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Ten Truths About Tax Havens: Inclusion and the "Liberia" Problem

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ABSTRACT

There has been a decades-long effort to repair an increasingly fragile international tax system. One reason it has foundered has been what we identify as the "Liberia problem." In 2000, the powerful Organization for Economic Cooperation and Development identified Liberia—but not Switzerland—as a tax haven and targeted it for sanctions. It did not go well. During the two decades since, everything has changed; yet seemingly from this lens of inclusion, nothing has changed at all. Awkwardly similar "blacklists" still target "Black" and "Brown" jurisdictions despite the fact that experts mean something quite different when they speak of the "scourge of tax havens" and secrecy jurisdictions. We think differently in important respects but believe that those real disagreements demonstrate the need for a less insular global tax policymaking apparatus. And we share a conviction that a more inclusive and more level playing field in the international tax arena would benefit all states. To show why, we offer a series of "truths" designed to prompt a long-overdue conversation about perceptions of bias and privilege in international taxation.

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INTRODUCTION

For decades, tax havens[1] or secrecy jurisdictions have been presented as an existential threat to the modern state.[2] For many, a familiar racial subtext of Black lawlessness and white privilege both come into view and fall apart upon close examination of that narrative.[3] Less wealthy tropical tax havens loom large in the popular imagination, but in reality they pose a limited threat to wealthy states.[4] Yet "blacklists," such as those published in 2000 by the Organization for Economic Cooperation and Development (OECD) and in 2020 by the European

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1 We will use the term tax haven interchangeably with others such as secrecy jurisdictions. All such terms raise questions about how the jurisdictions are viewed and treated and we want to focus on the disparity in treatment, not definitional contentions. Our style borrows from an exchange between Michael Schler and David Weisbach on tax shelters. *See* David A. Weisbach, *Ten Truths About Tax Shelters*, 55 TAX L. REV. 215 (2002); Michael L. Schler, *Ten More Truths About Tax Shelters: The Problem, Possible Solutions, and a Reply to Professor Weisbach*, 55 TAX L. REV. 325 (2002).

2 Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1576 (2000) (noting that tax havens "undermine the individual and corporate income taxes, which have traditionally generated the largest share of revenue for modern welfare states").

3 It has long been an open secret that European states can be tax havens while avoiding the taint associated with the classification. *See* J.F. Avery Jones, *Introduction*, *in* TAX HAVENS AND MEASURES AGAINST TAX EVASION AND AVOIDANCE IN THE EEC, at xi (J.F. Avery Jones ed., 1974) ("It is perhaps an indication of the bad odour which the expression tax haven has aroused that the countries which spring to mind as tax havens both argue that they are not: Luxembourg points out that, apart from its holding company legislation, it is a high-tax country and the Channel Islands prefer to be known as a low-tax country rather than as a tax haven.").

4 Whether in the illustration for a BBC podcast or the examples highlighted in a Presidential press release, tax havens tend to be synonymous with tropical island archipelagos. The Real Story, *Should Tax Havens Help Pay for Coronavirus?*, BBC (July 24, 2020), https://www.bbc.co.uk/programmes/w3cszcn5; Steven Dean, *A Plea to President Biden to Stop Perpetuating Racist Tax Policy*, NATION (Apr. 13, 2021), https://www.thenation.com/article/economy/biden-tax-policy/. Respected investigative journalists predictably turn to stock photos of islands to illustrate conclusions that the blame for offshore tax evasion and avoidance lies in less inviting climates. Sean McGoey, *Wealthy Countries That Set Global Tax Rules Are Biggest Enablers of Corporate Tax Abuse, Report Finds*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Mar. 10, 2021), https://www.icij.org/inside-icij/2021/03/wealthy-countries-that-set-global-tax-rules-are-biggest-enablers-of-corporate-tax-abuse-report-finds/ ("The world's wealthiest countries that help set global tax standards are actually responsible for the majority of corporate tax abuses around the world[.]"). Even in scholarly work, archipelagos serve as a motif for the broader phenomenon of tax havens. *See, e.g.*, Vanessa Ogle, *Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s*, 122 AM. HIST. REV. 1431, 1437 (2017) ("Prior to the 1970s, capitalism's archipelago consisted of a variety of spaces—some of them small island territories such as the Cayman Islands; some of them city-states such as Singapore; some of them areas within a larger national territory such as Delaware or the Panama Canal Zone."). There are countless examples of publications focused on tax evasion featuring tropical islands on their covers. *See, e.g.*, JEAN FRANCO FERNÁNDEZ CLARK, OFFSHORE AFFAIRS: THE OFFSHORE WORLD EXPLAINED BY AN INTERNATIONAL TAX LAWYER (2020); DARREN JOSEPH, TAXES FOR INTERNATIONAL ENTREPRENEURS AND EXPATS: PROVEN PRINCIPLES FOR LEGALLY REDUCING TAXES (2019); NICK BRAUN, TAX PLANNING FOR NON-RESIDENTS & NON DOMS 2019/20 (2019); VESNA IVKOVIC, TAX HAVENS AND OFFSHORE BUSINESS: DOING BUSINESS THROUGH TAX HAVENS (2016); NICHOLAS SHAXSON, TREASURE ISLANDS: UNCOVERING THE DAMAGE OF OFFSHORE BANKING AND TAX HAVENS (2011). Some covers suggest a more complex reality. *See, e.g.*, OLIVIER WAGNER, U.S. TAXES FOR WORLDLY AMERICANS: THE TRAVELING EXPAT'S GUIDE TO LIVING, WORKING, AND STAYING TAX COMPLIANT ABROAD (2017) (featuring palm trees silhouetted against the backdrop of a city skyline).

Union, target states like Liberia and Trinidad and Tobago.[5] Whiter, wealthier states like Switzerland and Luxembourg do not appear on such lists.[6] Others like Hong Kong, Singapore, Mauritius, or Seychelles seem to drop on and off the radar with apparent ease.

This Essay offers ten provocative "truths" designed to highlight perceptions of bias that fuel global inequality, distorting international tax policies and priorities. International tax law may seem an unlikely place for the dog-whistle politics of race and discriminatory exclusion, yet its preoccupation with preserving the market from perceived threats lends itself to fears of lower class or racially charged lawlessness.[7] A structure tainted by perceptions of bias has been increasingly challenged as more players emerge and more developing states become more politically assertive and astute, offering an opportunity to build a more inclusive international tax system.

By 2000, it had become clear that the international tax system designed by the League of Nations suffered from grave flaws, jeopardizing the wellbeing of both rich and poor states. Rather than looking inward to identify the source of the problem, the leading global tax policymaking organization concluded that states like Liberia—"behaving like gangsters"—were to blame.[8] The fallout from what many perceived as a discriminatory and racially tainted blacklist caused a lost decade in international tax policy and still distorts policymaking.

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5 *Taxation: EU List of Non-Cooperative Jurisdictions*, EUROPEAN COUNCIL, https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/ (last visited Apr. 7, 2021); OECD, TOWARDS GLOBAL TAX CO-OPERATION: REPORT TO THE 2000 MINISTERIAL COUNCIL MEETING AND RECOMMENDATIONS BY THE COMMITTEE ON FISCAL AFFAIRS: PROGRESS IN IDENTIFYING AND ELIMINATING HARMFUL TAX PRACTICES 17 (2000).

6 Not one of the jurisdictions Kimberly Clausing identifies as the "big seven havens" appeared on either the OECD's 2000 blacklist or that published in 2020 by the European Union. *Compare* Kimberly A. Clausing, *Profit Shifting Before and After the Tax Cuts and Jobs Act*, 73 NAT'L TAX J. 1233, 1237 n.14 (2020) (noting that "$2.8 trillion is located in just 9 havens (Bermuda, the Caymans, Ireland, Jersey, Luxembourg, Netherlands, Puerto Rico, Singapore, and Switzerland)"), *with* EUROPEAN COUNCIL, *supra* note 5, *and* OECD, *supra* note 5, at 17.

7 Quinn Slobodian suggests that the tax treaties that proliferated in the 1970s and 1980s form part of a broad system of neoliberal control designed to limit state power—including the power to tax—gained through decolonization. *See* QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 261 (2018) ("'Internationalism' had to prevail with respect to commercial treaties, sanctity of contract, and property. If free nations remained snug within the bonds of world economic order, then decolonization presented no problems. Indeed, the proliferation of formally sovereign territories could even be useful by multiplying the jurisdictions for investment and innovation, leading to pressure on states to create attractive climates for capital.").

8 *See* Barry James, *Tax Havens Face OECD Threat of Sanctions*, N.Y. TIMES (June 14, 2000), https://www.nytimes.com/2000/06/14/news/tax-havens-face-oecd-threat-of-sanctions.html (quoting an OECD spokesman who asked: "Why give aid to people who are behaving like gangsters?").

Naming and shaming this one country while allowing numerous others to be excluded in that statement highlights the impact a lack of inclusion continues to have on global perceptions of those wielding power in international tax policy circles. What causes us even more grave concern is the impact those perceptions have on those excluded from the international tax policymaking process because of the color of their skin, their gender, or their country. Watching an elite within the OECD and the European Union continue to shape the global policymaking process as developing states struggle to build the capacity of their taxpayers does not suggest a bright future for the international tax system.[9]

Part I explores complexities of the term tax haven or secrecy jurisdictions. Truth #1 explains why tax havens will always exist. Truth #2 shows why, the islands by themselves, however firmly fixed in the public imagination as the quintessential tax havens, do not matter very much in practice. Truth #3 observes that the United States has gone a long way toward becoming the tax haven of tomorrow—it is a case of David and Goliath where Goliath may be winning.

Stubborn facts of inequality, racism, and privilege have kept outdated perceptions alive, stifling efforts to address persistent problems of inequality, racism, and privilege.[10] Oppression pervades the system and, if not understood and unpacked as well as progressively highlighted and deconstructed, it will continue to maintain the status quo and undermine the path to a fair and just global fiscal system. Part II reveals how the fight against tax havens has come to be seen by many as a racialized system of control. Truth #4 describes a Global Southern Strategy in historical context, explaining how it anticipated the nativism that has come to define the politics of our era. Truth #5 shows how a perception that white privilege allows some tax havens to avoid the label has grown entrenched. Truth #6 highlights the consequences of the collision between race and inequality in the fight over tax havens, showing why such perceptions matter.

Part III explains why inclusivity matters in international taxation today. Truth #7 shows how inclusivity helped the U.S. Foreign Account Tax Compliance Act (FATCA) target offshore tax evasion more effectively than

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[9] See ATTIYA WARIS, FINANCING AFRICA (2019) for an analysis on how African countries are trying to progress in building taxpayer capacity.

[10] Keeanga-Yamahtta Taylor's exploration of the role of "predatory inclusion" in the U.S. housing industry shows how racism distorts economic policies, creating a cycle of racism and inequality. KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 5 (2019) ("Predatory inclusion describes how African American homebuyers were granted access to conventional real estate practices and mortgage financing, but on more expensive and comparatively unequal terms.").

naming and shaming. Truth #8 highlights how the U.S. Global Intangible Low-Taxed Income (GILTI) regime penalizes innocent states in its effort to punish the guilty. Truth #9 shows how a retributive emphasis in international tax policy—often driven by non-tax concerns—favors relatively wealthy states.

Truth #10 reveals that inclusion must be broad and deep. A system dominated by men with women slowly entering the space underscores how the architecture of the international tax system stymies inclusivity along other lines, including gender. Achieving a fiscally legitimate international tax system demands that we address the international tax system's Liberia problem. We hope that this represents only the beginning of a conversation about how to make this policy space more inclusive for all.

I. WHAT IS A TAX HAVEN?

A. Truth #1: Tax Havens or Secrecy Jurisdictions Will Probably Always Exist

Tax policy remains primarily a matter of domestic politics. As a result, states inevitably pursue different approaches to similar challenges. To borrow Michael Graetz's words, "[t]he freedom and independence, as well as the economic welfare, of people varies from nation to nation. This simply is fact. In the absence of a world government, this is how it must be."[11] Even if each state started with equal resources and a blank tax policy slate today, tax laws and policies would vary greatly from place to place.

Because "[t]he pattern of taxes in different countries varies, reflecting such factors as economic structure, history, and the tax structures found in neighboring countries," conflicts inevitably arise.[12] As a result, "[t]he central challenge in international tax is navigating the relationship between an individual country's tax system and the rest of the world."[13] Both the broad contours and the finer details of tax laws reflect the fact that "countries may attach different importance to such commonly accepted characteristics of a good tax system as fairness, economic effects, and collection costs."[14] The substantive differences this produces from state to state can be subtle or stark.

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[11] Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261, 278 (2001).

[12] Richard M. Bird & Eric M. Zolt, *Tax Policy in Emerging Countries*, 26 ENV'T PLAN. C: GOV'T & POL'Y 73, 74 (2008).

[13] Diane M. Ring, *One Nation Among Many: Policy Implications of Cross-Border Tax Arbitrage*, 44 B.C. L. REV. 79, 79 (2002).

[14] Bird & Zolt, *supra* note 12, at 74.

When countries resemble one another, their tax laws might run largely parallel with relatively minor differences in the definition of the tax base. For example, the United States and Japan have much in common both in terms of their economies and their tax laws.[15] Despite their many similarities, opportunities for "international tax arbitrage" grow in the inevitable cracks between even such closely matched tax regimes.

Diane Ring offers an illustration of a substantive tax advantage derived from a loan providing for the deferral of interest from a Japanese lender to a U.S. borrower. Since "[t]he U.S. issuer received current annual interest expense deductions, while the Japanese holder paid no tax on the foreign bond interest under Japanese law until the interest income was actually received (for example, at the end of the bond period)," the loan produced a net tax benefit.[16] As Ring notes, "[h]ad the borrowing been entirely domestic, with either the U.S. issuer selling to U.S. purchasers or Japanese investors buying from Japanese issuers, this timing benefit might not have been available."[17] Such ineradicable differences present a daunting challenge.

When countries have little in common, the differences in their tax systems become more dramatic. "A country's revenue structure depends to some extent upon its location and economic structure. In small island countries such as Barbados, international trade taxes may play an unusually important role."[18] When the differences between tax systems reside not in esoteric details but in fundamental choices driven by immutable characteristics, cross-border tax conflicts look very different from those Ring describes.[19]

Even when a poor country and a rich country both impose income taxes, the results may bear little resemblance to one another.[20] Because of differences in

[15] The similarities in their tax laws are no accident. After World War II, U.S. advisors helped lay the foundation of Japan's post-war tax regime. *See* THE POLITICAL ECONOMY OF TRANSNATIONAL TAX REFORM, THE SHOUP MISSION TO JAPAN IN HISTORICAL CONTEXT (W. Elliot Brownlee et al. eds., 2013).

[16] Ring, *supra* note 13, at 92.

[17] *Id.*

[18] Such differences reflect very different economic and geographic circumstances. Bird & Zolt, *supra* note 12, at 75 ("Trade taxes are most important in the lower-income group, where they account for 24% of tax revenues, compared with only 1% in the higher-income group. Trade taxes clearly decline in importance as per capita income rises. The higher the level of per capita income, the more countries rely on direct taxes, especially those on personal income. Consumption taxes too are relatively more important in more developed countries.").

[19] Even when economies are similar, small differences in their tax systems can grow large as states compete for an edge over their neighbors. This approach shifts power from raw material or services producer states to industrialized states as they select based on parameters other than quality of goods and services.

[20] Richard M. Bird & Eric M. Zolt, *Redistribution Via Taxation: The Limited Role of the Personal Income Tax in Developing Countries*, 52 UCLA L. REV. 1627, 1659 (2005).

administrative capacities, "[t]he effective scope of personal income taxes in developing countries is . . . much narrower than in developed countries."[21] As a result, the conflicts that arise between states like the U.S. and Japan tend to be reproduced in exaggerated fashion between very different states.

And that explains how the international tax system developed a Liberia problem.[22] In 2000, when the OECD searched for an explanation for the failures of the international tax system it had overseen for decades, it did not see a war-ravaged Liberia spiraling into more years of brutal killing.[23] The OECD simply saw a state without a comprehensive income tax.[24] Worse, it saw one without the administrative capacity to exchange information with OECD states to help deter offshore tax evasion.[25]

The OECD saw a "gangster" willfully engaging in "harmful tax competition."[26] It threatened Liberia with sanctions if it failed to set aside its civil war to address its international tax shortcomings.[27] The international tax system's Liberia problem can be summed up simply. Because of the inescapable dynamics described above, if defined in terms of "the costs that tax havens impose on other countries" so that even a nation in crisis can be made a scapegoat, tax havens will always exist.[28]

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21 *Id.*

22 *See* OECD, *supra* note 5, at 17 (listing countries identified as tax havens but failing to include European nations often engaging in similar practices).

23 *See generally id.* (attributing tax haven issue to improper tax policies but failing to address any internal political or social issues that may explain the lack of adequate tax policy).

24 OECD maintained Liberia on a list of uncooperative tax havens up until 2007 despite the fact that the country was embroiled in two civil wars from 1987 to 1997 and 1999 to 2003. *See OECD Removes Liberia from Its List of Uncooperative Tax Havens*, OECD (July 24, 2007), http://www.oecd.org/general/oecdremovesliberiafromitslistofunco-operativetaxhavens.html, *Liberia*, CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/where-we-work/liberia/ (last visited Aug. 3, 2021).

25 The first two factors in the OECD's 2000 definition of a tax haven—"1) there is no or nominal tax on the relevant income (from geographically mobile financial and other service activities); [and] 2) there is no effective exchange of information with respect to the regime"—capture that intuition but could describe either a weaponized tax system or a rudimentary one. *See* OECD, *supra* note 5, at 10 n.4. The remaining two factors—"3) the jurisdiction's regimes lack transparency e.g. the details of the regime or its application are not apparent, or there is inadequate regulatory supervision or financial disclosure; and 4) the jurisdiction facilitates the establishment of foreign owned entities without the need for a local substantive presence or prohibits these entities from having any commercial impact on the local economy"—are less intuitive but equally ambiguous. *Id.*

26 *See* James, *supra* note 8 (quoting an OECD spokesman asking: "Why give aid to people who are behaving like gangsters?"); Michael Littlewood, *Tax Competition: Harmful to Whom?*, 26 MICH. J. INT'L L. 411, 413–14, 438 (2004) (defining "harmful tax competition" and addressing OECD's focus on Liberia).

27 *See* James, *supra* note 8 (describing OECD's use of "defensive measures" such as economic sanctions against "tax havens").

28 Gabriel Zucman's book seeks to measure culpability by the costs imposed on other states and to impose sanctions accordingly. *See* GABRIEL ZUCMAN, THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX

B. Truth #2: Tropical Tax Havens Do Not Matter Much

Tax havens such as those on the OECD's 2000 blacklist have no power at all. A U.S. Department of Justice (DOJ) investigation into a Cayman bank at the time the blacklist was being assembled reveals why.[29] In 1999, the DOJ entered into a plea deal with a Texas resident, John Mathewson, who served as the chairman and controlling shareholder of that Cayman bank. Information revealed by Mathewson showed that "both the underlying funds . . . deposited . . . and the investment income, were generally purely domestic transactions" and that the Cayman bank served simply as the financial equivalent of a fake mustache disguising U.S. investors as foreigners.[30]

In other words, most of the money "deposited" in the bank made a quick round trip from and to the United States.[31] U.S. individuals used such circumlocutions to invest in the United States anonymously.[32] Since the United States generally exempts the investment income earned by foreigners, an apparently robust U.S. domestic information reporting mechanism failed to prevent tax evasion, bolting the front door while leaving the back door open.[33]

Obviously, such a gambit could be interrupted either in the United States or the Cayman Islands.[34] To paraphrase Coase, although "[t]he question is commonly thought of as one in which [tax havens] inflict[] harm on [the United States] and what has to be decided is: how should we restrain [tax havens]? . . . [T]his is wrong. We are dealing with a problem of a reciprocal nature."[35] In this case, given that the banker, the clients, and the investments were all located in the United States, that seems clear.[36] In theory, the United States could easily impose a robust withholding tax to defeat such a strategy.[37]

HAVENS (Teresa Lavender Fagan trans., 2015). Ronald Coase explains why this makes little sense in theory. *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960). In practice, as Truth #5 explains, such punishments have never been meted out in a color-blind fashion. *See infra* notes 66–75 and accompanying text.

29 *See, e.g.*, Joseph Guttentag & Reuven Avi-Yonah, *Closing the International Tax Gap*, *in* BRIDGING THE TAX GAP: ADDRESSING THE CRISIS IN FEDERAL TAX ADMINISTRATION 99–100 (Max B. Sawicky ed., 2005) (describing a financial transaction being run through the Cayman Islands where all funds and income were related to U.S. actors).

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.* at 104–07.

35 Coase, *supra* note 28.

36 *See* Guttentag & Avi-Yonah, *supra* note 29, at 100.

37 *See generally* Reuven S. Avi-Yonah, *A Coordinated Withholding Tax on Deductible Payments*, 119 TAX NOTES 993 (2008) (describing the U.S. elimination of the withholding tax for foreign residents in 1984).

But since the 1980s, it has chosen not to in order to spur foreign investment in the United States.[38]

Even if we envision a more complex world, the same remains true. States concerned about tax havens could insist that havens "fence out" their taxpayers, but could also "fence in."[39] For example, a U.S. taxpayer might invest in Germany through a tax haven, again using a Cayman bank as a cheap but effective disguise.[40] Since the bank merely serves as a conduit, if Germany imposed a robust tax on the investment income there would be no benefit to wearing that disguise.[41] As Avi-Yonah noted, in the same year that the OECD took decisive action to address its Liberia problem, "tax havens' cooperation is not needed" as long as the jurisdictions in which taxpayers prefer to invest to earn "decent returns without incurring excessive risk" cooperate to fence their taxpayers in.[42]

C. Truth #3: The United States Has Become a Superhaven

The tropical tax havens featured in colorful episodes like Project Haven—with a Bahamian banker lured to dinner in Key Biscayne while his briefcase was photographed by an IRS informant—have a firm hold on the popular imagination.[43] But the reality tends to be far more complex. Because the United States generally refrains from taxing capital income earned by foreigners—most notably by providing "an exemption from tax for portfolio interest income derived from U.S. firms by foreign investors," all a U.S. person needs to do to evade U.S. taxes is blend in with the crowds of foreign investors avoiding

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38 *See id.* at 993–94.

39 *See* Guttentag & Avi-Yonah, *supra* note 29, at 104 (describing ways in which a nation could hold its own citizens accountable for tax evasion through internal tax policies and enforcement mechanisms).

40 Avi-Yonah, *supra* note 37, at 994 (providing a similar example where German citizens invest through Luxemburg-based accounts to minimize tax implications).

41 *Id.* (describing the current withholding tax policy globally as a "prisoner's dilemma" and recommending the solution as all countries implementing a withholding tax so that no one country is more favorable for tax purposes than another).

42 Avi-Yonah, *supra* note 2, at 1668 ("The world's savings may be parked in traditional tax havens, but the tax havens' cooperation is not needed. To earn decent returns without incurring excessive risk, investors must use the markets in the EU, the United States, Japan, and Switzerland. Thus . . . OECD member countries could . . . effectively tax cross-border portfolio interest flows.").

43 Jim Drinkhall, *IRS v. CIA: Big Tax Investigation Was Quietly Scuttled by Intelligence Agency*, WALL ST. J., Apr. 18, 1980, at 1 ("The photographed documents were a revelation. One of them was a computer printout of the bank's account holders—some 308 names, including not only nationally known U.S. businessmen and entertainers but quite a few well-known organized-crime figures as well. The account holders controlled about a quarter of a billion dollars in assets. To the jubilant agents the list presented the possibility of the single biggest tax-evasion strike in IRS history.").

foreign taxes.[44] Such arrangements—"common among industrialized nations"—make fencing in impossible.[45]

The sleight of hand that tax evasion represents increases financial returns. An investment yielding a return of ten dollars looks more appealing when the investor can keep all of them rather than only seven or eight. Other financial crimes such as money laundering serve a different purpose, with secrecy serving as an end rather than a means.[46] And while it may be true to say that trillions of dollars are hidden in tax havens, tax evasion does not explain why.

A tropical tax haven will never be a one-stop-shop because it provides few appealing investment opportunities (and keeping only seven out of ten after-tax dollars will always beat keeping all of no investment return at all). None of the tax havens on the 2000 or 2020 blacklists could compete for the world's investment dollars in a world without taxes. "To earn decent returns without incurring excessive risk, funds have to be invested in an OECD member country (and more particularly, in the EU, the United States, Japan, or Switzerland)."[47]

Tropical tax havens can only provide secrecy and be a conduit for money in transit. A state that could combine secrecy, non-taxation, and attractive rates of return would represent a quantum leap in tax havens over one offering secrecy alone. With the advent of a sweeping, OECD-led multilateral transparency initiative referred to as the Common Reporting Standard (CRS), the United States appears poised to become precisely that tax haven 2.0.[48] Even Switzerland has agreed to participate. Having refused, "the United States is the only major financial center that has not committed to the CRS."[49]

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44 *See generally* I.R.C. §-871(h)(1) (providing for the portfolio interest exception).

45 The U.S. policy of exempting capital income earned by foreign taxpayers does not attract the same scrutiny as the policy choices made by today's tax havens. *See, e.g.*, Karen B. Brown, *Harmful Tax Competition: The OECD View*, 32 GEO. WASH. J. INT'L L. & ECON. 311, 318 (1999) ("Since 1984, for example, the United States has allowed an exemption from tax for portfolio interest income derived from U.S. firms by foreign investors. This type of exemption is common among industrialized nations. Yet, it appears to escape harmful competition classification because it lacks the factors determined by the *Harmful Tax Competition Report* to be possessed by tax havens or harmful tax competition jurisdictions.").

46 *See infra* note 117.

47 Avi-Yonah, *supra* note 37, 995.

48 *Common Reporting Standard*, OECD, http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/ (last visited Feb. 5, 2020) ("The Common Reporting Standard (CRS), developed in response to the G20 request and approved by the OECD Council on 15 July 2014, calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. It sets out the financial account information to be exchanged, the financial institutions required to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions.").

49 Elisa Casi, Christoph Spengel & Barbara Stage, *Cross-Border Tax Evasion After the Common*

Experts have shown that when some tax havens agree to fence out, others capitalize.[50] One notable beneficiary of that dynamic in recent years has been the United States.[51] Any such increase in the volume of tax evasion must be must be measured against a longstanding "sucking sound, tax-wise" in the form of "the large amount of portfolio investment in U.S. bonds and securities that likely bears little, if any, tax in the country of residence."[52] By declining to participate in CRS, the United States has secured its place as the tax haven of tomorrow.[53]

II. PRIVILEGE AND TAX HAVENS

A. *Truth #4: The Global Southern Strategy Tells a Culture Story*

The ascendance of the Global Southern Strategy[54] in 2000 has no parallel. But it does have an origin story. This cynical—and highly successful—political ploy shifted blame for structural failures onto Black and Brown states. In some respects, it represented a throwback to other efforts to blame the Global South for the Global North's problems.[55] And it continues to serve as a coded call to action. Scholars, for example, exploit the Global Southern Strategy by invoking

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Reporting Standard: Game Over?, 190 J. PUB. ECON. 1, 2 (2020) ("This represents a key advantage over traditional tax havens, which now automatically exchange information on foreign accounts under the CRS.").

50 Niels Johannesen & Gabriel Zucman, *The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown*, 6 AM. ECON. J.: ECON. POL'Y 65, 67 (2014) (concluding that such fencing out tends to produce not a "significant repatriations of funds, but rather a relocation of deposits between tax havens").

51 Casi et al., *supra* note 49, at 11 ("[A]fter the CRS took effect, an unexpected country seems to have begun to attract wealth and related income, namely, the United States. . . . [O]ver our sample period, cross-border deposits held by residents of nonhaven countries in the United States increased by 10% after the CRS took effect.").

52 Bird & Zolt, *supra* note 20, at 1659.

53 *See* LUKAS HAKELBERG, THE HYPOCRITICAL HEGEMON: HOW THE UNITED STATES SHAPES GLOBAL RULES AGAINST TAX EVASION AND AVOIDANCE (2020). The passage of the Corporate Transparency Act represents a small step towards addressing the hypocrisy Hakelberg describes by requiring some formerly anonymous shell companies to disclose their beneficial ownership. *See* Corporate Transparency Act of 2019, H.R. 2513, 116th Cong. (2019).

54 The Global Southern Strategy's name harkens back to prior racist political machines. The phrase "southern strategy" was also used by the United States' Republican Party following the Civil Rights Movement when the party sought to capitalize on the racial fears of Southern white voters. *See* Angie Maxwell, *What We Get Wrong About the Southern Strategy*, WASH. POST (July 16, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/07/26/what-we-get-wrong-about-southern-strategy/.

55 Like Nixon's War on Drugs, the Global Southern Strategy tapped into racial prejudice and xenophobia to simplify a complex problem with predictably poor results. *See* GLOB. COMM'N ON DRUG POL'Y, THE WAR ON DRUGS 2 (2011) ("The global war on drugs has failed, with devastating consequences for individuals and societies around the world. Fifty years after the initiation of the UN Single Convention on Narcotic Drugs, and 40 years after President Nixon launched the US government's war on drugs, fundamental reforms in national and global drug control policies are urgently needed.").

"the scourge of tax havens" to call for punitive action.[56] They may intend their imagined punishments for Switzerland, but such states routinely avoid blacklists and sanctions.[57]

The Global Southern Strategy tells a "culture story" to explain the danger posed by tax havens.[58] The culture story of tax havens might acknowledge Truth #1 while concluding that its structural story offers an incomplete account. Tropical tax havens lack the administrative capacity to implement personal or corporate income taxes comparable to those employed by the OECD, but the Global Southern Strategy suggests that "beliefs, values, norms, and socialization" also play an important role.[59]

In the 1990s, similar narratives shaped the U.S. domestic anti-poverty and crime policies of the Clinton Administration with profound—and profoundly unequal—consequences.[60] Under Clinton's Treasury Secretary Larry Summers, in the cross-border context, blacklists gained favor.[61] Then and now, the Global Southern Strategy reflects a reality that "what is counted as a tax haven has much less to do with objective features of the tax regime or financial regulations than a country's reputation and the motives of the observer."[62]

Unable to offer a structural explanation for a growing gap between the burdens the tax law purported to impose on the wealthy and the apparent ease

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56 Gabriel Zucman's influential book's title references the "scourge of tax havens," which he emphasizes means countries like Switzerland and Luxembourg. *See* ZUCMAN, *supra* note 28. In practice, history suggests that his proposal "to levy sanctions proportional to the costs that tax havens impose on other countries" would punish very different states. *Id.* at 5.

57 *Id.* at 5 ("The calculations presented in this book show that France, Germany, and Italy would be able to force Switzerland to disclose all the assets held there by their residents by jointly imposing customs duties of 30% on the goods that they import from Switzerland[.]").

58 To explain the U.S. racial educational achievement gap without "blam[ing] [B]lack genes" or accepting "that environmental conditions alone" can explain the relative success of white students a "culture story" points to the "beliefs, values, norms, and socialization of the families, groups, or communities to which they belong." Charles R. Lawrence III, *Education Law: Unconscious Racism and the Conversation About the Racial Achievement Gap*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 116 (Justin D. Levinson & Robert J. Smith eds., 2012).

59 *Id.*

60 Fears of Black male violence spawned talk of "predators" and helped create the 1994 crime bill blamed for today's mass incarceration crisis while fears of Black "welfare queens" inspired welfare reform. *See* Andrew Kaczynski, *Biden in 1993 Speech Pushing Crime Bill Warned of 'Predators on Our Streets' Who Were 'Beyond the Pale'*, CNN (Mar. 7, 2019, 11:43 AM), https://www.cnn.com/2019/03/07/politics/biden-1993-speech-predators/index.html; Bryce Covert, *The Myth of the Welfare Queen*, NEW REPUBLIC (July 2, 2019), https://newrepublic.com/article/154404/myth-welfare-queen.

61 J.C. SHARMAN, HAVENS IN A STORM: THE STRUGGLE FOR GLOBAL TAX REGULATION 36 (2006) ("[T]he U.S. Treasury, particularly under the Clinton administration's Lawrence Summers, has been the strongest proponent of the FATF and OECD blacklists.").

62 *Id.* at 21.

with which they were permitted to evade them, the OECD relied on culture. And why not? The War on Drugs declined to address societal failure, instead marshaling "[v]ast expenditures on criminalization and repressive measures directed at producers, traffickers and consumers of illegal drugs" that offered leaders the opportunity to portray themselves as defenders of law and order.[63] The Global Southern Strategy did the same with tax evasion, transforming the OECD from a forgettable collection of experts into generals in a just war against tax havens.[64]

With the benefit of hindsight, Truth #6 reveals the Global Southern Strategy to have been a clear misstep. But in 2000, such culture stories retained a broad appeal.[65] And indeed, the embarrassing details of the 2000 blacklist and its decisive rejection were—as Truth #6 recounts—misunderstood and quickly forgotten. The intervention by the U.S. Congressional Black Caucus it describes successfully challenged that culture story. But even after 2010, when, as Truth #7 describes, President Obama demonstrated that tax evasion represents a structural problem, the lure of punishing tax havens would endure. And Truth #5—highlighting the role of privilege in shielding a few states from consequences—may be the most important of all.

B. Truth #5: Privilege Matters in International Tax

Whiteness has its privileges. Switzerland (an OECD member) was not included on the 2000 list threatening sanctions.[66] Despite evidence showing its growing role in facilitating tax evasion, the United States was not included on the 2020 blacklist published by the European Union.[67] Those states have been dubbed "too big to be listed" and continue to escape such blacklisting.[68]

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63 *See* GLOB. COMM'N ON DRUG POL'Y, *supra* note 55, at 2 ("Apparent victories in eliminating one source or trafficking organization are negated almost instantly by the emergence of other sources and traffickers.").

64 The failed OECD effort was occasionally—playfully—described as a "war." Martin A. Sullivan, *Lessons from the Last War on Tax Havens*, 116 TAX NOTES FED. 327, 334 (2007) ("It is entertaining to consider, for example, why the larger nations did not use their militaries to enforce their will on smaller nations. After all, the U.S. did invade two of the blacklisted nations in recent times — Grenada in 1983 and Panama in 1989. And there is no doubt military action would have been effective and efficient.").

65 A broad recognition of the need to "[r]eplace drug policies and strategies driven by ideology and political convenience with fiscally responsible policies and strategies grounded in science, health, security and human rights" remained years into the future. GLOB. COMM'N ON DRUG POL'Y, *supra* note 55, at 3.

66 OECD, *supra* note 5; Clausing, *supra* note 6.

67 EUROPEAN COUNCIL, *supra* note 5.

68 JOHAN LANGEROCK, OXFAM, OFF THE HOOK: HOW THE EU IS ABOUT TO WHITEWASH THE WORLD'S WORST TAX HAVENS 3, 16 (2019).

But size alone does not explain which countries are listed and which are not. Liberia, unlike many listed states, has a population that rivals or even exceeds some European countries that have been identified as tax havens.[69] To understand their disparate treatment,

> it is not enough to recognize that we hold stereotypes and have implicit biases when it comes to associations between [B]lack and [B]rown skin, on one side, and criminality on the other. We must also recognize that we hold stereotypes and have implicit biases that associate whiteness with law abidingness and honesty.[70]

Many blacklisted states are small. Dominica's treatment by the European Union recently raised eyebrows. In 2019, the European Union included Dominica on a blacklist of tax havens.[71] In the words of the Caribbean Community, "[t]he case of Dominica highlights the insensitivity of the EU Council to a country that was devastated by two natural disasters in 2015 and 2017 and lost its largest investor."[72] Blacklisting a state less than two years after being hit by a category five hurricane would seem callous even if Dominica had not made every effort to placate the European Union. But, in fact, Dominica had already "completed all the required legislative and administrative reforms to which the government had committed in mid-2018 to undertake."[73] The excessive punishment meted out to Dominica for the crime of being a tax haven fits an all-too-recognizable pattern of an unlevel playing field. And it fueled perceptions of disparate treatment of nations with predominantly Black or Brown populations.[74]

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[69] One such state is Luxembourg, which the Tax Justice Network refers to as part of the "Axis of Tax Avoidance" along with Switzerland, the Netherlands, and the United Kingdom. ALEX COBHAM, JAVIER GARCIA-BERNARDO & MARK BOU MANSOUR, TAX JUST. NETWORK, THE AXIS OF TAX AVOIDANCE (2020), https://www.taxjustice.net/wp-content/uploads/2020/04/The-axis-of-tax-avoidance_Tax-Justice-Network_April-2020-1.pdf; *see also* Jones, *supra* note 3 ("It is perhaps an indication of the bad odour which the expression tax haven has aroused that the countries which spring to mind as tax havens both argue that they are not: Luxembourg points out that, apart from its holding company legislation, it is a high-tax country and the Channel Islands prefer to be known as a low-tax country rather than as a tax haven.").

[70] I. Bennett Capers, *The Under-Policed*, 51 WAKE FOREST L. REV. 589, 605 (2016).

[71] Viktoria Dendrinou & Lyubov Pronina, *U.A.E., 9 Other Jurisdictions Added to EU Tax-Haven Blacklist*, BLOOMBERG L. NEWS (Mar. 12, 2019, 10:19 AM), https://www.bloomberg.com/news/articles/2019-03-12/u-a-e-9-other-jurisdictions-added-to-eu-tax-haven-blacklist.

[72] Kendol Morgan, *CARICOM Statement on Revised EU Blacklist of Members of the Community*, CARICOM TODAY (Mar. 29, 2019), https://today.caricom.org/2019/03/27/caricom-statement-on-revised-eu-blacklist-of-members-of-the-community/.

[73] *Id.*

[74] *See* Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1603 (2017) (describing "the routine harassment of [B]lack people for alleged petty offenses that often leads to impoverishing and detaining them without regard to their culpability for law breaking").

The culture story of tax havens allows race to play a counterproductive role in shaping policy responses to a structural problem. If being a tax haven becomes equated with lawlessness, punishment becomes the only appropriate response. And however easy it may be to punish Dominica, punishing influential states like Switzerland remains exceedingly difficult. Veering into hypocrisy—as Truth #3 reveals the United States has—puts the idea of a structural solution applied evenhandedly to all even further out of reach.[75]

C. *Truth #6: The Culture Story of Tax Havens Caused a Lost Decade in International Tax Policy*

Punishing Dominica and Liberia as tax havens seems peculiar at best and driven by racial animus at worst. When targeted by powerful actors for sanctions, neither had the access or clout needed to steer history in a different direction. But at least one representative—technically a non-voting Delegate—of another apparently helpless jurisdiction listed by the OECD in 2000 moved freely through the corridors of power and that made all the difference.

Shortly after the OECD published its blacklist in 2000, the United States withdrew critical support from the effort.[76] Most observers linked this change to the 2000 U.S. election and the arrival of a Republican administration.[77] But a closer look suggests a different catalyst. In May of 2001, six months after the U.S. presidential election, Treasury Secretary Paul O'Neill signaled the U.S. change. "Recently," he wrote, "I have had cause to re-evaluate the United States' participation in the Organization for Economic Cooperation and Development working group that targets 'harmful tax practices.'"[78] What caused O'Neill to change course was not the 2000 election, but a much-misunderstood March 14, 2000, letter from the Congressional Black Caucus.[79] In that letter, the nonpartisan group strongly criticized the OECD effort as unfair to developing countries.[80] With it, they accomplished what neither a Presidential election nor

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[75] HAKELBERG, *supra* note 53 (noting instances of hypocrisy in U.S. international tax policy throughout).

[76] Sunita Jogarajan & Miranda Stewart, *Harmful Tax Competition: Deafeat or Victory?*, 22 AUSTL. TAX F. 3, 4, 13 (2007).

[77] *See id.* at 13 ("[I]t is important to acknowledge a simpler explanation for failure of the project – that it was caused by the withdrawal of support by the US government after the election of President George Bush in 2001."). The election, of course, took place in 2000, not 2001.

[78] Paul O'Neill, Opinion, *Confronting OECD's 'Harmful' Tax Approach*, WASH. TIMES, May 11, 2001, at A17.

[79] Cordia Scott, *Black Caucus Says OECD Tax Move Unfairly Blasts Developing Nations*, 22 TAX NOTES INT'L 1600, 1600–01 (2001).

[80] *Id.*

months of pressure from conservative think tanks had: U.S. support for the OECD effort evaporated.

Most observers dismissed the CBC letter as an aberration.[81] But from the CBC's perspective—and to many more with the benefit of hindsight—the OECD's 2000 blacklist represented a troubling collision of the over-policing of Blacks and white privilege. That perspective comes into focus with the help of a long-overlooked second letter, written days earlier. On March 12, 2001, a nonvoting Congressional Delegate from the U.S. Virgin Islands challenged the OECD.[82] Even if it seems odd that a majority of the CBC would sign a letter opposing the OECD effort, that Delegate Donna Christensen would oppose sanctions targeting the Congressional District that sent her to Washington would certainly not.

Nor should it seem remarkable that she persuaded many of her fellow CBC members to join her. Thanks to her intervention, one of the most powerful men in the world, Representative Charles Rangel, signed the second letter.[83] Beyond being a Black man well acquainted with over-policing and privilege, Rangel had his own reasons to speak out against this particular form of injustice.

Elected to Congress as a war hero in the 1970s, Rangel soon became Chair of the House Ways and Means Committee.[84] In the 1980s, he helped craft tax legislation that a South African ambassador would later tell him had been decried as the "bloody Rangel Amendment."[85] Ignoring objections that racial injustice overseas should not be considered when formulating international tax rules, it denied foreign tax credits to U.S. businesses operating in Apartheid-era South Africa.[86] At the moment Liberia was being targeted by the OECD for

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[81] Most seemed to conclude that opposing the OECD effort represented a miscalculation on the part of the CBC or a capitulation to pressure from conservative groups. J.C. SHARMAN, HAVENS IN A STORM: THE STRUGGLE FOR GLOBAL TAX REGULATION 67 (2006) (noting that the CBC may have been "open to suggestion as to where their interests lay in relation to this issue"). Others seemed to see the CBC stance as a betrayal of civil rights principles. *See* Anand Giridharadas, *Saved Havens*, 225 NEW REPUBLIC 23, 24 (2001) (concluding that the CBC sent their letter "after laborious persuasion" from right wing groups groups).

[82] Letter from Donna M. Christensen, Del., D-V.I., to Hon. Paul O'Neill, Sec'y, U.S. Dep't of the Treasury (Mar. 12, 2001).

[83] Scott, *supra* note 79, at 1600.

[84] *Biography of Charles B. Rangel*, U.S. HOUSE REPRESENTATIVES, https://history.house.gov/People/Detail?id=20144 (last visited Feb. 8, 2021).

[85] CHARLES B. RANGEL, AND I HAVEN'T HAD A BAD DAY SINCE: FROM THE STREETS OF HARLEM TO THE HALLS OF CONGRESS 52–53 (2007).

[86] *See* John F. Burns, *U.S. Tax Sanction Angers Pretoria*, N.Y. TIMES, Dec. 25, 1987, at D2 (quoting South African Foreign Minister Roelof F. Botha, describing the Rangel Amendment as "a particularly gross form of hypocrisy"); *The Rangel Amendment*, WASH. POST, Jan. 3, 1988, at B6 (arguing that firms in South Africa are in "the vanguard of equal rights" and they will be forced to sell to investors without such scruples);

sanctions, Rangel was playing a pivotal role in the passage of African free trade legislation.[87]

The fallout of "the effective withdrawal of substantial U.S. backing" triggered by opposition from Rangel and the CBC "dealt a major blow to the [OECD's] tax competition work."[88] Had the U.S. Virgin Islands not been put on the OECD's blacklist, Rangel might never have heard of it. And had Liberia not been targeted, he might not have opposed it. But Rangel, more knowledgeable about the intersection of international tax law and politics than almost anyone, would have had little difficulty recognizing the contours of the OECD's Global Southern Strategy.

Delivering punishment to Black states to recall a lost era of order and prosperity turned the power of the Rangel Amendment on its head. To the author of countless pieces of international tax legislation over a quarter century—including a decisive blow against Apartheid—the injustice of convicting Liberia for a crime it could not have committed would have been obvious. Whether the product of overt racism, implicit bias, or both, leveraging a culture story to justify punishing a powerless African state persuaded a majority of the Congressional Black Caucus to join forces with ideological foes such as the Heritage Foundation with extraordinary consequences. Not until almost a decade had passed did another opportunity to shape a structural solution to offshore tax evasion arise.

III. DISTORTED POLICIES

A. *Truth #7: Fencing Taxpayers in Proved to Be Easy*

The OECD report "paint[ed] a picture of money laundering and unsound regulatory practices" to justify its stark threats.[89] Yet that culture story does not

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Nancy H. Kreisler, *Mobil is Quitting South Africa, Blaming 'Foolish' Laws in U.S.*, N.Y. TIMES, April 29, 1989, at 1 (citing the "foolish" Rangel Amendment as the decisive factor in Mobil's decision to sell its operations in South Africa).

[87] *See* Karen B. Brown, *Missing Africa: Should U.S. International Tax Rules Accommodate Investment in Developing Countries?*, 23 U. PA. J. INT'L ECON. L. 45, 47 (2002) (noting that the Trade and Development Act of 2000 "established the United States-sub-Saharan Africa Trade and Economic Cooperation Forum, liberalized import restrictions, and relaxed tariffs on textiles imported into the United States," and represented "years of efforts by Congressman Charles Rangel and others to highlight the need for development of enhanced commercial ties with sub-Saharan Africa").

[88] Diane M. Ring, *What's at Stake in the Sovereignty Debate: International Tax and the Nation-State*, 49 VA. J. INT'L L. 155, 189 (2008).

[89] Letter from the Congressional Black Caucus to Hon. Paul O'Neill, Sec'y, U.S. Dep't of the Treasury (Mar. 14, 2001).

withstand careful scrutiny. Those states typically identified as tax havens "score very well on cross country indices of governance quality that include measures of voice and accountability, political stability, government effectiveness, rule of law, and the control of corruption. Indeed, there are almost no poorly governed tax havens."[90] Vilifying such states as "gangsters" would have seemed like ham-fisted racial profiling to Rangel and his colleagues.[91] At what proved to be a pivotal moment, they urged the Bush administration to "to reject the OECD's misguided initiative" and its culture story of tax havens.[92]

A lost decade followed the collapse of the OECD effort. In 2009, Rangel would return to the challenge of offshore tax evasion with a starkly different vision. Rather than bullying other states to fence taxpayers out, Rangel would help craft legislation designed to fence them in. With hindsight, it seems almost too easy. In the wake of the 2008 financial crisis and the fiscal crunch that followed, the United States passed FATCA.[93]

Before FATCA, the United States received paper documents and countless magnetic tapes from its bilateral tax treaty partners. Those records contained information about "passive income such as interest, dividends, rents, and royalties."[94] In theory, that "information exchange" should have made evasion difficult, but, a few years before FATCA, the Commissioner of the IRS explained why it did not:

> Most of the information does not contain a U.S. tax identification number (TIN). These documents are in a foreign language and involve foreign currency, contain mismatched tax years and/or multiple tax years, are not timely received for an automated matching program, and at times, do not report a taxable event in the U.S.[95]

For all the reasons Commissioner Mark Everson cataloged, extending information exchange arrangements to include tax havens—as the OECD's 2000 effort urged—would have accomplished little.

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90 Dhammika Dharmapala & James R. Hines Jr., *Which Countries Become Tax Havens?*, 93 J. PUB. ECON. 1058, 1058 (2009).

91 *See* Barry James, *Tax Havens Face OECD Threat of Sanctions*, N.Y. TIMES (June 14, 2000), https://www.nytimes.com/2000/06/14/news/tax-havens-face-oecd-threat-of-sanctions.html (quoting an OECD spokesman asking, "Why give aid to people who are behaving like gangsters?").

92 Letter from the Congressional Black Caucus to Hon. Paul O'Neill, *supra* note 89.

93 HAKELBERG, *supra* note 53, at 4; *see also* Scott D. Michel, *FATCA: A New Era of Financial Transparency*, J. ACCOUNTANCY (Jan. 1, 2013), https://www.journalofaccountancy.com/issues/2013/jan/20126594.html.

94 Letter from Mark W. Everson, Comm'r, IRS, to Hon. Max Baucus, Ranking Member, U.S. Senate Comm. on Fin., at 1 (June 12, 2006).

95 *Id.* at 2.

What the IRS needed was, simply put, information reporting from banks.[96] And FATCA demanded just that. FATCA made no pretense of bartering with other states to give and receive information. It threatened financial institutions—not states—with harsh penalties if they failed to send the IRS specific items of information about U.S. taxpayers.[97]

Rangel, together with another former CBC member, President Obama, delivered on Obama's campaign promise to crack down on international tax abuses by crafting FATCA.[98] FATCA, although far from perfect, learned important lessons from the OECD's failure a decade before. Not only did it make no effort to identify or define tax havens, in a forceful rejection of the Global Southern Strategy—the landmark U.S. legislation did not even use the words.[99]

Both its strengths and weaknesses flow from that critical choice. Given that the United States taxes all its citizens regardless of residence, fencing in all U.S. taxpayers represents a global undertaking. Many Americans living overseas pay no U.S. taxes because of well-established safe harbors designed to shield Americans abroad from compliance burdens.[100] But even they found themselves subject to FATCA's burdens. FATCA subjected middle-class expatriates to a brand of policing generally reserved for Black and Brown Americans.[101] And they did not like it.[102]

But from the CBC's perspective, the decision to fence in U.S. taxpayers addressed key shortcomings of the earlier OECD effort.[103] FATCA reached banks everywhere that Americans lived and worked overseas rather than

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[96] *Id.* (Observing that "we have made efforts to process the paper documents for use in an automated matching program for individuals by converting them into Forms 1099," but "the deficiencies in the documents, the need to fund competing and other priority compliance initiatives, and the lack of an adequate cost/benefit analysis have impeded the strategic and coordinated use of this information").

[97] HAKELBERG, *supra* note 53, at 4.

[98] *See* Scott Langdon, *President Obama Challenges Tax Evasion with Foreign Account Tax Compliance Act*, MONEY TASK FORCE (Oct. 27, 2009), https://www.moneytaskforce.com/taxes/president-obamas-statement-on-foreign-account-tax-compliance-act-of-2009/.

[99] Foreign Account Tax Compliance Act, Pub. L. No. 111-147, 124 Stat. 71 (2010).

[100] *See Publication 54 (2020), Tax Guide for U.S. Citizens and Resident Aliens Abroad*, IRS, https://www.irs.gov/publications/p54 (last visited Mar. 3, 2021) (documenting the taxation and safe harbor exemptions for nonresident Americans and others).

[101] *See* Steven A. Dean, *FATCA, the U.S. Congressional Black Caucus, and the OECD Blacklist*, TAX NOTES (July 2, 2020), https://www.taxnotes.com/special-reports/competition-and-state-aid/fatca-us-congressional-black-caucus-and-oecd-blacklist/2020/07/02/2cns4.

[102] One Twitter reply to a post about the anti-racist nature of FATCA complained that FATCA might not be racist, but it was "placist." Laura Snyder (@TAPInternation), TWITTER (July 5, 2020, 9:12 AM), https://twitter.com/TAPInternation/status/1279765026006536193.

[103] Dean, *supra* note 101.

focusing on Black and Brown jurisdictions.[104] In addition to avoiding the racial profiling that put Liberia on the OECD's blacklist, by focusing on banks it addressed the failures Everson had identified just a few years before. Intergovernmental exchanges of inscrutable magnetic tapes gave way to the systemic data collection he had urged, delivering information rather than a pretense of law and order. And Rangel had proven long before that he would not shrink from pressure by multinational corporations.[105]

B. Truth #8: Minimum Taxes Punish Difference

FATCA showed that treating tax evasion as a structural problem could lead to increased compliance. But international tax still has a Liberia problem. The brutality of the 2000 tax haven blacklist does not have the visceral impact of the murder of Eric Garner by New York City police over suspicions of cigarette tax evasion. But had the CBC not intervened on behalf of Liberia and the other listed jurisdictions, sanctions might have caused countless deaths.

International tax law's inequities tend to be more subtle. Like the racism and gender discrimination embedded in U.S. domestic tax law highlighted by critical tax scholars, international tax rules reflect and magnify the chauvinisms that pervade society.[106] International tax policy has largely escaped similar scrutiny.[107]

The foreign tax credit, for example, relies on a culture story to decide which countries should benefit from that U.S. largesse. Only income taxes very similar to those imposed by the United States trigger the foreign tax credit.[108] That disadvantages the most vulnerable states (states that Truth #1 suggests will be least likely to impose taxes enough like the U.S. income tax to make the credit

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[104] *Id.*

[105] *Supra* notes 85–88 and accompanying text.

[106] *See, e.g.*, Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 796–97 (2007); DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT (2021); Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 450–51 (2019).

[107] Although international tax rules have not attracted any significant attention in terms of gender or race, some comparative tax work has focused on gender. *See, e.g.*, U.N. DEV. PROGRAM, TAXATION, ISSUES BRIEF: GENDER EQUALITY AND POVERTY REDUCTION 3–4 (2010), https://www.undp.org/content/undp/en/home/librarypage/womens-empowerment/taxation-note.html (a UN report on gender in various tax regimes); *Why Is Tax a Feminist Issue?*, PEACEWOMEN, http://peacewomen.org/resource/why-tax-feminist-issue (last visited February 5, 2021); Caroline Othim & Roosje Saalbrink, *It's Time to Tax for Gender Justice*, OPENDEMOCRACY (Oct. 1, 2019), https://www.opendemocracy.net/en/oureconomy/its-time-tax-gender-justice/.

[108] I.R.C. §-901(b); I.R.C. §-904.

available) producing a "low-end regressivity" more familiar in the domestic tax policy context.[109]

The culture story that prompted policymakers to replace traditional welfare with tax credits—that generous welfare benefits for families promoted sloth—leave those most in need vulnerable.[110] If discrimination or a lack of childcare deny a person access to the labor market, they lose access to the Earned Income Tax Credit. Similarly, a jurisdiction that lacks the resources to employ a U.S.-style income tax loses the benefit of the foreign tax credit. States that lack the administrative capacity or market power to collect income taxes get little or no benefit. Such vulnerable states lose out, even if they impose other taxes on U.S. businesses. If their taxes do not conform to U.S. norms, they do not qualify for the foreign tax credit.[111]

The most recent anti-tax haven effort, Global Intangible Low-Taxed Income (GILTI), does not rely on blacklists.[112] And, like FATCA, it disdains the term tax havens. Still, it embraces the same culture story to punish "low-tax" jurisdictions. GILTI employs the settler colonial logic of "efficient expropriation" to collect taxes belonging to low-tax jurisdictions.[113] Collecting revenues that Liberia does not, without interrogating the structural reasons for that failure, finds justification in the familiar culture story that interprets the absence of a familiar income tax as just cause for punishment.

GILTI does not openly target vulnerable states as blacklists do. But its continued embrace of the culture story of tax havens justifies treating any state

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109 *See* Ariel Jurow Kleiman, *Low-End Regressivity*, 72 TAX L. REV. 1, 3 (2018).

110 *See* Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515, 522 (2013) ("[I]n its current form, [the earned income tax credit] fails as a safety net for families."). The temporary 2021 expansion of tax credits for Americans living in poverty responded to these concerns by creating a more generous Child Tax Credit, which does not include any sort of work requirement. *See* Megan Leonhardt, *Here's Who Qualifies for the New $3,000 Child Tax Credit*, CNBC (Mar. 11, 2021, 2:38 PM), https://www.cnbc.com/2021/03/10/who-qualifies-for-3000-dollar-child-tax-credit.html ("The new provision allows households with no income to claim the credit. This is a major change, as previous rules limited the credit to those earning at least $2,500. In the past, families with very low incomes did not receive the full credit.").

111 Biddle v. Comm'r of Internal Revenue, 302 U.S. 573, 581–82 (1938) ("[O]ur statutes afford no scope for saying that the stockholder of a British corporation pays the tax which is laid upon and collected from the corporation, and no basis for a decision that [the foreign income tax credit] extends to such a stockholder a credit for a tax paid by the corporation—a privilege not granted to stockholders in our own corporations. It can hardly be said that a tax paid to the Crown by a British corporation subject to United States income tax is not a tax paid . . . [that] allows a deduction from gross income for taxes paid to a foreign country[.]").

112 Guidance Related to Section 951A (Global Intangible Low-Taxed Income) and Certain Guidance Related to Foreign Tax Credits, 84 Fed. Reg. 29,288 (June 21, 2019) (codified at 26 C.F.R. pt. 1).

113 Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of Amerindian Lands*, 148 U. PA. L. REV. 1065, 1071 (2000).

that geography or economics leaves without a comprehensive income tax as having forfeited its claim to the revenues a more civilized state would have collected. Such minimum taxes take a meandering and highly technical route only to arrive at the same Liberia problem faced by the OECD two decades ago.

C. *Truth #9: A Preoccupation with Punishing Tax Havens Distorts the International Tax Policymaking Agenda*

Because GILTI acknowledges corporate tax avoidance as a structural problem—as FATCA did for personal income tax evasion—targeting Switzerland, along with the Black and Brown states that inevitably wind up on blacklists, it represents a step forward from this approach. Yet it reveals the continuing power of the Global Southern Strategy and its culture story of tax havens. For the past quarter century, the culture story evident in the OECD's 2000 blacklist has shaped both individual international policy initiatives and the international tax policy agenda, keeping the Liberia problem alive.

Punishing all states without the right income tax represents progress over targeting only Black and Brown states. But by dominating the international tax policy discourse, the culture story of tax havens obscures the broader question of what belongs at the top of the global tax policy agenda. Country by Country Reporting (CbCR) represents the path not taken to shore up the corporate tax.[114] Unlike GILTI, CbCR implicitly acknowledged that the failures of the corporate income tax describe a collective failure that will not be solved by punishing wayward states.[115] The culture story of tax havens helps explain why it lost out to FATCA and GILTI.

The power of the culture story of tax havens to shape the global tax policy agenda can be seen not only in the particulars of blacklists and minimum taxes, but also in the primacy given to personal income tax evasion over corporate tax avoidance. Although tax planning by multinationals grabbed headlines in the wake of the 2008 financial crisis, an avalanche of secrets—often having nothing to do with tax planning—ultimately proved more compelling. Al Capone famously went to prison not because he was a mobster, but because he did not pay taxes on the income generated by his crimes.[116] For Capone, as for Icelandic

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114 For an overview of CbCR, see Shu-Yi Oei & Diane M. Ring, *When Data Comes Home: Next Step in International Taxation's Information Revolution*, 64 MCGILL L.J. 707, 726–27 (2019) (describing CbCR); HAKELBERG, *supra* note 53, at 122–24 (describing resistance to CbCR).

115 Oei & Ring, *supra* note 114, at 735–36.

116 *Historical Documents Relating to Alphonse (Al) Capone, Chicago*, IRS, https://www.irs.gov/privacy-disclosure/historical-documents-relating-to-alphonse-al-capone-chicago (last visited Aug. 3, 2021).

Prime Minister Sigmundur Davíð Gunnlaugsson, secrecy obscured misdeeds other than tax evasion. The Panama Papers revealed Gunnlaugsson had lost millions in the collapse of Iceland's financial system through a company he and his wife set up in the British Virgin Islands.[117]

Unfortunately for Gunnlaugsson, the absence of a tax evasion motive earned him no sympathy. The creation of FATCA owed much to the popular backlash over such non-tax transgressions.[118] While FATCA delivers the help that Everson demanded, Everson's problems are not Liberia's. FATCA and the OECD's CRS regime focus on personal income taxes. For the United States and its OECD peers, that focus makes good sense. The personal income tax generates a significantly higher share of revenues both for the United States and for the OECD than for developing states.[119] However compelling the story of the Icelandic Prime Minister may be to those with the power to steer international tax policy, poorer countries rely far more heavily on corporate taxes.[120]

Of course, the states in the Global South that rely on corporate income taxes do not control the global tax policy agenda. Over the past decade, trillions of dollars have been poured into improving personal income tax enforcement through FATCA and CRS. Those dollars have disproportionately benefited wealthy states.[121] (And, as Truth #3 shows, CRS helped turn the United States into a superhaven.) Corporate income taxes, far more important to poor states, have not been ignored, but have received less attention.[122]

CbCR treats corporate tax evasion as primarily a structural failure rather than a culture story, which may help explain why opposition from within the OECD yielded a much-diminished CbCR.[123] Minimum taxes like GILTI—billed as an

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117 That company had later asserted a multi-million dollar claim as a creditor at the same time Gunnlaugsson's government was helping broker a deal on the payment of those claims. The conflict of interest resonated because "Iceland suffered a deep economic depression, a stock market collapse and huge losses, requiring emergency loans from the International Monetary Fund and capital controls" as a result of the failure of the banks in which Gunnlaugsson invested. Steven Erlanger, '*Panama Papers' Leaks Put Iceland Prime Minister Under Pressure to Quit*, N.Y. TIMES (Apr. 4, 2016), https://www.nytimes.com/2016/04/05/world/europe/panama-papers-leaks-put-iceland-leader-under-pressure-to-quit.html.

118 Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. REV. 532, 536–37 (2018) (cataloging the benefits and drawbacks of lawmaking fueled by such leaks).

119 *See* Bird & Zolt, *supra* note 20, at 1659–60.

120 Roger Gordon & Wei Li, *Tax Structures in Developing Countries: Many Puzzles and a Possible Explanation*, 93 J. PUB. ECON. 855, 856 (2009) ("The corporate income tax is a much more important source of tax revenue among developing vs. developed countries, as are tariffs and seignorage. Poorer countries collect much less revenue from personal income taxes[.]").

121 *See* Oei & Ring, *supra* note 118, at 606–07.

122 *See* Gordon & Li, *supra* note 120.

123 Letter from Orrin G. Hatch, Chairman, Senate Comm. on Fin., and Paul D. Ryan, Chairman, House

"America first" tax policy—do target tax havens.[124] CbCR could have anchored a solution to corporate tax avoidance superior to GILTI but lacked the urgency of the Global Southern Strategy's compelling culture story. As long as the fight against personal income tax evasion and corporate income tax avoidance is framed as a fight against tax havens, the Global Southern Strategy will continue to generate suboptimal international tax policies.

D. *Truth #10: Inclusion Is a Powerful Tool and International Tax Must Learn to Wield It*

Tax havens will never go away (Truth #1). Fortunately, offshore tax evasion and other structural failures of the international tax system can be contained. The CBC showed us how, revealing the power of inclusion in international taxation (Truth #7).[125] Learning to fence in U.S. taxpayers by treating tax evasion as a structural problem succeeded where naming and shaming failed. Unfortunately, the subsequent history of misguided minimum taxes (and even FATCA's emphasis on personal income taxes) shows the continuing impact of a flawed culture story on international tax policy (Truth #9).

The impending arrival of a "majority-minority" America represents one potential antidote[126] to the culture stories that continue to shape not only particular international tax policies, but also the global tax policy agenda. But we need not wait that long to address the international tax system's Liberia problem. The CBC has already proven that it could play a leading role in crafting international tax policy, including steering the U.S.'s relationship with the OECD. It would be rich with irony for the United States to grant the CBC power to supervise the OECD.

Such a grand gesture could have an enormous impact on the trajectory of the international tax system. But, in truth, inclusivity comes in slow, gradual steps and comes with consistent effort and persistence in seeing a different way of

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Ways & Means Comm., to Hon. Jacob Lew, Sec'y, U.S. Dep't of the Treasury (June 9, 2015).

124 It is no small irony that while intended as an "America first" policy, critics complain that it puts "America last." *See* Kimberly Clausing, *Fixing Our 'America Last' Tax Policy*, HILL (Apr. 11, 2019), https://thehill.com/opinion/finance/438274-fixing-our-america-last-tax-policy.

125 *See, e.g.*, Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597, 610 (2006) (identifying "specific advantages of racial heterogeneity for group decision making" and highlighting "particular circumstances under which racial diversity is likely to lead to improved group performance" and, in particular, that "the influence of racial diversity can be seen in the performance of [w]hite as well as Black group members").

126 *See* I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 6 (2019) (describing how a range of legal regimes might change in a racially altered future).

being. Whether racial, gender, religious, or ethnic, the truth of the matter is that failure to make a consistent effort to be inclusive and to level all elements of the playing field will continue to hamper the ability of states to achieve an inclusive, fair, and just outcome and a future that delivers an international system that is fiscally legitimate. This Essay was not intended to point fingers but to jump-start what will be an uncomfortable conversation on how people see and perceive the system and to encourage them to think carefully about inclusion before they act.

CONCLUSION

Uncomfortable conversations, such as the one we invite here about perceptions of racial bias in international taxation, can produce breakthroughs. At a minimum, the value of tax haven blacklists must be weighed against their costs, including a perception of racial bias perpetuated by influential policymakers. A traffic light approach—green, yellow, and red, rather than black and white—would be an obvious first step.

But our aim is much broader. A generation from now, the international tax policy agenda determining which states can meet the urgent needs of their people must be defined by inclusion rather than exclusion. Taking the first step on the path toward the future that lies beyond the Liberia problem could be as easy as asking what the term tax haven means to you.