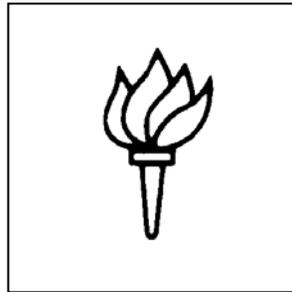


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### **Interrogating the Relationship between 'Legally Defensible' Tax Planning and Social Justice**

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**INTERROGATING THE RELATIONSHIP BETWEEN  
“LEGALLY DEFENSIBLE” TAX PLANNING AND SOCIAL JUSTICE**

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**Conference Draft**

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**I. INTRODUCTION**

A. Underlying Ambiguities

Suppose that straight-out tax fraud, such as the use of offshore bank accounts to get paid without leaving a paper trail for the U.S. tax authorities, was playing a major role in the rise of high-end inequality. That is, suppose such behavior, rather than being concentrated among the owners of cash businesses who generally are not super-rich, was mainly the province of billionaires, along with – begging the question, for now, of how this relates to inequality between *people* – highly profitable corporations. Then there would obviously be a need to focus on corporate social responsibility with regard to tax planning behavior, and on the ethics of any tax professionals who aided or knew about the cheating.

In practice, however, outright fraud generally is not a prominent feature of such taxpayers’ planning. This reflects their interests and incentives, not just the influence of any ethical considerations. Given both the level of scrutiny that such taxpayers may expect, and the availability of other mechanisms for reducing their tax burdens, fraud for them, to paraphrase Talleyrand, would not just be a crime – it would be a mistake. Thus, it should come as no

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surprise that the tax-reducing strategies of super-rich individuals and highly profitable corporations commonly qualify as what I will call “legally defensible.”<sup>1</sup> This term, however, covers tax planning that may vary across a range in at least three important dimensions:

*Likelihood of legal correctness* – Some tax reporting positions are clearly legally correct, whether on their face or because the Internal Revenue Service (IRS) has agreed to them in advance. At the limit, a clearly correct position is one that would be 100 percent certain of being upheld ex post, even in the face of close IRS scrutiny that reflected adequate resources, an accurate understanding of all pertinent facts, and a willingness to litigate if necessary.

In other cases, however, the ex ante likelihood of correctness, as judged by the taxpayer’s advisors,<sup>2</sup> may be considerably less than 100 percent. Consider the following chart – submitted to the Internal Revenue Service (IRS) by the American Institute of Certified Public Accountants (AICPA) – which gives a common version of the standards that tax professionals use when writing opinion letters to taxpayers regarding the merits of a particular tax reporting position:

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<sup>1</sup> At times, this feature of high-end tax planning weakens a bit. For example, in the late 1990s and early 2000s, there was a vogue of investing in abusive tax shelters, such as the so-called “Son-of-BOSS” transaction, that the government repeatedly successfully challenged in court, and made the basis for imposing tax penalties. There were also criminal convictions of such transactions’ promoters. See, e.g., Tanina Rostain and Milton C. Regan, Jr., *CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY* (2014). Even these tax shelter transactions, however, were not so clearly fraudulent as hiding income. Thus, the taxpayers who used them generally only faced civil penalties.

<sup>2</sup> What the ex ante likelihood of correctness actually means here is open to question. Suppose a taxpayer has a unique set of facts, and takes a particular position in reporting its tax consequences. Its treatment either will be questioned by the Internal Revenue Service (IRS) or not, and if ultimately litigated will either be sustained or not. A tax professional who concludes that the likelihood of its being sustained is, say, 70 percent, is not making a testable frequentist claim about a particular group of items, but might be viewed as expressing her subjective view of the odds at which she would be indifferent, as between taking one side or the other of a bet on the outcome, if she were risk-neutral.

OPINION “QUALITY”<sup>3</sup>

Will	At least 90% probability of success if challenged by IRS
Should	At least 70% probability of success if challenged by IRS
More likely than not	Greater than 50% probability of success if challenged by IRS
Substantial authority	At least 40% probability of success; weight of authorities in support is “substantial” relative to that of authorities opposing the position
Realistic possibility of success	At least 1 in 3 probability of success if challenged by IRS
Reasonable basis	Significantly higher than not frivolous, but lower than 1/3
Not frivolous	Not patently improper; some merit to position
Frivolous	Patently improper

SOURCE: American Institute of Certified Public Accountants (AICPA), Statements on Standards For Tax Services (2010), available online at [https://www.irs.gov/pub/irs-utl/statements\\_on\\_standards\\_for\\_tax\\_services.pdf](https://www.irs.gov/pub/irs-utl/statements_on_standards_for_tax_services.pdf)

Suppose we define a legally defensible position as one that has at least a “reasonable basis” – the relevant legal threshold, under certain circumstances, for avoiding tax penalties.<sup>4</sup> (The intuitive reason for setting it so low might be that surely taxpayers are entitled to take “reasonable” positions in their own favor, even if the likelihood of success is below 50 percent.) At this level – but indeed, even if taxpayers are taking multiple “will” positions, each with a separate 90 percent probability of success – they may be expected to pay too little tax, relative to the case where all relevant legal issues were fully scrutinized, and thus (by definition) resolved ex post “correctly.” Ex ante legal uncertainty also, in the absence of sufficient “strict liability” penalties, gives taxpayers an incentive to play the “audit lottery” – that is, to count on (and perhaps attempt to enhance) the unlikelihood of full review of their tax positions, even if these are always legally defensible.<sup>5</sup>

<sup>3</sup> It is telling, perhaps, that the term opinion “quality,” in tax practice, refers to how high a level of confidence the opinion-writer is willing to express – not how convincing, thorough, or fair the analysis is. A “will” opinion thus has the highest possible “quality.”

<sup>4</sup> See Code section 6662. Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1986, as amended. Under this provision, disclosure may be required to permit invocation of the “reasonable basis” defense against the imposition of a penalty.

<sup>5</sup> See Daniel Shaviro, Disclosure and Civil Penalty Rules in the U.S. Legal Response to Corporate Tax Shelters, in Wolfgang Schön (ed.), TAX AND CORPORATE GOVERNANCE (2008).

*Consistency with legislative or regulatory intent* – Tax planning that is legally defensible sometimes can have results that are clearly ridiculous, in the sense that they cannot logically be defended. For example, various convoluted financial transactions that were prevalent in the 1990s took advantage of peculiar interactions between distinct tax provisions to permit taxpayers to claim that, simply by reason of causing cash to travel around in a circle, they were entitled to deduct huge losses. In such cases, even if the transactions initially are sustained upon challenge, one may expect that the government will respond by changing the rules, so that they will cease to work.<sup>6</sup> The tax shelter industry therefore works hard at searching for new transactions that can be sold to first-generation taxpayers, before being detected by the government and promptly (but only prospectively) shut down – at which point the promoters may roll out the next items on their next “product lines.”<sup>7</sup>

By contrast, other tax benefits clearly *were* intended by Congress or the Treasury (when devising regulations within its discretionary powers), with the consequences that (1) detection is not an issue and (2) the benefits may be expected to remain in place indefinitely, unless there is a new political decision to change policy. Thus, consider the exclusion of municipal bond interest from taxable income,<sup>8</sup> or the allowance of accelerated depreciation (in excess of economic depreciation) for various assets.<sup>9</sup> These rules offer deliberate tax benefits that are meant to encourage particular types of investments – potentially with the effect, in practice, of driving down the after-tax returns from such investments so that they are no greater than those available from fully taxed alternatives.

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<sup>6</sup> See, e.g., Joseph Bankman, *The Tax Shelter Problem*, 57 Nat'l Tax J. 925, 927 (204).

<sup>7</sup> See *id.* at 930.

<sup>8</sup> See Code section 103.

<sup>9</sup> See Code section 168.

There is also a middle range, in which taxpayers discover new tax planning opportunities that may not have been anticipated by Congress or the Treasury, and that might never have been deliberately adopted, but that prove resilient once discovered. Such reliance may reflect one or more of the burden of legislative inertia, status quo bias, and broader reliance claims by taxpayers. Thus, consider the so-called “Wall Street Rule,” under which, as Lee Sheppard has noted, taxpayers “take aggressive positions, and they figure if enough of them ... [do so], and there’s billions of dollars at stake, then the IRS is kind of estopped from arguing with them because so much would blow up.”<sup>10</sup>

*Ordinary course of business versus carefully contrived* – Candidates for public office who release their tax returns, and who are criticized for having paid too little tax, typically defend themselves by saying that they paid everything they owed, and not a penny more. This may give the impression that all they did, in effect, was passively tote things up and decline to over-pay (in the sense of making a voluntary contribution on top of one’s legally mandated liability). Such an impression may be misleading, however, insofar as careful tax planning yielded the result that one sees – and especially if it involved taking advantage of the audit lottery, and/or of arguably unintended tax planning opportunities.

#### B. Setting the Stage for an Exploratory Dialogue

Again, if tax minimization by super-rich individuals and highly profitable corporations mainly involved straight-out fraud, there would be a simple and straightforward case for demanding “good corporate tax behavior,” and for focusing on the ethics of any tax professionals who aid and abet the fraud. Things become more complicated, however, when one looks instead at legally defensible tax planning. To be sure, legal defensibility does not support the

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<sup>10</sup> Quoted in Bradley T. Borden and David Reiss, *Wall Street Rules Applied to REMIC Classification*, Brooklyn Law School Legal Studies Research Paper No. 294 (September 2012).

conclusion: “Move on – nothing to see here” – indeed, far from it. However, it may cause the associated normative and empirical issues to be both two-sided and hard to resolve.

To help illustrate this point, while also locating some of the main fault lines raised by social justice challenges to legally defensible high-end tax planning, I have chosen here to employ an unusual format: that of a dialogue between two wholly fictitious individuals. This dialogue is not meant to be Socratic. That is, neither discussant leads the other on a journey from ignorance to wisdom. Instead, each has good points to make, and they do not reach full consensus. In addition, neither discussant speaks entirely for me, nor is either based on any particular individual whom I have ever known or heard about. They are simply vehicles for me to set forth competing points of view, in each case more crisply and decisively than I could if speaking directly for (and as) myself, given my belief, in many instances, that opposing arguments may each have some merit.

I will call my two discussants Megan and Russell. Megan is a tenured tax law professor, while Russell is an economist at an accounting firm who works closely with both lawyers and accountants, on both tax planning and lobbying matters. Megan and Russell are old friends, who used to work together at the Treasury Department. During their Treasury days, they both thought of themselves as idealistically pro-government, which they might have defined as favoring increases in the extent to which high-income individuals and corporations faced effective tax rates that were closer to, though not above, their statutory rates.

Nowadays, both Megan and (more strongly) Russell feel that their thinking in those days was a bit simplistic. While Megan still generally favors increasing high-end effective tax rates, she is now more keenly aware than she used to be of the associated efficiency costs and practical difficulties, especially when this can only be attempted via second-best (or ninety-ninth best)

means. Russell does not think well of all the transactions, or support all of the client positions, on which he works in connection with his job. However, he now has greater understanding of, and sympathy for, the competitive pressures and compliance burdens that businesses (and tax advisors!) face than he had during his government days. In addition, he has grown highly skeptical regarding the policy merits of convoluted pro-government rules that, as his experience teaches him, often just create tedious and resource-wasting mazes through which he must (or at least can and does) help his clients to navigate.

Megan and Russell agree to conduct a dialogue regarding the relationship between social justice and legally defensible tax planning. Their mutual aim is to seek common ground, or at least a specification of their differences through reasoned discussion – not to try to win a debate. The discussion is organized around four distinct propositions, two advanced by each of them. The propositions are as follows:

(1) MEGAN: Large-scale tax avoidance by wealthy individuals and large companies that is legally defensible can nonetheless harm social justice and public morale.

(2) RUSSELL: Taxpayers have a right to pay as little tax as they legally can. If you don't like the results, change the rules!

(3) MEGAN: Tax advisors' professional and personal ethical obligations require them to do more than just minimize expected tax liability.

(4) RUSSELL: It's a tactical error for human rights advocates to focus on "corporate social responsibility" and tax professionals' ethics, rather than on the existing rules and resulting incentives.

## **II. DISCUSSION OF THE FIRST PROPOSITION**

MEGAN: You picked "rock" and I picked "paper," so I get to go first.

RUSSELL: I should have known that you would pick “paper.” How many do you write in a year, anyway?

MEGAN: Never mind that. As you know, because we gave each other advance notice, my first proposition holds: **“Large-scale tax avoidance by wealthy individuals and large companies that is legally defensible can nonetheless harm social justice and public morale.”** I am hoping that you will quickly agree with me on this one, and we can move on.

RUSSELL: I’ll need to hear more from you first. Granted, large-scale tax avoidance by wealthy individuals can increase high-end wealth concentration, which I join you in disliking. At least, that would seem to be its direct effect, but don’t we also need to think about the indirect effects? As for large companies, obviously I’m going to ask you to address who bears the corporate tax. What if the incidence increasingly falls on labor, not by management or shareholders or holders of capital generally?

MEGAN: Can I start answering you now?

RUSSELL: I also have questions about social justice and public morale.

MEGAN: All in good time. I’ll start with wealthy individuals. Is this a Republican thing? Job creators and “I built that”?

RUSSELL: Not at all. Or at least it doesn’t have to be. As you would probably have guessed, I give campaign donations to both parties. But let’s look at a business founder who creates a new billion-dollar company. The salary that he or she gets is deductible by the company anyway, so why do we even care about that – leaving aside the spread between the 39.6 percent top individual rate and the 35 percent corporate rate. Meanwhile, people get upset if the founder’s capital gains are taxed at just 20 percent. But even apart from state and local taxes, and the 3.8 percent Medicare tax on investment income, and for that matter the estate tax, there’s

also the entity-level corporate tax. Capital gains just reflect changes in the present value of the company's future expected profits, which generally are taxable, at least in theory.

MEGAN: Key words there, "at least in theory."

RUSSELL: Granted. But when you're talking about an income tax, as well as an estate tax, you are affecting incentives not just to work, but also to save and invest. Now admittedly, there isn't strong econometric evidence that savings rates are highly tax-responsive. But still, there's clearly a tax incidence question. You could raise tax rates on saving by high-income U.S. individuals, or on investment by anyone in the U.S., and the effect could be to lower labor productivity and wages further down the income spectrum. I'm not saying it would be – but don't you need to know?

MEGAN: Fair enough. But suppose we're taxing rents that these people earn from having high ability, or first-mover advantages, or special opportunities, or monopoly power, or whatever else it is. Then there's actually an element of free money, in efficiency terms, from taxing people at the top, and they will bear the incidence.

RUSSELL: Okay, enough about that. I don't really disagree with you about taxing rich people more, so long as it's done intelligently, which is probably unlikely. But cracking down on tax shelters is often a great thing, as it certainly was in the early 2000s, when people had to be scared out of doing sleazy transactions that didn't even work. Some people in my line of work went to jail – and they deserved it. But we're talking about "legally permissible" tax planning, in an environment where the IRS has fortunately made it clear that it is very serious about anti-tax shelter doctrines, such as requiring economic substance and business purpose.

MEGAN: You mentioned companies, and the incidence of the corporate tax. Obviously, there are complicated efficiency issues if Apple can use tax haven subsidiaries to avoid paying

much tax anywhere, while purely domestic U.S. companies may be paying much closer to a 35 percent effective rate, even leaving aside the shareholder-level tax. But on the other hand, I agree that we also have to think about Apple versus other multinationals, including non-U.S. companies. Let's leave all that aside, because it's about efficiency, not directly about inequality. But still, if Steve Jobs' salary was \$1 per year because he was getting stock appreciation, and Apple isn't paying much entity-level tax because of its international tax planning, and then he gets tax-free basis step-up at death for all the appreciated shares, that only leaves the estate tax, which is notoriously porous in its own right.

RUSSELL: Fair enough. I may disagree with you more later in our colloquy than on Proposition One. And, if we're parsing your exact words, it's certainly true that legally defensible tax avoidance, especially when it's allowed to be large-scale, can harm social justice and public morale and probably has at times done so. But let's interrogate those two terms a bit more. By "social justice," do you also mean the safety net and treatment of the poor?

MEGAN: Potentially. One point about rising high-end wealth concentration is that it distorts the political system. We saw this at work in 2008, after the financial crisis. Austerity on both sides of the Atlantic, and the amazingly tepid response to sustained high unemployment, reflected where money and power are concentrated these days. And whether legally defensible high-end tax avoidance had a large indirect impact on this or a small one – probably the latter – surely its direction is clear.

RUSSELL: Once again, we risk being boringly in agreement. But I don't agree that legally defensible tax planning, as defined by existing rules, has made anti-poverty or entitlements programs in the U.S. budgetarily unaffordable. If those things are under-funded, that's a political choice, and we don't seem to have trouble spending money on things – say,

national defense or homeland security, not to mention the Iraq War back when that happened – that have sufficient backing.

MEGAN: Maybe. I'll let that pass. What's your point on morale?

RUSSELL: Just that people who dislike aggressive tax planning by rich people and big corporations – maybe for good reasons – often like to throw in the extra argument that general public morale and compliance are suffering. That could be so, but I'd like to see more proof.

MEGAN: Other people in the biz tend to rely on that argument more than I do.

RUSSELL: Maybe it's an American thing. Look at how people in England got angry about Starbucks reporting U.K. tax losses. But we're an anti-tax country. People don't care. No one's refusing to buy Apple products because of their tax planning.

MEGAN: Or maybe it's a U.S. versus Europe thing. Maybe what they don't like in Europe is U.S. companies not paying enough tax to them.

RUSSELL: Either way, if Americans are still buying Apple products, I doubt that their taxpaying morale is being seriously affected either.

MEGAN: I'll demur on this, because people have become so cynical about politics on so many fronts and for so many reasons. But I'm not relying heavily on the tax compliance issue, nor do I think I need to.

### III. DISCUSSION OF THE SECOND PROPOSITION

RUSSELL: My turn. Given how agreeable I just was, for the most part, I am hoping that you will endorse the following proposition: **Taxpayers have a right to pay as little tax as they legally can. If you don't like the results, change the rules!**

MEGAN: I'm going to give you a yes and no on this one. Or rather, make that two yeses and noes. I think you have two distinct propositions there.

RUSSELL: One for each sentence? I could have used a semicolon, and made it all one sentence. But I suppose that wouldn't have helped.

MEGAN: That's correct. But let me refine my yeses and noes. The first sentence is true, but irrelevant if you are trying to draw the broader implications that I suspect you are. The second one I also agree with, but I wonder if you are trying to make the best into the enemy of the good, so far as reform efforts are concerned. Also, we can change penalty rules that affect tax planning – not just substantive rules that affect the pre-penalty tax consequences of a given fact pattern.

RUSSELL: Okay, let's slow down here a bit. I'll do as you like, and defend one sentence at a time. So let's start with the first one: "Taxpayers have a right to pay as little tax as they legally can." You seem to be assuming that I mean this as a normative statement: If they have a right to do something, then there can't be any complaint about the end result of what they're doing. I agree that people often argue that way about tax planning. But I mean something much simpler, which tends to unify my two sentences into a single proposition: Because they have this right, legally speaking and in terms of the consequences that they will face, it's not going to be helpful to gripe about the morality. Instead, we need to change the rules – potentially including the penalty rules.

MEGAN: I suppose we have no choice here but bring up that old Learned Hand chestnut, from *Gregory v. Helvering*.<sup>11</sup> Lawyer or not, by now you must know it as well as I do.

RUSSELL: Okay, I'll do the honors. [He punches a few buttons on his phone.] You can see I was ready for this. "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not

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<sup>11</sup> 69 F.2d 809 (2d Cir. 1934), aff'd, 293 U.S. 465 (1935).

even a patriotic duty to increase one's taxes." But of course Hand goes on to hold for the government, and more or less to invent the modern economic substance doctrine.

MEGAN: Then, to show what he means by rejecting literalism in tax statutory interpretation when it leads to what he calls unintended results, he says something about how "a melody is more than the notes." That is definitely not the most pellucid guidance ever given by a court in a tax opinion.

RUSSELL: I always call in my lawyer colleagues when we have an economic substance issue. Luckily they've never quoted that sentence to me – if they did, I'd probably punch someone in the face.

MEGAN: But you probably have heard the line: "I know it when I see it."

RUSSELL: Is that from *Gregory*?

MEGAN: No, but it's lawyer talk or judge talk of the same kind.

RUSSELL: I didn't think it was *Gregory*. But anyway, I'm not complaining about vague, touchy-feely doctrines. I know from experience that the tax system needs them. In terms of the proposition, my point is simply this. Taxpayers will do what they have a current legal right to do. It doesn't mean that they shouldn't feel bad about it – we'll get to that issue later. And it doesn't mean that the rules shouldn't be changed. But if you give particular incentives to economic actors – and here, a "right" to pay as little tax as they can merely refers to the set of consequences they'll face in alternative scenarios – you can't be too surprised if they act on those incentives.

MEGAN: In other words, mere exhortation isn't likely to matter a whole lot.

RUSSELL: At least, it won't matter unless it's tied to greater consequences than seem likely here. Again, Apple's right to pay less taxes, rather than more, will not prevent the

managers from voluntarily “over-paying” – in scare quotes – if they believe that doing so is in the shareholders’ best interest – whether for consumer goodwill reasons or any other.

MEGAN: Let’s hear it for managers who only care about shareholder welfare.

RUSSELL: In fairness, there are some well-governed companies out there, and not all of them are closely held. But yes, managerial incentives matter plenty as well. And indeed, companies sometimes “shirk” – again in scare quotes – on minimizing tax as much as they should, from the shareholders’ standpoint, because of the reputational or other downside risks that the managers would face in cases where a reasonable ploy ex ante didn’t work out ex post.

MEGAN: Okay, with those clarifications I am willing to accept your first sentence, “Taxpayers have a right to pay as little tax as they legally can.” Only, as explained it’s pretty much circular and doesn’t add anything.

RUSSELL: What it adds is a dose of realism. But let’s move onto the second sentence. “If you don’t like the results, change the rules!” You seem to think I meant just the substantive rules. But I also definitely meant to include the penalty rules.

MEGAN: So let’s talk about those now. Today, tax penalty rules generally require some kind of fault, such as negligence, from the lack of a reasonable basis for your position, or from failing to comply with disclosure rules.

RUSSELL: I assume you wouldn’t send people to jail without fault.

MEGAN: Sure, but that’s criminal tax fraud, so you need mens rea. But civil tax penalties are just monetary sanctions – say, 20 or 30 percent of a given underpayment, depending on which rule you have in mind.

RUSSELL: You’re saying they should be higher?

MEGAN: Maybe, but first let's look at fault. If we had no-fault, strict liability penalties for a tax underpayment, and we set the penalties at the right level, that would be one thing. But we don't. So, I'm sorry to say this, but we need to go back to your first sentence again, and add in legal uncertainty.

RUSSELL: Okay. "Taxpayers have a right to pay as little tax as they legally can."

MEGAN: Suppose there was complete legal certainty about the correct tax reporting position in all cases. Then, everyone would know exactly what they should pay – at least, they would know if they hired your firm. But let's make it even simpler – suppose they didn't need to hire your firm, because all of the answers were facially obvious, like not hiding cash from the IRS. So now they have a right to pay what they owe, not a penny more unless they feel like it, and we throw them in jail if they deliberately get it wrong.

RUSSELL: Leaving aside mistake and all that.

MEGAN: Sure. But now let's go the real world, where there's pervasive legal uncertainty. And it's not just ex post in a planning sense – "Here's what I did – how much do I owe?" It's also ex ante: "Should I do X? How much would I owe then?" In this world, when I am filing a tax return under uncertainty, what's the amount that I have to pay?

RUSSELL: Now you should definitely use my firm.

MEGAN: I couldn't afford it.

RUSSELL: That's okay, the work wouldn't be interesting anyway. But that's a compliment, not an insult.

MEGAN: Thank you. But suppose I were your type of client. You tell me, if I do X, more likely than not I can report it like so. But say there's a 49 percent chance the position

you're telling me that I can take is wrong. If I take a hundred such positions, then presumably on average about 49 of them are wrong.

RUSSELL: Or at least they would be so held on average, if our analysis is exactly right.

MEGAN: But probably none of them will ever be audited. And even if a few are, I won't owe penalties on any that I lose.

RUSSELL: I think I see where you're going.

MEGAN: Well-advised taxpayers – rich people and big corporations – often have complicated returns and good advisors. Even if they're acting in complete good faith, and even if they never take any position unless it's more likely than not to be correct, they're paying too little tax, relative to what they would pay if everything were decided correctly.

RUSSELL: It's even worse than that. First of all, even among the taxpayers who hire us – and they're generally a compliant bunch – reasonable basis is often plenty good enough. Even if they need to disclose, sometimes they over-disclose, so the IRS doesn't know what to look for.

MEGAN: Including Fortune 500 companies?

RUSSELL: Well, a lot of the big public companies require “more likely than not,” because otherwise they don't get the accounting benefit. But then, second of all, clients can opinion-shop, and they also can pressure the advisor over opinion quality.

MEGAN: Nice.

RUSSELL: Well, it's not all bad. When they're still planning a transaction, we can say: “Do X and we'll get to ‘more likely than not.’” But the other side of the coin is, *they* can say: “Joe Smith at the Such-and-So firm will give us ‘more likely than not’ What's *your* problem?”

MEGAN: So you either give in or lose the opinion letter.

RUSSELL: No one really wants to sign the opinion letter anyway. Or at least that's what the lawyers tell me – luckily, I don't have to sign anything. But if you don't give in, you lose the transaction work, or in our case maybe the auditing work, that goes with the opinion letter.

MEGAN: So, is there a lot of pressure to give in?

RUSSELL: Well, the other side of the coin for the lawyer is his reputation. Plus, hopefully the firm cares about his reputation. But people can get a bad name for being too cautious, as well as too eager.

MEGAN: Okay, back to uncertainty and the right to pay as little tax as you owe. Once we have uncertainty, people are systematically underpaying, due to the audit lottery and the lack of no-fault penalties, even if they are acting in what we would call complete good faith. And this is mainly an issue for rich people and big corporations. So we are back to my distributional story from Proposition 1.

RUSSELL: What if all that's anticipated when they set the rules?

MEGAN: Anticipated by whom?

RUSSELL: Congress, in setting the rates and everything else. You can easily get to the same effective tax rate either of two ways – higher nominal rate, but people can exploit uncertainty, or lower nominal rate but everything is audited to death. Doing it the way we actually do it, without so much review of every taxpayer position, is certainly a whole lot cheaper.

MEGAN: Okay. But what makes you think Congress logically picked the tax rates for rich people and big corporations, based on exactly how much they can do through tax planning that relies on the audit lottery? And anyway that changes all the time.

RUSSELL: Well, I'll agree that "Congress" and "logically" don't fit well in the same sentence. So why don't we say instead, it's the political equilibrium. If you had higher effective tax rates, the lobbying would bring things back down again, one way or another.

MEGAN: But isn't the legislative process more rigid than that? And don't perceptions usually matter more than substance?

RUSSELL: Okay, fine. We've identified a disagreement here. But, moving on, you'd fix the problem through no-fault penalties? How would you set the penalties?

MEGAN: In theory, it should depend purely on the probability of detection – that is, on the audit lottery odds. If there's a 20 percent chance that the IRS will vet your position, a 5-to-1 penalty, in the case where you lose, makes you indifferent between more uncertain and less uncertain positions. But don't ask me how to determine the odds in practice – I'm just giving you a benchmark.

RUSSELL: And this applies even if you had a good-faith "Will" opinion, based on a 95 percent likelihood of correctness, but then you just happened to lose?

MEGAN: Right. But of course you won't lose very often, and face the penalty, in that set of cases.

RUSSELL: The clients I know would just love this. But mind you, it isn't my problem.

MEGAN: So what if they're risk-averse. They can get insurance.

RUSSELL: Tax insurance? You know what happened to that. A couple of start-ups tried to offer it about ten years ago, but it failed.

MEGAN: If the penalty rules were set properly, there'd be more demand for it.

RUSSELL: It didn't fail because there wasn't demand – it failed because they didn't know how to price it. Apparently they were calling lawyers on the deals, and asking them what the likelihood of correctness was.

MEGAN: Wow, that's like the car insurance company asking me how good a driver I am, so they can set the rate.

RUSSELL: Exactly.

MEGAN: But that makes the legal uncertainty problem even worse. Who's to say that a "more likely than not" opinion is even truly 51 out of 100?

RUSSELL: Agreed. But let's get back to my proposition. Second sentence: "If you don't like the results, change the rules." I don't need to decide whether or not I like no-fault penalties, or how to set the odds, or how to deal with taxpayers' risk aversion, or how it would actually work in practice. You see a problem, from the effects of legal uncertainty on how much tax rich people and corporations actually pay, compared to what they would pay if all issues were resolved "correctly" – with big scare quotes, this time. I agree that you have a point.

MEGAN: It also goes to the incentive effects of legal uncertainty, along with the polluting and corruption of the market for legal advice.

RUSSELL: Okay, I still agree. But the thing is, we're now debating what the rules should be. So I win.

MEGAN: That's very male of you. Thanks.

RUSSELL: Any time.

MEGAN: But the thing is, you actually don't win. Given that we don't have legal certainty, or rules that avoid rewarding taxpayers that deliberately seek out uncertain positions, so that they can pay less tax than otherwise in expected value, I'm back to your first sentence. I

don't know what it means to "have a right to pay as little tax as you legally can." You have an entire industry that's founded on legal uncertainty, not to mention a grossly under-funded IRS that lacks the resources for a proper audit rate.

RUSSELL: Not to mention that taxpayers who are audited may complain to Congress – at least, if they are worth auditing.

MEGAN: So unless you make the first sentence completely meaningless and circular – which I guess you've already agreed to – all that's left from your entire proposition is the fairly banal point that it's desirable, all else equal, to set taxpayers' incentives properly, whatever that might mean in practice.

RUSSELL: You call it banal, but that's only because you agree with me that incentives are important. In the real world out there, it's actually worth emphasizing.

MEGAN: Compared to blaming people like you. Well, at least you're well-paid.

RUSSELL: No complaints there, although you should see some of our clients. Or try the other families in my kids' private schools.

MEGAN: But just because I'd like to get the rules right, too, doesn't mean I'm letting you off the hook. So let's go to Proposition Three, which addresses your sort's ethical obligations.

RUSSELL: "Your sort." I like that.

#### IV. DISCUSSION OF THE THIRD PROPOSITION

MEGAN: As you'll recall, my next proposition goes: **"Tax advisors' professional and personal ethical obligations require them to do more than just minimize expected tax liability."**

RUSSELL: Well, that's certainly true. Minimizing tax liability is not even exactly what the client wants.

MEGAN: You mean, if you're also a business advisor?

RUSSELL: Even if you just do tax. You want to be able to describe the choices and tradeoffs, and how they would affect the tax analysis. But the final choice is the client's. And not everyone wants to minimize expected tax liability. There are risk issues, confidence intervals, financial accounting considerations, and reputational or other tradeoffs. A good tax advisor is a team player, and just offers inputs to the broader analysis.

MEGAN: Plus, of course the goal isn't minimizing tax liability. To do that, all you need tell the client is to go ahead and lose money. Tax liability zero, perhaps even refunds for a company's past year's taxes. So what I meant was, maximizing after-tax income, which implies minimizing expected tax liability, adjusting for risk and all else equal.

RUSSELL: Fair enough. But what are you getting at? This isn't still about uncertainty, or is it?

MEGAN: There's one piece that is about uncertainty, but I'm looking at something bigger.

RUSSELL: As the saying goes, "Proceed, governor."

MEGAN: Okay, first here's one thing it's not about. The tax advisor says, if you do X, which you disvalue at \$10 million, there's a fifty-one percent chance that your correctly measured tax liability declines by \$15 million. The other 49 percent, your tax liability stays the same. The taxpayer wouldn't do X if review of the position were certain, because it scores out as a negative. But given the low probability of serious IRS review, the actual expected tax saving from the reporting position is close to the full \$15 million. So the client does X.

RUSSELL: You're saying your point is not about that?

MEGAN: I have a hard time blaming the tax advisor for performing the analysis and correctly, let's assume, analyzing the tax consequences of X. Now, as I was just saying, I don't like the incentive here, and I think it might have broader social justice effects when we observe who gets these tax planning opportunities, and I think it undermines your observation about paying just the tax you owe, but we've been through that, and I don't blame the tax advisor for anything – yet.

RUSSELL: So where do you start having a problem?

MEGAN: A few things. First, telling the taxpayer to do it because the audit risk is low.

RUSSELL: The opinion letters can't address the audit risk, of course. They just assess the probabilities if the IRS does review an issue. But agreed, this is a ticklish area. It's hard not to answer the question about audit probabilities, when you're asked.

MEGAN: Second, helping the taxpayer to structure it so the audit risk will be lower.

RUSSELL: Another gray area. People certainly counsel disclosing absolutely everything, knowing that it will tend to divert attention from the things that really need to be disclosed. But I would think they're careful about how they say this.

MEGAN: Third, change my hypothetical in a couple of ways. First, while I tend to think about probability in continuous terms – fifty-one percent versus forty-nine percent probability of correctness doesn't make all that much difference to me – let's start driving down the probability of correctness. Say the tax advisor is pointing out all sorts of things that are just reasonable basis. Does that mean, say, a twenty percent chance of being correct?

RUSSELL: Thereabouts.

MEGAN: Again, it's not the threshold I care about, but getting closer to zero. But also, let's suppose that the advisor isn't just passively answering questions, like: "What are the merits of this position? What about that one?" Suppose the advisor is combing the Tax Code, and looking through the regulations, trying to find long-shot tax planning tricks that might just be good enough to use without commission of tax fraud.

RUSSELL: That's definitely a market niche.

MEGAN: I also have an example where the chance of legal correctness is very high – we can even say 100 percent, for argument's sake – and I see ethical issues. But let's deal with the probabilistic cases first.

RUSSELL: You rightly point to a fraught area. But even leaving aside the penalty rules and whether they should do something different, it's inherent to the agency problem. Start with taxpayers versus the IRS. From an aggregate social welfare standpoint, the taxpayers have the wrong objective. They are trying to maximize personal utility, not social utility. Socially the taxes they pay are a transfer, personally they're a cost. But we accept this. They are expected, and even entitled, to try to maximize after-tax income, all else equal, subject to observing the criminal laws.

MEGAN: And using penalties, among other rules to shape their incentives.

RUSSELL: Yes, but not to optimize their incentives, from a social standpoint, at every margin. We accept that people might work less due to the marginal incentive effects of the income tax, and while that affects the optimal marginal rate structure, it doesn't mean they're immoral for working less – unless we're asking them to be saints.

MEGAN: I assume you'll be bringing up the tax advisors any moment now.

RUSSELL: Bear with me. People can't do everything for themselves – they need agents. And those agents have fiduciary duties towards them. Some of those agents are tax advisors.

MEGAN: Others are, say, criminal defense lawyers.

RUSSELL: Yes. And defense lawyers owe their clients their best efforts at defending them.

MEGAN: Speak of fraught ethical relationships. You can't knowingly put on false testimony. On the other hand, you can't refuse to give your client the best possible defense, just because you have your doubts. The easy way out is not to take the case, but someone has to take it. And if the defendant has money, it will be someone who's good.

RUSSELL: I wouldn't want that job. But again, it's inherent in the agency relationship.

MEGAN: Criminal defense lawyers are also officers of the court.

RUSSELL: What about tax lawyers?

MEGAN: They're not literally officers of the court unless they're appearing in court. But they are members of the Bar, and that involves ethical responsibilities.

RUSSELL: Aren't those at least partly just about being a faithful agent?

MEGAN: Yes, and some would say also about protecting lawyers' monopoly in the legal services market – although, in tax, that's weakened by the role of accountants. But there are also ethical obligations towards improving the legal system.

RUSSELL: Of course. But where do you cash them out, in terms of tax advice about minimizing tax liability? Taking as given, of course, that fraud and other crimes are impermissible, and that there are gray areas as you move from avoiding needless audit red flags towards counseling concealment.

MEGAN: Let's take my case with 100 percent certainty of being legally correct. It can still be unethical. Maybe not in terms of violating the code of professional responsibility for lawyers, or in any legally enforceable sense – but in how we judge people, and how we urge them to act.

RUSSELL: So you're saying, we tell a client, if you do X you will pay \$10 million less tax, with 100 percent certainty of being correct, and it might be unethical? Given the agency relationship, wouldn't it be unethical *not* to tell the client, if the delegation is broad enough?

MEGAN: Let me give you two cases. Both involve the so-called high-basis, low-value tax shelter, which Joseph Bankman wrote about some years ago.<sup>12</sup> This was a silly accounting manipulation, involving the tax-free incorporation rules, that in theory permitted unlimited loss creation by corporate taxpayers. It seemingly worked as a matter of black-letter law, but was vulnerable, to say the least, under a variety of common law doctrines such as the economic substance requirement. But Joe says – I put this on my phone, just like you had the Learned Hand quote: “It is easy to see that if this shelter were respected (say, approved in a Revenue Ruling), it would reduce corporate taxable income to near zero.”<sup>13</sup>

RUSSELL: We looked at high-basis, low value shelters, and decided to pass.

MEGAN: Good for you.

RUSSELL: I can't speak for everyone in my firm, however.

MEGAN: Suppose, although it's absurd, that things happened just like Joe said. The IRS and Treasury expressly approve the deal, and corporate tax revenues are headed to zero.

RUSSELL: Do they seek legislation to eliminate it prospectively?

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<sup>12</sup> Megan is thinking of Joseph Bankman, *The New Market in Corporate Tax Shelters*, 83 *Tax Notes* 1775 (1999).

<sup>13</sup> *Id.* at 1777.

MEGAN: The scenario is too ridiculous for me to need to answer that question. But Case One, out of my two cases, is the one where all that has actually happened, and you are the tax advisor for a firm that is considering doing it.

RUSSELL: I take it you can say, go ahead.

MEGAN: Yes. Even if you think the government was wrong in its legal analysis, I don't think that, as an ethical matter, you or your client need to be the lone holdout. Of course, it would be laudable if you supported reform efforts to get rid of the loophole, and unethical to oppose the reform efforts publicly on bogus grounds.

RUSSELL: What about not so bogus grounds, such as that the corporate tax is inefficient, and this at least gets rid of it?

MEGAN: Well now, we're starting to get into academic ethics and values, which would be a further conversation. But certainly, if that's what you believe, you should say so. Others will judge whether they think it's a good argument. And if you're paid for saying it, they'll judge that, too.

RUSSELL: So what is Case Two?

MEGAN: That is where you are the one who came up with the shelter. And now let's forget about the Treasury approving it, which was just to make a hypothetical point. Suppose you are combing the Internal Revenue Code, looking for unexpected and unintended interactions between distinct provisions, that will turn into loss generators. Assume that they work, in cases where you can gin up enough economic substance, but that Congress or the Treasury will eliminate them as soon as word leaks out. And when that happens, no problem. You've already sold those deals enough times, people are starting to do their own knock-offs anyway, and it's time for the next generation of deals.

RUSSELL: Say you're an early adopter, but not the inventor. Is that better, or worse?

MEGAN: Well, now we're into matters of degree. The point I want to make is that not just lawyers, but people generally, should do better than this. It's not something to be proud of. I'd be ashamed of myself if I were doing it. And I would aspirationally urge people – my students, for example – to do different and better things with their lives.

RUSSELL: Two comments in response. First, I agree with you up to a point. But if people have incentives to do things, they are going to do them. It's like an ecological niche for nasty things like mosquitoes. At a certain point it's just hand-waving to say you don't like those people or those things. And shouldn't you be focusing your attention on law reform?

MEGAN: It isn't either-or. Besides, there are always going to be holes in the system, of one kind or another. And maybe inciting people to be more thoughtful about what they do with their lives can have an influence at the margin.

RUSSELL: Okay, I'm not opposed to that – although maybe I'm more skeptical than you are about the payoff. We'll return to that for my next proposition. But here's my second comment. How far do you take it, and where do you draw the line?

MEGAN: There may not be entirely clear lines. That's why it's a general aspirational point, not an enforceable legal rule.

RUSSELL: Well, let me press you further. On the high-basis, low-value shelter, in Case Two that we agree is more realistic than Case One, I take it that the key is that the government would eliminate it ASAP. So it amounts to exploiting a temporary glitch. But what about some more durable tax planning examples? The "Double Irish Dutch Sandwich" got a lot of media play several years ago. It was a highly structured and artificial set of arrangements, navigating

through the tax laws of multiple countries, that U.S. multinationals used to create “stateless income.” But a bunch of press articles revealed it, and life just went on.

MEGAN: Isn’t it dead now?

RUSSELL: Ireland eventually changed its rules so it would no longer work, but that was only after it had been around for decades – admittedly, not all of them spent in public.

MEGAN: That’s a more complicated example in some ways, due to the international element. The companies weren’t just avoiding U.S. taxes, but also foreign taxes, so we as Americans have to decide what to think about that.

RUSSELL: Check your ethics at the national border?

MEGAN: Either way, that’s a further conversation. A purely domestic example, where U.S. companies were avoiding U.S. taxes on what was purely U.S. source income, and exclusively using the tax rules, might not have lasted so long.

RUSSELL: But someone invented the Double Irish Dutch Sandwich – possibly a tax advisor for Apple, back in the 1980s.<sup>14</sup> Was that unethical?

MEGAN: I bet it was lucrative. But let’s put it this way. All else equal, I wouldn’t feel proud about it, if doing things like that was my life’s work.

RUSSELL: Someone else would have done it anyway.

MEGAN: Great, so let them.

RUSSELL: But you wouldn’t do it yourself?

MEGAN: I didn’t say that. It isn’t murder.

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<sup>14</sup> Unless he is relying on personal or industry knowledge, Russell may have read about Apple’s early tax innovations – not limited to the Double Irish Dutch Sandwich – in Charles Duhigg and David Kocieniewski, “How Apple Sidesteps Billions in Taxes,” New York Times, April 28, 2012, available online at <http://www.nytimes.com/2012/04/29/business/apples-tax-strategy-aims-at-low-tax-states-and-nations.html>.

RUSSELL: Does it get back to what I said before about not asking people to be saints? We can't build a system on altruism.

MEGAN: It's all a matter of context. Obviously I agree that, even if I should happen to write a tax policy piece that's based on a utilitarian social welfare function, I am not going to go home and give away all my money to people who are poorer than me. Even leaving aside the case of special duties towards one's children.

RUSSELL: But at least you don't do what I do professionally, so that's in the plus column for you.

MEGAN: I didn't say that either. You keep putting words in my mouth. And besides, there are people who do far more altruistic things with their lives than I do with mine. I'm kind of an art for art's sake type of gal academically, more than a do-gooder.

RUSSELL: But would you say, you turned down the big law firm money because you strongly believed – well, I'll let you finish the sentence.

MEGAN: I did what I thought I'd enjoy the most, and also what I thought I'd be best at.

RUSSELL: As an economist, I didn't have the same academic prospects as you did in law. Maybe teaching oversubscribed Econ 101 classes in the Midwest somewhere, then trying to crack the top journals so I'd get tenure. And I don't really have the patience to be elite with either data or econometrics.

MEGAN: Like me, you prefer the big picture, but academics in your field isn't as friendly to it as mine.

RUSSELL: So I'm also doing what I'm good at, and I even enjoy it most of the time. Only, it does frequently involve helping high-net-worth individuals and big corporations pay less

tax than they would otherwise. Which may sometimes even be good policy. And it also can be interesting, like solving a puzzle.

MEGAN: Okay.

RUSSELL: But you wouldn't feel good about doing it yourself.

MEGAN: No, but admittedly I might have done it if I just happened to like different things, and to have a different skill set. So in that sense, it's not about ethics at all.

RUSSELL: And anyway, we're just haggling over the price.

MEGAN: Absolutely.

RUSSELL: Where does that leave us on Proposition Three?

MEGAN: Still saying, at least for my part, that tax advisor can be an honorable profession, but it's important to do it as honorably as possible. That means keeping some focus on the long-term quality of the system. And not doing everything that might "work."

RUSSELL: And I'm still saying, for my part, that we should all do our best, but no one has to be a saint. And an agent's job is to help the principal, albeit within ethical limits that would apply to the principal itself.

MEGAN: Nice gender-neutral term there, "itself."

RUSSELL: I was thinking about my corporate clients.

MEGAN: But also, experts face some ethical considerations that don't apply to the principal. Criminal defense again – no one blames the defendant as much for lying, as we would rightly blame a defense lawyer who went over the line.

RUSSELL: So now you're minimizing corporate social responsibility, in favor of blaming the advisors?

MEGAN: I haven't actually said "corporate social responsibility," until just now. But I'd be happy to use moral suasion to influence them both.

RUSSELL: That's a perfect lead-in for our final proposition.

MEGAN: Go ahead.

## V. DISCUSSION OF THE FOURTH PROPOSITION

RUSSELL: Last up for the day: **"It's a tactical error for human rights advocates to focus on "corporate social responsibility" and tax professionals' ethics, rather than on the existing rules and resulting incentives."**

MEGAN: So now we're just talking tactics.

RUSSELL: Exactly.

MEGAN: Friendly advice from across the aisle. But to some extent, this just follows automatically from Proposition Two, once you interpreted it as saying that only incentives matter. So what's the new angle here?

RUSSELL: Well, here I'm talking about distraction and wasted effort. Exhorting companies to be good corporate citizens, when there's no evidence that consumers care, is just people having fun, preaching to the choir at academic conferences. Or else, it's really silly things that cheapen public dialogue – like saying that a U.S. corporation, which is an intangible web of contracts, is "unpatriotic" if the managers seek to increase shareholder value.

MEGAN: By inverting, if that's what it takes.

RUSSELL: Yes, if the rules make that feasible and advantageous. Which is not to judge what the rules should be.

MEGAN: I'll check, not raise, your bidon management just serving the shareholders. There's also the stakeholder view, but it's not my area. So let me make two other points instead. The first is about behavior, and the second is about politics.

RUSSELL: Whose behavior?

MEGAN: Corporate tax directors and their bosses and tax advisors. You've been talking about incentives, but what about fashions and trends and follow the leader? Take corporate tax shelters back in the day. It became a thing. And it wasn't just incentives. A lot of what people were doing was really stupid. But if everyone else you knew was doing it, you'd feel pressure to do it, too.

RUSSELL: Or else your boss would ask you why you weren't doing it.

MEGAN: Similar point about aggressive corporate tax planning that's legally defensible or better. As I understand it – although you'd know better than I – there are all these comparative pressures on the tax directors at big companies, focused on the effective tax rate. The point isn't to pay 10 percent instead of 20 percent, at least for its own sake. It's that, if the other guys are all paying 20 percent, that's good enough, but if they're down to 10 percent then you'd better get there too. So it's not actually, at least directly, about shareholder welfare.

RUSSELL: I agree that people think that way. And it might even be part of how they get to shareholder welfare, given agency costs.

MEGAN: But you don't need to have a stakeholder view of how companies ought to be managed in order to say, since *we* consider taxes paid a transfer, rather than a social cost, we want to discourage companies from tax-planning too aggressively. If that involves relying on agency costs and managerial shirking of shareholder welfare promotion, so be it.

RUSSELL: But how does this relate back to a corporate social responsibility agenda?

MEGAN: It could be part of an effort to change the social pressures people follow, as opposed to just incentives or shareholder welfare in tax planning.

RUSSELL: Like Take Your Kid to Work Day?

MEGAN: In effect.

RUSSELL: I don't see it. Corporate social responsibility talk from the outside only matters if it affects something they care about on the inside, like consumer goodwill. Again, I don't see that happening in the U.S., like with Apple and iPhone sales. And if they embrace it from the inside, it's either trivial, like Take Your Kid to Work Day, or else it's marketing.

MEGAN: So how would you respond to follow-the-leader behavior in aggressive tax planning?

RUSSELL: For corporate tax shelters, it was enforcement. People went to jail, institutions got embarrassed, and the whole thing calmed down a bit. And by the way, we should distinguish the individual side – people buying son-of-BOSS shelters was all about believing it might actually work, and then finding out that it didn't. So there it was a more rational process, without the same agency costs.

MEGAN: What about legally defensible tax planning that we don't like?

RUSSELL: There I really can't see exhortation or the corporate social responsibility agenda making a major difference, given that the consumers don't care.

MEGAN: Okay, suppose I take your point that, even though behavior matters and it's not just rationality and incentives, human rights advocates may not have access to the right set of tools to change corporate culture from the outside. So let me turn to my point about politics.

RUSSELL: I figured that was your main one.

MEGAN: Let's talk about inversions being called unpatriotic. You seemed to be offended by that. And it's true I wouldn't discuss them that way if I were writing an academic article. But say you're advising the White House about how to build public support for new anti-inversion rules. Should they talk about repatriation taxes and subpart F? Hopscotch loans and earnings-stripping? Or should they use concepts that people can understand?

RUSSELL: Like, that a company with personnel around the world, traded on global stock markets, and not even made of flesh and blood, is a "Benedict Arnold" if it merges with a foreign company based partly on U.S. tax considerations.

MEGAN: Why not, if that's what it takes?

RUSSELL: It's not elevating discourse or improving public understanding. It's finding villains for complicated problems. It's blaming people within the companies who are rationally following their incentives.

MEGAN: Welcome to politics. The world is complicated, and people are busy. They like simple narratives. And no one's being strung up on a lamppost. I should be as hard-pressed as the Pfizer CEO, with his \$20 million annual compensation.<sup>15</sup>

RUSSELL: Whatever happened to art for art's sake?

MEGAN: Different roles for different folks. But I thought you were talking about tactical errors, and I'm arguing that, if people who think U.S. corporate inversions are bad for social justice hear it being discussed in terms that they might not use themselves use analytically, they might figure that the political experts who are on their side must know what they are doing. So it's not a tactical error; it's the way the public political game is played.

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<sup>15</sup> Megan may have seen something like FiercePharma's online estimate, at <http://www.fiercepharma.com/special-report/ian-read-pfizer>, that Pfizer CEO Ian Read (who presided over the failed Allergan merger / inversion) received total 2014 compensation worth \$23.28 million.

RUSSELL: Of course, we're taking it for granted here that the rhetoric will only be deployed when the legislation is in fact good. It can just as easily be deployed to support bad legislation.

MEGAN: Well, what about competitiveness talk in support of U.S. companies? A lot of people say that's nonsense, too, at least in many of the cases where it's deployed. You have to fight fire with fire – at least if you're in politics, which I'm not.

RUSSELL: But anyway, that example may be too easy for you. Say there's a concrete proposal to do X, Y, and Z about inversions. So it goes to the political marketing team, and they talk about how unpatriotic it is. But a lot of the time, isn't it just "Apple is bad," – "No, Apple is smart," or maybe it's Google or Facebook, and the whole thing just devolves into name-checking.

MEGAN: What do you propose instead?

RUSSELL: I like the journalism – investigative reporting – that's been done on these companies. It's been enormously helpful, although obviously not to them. But Washington policymaking is a private dialogue, for the most part, anyway. So do the analysis, make proposals, and keep it concrete.

MEGAN: Again, I don't see why it's either-or.

RUSSELL: You think you're making additional allies. But what if you're also putting some people off, or else just losing your focus?

MEGAN: Well, at this point maybe *we're* losing our focus. I think we've both said what we had to say.

RUSSELL: Until next time, then. But it's been fun. Should I buy the first round?

MEGAN: I wish. But I'd better get to Union Station, or the Acela line will be halfway down the concourse.