Should Tax Avoidance be Criminalised?
Tax Avoidance and Criminal Law Theory

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I Part One: Introduction

This dissertation asks the question, should tax avoidance be criminalised? Recently, tax avoidance has received an unprecedented level of attention. Much of this attention is due to the actions of UK Uncut, a United Kingdom group that protests against well known tax avoiders.¹ UK Uncut was created in 2010 as a response to the largest public service cuts in Britain for 90 years, mainly due to the economic recession. While the brunt of the spending cuts were being borne by Britain's middle and lower classes, it was believed that Vodafone and other large corporations were engaging in large-scale tax avoidance. This led a small group of 70 protestors to occupy Vodafone’s most prominent London store on October 27 2010.² On the 30th of October 2010, almost 30 Vodafone stores had to be closed because of the protests. In 2011 the movement has gained worldwide attention for its protests against tax avoiders. Even U2, the rock band known for their numerous humanitarian efforts were

¹ “UK Uncut” <http://www.ukuncut.org.uk/>.
² Vodafone was targeted because it was believed they were involved in £6 billion of tax avoidance scheme.
subject to a UK Uncut protest. \(^3\) New Zealand, being more insulated from the global recession than the United Kingdom, was not forced to cut public spending to the same degree. As such, there is less chance New Zealand companies will suffer the same protests. Nonetheless tax avoidance gained nationwide attention after the Supreme Court released their judgment in the *Penny and Hooper* case.\(^4\) The Court held the taxpayers had engaged in tax avoidance by using a commercial structure which is common among New Zealand businesses, thus there was a high amount of interest in the outcome.\(^5\)

The UK Uncut protests show a high degree of negative sentiment exists against tax avoidance. Thus it may surprise some to know tax avoidance is merely a civil, not a criminal wrong.

This dissertation questions why this is so by examining the issue in nine parts. Part two will attempt to describe tax avoidance in some depth and distinguish it from mitigation and evasion. For the purposes of this introduction however, the definition of tax avoidance from Sir Wulford Fulliger suffices: dodging tax without breaking the law.\(^6\) After describing tax avoidance, part three addresses the main features of tax avoidance law in New Zealand.

The dissertation then moves to part four where the morality of tax avoidance is investigated. Using the work of HLA Hart, Tony Honoré and Zoe Prebble and John Prebble, part four concludes avoidance is immoral and that laws against it must be present in any legal system. Part five then broadly introduces criminal law theory. Parts six and seven both test the broad conclusion from part four and ask whether the laws against tax avoidance should be included in the criminal law. To do so, the dissertation will examine and discuss modern theories of criminal responsibility with reference to tax avoidance. Part eight addresses the negative case for criminalisation and concludes while grounds of efficacy do not stand in the way of criminalisation, principles of the Rule of Law are another matter. Rule of Law principles constitute an immovable roadblock in the way of criminalising avoidance.

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\(^4\) *Penny and Hooper v Commissioner of Inland Revenue* [2011] NZSC 95.


II  Part Two: Evasion, Avoidance and Mitigation

In order to attempt to define and describe tax avoidance, it is useful to describe what it is not. Avoidance is an example of tax minimisation. Other examples of tax minimisation are tax evasion and tax mitigation. These labels are not used universally, but they have been accepted internationally by the International Academy of Comparative Law at its 18th congress in Washington in 2010. The distinction between tax mitigation, avoidance and evasion can be viewed as a partially overlapping legal spectrum of tax minimising behaviour. At one end is evasion, which is illegal and criminal. Tax mitigation, at the other end of the spectrum, is tax minimisation behaviour that the government is aware of and allows to continue. In some instances the government may even encourage it. Tax avoidance lies between the two, exploiting the form of tax law while denying its substance.

A  Tax evasion

A discussion on the distinction between avoidance and evasion often starts by stating that avoidance is legal whereas evasion is not. However as will be discussed, classifying tax avoidance as legal may not be the best description or completely accurate. While the traditional definition may be slightly misleading, the evasion/avoidance distinction is clearer than the avoidance/mitigation distinction.

Prebble describes evasion and avoidance as factually similar but legally distinct. While they are motivated by the same desire to reduce tax liability, they have different legal classifications. Furthermore the economic outcomes of the two are identical; both result in a reduction in taxes, but do so in different ways.

Tax evasion is illegal and often criminal. Evasion is “[t]he willful attempt to defeat or circumvent the tax law in order to illegally reduce one’s tax liability.” Tax evasion occurs when a taxpayer's transactions result in a certain amount of taxable income, but the taxpayer declares a lower income on their return, or fails to make a return at all. There are different types of evasion, but typical examples involve the understating of income; for example a builder who does not record his receipts of cash or a butcher who does not ring up cash

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9 Ibid.
transactions on the till. By not recording their cash income, the butcher and builder underreport the amount of income they have received. Taxes can also be evaded by the use of sham transactions, where the substance of a transaction is misrepresented to make it look like something it was not. For example a retailer asking their supplier to invoice them at a higher price than the actual price paid in order to receive a greater tax deduction for expenses.

Both scenarios result in the under-reporting of taxable income; the second simply has “embroidery added”.  

Being convicted of tax evasion can have a variety of consequences, from shortfall penalties to imprisonment.  

B  Tax mitigation

On the opposite end of the scale to tax evasion is tax mitigation. Tax mitigation is not a term of art and recently the New Zealand Supreme Court has said the mitigation/avoidance distinction is “conclusory and unhelpful” in determining whether a particular arrangement is avoidance. While this may be true in individual cases, the term is helpful to label in general terms what tax avoidance is not. The Supreme Court’s criticism seems strange because all labels like mitigation and avoidance are conclusory. They describe or label the conclusion of legal reasoning. They do not purport to contain the rules within themselves; they are simply useful terms in the tax avoidance discussion. Having such terms saves a circumlocution because if mitigation cannot be called by name, it must be described by a long winded explanation.

That said, this paper uses “tax mitigation” to refer to gaining a tax advantage intended by Parliament, for example by requesting a deduction for a donation to charity. Clearly put by the House of Lords in the Willoughby case: 

The hallmark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option.

13 See for example Tax Administration Act 1994, s143B.
15 Ben Nevis Forestry Ventures Limited v CIR; Accent Management Limited v CIR (2009) 24 NZTC 23,188 at 95
Tax mitigation follows both the letter and the spirit of the law, whereas avoidance follows the former but not the latter.

C Tax avoidance

Tax avoidance falls between tax evasion and mitigation on the scale of tax minimising behaviour. Avoidance does not have a limited, uncontroversial and definite meaning. The Income Tax Act 2007 does contain a definition of tax avoidance and a tax avoidance arrangement, but it is somewhat unhelpful. If the Act were given a literal reading, many legitimate structures would fall within its reach. Therefore tax avoidance must mean more than the bare words contained in the Act and it is left to judges to find this meaning.

A good start is from Black’s Legal Dictionary where avoidance is defined as “[t]he act of taking advantage of legally available tax-planning opportunities in order to minimize one’s tax liability.”

Unlike evasion, avoidance is not criminal, and is often said to be legal. Avoidance exploits the tax law to use it in a way unintended by parliament by following its black letter requirements but not its spirit. Put simply:

The hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability.

Avoidance transactions rely on specific provisions or rules in tax law to gain tax advantages unintended by law makers. Often such transactions will display one or more of the hallmarks of tax avoidance, including arrangements that are artificial, lack business reality or risk, are circular, or exploit legislation’s loopholes. While it is impossible to predict all possible avoidance arrangements, it is useful for illustrative purposes to describe a number of tax avoidance cases.

1 Tax deferral: Furniss v Dawson

The Dawsons were a father and two-son team who owned a clothing business. The Dawsons received an offer to buy the business and subsequently agreed on a price. Generally, capital

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21 *IRC v Willoughby* [1997] 1 WLR 1071.
22 *CIR v Willoughby* (1997) 70 TC 57 116 (HL) (Eng).
23 Prebble and Prebble, above n 14 at 23.
gains tax had to be paid on any sale. However a specific tax rule stated that if a seller of a company was paid by receiving shares in another company, capital gains tax would not be payable until the shares in the new company were sold. The Dawsons duly incorporated a new company, which bought the clothing business in exchange for shares in the newly incorporated company. Subsequently the new company on-sold the clothing company to the buyers. Notwithstanding the existence of the specific tax rule, the House of Lords held that the arrangement was tax avoidance and the Dawsons were liable to capital gains tax as if they sold the company for cash. Their Lordships held the effect of the arrangement was the sale of the clothing company to the ultimate buyers and the intermediate stages were only entered into for their tax savings.

2 Income splitting: Mangin v Commissioner of Inland Revenue 24

Mangin involved a farmer’s attempt to avoid tax by using a technique called “income splitting”. The farmer owned six fields. The farm was mainly pastoral, but the farmer cropped one field per year in rotation. Each year the farmer would let the cropping field to a trust at a low rental. The beneficiaries were the farmer’s wife and children. The trust then employed the farmer to work on the field. The upshot of the arrangement was that income from the harvest went to the trust and the farmer only received the rent and wages. The trust was taxed at a lower rate than the farmer’s income, thus reducing the farmer’s income tax.

Both the Court of Appeal and Privy Council held that the arrangement constituted tax avoidance after finding a general anti-avoidance provision applied, resulting in the scheme being ignored for tax purposes. 25

3 Deduction for depreciation: Ben Nevis 26

Ben Nevis involved a forestry venture which generated huge income tax deductions through depreciation. The issue was whether the depreciation deductions constituted tax avoidance.

Like many avoidance cases, the facts of Ben Nevis are very complicated. The following outlines the key details. A company, Trinity Ltd bought a block of land in the South Island before selling a license to the taxpayers to plant a Douglas Fir forest on the land. In exchange, the taxpayers were to pay a license premium at the expiry of the agreement (50 years time in 2047) and a relatively small up-front license fee. The license premium was determined by an

26 Ben Nevis Forestry Ventures Ltd & Ors v Commissioner of Inland Revenue; Accent Management Ltd & Ors v Commissioner of Inland Revenue (2009) 24 NZTC 23,188 (SC).
estimation of the present value of the trees at harvest; calculated to be just over $2 million per hectare. The license premium was Fixed Life Intangible Property, which meant its cost in 50 years time could be depreciated over the 50 year period. The potential deductions generated by the scheme were huge; estimated to be $3.7 billion dollars by the Commissioner of the Inland Revenue (the Commissioner).

The Supreme Court expressed scientism as to the business reality of the scheme. The land had only been bought for $580 per hectare a year earlier and now the taxpayers were being charged $2 million per hectare for a right to use the land. Moreover, a captive insurance arrangement provided even more reason for the scepticism.

The minority held the transactions that purportedly entitled the taxpayers to their deductions did not fall within a purposive interpretation of the specific provision which the taxpayers were relying on for their deduction. The majority reached the same ultimate conclusion, but by different means. The majority held but for the general anti-avoidance rule the arrangement would not be avoidance, as it satisfied the specific provision giving the deduction.

Furthermore, their Honours held that the arrangement was “abusive” and imposed a 100% penalty of the tax shortfall.

While the above examples are useful to describe tax avoidance, they in no way exhaust all avoidance structures. On the contrary, tax planners are constantly devising new and cunning ways to avoid tax. Thus even a complete description of all types of avoidance would be out of date almost as soon as this dissertation was published. The inability to define or completely describe avoidance means that any laws against tax avoidance frustrate the Rule of Law through a lack of certainty. While the Rule of Law issues will be discussed in a later

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EG 1 Annual Depreciation Deduction

(1) Subject to this Act, a taxpayer is allowed a deduction in an income year for an amount on account of depreciation for any depreciable property owned by that taxpayer at any time during that income year.

Fixed life intangible property is the right to use land which does not amount to an interest in land. An interest in land is not depreciable, whereas a right to use land is as long as it satisfies the combination of provisions in Section EE 62 also under EE67.


29 Penalties will be discussed in part three.

30 This is so because there are very few other areas of law that people try so vigorously to avoid, further reading see Prebble and Prebble, above n 14.

31 Ibid.
chapter, it is important to understand from the outset it is these issues that are holding back criminalisation.

4 Tax avoidance ‘legal’

In academic writing on the distinction between tax avoidance and evasion, a key distinction is made that tax evasion is illegal, whereas avoidance is legal. This is a curious distinction.

Tax avoidance is a civil wrong. When discovered the Commissioner has the power to reconstruct the taxpayer’s transactions to counteract any tax advantage gained from the avoidance. Furthermore, in more serious cases, the Commissioner can impose civil penalties. Being a civil wrong, avoidance is analogous to a breach of contract, or trespass. It would be strange to think of a breach of contract or trespass as legal. Nonetheless many scholars and judges stress that tax avoidance is legal and the legality of tax avoidance is one of its distinguishing features from evasion. The curious distinction can be seen more clearly when comparing avoidance to assault and trespass to the person. Assault is certainly illegal and criminal. Trespass to the person involves acts identical to assault, only non-criminal, and it too is certainly illegal although classified as a civil wrong. Although unlike assault and trespass, the acts of tax avoidance and evasion are different but there outcomes are identical.

A better description suggested by William Barker is to classify avoidance as non criminal. Barker uses the definition of legal from Black’s law dictionary to illustrate his point. Barker argues that when a taxpayer is not entitled to the fruits of his plan, the whole arrangement is hardly legal in that it is hardly an activity that “conforms to the law, is according to the law, is not forbidden or discountenanced by the law, and is good and effectual in law.” Barker submits the opposite is true, that avoidance is illegal, or not authorized by law, contrary to the law, contrary to the principles of the law and is ineffective in law.

Furthermore, legality involves a strong predictive aspect. Illegality is not premised on being caught or convicted. An assault remains illegal regardless of any criminal sanction. Again there is nothing special about the criminality of assault; if you breach a contract you would still be acting illegally even if there were no legal consequences.

32 Crimes Act 1961 s196, common assault.
33 Barker above n 19 at 242.
37 Prebble and Prebble, above n 8, makes a similar point with regard to murder at 123.
5 Part one conclusion

Tax avoidance and the line between it and mitigation is very difficult to pin down. The Income Tax Act 2007 does provide a definition, but it is unhelpful. To add to the confusion even the legal character of avoidance is in doubt.

The next part of the dissertation examines anti-avoidance legislation in New Zealand and the consequences for engaging in tax avoidance.

III Part Three: Tax Avoidance in New Zealand

Anti tax avoidance legislation can be divided between specific and general provisions. New Zealand’s anti-avoidance legislation contains both. Specific provisions are narrowly focused and combat very particular sorts of avoidance. Usually these provisions are the result of government either closing loopholes that were used for avoidance in the past or the result of predicting future arrangements. An example of a specific rule is in section DB57 and DC5 of the Income Tax Act 2007. The sections relate to payments to a spouse that are to be deducted. The purpose of the provisions are to prevent taxpayers paying their spouses excessive funds to reduce their income. However the complexity of the law and sophistication of avoidance means that it is impossible for governments to predict all forms of avoidance. Therefore, many countries have adopted general anti-avoidance rules, or gaars to supplement the specific provisions.\(^{38}\) New Zealand was the first country to promulgate a gaar in section 62 of the New Zealand Land Tax Act 1878 and has had one ever since.

D New Zealand’s gaar

New Zealand’s gaar in its current form is spread between sections BG 1, GA 1 and YA 1\(^ {39}\) (the definitions section) and is the most powerful anti-avoidance provision. When these provisions are read together, the thrust of the gaar is that any arrangement entered into with a more than an incidental purpose or effect of altering the incidence of any income tax is void against the Commissioner for income tax purposes.

As previously stated, interpreted literally, the gaar would apply to and strike down any kind of tax minimisation, but the gaar was only intended to cover tax minimisation that this dissertation refers to as avoidance.

\(^{38}\) Prebble and Prebble, above n 14, at 25.

Thus the courts have always been aware the gaar’s application must be read down, as McCarthy P stated: 40

It cannot be given a literal application, for that would … result in the avoidance of transactions which were obviously not aimed at by the section. So the Courts had to place glosses on the statutory language in order that the bounds might be held reasonably fairly between the Inland Revenue authorities and taxpayers.

The question that the courts ask themselves then is whether the avoidance arrangement would have been within Parliament’s contemplation as permissible tax planning when it enacted the provision. 41 If the answer is yes, the arrangement is not tax avoidance and will stand.

6 Other jurisdictions

The effect of New Zealand’s gaar is similar to other jurisdictions’ gaars, regardless of their different forms. Australia’s and Hong Kong’s gaars are the most similar to New Zealand’s in that neither have exceptions to the gaar for legitimate tax reducing behavior. It is instead left to the courts to decide what is and what is not legitimate. 42 On the other hand the Canadian, South African and Dutch gaars contain exceptions for arrangements that do not misuse or abuse the tax legislation, frustrate parliament’s intent, or are permissible. 43 Although the foreign provisions have these exceptions, the exceptions do not distinguish the foreign gaars from New Zealand. In fact the foreign provisions more or less summarise what the New Zealand courts have said about New Zealand’s gaar.

E Relationship between general and specific provisions

How the gaar interacts with specific provisions is vital in tax avoidance cases.

Many tax avoidance arrangements rely on following specific rules of the Income Tax Act 2007 for their effectiveness. For example the taxpayers in the Ben Nevis case relied on trying

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43 Ibid. Countries without gaars have developed judge made doctrines in their place to deal with avoidance. The United Kingdom is a notable examples, which uses a doctrine established from the decision in W T Ramsay Ltd v IRC [1982] AC 300[1982] AC 300.
to create a form of fixed life intangible property that enabled them to use land, but did not amount an interest land.\textsuperscript{44}

In typical avoidance cases, the Commissioner alleges a particular scheme is avoidance regardless of the taxpayer’s compliance with the black letter requirements of a specific provision. Prior to \textit{Ben Nevis}, scholars and the courts grappled with different interpretations of the relationship between the gaar and specific provisions. The three most common were listed by Craig Elliffe and Jess Cameron, being that the gaar should:\textsuperscript{45}

1. Be interpreted narrowly, therefore once the technical requirements of the specific provision have been met the gaar cannot be applied.
2. Only be used as a longstop in that a purposive interpretation of the specific provision will rule out most tax avoidance arrangements. The minority in \textit{Ben Nevis} took this view.
3. Override the specific provisions, so that black letter compliance with the specific provision does not save the transaction if the tax avoidance purpose is more than incidental.

However, the majority in \textit{Ben Nevis} took a different view from those above.\textsuperscript{46} The Court interpreted both specific and general provisions purposively and adopted a “tandem approach”\textsuperscript{47} giving equal weight to the two sorts of provisions.

Helpfully, the Court gave a two step test for determining whether or not an arrangement is tax avoidance:\textsuperscript{48}

1. Was the use of the specific provision within its intended scope?
2. And, if so has the provision been used, in the light of the arrangement as a whole, in a way that was within Parliament’s contemplation when it enacted the provision?

Thus there are two ways in which an arrangement can fail. The first is simply when the arrangement falls outside a purposive interpretation of the specific provision. The second is where despite the specific provision having been used correctly, the overall arrangement falls outside what Parliament would have contemplated. The first situation could be understood as not avoidance at all, because the taxpayer merely failed to use a specific provision correctly.

\textsuperscript{44} \textit{Ben Nevis}, above n 15.
\textsuperscript{45} Craig Elliffe and Cameron above n 38 at 446.
\textsuperscript{46} \textit{Ben Nevis}, above n 15, at [100] [104].
\textsuperscript{47} Ibid, at [103].
\textsuperscript{48} Ibid, at [107].
Whereas under the second point, regardless of a successful purposive interpretation of a specific provision, the court will then take a harder and deeper look at the transaction as a whole to determine whether or not Parliament would have contemplated it.

Following the finding of tax avoidance in *Ben Nevis*, penalties were imposed on the taxpayers along with reconstruction, discussed below.

**F Reconstruction and penalties**

When a tax avoidance arrangement is detected, the Commissioner will reconstruct the taxpayer’s affairs to counteract any tax advantage gained from the arrangement. In addition, Parliament introduced civil penalties for more serious tax avoidance arrangements into the Tax Administration Act 1994 in 1996. There are different levels of penalty and each carries a different penalty level. The classification and level of penalty are shown in the table below.

<table>
<thead>
<tr>
<th>Category of Behavior</th>
<th>Penalty Amount as percentage of tax shortfall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not taking reasonable care</td>
<td>20%</td>
</tr>
<tr>
<td>Unacceptable</td>
<td>20%</td>
</tr>
<tr>
<td>Gross Carelessness</td>
<td>40%</td>
</tr>
<tr>
<td>Abusive</td>
<td>100%</td>
</tr>
</tbody>
</table>

7 **Promoter penalties**

The Tax Administration Act now also contains “promoter penalties.” The penalties provide that the “promoter” of the tax avoidance arrangement may be liable to pay any penalties on

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51 Tax Administration Act 1994, s 141A.
52 Ibid, s 141B.
53 Ibid, s 141C.
54 Ibid, s 141D.
55 Ibid, s 141EB.
behalf of the taxpayer, if the arrangement was offered or sold to more than ten people in a tax year.\textsuperscript{56}

\textbf{G Part three conclusion}

The foregoing has described how tax avoidance legislation operates in New Zealand and the consequences of engaging in avoidance. Currently the worst a tax avoider can expect is civil punishment and penalties, and only when their arrangement is detected. The subsequent parts of this dissertation ask whether the civil regime is sufficient and namely whether criminalising tax avoidance is justified. The first step in this inquiry is to examine the morality and harms associated with avoidance, which this dissertation will examine in part four, below.

\textbf{IV Part Four: Hart’s Minimum Content and Logical Progression}

In broad terms the argument that avoidance should be criminalised follows from combining the work of a number of scholars. To summarise these scholars and to explain their position in the argument, I first take HLA Hart and his concept of the minimum content of natural law. In parallel with Hart, this paper considers arguments by Tony Honoré in respect of law’s effect on morality. From these two philosophers, the argument moves to an argument by John Prebble and Zoe Prebble as to the question of whether avoidance is moral. On the basis of this chain of reasoning, a tentative conclusion will be reached that laws against tax avoidance are included in Hart’s minimum content of natural law. Subsequently, I will test this conclusion with reference to a number of eminent criminal law philosophers.

\textbf{H Hart’s minimum content}

Hart, although a positivist,\textsuperscript{57} argued that there is a minimum content of natural law common to all legal systems and conceptions of morality.\textsuperscript{58} Hart’s argument is based on survival being the fundamental human goal.\textsuperscript{59} Hart believes because of limited resources, basic equality in strength and physical vulnerability to each other, laws regarding prevention of physical injury

\textsuperscript{56} Ibid, s 141EB (1) (a) and (b), where the promoter is someone who was significantly involved in forming the arrangement and aware of any material aspects, Tax Administration Act 1994, s 141EC.

\textsuperscript{57} Posivists generally believe law’s contents depend on only on its sources, and not on its merits. Hart’s minimum content is not in the positivist tradition because the source of it is not what makes it part of our law and morality.

\textsuperscript{58} Herbert Hart The Concept of Law (Oxford University Press Oxford 1961) at 189-195.

\textsuperscript{59} Ibid at 189.
and the possession of property are unavoidable in any legal or moral system. Hart called these norms the “minimum content of Natural Law”. Included in Hart’s minimum content are norms against murder, assault and theft, for example.

Hart submits without such minimum content neither law nor morality could ensure human survival.

1 Honoré: connection between morality and law

Tony Honoré examines the connection between law and morality from a different angle. Honoré concludes that in complex societies morality must have a legal component and that a complex society’s morality will be incomplete without reference to the laws of that society. Honoré argues that law and morality are related in two important ways. First, that law can form part of morality and secondly, that laws are open to moral criticism. For a positivist, the second contention is uncontroversial, but the first needs to be explained.

Moral principles tell us how we ought to behave, but they are often broad and general. This general nature means that in some instances morality alone cannot tell us exactly what to do. The problem is exacerbated when individuals with conflicting duties to each other have conflicting interests. The problem is solved in primitive societies because moral duties are fleshed out by convention and social pressure. Honoré gives the example of a convention that requires every household to contribute one able-bodied man to the defence of society during wartime. The convention gives shape to the moral duty to protect the community.

Honoré explains that the links between individuals in complex societies (like our own) are too varied for convention and social pressure to settle moral obligations. Individuals are not as connected to others as they are in primitive societies. Thus convention and social pressure

61 Hart, above n 58, at 190.
62 Ibid, at 192.
63 Ibid at 189.
65 Prebble and Prebble, above n 8, at 146.
66 Ibid.
68 Honoré, above n 60 at 7.
69 Ibid.
70 Ibid.
are inadequate to enforce moral obligations.\textsuperscript{71} The result is that law must determine the precise dimensions of moral duties in complex societies.\textsuperscript{72}

Even when members of society agree on a moral value, there are examples where there is no way for the value to be concretized into an obligation except by law. Honoré gives the example of the moral norm to keep your car in good order to prevent injuring others.\textsuperscript{73} Most people understand the moral importance of keeping their car in good working order, but they do not know exactly what is required to satisfy the obligation.\textsuperscript{74} To make the obligation specific the law requires cars to have regular warrant of fitness tests, thus detailing our moral duty.\textsuperscript{75} The same is true for tax obligations. Honoré argues that taxation is an even better example, submitting most people believe they ought to contribute to the expense of collective needs and a morality that denies this obligation could hardly count as cooperative.\textsuperscript{76} Honoré continues, although there is a moral obligation to pay some tax, the exact amount to be paid is unclear without reference to the law.\textsuperscript{77} There is no \textit{effective} moral obligation to pay tax without law, and it is the law that gives force to the moral obligation.\textsuperscript{78}

Individuals cannot determine how much tax to pay independently of law. To do so, each individual would have to know the amount of tax required by the community and also the amount that other individuals ought to or do contribute.\textsuperscript{79} Such a system would be hopelessly impractical or even impossible.\textsuperscript{80} Moreover, different individuals would have different views on how much taxation is necessary, which would lead to different norms and rates of self assessment.\textsuperscript{81}

The conclusion to be drawn from Honoré is not just that there is an obligation to pay tax, but there is a specific obligation to pay the amount of tax the law requires in your society.\textsuperscript{82} It follows that tax evasion is not only illegal but also immoral because offenders evade their moral duty provided by the law. This conclusion is consistent with Hart’s “minimum

\begin{itemize}
\item \textsuperscript{71} Tony Honoré “Must We Obey? Necessity as a Ground of Obligation” (1981) 67 VA L REV 39 at 48.
\item \textsuperscript{72} Ibid, at 49.
\item \textsuperscript{73} Honoré, above n 60 at 12.
\item \textsuperscript{74} Ibid.
\item \textsuperscript{75} Ibid.
\item \textsuperscript{76} Ibid.
\item \textsuperscript{77} Ibid at 5.
\item \textsuperscript{78} Ibid at 5-6.
\item \textsuperscript{79} Ibid at 6.
\item \textsuperscript{80} Ibid.
\item \textsuperscript{81} Ibid.
\item \textsuperscript{82} Ibid at 5.
\end{itemize}
content”, because tax evasion can be analogised with theft. Both theft and evasion take property from others without consent and leave the victim(s) in a worse position than they started. Imagine a society with three taxpayers, X, Y and Z. Z evades his taxes, therefore X and Y must pay more tax to cover the shortfall. Z effectively takes money from Y and Z. Therefore just as rules against theft are included in Hart’s minimum content, so too are rules against tax evasion.  

J Prebble analysis

Zoe Prebble and John Prebble were arguing in a parallel but separate line from Honoré, but they reached the same conclusion. To summarise their argument, avoidance and evasion are factually similar but they have different legal classifications. Avoidance and evasion both lead to a reduction in tax paid and both are committed knowingly. The factual consequences of evasion and avoidance are alike, leading to either a heavier tax burden on others or a reduction in government services, or both.

That said, the moral status of tax avoidance is still debated. Historically, judges have tended to state avoidance is not immoral. Prebble and Prebble sum up this historical position:  

Other cases have confirmed that there is ‘nothing illegal or immoral,’ and ‘nothing wrong’ about transactions with tax avoidance purposes. Tax avoidance is not in the least ‘fraudulent’ but a basic taxpayer entitlement; and a tax avoider ‘neither comes under liability nor incurs blame. In Helvering v. Gregory, Judge Learned Hand rejected the notion that there is ‘even a patriotic duty to increase one’s taxes.’

Prebble and Prebble argue that the historical feeling regarding the morality of tax avoidance is due to confusion between the legal and moral lines. This confusion has led judges to

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83 It is interesting to note again here that tax evasion is included in the criminal law. A simple omission to file a tax return when you have tax due can amount to tax evasion. The interesting point here is that the criminal law is generally more concerned with positive acts rather than omission. Unlike some forms of evasion, tax avoidance does involve positive acts in order to set up a particular tax avoidance arrangement.


85 Prebble and Prebble, above n 8, at 113.

86 Prebble and Prebble, above n 8, at 125.

87 A-G v. Richmond, [1909] AC 466 at 475 (HL) (Eng).


89 CIR v G Angus & Co [1889] 23 QB 579 at 593 (Eng).

90 CIR v. Fisher’s Ex’rs [1926] AC 395 at 412 (HL) (Eng).


92 Ibid at 469.

93 Prebble and Prebble, above n 8, at 126-127.
erroneously believe that if one is acting legally, they must also be acting morally. But this is not the case. The morality of conduct does not critically depend on its legality. For example, there are many circumstances where it is immoral to publish true but damaging stories about another person, but it is not illegal to do so.  

Prebble and Prebble submit that the confusion regarding the morality of tax avoidance is based on flawed assumptions regarding tax avoidance. The assumptions are examined below.  

8 Flawed moral assumptions  
People argue that tax avoidance is victimless, much like sodomy was before homosexuality was legalised. But this is not the case. Harms from tax avoidance on individuals may not be obvious, but that is not to say they do not exist. On the contrary, the harms of avoidance are many and pervasive. The lack of obvious, immediate and direct victims does not mean there are none. Instead the harms are spread out, or diffuse. Even if victims are unaware of it, there is still harm. Society has shared interests and an act can be harmful if it interferes with such interests. The most serious harms are identified below.  

Revenue loss  
The most obvious harm of tax avoidance is lost state revenue. It is difficult to estimate the exact amount of lost revenue from avoidance because many schemes rely on secrecy and non-detection for their success. In saying that, estimates in the United Kingdom have put the cost at £25 billion per year. As a result, either the government cannot provide all the services it would have been able to, or it is forced to increase tax rates to recoup the lost revenue from dutiful taxpayers. Thus revenue loss harms society at large and also the

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94 Prostitution is another example.
95 Prebble and Prebble, above n 8, at 129.
96 Ibid, at 135.
98 Stuart O Green “Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses” (1997) 46 Emory LJ 1533 at 1550.
100 Ibid at 9.
individual taxpayers who are forced to give up more of their property due to increased tax rates.

Perceived Unfairness

Avoidance undermines the public’s confidence in both the tax system and the law in general. Successful avoidance undermines both the avoider’s and the honest taxpayer’s confidence in the system. The successful avoiders disrespect for the tax system increases the more they circumvent it while the rest of the taxpaying public perceives this unfairness.102 Previously honest taxpayers follow the lead of the tax avoiders as their feelings of unfairness and disrespect for the tax system increase, resulting in a “race to the bottom”.103

Deadweight Loss

Tax avoidance can be understood as the reallocation of resources to the avoider from society.104 The reallocation has costs already identified, but these are not the only costs from the reallocation. Because tax avoidance arrangements are generally time consuming and costly to implement, their implementation requires resources to be diverted away from other productive areas of the economy.105 For example a team of lawyers working on an avoidance arrangement cannot lobby the government for beneficial law reform, or solve any commercial issues a company may have.106

The diversion of resources may create a tax windfall for the individual taxpayer, but the windfall is only from paying less tax than the government expected.107 Thus while profitable for the taxpayer, the costs of setting up the avoidance arrangement creates nothing of value to society; it does not create wealth, but simply reallocates it in an inefficient and inequitable way. The tax avoider may subsequently invest his tax savings back into the market, but the cost of setting up the avoidance arrangement will never be recovered.

This loss is clear if one imagines that everyone engaged in tax avoidance. First, effective tax rates would be reduced. Thus, the Government would collect less revenue and would be

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103 Ibid, at p. 2
106 These are commercial examples because usually tax lawyers are commercial lawyers, thus if they were not helping tax avoidance, they would likely be doing other commercial law work.
107 Prebble and Prebble, above n 8, at 137
forced to increase tax rates to cover the shortfall. After the increase everyone would be in the same position as before they all started to avoid tax, but less the time and resources needed to set up their avoidance schemes.\textsuperscript{108}

The harms stemming from tax avoidance are almost identical to harms due to evasion. Both reduce the amount of tax collected and undermine confidence in the tax system. This gives strong support to John and Zoe Prebble’s argument that judges have confused legal behaviour with moral behaviour; simply because evasion is immoral and illegal it does not follow that because avoidance is legal, it is also moral.

9 Moral right to pre-tax income
A further flawed justification for the morality of tax avoidance is that we have a right to our pre-tax income, that is to say individuals have the right to property accumulated through market transactions.\textsuperscript{109} Murphy and Nagel argue this view is unsound and that logically we cannot have such a right.

The basis of Murphy and Nagel’s argument is that the very existence of our pre-tax income is contingent on the state providing the economic policy and legal apparatus to make income possible and the existence of the state is contingent on taxation.\textsuperscript{110} Lockean liberals oppose this view because they believe our property rights are natural rights that are independent of, and certainly not contingent on the state. Instead the state’s raison d’être is to protect property rights.\textsuperscript{111} Thus, to John Locke taxation other than to defend property rights is unjustified. Nonetheless, Murphy and Nagel’s argument does not depend on whether the natural conception of property rights is correct, because regardless of whether property relies on the state for its existence, income in its modern form certainly relies on the state for its creation.\textsuperscript{112}

Murphy and Nagel argue “money, banks, corporations, stock exchanges, patents, or a modern market economy ... the institutions that make possible the existence of almost all contemporary forms of income and wealth”\textsuperscript{113} all owe their existence to the state.\textsuperscript{114} The state

\textsuperscript{108} The same point is made in Prebble and Prebble, above n 8, at 137 and O’Grady above n 105.
\textsuperscript{109} Prebble and Prebble, above n 8, at 130
\textsuperscript{110} Liam Murphy “Taxes, Property, Justice” (2010) 5 NYU Journal of Law and Liberty 983 at 984.
\textsuperscript{111} John Locke, Two Treatises of Government (Cambridge University Press Cambridge 1960) at 988.
\textsuperscript{112} Ibid.
\textsuperscript{113} Liam Murphy and Thomas Nagel The Myth of Ownership: Taxes and Justice (Oxford University Press, New York, 2002) at 32
\textsuperscript{114} Prebble and Prebble, above n 8, at 132
requires taxation to operate. Therefore taxation cannot be opposed on the basis that people are entitled to their pre-tax income because income is contingent on the state.

Murphy, writing alone, attacks another justification for the right to pre-tax income, in an argument that does not involve natural rights theory. “Some people believe that the ideal society is one that maximizes freedom, and, since we know that free people will trade, an ideally free market ends up being our political ideal.”

Such a view values freedom above all other values, including welfare for example. Murphy does not go into the cogency of the ideal, because his objection is not based on its plausibility. He submits that we do not have a moral right to pre-tax income, irrespective of whether the ideal is correct, because the dealings which gave rise to your income occurred in today’s world, and not in a world where the ideal is present.

K Result of Hart/Honoré /Prebble

From Honoré’s analysis evasion can be seen as analogous to theft, which is included in Hart’s minimum content. Avoidance is factually similar to evasion and causes similar harms, thus certain sorts of avoidance may also be included in the minimum content of morality and law.

The laws included in Hart’s minimum content are by definition the most important laws for human survival and society’s existence. Therefore most of the minimum content is enforced by criminal sanctions. A counter argument against the conclusion that tax avoidance is included in the minimum content could be that tax avoidance has never been criminalised, yet humanity still survives. However Hart’s minimum content does not only refer to the criminal law. Instead Hart speaks generally about legal sanctions being imposed, without mentioning the word criminal. Thus the that fact that tax avoidance has only been subject to civil sanctions in the past does not exclude it from Hart’s minimum content. In saying that stricter punishment may be warranted.

To test whether criminalisation is justified, part five introduces criminal law theory, before parts six and seven investigate the criminalisation question with reference to specific criminal philosophies.

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116 Ibid.
117 Hart, above n 58, at 189.
Part Five: Criminal Law Theory Introduction

In order for criminalisation of conduct to be justified, both positive and negative constraints must be satisfied. Positive constraints (the positive case for criminalisation) are theoretical justifications, whereas the negative constraints are largely practical. The positive case will be considered in parts six and seven and the negative case in part eight.

Normative theories of criminal law (what the criminal law ought to be) are either instrumentalist or non-instrumentalist. Instrumentalist theories of criminal law see the law as a means to an end to achieve some desirable outcome. Non-instrumentalist theories do not pursue any particular goal, and submit that the criminal law should have no purpose other than itself.\(^\text{119}\)

Instrumentalist theories are typically utilitarian, and thus use the criminal law to try to secure the greatest good for the greatest number. To instrumentalists, the criminal law has three main functions; a declaratory function, a pragmatic function and a censuring function. The declaratory nature of the criminal law proclaims what sort of acts society disapproves of, the pragmatic function gives those that would otherwise engage in the unwanted conduct good reason for not doing so and the censuring function punishes those who engage in the unwanted conduct regardless.\(^\text{120}\) The most popular instrumentalist theory is the harm principle, which gained prominence following John Stuart Mill’s publishing of *On Liberty*.\(^\text{121}\) Instrumentalist theory can be split again, between pure and side constrained instrumentalism.\(^\text{122}\)

L. Pure or Side Constrained

Pure instrumentalists justify all aspects of the criminal law by reference to the goals of the system and solely seek the rules and practices that will reach the goa. In contrast, side constrained instrumentalists argue that the criminal law cannot be guided only by the broad aim of the system. Instead other considerations should limit and constrain the scope of the criminal law. Such constraints may be to do with justice, morality, or moral culpability and limit the operation of the criminal law, even if criminalising conduct would serve society's goals. For example a pure instrumentalist theory could be “all harmful conduct should be


\(^{120}\) Andrew Ashworth *Principes of Criminal Law* (5th ed Oxford University Press Oxford 2006) at 22.


criminalised”, where harm means another’s decrease in pleasure. However a side-constrained instrumentalist could have the same theory, but constrain the meaning of “harm” to when only specified interests are violated. 123

Without constraints, it is easy to imagine pure instrumentalism running roughshod over an individual’s rights and the principles justice. Side constrained instrumentalists can avoid this problem by constraining the criminal law’s scope and reach. 124 However if instrumentalism is constrained by too many other elements other than what the theory primarily seeks, the theory loses force and it could even cease to be instrumentalist at all. 125

M Non instrumentalist theory

While morality and moral culpability are included in some instrumentalist theories, these concepts form the basis of non-instrumental theories. 126 Michael Moore argues that criminal law should punish "all and only those who are morally culpable in the doing of some morally wrongful action”. 127 Non-instrumentalist theories do not pursue any particular goal, but believe that the criminal law is an appropriate response to wrongful conduct.

From distinguishing the two types of criminal law theory the dissertation will move to a discussion of the harm principle and legal moralism in more detail, starting with the harm principle.

VI Part Six: The Harm Principle

The harm principle came to prominence when Mill wrote On Liberty. The book contained the famous passage, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.” 128 Mill was a liberal and saw the principle as the best way to constrain the state’s coercive powers and to

123 Joel Feinberg’s harm principle is constrained in this way, discussed in part six.
124 Duff, above n 119.
125 Bernard Harcourt “The Collapse of the Harm Principle” 1999 90(1) J. Crim Law & Cri. 109, where it is argued the harm principle has collapsed due to other normative elements other than the harm principle being imported into the theory.
126 Duff, above n 119.
preserve personal autonomy. The harm principle’s popularity among liberals has had the principle dubbed the liberal position.

The principle has been refined and reshaped by subsequent theorists, none to a greater extent than Joel Feinberg. Feinberg does not go as far as Mill to say harm is the only legitimate reason for criminalisation. Feinberg argues that harm to others is always a good reason for criminalisation, while leaving the door open for the inclusion of other reasons. Nevertheless, Feinberg’s position is still in the Millian vein.

Like all popular theories the principle has its problems and critics, which will be discussed. However any problems have not stymied the principle’s rise in popularity.

N The attraction of the harm principle

Unlike some other jurisprudential topics, the harm principle’s appeal spreads farther than academia. It is also the dominant political theory. Its allure comes from its simplicity harm and its resonance, since a “no harm” principle seems almost self evidently correct.

On its face, the harm principle is very simple; government may stop you doing something only if it causes harm. Everyone understands what harm means, and thus can easily understand the principle.

The idea that we can be prevented from doing something only if we harm others is intuitively true for most of us. The “no coercion without harm” idea has been instilled into us from an early age. Stephen Smith gives the “somebody else’s nose” example in that from childhood we were all told we could swing our arms as we wished until they came in contact with someone else’s nose. Smith states the harm principle is virtually identical.

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129 John Stanton-Ilife “The Limits of Law” The Stanford Encyclopaedia of Philosophy. The principle’s popularity among liberals has had the principle dubbed the “liberal position”.


131 For example the “offence principle”. The principle is not discussed because tax avoidance cannot be deemed “offensive” under Feinberg’s definition.


133 Ibid, at 10.

134 Ibid, at 15.

135 Ibid.
Furthermore, the harm principle resonates with what many believe is the fundamental reason for government. In a pre-legal state of nature we were free to do what we wished, but so were others, and sometimes others harmed our welfare. Thus government was formed to prevent harm, thus the harm principle simply continues this tradition.\textsuperscript{136}

The harm principle’s popularity is due to its simplicity and resonance. Yet as will be discussed the principle loses much of its initial force when it is examined more deeply.

\textbf{O Harm’s general meaning}

If the only reason for allowing state coercion is the prevention of harm to others, then the definition of harm is crucial to the scope of the principle.\textsuperscript{137} Harm could plausibly be understood subjectively, that is based on feelings, or harm could be defined in a more technical sense, with reference to some normative theory of human interests.\textsuperscript{138} Steven Smith submits that both approaches are open, but it is the subjective understanding of harm that makes the principle so attractive and resonate so deeply.\textsuperscript{139}

In the subjective sense, tax avoidance certainly causes harm. All would agree that having to pay more tax is harmful. Moreover, with a subjective definition of harm many other less harmful actions would also be included in the harm principle’s scope because very few human actions are subjectively harmless.\textsuperscript{140} As a result Mill, Feinberg and other harm principle advocates have introduced technical qualifications to the principle to limit its scope. Mill and Feinberg’s formulations of the harm principle will be examined below.

\textbf{P Mill’s liberty limiting principles}

Mill had more than one liberty limiting principle. For present purposes the two at issue are:

1. “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”\textsuperscript{141}

\textsuperscript{136} Ibid, at 16.
\textsuperscript{137} Nils Hotlug “The Harm Principle” (2010) 5 Ethical Theory and Moral Practice 357 at 357
\textsuperscript{138} Ibid, at 18.
\textsuperscript{139} Ibid.
\textsuperscript{140} Harcourt, above n 125, at 186. Even something as slight as a gay couple holding hands on the street may cause harm in a subjective sense to those that oppose homosexuality.
\textsuperscript{141} Mill, above n 122, at 21–22.
2. “The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.”

The two principles use different concepts to describe when coercion is justified. The first uses harm as a justification for coercion and the second limits the criminal law’s reach to conduct that concerns others.

Mill’s first principle is often discussed in isolation from the second, thus I will begin by examining the first principle alone. Subsequently, I will discuss an interpretation of Mill that combines principles both into a more functional liberty limiting principle.

10 Mill’s first principle - harm

Mill’s harm principle was grounded in utilitarianism. He believed if the criminal law was constrained in that way it would secure the greatest good for the greatest number. Since Mill’s conception of harm was inherently linked to utility, it is important to understand Mill’s conception of utility, though his conception is not entirely clear.

Mill first stated:

Utility ... holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.

Thus it would be a fair conclusion to understand Mill’s conception of harm as pain or the deprivation of pleasure. However, after asserting the idea of utilitarianism just mentioned, Mill begins to speak of utility as the satisfaction of preferences. Mill then qualifies utility again as the satisfaction of only noble preferences. Understanding utility as noble preference satisfaction as Mill appears to, Millian harm must be the frustration of noble preferences. Mill has thus started with a very broad harm principle before refining it down to his end result.

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142 Ibid.
144 Mill, above n 122 at 10.
145 J. S. Mill, Utilitarianism 55 (Roger Crisp ed. 1998) at 57
146 Smith, above n 132, at 18.
147 Ibid, at 21.
148 Mill, above n 122, at 60.
149 Smith, above n 132, at 22.
Mill justified the nobleness limit on utility because man was a “progressive being”, thus preferences or interests that were not tied to progression or nobility did not factor in Mill’s utilitarian calculations. Progressivity was tied to the pursuit of knowledge and a better functioning society. Furthermore, Mill submitted that man needs independence to allow noble progression. Thus he limited the harm principle’s reach when it would unduly impinge on independence. The limit does not mean punishment will never be justified on the basis that punishment always affects independence, but when weighing up whether the state should punish, independence is given a high value. In fact Mill envisaged a highly regulated society based on his principle, with regulations on alcohol consumption, education and sex.

Regarding tax avoidance, it must surely be a noble preference to desire the smooth functioning of government. Governments provide services that help man progress, such as education. A decrease in revenue collected by governments then translates to lower quality government services, including education which would hamper man’s progressivity. As a result, criminalising avoidance is consistent with Mill’s principle so far.

Later in his essay, in apparently summarising his conception of harm, Mill suddenly limits his harm principle’s application to only cases when rights are violated. Mill defines rights as “certain interests, which, either by express legal provision or by tacit understanding ought to be considered as rights.”

Notwithstanding the criticisms of this position, tax avoidance is not a victimless crime and infringes on an individual’s rights. Most clearly avoidance infringes on property rights because dutiful taxpayers are forced to pay more than their fair share for government services.

The foregoing analysis of Mill’s has shown he was concerned with much more than our subjective notions of harm. Critics have taken exception to this.

11 Criticism – Mill

By introducing the noble and right violating elements into his harm principle, Mill incorporates other normative factors independent of subjective harm. Because of the extra normative criteria, the principle loses much of its resonance. Mill’s principle is no longer

150 Mill, above n 122, at 13-14
151 Ibid, at 65-66
152 Ibid, at 96-106. Cited in Harcourt, above n 125, at 188.
153 Smith, above n 132, at 34.
154 Mill, above n 122, at 75.
purely about what the average person subjectively understands as harm. What makes something noble depends on one’s understanding of the word. To Mill nobility was progressivity and the flourishing human development, but others may have equally plausible accounts of nobility that are inconsistent with Mill’s. Human equality for example could be considered at least as noble as progressivity. The criticism is even more fundamental regarding the rights element. It is uncontroversial that individuals have very different conceptions of rights. Thus Mill has incorporated his own moral judgments as to what is inherently good, something that the harm principle supposedly resisted.

This criticism will be considered in more depth after an explanation of Joel Feinberg’s conception of the harm principle. After this discussion, the dissertation will return to Mill and argue that a non-normative reading of his harm principle is possible.

Q Feinberg’s harm principle

Feinberg’s harm principle is different from Mill’s in two important ways. First, Feinberg believed it was impossible for a principle that valued liberty to be based on utilitarian grounds because it would give morality too much force.155 Secondly he acknowledged that normative elements other than harm must be included in any liberty limiting principle to constrain its reach.156

12 Feinberg’s conception of harm

Feinberg considered three common meanings of harm, namely damage, setback to interests and harm as wrongdoing. To Feinberg, only the second and third meanings of harm are relevant to the harm principle. Moreover, they should be combined.157 Therefore to Feinberg harm is the wrongful “thwarting, setting back, or defeating of interest[s]”.158 That is, a wrong without harm does not satisfy his harm principle, nor does a harm which was not wrongful. Thus to satisfy Feinberg’s account of the criminal philosophy, tax avoidance must be a wrongful setback to interests.

156 Feinberg, above n 130, at 65.
157 Hamish Stewart “Harms, Wrongs and Setbacks in Feinberg’s Moral limits of the Criminal Law” 2001-2002 13 Buff Crim L Rev 47 at 51. The reason for excluding damage was probably because damage is too broad and including it in the harm principle would give the principle too broad a reach.
158 Feinberg, above n 130, at 33.
13 Setback interests

Feinberg advances that “setback interests” must be “linked to the advancement or detriment of the individual,” and must relate to something that a person has a stake in to the extent that that person will suffer loss or gain depending on what happens. For example people have an interest in the effective running of government and its services. People rely on the State for healthcare and education, two prime examples of what constitutes a setback interest to Feinberg. However an interest in recreational fishing for example is not a sufficient interest for the harm principle to afford protection because it does not advance the individual. That is, not all reductions in welfare are setback interests, and even if interests are setback, state intervention is unjustified unless the setback was wrongful.

14 Wrongfulness

To Feinberg, a wrong is a morally indefensible act that violates another’s rights. Morally indefensible conduct has no justification (such as necessity), or excuse (such as duress, insanity, automatism), or plainly, the harm is the actor’s fault or they are to blame. If an excuse or justification exists, there is no fault or responsibility, meaning there is no wrong and consequently no harm in the relevant sense. Feinberg uses moral indefensibility to show that in a contest such as a sporting encounter, the losing team does not have a legitimate grievance. Even though their interests in winning the game have been set back they have not been wronged.

Feinberg’s arguments are not without their detractors. Anthony Duff has criticised the place of moral indefensibility in the definition of harm. He submits that moral indefensibility blurs the distinction between two areas of the criminal law; wrongdoing and attribution. Duff believes questions of excuse should not be part of the wrongdoing discussion, for a wrong has been done regardless of whether the actor was responsible for it. The question then becomes

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159 Ibid, at 34
161 Hotlug, above n 137, at 373.
162 Feinberg, above n 130, at 107.
165 Feinberg, above n 130, at 114.
whether the actor was responsible for the wrong, or can it be attributed to him.  

To reduce wrongdoing and attribution to one question implies that a killing by an insane person cannot be considered a crime at all. Duff suggests that the correct classification would be to say that a crime has been committed, which the public can rightfully resist and others cannot assist in, but the actor should not be held criminally responsible.

Regardless of the proper place of attribution in the criminal law, it does not affect conclusions regarding tax avoidance. Tax avoiders always have the required mens rea, because they intended to set up a particular arrangement. Moreover, they will often have an additional intention to reduce tax.

Finally, rights must also be violated to constitute Feinbergian harm. The question of rights is certainly a technical and moral question. This feature of Feinberg’s harm principle has been subject to broad criticism.

Feinberg defines a right as a valid claim against another, where validity is tested by the reasons that can be given in its favour. He elaborates to say that any interest you have is the basis for a right and a claim of non-interference by others. However he excludes wicked interests. Examples of wicked interests include an interest in causing suffering to others.

At first blush it appears Feinberg’s right violating criterion is unnecessary; if one has already had their interests set back, would that not mean that their rights have also been violated? Feinberg is aware of this problem but explains that the rights criterion is needed when people have wicked interests.

Feinberg states a wicked interest can be set back indefensibly, but has no right to be respected and is thus not a right. Feinberg gives the example of a person A on a murderous rampage who is captured by a member of the public, B. B continues to either execute A, or imprison him indefinitely. According to Feinberg, B’s actions did not constitute harm relative to his principle because the wickedness of A’s murderous interest meant A’s interest was not a right, therefore B did not violate A’s rights. Punishment of B may be justified on other grounds.

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167 Ibid, at 19.
168 Ibid.
169 The question of rights is certainly a technical and moral question, thus this feature of Feinberg’s harm principle has been subject to broad criticism.
170 Feinberg, above n 130, at 215.
171 Ibid, at 111.
such as the public harm involved in taking the law into your own hands, but not from violating A’s rights.

A major problem with Feinberg’s “rights” element is how one decides whether a right is wicked?\(^{172}\) The wickedness of a right must be a moral question, and different people will have differing moral opinions. The harm principle loses some of its force when a moral issue regarding rights has to be resolved before the harm principle is satisfied. In this way the rights Feinberg refers to are superior to the actual harm as the basis for the principle.

Whatever the correct answer, we have already established that tax avoidance is immoral due to its inclusion in Hart’s minimum content of natural law. Therefore tax avoidance is obviously wicked and Feinberg would not consider it worthy of protection.

R Wider criticism of liberal position

The rights criticism is part of a wider critique of both Mill’s and Feinberg’s positions.\(^ {173}\) Critics submit that reshaping what is meant by harm by including other normative elements seriously undermines its attractiveness as a theory.

15 Loss of simplicity

One of the main attractions of the harm principle was its simplicity. However this simplicity is lost because the definition of harm cannot be adequately contained without resorting to complicated normative arguments such as Mill’s nobleness and Feinberg’s rights elements.\(^ {174}\)

16Circularity

Introducing normative elements into the harm principle makes it possible to reach your desired conclusion and then subsequently inventing a premise including normative elements to ensure the desired conclusion is reached. Liberal theorists exclude simple preference frustration and pain from their harm principles because it would lead to extensive amounts of criminalisation, which liberals oppose.\(^ {175}\) Thus when harm is detached from its popular meaning it is difficult to be sure whether the premise is justifying the conclusion or vice versa.\(^ {176}\) Conclusions justifying premises may not be such a huge problem since it is difficult to come up with a theory without having some sort of idea about what you would like the end

\(^{172}\) Smith, above n 132, at 43.

\(^{173}\) Namely Mill’s, Hart’s and Feinberg’s formulations.

\(^{174}\) Smith, above n 132, at 43.

\(^{175}\) Ibid, at 42.

\(^{176}\) Ibid, at 45.
result to look like. However when the harm principle’s apparent simplicity and resonance is used to appeal to the masses while subtly incorporating normative judgments, the principle can be manipulated for ideological ends.

Bernard Harcourt gives examples.\textsuperscript{177} He points to debates on prostitution, homosexuality and temperance movements in the USA.\textsuperscript{178} Harcourt alleges those debates used to centre around immorality, but have now become debates about the harms of the activities. In New York, criminalisation of loitering, public intoxication, prostitution, public urination and others were justified because minor offences such as those are causally related to serious crime.\textsuperscript{179} The justification was that if anti-social behaviour is stamped out further harm would be prevented. Thus behaviour that used to be demonised because of its moral offence was being criminalised on the basis of causing harm. The same is so for debates surrounding pornography. Pornography used to be opposed because the content itself was immoral and because it led to immoral behaviour. Now those against pornography have reshaped their argument, instead arguing pornography encourages sex crimes.\textsuperscript{180}

Harcourt goes on to cite numerous other examples in support of his claim that the harm principle has collapsed under the weight of its own success.\textsuperscript{181} Harcourt submits conservatives (moralists) have adopted the harm principle and have influenced its application.\textsuperscript{182}

Furthermore, both Mill and Feinberg limit harms to when ‘rights’ are violated. This creates circularity because as Smith points out, one of the reasons for defining the harm principle was to define and protect the rights we have against government coercion. Smith puts it as “[s]o it seems that we cannot know whether something counts as a ‘harm’ unless we know what ‘rights’ people have, and we cannot know what ‘rights’ we have unless we know what will count as ‘harm.’”\textsuperscript{183}

How then, might these arguments apply to the context of tax avoidance? The criticism is certainly true for cases on the borderline of what we have a right to do, but tax avoidance is

\textsuperscript{177} Harcourt, above n 125, at 110.
\textsuperscript{178} Ibid.
\textsuperscript{179} Ibid.
\textsuperscript{180} Ibid, at 111-112.
\textsuperscript{181} Ibid, at 113.
\textsuperscript{182} Ibid, at 115-116.
\textsuperscript{183} Smith, above n 132, at 42-43.
far from the borderline. Society cannot countenance such a right to avoid tax because if there were such a right society could not function.

17 Free riding

Normative conceptions of harm turn the word into a term of art. They make what counts as harm more than simply a subjective question. For instance a normative harm principle like Mill’s or Feinberg’s loses much of its rhetorical force because it is based on their own conceptions of the good life. For example, if instead of noble progressivity, one thinks that certain moral standards are essential, then one could justify enforcing morality which the harm principle apparently resists.

Smith may be correct, but the harms to which Hart’s minimum content refers by definition must be present in all forms of morality and law, regardless of normative glosses. Therefore the morality of tax avoidance will not change with different conceptions of morality.

18 Inevitable

Harcourt argues that although the harm principle loses force when normative elements like “nobility” are introduced, the normative additions are inevitable. However a non normative reading of the harm principle is possible by interpreting Mill from a different angle.

S Mill’s second principle – self concerning actions

We have seen that a subjective harm principle cannot form the basis of criminal law theory because the reach of the principle would be too wide. Liberal theorists have tried to limit the principle by adding normative elements, but in doing so they cause the principle to lose much of what made it attractive in the first place.

Despite this problem, a non-normative reading of Mill’s harm principle is possible when Mill’s two liberty limiting principles are read in conjunction with each other.

Mulnix submits that combining the two principles allows a non-normative reading of harm in that only actions that “concern others” are included.

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184 Ibid, at 58.
185 Harcourt, above n 125.
186 Mill’s two principles are given on page 28.
19 Self or other-concerning?

The key to Mill’s second principle is to determine when acts are self-concerning and when they concern others. Mill explains “When I say [an action affects] only himself, I mean directly and in the first instance; for whatever affects himself can affect others through himself”.\(^{188}\) Thus Mill understood self-concerning actions to have only indirect effects on others. The question becomes whether there is a clear distinction between direct and indirect effects.

20 Direct or indirect?

Mill says that an effect will be indirect when an action’s effects on your happiness are purely because you find the action to be immoral or disagreeable.\(^{189}\) Mill submitted that indirect effects can arise in two ways. The first is where you are involved in the actor’s life in a capacity which causes you to promote the actor’s happiness as if it was your own.\(^{190}\) An example of this is paternalistic legislation forcing all car passengers to wear seatbelts, or restricting who can purchase cigarettes. The second sort of indirect effect arises from when an action’s effect is purely due to preconceived moral beliefs about the action.\(^{191}\) For example a devout Christian may be offended by homosexual couples holding hands. The holding hands only affects the observer because of the observer’s preconceived beliefs.

Munix points out the two ways in which indirect effects can come about have similar structures.\(^{192}\) Both effects are generated by certain beliefs about the self-concerning action. In the first case you must believe the action will negatively affect the actor, whose welfare you care about. The second case also requires certain preconceived beliefs in order to be indirectly harmed.\(^{193}\) Thus an effect will be indirect when an action’s effects are due to preconceived beliefs. Put another way, actions are indirect where you would not have suffered harm but for your beliefs.

Considering Mill’s self-concerning – other-concerning distinction when interpreting the definition of harm thus produces a non-normative account of the harm principle. This account does not assume any standard of morality, and whether an action is other or self concerning

\(^{188}\) Mill, above n 122, at chapter 5, cited in Ibid, at 209.
\(^{189}\) Ibid, cited in Munix, above n 187, at 209.
\(^{190}\) Munix, above n 187, at 210 citing Mill, above n 122, chapter 1 page 12.
\(^{191}\) Munix, above n 187, at 210.
\(^{192}\) Ibid.
\(^{193}\) Ibid.
will not be influenced by moral judgments, such as the “nobility” or “wickedness” of the conduct.\textsuperscript{194}

In this manner Mulnix’s interpretation of Mill, regardless of whether Mill would agree with it, responds to the most serious challenge to the harm principle; that it cannot be read without external normative references.

Tax avoidance does not fall within the self concerning category. Avoidance is not harmful because others worry about the wellbeing of the tax avoider, or because others are offended by it. Tax avoidance is directly harmful and is “other concerning”.\textsuperscript{195}

\textbf{T Conclusion of part six and link to moralism}

We have seen that Feinberg, unlike Mill, does not believe his harm principle is the only possible justification for limiting liberty. Explicitly, Feinberg defends his offence principle. Additionally Feinberg makes what at first seems to be a great departure from his liberal roots by stating:\textsuperscript{196}

> Since evils are by definition something to be regretted and prevented when possible, it seems to follow that the prevention of an evil, any evil, is always a reason of some relevance, however slight, in support of a criminal prohibition.

However Feinberg goes on to say that evils other than harm will rarely justify coercion.\textsuperscript{197} Thus Feinberg has given some ground to legal moralism which will be discussed in the following part.

\textbf{VII Part Seven: Legal Moralism}

Legal moralists believe that society is entitled to impose criminal sanctions on immoral behaviour. Strict moralists like Michael Moore support criminalisation of immoral conduct regardless of harm. They are often referred to as retributivists. Conservative moralists on the other hand believe society is entitled to use coercion to preserve and protect itself. Conservative moralism can be seen as a different formulation of the harm principle, since its justification can be seen as protecting society from harm.

\textsuperscript{194} Ibid, at 216.
\textsuperscript{195} Refer back to harms of tax avoidance from page 19.
\textsuperscript{196} Feinberg, above n 146, at 37.
\textsuperscript{197} Ibid, at 38.
Conservative

Moralists justify their view by saying that immorality threatens society itself. Lord Devlin was a famous moralist. His arguments were in response to the Wolfenden Report which commented on the place of homosexuality and prostitution in the criminal law. The report concluded that unless parliament was willing to equate harm and sin, “there must remain a realm of private morality and immorality which is ... not the law's business.” Devlin disputed the conclusion on the grounds that society is a “community of ideas” and morality is central to the survival of society, thus the criminal law must punish conduct that erodes society's morals.

Devlin analogised moral wrongs with treason, which he submits share the same justification for criminalisation as moral wrongs; to protect society. He explained that criminalising is justified because society needs a well functioning government to prosper. Just as important to society as a well functioning government, Devlin argues, is a common, shared morality. Devlin based his argument on the assertions that “societies disintegrate from within [due to no common morality] more frequently than they are broken up by external pressures [treason].” Thus just as treason is justified by the protection of society, so are laws that prohibit immorality.

Tax avoidance certainly satisfies Devlin’s societal disintegration justification for criminalisation. First, as discussed earlier, tax avoidance is immoral. Secondly, tax avoidance and evasion can cause society to disintegrate. An example of this is in Greece, where the black market makes up for one-third of the total economy. Moreover, corruption is a serious problem in Greece which one could fairly assume would lead to more evasion and avoidance. Therefore more than one-third of taxes are lost. Consequently, the Greek

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201 Devlin, above n 198.
202 Ibid.
203 Ibid.
government has been unable to pay its debts, and has been forced to cut spending, leading to the riots seen in Greece earlier this year.206

Devlin submitted that morality is determined by the “reasonable man”207 and can be based on feelings of disgust.208 Considering that rules against tax avoidance form part of the minimum content of morality and law, the “reasonable man” must believe avoidance is immoral.

Devlin’s arguments are similar to arguments based on the harm principle. His argument is utilitarian, that society will be better off if it uses the criminal law to protect shared morality.209

21 Criticism

Devlin’s arguments have been the subject of much discussion and criticism. The main criticisms can be divided into what are commonly known as the empirical challenge, the Nazi challenge, the no difference challenge and a broad challenge to his concept of morality.

22 Empirical challenge

At the time, Devlin’s argument came under attack by HLA Hart. Hart pointed out it does not follow that a lack of common morality between people in some areas (for example sexual morality) automatically translates to a lack of common morality in all areas.210 Hart conceded that some shared morality is needed for society to function, but equating a change in shared morals to the destruction of society is too great a leap. Devlin’s argument implies that a society’s morals cannot change, and if morality does change, the old society is actually being replaced by a new one.211

Feinberg continued the criticism on empirical grounds, stating Devlin’s argument stemmed from a confusion over “sometimes” and “always”. He concurred with Devlin that society is a community of ideas and agreement between members is needed, but not to the extent that Devlin suggests. The sole alternative to total agreement on moral matters is not total

206 Although not the only cause.
207 Devlin, above n 198, at 15.
208 Ibid, at 17
210 Jeffrie Murphy “Another Look at Moralism” (1966) 77 Ethics 50 at 56.
211 HLA Hart Law, Liberty and Morality (Stanford University Press, Stanford, 1963) at 52.
disagreement. In Feinberg’s view Devlin confused the preservation of some common morality with the need to preserve the entire current morality.

The criticism is called the empirical challenge, because empirical evidence has shown Devlin was wrong, in that allowing “immoral” acts does not destroy society. Abortion and homosexuality (two immoral acts Devlin was concerned with) have been decriminalised in many countries, including New Zealand, but the decriminalisation has not resulted in societal disintegration. It seems that not all immoral acts destroy society, but some are certainly more damaging than others. Tax avoidance and evasion for example are certainly more harmful from a societal disintegration standpoint than abortion or homosexuality. From Greece’s example we can see society has been severely damaged because of a lack of taxation revenue. Thus despite the broad validity of the empirical challenge, it may be less true regarding tax avoidance.

23 Nazi challenge

A further problem with Devlin’s argument is that it assumes common morality is always worth protecting, but this is not always the case. A commonly cited example is Nazi Germany, where the shared morality of society allowed gross harms to be inflicted on Jews and other minorities. The common morality of the German people at the time allowed the Nazi laws to exist, but the German common morality could not be seen as worthy of protection.

A less extreme example was the sterilisation of “incompetents” which was seen as the morally right thing to do in the past. Yet beliefs changed and subsequent laws outlawed sterilisation on moral grounds.

While this is a flaw in Devlin’s theory, it is hard to imagine a social environment where the moral character of tax avoidance would change, especially when regard is paid to its inclusion in the minimum content of morality and law.

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212 Feinberg, above n 146 at 136.
213 Ibid at 142 cited in Sylla, above n 198, at 56.
No difference challenge

The third challenge often raised against Devlin is that his argument is no different from a liberal’s harm principle. Devlin’s writing often gives the impression his legal moralism argument may be a reformation of the harm principle.\(^\text{216}\)

I do not think that one can ignore disgust if it is deeply felt and not manufactured. Its presence is a good indication that the bounds of toleration are being reached… But before a society can put a practice beyond the limits of tolerance there must be a deliberate judgment that the practice is injurious to society.

Devlin’s passage appears to be saying that disgust stemming from immoral behaviour is not enough to justify criminalisation. Instead society must actually be injured by the behaviour causing the disgust. If this is the case, Devlin’s theory is just another spin on the harm principle.\(^\text{217}\) Feinberg takes this interpretation, suggesting that Devlin’s theory is instrumentalist and liberal in that it states that immorality should be criminalised to prevent harm.\(^\text{218}\) However, others interpretations are possible.

Thomas Petersen compares the passage quoted above to others where Devlin refers to the sanctity of human life as a fundamental principle.\(^\text{219}\) Petersen explains that Devlin believes that actions like killing and abortion are not just wrong because they cause harm to others, but more importantly because they violate the sanctity of human life. On Petersen’s interpretation, the sanctity of human life is the theory’s primary principle, setting it apart from harm-based accounts.\(^\text{220}\)

Petersen quotes Devlin, where Devlin states: \(^\text{221}\)

Thus, if the criminal law were to be reformed so as to eliminate from it everything that was not designed to preserve order and decency or to protect citizens … it would overturn a fundamental principle.

The fundamental principle Devlin refers to is the sanctity of human life.\(^\text{222}\) Devlin gives examples of actions such as abortion and incest that, when done in private, often do not harm anyone. However Devlin still considers these actions worthy of criminalisation because of

\(^{216}\)Devlin, above n 198, at 17 cited in Petersen, above n 214, at 219.
\(^{217}\)Petersen, above n 214, at 219.
\(^{218}\)Feinberg 1988 at 8
\(^{219}\)Petersen, above n 214, at 219 and Devlin, above n 198, at 7.
\(^{220}\)Ibid, at 219-220.
\(^{221}\)Devlin, above n 198, at 7.
\(^{222}\)Ibid, at 6.
their immorality. Thus on Petersen’s interpretation, Devlin’s moralism focuses on the sanctity of human life, rather than on harm, distinguishing it from the harm principle.

Petersen does not go into much depth on the issue, but points out the sanctity principle justifies only a small portion of what moralists seek to criminalise.223 It would be drawing an impossibly long bow to say the criminalisation of premarital sex and homosexuality are justified because they infringe on the sanctity of human life. Therefore in the present author’s view, Devlin is still subject to the no difference challenge.

25 Devlin’s concept of morality

A broader problem critics have with Devlin’s theory is his reliance “on an unacceptably loose concept of morality” in assuming the morality of behaviour can be measured by the feelings of ordinary people. Ashworth submits that morality must be based on reason and not feelings, which can be coloured by prejudice.225 Dworkin takes a similar view and argues that morality must be adequately defined and have reasons supporting it, reasons that are more than mere feelings of distaste or disgust in order to prevent moral judgments from changing on a case by case basis.226

While Devlin’s morality may be too broad or indeterminate, the moral character of tax avoidance is not; tax avoidance is universally immoral. Thus the criminalisation of avoidance would be justified under any form of legal moralism.

V Modern moralism

More recent legal moralists have reformulated the moralist position to counter Devlin’s critics, however the reformulations are not immune from criticism.

26 Empirical challenge

Moralists’ first counter-argument is that Devlin’s concept of societal disintegration was misinterpreted. Robert George227 and John Kekes228 both submit that disintegration does not mean the complete breakdown of society. Instead George understands Devlin as claiming that a loosening of morals will negatively affect interpersonal relationships in communities which

223 Petersen, above n 214, at 220.
225 Ibid.
are a good in themselves, regardless of whether a breakdown of society occurs along with it.\textsuperscript{229} Thus George is, and believed Devlin was, concerned with a loss of social cohesion resulting from degenerating morals.\textsuperscript{230} Kekes takes the same position as George.\textsuperscript{231}

Modern moralist theorists like George and Kekes may have correctly interpreted Devlin’s work, or if not they may have formed a version of legal moralism of their own which is not subject to the empirical challenge.

However their theories do not satisfy other criticisms.

\textit{27 No difference challenge}

George’s moralism appears to be open to the no difference challenge, in that he believes the law should be used to prevent “moral harm”.\textsuperscript{232} However Petersen claims that George’s moral harm is different from what a liberal would normally understand as harm.\textsuperscript{233} To George, moral harm is the changing of one’s character for the worse due to indulging in immoral behaviour, so that you are more inclined to commit subsequent immoral acts.\textsuperscript{234}

An argument along similar lines was made \textit{against} the introduction of income tax in New Zealand’s parliament by the opposition party in 1881. The leader of the opposition, John Bryce, worried that because income tax required individuals to file returns, they would lie in order to pay less tax.\textsuperscript{235} Bryce argued that lying on one’s return would lead to other more serious immorality.\textsuperscript{236} Today Bryce’s argument is untenable due to society’s reliance on taxation. Furthermore, the core of Bryce’s argument, like George’s, actually supports criminalising tax avoidance. Criminalisation would deter immoral tax avoidance to nip further moral slippage in the bud.

To return to the “no difference” challenge, although the harm George posits is different from the typical liberal notion of harm, his theory is inescapably contingent on some form of harm. Just as Mill and Feinberg defined harm in certain ways, so does George. Thus in the author’s view he has not overcome the “no difference” hurdle.

\textsuperscript{229} George, above n 228, at 66.
\textsuperscript{230} Petersen, above n 214, at 222.
\textsuperscript{231} Kekes, above n 228, at 27-28
\textsuperscript{232} George, above n 228, at 80.
\textsuperscript{233} Petersen, above n 214, at 222 – 223.
\textsuperscript{234} Ibid.
\textsuperscript{235} Or in others words, indulge in tax evasion.
\textsuperscript{236} John Prebble “Why is Tax Law Incomprehensible” (1994) 4 British Tax Review 380 at 381.
28 Morality too broad

Kekes tries to salvage Devlin’s moralism by defining more narrowly the sorts of moral interests that can justifiably be protected.

Unlike Devlin, who believed the reasonable man (the jury) can decide whether actions are immoral and thus whether coercion is justified, Kekes distinguishes two types of values which he calls primary and secondary values.

Unlike Devlin, Kekes does not believe the question of whether coercion is justified on grounds of immorality should be left up to the reasonable man. Instead he distinguishes between two types of moral values, which he calls primary and secondary. Primary values relate to requirements vital to living a good life and include good shelter and the protection from harm.237 On the other hand secondary values are not needed for survival, but lead to different sorts of fulfillment, such as religious faith.238 Kekes submits primary values must be enforced to prevent societal disintegration, whereas secondary values may be enforced, but society’s survival does not depend on their enforcement.

However determining what is a primary and what is a secondary value will be unclear at the margins. Thus while Kekes does improve on Devlin’s conception of morality, it is still subject to similar criticism in that there will be disagreement regarding moral classifications.

29 Nazi challenge

George counters the Nazi challenge by stating that only morality that is true should be protected by the law.239 To George, true morality advances basic human goods which include life in a broad sense, knowledge, play, aesthetic experiences, sociability, practical reasonableness and religion.240

Although George and Kekes can respond to the challenge as it relates to Nazi Germany, since the absence of genocide is certainly a true moral feature and is a primary value, the Nazi example is used because it is so extreme. Morality that may have been viewed as true or primary 100 years ago, may not be viewed in the same light today. For example some people saw miscegenation241 as immoral two or three generations ago but their descendants would probably now disagree. But if Kekes’ or George’s position is to be taken, it appears true or

237 Kekes, above n 228, at 23.
239 George, above n 228, at 73-74.
240 Ibid, at 13
241 Mixed race reproduction.
primary values cannot change. As a result the Kekes-George viewpoint is still subject to a watered down version of the Nazi Challenge.

In summary, while modern moralists have made improvements on Devlin’s theory, there are still discontinuities in the analytical framework. The same discontinuities are not present in a different sort of legal moralism, which is clearly non-instrumental.

**W Moore and Retributive Theory**

While Devlin’s legal moralism can be interpreted as a derivative of the harm principle, the same cannot be said about retributivism.242 The theory is very straightforward: “retributivism is the view that we ought to punish offenders because and only because they deserve to be punished. Punishment is justified, for a retributivist, solely by the fact that those receiving it deserve it.”243 Those who deserve punishment are those “who are morally culpable in the doing of some morally wrongful action.”244

Retributive theory, like all non-instrumentalist accounts of the criminal law, does not seek any goal beyond its purpose of punishing morally culpable agents. Their punishment in itself is a good, regardless of its consequences because punishment delivers justice. A retributivist system will have obvious spin-off benefits, such as deterrence, but any benefits are secondary to the primary aim of punishing the culpable.245

The difference between retributivism and competing theories like the harm principle is in what they consider to be inherently good. All criminal theories seek something that is inherently good; utilitarian theories like the harm principle see the maximisation of utility or the prevention of harm as inherently good, whereas a retributivist believes that punishing the culpable is inherently good. It follows that retributivism cannot be criticised on the grounds that it does not maximise utility, because the theory is not concerned with utility.246

There is certainly a positive case for the criminalisation of avoidance on the basis of retributive theory. Avoidance is plainly immoral and the complex and contrived nature of avoidance means there will very rarely be any question surrounding culpability; tax avoiders

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244 Ibid, at 35.
245 Jeffrie Murphy “Legal moralism and retribution revisited” 2007 1 Crim Law and Philos 5 at 12.
by and large intend to avoid tax. Nevertheless a theory that states basically little more than punishment is justified for punishment’s sake needs justification.

30 Moore - thought experiment

One justification that Michael Moore offers is that people naturally think that punishment for wrongdoing is justified.\(^{247}\) To support his point Moore constructs a thought experiment in which crimes are being committed but there is no instrumental reason to punish, either utilitarian or rehabilitative. The offender has subsequently found God and is no longer a risk to society, and nor does he need to be reformed. Further, the experiment hypothesises that the crime goes undetected. As a result a lack of punishment will not encourage copycats. Moore submits that in this situation, the majority of people would still want the wrongdoer to be punished, not because the punishment will achieve anything in particular, but because the offender deserves it.\(^{248}\)

The thought experiment justification has been criticised on the grounds that a person’s rational judgment is tainted with what Friedrich Nietzsche called resentment.\(^ {249}\) Ressentiment (French) translates to various negative emotions such as fear, envy and resentment, which Nietzsche claimed are non-virtuous emotions that make our judgments irrational and unreliable.\(^ {250}\)

Retributivists respond to Nietzsche’s criticism by saying that the retributive urge may be linked to ressentiment emotions, but the connection is not inevitable. Instead Retributivists distinguish between virtuous and non-virtuous emotions, concluding that the former are responsible for retributive urges.\(^ {251}\) Moore identifies two virtuous emotions that motivate retributive justice.\(^ {252}\)

The first is that it is virtuous to feel negatively towards moral violations that harm others.\(^ {253}\) Moore reaches this point by asking whether it is morally wrong not to care about others. He answers the question affirmatively and extrapolates from that answer to a presumption that it must also be virtuous to care about others. Therefore it must be virtuous for others to feel

\(^{247}\) Moore, above n 243 at 112.

\(^{248}\) Ibid.

\(^{249}\) Retributivism, above n 245.

\(^{250}\) Ibid.

\(^{251}\) Moore, above n 243, at 144.

\(^{252}\) Ibid.

\(^{253}\) Ibid.
negatively towards immoral actions that harm others. Other retributivists have described this emotion as “moral hatred”\textsuperscript{254} or “moral outrage”\textsuperscript{255} and a virtuous response to wrongdoing.\textsuperscript{256}

Retributivists argue such moral outrage is independent of Nietzsche’s ressentiment taxonomy of non-virtuous emotions and is not only a worthy response to wrongdoing, but the only satisfactory response from those who care about others and morality in general.\textsuperscript{257}

Secondly, and more simply, Moore argues the feeling of guilt is distinct from ressentiment emotions.\textsuperscript{258} Moore uses another thought experiment to demonstrate his point.\textsuperscript{259} He uses the example of a horrendous murder in the USA, which to a New Zealand reader, could be analogised to Sophie Elliot’s murder. He asks the participant what they would feel if they were the one who murdered Sophie in such gruesome circumstances. Almost everyone (with some exceptions) would feel incredibly guilty after such an act and Moore himself could not imagine any suffering could exceed what he deserved and implies many others would feel the same.\textsuperscript{260}

Evidence suggests many tax avoiders do feel at least uncomfortable and embarrassed about tax avoidance. In England, the supermarket chain Tesco sued The Guardian newspaper for libel over claims that Tesco engaged in aggressive tax avoidance.\textsuperscript{261} The Guardian greatly overstated the scale of Tesco’s avoidance, which amounted to what Tesco’s lawyers said was “a devastating attack on its integrity and ethics.”\textsuperscript{262} Thus it appears that Tesco believes at least large scale avoidance is immoral.\textsuperscript{263}

31 Moore conclusion

Moore’s theory responds well to the main critiques of Devlin’s theory, but it does so by forming a non instrumentalist account of the criminal law. Retribution, rather than harm minimisation is the goal of the theory. Whether or not the main function of the criminal law is or should be retribution will depend on individual tastes, but the theory is not defeated simply

\textsuperscript{254} Ibid.
\textsuperscript{255} Ibid.
\textsuperscript{256} Ibid.
\textsuperscript{257} Ibid.
\textsuperscript{258} Ibid, at 145
\textsuperscript{259} Ibid.
\textsuperscript{260} Ibid.
\textsuperscript{261} Prebble and Prebble, above n 8, at 153.
\textsuperscript{263} Prebble and Prebble, above n 8, at 154.
because it does not maximise utility. Retributivists are concerned with retribution in itself, not retribution.

X  Positive case conclusion

All criminal law theories have their flaws and critics. It is unlikely that any particular theory will ever be perfect. However this is not the same as saying we will never be able to test whether any particular action should be criminalised. Satisfactory conclusions may be difficult to draw for acts that are on the boundary of either the harm principle or legal moralism, but the majority of current crimes easily fit within either or both theories’ frameworks. Although not yet criminal, tax avoidance also easily satisfies the positive case for criminalisation under both criminal law theories. So easily in fact it is reasonable to ask why avoidance is not criminal already. Are legislators not aware of the harm or the immorality, or is there a road block in the way? Legislators are certainly at least aware of the revenue loss from tax avoidance, and if thought through, they must also be aware of its harms and consequently its immorality. Therefore the negative case for criminalisation must not be satisfied.

VIII  Part Eight: The Negative Case

Regardless of the result of the positive case for criminalisation, criminalisation should not be accepted if it fails to satisfy the negative case.264 Practical elements such as efficacy and principles of the Rule of Law are central to the negative case discussion.265

Y  Efficacy

Of all possible state responses to undesirable conduct, criminalisation is the most severe and should be used only when “absolutely necessary”.266 Therefore a strong reason against criminalisation is if the current system or alternatives to the criminal law are, or would be just as effective at deterring tax avoidance.267 The efficacy judgment is often based on empirical evidence, however in the case of avoidance empirical evidence is either unhelpful or non-existent.

266 Simester and Sullivan, above n 264, at 581.
267 Ashworth, above n 224, at 31.
Avoidance is not criminal in any other jurisdictions studied by the author, thus direct comparisons are not possible. Furthermore the efficacy of the current penalty regime is hard to gauge. Tax avoidance relies on secrecy for its success, therefore it is impossible to know how much is occurring. There is anecdotal evidence\(^{268}\) that the new penalties regime discourages some avoidance, but due to the invisibility of much tax avoidance, the penalty regime’s exact success is unknown. The Inland Revenue does publish statistics of the volume and value of penalties imposed, but these statistics are not determinate of the penalties’ effectiveness.\(^{269}\) First, any change in the amount or quantum of penalties could be due to a change in Inland Revenue policy, rather than a change in taxpayer behaviour. Secondly, even if Inland Revenue policy remained constant, tax avoiders may have found more shrewd ways to prevent arrangements being detected.

Due to scarcity and, or unhelpfulness of empirical evidence one is forced to speculate and hypothesise. One speculative argument is that criminalising avoidance will certainly deter lawyers and accountants from devising avoidance structures, because if their involvement is discovered, they would be struck off by their professional bodies.

Although it is difficult to determine the effect that criminalisation will have on taxpayer behaviour, the criminal law is more than just a deterrent.\(^{270}\) The criminal law is also declaratory, in that it declares what sort of conduct society finds unacceptable.\(^{271}\) Considering the moral status of tax avoidance and the harm it causes, one would expect that society would wish to denounce avoidance emphatically. Making avoidance a criminal effect will certainly have that effect.

For all these reasons it is difficult to come to a concrete conclusion regarding the efficacy of criminalisation, but the considerations discussed weight in of criminalisation. The same cannot be said for the relevant Rule of Law issues.

Z  Rule of Law

Rebecca Prebble and John Prebble considered whether gaars and tax avoidance generally breach principles of the Rule of Law. Their conclusion was that it does, but the breach is

\(^{268}\) The anecdotal evidence comes from discussions with those who were or are in the accounting and taxation field and from discussing the issue with taxation academics.


\(^{270}\) Ashworth, above n 224, at 22.

\(^{271}\) Ibid, at 22.
acceptable within the current civil framework. Prebble and Prebble argued “[t]he Rule of Law is not an unqualified good”\textsuperscript{272} and can be outweighed by other factors, in this case the need to combat tax avoidance.\textsuperscript{273} Nonetheless the Rule of Law has far more weight in criminal law contexts. Criminal convictions impact seriously on autonomy through loss of liberty, financial penalties and through secondary penalties such as loss of professional licenses and social stigma. Thus the Rule of Law and certainty are particularly important in the criminal law.

Philosophers disagree on the exact content of the Rule of Law, but all agree certainty in the law is a vital and necessary component.\textsuperscript{274}

32 Importance of certainty

To Rawls certainty was vital to liberty, because if man does not or cannot know the law, he cannot know the boundaries of his liberties.\textsuperscript{275} People cannot know how free they are if they do not know the limits of the law. This criticism applies to gaars because no one really knows the extent of their reach.\textsuperscript{276} Due to the gaar’s uncertainty, taxpayers may be discouraged from legitimately minimising their taxes because they do not want to risk falling foul of the law.\textsuperscript{277} Prebble and Prebble are sceptical of this assertion, since it is not reflected in reported cases in which the gaar has been applied.\textsuperscript{278} In cases known to Prebble and Prebble the impugned arrangements were obviously tax avoidance when viewed objectively.\textsuperscript{279}

Although reported cases were relatively clear in Prebble and Prebble’s opinion, it is unrealistic to believe this will always be the case, especially when the nature of tax avoidance and the gaar’s vagueness are appreciated.

For Joseph Raz, law’s quality as a guide is even more important to human dignity than it is to liberty.\textsuperscript{280} To Raz, the law must assume that people are capable of rational thought since rationality is one of the keys to culpability.\textsuperscript{281} Thus human beings want to plan their lives

\begin{itemize}
  \item \textsuperscript{272} Prebble and Prebble, above n 14, at 45.
  \item \textsuperscript{273} Ibid.
  \item \textsuperscript{274} The Philosophy of Law – An Encyclopaedia (1\textsuperscript{st} ed, 1999) vol 2 Rule of Law at 765.
  \item \textsuperscript{276} Prebble and Prebble, above n 14, at 31.
  \item \textsuperscript{277} Ibid.
  \item \textsuperscript{278} Ibid at 32.
  \item \textsuperscript{279} Ibid.
  \item \textsuperscript{281} Ibid.
\end{itemize}
around the law so as not to fall foul of it. It follows that Laws that are too vague to be observed insult human dignity, because the law “encourages autonomous action only to frustrate its purpose.”

33 Why is avoidance so uncertain?

The uncertainty surrounding avoidance is due to the fine line between avoidance and mitigation. A literal interpretation of gaars would mean they attach to many legitimate transactions. Therefore the gaar must mean more than its plain words.

Although all laws and rules have borderline cases, tax avoidance and cases involving the application of the gaar are especially difficult. Prebble and Prebble draw on Hart’s distinction between cases that form the “core” of the law in the area, and the “penumbra”. In “core” cases, there is no question the law applies, whereas cases in the “penumbra” are more uncertain. The problem with tax avoidance and gaars in particular is that gaars’ penumbras are far greater than other law’s. Arguably avoidance is all penumbra. Gaars have this quality by design. Legislators are unable to predict every instance of avoidance. The gaar is there to pick up the slack. Therefore it falls to judges to fill in the gaps left by the gaar. This is a serious breach of the Rule of Law as the law in avoidance cases is somewhat unknowable in advance.

Prebble and Prebble argue that any Rule of Law breaches by gaars are outweighed by the need for governments to be able to effectively combat tax avoidance. However their argument was regarding the current civil regime.

If criminalisation was the only option to prevent tax avoidance then it might be justified for society to breach the Rule of Law in this manner, but criminalisation is not the only option. The civil penalties and reconstructive powers of the Commissioner deter avoidance to an extent. Criminalisation might provide more effective deterrence, but the extra deterrence would come at too high a price in terms of the Rule of Law.

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282 Ibid.
283 Prebble and Prebble, above n 14, at 22.
284 Ibid at 29.
285 Ibid.
287 Prebble and Prebble, above n 14, at 29.
288 Ibid.
To criminally punish citizens for indefinable behaviour would give the state too much power and breaches what American philosophers call the doctrine of fair warning. The doctrine states citizens must be respected as autonomous (Rawls) and rational (Razz) human beings, which requires fair warning of the contents of the criminal law in order to avoid being subject to it.\(^{289}\) Moreover, fair warning requires that there should be no undue difficulty in ascertaining the criminal law’s scope. Fair warning is impossible in tax avoidance cases since no one knows the gaar’s full reach.

Two important negative implications flow the indefinability of avoidance.\(^{290}\) The most obvious is that individual autonomy is impeded in two ways. First, individuals might be convicted and sentenced for avoidance. Secondly, taxpayers may not engage in legitimate tax mitigation transaction fearing the gaar.

Furthermore, uncertainty in legislative drafting gives enforcement agencies a great deal of power and discretion, which can have negative consequences. The authorities may misuse the broad nature of the gaar and tax avoidance itself to prosecute and criminalise behaviour in a way inconsistent with legislative intent.\(^{291}\) Tax authorities would have to define the scope of the offence by deciding what cases to prosecute rather than the legislature. Prosecutorial discretion in tax avoidance cases would not be as transparent as for other offences because of the uncertain nature of tax avoidance. The potential for selective prosecution (or non-prosecution) is higher because the offence is not exactly defined, which would make it more difficult to judge whether there has been selective prosecution.\(^{292}\) Injustices are also more likely at the adjudicative level from judges misinterpreting the law.

The costs of over-zealous prosecutors and incorrect judicial interpretation will be tempered by the appeal structure of the courts, but not completely. In addition, the economic cost of criminal trials to the state cannot be ignored. More importantly the personal cost to the defendant from a criminal trial are serious, both emotionally and socially. Even if innocent taxpayers are acquitted their reputations may still be unfairly damaged. At the same time


\(^{290}\) Ibid.

\(^{291}\) Ibid.

society may start to disrespect the criminal justice system as its lack of objectivity and even handedness is observed.\textsuperscript{293}

The same negative implications are present in the current framework, but the civil consequences have less serious effects.

From another angle, criminalising tax avoidance violates the social contract between the state and its citizens. Citizens living in society agree to live within the laws laid down by the state and in turn those laws must be knowable, otherwise it will be impossible for citizens to fulfill their end of the social contract.

Society has acquiesced to the imposition of civil liability, but the liability should not be extended into the criminal realm, where liberty and livelihoods are at stake. The coercive nature of the criminal law requires fair warning to be given to citizens as to what conduct is prohibited.

At least in New Zealand, no part of the criminal law is as inherently as uncertain as tax avoidance. While there are hard cases for all rules they are usually in the minority. The opposite is true for avoidance.\textsuperscript{294}

The kind of criminalisation dilemma that we face with avoidance is rare in law but it does occur, for instance in laws against anti-competitive behaviour. Anti-competitive behaviour is similar to avoidance in that it involves contracts, arrangements, and so on that are legal according to the general law. Nevertheless, the law wants to ban the behaviour, here because it reduces competition. The sorts of behaviour that reduce competition are incapable of precise definition because there are so many different business activities in which people engage. Also, Parliament may consider some of them to be legitimate, even though they reduce competition. Countries therefore have rules about anti-competitive behaviour that are similar in structure to gaars. An example is section 27 of the New Zealand Commerce Act 1986. Governments might want to criminalize anti-competitive behaviour, but section 27 is just as imprecise as BG 1. Therefore, the penalties in the Commerce Act, while potentially very substantial, are civil, not criminal.

Thus the gaar and tax avoidance are not the only areas of law that contain only quasi-criminal penalties due to their uncertainty. Presently the harms from tax avoidance do not justify such

\textsuperscript{293} Ibid.

\textsuperscript{294} Prebble and Prebble, above n 14, at 29.
a large infringement on the Rule of Law through criminalisation. The presence of penalties deters tax avoidance in a quasi-criminal way, but they are not such an affront to human dignity or autonomy as fully fledged criminal provisions would be.

IX Part Nine: Conclusion

This dissertation asked whether tax avoidance should be criminalised. The conclusion reached is that as much as criminalisation would be desirable, society should not take that step. Parts two and three discussed the inherent problems in defining tax avoidance and thus how difficult it is to know the full ambit of the gaar. It is this fundamental uncertainty that blocks criminalisation. The uncertainty is unfortunate, however, because as part four showed, laws against avoidance are indeed included in the minimum content of natural law. Tax avoidance is both harmful and immoral, to the extent it easily satisfies the different positive cases for criminalisation discussed in parts six and seven. Tax avoiders shirk their moral duty to contribute their fair share to society. As a consequence other taxpayers are forced to pay more tax or governments are forced to reduce spending on services.

Criminalising tax avoidance will not increase the uncertainty surrounding tax avoidance and the gaar, but as discussed in part eight, it will have a more serious impact on autonomy. The current regime of penalties and reconstruction does infringe on the Rule of Law and autonomy, but the regime’s civil nature means any infringements on autonomy are far less serious than under a criminal system. The infringement on autonomy by the civil regime is justified because society must be able to combat avoidance in some way. However to combat avoidance by criminalising it would go too far. Because criminal law is coercive, not only the Rule of Law but fundamental principles of the law itself require that citizens should receive fair warning of what the criminal law prohibits and what it requires. What amounts to tax avoidance, however, is so uncertain that it is not possible to give fair warning as to the measures that counter avoidance, at least not in the relatively precise terms ordinarily understood by "fair warning". It follows that if the law is to observe the fundamental principles embodied in the idea of fair warning, Parliament cannot at the same time make tax avoidance a crime.
Bibliography

Primary Sources

Statutes

New Zealand

Commerce Act 1986.
Tax Administration Act.

Other Jurisdictions

Income Tax Act (SA).
Income Tax Act 1988 (Can), s 245.
Inland Revenue Ordinance (HK).
Livre de Procédure Fiscale (Fr).

Cases

34 New Zealand


Ben Nevis Forestry Ventures Limited v CIR; Accent Management Limited v CIR (2009) 24
NZTC 23 188.

Challenge Corporation Ltd v Commissioner of Inland Revenue [1986] 2 NZLR 513 (PC).

Commissioner of Inland Revenue v BNZ Investments Ltd [2002] 1 NZLR 450 (CA).


Commissioner of Inland Revenue v Penny and Hooper [2010] NZCA 231.

Furniss v Dawson [1984] A.C. 474


Penny and Hooper v Commissioner of Inland Revenue [2010] NZSC 94.

Penny and Hooper v Commissioner of Inland Revenue [2011] NZSC 95.

Peterson v Commissioner of Inland Revenue [2006] 3 NZLR 433 (PC).


35 Australia


36 United Kingdom

AG v Richmond [1909] A.C. 466, 475 (H.L.) (Eng.).

CIR v Fisher’s Ex’rs [1926] AC 395 at (HL)


Latilla v Inland Revenue Commissioners [1943] AC 377.

Secondary Sources

Texts


Feinberg, Joel Harm to Others (Oxford University Press, New York, 1984).


**Journal Articles**


Bonahoom, Michael “Moral and Ethical Considerations in Tax Practice” (1953) 37 Marqu L Rev 85.


Green, Stuart “Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses” (1997) 46 Emory LJ 1533.


Littlewood, Michael “Ben Nevis Forestry Ventures Ltd and Others v CIR; Glenharrow Ltd v CIR — New Zealand’s new Supreme Court and Tax Avoidance” (2009) 2 BTR 169.


Murphy, Jeffrie “Another Look at Moralism” (1966) 77 Ethics 50.


Prebble, John, Prebble, Rebecca and Vidler Smith, Catherine “Legislation with Retrospective Effect, with Particular Reference to Tax Loopholes and Avoidance” (2006) 22 NZULR 17.

Prebble, John, Prebble, Rebecca and Vidler Smith, Catherine “Legislation with Retrospective Effect, with Particular Reference to Tax Loopholes and Avoidance” (2006) 22 NZULR 17.


Encyclopaedias and Dictionaries


Websites


Other Sources


