments and as a behavioral control for taxpayers. The stability of the equilibrium point will also matter: If entrenchment impulses do not dominate, then any

286 Id.
287 Id.
290 One scholar has questioned whether the trend toward tax transparency is “misguided,” noting highly publicized nontax data breaches including those by Snowden and Manning and the reality that “[w]e are living in a world where internal safeguards are easily undermined.” Sprackland, supra note 289 (arguing that transferred data can be exploited for “political vendettas” or other “dangers”).
291 See, e.g., Hugo Miller, France Must Discourage Tax Data Theft, Macron Swiss MP Says, BLOOMBERG LAW INT’L TAX MONITOR (July 17, 2017) (“France should discourage the theft of banking and tax 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]”).
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 degree of 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.\footnote{See generally supra Parts I.B, I.C, and III.A.} 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, though we cannot be sure, 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 recently established a competing “EUleaks” website to allow whistleblowers another platform for submitting leaked information securely.\footnote{Teri Sprackland, \textit{EU Parliament Group Sets up Secure “EUleaks” Website}, 84 TAX NOTES INT’L 27 (Oct. 3, 2016); \textit{EU Leaks – a New Platform for Whistleblowers}, TAX JUSTICE NETWORK (Sept. 28, 2016), \url{https://www.taxjustice.net/2016/09/28/eu-leaks-new-platform-whistleblowers/}.} Part of the impetus for EUleaks and other platforms like it may be a desire to more effectively control data leaks rather than relying on WikiLeaks or ICIJ. At the other extreme, another possibility is that markets for leaked data might disintegrate, either because heightened transparency has rendered leaks unnecessary, or because of more systematic attempts at shutting down the existing pathways.\footnote{See, e.g., Miller, supra note 291 (French MP representing French expatriates in France).}
Of course, EUleaks is merely symptomatic: More news outlets are actively soliciting leakers and whistleblowers through encrypted online submission systems and other avenues, such as SecureDrop. 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 (i.e., governments or the ICIJ) will develop clear 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 and reduce time lags or provide more comprehensive data to the public. Policymakers would do well to consider how to optimize the design of existing markets for leaked data, in order to improve the probability that a leak will ultimately produce a positive result.

4. Other Unanticipated Future Shifts

Switzerland expressing preference for legal information exchanges as opposed to data thefts).

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 evolve in different directions.

For example, information brokers and intermediaries of the future may have less established professional integrity than current intermediaries, or 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.296 Government actors may figure out different ways to spin or otherwise abuse leaked data to advance non-tax agendas (for example, discrediting or persecution of political opponents).297 Conversely, government actors may attempt to suppress leaks that some might otherwise find socially beneficial, for example, by prosecuting and investigating leakers.298

In short, any analysis of the effects of tax leaks must account for the possibility of future shifts. Developments in non-tax arenas have amply 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.

296 In non-tax arenas, for example, others have alluded to the possibility that leaked data might have been doctored or modified. See, e.g., Alex Gibney, Can we Trust Julian Assange and WikiLeaks?, NY TIMES (Aug. 8, 2016), https://www.nytimes.com/2016/08/08/opinion/can-we-trust-julian-assange-and-wikileaks.html; Lauren Carroll, Are the Clinton WikiLeaks Doctored, or are They Authentic?, POLITIFACT (Oct. 23, 2016), http://www.politifact.com/truth-o-meter/article/2016/oct/23/are-clinton-wikileaks-emails-doctored-or-are-they-/.

297 See, e.g., supra note 274 (discussing the unfolding of the Macron tax leak during the French presidential election campaign).

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, leaked data can serve an important function in cross-border tax law and policy making 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 undue 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.