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## THE ETHICS OF TAX CLONING

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В установлении новых налогов нужна очень  
большая осторожность.

Е.Ф. Канкрин  
министр финансов России  
(1774-1845)<sup>2</sup>

## I. INTRODUCTION

One morning while I was reading the newspaper over breakfast, I was struck by the following sentence in an article that recounted the highlights of a wide-ranging interview with U.S. Secretary of State Colin Powell:

“In my judgment, any country right now that has a despotic leadership, that is unrepresentative of its people, that is not putting in place market economic systems, that is rife with corruption, a lack of transparency and no rule of law, that thinks it can achieve a position on the world stage through development of weapons of mass destruction that will turn out to be fool’s gold for them, is a loser,” he said.<sup>3</sup>

This sentence formed part of an attempt to explain President Bush’s then-recent use of the phrase “axis of evil” to describe Iran, Iraq, and North Korea.

What struck me about this statement was that Powell accorded the same level of stigmatization to the lack of market economic systems, transparency, and the rule of law as he did to despotism, corruption, and a form of blackmail. You might (quite correctly, I would add) be wondering why I simply did not move on to another story or just put the newspaper down and do something more productive, like walk my dog or prepare for the class that I had to teach in a scant few hours. But these three characteristics – market economic systems, transparency, and the rule of law – are the features of Western political and

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2. “The Creation of new taxes requires the exercise of great caution.” E.F. Kankrin, Russian Minister of Finance (1774-1845) (translation by author). This quotation was found on a website maintained by the Administration of the Ministry of Taxation of the Russian Federation for the Nizhegorod Region, at <http://www.umns.nnov.ru/comm/indexall.phtml?id=1354> (last visited Sept. 12, 2003). Please note that the transliteration from the Russian Cyrillic alphabet was made in accordance with the American Library Association-Library of Congress Romanization Tables, at <http://www.loc.gov/catdir/cpso/roman.html> (last visited Sept. 12, 2003).

3. Todd S. Purdum, Powell to Press Mideast Peace: Says We’ll Expand Role and Pursue Saudi Peace Plan, *Pittsburgh Post-Gazette*, Feb. 28, 2002, at A5.

economic systems<sup>4</sup> that have been used to explain the West's success during the Cold War period and the concomitant failure of the Soviet Union and its satellites.<sup>5</sup> Maybe I was reading too much into one sentence, but, at least to me, the subtext of Powell's statement appeared to be that any country that is not made in the Western mold is a "loser" or "evil."

Seen in this light, Powell's statement evinces what can only be described as missionary zeal – a zeal that has characterized American efforts to propagate Western legal ideas in developing countries<sup>6</sup> and, more recently, in the formerly socialist countries of Central and Eastern Europe ("CEE") and the newly independent states of the former Soviet Union ("NIS").<sup>7</sup> The effort

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4. In other words, those of the United States, Canada, and Western Europe.

5. See, e.g., Maxwell O. Chibundu, *Globalizing the Rule of Law: Some Thoughts at and on the Periphery*, 7 *Ind. J. Global Legal Stud.* 79, 79 (1999) ("In the wake of the unparalleled economic and political success of the West, rendered in stark relief by the fall of the Berlin wall a decade ago, a triad of concepts has been deployed both to explain the West's ascendancy, and as a prescription for the laggards of the emerging (or 'transitional') and underdeveloped countries of the former communist and Third World societies. 'Democracy,' the 'free market,' and the 'rule of law' are advanced as a trinity that underpin liberal capitalism, and without which developing and transitional societies will continue to languish in the shadows of misery." (footnote omitted)); John V. Orth, *Exporting the Rule of Law*, 24 *N.C. J. Int'l L. & Com. Reg.* 71, 71 (1998) ("The achievement of the Rule of Law in Western Europe and North America came at a great cost, involving wars and revolutions, and took place over centuries and decades, not months and weeks."); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *Wis. L. Rev.* 1062, 1085-86 ("Legal development assistance began in a period when Cold War rhetoric and Cold War policy were ascendent. The American elite and policy makers saw the 'rule of law' as one of the major features that distinguished the United States from Communist nations.").

6. See James A. Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* 12-15, 35-52 (1980); Lawrence M. Friedman, *On Legal Development*, 24 *Rutgers L. Rev.* 11, 11-12 (1969); John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 *Am. J. Comp. L.* 457, 479-83 (1977); Trubek & Galanter, *supra* note 5, *passim*.

7. See Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 *Am. J. Comp. L.* 93, 103 (1995) ("During the current post-socialist phase, . . . the concealment [of Western influence of socialist civil law] has changed in an open acceptance of foreign scholarly and statutory models . . . . The concealment disappeared because of pressure of various factors: the need to legislate in a short time and to fill the vacuum left by the previous experience; pressure from supranational organizations as well as of international financial institutions; and also the simple desire of the politicians, and jurists to provide one's system with tools already in use elsewhere."); Jacques deLisle, *Lex Americana? United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*,

to convince these countries of the correctness and universality of our ideas may be perceived either as a benign attempt at sharing with them what has worked for us (fueled, of course, by a healthy dose of American hubris) or as a more malignant, thinly-veiled form of imperialism.<sup>8</sup> Whatever the impetus, my first reaction to Powell's statement was to question the utility of replicating Western models in countries with markedly different social, political, and economic contexts. Being a tax academic and recalling stories that had appeared in the tax press from time to time during the past decade, I particularly questioned the utility of replicating all or portions of Western tax systems in the so-called "transition"<sup>9</sup> countries of the CEE/NIS region.<sup>10</sup>

After further reflection, however, I began to look at the issue from a slightly different perspective. I began to focus on the relationship between the

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20 U. Pa. J. Int'l Econ. L. 179, 180 (1999) ("These . . . episodes lie at the unhappy end of a spectrum of contemporary United States efforts to export legal models and provide legal assistance around the world. They represent only very small, and strikingly ineffective, parts of the extraordinarily ambitious and multifaceted drive undertaken or supported by U.S. organizations and individuals to transplant laws and legal ideas and to foster legal reform or development abroad."); *id.* at 181 ("[T]he crumbling of state socialism has precipitated a worldwide wave of democratization. These transformations have produced a seemingly insatiable appetite for legal and constitutional reforms suited to the new political and economic orders. The opening of new areas (both geographic and substantive) to American influence, the removal of the principal rivals to U.S. power and American-supported ideologies, and the seemingly sweeping embrace of principles that official and unofficial U.S. actors have seen as congenial (or even as proprietarily American) thus have provided the setting for countless U.S. legal export-promotion and advice-offering activities that have sought to respond to the demands and opportunities of the era.").

8. Gardner, *supra* note 6, at 13, 29.

9. See, e.g., Helmut K. Anheier & Lester M. Salamon, *Volunteering in Cross-National Perspective: Initial Comparisons*, 62 *Law & Contemp. Probs.* 43, 57, 64 (1999); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 *Harv. L. Rev.* 621 *passim* (1998); Victor Thuronyi, *International Tax Cooperation and a Multilateral Treaty*, 26 *Brooklyn J. Int'l L.* 1641, 1662-63 (2001).

The fact that the formerly socialist countries of the CEE/NIS region are referred to as "transition" countries is itself indicative of the general attitude of Western superiority. The term "transition" implies a change from a "bad" socialist state and command economy to a "good" market economy. See Miranda Stewart, *Global Trajectories of Tax Reform: Mapping Tax Reform in Developing and Transition Countries*, 44 *Harv. Int'l L.J.* 139, 173 (2003) ("Tax reform discourse . . . participates in the conceptualization of developing and transition countries as 'backward,' 'primitive,' 'feudal,' 'medieval,' 'developing country,' and 'pre-industrial,' hence representing them as deficient in relation to a 'Western' (i.e., 'developed,' or 'international') norm." (footnote omitted)).

10. See, e.g., the sources cited *infra* note 167.

American experts who are providing tax reform advice and the transition countries that are receiving that advice.<sup>11</sup> For purposes of this article, I will divide these American tax experts into two general groups: the “stakeholders” and the “neutral” experts.

The stakeholders include all of the advisors who have a direct stake in the outcome of the tax reform process in transition countries. This category includes, among others, the International Monetary Fund (because it loans large sums of money to transition countries) and the Organization for Economic Co-operation and Development (because transition countries may wish to accede to membership in the organization).<sup>12</sup> The neutral experts constitute a residual

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11. While advice has also been proffered by foreign advisors, see, e.g., *infra* note 167 and accompanying text, a discussion of their activities is beyond the scope of this article. Recognizing the fact that I am a product of the U.S. legal culture and that other legal cultures may view the issues discussed in this article differently, I have purposefully maintained a narrow focus on American advisors and American legal ethics.

12. While neither the International Monetary Fund nor the Organization for Economic Co-operation and Development is an American organization, I have included them in this discussion because of the perceived hegemonic influence of the United States over international economic organizations. See, e.g., Paul B. Stephan, *American Hegemony and International Law: Sheriff or Prisoner? The United States and the World Trade Organization*, 1 *Chi. J. Int'l L.* 49, 50 (2000) (“An essential component of these accounts is the perceived relationship between the United States and the international institutions that help shape the world economy. Those who see the United States as a hegemonic power portray the International Monetary Fund . . . , the World Bank, the WTO, and similar bodies as instruments of U.S. policy. Typical is the renowned historian Eric Hobsbawm, who speaks of the IMF and the World Bank as ‘de facto subordinated to US policy’ . . . .” (quoting Eric Hobsbawm, *The Age of Extremes: A History of the World, 1914-1991*, at 274-75 (1994)); Miranda Stewart, *The “Aha” Experience: Comparative Income Tax Systems*, 19 *Tax Notes Int'l* 1323, 1329 (1999) (“This dramatically understates U.S. influence on the development of tax systems over the last half of the 20th century, both directly and through U.S. tax advisors who play a key role in international organizations, including the IMF and OECD, that have pushed for structural tax reforms since the 1960s.”); Eisuke Suzuki, *The Fallacy of Globalism and the Protection of National Economies*, 26 *Yale J. Int'l L.* 319, 319 (2001) (“In addition to holding sway over the political economies of a large number of states, the United States also exerts considerable influence through international finance institutions . . . such as the International Monetary Fund . . . and the World Bank . . . .”); Paul Lewis, *Conflict over Post in O.E.C.D.*, *N.Y. Times*, Nov. 2, 1981, at D3 (“The smaller European nations, which are not invited to the annual meetings, value the O.E.C.D. as the only place where they have a chance to influence United States economic policy through direct contact with the American officials involved, and they say that for this reason, the organization should be run by someone appointed by themselves.”).

category, and include all of the advisors who appear not to have a direct stake in the outcome of the tax reform process.<sup>13</sup>

Dividing the experts along these lines serves to highlight the type of relationship between the expert and the transition country that, from an American perspective, would be deemed appropriate. On the one hand, it is understandable (if not expected) that stakeholders will attempt to influence the outcome of the tax reform process in transition countries – precisely because they have a stake in the outcome of that process and stand to benefit from achieving their desired result. This understanding (or expectation) arises from the quasi-adversarial, yet cooperative relationship between stakeholders and transition countries. Transition countries should, therefore, be on notice that a stakeholder’s advice may be motivated by an interest in the outcome of the tax reform process and, to the extent practicable under the circumstances, they should adjust their acceptance of this advice accordingly.

The neutral experts, on the other hand, simply do not have the same type of relationship with the transition countries. By definition, neutral experts lack a direct stake in the outcome of the tax reform process. They also lack the leverage that stakeholders sometimes have over transition countries – leverage that can be used to get desired tax reforms enacted.<sup>14</sup> As a result, the neutral experts’ impact on the transition countries’ tax policies will depend both upon the neutral experts’ ability to foster confidence in their expertise<sup>15</sup> – an expertise that these countries need, but which they themselves lack – and upon

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13. Even though ostensibly fitting into the neutral category, some of these experts are more appropriately placed in the stakeholder category because of a (sometimes, not so) hidden agenda. The description in the text below of the International Tax and Investment Center may serve as an illustrative example. See *infra* notes 53-90 and accompanying text. This organization touts itself as “an independent nonprofit research and education foundation.” *Int’l Tax & Inv. Ctr., Biennial Report 2001*, at 2 (2001), available at <http://www.iticnet.org/publications/itic01ar.pdf> (last visited Sept. 12, 2003) [hereinafter *Biennial Report*]. Nevertheless, the organization’s own description of its activities casts in serious doubt this claim of independence, because the description suggests a troubling level of influence by the organization’s corporate “sponsors,” which provide the vast majority of its funding. See *infra* notes 85-90 and accompanying text.

14. See *infra* notes 125 and 126 and accompanying text. See also Stewart, *supra* note 9, at 184 (“[T]he increased focus on tax administration and enforcement is clearly the result of external pressures to increase collections and reduce government deficits, stemming from the debt crisis of the 1980s. . . . [T]his kind of governance reform enables increased intervention of the international institutions into the bureaucratic workings of the borrower governments. It extends the scope of conditionality far beyond broad-brush policy recommendations, giving the institutions a role in the micro-construction of the developing or transition country government into one suited to a market-oriented state.”).

15. See *infra* notes 34 and 63 and accompanying text.

the neutral experts' ability to foster confidence in their trustworthiness – because, lacking the expertise themselves, the transition countries will encounter difficulty in monitoring the experts' performance and in detecting abuses of power.<sup>16</sup>

Being based on trust and confidence and marked by a measure of vulnerability on the part of the transition countries, the relationship between the neutral experts and the transition countries can be characterized as fiduciary in nature.<sup>17</sup> Fiduciary relationships are normally accompanied by the imposition of ethical limits on the activities of the person in whom trust has been

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16. See *supra* note 13.

17. See Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 *Or. L. Rev.* 1209, 1212 (1995) (“In sum, fiduciary rules reflect a consensual arrangement covering special situations in which fiduciaries promise to perform services for entrustors and receive substantial power to effectuate the performance of the services, while entrustors cannot efficiently monitor the fiduciaries’ performance.”); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 *Vand. L. Rev.* 1399, 1413-14 (2002) (“While courts use various formulations to describe informal fiduciary relationships, the common elements are quite simple: (1) ‘trust’ or ‘confidence’ reposed by one person in another; and (2) the resulting ‘domination,’ ‘superiority,’ or ‘undue influence’ of the other. Trust alone is not enough, though courts often speak loosely in ways that suggest otherwise – nor is vulnerability. Only in the aggregate do these factors give rise to a fiduciary relationship.”); cf. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 *Duke L.J.* 879, 915 (“One could justifiably conclude that the law of fiduciary obligation is in significant respects atomistic. . . . Described instrumentally, the fiduciary obligation is a device that enables the law to respond to a range of situations in which, for a variety of reasons, one person’s discretion ought to be controlled because of characteristics of that person’s relationship with another.”).



reposed.<sup>18</sup> The exact scope of these limits will vary depending upon the nature of the fiduciary relationship.<sup>19</sup>

In the United States, the limits on a fiduciary's activities are usually developed by analogy, using existing fiduciary relationships as a guide.<sup>20</sup> Many of the American neutral experts advising transition countries are attorneys,<sup>21</sup> and as such are fiduciaries whose activities are confined within prescribed ethical boundaries.<sup>22</sup> In addition, the subject of the neutral experts' advice –

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18. In the oft-quoted words of Justice Cardozo:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

*Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928); see also Frankel, *supra* note 17, at 1226; Tamar Frankel, *Fiduciary Law*, 71 Cal. L. Rev. 795, 829-32 (1983).

19. DeMott, *supra* note 17, at 879, 908-09; Frankel, *supra* note 17, at 1226; Smith, *supra* note 17, at 1400, 1482-86.

20. See DeMott, *supra* note 17, at 879, 891; Frankel, *supra* note 18, at 797, 804-08 (arguing that this approach is flawed); Smith, *supra* note 17, at 1430.

21. See Victor Thuronyi, *Introduction to 1 Tax Law Design and Drafting*, at xxvii, xxix (Victor Thuronyi ed., 1996) [hereinafter *Tax Law Design*].

22. 1 *Restatement of the Law Governing Lawyers* § 16 cmt. b (2000) ("A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. Assurances of the lawyer's competence, diligence, and loyalty are therefore vital."); see also Comm'n on Professionalism, *Am. Bar Ass'n*, ". . . In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism" (1986), reprinted in 112 F.R.D. 243, 261 [hereinafter *ABA Professionalism Report*]; Howard S. Becker, *The Nature of a Profession*, in 2 *Education for the Professions: The Sixty-first Yearbook of the National Society for the Study of Education* 27, 37 (Nelson B. Henry ed., 1962); Robert A. Rothman, *Deprofessionalization: The Case of Law in America*, 11 *Work & Occupations* 183, 188 (1984); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 *Wm. & Mary L. Rev.* 1303, 1308-09 (1995).

whether they, as individuals, happen to be attorneys or not – is law reform. By rendering advice concerning the proper structure and content of a country's tax laws, these experts are rendering what is arguably legal advice – broadly construed.<sup>23</sup> In view of the nature of the advice being given and the fact that attorneys number among those rendering such advice, the attorney-client relationship will be employed in this article as the benchmark for setting ethical boundaries within which American neutral experts should confine their activities.

The purpose of this article is to begin to explore these ethical boundaries. Because the development of a complete ethical framework for the activities of American neutral experts is beyond the scope of this article, I have chosen, consistent with the impetus for writing this article, to focus on the ethical limits that should be imposed on American neutral experts when propagating Western tax rules in transition countries. However, even within this

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23. Delineating the precise boundaries of the “practice of law” has proved exceedingly difficult. See Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors – or Even Good Sense?*, 1980 Am. B. Found. Res. J. 159 (1980); Elizabeth Michelman, *Guiding the Invisible Hand: The Consumer Protection Function of Unauthorized Practice Regulation*, 12 Pepp. L. Rev. 1, 3-11 (1984); Alan Morrison, *Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question*, 4 Nova L.J. 363 (1980); John Gibeaut, *Another Try: ABA Task Force Takes a Shot at Defining the Practice of Law*, 88 A.B.A. J. 18 (2002).

One commentator has distinguished between the boundaries that should be set for purposes of applying codes of legal ethics and those that should be set for purposes of restricting the activities of non-lawyers. Linda Galler, *New Roles, New Rules, but No Definitions*, 72 Temp. L. Rev. 1001 (1999). Analyzing the issue from the perspective of multidisciplinary practice, this commentator has advocated adopting a broad construction of the practice of law for the former purpose, in order to ensure that lawyers working in non-traditional settings are subject to legal ethics rules. *Id.* at 1004-06. As she points out, broadly construing the practice of law for this purpose is consonant with Model Rule 5.7, which requires lawyers to comply with the Model Rules of Professional Conduct not only with respect to the legal services that they provide, but also with respect to “law-related” services that they provide. Model Rules of Prof'l Conduct R. 5.7 (2002); see Galler, *supra*, at 1006. The principal concern behind this rule is that

the person for whom the law-related services are performed [may] fail[] to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

Model Rules of Prof'l Conduct R. 5.7 at cmt. at para. 1 (2002). Similar concerns dictate a broad construction of what constitutes legal advice in the instant situation.

limited scope (and notwithstanding the use of the attorney-client relationship as a benchmark), this article is intended to cover the activities of all American neutral experts, whatever their respective professional calling or occupation,<sup>24</sup> who are rendering tax reform advice to transition countries. As a result, the purpose of this article is not to point out that certain sections of the various state legal ethics codes may apply to attorneys who are advising transition countries; rather, it is to begin the process of elucidating and explicating the norms, derived from legal ethics, that should guide all American neutral experts when propagating Western tax rules in transition countries. By drawing attention to the ethical dimension of their conduct, this article aims to prod American neutral experts to reflect both on the nature and quality of the advice that they have been rendering to transition countries and on the nature and quality of the advice, if any, that they will render in the future – taking into account the guidelines developed in this article as well as any and all other relevant legal ethical norms.

Part II begins the exploration of this issue by providing a description of the activities of a cross-section of American tax experts. Following this description, Part III revisits the debate over the appropriate terminology to be used when describing the propagation of Western legal rules. In the comparative law literature, this phenomenon has generally been referred to as the “borrowing” or “transplantation” of legal rules. In Part III, it is argued that a timely and more accurate description of this phenomenon would be the “cloning” of a legal rule. Because of the natural link with the ethical debate over human cloning, this suggested change in terminology would also carry with it the benefit of focusing attention on the ethical dimension of this phenomenon.

With this background, the task of formulating ethical guidelines for the cloning of tax rules is then undertaken. First, in view of the aptness of the cloning analogy, Part IV turns to the experience of bioethicists with the debate over human cloning for aid in identifying the norm(s) that should serve as the basis for these ethical guidelines. After analyzing the salient arguments in the debate over human cloning, it is concluded that the principle of nonmaleficence lies at the core of this debate. Next, given that the relationship between the American neutral experts and the transition countries is analogous to the attorney-client relationship, Part IV analyzes the ethical standards governing the professional conduct of lawyers to determine whether the principle of nonmaleficence also serves as part of the general framework for analyzing problems in legal ethics. Concluding that it does, Part V suffuses the principle of nonmaleficence – in its specific application to the context of tax cloning –

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24. This group of American neutral experts includes not only attorneys, but also accountants, economists, and tax administrators. Richard K. Gordon & Victor Thuronyi, *Tax Legislative Process*, in 1 *Tax Law Design*, supra note 21, at 4-6.

with content and meaning by describing the extant comparative law literature on issues related to legal cloning and synthesizing from it ethical guidelines that American neutral experts can employ when considering the propagation of Western tax rules in transition countries. Part VI consists of concluding remarks.

## II. DESCRIPTION OF ACTIVITIES OF AMERICAN ADVISORS

Since the break-up of the Soviet Union, there has been no shortage of Western (and particularly American) experts willing to proffer tax reform advice to the transition countries in the CEE/NIS region.<sup>25</sup> This advice has come from U.S. government agencies, private sector programs, universities, and international organizations. By way of background, a brief and non-exhaustive

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25. Ward M. Hussey & Donald C. Lubick, *Basic World Tax Code and Commentary*, at vii-viii (1996), available at <http://www.taxanalysts.com/www/website.nsf/Web/BasicWorldTaxCode?OpenDocument> (last visited Sept. 12, 2003) [hereinafter BWTC] (“no country has been beguiled into enacting our draft *in toto*, or has failed to receive ample advice (solicited and unsolicited) as to a myriad of alternatives”); Kevin Holmes, *Development of Tax Administrations in Central and Eastern Europe and in Developing Countries: Needs and Opportunities for Tax Research*, 42 *Eur. Tax’n* 18, 18 (2002) (“The early and mid-1990s were also periods of wholesale transformation of legislation in the former Soviet countries, designed to implement the new tax policies. There was no shortage of experts from the West to advise these countries on tax policy and how the new legislation should be written.”); Rick Krever, *Parochialism and Catholic Advice*, 7 *Tax Notes Int’l* 193, 193 (1993) (“In a world of recession-induced constrictions and collapses, one industry has bucked the trends and embarked on a path of vigorous growth. That industry is the provision of tax design advice to the governments of developing countries and, since the collapse of socialism in eastern Europe, to the governments of transforming capitalist economies.”).

The provision of tax reform advice is not a new endeavor – transition countries are merely the most recent recipients of such advice. Indeed, Western experts have been proffering tax reform advice to developing countries for decades. U.N. Technical Assistance Admin., *Taxes and Fiscal Policy in Under-Developed Countries* at 43-110, annex, U.N. Doc. ST/TAA/M/8, U.N. Sales No. 1955.II.H.1 (1954); Oliver Oldman & Stanley S. Surrey, *Technical Assistance in Taxation in Developing Countries*, in *Modern Fiscal Issues: Essays in Honor of Carl S. Shoup* 278, 278-83, 284-85 (Richard M. Bird & John G. Head eds., 1972); see, e.g., Nicholas Kaldor, *Indian Tax Reform: Report of a Survey* (1956); Richard A. Musgrave, *Fiscal Reform in Bolivia: Final Report of the Bolivian Mission on Tax Reform* (1981); Richard A. Musgrave, *Fiscal Reform for Colombia: Final Report and Staff Papers of the Colombian Commission on Tax Reform* (Malcolm Gillis ed., 1971); Carl S. Shoup et al., *The Fiscal System of Venezuela: A Report* (1959).

description of the activities of members of each of these groups, which include both neutral experts and stakeholders, follows immediately below.<sup>26</sup>

*A. U.S. Government Agencies*

The U.S. Treasury Department, through its Office of Technical Assistance (“OTA”), provides tax reform advice to the transition countries in the CEE/NIS region. The Office of Technical Assistance has provided advisors to governments in CEE countries since 1990, and has provided advisors to governments in NIS countries since 1992.<sup>27</sup>

Advisors are assigned to a country only after the OTA receives a written request for assistance from the country.<sup>28</sup> A country is eligible to make such a request only if it is “committed to democracy, economic reform and to sound relations with . . . International Financial Institutions.”<sup>29</sup> Before the OTA will honor a request for assistance, the Treasury Department and the requesting country must agree on the scope of the project, which is memorialized in a document referred to as the “Terms of Reference.”<sup>30</sup> The Terms of Reference routinely include a confidentiality agreement in order to encourage the requesting country to “share confidential data [and] discuss policy options with Treasury advisors.”<sup>31</sup>

OTA operates through resident advisors, who are posted to the host country for no less than one year and whose assignments should ideally run “from 2-4 years to be maximally effective.”<sup>32</sup> The resident advisors “almost always work inside host government agencies, so that advisors are regularly and conveniently close to their counterparts.”<sup>33</sup> This arrangement allows the advisor “to engage in problem solving immediately when issues or policy decisions

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26. For further description of the activities of external participants in the tax reform process in developing and transition countries, see Stewart, *supra* note 9, at 142-71.

27. U.S. Dep’t of Treasury, Office of Technical Assistance Overview, at <http://www.treas.gov/offices/international-affairs/assistance/index.html> (last visited Sept. 12, 2003) [hereinafter OTA Overview].

28. Letter from G. Edwin Smith, III, Director, Office of Technical Assistance, U.S. Dep’t of Treasury, to Anthony C. Infanti, Assistant Professor of Law, University of Pittsburgh School of Law 1 (Nov. 5, 2002) (on file with author) [hereinafter OTA Letter].

29. *Id.*

30. *Id.*

31. *Id.* at 2.

32. *Id.* at 1, 2.

33. *Id.* at 1.

arise,” and helps to foster “relationships of trust and confidence” between the advisor and his host country counterpart.<sup>34</sup>

Because of the government-to-government nature of OTA’s activities, resident advisors “are assigned to work directly with officials of the counterpart government.”<sup>35</sup> There can, however, be a wide range of potential counterparts in the host country government, “including officials in the Ministries of Finance, State Tax Authorities, or Consolidated Revenue Authorities.”<sup>36</sup> Resident advisors may also meet with legislators and their staffs or with public interest groups if doing so is in furtherance of the project, but “OTA does not provide assistance to non-governmental agencies.”<sup>37</sup>

Resident advisors generally provide advice in three areas: (i) “tax policy (legal and economic advice in structuring tax legislation and regulation to eliminate complicating and inefficient tax preferences and reduce unreasonably tax high [sic] rates,”<sup>38</sup> (ii) “forecasting and revenue estimation (the structuring of models and the generation of statistical data to feed such models),”<sup>39</sup> and (iii) “tax administration (system organization and operation, taxpayer education and service, effective audit and collection functions, training, and creation of host country management and training capacities).”<sup>40</sup> OTA has provided tax policy advice to most CEE/NIS countries.<sup>41</sup> As an example of such advice, OTA cites “[a] major program in Russia [that] resulted in formal tax reform proposals being submitted to the Duma during the summer of 1996.”<sup>42</sup> OTA has provided advice on tax modeling to Bosnia & Herzegovina, Bulgaria, Estonia, Latvia, Poland, Russia, Slovakia, and Ukraine.<sup>43</sup> On the tax administration front, OTA has undertaken “several pilot programs to demonstrate functional administration with centralized direction,” and has participated “in the development of a National Tax Administration Training Center in Ukraine.”<sup>44</sup>

Resident advisors serve under three types of employment agreements: “(1) Personal Service Contracts, (2) Reimbursable agreements with other U.S. Government agencies, i.e. IRS, the Office of the Comptroller of the Currency, and others; (3) and Inter-agency Personnel Agreements, under which OTA

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34. Id.

35. Id.

36. Id.

37. Id.

38. OTA Overview, *supra* note 27.

39. Id.

40. Id.

41. Id.

42. Id.

43. Id.

44. Id.

secures the services of advisors from states and universities.”<sup>45</sup> In each case, OTA “directly manages the employee” while she serves as a resident advisor.<sup>46</sup>

Individuals are hired to serve as a resident advisor

based on the match between their professional skills and job experience with the project needs of the counterpart government agency. [OTA] actively recruit[s] from both the government and the private sector to find the necessary skill sets to do [its] work. Fluency in the local language or familiarity with the local culture can be a factor in OTA’s hiring process, but the most important qualification is high-level functional expertise. OTA provides a budget for local language training for its advisors, although such training is optional. Most advisors do take advantage of this training, and some have reached high degrees of fluency. OTA regularly hires a local country national as an assistant to each resident advisor. The assistants often work as translators and are crucial in providing orientation on protocol, culture, and customs.<sup>47</sup>

Although “OTA prefers utilizing longer-term resident advisors to conduct technical assistance projects,” short-term advisors may be used under a variety of circumstances.<sup>48</sup> For example, short-term advisors may be used

(1) as a lead-in to a resident-based project, when sufficient funding is initially not available; (2) as a follow-up to a largely completed project to ensure that the work program stays on track; (3) when a project is very specialized and requires the use of functional experts for short periods of time; and (4) when a project needs to be operational and funding is only sufficient for intermittent work.<sup>49</sup>

Short-term advisors may also “provide specialized expertise to existing resident-based projects.”<sup>50</sup> A short-term advisor may, for example, provide expertise in tax forms design as part of a tax administration project.<sup>51</sup> In fact, each of the resident advisor positions is accompanied by funding that is “budgeted for short-term specialists to conduct support missions.”<sup>52</sup>

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45. OTA Letter, *supra* note 28, at 2.

46. *Id.*

47. *Id.* at 3.

48. *Id.* at 2.

49. *Id.*; see also OTA Overview, *supra* note 27.

50. OTA Letter, *supra* note 28, at 2.

51. *Id.*

52. *Id.*

### B. Private Sector Programs

Following two missions to Russia in 1991 and 1992,<sup>53</sup> the International Tax and Investment Center (“ITIC”) was organized in 1993 as “an independent nonprofit research and education foundation.”<sup>54</sup> The mission of ITIC is “to serve as a clearinghouse for information and as a training center to transfer Western taxation and investment know how to improve the investment climate of transition countries, thereby spurring formation and development of business and economic prosperity.”<sup>55</sup> ITIC attempts to achieve this goal by (i) establishing relationships with officials in the governments of the transition countries, (ii) “maintain[ing] a reliable schedule of high-quality educational programs,” and (iii) consistently relaying the message in communications with government officials and in educational programs that there is a “need for tax and economic reforms that will achieve prosperity and financial stability.”<sup>56</sup>

ITIC describes its agenda as “spread[ing] ‘best international practice.’”<sup>57</sup> There is a “division of labor” in spreading this information: relationships with government officials are cultivated by the ITIC staff, and substantive contributions to the educational programs are made by ITIC “sponsors,”<sup>58</sup> who “draw[] on their particular international experience.”<sup>59</sup> ITIC currently conducts its activities in Russia, Kazakhstan, Azerbaijan, and Ukraine.<sup>60</sup>

ITIC conducts several different types of programs “to facilitate dialogue and information sharing between private sector specialists and government policy makers.”<sup>61</sup> These programs take place in the transition countries, the United States, and Europe, and include: (i) monthly policy

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53. These missions were organized by the Tax Foundation, which was the precursor to the International Tax and Investment Center. Int’l Tax & Inv. Ctr., ITIC History, at <http://www.iticnet.org/about/history.htm> (last visited Sept. 12, 2003); Bill Ahern, U.S. Tax Experts Present Russian Officials with Plan to Improve Investment Climate, 5 Tax Notes Int’l 187 (1992) (recounting advice of a delegation of tax experts supported by the Tax Foundation).

54. Int’l Tax & Inv. Ctr., About the International Tax and Investment Center, at <http://www.iticnet.org/about/Default.htm> (last visited Sept. 12, 2003) [hereinafter About ITIC]; see also Biennial Report, supra note 13, at 2.

55. About ITIC, supra note 54; see also Biennial Report, supra note 13, at 2.

56. About ITIC, supra note 54; see also Biennial Report, supra note 13, at 2.

57. Biennial Report, supra note 13, at 5. “Best international practice” appears to be a euphemism for Western-style tax rules.

58. For a discussion of ITIC sponsors, see infra notes 85-90 and accompanying text.

59. Biennial Report, supra note 13, at 5.

60. Id. at 12-16.

61. Int’l Tax & Inv. Ctr., ITIC Programs, at <http://www.iticnet.org/programs/Default.htm> (last visited Sept. 12, 2003).



forums held in Russia and Kazakhstan that “provide government and Parliament officials and company representatives an opportunity to work together to identify and solve specific tax and regulatory problems facing investors”; (ii) working groups and committees that allow private and public sector officials in transition countries to focus on “critical tax and investment issues”; and (iii) training workshops and seminars that are designed to expose “parliamentarians and finance and tax officials to Western taxation and business practices.”<sup>62</sup>

ITIC has also provided assistance in the drafting of tax laws. ITIC recently served “as a trusted advisor in the drafting” of Part II of the Russian Tax Code.<sup>63</sup> In addition, ITIC worked with the government of Kazakhstan to write and implement its tax code, a process that “continues today, as ITIC works closely with the important legislators assembled in the Majilis’ Budget and Economics Committee, where all tax and investment-related legislation is approved.”<sup>64</sup> In conjunction with the recent redrafting of the Kazakhstani Tax Code, ITIC served as an advisor to the Expert Council that advised the authors of the revisions, regularly organized conferences to bring investors together with the authors of the revisions, and “prepared numerous commentaries and memoranda on the draft Tax Code revisions.”<sup>65</sup>

ITIC has participated in several coalitions that are focused on making changes in specific tax policies. In Russia, ITIC has helped to form the Russian Commercial Taxation Committee, the Russian Financial Services Taxation Committee, the Russian Automotive Investment Center, and the Petroleum Tax Reform Project.<sup>66</sup> In Kazakhstan, ITIC has helped to form the Caspian Mineral Taxation Committee. The purposes and activities of each of these committees are briefly described below:

*Russian Commercial Taxation Committee.* This committee was formed with Ernst & Young in 1998, and “is comprised of over 20 U.S. and European multinational manufacturing companies in Russia.”<sup>67</sup> The purpose of the committee is “to improve Russia’s profits tax and [value-added tax] regimes, making them closer to international practice.”<sup>68</sup> To achieve this goal, the committee provided assistance in legislative drafting to the Department of Tax Reform of the Russian Ministry of Finance and to the Taxation Subcommittee of the Russian Duma, and “improved the final language” of the Russian Tax Code “with many proposals, including the elimination of the limit on

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62. Id.

63. Biennial Report, *supra* note 13, at 12.

64. Id. at 14.

65. Id.

66. Id. at 12-13.

67. Id. at 12.

68. Id.

advertising expenses, travel expenses, [and] training and recruitment expenses.”<sup>69</sup>

*Russian Financial Services Taxation Committee.* This committee was formed with PricewaterhouseCoopers in 1998, and is comprised of banks and financial services companies.<sup>70</sup> The committee has organized “an ongoing series of study tours and workshops in London” that “provide Russian officials with hands-on exposure to the ways these complex financial and taxation issues are addressed in the West.”<sup>71</sup> This educational program was launched with a grant from the U.K. Department for International Development.<sup>72</sup> The committee has also worked on drafting and introducing legislation in the Duma on the tax treatment of exchange gains and losses incurred in bank recapitalizations,<sup>73</sup> and has reviewed and prepared amendments to the Russian profits and value-added taxes as they relate to banks and financial institutions.<sup>74</sup>

*Russian Automotive Investment Center.* This coalition was formed with Ernst & Young in 2000 “to address the challenges of the Russian automotive sector.”<sup>75</sup> The center “has already succeeded in organizing foreign automakers and suppliers to address legislative and regulatory issues affecting the automotive sector in Russia,” and has helped to secure changes in the Russian Tax Code concerning “regional investment incentives for automotive investment.”<sup>76</sup>

*Petroleum Tax Reform Project.* This coalition was formed with the Tax Committee of the Petroleum Advisory Forum in 2000, and has as its purpose “to rationalize the taxation of the petroleum industry, so that it can provide a reliable flow of energy to domestic and foreign markets, while also providing a steady flow of tax revenue.”<sup>77</sup> The project has “organized a series of education programs for the State Duma and Ministry of Finance Tax Code authors,” and has prepared “numerous draft amendments to the . . . draft Tax Code.”<sup>78</sup>

*Caspian Mineral Taxation Committee.* This committee is an industry group that is comprised of “22 multinational oil, gas, and mining companies.”<sup>79</sup> The committee provides “input on tax policy and how to implement best international accounting and tax practices” in Kazakhstan and other Caspian

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69. Id. at 12-13.

70. Id. at 13.

71. Id.

72. Id.

73. Id.

74. Id.

75. Id.

76. Id.

77. Id.

78. Id.

79. Id. at 14.

nations.<sup>80</sup> The committee has organized conferences to discuss the revision of the portions of the Kazakhstani Tax Code dealing with international taxation and natural resources taxation, and has prepared memoranda on draft revisions to the Kazakhstani Tax Code and Transfer Pricing Law.<sup>81</sup>

Shifting from tax policy to tax administration, ITIC established its first “tax academy” in Kazakhstan in 2000. The purpose of the Kazakhstan Mineral Taxation Academy is “to prevent promising legislative reforms from being rendered useless by poor implementation.”<sup>82</sup> The academy is to achieve this goal by becoming “a place where civil servants in national and regional revenue offices, investors’ staff and foreign experts can interact in efforts to develop a balanced tax regime for the extractive industries.”<sup>83</sup> To this end, the academy “employ[s] an interactive seminar format, requir[ing] host country faculty as well as Western tax experts, and use[s] a jointly developed curriculum.”<sup>84</sup>

Over 80% of ITIC’s funding is supplied by “the tax-deductible contributions of business with concerns in transition economy enterprise.”<sup>85</sup> These sponsors “include a broad range of interests, including aviation, oil and gas, banking and securities, manufacturing, cosmetics and foodstuffs.”<sup>86</sup> The sponsors “directly benefit from the talented advocacy of ITIC’s staff of experts . . . , and the pro-investment reforms ITIC has helped achieve contribute significantly to improving the . . . sponsors’ bottom lines.”<sup>87</sup> In addition, the establishment of relationships with government officials in transition countries has “provided channels for private sector expertise to reach the government before, during, and after the official policymaking process. This combination, which is truly unique to ITIC, is the institution’s principal asset – it provides ITIC and its sponsors a seat at the policymaking table.”<sup>88</sup>

ITIC “briefs its sponsors constantly,” and, even though its “primary mission is transferring Western know-how to CIS officials, [it] also reports back to its supporters with advance information on tax and investment laws, decrees, and regulations so that ITIC investors are involved in the policy process on the ‘front end.’”<sup>89</sup> In fact, ITIC maintains a “sponsors only” web

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80. Id.

81. Id. at 15.

82. Id.

83. Id.

84. Id. at 6.

85. Int’l Tax & Inv. Ctr., Join ITIC, at <http://www.iticnet.org/join/Default.htm> (last visited Sept. 12, 2003) [hereinafter Join ITIC].

86. Id. For a list of sponsors, see Biennial Report, *supra* note 13, at 17.

87. Join ITIC, *supra* note 85.

88. About ITIC, *supra* note 54.

89. Id.

page to which it posts information (e.g., draft tax legislation, commentaries on legislation, and regulations) that is accessible only with a password.<sup>90</sup>

### C. Academic Endeavors

The International Tax Program (“ITP”) at Harvard Law School was founded in 1952.<sup>91</sup> The mission of ITP “is to provide future fiscal leaders and tax experts working in government, private practice and academics around the world with the finest available interdisciplinary graduate education in taxation.”<sup>92</sup> A student’s course of study while enrolled in ITP will depend, to a great extent, on whether she comes from the public sector or intends to work in the private sector or academia.<sup>93</sup>

Public sector students are those tax professionals “who are involved in the formulation and implementation of tax policies, the drafting of tax legislation, the negotiation of tax treaties, and the management of tax administration.”<sup>94</sup> Public sector students are not required to be lawyers to be eligible for the ITP program.<sup>95</sup> Public sector students enroll in the ITP

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90. Int’l Tax & Inv. Ctr., Welcome to ITICNET.ORG, at <http://www.iticnet.org/> (last visited Sept. 12, 2003). For a list of information posted to the “sponsors only” web page, see, e.g., New Postings on Sponsors Only ITIC Web Page, ITIC Bulletin, February 2002, at 5, available at <http://www.iticnet.org/publications/ITIC%20Bulletin%20Feb02.PDF> (last visited Sept. 12, 2003); New Postings on Sponsors Only ITIC Web Page, ITIC Bulletin, December 2000, at 5, available at <http://www.iticnet.org/publications/ITIC%20Bulletin%20December%202001.PDF> (last visited Sept. 12, 2003); New Postings on Sponsors Only ITIC Web Page, ITIC Bulletin, July 2001, at 6, available at <http://www.iticnet.org/publications/Bulletin-July%202001.pdf> (last visited Sept. 12, 2003); New Postings on Sponsors Only ITIC Web Page, ITIC Bulletin, June 2001, at 4, available at [http://www.iticnet.org/publications/June\\_01\\_ITIC\\_%20bulletin.pdf](http://www.iticnet.org/publications/June_01_ITIC_%20bulletin.pdf) (last visited Sept. 12, 2003).

91. Merryman, *supra* note 6, at 457 n.4. For a description of the program’s early activities, see Oliver Oldman & Elisabeth A. Owens, *The Harvard Law School International Program in Taxation* (Harvard Law School, Occasional Pamphlet No. Five, 1961). This description was updated several years later in Oliver Oldman & Elisabeth A. Owens, *The International Tax Program*, 14 *Can. Tax J.* 444 (1966).

92. Int’l Tax Program, Harvard Law Sch., Mission, at <http://www.law.harvard.edu/programs/itp/index.html> (last visited Sept. 12, 2003).

93. Int’l Tax Program, Harvard Law Sch., ITP Programs, at <http://www.law.harvard.edu/programs/itp/programs.html> (last visited Sept. 12, 2003) [hereinafter ITP Programs].

94. *Id.*

95. *Id.*

certificate program,<sup>96</sup> and are required to take the following tax courses: U.S. federal income taxation, public finance economics of taxation, comparative tax policy and administration, and value-added tax.<sup>97</sup> In addition to their required courses, students may take elective courses both within and without the law school.<sup>98</sup>

Students with an academic background in law who intend to work in private practice, government, or academia are able to apply for admission to the ITP/Master of Laws program.<sup>99</sup> This program allows students to pursue LL.M. studies at the Harvard Law School with a concentration in tax.<sup>100</sup> Students in the ITP/Master of Laws program are required to take U.S. federal income taxation, a tax seminar, and “an additional 8 credits in elective tax courses.”<sup>101</sup> Students may also take elective courses both within and without the law school.<sup>102</sup>

Aside from its academic program in taxation, ITP has sponsored Ward Hussey and Donald Lubick in their drafting of the Basic World Tax Code and Commentary (“BWTC”). Hussey and Lubick drafted the BWTC in response to “the demonstrated need by developing and transition countries for a legislative framework as they work to formulate modern tax policies and taxation laws.”<sup>103</sup>

A preliminary edition of the BWTC was published in 1992.<sup>104</sup> Shortly thereafter, Tax Notes International commissioned critiques of the preliminary edition, and it published those critiques in the summer of 1993.<sup>105</sup> A revised edition of the BWTC was later published in 1996.<sup>106</sup> While the policy decisions

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96. *Id.*

97. Int’l Tax Program, Harvard Law Sch., Coursework, at <http://www.law.harvard.edu/programs/itp/courses.html> (last visited Sept. 12, 2003).

98. *Id.*

99. ITP Programs, *supra* note 93.

100. *Id.*

101. *Id.*

102. *Id.*

103. Glenn P. Jenkins, Foreword to BWTC, *supra* note 25, at iii, iii.

104. BWTC, *supra* note 25, at vii.

105. *Id.* at viii. The published critiques of the preliminary edition of the BWTC include the following: Brian J. Arnold, International Aspects of the Basic World Tax Code, 7 *Tax Notes Int’l* 260 (1993); Tim Edgar, The Tax Treatment of Interest Under the Basic World Tax Code, 7 *Tax Notes Int’l* 347 (1993); Richard Goode, The Basic World Tax Code and Commentary, 7 *Tax Notes Int’l* 189 (1993); Richard K. Gordon, Some Comments on the Basic World Tax Code and Commentary, 7 *Tax Notes Int’l* 1279 (1993); Krever, *supra* note 25; Leif Muten, Some Comments on the Basic World Tax Code, 7 *Tax Notes Int’l* 179 (1993); Frans Vanistendael, The Proof in Making and Eating the Pudding: Some Comments on the Basic World Tax Code, 7 *Tax Notes Int’l* 463 (1993); and Richard J. Vann, Some Lessons from Hussey and Lubick, 7 *Tax Notes Int’l* 268 (1993).

106. Jenkins, *supra* note 103, at iii.

that led to the 1992 preliminary edition “were heavily influenced by those developed over many years of technical assistance to developing countries in reform of their tax systems,”<sup>107</sup> the 1996 revised edition was “slanted somewhat more to reflect [the authors’] experiences since the Preliminary Edition appeared, primarily in the formerly socialist countries of central and eastern Europe and the former Soviet Union.”<sup>108</sup>

The BWTC consists of the text of a sample tax code (which is comprised of an income tax, a value added tax, excise taxes, property taxes, and provisions addressing tax administration) and commentary on that text.<sup>109</sup> The purpose of the BWTC is described in the foreword to the 1996 edition as follows:

The BWTC was initiated as a modest attempt to provide an example of the laws that are needed for an efficient and effective tax system. The objective was to provide the tax policy and legal experts in the reforming countries with a framework, or a checklist, of what is needed (or not needed) to have the foundation for a system . . . . The objective has never been, nor should be, to build a comprehensive tax code with all the details that might arise in each specific country. The goal has been to design a highly professional, but basic, tax code which could provide a solid legal foundation for a modern tax system.<sup>110</sup>

While acknowledging that a single tax code “will not exactly fit the economic, social, and political situations of each and every country,” Hussey and Lubick felt that there were sufficient common problems faced by developing and transition countries “to conclude that it is worthwhile to offer a single draft as a starting point.”<sup>111</sup>

In this regard, Hussey and Lubick explicitly contemplated that developing and transition countries would have to adjust the complexity of the BWTC’s provisions to suit their individual needs.<sup>112</sup> They anticipated that the BWTC would prove too complex for some countries, even though it had been stripped of much of the complexity encountered in the tax laws of industrialized nations.<sup>113</sup> At the same time, they anticipated that the BWTC would prove too basic for other countries, which would find it necessary to adopt some of the

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107. BWTC, *supra* note 25, at vii.

108. *Id.* at 1.

109. *Id.*

110. Jenkins, *supra* note 103, at iv.

111. BWTC, *supra* note 25, at 2.

112. *Id.*

113. *Id.*

more complex provisions encountered in the tax laws of industrialized nations.<sup>114</sup>

The BWTC has been criticized on several general grounds. With respect to its style, one commentator reviewing the 1992 preliminary edition stated that

[t]he BWTC reads like a clone of the U.S. Internal Revenue Code (albeit with some differences in policy). Whether or not this is intended to suggest that the IRC “style” is the epitome of legislative drafting, copying the style naturally leads to a thoroughgoing Americanism about the BWTC that is much more pervasive than the authors probably realize.<sup>115</sup>

Other commentators have echoed this criticism insofar as it concerns the use in the BWTC of “Americanisms” (i.e., “U.S.-style jargon that has special meanings in U.S. tax terminology”).<sup>116</sup> Despite Hussey and Lubick’s dismissal of this criticism in the 1996 edition,<sup>117</sup> one commentator has pointed out that employing Americanisms will necessarily create difficulties in translation – the translator will need to be conversant not only in English, but also in the argot of American tax lawyers.<sup>118</sup>

Although it has been asserted that a consensus has formed concerning the “design of effective and stable tax systems,”<sup>119</sup> drafting a tax law naturally requires a number of policy choices to be made, and many of those choices are not the subject of universal agreement.<sup>120</sup> In this regard, the BWTC has been

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114. *Id.*

115. Vann, *supra* note 120, at 274; see also Arnold, *supra* note 120, at 261; Edgar, *supra* note 120, at 347. Notwithstanding the changes made in the 1996 edition, U.S. tax lawyers will still find themselves on very familiar ground when reading the income tax portion of the BWTC. See generally Richard K. Gordon, *Model Codes and Tax Technical Assistance: Note on the Revised Edition of the Basic World Tax Code and Commentary*, 12 *Tax Notes Int’l* 927 (1996).

116. Vann, *supra* note 120, at 274; see also Goode, *supra* note 120, at 192; Gordon, *supra* note 120, at 282-84; Krever, *supra* note 25, at 195; Muten, *supra* note 120, at 179.

117. BWTC, *supra* note 25, at 6 (“any BWTC provision that is enacted will necessarily be translated into another tongue, we leave to the translator the choice of the appropriate local idiom”).

118. Richard Krever, *Drafting Tax Legislation: Some Lessons from the Basic World Tax Code*, 12 *Tax Notes Int’l* 915, 919-20 (1996); see also Vann, *supra* note 120, at 274-76.

119. Jenkins, *supra* note 118, at iii; see also Krever, *supra* note 24, at 211; Muten, *supra* note 120, at 179; Vanistendael, *supra* note 120, at 463.

120. See Vann, *supra* note 105, at 276 (“In fact, every provision of a tax law involves a larger or smaller policy choice. For those who doubt this proposition, turn up a page or two of the BWTC and ask if the provisions found there could be done any differently in a policy sense.”); see also Arnold, *supra* note 105, at 261; Goode, *supra*

criticized for its failure to present alternative policy choices in the text of the sample tax code.<sup>121</sup> Hussey and Lubick rejected this approach as too cumbersome, choosing instead to present in each case only one of the possible alternatives in the text of the BWTC – the alternative that they preferred; however, they do, from time to time, supplement their preferred alternative with a brief mention of other alternatives in the commentary.<sup>122</sup> Some commentators have taken this criticism a step further and have questioned the approach of drafting a sample tax code at all, because such a code embraces policy choices that an uninformed advisor may unintentionally (and inappropriately) incorporate into local law.<sup>123</sup> These commentators prefer a series of model income tax provisions, which would present various alternative choices and would be accompanied by commentary explaining their origin, the criteria for their selection, and the differences between them.<sup>124</sup>

#### *D. International Organizations*

The transition countries of the CEE/NIS region are also often given tax reform advice by the International Monetary Fund (“IMF”), which holds the purse strings to sometimes sorely needed money,<sup>125</sup> and by international

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note 105, at 189; Krever, *supra* note 118, at 920-21; Krever, *supra* note 25, at 211; Vanistendael, *supra* note 105, at 464.

121. See Graham Glenday, *Basic World Tax Code: Does It Fit the Bill in Sub-Saharan Africa?*, 12 *Tax Notes Int'l* 1343, 1343-45 (1996); Gordon, *supra* note 115, at 934-35; Vann, *supra* note 105, at 276-78.

122. BWTC, *supra* note 25, at 3-4.

123. See Gordon, *supra* note 115, at 934 (“A highly competent lawyer or group of lawyers (such as Hussey and Lubick) would never be fooled into adopting their own sample wholesale in an inappropriate setting. I am worried, however, about what might happen when others refer to their sample.”); Vann, *supra* note 105, at 277 (“If the purpose is to provide both policy advice and drafting assistance, which seems to be the BWTC’s objective, the single draft approach is doubly difficult – . . . because the (presumably unintended) effect of its use will be to smuggle in a whole range of policy choices unbeknownst to the policymakers and administrators looking to the BWTC for help. The last point bears repetition. Drafts rest upon various unstated assumptions about a whole range of topics, as we have seen in the analysis of the BWTC above. The lack of alternative drafts that allow for variation of the assumptions tends to disguise them.”)

124. Gordon, *supra* note 105, at 279; Vann, *supra* note 105, at 278.

125. Susan Himes & Martine Milliet-Einbinder, *Russia’s Tax Reform*, OECD Observer, Jan. 1999, at 26 (“International lenders have made it clear that they will pull their money out and refuse to make new loans unless they see reforms throughout the economy. Of particular importance is Russia’s tax system and the imperative of improving collection.”); Betsy McKay, *Yeltsin Backs Crackdown on Taxes*; Russian Parliament Endorses Overhaul, *Wall St. J.*, July 6, 1998, at A12 (“The government is scrambling to implement long-promised reforms such as a tax overhaul because it wants



organizations of which they wish to become members (e.g., the Organization for Economic Co-operation and Development (“OECD”)).<sup>126</sup>

*1. The OECD* – The OECD provides assistance to transition countries in a number of different ways. The OECD cooperates with non-member countries through its global forum, “which stresses the strong mutual interest in a common agenda among member and non member countries.”<sup>127</sup> The OECD has also established regional and country programs directed at transition countries.<sup>128</sup> Its country program with the Russian Federation is “the largest and

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to qualify for \$10 billion to \$15 billion in funding from the International Monetary Fund and World Bank that will help calm markets and prevent a potential financial collapse. The IMF has imposed strict conditions for receipt of the aid; it regards passage of the tax code as one of the most important signs that reform is moving forward.”); John Odling-Smee, *Russia’s Vicious Circle of Tax Nonpayment*, *Wall St. J.*, June 16, 1998, at A19 (“[The IMF] strongly agree[s] that an orderly tax system with a reasonable tax burden is vital for output growth to resume. Indeed, a key aim of the Russian government and an element of the IMF’s EFF program is the passage of the Tax Code, which should go a long way toward reducing the burden on taxpayers by eliminating a number of taxes and exemptions and reducing compliance costs. These elements consistently have been a part of Fund advice to the Russian government since the medium-term program was launched in 1996.”); see also, e.g., Letter of Intent from Victor Youshenko, Prime Minister of Ukraine, and Volodymyr Stelmakh, Chairman, National Bank of Ukraine, to Horst Köhler, Managing Director, International Monetary Fund ¶¶ 7-11 (Dec. 5, 2000) (outlining changes in tax policy that the country intends to implement in connection with its request for financial support from the IMF), available at <http://www.imf.org/external/np/loi/2000/ukr/01/index.htm> (last visited Sept. 12, 2003); Memorandum of Economic Policies for July 1, 1998-June 30, 2001 from the Government of Ukraine and National Bank of Ukraine to the International Monetary Fund ¶¶ 6, 25-26 (Aug. 11, 1998) (same), available at <http://www.imf.org/external/np/loi/081198.htm> (last visited Sept. 12, 2003); Statement of the Government of the Russian Federation and Central Bank of Russia on Economic Policies ¶¶ 13-22 (July 13, 1999) (same), available at <http://www.imf.org/external/np/loi/1999/071399.htm> (last visited Sept. 12, 2003).

126. Org. for Econ. Co-operation & Dev., *The OECD in the Wider World*, at [http://www.oecd.org/document/21/0,2340,en\\_2649\\_33709\\_1915989\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/21/0,2340,en_2649_33709_1915989_1_1_1_1,00.html) (last visited Sept. 12, 2003) (“Compliance with OECD standards and best practices in the fiscal area is an important criterion when assessing a country’s request for accession.”) [hereinafter *OECD in the Wider World*].

127. *Id.*

128. See, e.g., Org. for Econ. Co-operation & Dev., *Eurasia: Regional Baltic Programme: About*, at [http://www.oecd.org/about/0,2337,en\\_2649\\_34679\\_1926375\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/about/0,2337,en_2649_34679_1926375_1_1_1_1,00.html) (last visited Sept. 12, 2003); Org. for Econ. Co-operation & Dev., *Eurasia: South Eastern Europe Programme: About*, at [http://www.oecd.org/about/0,2337,en\\_2649\\_34683\\_1926291\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/about/0,2337,en_2649_34683_1926291_1_1_1_1,00.html) (last

most comprehensive” of these programs.<sup>129</sup> At a general level, the Russia program attempts to assist “the Russian tax administration to implement reforms.”<sup>130</sup> More specifically, the program “is designed to familiarise Russian officials with Western tax policies that promote domestic and foreign investment, improve the quality of international tax agreements, and protect taxpayer rights, including confidentiality.”<sup>131</sup>

The specific objectives of the Russia program are achieved through the following means:

First, the Russian Federation participates in seminars on international tax issues and in workshops hosted by the OECD’s multilateral tax centers.<sup>132</sup> The Russian Federation also participates as an observer in the activities of the OECD Committee on Fiscal Affairs.<sup>133</sup> This observership, which commenced in 1998, has been credited with the adoption of a transfer pricing provision in the new Russian Tax Code that is based on the OECD transfer pricing guidelines, the conclusion of tax treaties that follow the OECD Model Income Tax Convention, the improvement of both the quality and timeliness of exchanges of information, and the increasing adoption “of international best practices in tax administration.”<sup>134</sup>

Second, the OECD participates in the Moscow International Tax Centre, which is a joint venture of the Russian State Tax Service, the European Union, and the OECD.<sup>135</sup> The center has hosted more than 100 activities since its establishment in 1993, “ranging from two-day workshops for senior officials on strategic management to two-week seminars on income tax and VAT audits for inspectors.”<sup>136</sup>

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visited Sept. 12, 2003); Org. for Econ. Co-operation & Dev., Country Programme on Taxation with the Russian Federation, at [http://www.oecd.org/document/49/0,2340,en\\_2649\\_34625\\_1909425\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/49/0,2340,en_2649_34625_1909425_1_1_1_1,00.html) (last visited Sept. 12, 2003) [hereinafter OECD Russia Country Program].

129. OECD Russia Country Program, supra note 128.

130. Id.

131. Id.

132. See infra notes 140-143 and accompanying text for a description of the OECD’s multilateral tax centers.

133. OECD Russia Country Program, supra note 128.

134. Centre for Co-operation with Non-Members, Org. for Econ. Co-operation & Dev., OECD and the Russian Federation Co-operation 1992-2000, at 8 (2002), available at <http://www.oecd.org/dataoecd/14/57/2082432.pdf> (last visited Sept. 12, 2003) [hereinafter OECD Russia Co-operation]; see also OECD Russia Country Program, supra note 128.

135. OECD Russia Co-operation, supra note 134, at 9; OECD Russia Country Program, supra note 128.

136. OECD Russia Co-operation, supra note 134, at 9; OECD Russia Country Program, supra note 128.

Finally, the OECD has directly assisted the Russian Federation in its tax reform efforts. OECD officials have met with members of the Budget Committee of the Russian Duma in an effort to engage the Russian legislature in policy dialogue and to help “Parliamentarians to better understand how tax proposals currently under discussion in Russia relate to policies in [OECD] Member countries.”<sup>137</sup> The OECD has also commented on “the development of the international aspects of the Russian tax code,”<sup>138</sup> and has assisted the Russian Federation both in fighting international tax evasion and avoidance and in assessing whether it has “appropriate policies for developing innovative financial instruments and sound, transparent financial institutions and markets.”<sup>139</sup>

In addition to the foregoing methods, the OECD cooperates with and assists transition countries by (i) hosting regional programs to improve the efficiency of tax systems, (ii) hosting multilateral workshops on specific issues relevant to tax reform, and (iii) facilitating policy dialogue at its multilateral tax centers and in the context of in-country assistance.<sup>140</sup> The OECD currently has four multilateral tax centers, which have hosted activities that “have ranged from two-day workshops on income tax policy to three-week seminars on international taxation and tax treaties.”<sup>141</sup> The programs at the multilateral tax centers are designed to “facilitate[] experience-sharing between transition countries and OECD Member countries in the areas of international taxation, tax policy, tax administration and tax training.”<sup>142</sup> These programs also facilitate “the development and adoption of global tax standards in the area of international taxation,” and “promote[] these standards and assist[] non-member

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137. OECD Russia Country Program, *supra* note 128.

138. *Id.*

139. *Id.*

140. OECD in the Wider World, *supra* note 126; see also Jorg-Dietrich Kramer, Bulgaria’s VAT: The Introduction of Western Tax Law into Eastern European Countries Is Sometimes a Dubious Gift, 8 *Tax Notes Int’l* 14, 15 (1994); OECD Offers to Coordinate Western Efforts to Build Better Tax System in Russia, 17 *Tax Notes Int’l* 880 (1998) (“So far the OECD, the U.S. Treasury, and the International Monetary Fund have submitted plans for solving Russia’s tax system woes. [The Secretary-General of the OECD] said each of the plans should be mulled over carefully and that the OECD is well-positioned to assist in that endeavor.”); Central, East European Countries Should Reform Tax Systems, OECD Official Says, *Daily Tax Rep. (BNA)*, at G-4 (Jan. 25, 1991); OECD to Train Tax Officials in Central, Eastern Europe, *Daily Tax Rep. (BNA)*, at G-1 (Feb. 28, 1992); Russian Restructuring, Economic Investment Depends on Stable Tax System, OECD Says, *Daily Tax Rep. (BNA)*, at D-13 (Nov. 5, 1997).

141. Org. for Econ. Co-operation & Dev., The OECD Multilateral Tax Centres, at [http://www.oecd.org/document/9/0,2340,en\\_2649\\_34677\\_1909385\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/9/0,2340,en_2649_34677_1909385_1_1_1_1,00.html) (last visited Sept. 12, 2003).

142. *Id.*

countries to apply them in a correct and efficient way.”<sup>143</sup> Three of these multilateral tax centers focus their activities on the transition countries in the CEE/NIS region.

2. *The IMF* – The IMF also provides tax reform advice to transition countries in the CEE/NIS region. This advice can come in the form of conditions imposed on IMF loans to the transition country,<sup>144</sup> or it can come in the form of technical assistance to the transition country in matters relating to fiscal policy.<sup>145</sup> IMF technical assistance “is provided through staff missions of limited duration, and the placement of experts for periods ranging from a few weeks to a few years.”<sup>146</sup> Technical assistance may also be provided “in the form of technical and diagnostic reports, training courses, seminars, workshops, and on-line advice and support from [IMF] headquarters in Washington, D.C.”<sup>147</sup>

To provide general guidance to developing and transition countries that wish to reform their tax systems, the IMF has published a two-volume set entitled *Tax Law Design and Drafting*.<sup>148</sup> This set is a collaborative effort by a number of authors, most of whom have served either as staff members of or as consultants to the Legal Department of the IMF.<sup>149</sup> The set is based on the experiences of the authors “in drafting laws and advising on tax legislation for over two dozen” developing and transition countries.<sup>150</sup>

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143. *Id.*; see also Stewart, *supra* note 9, at 170 (“Since 1990, the ‘remarkable consensus’ in tax reform advice also has affected reform in transition countries, largely through the work of the OECD and IMF. . . . I suggest that the key factor is the development of an international consensus, or ‘norm,’ of tax reform and policy driven largely by the international institutions, and propounded by non-government tax experts.”).

144. See Jorge Martinez-Vasquez et al., *IMF Conditionality and Objections: The Russian Case* (Int’l Studies Program, Ga. State Univ., Working Paper No. 00-3, 2000), available at <http://isp-aysps.gsu.edu/papers/ispwp0003.pdf> (last visited Sept. 12, 2003); see also sources cited *supra* note 125.

145. Int’l Monetary Fund, *Technical Assistance: A Factsheet*, at <http://www.imf.org/external/np/exr/facts/tech.htm> (last visited Sept. 12, 2003) [hereinafter *Technical Assistance Factsheet*]; see also Liam Ebrill & Oleh Havrylyshyn et al., *Tax Reform in the Baltics, Russia, and Other Countries of the Former Soviet Union*, at v (Int’l Monetary Fund, Occasional Paper No. 182, 1999); Staff of Tax Policy Div., Fiscal Affairs Dep’t, Int’l Monetary Fund, *Technical Assistance on Tax Policy: A Review 8-14* (Int’l Monetary Fund, Working Paper No. 93/65, 1993).

146. *Technical Assistance Factsheet*, *supra* note 145. (emphasis omitted.)

147. *Id.* (emphasis omitted.)

148. *Tax Law Design*, *supra* note 21.

149. François Gianviti, Preface to 1 *id.* at xxiii.

150. Thuronyi, *supra* note 21, at xxvii.

The expressed purpose of Tax Law Design and Drafting is to present the tax laws of developed countries, which “are barely understandable to tax practitioners in the country concerned and are even more impenetrable to outsiders,” in a way that is “relevant and accessible” to officials in developing and transition countries who would look to those laws for guidance.<sup>151</sup> The authors of Tax Law Design and Drafting intend the set to be a useful source for general background, options, and guidelines and examples, which should be supplemented by the study of much more specific material before the task of drafting the tax laws of a particular developing or transition country is undertaken.<sup>152</sup>

The first volume of Tax Law Design and Drafting discusses general issues, such as the legal framework for taxation, the tax legislative process, and the manner in which tax legislation should be drafted. Of particular interest to this article, the chapter on the tax legislative process contains the following advice concerning the issues that should be considered when choosing and employing foreign legal advisors:<sup>153</sup>

- First, foreign legal advisors should be familiar with the local language, and, at a minimum, should be able to read it so that drafting can occur in that language.<sup>154</sup>
- Second, foreign legal advisors should “have a knowledge of comparative tax law.”<sup>155</sup> They should be experts in the tax laws of any country from which legal rules are to be borrowed, and “should not be a person who seeks to impose the law of [her] own country on that of another country, or who, regardless of intentions, is equipped only to do so.”<sup>156</sup>
- Third, foreign legal advisors should not only be experts in tax law, but should also “have substantial experience or skills in drafting tax legislation. Drafting is a subspecialty that most practicing tax lawyers or academics do not normally cultivate, often because it is reserved for specialists in their home countries.”<sup>157</sup>

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151. Id.

152. Id. at xxviii.

153. Richard K. Gordon & Victor Thuronyi, Tax Legislative Process, in Tax Law Design, supra note 21, at 11-14.

154. Id. at 11-12.

155. Id. at 13.

156. Id.

157. Id.

- Fourth, foreign legal advisors should consult local lawyers to ensure that the draft tax legislation “is fully suited to the country’s circumstances,” and, more particularly, that it is consistent with the rest of the country’s legal system.<sup>158</sup>
- Fifth, foreign legal advisors should fully explain draft tax legislation to local officials, and should prepare an explanatory memorandum that explains both how the draft legislation functions and how it differs from existing law.<sup>159</sup>
- Finally, the exact role to be played by foreign legal advisors should be clarified.<sup>160</sup> It is suggested that the local officials keep the foreign legal advisors involved in each step of the legislative process.<sup>161</sup> In addition, although foreign legal advisors should not have the power to make changes in draft legislation prepared by local officials, they “should have an opportunity to raise and explain problems that [they] perceive[.]”<sup>162</sup>

By being aware of these issues from the outset, local officials will increase the chance that the foreign legal advisors’ participation in the drafting process will prove helpful.<sup>163</sup>

The remainder of the first volume of *Tax Law Design and Drafting* is devoted primarily to a discussion of the major taxes other than the income tax (e.g., value-added tax, excise taxes, wealth taxes, and social security tax). The entirety of the second volume is devoted to a discussion of the income tax, with chapters on the individual income tax, the pay-as-you-earn tax on wages, the taxation of income from business and investment, the taxation of enterprises and their owners, the taxation of corporate reorganizations, and the international aspects of the income tax, among others. The first volume also contains two chapters with relevance to the income tax – one concerning presumptive taxation and the other concerning the adjustment of taxes for inflation.

In contrast to the BWTC, *Tax Law Design and Drafting* does not take the form of a sample tax code embodying the preferences of the authors, which may simply be adopted in whole or in part by developing and transition

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158. Id.

159. Id. at 13-14.

160. Id. at 14.

161. Id.

162. Id.

163. Id. at 11.

countries. Rather, the authors of *Tax Law Design and Drafting* have adopted as their framework “a comparative discussion of the tax laws of developed countries,” without any particular focus on the problems of developing and transition countries.<sup>164</sup> The impetus for writing this set and for the differences between it and the BWTC are underscored by the following passage:

The project responds to the suggestion of Richard Vann, who spent a year at the IMF Legal Department in 1990, that there was a need in developing and transition countries for nonprescriptive drafting materials that covered the major choices to be made in constructing a tax system. It represents an effort to distill from our collective experience, and from the tax laws of many other countries of the world, practical guidelines for drafting tax legislation that can be used by officials of developing and transition countries and by their foreign advisors.<sup>165</sup>

### III. THE TERMINOLOGICAL DEBATE

Due at least in part to the efforts of this myriad of experts, transition countries have enacted tax legislation during the past decade that incorporates, or has been influenced by, Western legal rules, concepts, and structures. Naturally, the degree of Western influence on the tax system of any given transition country has varied, with some having felt the impact more strongly than others.<sup>166</sup> The following passage, which primarily describes Western influence on the recently-enacted Russian tax code, is particularly instructive:

Over the course of the preparation of the [Russian] tax code, Shatalov and other drafters of the tax code had numerous discussions with a wide range of tax experts. These experts included foreign advisors, primarily from the USAID-funded tax technical assistance program and the International Monetary Fund, but also from the OECD, the German Ministry of Finance, and the British Know-How Fund. The discussions with these foreign advisors no doubt influenced certain

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164. Thuronyi, *supra* note 21, at xxvii.

165. *Id.*

166. Victor Thuronyi, Introduction to 2 *Tax Law Design*, *supra* note 21, at xxi, xxxi (“The Baltic countries, Georgia, Kazakhstan, the Kyrgyz Republic, and to some extent Uzbekistan and Moldova have adopted systems heavily influenced by international models. Russia and Ukraine have been slower to make fundamental changes, but have nevertheless enacted a substantial volume of tax reform legislation in the income tax area, as with other taxes.”).

provisions in the draft tax code, but not to the extent of foreign influence on the new tax codes of Kazakhstan, Ukraine, and Georgia, substantial portions of which were drafted by foreigners. Both the Russian government and the foreign advisors have been sensitive to the xenophobia of some Russian parliamentarians and have avoided publicity of the foreign advisors' role. . . .

Oddly enough, the Western tax advisory community in Moscow has actively discussed, and sometimes criticized, the role of foreign technical assistance providers in the development of the tax code. A few have even called attention to the American influence in particular by referring to the tax code as 'cut and pasted' from the U.S. Internal Revenue Code. A close examination of the tax code, however, reveals that the drafters have borrowed from many different tax systems around the world.<sup>167</sup>

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167. Joel M. McDonald, *The Rise and Fall of the Russian Government's Draft Tax Code*, 16 *Tax Notes Int'l* 121, 127 (1998) (note that, from 1994-97, the author advised the Russian government on tax reform issues as part of the U.S. Treasury Department's Tax Advisory Program and the Harvard Institute for International Development's Russian Tax Reform Project); see also Charles E. McLure, Jr., *Tax Policy Lessons for LDCs and Eastern Europe* 5-7 (*Int'l Ctr. for Econ. Growth*, Occasional Paper No. 28, 1992); Himes & Milliet-Einbinder, *supra* note 125, at 26 ("The OECD is working closely with Russia—which has observer status in the Organisation's Committee on Fiscal Affairs—to ensure that the code being enacted brings Russia closer to international standards, while equipping administrators with new tools for collecting taxes in a non-discriminatory and fair manner."); Kramer, *supra* note 140, at 14 ("Western tax law, more or less modified and adapted, is being adopted almost everywhere in Eastern Europe. Tax experts from the Western world should be glad that the laws with which they are more or less familiar are considered so attractive in the developing Eastern European democracies. Unfortunately, the happy response to this event cannot be unfettered when the conditions under which Western tax law is adopted are taken into critical consideration."); Stewart, *supra* note 12, at 1329 ("Radical income tax reform since 1992 in many of these [transition] countries has been heavily influenced by international models, one of which is the Basic World Tax Code produced by Ward Hussey and Donald Lubick. Reform in transition countries has also been driven by structural adjustment packages of the IMF, with reliance on IMF technical assistance." (footnote omitted)); Stewart, *supra* note 9, at 142-43 ("This mapping will allow us to understand the role of external influence in tax reform projects. Whereas tax reform in developed countries falls within the domain of domestic government policy, many tax reform projects in developing and transition countries are largely a product of external influence. In transition countries, this influence performs a crucial role in conversion of the fiscal system from that suitable to a socialist state with a planned economy to a state organized for a market economy." (footnotes omitted)); see generally Holmes, *supra* note 25, at 18-19 (indicating that "[t]his transition [from a centrally-planned to a market



Labeling a phenomenon such as the propagation of tax rules recounted in this passage requires logical and analytical skill. Confined within a finite vocabulary, one must choose the label that most accurately describes the phenomenon being observed. But, in choosing a label, one must not stop there – while logical and analytical skills are important, one cannot overlook the creative aspect of this endeavor.<sup>168</sup> Choosing the most appropriate label also requires something akin to literary skill in selecting the term that best evokes the impressions, feelings, and emotions that one would like the term to conjure in the mind of the listener when she hears it or in the mind of the reader when she reads it.

As this Part details, the current terminology for describing the propagation of tax rules in transition countries falls short on all of these counts. In its place, this Part suggests alternative terminology that would both more accurately describe the process of propagating tax (and other legal) rules *and* evoke the generally neglected<sup>169</sup> ethical dimension of this phenomenon. Hopefully, by employing terminology that is redolent of an ethical conundrum to describe their activities, we can give American neutral experts reason to pause and reflect before advocating the propagation of Western tax rules in transition countries.

#### A. The Extant Terminological Alternatives

Comparatists have suggested a panoply of different terms to serve in the role of metaphorical shorthand for the propagation of legal rules.<sup>170</sup> Some of these terms do no more than limn the overall phenomenon. For example, the term “penetration” describes the phenomenon from the point of view of the

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economy] entailed an examination of Western-style tax systems with the *ideal* objective of transposing the best features of them into the newly emerging economic systems of the former Soviet states, after making appropriate adjustments that took into account the particular characteristics of each state,” but then emphasizing “the need for (particularly Western) advisors to tax policymakers to take cognizance of cultural differences between them and the recipient of advice”).

168. See generally Jack A. Hiller & Bernhard Grossfeld, *Comparative Legal Semiotics and the Divided Brain: Are We Producing Half-Brained Lawyers?*, 50 *Am. J. Comp. L.* 175 (2002).

169. Otto Kahn-Freund does cast his discussion of the importability of legal rules in terms of the situations in which law reformers may appropriately use – or inappropriately misuse – comparative law. See *infra* notes 358-382 and accompanying text.

170. See, e.g., Alan Watson, *Legal Transplants: An Approach to Comparative Law* 30 (2d ed. 1993) [hereinafter *Watson, Legal Transplants II*]; Ajani, *supra* note 7, at 93 n.1; Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 *Am. J. Comp. L.* 229, 236 n.14 (1991).

home legal environment, while the terms “absorption” and “importation” describe it from the point of view of the recipient legal environment.<sup>171</sup> Other terms are intended to categorize the variety of circumstances under which penetration or importation can occur:<sup>172</sup>

- “Reception” is the voluntary and conscious importation of a legal rule.<sup>173</sup> There are three categories of receptions: “true” receptions (when the reception is not due to any outside pressure),<sup>174</sup> “crypto-receptions” (when the reception is surreptitious or concealed),<sup>175</sup> and “imposed” receptions (when the reception, albeit voluntary and conscious, is induced by outside pressure).<sup>176</sup>
- “Imposition” is contrasted with reception, and occurs “where the law is not received from within a society by its people or legislator but is imposed from without.”<sup>177</sup> There are two

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171. See Guido Tedeschi, *On Reception and On the Legislative Policy of Israel*, 16 *Scripta Hierosolymitana* 11-12, 14 (1966). For the sake of simplicity, I will hereinafter refer to the overall phenomenon as penetration or importation, as the context requires.

172. See *id.* at 12 (“To characterize the importation of law as a reception it is not enough to show that the provisions in question were imported from a given foreign system; it is also necessary to show *how* they were imported.”); see also Kálmán Kulcsár, *Forced Adaptation and Law-Making: A Functional Aspect of Comparative Law*, in *Law in East and West: On the Occasion of the 30th Anniversary of the Institute of Comparative Law*, Waseda University, 243, 244 (1988) (“the basis of this typification [i.e., as ‘reception’ or ‘acculturation’] is formed by the historical circumstances and conditions that ‘*motivate*’ the adoption of law and which are the components of the social and historical situation in which the reception takes place”).

173. Tedeschi, *supra* note 171, at 14-15; see also Max Rheinstein, *Types of Reception*, in 6 *Annales de la Faculté de Droit d’Istanbul* 33, 35-36 (1956).

174. Tedeschi, *supra* note 171, at 12; see also Kulcsár, *supra* note 172, at 243-44 (describing “true” reception in terms of “legal acculturation,” which, although it “embraces the fact of reception,” is “broader than the usual interpretation of this term. It also embraces the psychological, sociological and cultural spheres of law, that is, not only change in the law but also change in legal culture”); *id.* at 254-56 (describing “cultural reception” as “the introduction of a broader context of which the law forms a part and precisely because of the longer period of time involved in the reception and its acculturation nature, the receiving environment is favourable for the law”).

175. Tedeschi, *supra* note 171, at 16.

176. *Id.* at 12; see also Kulcsár, *supra* note 172, at 244, 249-54 (referring to “imposed” receptions as “forced adaptations”).

177. Tedeschi, *supra* note 171, at 12; see also Rheinstein, *supra* note 173, at 34, 35-36.

categories of impositions: “true” impositions and “solicited” impositions (when the imposition is made at the request of the recipient).<sup>178</sup>

- “Infiltration” is the importation of a legal rule that “is not regarded as a rule peculiar to one system or another (although it is in fact no more than that) but is regarded rather as a rule which every legal system demands” or that is merely regarded as “the law.”<sup>179</sup>
- “Inoculation” is the importation of a limited amount of legal rules from another system in order “to give strength and coherence to its native fibre, and to enable it to resist successfully any general reception at a later date.”<sup>180</sup>
- “Coincidental or parallel development” is the importation of a legal rule “in ignorance of the fact that it already exists or existed in some other country.”<sup>181</sup>

Comparatists have generally come to refer to the process through which penetration or importation occurs as “transplantation,” after the style of Alan Watson, who has been, by far, the most prolific writer on this subject.<sup>182</sup> Watson defines legal transplantation as “the moving of a rule or a system of law from one country to another, or from one people to another.”<sup>183</sup>

178. Tedeschi, *supra* note 171, at 14 (“It must be admitted that in Palestine as in other British dependencies the ‘natives’ themselves often asked for the introduction of English law; that is, certain sections of the local population desired it. But even in these cases one cannot speak of a real reception, if only because a choice between English law and other law simply did not exist in the circumstances . . . . At best one can describe the process as an intermediate state between a reception and an imposition, parallel to, but the reverse of, the phenomenon discussed by Professor Rheinstein: instead of an ‘imposed reception’ there was here a ‘solicited imposition.’”).

179. *Id.* at 15.

180. *Id.* at 16 (quoting R.W. Lee, *Roman Law in the British Empire, Particularly in the Union of South Africa*, in 2 *Atti del Congresso Internazionale di Diritto Romano* 251 (1934-35)). See *id.* at 16-20 for an argument that the metaphor of an “immunizing inoculation” is inapposite.

181. *Id.*

182. Edward M. Wise, *The Transplant of Legal Patterns*, 38 *Am. J. Comp. L.* 1, 1 (Supp. 1990).

183. Watson, *Legal Transplants II*, *supra* note 170, at 21. Rheinstein had earlier employed the term “transplantation” in a narrower sense. He used the term to describe two different situations: first, where, under a system of personal law, a group migrates from one place to another, taking its law with it, and second, where, under a system of

Notwithstanding the pervasive use of this term, some commentators have expressed their discomfort with describing the process of effectuating penetration or importation as “legal transplantation.”<sup>184</sup>

Upon reflection, it quickly becomes clear that the term “transplantation” does not accurately describe the process through which penetration or importation is effectuated. As Pierre Legrand has pointed out, the word “[t]ransplant’ . . . implies displacement.”<sup>185</sup> Webster’s New World Dictionary of the American Language defines the verb “transplant” as

1. to dig up (a growing plant) from one place and plant in another
2. to remove (people) from one place and resettle in another
3. *Surgery* to transfer (tissue or an organ) from one individual or part of the body to another; graft.<sup>186</sup>

What each of these definitions has in common is the notion that something (a plant, a person, tissue, or an organ) has been removed from one location and has been deliberately placed in another.

These definitions each contemplate the existence, at all times, of only one such thing; in other words, at any given time, the plant, person, tissue, or organ either exists in the home environment, in the recipient environment, or in transit between the two – the item being transplanted never exists in more than one of these three locations at the same time. When a legal rule is imported into a recipient environment, however, the rule does not cease to exist in the

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territorial law, a group migrates from “an old, settled country in to what may be called empty or virgin soil” (or its equivalent). Rheinstejn, *supra* note 173, at 34-35. With respect to this point, consider the following passage from Watson, *Legal Transplants II*, *supra* note 170, at 29-30:

Voluntary major transplants – that is, when either an entire legal system or a large portion of it is moved to a new sphere – fall into three main categories. First when a people moves into a different territory where there is no comparable civilisation, and takes its law with it. Secondly, when a people moves into a different territory where there is a comparable civilisation, and takes its law with it. Thirdly, when a people voluntarily accepts a large part of the system of another people or peoples.

184. See, e.g., Wiegand, *supra* note 170, at 236 n.14 (expressing general dissatisfaction with the existing terminology used to “describe or explain the effective procedure of reception”); Wise, *supra* note 182, at 12 (“It seems less apt to talk in terms of ‘transplants’; that makes a process almost as natural as breathing sound like major surgery.”).

185. Pierre Legrand, *The Impossibility of ‘Legal Transplants,’* 4 *Maastricht J. Eur. & Comp. L.* 111, 111 (1997).

186. Webster’s New World Dictionary of the American Language 1512 (2d college ed. 1984).

home environment; indeed, following penetration or importation, the rule exists in both the home and recipient environments simultaneously. For this reason, the term “transplantation” is an inapposite metaphor for the process of effectuating penetration or importation.<sup>187</sup>

Commentators have proposed alternatives to the term “legal transplant.” For example, Edward Wise has suggested that the term “circulation” be used in place of “legal transplant.”<sup>188</sup> Wise describes circulation as “the movement, the continual flow of legal paradigms and ideas across national frontiers.”<sup>189</sup> Referring to the frequency with which one U.S. state imports law from another, Wise indicates that “[i]t may not be inapt to think of such pervasive borrowing as involving the circulation or diffusion or transmission of ideas.”<sup>190</sup> But, as defined by Wise, the term “circulation” does not appear to describe the nature of the process of effectuating penetration or importation; rather, it appears to describe the frequency with which that process occurs.

Shen Zongling has argued that there is “no substantial difference between the phrase legal transplant and drawing on or assimilating,” which is the terminology used in China to describe this phenomenon.<sup>191</sup> Once again, neither the phrase “drawing on” nor the term “assimilating” appears to describe the process of effectuating penetration or importation. Instead, the phrase “drawing on” should be included in the list of terms intended to categorize the circumstances under which importation can occur. The phrase implies that the importation is being accomplished by, and at the instance of, the recipient legal system, and connotes both a voluntariness and consciousness of the actions being taken. Accordingly, the phrase “drawing on” would more appropriately be characterized as a synonym of the term “reception” than as a synonym of the

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187. Watson appears to use the term “borrowing” interchangeably with the term “transplantation.” See, e.g., Alan Watson, *The Evolution of Western Private Law* 193-217 (2001) [hereinafter *Watson, Evolution*]; Watson, *Legal Transplants II*, supra note 170, at 107-18; Alan Watson, *Aspects of Reception of Law*, 44 *Am. J. Comp. L.* 335 (1996) [hereinafter *Watson, Reception*]; Alan Watson, *Legal Change: Sources of Law and Legal Culture*, 131 *U. Pa. L. Rev.* 1121 (1983) [hereinafter *Watson, Legal Change*]. This term, which in its etymological sense suggests that the recipient environment will at some point return the “borrowed” rule to the home environment, would seem to be equally inapposite. See *Webster’s New World Dictionary of the American Language* 164 (2d college ed. 1984) (“borrow . . . 1. to take or receive (something) with the understanding that one will return it or an equivalent”); *id.* at xii (indicating that the senses of an entry in the dictionary are generally “arranged in semantic order from the etymology to the most recent sense”).

188. Wise, supra note 182, at 1.

189. *Id.*

190. *Id.* at 12.

191. Shen Zongling, *Legal Transplant and Comparative Law*, *Revue Internationale de Droit Comparé* 853, 857 (1999).

term “transplantation.” As for the term “assimilating,” it is a synonym of absorption and, therefore, should be considered as describing the overall phenomenon rather than as describing the nature of the process of effectuating penetration or importation.

*B. A New Alternative*

A timely and more accurate description of the process of effectuating penetration or importation would be the cloning of a legal rule, followed by its implantation in a recipient environment. In its strictest sense,<sup>192</sup> the term “cloning” refers to the production of an exact copy;<sup>193</sup> however, in its modern usage, cloning is more loosely defined as “asexual reproduction of any kind,” and includes within its ambit such commonplace occurrences as when a plant is grown from cuttings or when a bacterium procreates by splitting itself in two.<sup>194</sup>

The term “cloning” also includes within its ambit “molecular cloning, cellular cloning, embryo twinning, [and] somatic cell nuclear transfer”:<sup>195</sup>

In molecular cloning, strings of DNA containing genes are duplicated in a host bacterium. In cellular cloning, copies of a cell are made, resulting in what is called a “cell line,” a very repeatable procedure where identical copies of the original cell can be grown indefinitely. In embryo twinning, an embryo that has already been formed by sexual reproduction is split into two identical halves. Theoretically, this process could continue indefinitely, but in practice, only a limited number of embryos can be twinned and retwinned. Somatic cell nuclear transfer is the process of taking the nucleus of an adult cell and

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192. Stuart H. Orkin, *Animal Cloning and Related Embryo Research: Implications for Medicine*, in 2 Nat'l Bioethics Advisory Comm'n, *Cloning Human Beings: Report and Recommendations of the National Bioethics Advisory Commission: Commissioned Papers at A-1, A-4* (1997) [hereinafter *NBAC Commissioned Papers*].

193. Arlene Judith Klotzko, *Voices from Roslin: The Creators of Dolly Discuss Cloning Science, Ethics, and Social Responsibility*, in *The Cloning Sourcebook* 3, 10 (Arlene Judith Klotzko ed., 2001) [hereinafter *Sourcebook*].

194. Craig M. Klugman & Thomas H. Murray, *Cloning, Historical Ethics, and NBAC*, in *Human Cloning* 3, 6-7 (James M. Humber & Robert F. Almeder eds., 1998); see also Glenn McGee, *A Pragmatic Approach to Human Cloning*, in *Sourcebook*, supra note 193, at 173, 175; Potter Wickware, *History and Technique of Cloning*, in *The Human Cloning Debate* 17, 20-21 (Glenn McGee ed., 1998) [hereinafter *Debate*].

195. Gregory E. Pence, *Introduction to Flesh of My Flesh: The Ethics of Cloning Humans: A Reader*, at ix (Gregory E. Pence ed., 1998); see also Wickware, supra note 194, at 27-32.

implanting it in an egg cell where the nucleus has been removed; this process could be used to originate a human child.<sup>196</sup>

Technically, somatic cell nuclear transfer, which is the technique that was used to produce the lamb Dolly,<sup>197</sup> does not result in the production of an exact copy of the original. Consequently, somatic cell nuclear transfer, which is what many people actually have in mind when they talk about human cloning, does not constitute cloning in the strict sense of that term, but will constitute cloning in the looser, modern sense.<sup>198</sup>

Employing the term in this looser, modern sense, cloning is an apt metaphor for the process of effectuating penetration or importation. As described above, the primary difficulty with referring to this process as “transplantation” is the implication that the transplanted legal rule ceases to exist in its home environment once the penetration or importation has occurred.<sup>199</sup> The term “cloning” avoids this problem by positing a reproduction or replication of the legal rule prior to its implantation in the recipient environment. Cloning also embraces a wide variety of copying, from copying at the molecular or cellular level to copying an entire animal or human being.<sup>200</sup> Thus, the term can appropriately be used to refer to the penetration or importation of all or part of a single legal rule, a set of legal rules, or an entire legal system. In addition, by employing the term in its looser sense, it is not necessary that the copy be an exact reproduction of the original.<sup>201</sup> As a result,

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196. Pence, *supra* note 195, at ix.

197. See *infra* note 210 and accompanying text.

198. Orkin, *supra* note 192, at A-4 (“[I]t has been assumed that the ‘cloned animal’ [i.e., Dolly] has a single parental origin, that of the adult somatic cell from which the donor nucleus was taken. This is largely, but not entirely, correct, as the egg’s cytoplasm contributes intracellular organelles, including mitochondria and accompanying mitochondrial DNA, to the future ‘clone.’ Mitochondria contribute very little DNA to the cell. Nonetheless, some human diseases are attributable to mutations in mitochondrial DNA. The genetic composition of a ‘clone’ created by nuclear transfer may, therefore, not be precisely identical to that of the donor cell, although its nuclear genome is presumed to be. This seemingly minor detail is not meant to diminish the near genetic identity of the cloned animal and the parental cell, but merely to illustrate that perfect duplication of an individual animal by nuclear transfer may not be attained by the procedures described thus far. Hence, if cloning humans were ever to take place, the individuals produced would, by definition, be non-identical (unless the somatic cell and the recipient egg were from the same woman.)”); see also Klotzko, *supra* note 193, at 10-11; Pence, *supra* note 195, at xi-xii.

199. See *supra* notes 185-187 and accompanying text.

200. See *supra* note 195 and accompanying text.

201. See *supra* note 198 and accompanying text.

the term “cloning” could also include within its ambit those legal rules that are altered or modified prior to penetration or importation.

The cloning metaphor is particularly apposite if one believes that a rule is more than just a mere formulation of words, and that it is only suffused with meaning when it is the subject of interpretation:

No form of words purporting to be a ‘rule’ can be completely devoid of semantic content, for no rule can be without meaning. The meaning of the rule is an essential component of the rule; it partakes in the ruleness of the rule. The meaning of a rule, however, is not entirely supplied by the rule itself; a rule is never completely self-explanatory. To be sure, meaning emerges from the rule so that it must be assumed to exist, if virtually, within the rule itself even before the interpreter’s interpretive apparatus is engaged. To this extent, the meaning of a rule is acontextual. But, meaning is also – and perhaps mostly – a function of the application of the rule by its interpreter, of the concretization or instantiation in the events the rule is meant to govern. This ascription of meaning is predisposed by the way the interpreter understands the context within which the rule arises and by the manner in which she frames her questions, this process being largely determined by who and where the interpreter is and, therefore, to an extent at least, by what she, in advance, wants and expects (unwittingly?) the answers to be. The meaning of the rule is, accordingly, a function of the interpreter’s epistemological assumptions which are themselves historically and culturally conditioned.<sup>202</sup>

Based on experience with identical twins (who are naturally occurring clones), it has similarly been argued that a clone of a human being will be more than just a mere composite of genetic material.<sup>203</sup> Few would doubt that the personal

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202. Legrand, *supra* note 185, at 114.

203. See Inmaculada de Melo-Martín, *On Cloning Human Beings*, 16 *Bioethics* 246, 249-50 (2002); Raanan Gillon, *Human Reproductive Cloning: A Look at the Arguments Against It and a Rejection of Most of Them*, in *Sourcebook*, *supra* note 193, at 184, 190; Arlene Judith Klotzko, *Animal Cloning: The Pet Paradigm*, in *Sourcebook*, *supra* note 193, at 169, 170; Richard Lewontin, *The Confusion over Cloning*, in *Debate*, *supra* note 194, at 125, 129; Orkin, *supra* note 192, at A-4 to A-5; Peter Singer, *Cloning Humans and Cloning Animals*, in *Sourcebook*, *supra* note 193, at 160, 162, 163; Wickware, *supra* note 194, at 39-40. But cf. James Q. Wilson, *The Paradox of Cloning*,



identity or individuality of a human clone would be different from that of its parent if the clone were raised in a different environment (e.g., a different time period or a different place). In the end, the parent and the clone might look alike, but they would be entirely different individuals with different personalities. Thus, even though the term “cloning” – as applied to the process of effectuating penetration or importation – would imply the duplication of the structure of the legal rule, it would countenance divergences in later development by dint of implantation in a foreign legal environment.

In his book *Legal Transplants*, Alan Watson abstained from entering into this terminological debate, and he challenged others who would demonstrate that terminology can have an impact on the substantive debate concerning the penetration and importation of legal rules.<sup>204</sup> I disagree with Watson on this point, because I believe that there is an independent utility to classification and categorization.<sup>205</sup> If one has decided to undertake the task of choosing a descriptive label for a phenomenon, then one should make every effort to choose the label that most accurately describes that phenomenon. An incorrect label has the potential to mislead others about the phenomenon’s true nature and fundamentally (and, most likely, unconsciously) to misshape their thinking about it. Accordingly, I would argue that the term “cloning” should

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in Leon R. Kass & James Q. Wilson, *The Ethics of Human Cloning* 61, 67 (1998) (arguing that claims “that the environment will have a powerful effect on a cloned child . . . [have been] exaggerated”).

204. Watson, *Legal Transplants II*, supra note 170, at 30 (“Actually, receptions and transplants come in all shapes and sizes. One might think also of an imposed reception, solicited imposition, penetration, infiltration, crypto-reception, inoculation and so on, and it would be perfectly possible to distinguish these and classify them systematically . . . . There is, I suggest, no point in elaborating a detailed classification of borrowing until individual instances have been examined to see what they reveal. It is up to those (if any) who would wish to elaborate types of transplantation to show what new light the classification would cast on the data.” (footnote omitted)). Although Watson’s challenge appears to concern only further classification beyond his meta-level labeling of the process as “legal transplantation” (either because he assumed that this term was correct or because, even if incorrect, any error would be harmless), his challenge would presumably also apply to any suggestion that this label be replaced with another.

205. Despite his challenge, Watson apparently agrees with me on this point. In fact, he dedicates an entire chapter of *Legal Transplants* to the importation of Roman systematics in Scotland and to discussing the importance of systematization (and classification). Watson, *Legal Transplants II*, supra note 170, at 36-43 (see especially pages 41-43 and note 13); see also Watson, *Evolution*, supra note 187, at 258 (indicating that civil law countries’ acceptance of the *Corpus Juris Civilis* had “profound consequences” for their legal systems, including the placement of an “academic and systematic” emphasis on law and the use of the *Corpus Juris Civilis* as a model for the codification of local law).

replace “legal transplants” even in the absence of an impact on the substantive debate concerning the penetration and importation of legal rules.

Nevertheless, I would argue that Watson’s challenge has been met, because terminology *can* have an impact on the substantive debate concerning the penetration and importation of legal rules. Given its link with the ethical debate over human cloning, the term “cloning,” if applied to the process of effectuating penetration or importation, would clearly and immediately evoke the (for the most part, neglected)<sup>206</sup> ethical dimension of this phenomenon in a way that “legal transplants” and other less accurate terms have not.

Use of the term “cloning” would also cause discussions of this phenomenon to become freighted with the baggage that naturally accompanies that term. In the popular imagination, the word “cloning” is associated with books such as Aldous Huxley’s *Brave New World* and Ira Levin’s *The Boys from Brazil* and with motion pictures such as *Jurassic Park*.<sup>207</sup> These and other associations have given the word a decidedly negative connotation,<sup>208</sup> and its use should naturally cause one to question the ethical propriety of engaging in any process that it labels. As a result, by referring to the process of effectuating penetration or importation as “cloning,” not only will the label more accurately reflect the underlying activity it is meant to describe, but it will also add a needed dose of caution to discussions of, and attempts at, penetration or importation.

#### IV. THE NORMATIVE BASIS OF THE ETHICAL GUIDELINES

Armed with terminology that now punctuates thoughts of propagating tax rules with an ethical question mark, we can turn to the task of developing guidelines that may help American neutral experts to resolve these newly-raised issues. The first step in this process will be to ascertain the relevant norm or set

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206. See *supra* note 169.

207. Klugman & Murray, *supra* note 194, at 3, 9, 10, 26.

208. See Gregory E. Pence, *Who’s Afraid of Human Cloning* 49 (1998) (“‘Clone’ connotes sub-human, zombie-like, insect-like behavior. It is associated with phrases such as ‘an army of clones’ and ‘Slave Clones of Caldor.’ It is really in the same class as dozens of other nasty terms that slur the racial, ethnic, and sexual origins of a person.”); David K. Chan, *Book Review: Who’s Afraid of Human Cloning*, 13 *Bioethics* 440, 441 (1999) (“Pence proposes the neutral phrase ‘nuclear somatic transfer’ (NST) in place of the emotionally-charged word ‘cloning’.”); Gillon, *supra* note 203, at 194-95 (“It is in the context of the social and personal harms of human reproductive cloning that *Brave New World* (and also the Ira Levin book of 1976, *Boys from Brazil*, in which clones of Hitler are bred in an attempt to rekindle the Nazi enterprise) has done so much to turn us against cloning, even succeeding in rendering the term pejorative.”); McGee, *supra* note 194, at 175 (“To avoid the pejorative overtone about clones and cloning, Pence suggests a new term: ‘somatic cell nuclear transfer.’”).

of norms that will guide our thinking about the ethical aspects of tax cloning. Given the role of the attorney-client relationship as the benchmark for setting the ethical boundaries within which American neutral experts should confine their activities, legal ethics would be the natural source of the relevant norm(s). Nevertheless, before having recourse to legal ethics, I propose continuing our sojourn in the world of bioethics a bit longer.

In light of the similarity that we have encountered between cloning and the process for effectuating the penetration or importation of legal rules, the experience of bioethicists with the debate over human cloning may prove useful in developing ethical guidelines for tax cloning. To tap into this experience, this Part will begin by exploring the bioethics debate over human cloning. The arguments for and against cloning will first be discussed with an eye toward ascertaining the norm or set of norms around which the debate is framed. Once we have identified the relevant norm or set of norms that underpin the debate over human cloning, this Part will consider whether an analogous legal norm or set of norms exists that may be used to develop ethical guidelines for tax cloning.

The process of developing ethical guidelines for tax cloning will then be completed in Part V, when the relevant legal norm or set of norms identified in this Part will be suffused with specific content and meaning as they relate to tax cloning.

#### *A. The Bioethics Debate*

The latest phase in the ethical debate over human cloning<sup>209</sup> was triggered by the announcement in February 1997 of the birth of a lamb named Dolly.<sup>210</sup> Dolly had been cloned from the mammary cells of a six-year old adult sheep by Dr. Ian Wilmut and his colleagues at the Roslin Institute near Edinburgh, Scotland.<sup>211</sup> The birth of Dolly was considered a breakthrough because, contrary to the then-prevailing scientific consensus,<sup>212</sup> Dr. Wilmut and

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209. For a historical overview of the ethical debate over cloning, see Klugman & Murray, *supra* note 194.

210. See Gina Kolata, *With the Cloning of a Sheep, the Ethical Ground Shifts*, N.Y. Times, Feb. 24, 1997, at A1. It was recently reported that Dolly had been “put to death after developing a lung infection.” Gina Kolata, *First Mammal Clone Dies; Dolly Made Science History*, N.Y. Times, Feb. 15, 2003, at A4. At the time of her death, Dolly was six years old. *Id.*

211. Kolata, *supra* note 210.

212. Arlene Judith Klotzko, *A Report from America: The Debate About Dolly*, in *Sourcebook*, *supra* note 193, at 121, 121; Klotzko, *supra* note 193, at 13 (comments of Keith Campbell); Orkin, *supra* note 192, at A-3; Pence, *supra* note 195, at x; Lee M. Silver, *Thinking Twice, or Thrice, About Cloning*, in *Sourcebook*, *supra* note 193, at 61, 63.

his colleagues demonstrated that it is possible to clone a mammal from an adult somatic cell.<sup>213</sup> Prior to Dolly's birth, "this feat had been accomplished only with cells of early embryos and only in selected non-primates."<sup>214</sup>

Although the product of this cloning was a lamb, Dolly's birth did not generate a debate about animal cloning.<sup>215</sup> Instead, what ensued was a vigorous debate over the propriety of human cloning and the related question whether a temporary or permanent ban on such activity should be enacted.<sup>216</sup> In the course of this debate, a number of arguments have been marshaled both for and against human cloning. These arguments will first be summarized and then an attempt will be made to ascertain whether they share a common normative basis that can be seen as providing a framework for this debate.<sup>217</sup>

*1. Arguments Against Human Cloning* – Both secular and religious arguments have been marshaled against human cloning. Opponents of human

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213. Orkin, *supra* note 192, at A-3. A somatic cell (as opposed to a germ cell) is one that has differentiated. See Clarissa Long & Christopher DeMuth, Introduction to Kass & Wilson, *supra* note 203, at vii, xi. Keith Campbell, one of the scientists on the Roslin Institute team, has described differentiation as "the specialization of cells to perform particular functions. Although all cells contain a complete copy of the genome [all the genes and other DNA], the specific genes that are turned on in a cell are those required for it to fulfill its particular function." Klotzko, *supra* note 193, at 11.

214. Orkin, *supra* note 192, at A-3.

215. Singer, *supra* note 203, at 165.

216. See Pence, *supra* note 208, at 1 ("On February 24, 1997, every paper in the world carried a front-page story about a lamb named 'Dolly' that had been cloned near Edinburgh, Scotland by Ian Wilmut. It was immediately apparent that Wilmut's cloning techniques might be applied to humans. Never in the history of modern science had the world seen such an instant, overwhelming condemnation of the application to humanity of a scientific breakthrough."); Orkin, *supra* note 192, at A-3 ("while it extends the envelope of animal cloning, the Wilmut experiment has raised immediate concern regarding the implications of this technology, if developed further, for humans"); Silver, *supra* note 212, at 63 ("Of course, it wasn't the cloning of a sheep that stirred the imaginations of hundreds of millions of people. It was the idea that humans could now be cloned as well, and many people were terrified by the prospect."); Hans O. Tiefel, Human Cloning in Ethical Perspectives, in Human Cloning, *supra* note 194, at 179, 179 ("The news of the scientific feat of cloning a sheep did not evoke popular press prophecies of flocks of identical sheep . . . , but of armies of cloned soldiers marching to the orders of a dictator, of cadres of replicated scientific geniuses controlling our future world.").

217. Because the purpose of this Part is to ascertain the normative basis of the arguments made in the debate over human cloning, consideration of the merits of these arguments is not germane to the instant discussion and, therefore, will not be undertaken. Suffice it to say that the existence and/or scope of the rights, harms, and benefits described in the text below is often the subject of dispute among the participants engaged in this debate.

cloning have made these arguments either in support of a total ban on human cloning or in support of a ban on human cloning for the near future. The secular and religious arguments against human cloning will be summarized separately below.

*A. Secular Arguments* – The secular arguments against human cloning are cast either in terms of the “rights” that are implicated by cloning or in terms of the effects that cloning may have on individuals or on society as a whole. The rights that may be implicated by cloning include “the right to have a unique identity and [the] right to ignorance about one’s future or to an ‘open future.’”<sup>218</sup> It is argued that each of these rights would be infringed if cloning were to be permitted.

The arguments concerning the effects that cloning may have on individuals or on society as a whole can generally be categorized under one of three rubrics: (i) risk of physical harm to those participating in the cloning process, (ii) risk of psychological harm to those participating in the cloning process, and (iii) risk of harm to society as a whole.<sup>219</sup> The following is a description of the arguments made under each of these three rubrics:

*Risk of Physical Harm.* It has been argued that, at present, insufficient knowledge exists concerning the safety of somatic cell nuclear transfer to warrant its application to humans.<sup>220</sup> Commentators making this argument point to the fact that, in the case of Dolly, it took 277 attempts to obtain one live birth from cloning.<sup>221</sup> They also point to reports of animal experiments that “have produced many abnormal embryos and fetuses, many spontaneous abortions, and many abnormal births.”<sup>222</sup> Concerns have also been raised that clones

218. Dan W. Brock, *Cloning Human Beings: An Assessment of the Ethical Issues Pro and Con*, in NBAC Commissioned Papers, *supra* note 192, at E-1, E-11 to E-14; see also Gillon, *supra* note 203, at 191; Michael Tooley, *The Moral Status of the Cloning of Humans*, in *Human Cloning*, *supra* note 194, at 67, 77-85.

219. de Melo-Martín, *supra* note 203, at 248; Silver, *supra* note 212, at 65.

220. See Pence, *supra* note 208, at 131-34; R. Alta Charo, *Cloning: Ethics and Public Policy*, 27 *Hofstra L. Rev.* 503, 506-07 (1999); George J. Annas, *The Prospect of Human Cloning: An Opportunity for National and International Cooperation in Bioethics*, in *Human Cloning*, *supra* note 194, at 53, 60; Leon R. Kass, *The Wisdom of Repugnance*, in Kass & Wilson, *supra* note 203, at 3, 31-32; Ina Roy, *Philosophical Perspectives*, in *Debate*, *supra* note 194, at 41, 46-47; Silver, *supra* note 212, at 65-66; Tooley, *supra* note 218, at 74-77.

221. Brock, *supra* note 218, at E-16; de Melo-Martín, *supra* note 203, at 248.

222. Gillon, *supra* note 203, at 195; see also Arthur L. Caplan, *Does Ethics Make a Difference? The Debate over Human Cloning*, in *Sourcebook*, *supra* note 193, at 158.

produced from adult somatic cells may be prone to diseases associated with premature aging.<sup>223</sup>

*Risk of Psychological Harm.* It has been argued that cloning may impose an intolerable psychological burden on the clone:

If clones feel burdened by having a very close resemblance to one parent, if they feel that their future is not their own because they were made to conform to someone else's expectations and dreams . . . , if they feel overwhelmed by the burden of knowing too much about their biological destiny because it is written in the body and appearance of the parent from which they came, if they elicit inappropriate or hostile reactions from parents and others, then it may prove to be too burdensome to ask someone to go through his or her life as a clone.<sup>224</sup>

In the same vein, it has been argued that, because of the prevalence of genetic essentialism<sup>225</sup> in common thought, cloning violates the autonomy and human dignity of the clone by denying her the ability to live her life as she determines rather than in the shadow of her parent.<sup>226</sup> In addition, the parents of a clone may do it psychological harm if they have expectations (as opposed to hopes) for their cloned child:

Still, if most parents have hopes for their children, cloning parents will have expectations. In cloning, such overbearing parents take at the start a decisive step that contradicts the entire meaning of the open and forward-looking nature of parent-child relations. The child is given a genotype that has already lived, with full expectation that the blueprint of a past

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223. Gillon, *supra* note 203, at 195; Caplan, *supra* note 222, at 158. For a summary of research concerning the rate of aging of clones, see Klotzko, *supra* note 193, at 17.

224. Caplan, *supra* note 222, at 158; see also Pence, *supra* note 208, at 135-40; Alta Charo, *supra* note 220, at 506; Gillon, *supra* note 203, at 195-96; Kass, *supra* note 220, at 33-34; Klotzko, *supra* note 203, at 171; Silver, *supra* note 212, at 66-67; Carson Strong, *Cloning and Infertility*, 7 *Cambridge Q. Healthcare Ethics* 279, 282-86 (1998); Tooley, *supra* note 218, at 93-94.

225. Genetic essentialism, which is also referred to as genetic determinism, is defined as "the idea that genes determine psychology and personality." Soren Holm, *A Life in the Shadow: One Reason We Should Not Clone Humans*, in *Sourcebook*, *supra* note 193, at 203, 204; see also Brock, *supra* note 218, at E-12.

226. Holm, *supra* note 225, at 205-06; see also Brock, *supra* note 218, at E-14 to E-15; de Melo-Martin, *supra* note 203, at 250; Gillon, *supra* note 203, at 190-94.

life ought to be controlling of the life that is to come. Cloning is inherently despotic, for it seeks to make one's children (or someone else's children) after one's own image (or an image of one's choosing) and their future according to one's will. In some cases the despotism may be mild and benevolent. In other cases it will be mischievous and downright tyrannical. But despotism – the control of another through one's will – it inevitably will be.<sup>227</sup>

Moreover, the potential for psychological harm to the women donating the eggs and carrying the clones has been raised in light of the fact that Dolly was the one successful birth out of 277 attempts.<sup>228</sup>

*Risk of Harm to Society.* It has been argued that cloning could result in a number of different harms to society:<sup>229</sup>

- *Eugenics.* Cloning opens the door to eugenics, which could be used to racist ends or for exploitative purposes or could lead to a division in society between the “superior” clones and the “inferior” others.<sup>230</sup>
- *Reducing Respect for Human Life.* Cloning reduces respect for human life by making human beings seem “replaceable” or “made to order.”<sup>231</sup> Similarly, cloning would reduce respect for human life if commercial interests were able to sell “genetically certified and guaranteed embryos for sale, perhaps offering a catalogue of different embryos cloned from individuals with a variety of talents, capacities, and other desirable properties.”<sup>232</sup>

227. Kass, *supra* note 220, at 41-42.

228. Gillon, *supra* note 203, at 195.

229. See Silver, *supra* note 212, at 67.

230. Pence, *supra* note 208, at 141-42, 143-44; Alta Charo, *supra* note 220, at 504, 506; Brock, *supra* note 218, at E-20; Gillon, *supra* note 203, at 196; Rosamond Rhodes, Clones, Harms, and Rights, in Sourcebook, *supra* note 193, at 208, 209; Roy, *supra* note 220, at 47-53; Strong, *supra* note 224, at 287-88; Tooley, *supra* note 218, at 91-92; Wilson, *supra* note 203, at 65.

231. de Melo-Martín, *supra* note 203, at 252-53; see also Annas, *supra* note 220, at 59; Brock, *supra* note 218, at E-18; Kass, *supra* note 220, at 27; Strong, *supra* note 224, at 286-87; Tooley, *supra* note 218, at 95-96.

232. Brock, *supra* note 218, at E-19; see also Alta Charo, *supra* note 220, at 506; Kass, *supra* note 220, at 39-40.

- *Threatening Stability of Family.* Cloning threatens the stability of the nuclear family by allowing a child “to be born from a single parent or to have up to seven parents” and by creating “confusion about who is the mother, the father, the grandparents, or the siblings.”<sup>233</sup>
- *Dehumanizing.* Cloning “is inherently dehumanizing” because it severs “procreation from sex, love, and intimacy.”<sup>234</sup>
- *Threat to Evolution.* Cloning represents a threat to human evolution because it reduces “the genetic variability of the human race.”<sup>235</sup>
- *Replication of Mistakes.* Cloning raises the specter of a “geometric increase through germline inheritance of any mistakes that are created.”<sup>236</sup>
- *Limited Public Resources.* Because it appears at present that cloning “uniquely meet[s] important human needs” in only a limited number of cases, using public funds to support cloning would divert those resources from more pressing needs.<sup>237</sup> In addition, if infants with birth defects were to result from cloning, society would be burdened with the costs of supporting those children.<sup>238</sup>
- *Sexism.* Cloning could foster sexism, because it could be used as a tool by men to control women.<sup>239</sup> The fear here is that “women would become Stepford Wives and would choose assisted reproduction only because they were coerced by men in their lives or by the male values of the larger society.”<sup>240</sup> If the child were cloned from the man, “[t]he wife would . . .

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233. de Melo-Martín, *supra* note 203, at 251; see also Alta Charo, *supra* note 220, at 504; Kass, *supra* note 220, at 33, 36; Strong, *supra* note 224, at 288; Wilson, *supra* note 203, at 72.

234. Kass, *supra* note 220, at 31; see also Pence, *supra* note 208, at 73-82; Alta Charo, *supra* note 220, at 504.

235. Gillon, *supra* note 203, at 196; see also Pence, *supra* note 208, at 129-31; Brock, *supra* note 218, at E-20; Wilson, *supra* note 203, at 68-69.

236. Gillon, *supra* note 203, at 196.

237. Brock, *supra* note 218, at E-19; Roy, *supra* note 220, at 54.

238. Roy, *supra* note 220, at 54.

239. Pence, *supra* note 208, at 142-43.

240. *Id.* at 142.



appear to some to be just the ‘handmaid’ of the husband and male son, to be discarded once the new male is produced.”<sup>241</sup>

*B. Religious Arguments* – Lee Silver, who cannot be counted among the opponents of human cloning,<sup>242</sup> has argued that people who voice any one or more of these concerns are – either consciously or subconsciously – hiding the real reason they oppose cloning. They have latched on to arguments about safety, psychology, and society because they are simply unable to come up with an ethical argument that is not based on the religious notion that by cloning human beings, man will be playing God, and it is wrong to play God.<sup>243</sup>

In light of Silver’s views, a brief exposition of the religious objections to human cloning should aid in elucidating the normative basis of this ethical debate.

From a Christian perspective, several different categories of objections or concerns about cloning have been raised. These categories have been labeled “responsible dominion over nature,” “human dignity,” and “procreation and the importance of the family”:<sup>244</sup>

*Responsible Dominion over Nature.* The rubric “responsible dominion over human nature” embraces concerns arising out of the need to demarcate the boundary between scientific inquiry that is “an appropriate expression of the image of God” and scientific inquiry that is “an inappropriate expression of human hubris or pride, that is, human usurpation of a role that is properly reserved to God.”<sup>245</sup>

*Human Dignity.* Objections have been raised against cloning on the ground that it violates human dignity, because it would compromise the uniqueness of the clone and of its parent.<sup>246</sup>

*Procreation and the Importance of the Family.* Cloning is considered to depart from the “normative view”<sup>247</sup> of procreation that is set forth in The Bible, which contemplates that procreation should take place between a man

241. *Id.*

242. McGee, *supra* note 194, at 175.

243. Silver, *supra* note 212, at 65; see also Pence, *supra* note 208, at 122, 126-27; James Rachels, *The Principle of Agency*, 12 *Bioethics* 150, 160-61 (1998).

244. Jan C. Heller, *Religiously Based Objections to Human Cloning: Are They Sustainable?*, in *Human Cloning*, *supra* note 194, at 155, 158.

245. *Id.* at 162; see also Leon R. Kass, *Family Needs Its Natural Roots*, in Kass & Wilson, *supra* note 203, at 77, 79.

246. Heller, *supra* note 244, at 168; see also Campbell, *supra* note 254, at D-35.

247. Gilbert Meilander, *Cloning Violates the Dignity of Children*, in *Debate*, *supra* note 194, at 189, 191.

and a woman in the context of a marital union.<sup>248</sup> By departing from the biblical prescription for procreation, cloning violates the dignity of conjugal relations.<sup>249</sup> Cloning also violates the human dignity of the child because the child is “made” rather than “begotten”<sup>250</sup> – we view that which we beget to be of equal dignity with ourselves, while we view that which we have made as being subject to our will and our desires.<sup>251</sup> In addition, cloning harms the child by depriving it “of the normal, nurturing relationship with engendering parents.”<sup>252</sup> The biblical view of procreation is considered in itself to be good because “[o]nly in and through the personal act of marital intercourse is the new life engendered best served. The child will be better nurtured if the parents are committed to one another and to their common social task, the raising of a family.”<sup>253</sup>

Judaism is committed to “an ethic of responsibility or duty, rather than an ethic of rights.”<sup>254</sup> The overriding duty that is derived from the Torah and rabbinic commentary is “the preservation of human life.”<sup>255</sup> The existence of this duty could make it “possible to support cloning when it is presented as a therapeutic remedy for a genetic disease or condition, such as infertility, that besets an individual or couple.”<sup>256</sup> But balanced against this is one of the exceptions to the duty to preserve human life: the prohibition of idolatry.<sup>257</sup> Furthermore, “[t]he ethic of responsibility is . . . expressed in Jewish norms of parenthood and the responsibilities of lineage.”<sup>258</sup> Reservations and objections would increase to the extent that the processes of becoming a parent were “separated from the actual creation of life.”<sup>259</sup> Cloning would diminish the ethic of responsibility by changing roles and relationships, thereby making it

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248. See *id.*; John Haas, Catholic Perspectives on Human Cloning, in *Debate*, supra note 194, at 205; Stephen G. Post, The Judeo-Christian Case Against Cloning, in *Debate*, supra note 194, at 197; see also Pence, supra note 208, at 79-81; Kass, supra note 245, at 79; Wilson, supra note 203, at 63.

249. See Haas, supra note 248, at 208; Heller, supra note 244, at 170; Meilander, supra note 247, at 192.

250. See Haas, supra note 248, at 211-12; Heller, supra note 244, at 170; Meilander, supra note 247, at 193-96.

251. Meilander, supra note 247, at 194-95.

252. Haas, supra note 248, at 208.

253. *Id.*; see also Meilander, supra note 247, at 192-93; Post, supra note 248, at 202.

254. Courtney S. Campbell, Cloning Human Beings: Religious Perspectives on Human Cloning, in *NBAC Commissioned Papers*, supra note 192, at D-1, D-29.

255. *Id.*

256. *Id.* at D-29 to D-30.

257. *Id.* at D-30.

258. *Id.*

259. *Id.*

“unclear who has responsibilities to whom between and among the generations.”<sup>260</sup>

The primary issue in the Islamic debate over cloning “is the question of the ways in which cloning might affect familial relationships and responsibilities.”<sup>261</sup> In Islam, interpersonal relationships are considered to be “fundamental to human religious life,” the family is “the fundamental institution to further these relationships,” and “the spousal relationship in marriage [is] the cornerstone of the prime social institution of the family for the creation of a divinely ordained order.”<sup>262</sup> Accordingly, “Muslims [should] have little problem with endorsing this technology,” but only to the extent that it is limited to therapeutic uses in aiding infertile married couples within the boundaries of the spousal relationship (i.e., there can be no third-party assistance through egg or sperm donation).<sup>263</sup> An additional issue in the Islamic ethical debate over cloning “is the problem of determining the moral status of the technology itself.”<sup>264</sup> Due to concerns of spiritual equality, the preservation of human dignity, and distributive justice, Muslims are troubled by the potential use of cloning for eugenics, the potential for cloning to result in the commodification of persons, and the need to address more immediately pressing, basic needs before pursuing costly research related to cloning.<sup>265</sup>

Both Buddhist and Hindu teachings may be interpreted as not being opposed to cloning per se, because each of these religions contains stories of creation that may be analogized to cloning.<sup>266</sup> Nevertheless, the scientific research necessary for the development of cloning technology would be circumscribed in Buddhism by the “[p]art of the ‘Noble Eightfold Path’ promulgated by the Buddha [that] prohibits infliction of violence or harm on sentient beings”<sup>267</sup> and in Hinduism by “*ahimsa*, or the non-injury of sentient beings.”<sup>268</sup>

*2. Arguments in Favor of Permitting Cloning*—In form, the proponents’ arguments are cast in the same terms as the secular arguments of the opponents of human cloning; in other words, they are cast either in terms of the rights that

260. *Id.*

261. Abdulaziz Sachedina, *An Islamic View, in Debate*, supra note 194, at 231, 237.

262. *Id.* at 237, 238.

263. *Id.* at 238; see also Campbell, supra note 254, at D-28 to D-29.

264. Sachedina, supra note 261, at 238.

265. *Id.* at 238-39, 241; Campbell, supra note 254, at D-28.

266. See Campbell, supra note 254, at D-23 to D-24, D-26 to D-27; Ravi Ravindra et al., *Buddhists on Cloning, in Debate*, supra note 194, at 227, 227-30.

267. Campbell, supra note 254, at D-25 (emphasis omitted); see also Ravindra, supra note 266, at 227-28 (comments of William LaFleur).

268. Campbell, supra note 254, at D-26.

are implicated by cloning or in terms of the effects that cloning may have on individuals or on society as a whole. In content, however, the arguments in favor of permitting cloning appear like a photographic negative of the arguments against cloning.

With respect to the rights that may be implicated by human cloning, proponents focus on the possibility that a ban on human cloning would infringe the rights of those who might wish to engage in cloning. It has been argued that, given the centrality of the right to liberty in our society, cloning should be permitted “unless it can be shown to cause harm to others in the enjoyment of their rights.”<sup>269</sup> More specifically, it has been argued that this right to liberty takes the form of “a right to reproductive freedom or procreative liberty,” which “includes not only the familiar right to choose not to reproduce, for example by means of contraception or abortion, but also the right to reproduce.”<sup>270</sup> In addition, it has been argued that a separate moral right may be implicated in the ethical debate over cloning: “the right to freedom of scientific inquiry and research in the acquisition of knowledge,” which may be considered part of the more general right to freedom of expression.<sup>271</sup>

With respect to the arguments concerning the effects that human cloning may have on individuals or on society as a whole, proponents have attempted to minimize the specter of harm raised by the opponents of human cloning, and they have countered with a list of cloning’s potential benefits.<sup>272</sup> Included in this list of benefits are:

- *Treating Infertility.* Cloning can aid infertile couples in having children who are genetically related to them, and thereby alleviate the psychological burdens and difficulties that may accompany the inability to have children.<sup>273</sup>

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269. Rhodes, *supra* note 230, at 209; see also Jean E. Chambers, *Equal Access to Cloning*, 11 *Cambridge Q. Healthcare Ethics* 169, 179 (2002).

270. Brock, *supra* note 218, at E-4 to E-5; see also Pence, *supra* note 208, at 100-01; Alta Charo, *supra* note 220, at 505-06; Gillon, *supra* note 203, at 194; Kass, *supra* note 220, at 42; Timothy F. Murphy, *Entitlement to Cloning*, 8 *Cambridge Q. Healthcare Ethics* 364 (1999); John Robertson, *Cloning as a Reproductive Right*, in *Debate*, *supra* note 194, at 67; Strong, *supra* note 224, at 280-82; Tiefel, *supra* note 216, at 182-83.

271. Brock, *supra* note 218, at E-7; see also Kass, *supra* note 220, at 42.

272. See Pence, *supra* note 208, at 99-148; Rhodes, *supra* note 230, at 208-12.

273. Pence, *supra* note 208, at 106-08; Alta Charo, *supra* note 220, at 503-04; Brock, *supra* note 218, at E-7; de Melo-Martín, *supra* note 203, at 254; Kevin T. Fitzgerald, *Human Cloning: Analysis and Evaluation*, 7 *Cambridge Q. Healthcare Ethics* 218, 220 (1998); Kass, *supra* note 220, at 16; Rhodes, *supra* note 230, at 211; Robertson, *supra* note 270, at 68; Roy, *supra* note 220, at 53; Tooley, *supra* note 218, at 90.

- *Combating Genetic Diseases.* Cloning can be used to fight genetic diseases by allowing “couples at high risk of having offspring with a genetic disease . . . [to] decide to originate a child by cloning in order to avoid the risks of transmitting the genetic disease.”<sup>274</sup>
- *Bringing back the Dead.* Cloning could be used to replace loved ones who had passed away – either to have “a baby who would share with the dead one some specific trait . . . [or] to accept the loss and move on with their lives.”<sup>275</sup>
- *Creating a Matching Donor.* Cloning could be used to obtain a donor who is a perfect match for an existing child who is suffering from an illness that requires as part of its treatment either organ or bone marrow transplantation.<sup>276</sup>
- *Duplicating Extraordinary Individuals.* Cloning could benefit society by re-creating individuals with “great talent, genius, character, or other exemplary qualities.”<sup>277</sup>
- *Opening the Way to Further Scientific Advances.* Engaging in human cloning or in human cloning research could lead to “important potential advances in scientific or medical knowledge.”<sup>278</sup> In particular, it has been argued that cloning could aid psychologists in resolving the nature versus nurture debate.<sup>279</sup> This particular knowledge is said to be of not only theoretical, but also practical, interest, because it would “enable one to develop approaches to childrearing that will increase the likelihood that one can raise people with desirable

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274. de Melo-Martín, *supra* note 203, at 259; see also Pence, *supra* note 208, at 101-06; Brock, *supra* note 218, at E-7 to E-8; Fitzgerald, *supra* note 273, at 219-20; Kass, *supra* note 220, at 16; Robertson, *supra* note 270, at 68.

275. de Melo-Martín, *supra* note 203, at 261-62; see also Brock, *supra* note 218, at E-9; Fitzgerald, *supra* note 273, at 221; Kass, *supra* note 220, at 16; Robertson, *supra* note 270, at 72.

276. Brock, *supra* note 218, at E-8; see also Alta Charo, *supra* note 220, at 504; Fitzgerald, *supra* note 273, at 220-21; Kass, *supra* note 220, at 16; Robertson, *supra* note 270, at 68, 72, 73; Singer, *supra* note 203, at 164; Tooley, *supra* note 218, at 91.

277. Brock, *supra* note 218, at E-9 to E-10; see also Kass, *supra* note 220, at 16; Tooley, *supra* note 218, at 86-88.

278. Brock, *supra* note 218, at E-10 to E-11.

279. Tooley, *supra* note 218, at 86.

traits, people who will have a better chance of realizing their potentials, and of leading happy and satisfying lives.”<sup>280</sup>

- *Creating Happier and Healthier People.* Cloning could “make it possible to increase the likelihood that the person that one is bringing into existence will enjoy a healthy and happy life.”<sup>281</sup> A person who is cloned from someone who has lived a long life free of mental and physical disease will be assured of an increased chance at a happy and healthy life, at least to the extent that health and character are determined by genetics.<sup>282</sup>
- *Making a More Satisfying Childrearing Experience.* To the extent that parents can obtain children with traits that they desire through cloning, their childrearing experience will be more satisfying for them.<sup>283</sup> Where the child is cloned from one of the parents, the childrearing experience could also be rendered more satisfying by attempting to rectify the mistakes that the parent deems to have been made during her own childhood and adolescence.<sup>284</sup>
- *Enhancing the Genetic Connection Between Parent and Child.* To the extent that a genetic connection between parent and child is considered valuable, cloning would enhance this connection. During the period immediately after birth, women tend to be more connected with babies than men by dint of their having engaged in child-bearing and breast-feeding. Men tend to bond with children equally with women only after these activities have been completed. By cloning the child from the father, however, both parents would have a strong connection with the child from the outset.<sup>285</sup>
- *Facilitating Child-Rearing by Gay and Lesbian Couples.* Cloning could also expand the options available to gay and lesbian couples that wish to have children. In the case of lesbian couples, cloning would also allow the child to have a genetic connection to both members of the couple (rather than

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280. Id.

281. Id. at 88.

282. Id.

283. Id. at 88-89.

284. Id. at 89-90.

285. Pence, *supra* note 208, at 108-12.

just one, as would be the case with in vitro fertilization) by having one member donate the egg and the other donate the nucleus.<sup>286</sup>

- *Empowering Single Women.* By allowing women to reproduce without the need for the participation of a man, cloning could “empower women to make autonomous choices about whether, with whom, and how they want to reproduce.”<sup>287</sup>

3. *The Normative Basis of the Bioethics Debate* – Having summarized the arguments both in opposition to and in favor of permitting human cloning, these arguments can now be examined with an eye toward ascertaining whether they share some common normative basis that may also serve as the basis for developing ethical guidelines for tax cloning. Notwithstanding the “pronounced deontological flavor” of the debate over human cloning, an examination of these arguments reveals an underlying norm that is consistent with the generally consequentialist cast of American bioethics.<sup>288</sup> Whether implicitly or explicitly,

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286. See *id.* at 114-15; Murphy, *supra* note 270; Tooley, *supra* note 218, at 90-91.

287. Jean E. Chambers, *May a Woman Clone Herself?*, 10 *Cambridge Q. Healthcare Ethics* 194, 194 (2001).

288. Klotzko, *supra* note 212, at 123-24; see also Tom L. Beauchamp & James F. Childress, *Principles of Biomedical Ethics* 114 (5th ed. 2001) (“Many types of ethical theory, including both utilitarian and nonutilitarian theories, recognize a principle of nonmaleficence.”); *id.* at 166 (“Beneficence and benevolence have played central roles in some ethical theories. Utilitarianism, for example, is systematically arranged on a principle of beneficence (the principle of utility) . . . .”); *id.* at 348 (“Although we have characterized utilitarianism as primarily a *consequence*-based theory, it is also *beneficence*-based. That is, the theory sees morality primarily in terms of the goal of promoting welfare.”). Beauchamp and Childress describe consequentialism as follows:

*Consequentialism* is a label affixed to theories holding that actions are right or wrong according to the balance of their good and bad consequences. The right act in any circumstances is the one that produces the best overall result, as determined from an impersonal perspective that gives equal weight to the interest of each affected party. The most prominent consequence-based theory, utilitarianism, accepts one and only one basic principle of ethics: the principle of utility. This principle asserts that we ought always to produce the maximal balance of positive value over disvalue (or the least possible disvalue, if only undesirable results can be achieved).

*Id.* at 340-41; see also Edward J. Eberle, *Three Foundations of Legal Ethics: Autonomy, Community, and Morality*, 7 *Geo. J. Legal Ethics* 89, 115 (1993); Roy, *supra* note 220,

the common normative denominator of all of the arguments described above is the principle of nonmaleficence.<sup>289</sup>

Nonmaleficence is one of the four basic moral principles identified by Beauchamp and Childress in their seminal<sup>290</sup> work, *Principles of Biomedical Ethics*.<sup>291</sup> The other three principles identified by them are beneficence, respect for autonomy, and justice.<sup>292</sup> Beauchamp and Childress derived all four of these principles from the common morality (i.e., those norms that “bind all persons in all places”), and identified them after examination of “considered moral judgments and the way moral beliefs cohere.”<sup>293</sup> Beauchamp and Childress contend that, together, these four principles provide a framework for analyzing

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at 42. In contrast, Beauchamp and Childress describe the deontological (or Kantian) view of morality as “a theory that some features of actions other than or in addition to consequences make actions right or wrong.” Beauchamp & Childress, *supra*, at 348-49; see also Eberle, *supra*, at 115; Roy, *supra* note 220, at 43. Under this view, moral judgments should rest “on reasons that also apply to others who are similarly situated” (the “categorical imperative”). Beauchamp & Childress, *supra*, at 349, 350; see also Eberle, *supra*, at 117-18. A formulation of the categorical imperative that is particularly relevant to the debate over human cloning is the notion that human beings should be treated as ends in themselves and not merely as a means to an end. See, e.g., John Harris, *Cloning and Human Dignity*, 7 *Cambridge Q. Healthcare Ethics* 163 (1998); John Harris, *Is Cloning an Attack on Human Dignity?*, 387 *Nature* 754 (1997); Axel Kahn, *Clone Mammals . . . Clone Man?*, 386 *Nature* 119 (1997); see also Beauchamp & Childress, *supra*, at 350-51 (generally describing this formulation of the categorical imperative); Roy, *supra* note 220, at 43 (same).

289. See generally Klugman & Murray, *supra* note 194, at 32, 39 (indicating that harm has been a major concern throughout the debate over human cloning).

290. Roger B. Dworkin, *Emerging Paradigms in Bioethics: Introduction*, 69 *Ind. L.J.* 945, 946 (1994); see also Susan M. Wolf, *Shifting Paradigms in Bioethics and Health Law: The Rise of a New Pragmatism*, 20 *Am. J.L. & Med.* 395, 399 (1994) (indicating that *Principles of Biomedical Ethics* has had a “pervasive influence” in modern bioethics).

291. Beauchamp & Childress, *supra* note 288. Wolf states that, although Beauchamp and Childress did not originate these four principles, their book did, however, “[give] them great currency.” Wolf, *supra* note 290, at 400.

292. Beauchamp & Childress, *supra* note 288, at 12. Beauchamp and Childress indicate that, historically, nonmaleficence and beneficence have played a central role in medical ethics, “whereas respect for autonomy and justice were neglected in traditional medical ethics but came into prominence because of recent developments.” *Id.*; see also Nancy S. Jecker, *Introduction to the Methods of Bioethics*, in Nancy S. Jecker et al., *Bioethics: An Introduction to the History, Methods, and Practice* 113, 114 (1997).

293. Beauchamp & Childress, *supra* note 288, at 3, 12-13 (emphasis omitted).



problems in biomedical ethics.<sup>294</sup> As such, these four principles “have become the most familiar litany recited in bioethics.”<sup>295</sup>

Beauchamp and Childress define the principle of nonmaleficence as the “obligation not to inflict harm on others.”<sup>296</sup> For purposes of this discussion, the principle of nonmaleficence can best be understood by juxtaposing it with the closely related principle of beneficence. Beauchamp and Childress define the principle of beneficence as the “obligation to act for the benefit of others,”<sup>297</sup> and they further divide this principle into three distinct norms: (i) “one ought to prevent evil or harm,” (ii) “one ought to remove evil or harm,” and (iii) “one ought to do or promote good.”<sup>298</sup>

294. Beauchamp & Childress, *supra* note 288, at 12. Beauchamp and Childress’ approach to reasoning about ethical problems has been labeled “principlism.” Wolf, *supra* note 290, at 399. Over time, Beauchamp and Childress have come to reject a purely deductivist approach to principlism in favor of a dialectical approach in which principles provide normative guidance and individual cases help to shape the boundaries of those principles. See John D. Arras, *Principles and Particularity: The Roles of Cases in Bioethics*, 69 *Ind. L.J.* 983, 986-87 (1994); Wolf, *supra* note 290, at 396.

The paradigm of principlism has dominated the field of bioethics “[f]or the bulk of its short history.” Wolf, *supra* note 290, at 399; see also Arras, *supra*, at 986; Sandra H. Johnson, *The Changing Nature of the Bioethics Movement*, 53 *Md. L. Rev.* 1051, 1051, 1060 (1994); Franklin G. Miller et al., *Clinical Pragmatism: John Dewey and Clinical Ethics*, 13 *J. Contemp. Health L. & Pol’y* 27, 27 (1996). Principlism’s historic dominance of the field has, however, been called into question. For example, Wolf has argued that bioethics is undergoing a paradigm shift, as “a plethora of alternative methods has recently been put forth, a new empiricism has challenged the content of previously accepted principles, and burgeoning feminist and race-attentive work has rendered suspect any bioethical approach geared to the generic ‘patient.’” Wolf, *supra* note 290, at 398. For a critique of principlism, see K. Danner Clouser & Bernard Gert, *A Critique of Principlism*, 15 *J. Med. & Phil.* 219 (1990). See also Arras, *supra*, at 991-1006, and Wolf, *supra* note 290, at 403-08, for a discussion of some of the shortcomings of principlism as well as a description of some of the alternative methods that have been developed. See Beauchamp & Childress, *supra* note 288, at 384-97, for a response to these critiques. Wolf argues that, when this shift is viewed as “part of larger trends,” what appears to be occurring is a move toward pragmatism. Wolf, *supra* note 290, at 398. For an attempt at articulating the paradigm of pragmatism, see Miller et al., *supra*, and for a pragmatic view of the ethical debate over human cloning, see McGee, *supra* note 194.

295. Wolf, *supra* note 290, at 400; see also Jecker, *supra* note 292, at 117-18.

296. Beauchamp & Childress, *supra* note 288, at 113.

297. *Id.* at 166 (emphasis omitted).

298. *Id.* at 115. Some commentators do not recognize the principle of beneficence. They reject the idea of an “obligation” to act beneficently, and recognize beneficence only as a moral ideal. *Id.* at 115, 388. Other commentators combine nonmaleficence and beneficence into a single principle. *Id.* at 114. Beauchamp and Childress reject both of these positions. *Id.* at 114, 390. They recognize both the principle of nonmaleficence and the principle of beneficence, and they treat each of

Beauchamp and Childress describe the relationship between nonmaleficence and beneficence as follows: “No sharp breaks exist on the continuum from not inflicting harm to providing benefit, but principles of beneficence potentially demand more than the principle of nonmaleficence because agents must take positive steps to help others, not merely refrain from harmful acts.”<sup>299</sup> By juxtaposing these two principles, the differing impact that each has on the actions of individuals comes into focus – nonmaleficence imposes an obligation *not* to take action, while beneficence imposes an obligation *to* take action.<sup>300</sup> Accordingly, the principle of nonmaleficence can be considered as undergirding the arguments made in the debate over human cloning only if two separate conditions exist: first, the obligation at issue must be one *not* to take action, and second, the obligation not to take action must stem from the potential harm that would be caused if action were to be taken.

With respect to the arguments made by opponents of human cloning, both of these conditions are satisfied. First, all of the opponents’ arguments are aimed at convincing others that either a temporary or permanent ban on human cloning should be put in place. A ban on cloning would impose an obligation to refrain from engaging in that activity – which is the essence of the first condition described above.

Second, the impetus for the arguments in favor of a ban on human cloning is the harm that cloning could potentially cause – which is the essence of the second condition described above. Some opponents argue that permitting human cloning would infringe an individual’s right to a unique identity and/or her right to an open future. Infringing these rights would not only constitute a wrong, but could also produce psychological harm to the person whose rights have been infringed.<sup>301</sup> With regard to the effects that cloning may have on individuals and on society as a whole, opponents put forth a number of reasons why they believe that cloning will risk (i) physical harm to those involved in the cloning process, (ii) psychological harm to those involved in the cloning process, and (iii) harm to society as a whole. In each case, these arguments are explicitly framed in terms of the harm that cloning may cause.

Avoiding the infliction of harm is also the rationale for the religious objections to human cloning:

From the perspective of Christianity, the objections to human cloning are based on (i) the harm caused by human hubris in attempting to usurp the

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them separately on the ground that to combine them together would “obscure[] relevant distinctions.” *Id.* at 114-15.

299. *Id.* at 165; see also *id.* at 168.

300. See Robert Araujo, *The Virtuous Lawyer: Paradigm and Possibility*, 50 *SMU L. Rev.* 433, 449 (1997).

301. See Brock, *supra* note 218, at E-14 to E-15. See Beauchamp & Childress, *supra* note 288, at 116-17, for an elaboration of the distinction between “wronging” and “harming” another person.

role of God; (ii) the harm caused when human dignity is violated by compromising the uniqueness of individuals; (iii) the harm caused by violating the dignity of conjugal relations; and (iv) the harm to the clone caused by violating its human dignity and depriving it of the normal, nurturing relationship that results from procreation in the context of a marital union.

From the perspective of Judaism, the objections to human cloning are based on the harm caused by violating the prohibition of idolatry and by diminishing the ethic of responsibility.

From the perspective of Islam, human cloning raises issues about its possible negative impact on familial relations as well as some of the same issues about its potential harms (e.g., commodification and the proper distribution of resources) identified by secular opponents of cloning.

From the perspective of Buddhism and Hinduism, even though cloning may be permissible, the development of the technology to perfect the cloning process could run afoul of restrictions on the infliction of harm on sentient beings.

Thus, the secular and religious arguments of opponents of human cloning satisfy both of the conditions described above. In each case, opponents are arguing that an obligation not to take action should be imposed, and the arguments for imposing that obligation stem from the harm that would be caused if action were to be taken. Because they have satisfied both of the conditions described above, it can be concluded that these arguments are based on an application of the principle of nonmaleficence to the specific context of human cloning.

With respect to the arguments made by proponents of human cloning, both of the conditions described above are also satisfied. First, the proponents of human cloning argue against interference with the development of the technique of cloning and with the implementation of that technique. An obligation to refrain from interfering with the development and use of cloning technology can be conceptualized as an obligation not to take action – which, once again, is the essence of the first condition described above.

Second, proponents of human cloning posit the existence of countervailing rights that would be implicated if human cloning were to be banned (either temporarily or permanently), and these rights serve as the moral basis for this obligation to refrain from interference. According to the proponents, the rights implicated by a ban on human cloning are the right to reproductive freedom and the right to the freedom of scientific inquiry and research in the pursuit of knowledge. The proponents argue that to ban human cloning would infringe these rights. The infringement of these rights would not only constitute a wrong, but could also produce psychological harm to the person whose rights have been infringed (and, in the case of the right to freedom of scientific inquiry, other types of harm could easily be imagined) – the potential for such harm is, once again, the essence of the second condition

described above.<sup>302</sup> Thus, with respect to the arguments concerning the rights implicated by a ban on human cloning, both of the conditions described above have been satisfied, and it can be concluded that these arguments are based on an application of the principle of nonmaleficence to the specific context of human cloning.

The proponents of human cloning also attempt to undercut the opponents' arguments by minimizing the existence and/or scope of the harms identified by them and by countering with a list of the potential benefits of human cloning. The list of potential benefits of human cloning serves the additional purpose of bolstering the proponents' rights-based arguments discussed in the previous paragraph. As has already been established, the principle of nonmaleficence undergirds both the opponents' arguments that are being undercut and the proponents' arguments that are being bolstered. Thus, the arguments minimizing the harms identified by the opponents of human cloning and the list of potential benefits assembled by the proponents of human cloning should be considered as derivatively satisfying the second condition described above, and should, therefore, also be considered to be based on an application of the principle of nonmaleficence to the specific context of human cloning.<sup>303</sup>

To summarize, all of the arguments made by both the opponents and proponents of human cloning constitute an application of the principle of nonmaleficence to the specific context of human cloning. In other words, the obligation to refrain from causing harm either explicitly or implicitly serves as the basis of all of these arguments. Having established that the arguments in the debate over human cloning do, in fact, have a common normative basis, it must next be determined whether this norm also serves as part of the general framework for analyzing problems in legal ethics, such that it might be used as a guide in establishing ethical guidelines for tax cloning.

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302. See Strong, *supra* note 224, at 280-82.

303. At first blush, one might think that the principle of beneficence undergirds the list of benefits compiled by the proponents of human cloning; however, it should be borne in mind that the proponents of human cloning would probably not argue that the existence of these benefits gives rise to an obligation to clone in order that they might be produced. Just as the existence of an obligation not to take action was a prerequisite to finding that the principle of nonmaleficence undergirds these arguments, the existence of an obligation to take action is a prerequisite to finding that the principle of beneficence undergirds them. Because no such obligation would be argued to exist here, the principle of beneficence should not be considered as undergirding the arguments concerning the potential benefits of human cloning.

*B. Legal Ethics*

*1. The Sources of Legal Ethical Rules and Their Impact on the Scope of the Discussion* – Law is commonly understood to be a profession, and lawyers, therefore, are commonly referred to as professionals.<sup>304</sup> Although the term “profession” is susceptible of a number of different uses and meanings,<sup>305</sup> when it is used to refer to the practice of law, the term is being used in its sociological sense.<sup>306</sup> Notwithstanding a lack of consensus concerning the traits that are essential to classification of an occupation as a profession in the sociological sense,<sup>307</sup> several traits do seem to recur in discussions of the sociological definition of a profession. These discussions posit an occupation that: (i) requires the mastery of “some esoteric and difficult body of knowledge”<sup>308</sup> (with mastery of such knowledge normally being acquired through lengthy specialized education and training); (ii) is marked by altruistic motivations (i.e., the individual professional’s commitment to clients and public service surpasses her self-interest in making money from engaging in the activity);<sup>309</sup> and (iii) is self-regulating (meaning that it determines and controls

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304. See, e.g., Model Rules of Prof’l Conduct, pmb. at paras. 1-13 (2002); Anthony T. Kronman, *Legal Professionalism*, 27 Fla. St. U. L. Rev. 1, 1 (1999); Robert B. McKay, *Law, Lawyers, and the Public Interest*, 55 U. Cin. L. Rev. 351, 353 (1986); Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 Fla. St. U. L. Rev. 153, 154 (1999); Richard A. Posner, *Professionalisms*, 40 Ariz. L. Rev. 1, 1 (1998); Deborah L. Rhode, *The Professionalism Problem*, 39 Wm. & Mary L. Rev. 283, 313 (1998); Ronald D. Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It, Inc.*, 49 Ark. L. Rev. 703, 703 (1997); Harold L. Wilensky, *The Professionalization of Everyone?*, 70 Am. J. Soc. 137, 141 (1964).

305. See Stephen F. Barker, *What is a Profession?*, 1 Prof. Ethics 73, 74 (1992); Becker, *supra* note 22, at 27.

306. Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 Law & Soc’y Rev. 713, 716-17 (1999). For a brief discussion of the different uses and meanings of the term “profession,” see Anthony C. Infanti, *Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar*, 22 Va. Tax Rev. 589, 598-602 (2003).

307. See Nancy J. Moore, *Professionalism Reconsidered*, 1987 Am. B. Found. Res. J. 773, 778 (1987); Rothman, *supra* note 22, at 183.

308. Becker, *supra* note 22, at 35.

309. Some may be ill at ease with the use of the word “altruism” to describe this trait. “Altruism” suggests that professionals (including lawyers) selflessly pursue the welfare and interests of others and “stand above ‘the sordid considerations’ of acquisition and economics, ‘devoting their lives to ‘service’ of their fellow men.’” Moore, *supra* note 307, at 783 (quoting Talcott Parsons, *The Professions and Social Structure*, in *Essays in Sociological Theory* 34, 43 (rev. ed. 1954)). Some commentators, including Talcott Parsons, have proposed using the term “disinterestedness” in place of

entry into the profession and enforces a specialized code of ethics that applies to those admitted to the practice of the profession).<sup>310</sup>

As a profession in the sociological sense, the law contains “a professional morality with standards of conduct that are generally acknowledged by those in the profession who are serious about their moral responsibilities.”<sup>311</sup> These moral responsibilities take the form of special obligations that are imposed on lawyers because of the role that they play, obligations that are intended “to ensure that persons who enter into relationships with [lawyers] will find them competent and trustworthy.”<sup>312</sup> To clarify these professional obligations, the legal profession has codified them in the Model Code of Professional Responsibility (“Model Code”)<sup>313</sup> and the Model Rules of Professional Conduct (“Model Rules”),<sup>314</sup> which were promulgated by the American Bar Association and have served as the basis for nearly all of the various state codes of legal ethics.<sup>315</sup> More recently, the

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“altruism.” See *id.*; Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1239 n.43 (1995).

310. See Beauchamp & Childress, *supra* note 288, at 6; ABA Professionalism Report, *supra* note 22, at 261-62 (definition formulated by Eliot Freidson); Barker, *supra* note 305, at 86-87, 92-93; Becker, *supra* note 22, at 35-37; Kritzer, *supra* note 306, at 717-18; John Kultgen, *Evaluating Codes of Professional Ethics*, in *Profits and Professions: Essays in Business and Professional Ethics* 225, 236 (Wade L. Robison et al. eds., 1983) [hereinafter *Profits and Professions*]; Lisa H. Newton, *Professionalization: The Intractable Plurality of Values*, in *Profits and Professions*, *supra*, at 23, 23-24; Pearce, *supra* note 309, at 1237-40; Posner, *supra* note 304, at 2; Rotunda, *supra* note 304, at 706-13; Wilensky, *supra* note 304, at 138, 140-41, 146; Zacharias, *supra* note 22, at 1307-14.

311. Beauchamp & Childress, *supra* note 288, at 5.

312. *Id.* at 6.

313. Model Code of Prof'l Responsibility (1980).

314. Model Rules of Prof'l Conduct (2002).

315. Geoffrey C. Hazard, Jr. & W. William Hodes, 1 *The Law of Lawyering* § 1.11 at 1-19, § 1.15 at 1-26, app. B (3d ed. 2002). For a succinct history of the codification of legal ethical norms, see Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 Yale L.J. 1239, 1249-60 (1991). For a history of the enforcement of these

American Law Institute has published a Restatement of the Law Governing Lawyers (“Restatement”), which goes beyond the Model Code and Model Rules by addressing (i) areas of law that lie beyond their scope and (ii) areas of law that lie within their scope, but which, in practice, have been the subject of variations made either by courts in decisional law or by the states when enacting the Model Code or Model Rules into law.<sup>316</sup>

While the Model Code, Model Rules, and Restatement are useful tools for plumbing the norms that underlie the generally-acknowledged standards of conduct that apply to lawyers, the reader should not be misled into believing that this discussion is intended to pertain only to the conduct of American attorneys. As indicated earlier,<sup>317</sup> the purpose of this discussion is not to provide a list of the sections of the various state legal ethics codes that may apply to attorneys who are advising transition countries.<sup>318</sup> That approach would unduly narrow the scope of the discussion. Instead, the discussion is meant to be of broad application, including within its ambit all of the American neutral experts, whatever their respective professional calling or occupation, who render tax reform advice to transition countries.<sup>319</sup> The attorney-client relationship and the ethical standards implicit in that relationship are employed here as no more than a benchmark for developing the ethical boundaries that circumscribe the activities of American neutral experts when advocating the cloning of Western tax rules in transition countries.

*2. The Principle of Nonmaleficence in Legal Ethics* – Many of the ethical rules that govern the conduct of lawyers embody the principle of nonmaleficence. In keeping with this principle, there are ethical rules that prohibit not only actions that may harm clients, but also actions that may harm the legal system, the opposing party, the legal profession, or third parties. The obligations not to harm each of these groups will be discussed separately below.

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norms, see Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 *Geo. J. Legal Ethics* 911 (1994).

316. Geoffrey C. Hazard, Jr., Foreword to 1 Restatement of the Law Governing Lawyers, at xxi, xxi-xxii (2000); 1 Hazard & Hodes, *supra* note 315, § 1.19 at 1-36.

317. See *supra* Part I.

318. Even if it were, determining which country’s code of professional conduct applies, as well as how it applies in the context of the cross-border practice of law, remains open to debate. See, e.g., Ronald A. Brand, *Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational, and Foreign Law*, 34 *Vand. J. Transnat’l L.* 1135 (2001); Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 *Fordham Int’l L.J.* 53 (1992); Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 *Geo. J. Legal Ethics* 677 (2000).

319. See *supra* note 23 for a summary of the concerns that militate in favor of a broad application of the legal ethics rules in this situation.

*A. Preventing Harm to Clients* – The principle of nonmaleficence can be detected in the specific duties that comprise the lawyer’s more general duty of loyalty to her client;<sup>320</sup> these specific duties include competence, confidentiality, and avoiding conflicts of interest.<sup>321</sup> The duty of competence effectively prohibits a lawyer from undertaking matters on behalf of a client unless she has “the appropriate knowledge, skills, time, and professional qualifications.”<sup>322</sup> The primary purpose of this prohibition is to protect the public from harm and thereby maintain its confidence in the profession.<sup>323</sup> The duty of confidentiality generally prohibits a lawyer from using or disclosing confidential client information “if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information.”<sup>324</sup> The duty to avoid conflicts of interest generally prohibits a lawyer from representing a client “if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person.”<sup>325</sup> This prohibition requires lawyers “to avoid divided loyalties that would harm their principals, their clients.”<sup>326</sup>

The obligation not to take action that will harm a client can also be seen in other ethical rules. A lawyer is generally prohibited from representing a client at the trial of a matter in which the lawyer is expected to testify for the client.<sup>327</sup> It has been said that

[c]ombining the roles of advocate and witness creates several risks. The lawyer’s role as witness may hinder effective

320. 1 Restatement of the Law Governing Lawyers § 16 cmt. e (“The responsibilities entailed in promoting the objectives of the client may be broadly classified as duties of loyalty . . . . In general, they prohibit the lawyer from harming the client.”).

321. See *id.*; L. Ray Patterson, *The Fundamentals of Professionalism*, 45 S.C. L. Rev. 707, 711 (1994).

322. 1 Restatement of the Law Governing Lawyers § 16 cmt. d (2000); see also Model Rules of Prof’l Conduct R. 1.1 (2002); Model Code of Prof’l Responsibility DR 6-101(A)(1)-(2) (1980).

323. 1 Hazard & Hodes, *supra* note 315, § 3.2 at 3-5.

324. 1 Restatement of the Law Governing Lawyers § 60(1) (2000); see also Model Rules of Prof’l Conduct R. 1.6 (2002); Model Code of Prof’l Responsibility DR 4-101 (1980).

325. 2 Restatement of the Law Governing Lawyers § 121 (2000); see also Model Rules of Prof’l Conduct R. 1.7-.9 (2002); Model Code of Prof’l Responsibility DR 5-101 to 5-107 (1980).

326. 2 Restatement of the Law Governing Lawyers 243-44 (2000).

327. Model Rules of Prof’l Conduct R. 3.7 (2002); see also Model Code of Prof’l Responsibility DR 5-101(B), -102 (1980); 2 Restatement of the Law Governing Lawyers § 108 (2000).



advocacy on behalf of the client. The combined roles risk confusion on the part of the factfinder and the introduction of both impermissible advocacy from the witness stand and impermissible testimony from counsel table. Concomitantly, an advocate may not interfere with an opposing counsel's function as advocate by calling him or her to the witness stand, except for compelling reasons. When a lawyer will give testimony adverse to the lawyer's client, a conflict of interest is presented that must either be avoided by withdrawal of the lawyer and the lawyer's firm or, where permitted consented to by the client . . . .<sup>328</sup>

In addition, a lawyer is prohibited from entering into a contingent fee arrangement with a client in either a criminal or domestic relations matter.<sup>329</sup> Such arrangements have the potential to harm a client because (i) in a criminal case, a lawyer who will obtain a fee only if the client is totally exonerated "might improperly counsel against a proffered plea bargain or might ignore opportunities to argue for mitigation or conviction of a lesser offense," and (ii) in a domestic relations case, a lawyer who will obtain a fee only upon securing a divorce for the client might "have a disincentive to urge the client to consider counseling or mediation or other interventions that might preserve the marriage."<sup>330</sup>

*B. Preventing Harm to Nonclients* – With respect to nonclients generally, a lawyer is prohibited from counseling or assisting "a client in conduct that the lawyer knows to be criminal or fraudulent or in violation of a court order with the intent of facilitating or encouraging the conduct."<sup>331</sup> Such conduct may entail harm to one or more of the following: opposing parties, third parties, the legal system, and the public in general.

Other ethical rules are intended to prevent harm from being inflicted on a discrete subset of nonclients. Several ethical rules impose an obligation on lawyers not to take action that may inflict harm on the legal system or opposing parties. First, a lawyer is prohibited from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning

328. 2 Restatement of the Law Governing Lawyers § 108 cmt. b (2000). Some commentators find the rationale for this rule to be weak. See 2 Hazard & Hodes, *supra* note 315, § 33.4.

329. Model Rules of Prof'l Conduct R. 1.5(d) (2002); Model Code of Prof'l Responsibility DR 5-101 to 5-107 (1980); 1 Restatement of the Law Governing Lawyers § 35(1) (2000).

330. 1 Hazard & Hodes, *supra* note 315, § 8.14 at 8-34 to -35.

331. 2 Restatement of the Law Governing Lawyers § 94(2); see also Model Rules of Prof'l Conduct R. 1.2(d) (2002); Model Code of Prof'l Responsibility DR 7-102(A)(7) (1980).

the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.”<sup>332</sup> False statements made by a lawyer with respect to holders of, or candidates for, judicial or public office “unfairly undermine public confidence in the administration of justice.”<sup>333</sup> Second, a lawyer is prohibited from “bring[ing] or defend[ing] a proceeding, or assert[ing] or controvert[ing] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.”<sup>334</sup> A lawyer who brings frivolous claims causes harm by “inflict[ing] distress, wast[ing] time, and caus[ing] increased expense to the tribunal and adversaries.”<sup>335</sup> Third, a lawyer is prohibited from making false statements to a tribunal and from offering false evidence to a tribunal.<sup>336</sup> A lawyer who violates this duty of candor to the tribunal harms “the ability of courts to function as courts” by undermining “the integrity of the decisionmaking process.”<sup>337</sup> Fourth, a lawyer is prohibited from engaging in conduct that taints the impartiality of or that disrupts the tribunal.<sup>338</sup> If a lawyer engages in such conduct, he may harm the opposing party by violating her right to a fair hearing, and he may also undermine judicial authority and public confidence in judicial rulings, both of which require “the reality and the perception of impartiality on the part of judicial officers.”<sup>339</sup> Finally, within certain bounds, a lawyer who is participating, or has participated, in the investigation or litigation of a matter is prohibited from making “an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”<sup>340</sup> This rule protects the integrity of the system, which “requires that extraneous influences upon the course of litigation be eliminated or rigidly controlled.”<sup>341</sup>

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332. Model Rules of Prof'l Conduct R. 8.2(a) (2002); see also Model Code of Prof'l Responsibility DR 8-102 (1980).

333. Model Rules of Prof'l Conduct R. 8.2 cmt. at para. 1 (2002).

334. *Id.* at R. 3.1; see also Model Code of Prof'l Responsibility DR 7-102(A)(1)-(2) (1980); 2 Restatement of the Law Governing Lawyers § 110 (2000).

335. 2 Restatement of the Law Governing Lawyers § 110 cmt. b (2000).

336. Model Rules of Prof'l Conduct R. 3.3(a)(1), (3) (2002); see also Model Code of Prof'l Responsibility DR 7-102(A)(4), (5) (1980); 2 Restatement of the Law Governing Lawyers §§ 111, 120 (2000).

337. 2 Hazard & Hodes, *supra* note 315, § 29.2 at 29-3.

338. Model Rules of Prof'l Conduct R. 3.5 (2002); Model Code of Prof'l Responsibility DR 7-106(C)(6), -108, -110 (1980); 2 Restatement of the Law Governing Lawyers §§ 113, 115 (2000).

339. 2 Restatement of the Law Governing Lawyers § 113 cmts. b, f (2000).

340. Model Rules of Prof'l Conduct R. 3.6(a) (2002); see also Model Code of Prof'l Responsibility DR 7-107 (1980); 2 Restatement of the Law Governing Lawyers § 109 (2000).

341. 2 Hazard & Hodes, *supra* note 315, § 32.2 at 32-4.

A lawyer is further prohibited from engaging in actions that unfairly tip the scales against the opposing party; for example, a lawyer is prohibited from unlawfully obstructing the other party's access to evidence; from unlawfully altering, destroying, or concealing evidence; from falsifying evidence or counseling or assisting a witness to testify falsely; and from making frivolous discovery requests.<sup>342</sup> Such tactics may harm the opposing party by burdening her, may allow the client to achieve unjust results, and also may "undermine the integrity of the litigation process itself."<sup>343</sup>

Several ethical rules impose an obligation on lawyers not to inflict harm on the legal profession (i.e., on all other persons who engage in the practice of law). Lawyers (including aspiring lawyers) are prohibited from making false statements of material fact in connection with their own or others' bar admission applications or disciplinary matters, and are prohibited from knowingly failing to respond to lawful demands for information from bar admissions or disciplinary authorities.<sup>344</sup> They are also prohibited from engaging in a whole host of conduct that may

indicate lack of those characteristics relevant to law practice.

Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.<sup>345</sup>

Recently, a specific rule has been adopted that prohibits lawyers from making or soliciting political contributions to a judge or other public official for the purpose of obtaining "a government legal engagement or appointment by a judge."<sup>346</sup> When lawyers engage in such conduct, "the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined."<sup>347</sup>

Several rules circumscribe the conduct of lawyers with respect to third parties. A lawyer is prohibited from making false statements to third parties, from generally communicating directly with persons who are known to be

342. Model Rules of Prof'l Conduct R. 3.4(a), (b), (d) (2002); see also Model Code of Prof'l Responsibility DR 7-102(A)(6), -109 (1980); 2 Restatement of the Law Governing Lawyers §§ 106, 110(3), 116(2)-(3), 117, 118 (2000).

343. 2 Hazard & Hodes, *supra* note 315, § 30.2 at 30-4; see also Model Rules of Prof'l Conduct R. 3.4 cmt. (2002).

344. Model Rules of Prof'l Conduct R. 8.1 (2002); see also Model Code of Prof'l Responsibility DR 1-101, -102(A)(5) (1980).

345. Model Rules of Prof'l Conduct R. 8.4 cmt. at para. 2 (2002); see also Model Code of Prof'l Responsibility DR 1-102(A), 9-101(C) (1980).

346. Model Rules of Prof'l Conduct R. 7.6 (2002).

347. *Id.* at cmt. at para. 1.

represented by counsel, from stating or implying that she is disinterested when communicating with persons who are not represented by counsel, and from using “means that have no substantial purpose other than to embarrass, delay, or burden a third person, or us[ing] methods of obtaining evidence that violate the legal rights of such a person.”<sup>348</sup> The prohibition against false statements “meets social expectations of honesty and fair dealing and facilitates negotiation and adjudication, which are important professional functions of lawyers.”<sup>349</sup> The limits on direct communications with third parties are designed to prevent the harm that may be caused by overreaching and deception by the lawyer as well as “intrusion into confidential information of the nonclient, and undermining the nonclient’s client-lawyer relationship” in the case of a third party who is known to be represented by counsel.<sup>350</sup>

In addition, in disseminating information to the public (in its capacity as a mass of prospective clients), lawyers are prohibited from (i) making false or misleading communications; (ii) generally paying others to recommend them; (iii) generally soliciting clients through in-person, live telephone, or real-time electronic contact; (iv) indicating that they are certified as specialists, unless they are certified by an approved organization or they practice admiralty or patent law; and (v) using the name of a lawyer who holds public office in the name of a law firm, or in communications on its behalf, “during any substantial period in which the lawyer is not actively and regularly practicing with the firm.”<sup>351</sup> Although lawyers have a right to communicate truthful information about their services to the public, these restrictions are designed to protect the public against false and misleading communications. In particular, direct solicitation is circumscribed because it “is fraught with special dangers: the client may be vulnerable to overreaching, the lawyer can more readily mix misleading speech with factual statements, and the contact is in private so that public scrutiny is more difficult.”<sup>352</sup>

As this discussion indicates, the principle of nonmaleficence pervades the ethical rules governing the professional conduct of lawyers.<sup>353</sup> The

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348. *Id.* at R. 4.1-.4; see also Model Code of Prof'l Responsibility DR 7-102(A)(1), -102(A)(5), -104, -106(C)(2), -108(D)-(E) (1980); 2 Restatement of the Law Governing Lawyers §§ 98-103 (2000).

349. 2 Restatement of the Law Governing Lawyers § 98 cmt. b (2000).

350. 2 *id.* at 69, § 99 cmt. b.

351. Model Rules of Prof'l Conduct R. 7.1-.5 (2002); see also Model Code of Prof'l Responsibility DR 2-101 to -105 (1980).

352. 2 Hazard & Hodes, *supra* note 315, at §§ 55.2, 57.3, 58.3.

353. That this is the case should not be surprising, as the principle of nonmaleficence is counted among a handful of basic moral duties. Paul G. Haskell, Teaching Moral Analysis in Law School, 66 *Notre Dame L. Rev.* 1025, 1030-35 (1991); see *supra* note 293 and accompanying text; see generally Araujo, *supra* note 300, at 447; Eberle, *supra* note 288, at 116.

obligation not to take action that may inflict harm appears to be at the core of many of the rules governing a lawyer's conduct vis-à-vis her client, which should be expected given the fiduciary nature of that relationship. Nonetheless, the rules also evince the importance attached to lawyers' refraining from actions that would inflict harm on nonclients – even when refraining from action would not be in a client's unalloyed best interest.

#### V. PROVIDING CONTENT TO THE PRINCIPLE OF NONMALEFICENCE

Having established that the principle of nonmaleficence, which is the common normative denominator of the ethical debate over human cloning, also pervades the ethical norms governing the professional conduct of lawyers, we can now construct ethical guidelines for tax cloning using this principle as a foundation. To construct these guidelines, it will be necessary to build on the principle of nonmaleficence by suffusing it with specific content and meaning as it relates to tax cloning. The source of this content will be the rich comparative law literature concerning legal cloning.

The viability of legal cloning has been hotly debated in the comparative law literature. The source of this debate is a divergence of views concerning the relationship between law and society. On the one hand, the mainstream view of comparatists (and legal historians) is that “[n]othing in law is autonomous; rather, law is a mirror of society, and every aspect of the law is molded by economy and society.”<sup>354</sup> On the other hand, the validity of the mainstream

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354. William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 *Am. J. Comp. L.* 489, 492-96 (1995); see, e.g., Alfred L. Brophy, “*Ingenium est Fateria per quos; profeceris*”: Francis Daniel Pastorious’ Young Country Clerk’s Collection and Anglo-American Literature, 1682-1716, 3 *U. Chi. L. Sch. Roundtable* 637, 641-42 (1996) (“Legal historians constantly debate the role of social forces in shaping law. The most popular belief, exemplified by the works of such people as Willard Hurst and Lawrence Friedman, is that law is largely a creation of the surrounding social conditions.”); P. John Kozyris, *Comparative Law for the Twenty-First Century: New Horizons and New Technologies*, 69 *Tul. L. Rev.* 165, 168-69 (1994) (“[Y]ou cannot truly pursue the comparative method through the study of formal legal texts alone. It is necessary to get to know what is behind the texts and also, even more important, how they function. This requires understanding the legal culture that produced the laws, and more broadly, the social and economic structures and the ethical and political values that support them. Laws cannot be grasped in an idealized form outside the context of the society that created them.”); John Henry Merryman, *Comparative Law and Scientific Explanation*, in *Law in the United States of America in Social and Technological Revolution: Reports from the United States of America on Topics of Major Concern as Established for the IX Congress of the International Academy of Comparative Law* 81, 92 (John N. Hazard & Wenceslas J. Wagner eds., 1974) (“If a given social system changes appreciably over time, one can expect some correlative change to take place in its legal system. Most, if not all, social systems do

view has been assailed by those who perceive legal rules as being “dysfunctional, that is, out of step with the needs and desires both of society at large and of its ruling elite.”<sup>355</sup>

This debate is exemplified by an exchange between Otto Kahn-Freund and Alan Watson on the question of legal cloning (or what they refer to as the “transferring” or “transplanting” of legal rules from one society to another).<sup>356</sup> Their exchange (along with Watson’s other work) will be used here to supply the principle of nonmaleficence with necessary content and meaning. First, for those unfamiliar with their work, Kahn-Freund’s and Watson’s views concerning the viability of legal cloning will be separately recounted. Then, it will be established that (i) despite their generally divergent views, Kahn-Freund and Watson do share some common ground, and (ii) ethical guidelines for tax cloning can be constructed using the principle of nonmaleficence as a foundation and this common ground as the building blocks.

#### *A. Kahn-Freund’s Perspective on Legal Cloning*

Advancing a nuanced version of the mainstream “mirror” theory of the relationship between law and society,<sup>357</sup> Kahn-Freund argues that there are

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change appreciably over time. Accordingly, it should not be surprising if the legal systems of nations A and B (or of a given nation at times X and Y) are found to differ. On the contrary, it would be astonishing if they did not.”); Christopher Osakwe, *Recent Development: An Introduction to Comparative Law*, 62 *Tul. L. Rev.* 1507, 1508 (1988) (“Modern comparative law is aware of the relationship among law, history, and culture. Accordingly, any serious exercise in the comparison of laws proceeds on the premise that each national law is a tapestry woven from a rich background of historical and cultural threads. Comparative law operates on the assumption that every legal system is deeply rooted in the spirit of the people and is an outgrowth of the national character of the society in which it operates.”); see also Alan Watson, *Society and Legal Change* 1-4 (1977) [hereinafter *Watson, Society & Legal Change*]; Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 *Int’l Rev. L. & Econ.* 3, 4 (1994); P.G. Monateri, “Everybody’s Talking”: *The Future of Comparative Law*, 21 *Hastings Int’l & Comp. L. Rev.* 825, 825-26, 839 (1998); Catherine A. Rogers, *Gulliver’s Troubled Travels, or the Conundrum of Comparative Law*, 67 *Geo. Wash. L. Rev.* 149, 181 n.166 (1998).

355. Watson, *Legal Change*, supra note 187, at 1151.

356. See Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 *Mod. L. Rev.* 1 (1974); Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1974) [hereinafter *Watson, Legal Transplants I*]; Alan Watson, *Legal Transplants and Law Reform*, 92 *L.Q. Rev.* 79 (1976) [hereinafter *Watson, Law Reform*] (replying to Kahn-Freund’s article); see also Eric Stein, *Uses, Misuses – and Nonuses of Comparative Law*, 72 *Nw. U. L. Rev.* 198, 198 (1977).

357. See Ewald, supra note 354, at 492.

“degrees of transferability,”<sup>358</sup> and posits the existence of a continuum of transferability.<sup>359</sup> At one end of the continuum, he places those legal rules that can be mechanically removed from one system and inserted into another.<sup>360</sup> He likens this process to the removal of a carburetor from one automobile and its insertion into another – no one would wonder that the new car might “reject” the transplanted carburetor.<sup>361</sup> At the other end of the continuum, Kahn-Freund places those legal rules that can only be removed from one system and inserted into another through a “complicated and sometimes hazardous surgical operation[.]” that may require adjustments to, and entail a risk of rejection by, the recipient.<sup>362</sup> He likens this process to the removal of a kidney from one human being and its transplantation into another.<sup>363</sup> The location of a given legal rule on this continuum of transplantability depends on how closely it is tied to its home environment.<sup>364</sup>

Kahn-Freund derives the factors that determine how closely a legal rule is tied to its home environment from Montesquieu, who is often cited for his “opinion that it was only in the most exceptional cases that the institutions of one country could serve those of another at all.”<sup>365</sup> Montesquieu enumerated environmental,<sup>366</sup> social and economic,<sup>367</sup> cultural,<sup>368</sup> and political factors<sup>369</sup> in support of his opinion. The central thesis of Kahn-Freund’s article is that, while Montesquieu’s list of factors remains relevant, the environmental, social, economic, and cultural factors “have greatly lost, but . . . the political factors have equally greatly gained in importance.”<sup>370</sup> Kahn-Freund summed up his central thesis as follows:

[T]he degree to which any rule, say on accident liability or on the protection of the accused in criminal proceedings, or any institution, say a type of matrimonial property or of commercial corporation or of local government, can be transplanted, its distance from the organic and from the

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358. Kahn-Freund, *supra* note 356, at 6.

359. *Id.*

360. *Id.*

361. *Id.* at 5-6.

362. *Id.* at 5.

363. *Id.* at 5-6.

364. See *id.* at 12; Stein, *supra* note 356, at 199.

365. Kahn-Freund, *supra* note 356, at 6.

366. For example, climate, fertility of the soil, and geography. *Id.* at 7.

367. For example, the wealth of the people, their population density, and trade.

*Id.*

368. For example, religion, customs, and manners. *Id.*

369. For example, the degree of liberty that the constitution will tolerate. *Id.*

370. *Id.* at 8.

mechanical end of the continuum still depends to some extent on the geographical and sociological factors mentioned by Montesquieu, but especially in the developed and industrialised world to a very greatly diminished extent. The question is in many cases no longer how deeply it is embedded, how deep are its roots in the soil of its country, but who has planted the roots and who cultivates the garden. Or in non-metaphorical language: how closely it is linked with the foreign power structure, whether that be expressed in the distribution of formal constitutional functions or in the influence of those social groups which in each democratic country play a decisive role in the law-making and the decision-making process and which are in fact part and parcel of its constitutional and administrative law.<sup>371</sup>

In support of his thesis, Kahn-Freund cited experience in family law, which is an area where one “would expect the risk of rejection and the difficulties of adjustment to be . . . at their maximum.”<sup>372</sup> To support his view that the importance of environmental, social, economic, and cultural factors has decreased, Kahn-Freund pointed to a number of situations in which rules of divorce law and the property relations between spouses have been transplanted from one country to another.<sup>373</sup> To support his view that the importance of political factors has increased, Kahn-Freund pointed to “the staggering contrast between the English and Irish attitudes” toward divorce, which can only be explained “in terms of the political power of the Catholic hierarchy” in Ireland.<sup>374</sup>

In further support of this view, Kahn-Freund discussed failed attempts at the transplantation of public law rules (i.e., rules that organize “constitutional, legislative, administrative, or judicial institutions and procedures”<sup>375</sup>), including the attempt “made in the nineteenth century to export the English jury system to the continent,” which failed because it departed from the “accustomed distribution of power between Bar and Bench” and was therefore opposed by the legal profession.<sup>376</sup> Kahn-Freund considered public law rules to be “the ones most resistant to transplantation” because they “are

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371. *Id.* at 12-13.

372. *Id.* at 13.

373. *Id.* at 14-15.

374. *Id.* at 15-16.

375. *Id.* at 17; see also J.W.F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* 13 (1996) (referring to this passage in Kahn-Freund’s article and stating that “[w]hat we would consider public-law rules [Kahn-Freund] considers as the least transplantable”).

376. Kahn-Freund, *supra* note 356, at 17-19.



closest to the 'organic' end of our continuum."<sup>377</sup> Kahn-Freund also discussed the provisions of the British Industrial Relations Act of 1971 concerning collective agreements and strikes, which were strongly influenced by U.S. law.<sup>378</sup> He stated that "[i]t would indeed be an almost unbelievable 'hazard,' an unexpected coincidence if substantive rules wrenched out of their American constitutional, political and industrial context could successfully be made to fit the needs of a country with institutions and traditions so different from those of the United States."<sup>379</sup>

Kahn-Freund closed his article by stressing that "we cannot take for granted that rules or institutions are transplantable."<sup>380</sup> Any attempt at transplanting a legal rule from its home environment into a recipient environment entails the risk of rejection,<sup>381</sup> with the level of risk being determined by where the rule is situated along the continuum described above: the closer the rule is to the mechanical end of the continuum, the lower its risk of rejection by the recipient; conversely, the closer the rule is to the organic end of the continuum, the higher its risk of rejection by the recipient. An individual rule's placement along the continuum is determined by how closely tied the rule is to its home environment.

Despite these warnings about the risk that transplanted legal rules might be rejected by the recipient environment, Kahn-Freund hoped that the existence of this risk would not

deter legislators in this or any other country from using the comparative method. All I have wanted to suggest is that its use requires a knowledge not only of the foreign law, but also of its social, and above all its political, context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law.<sup>382</sup>

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377. *Id.* at 17.

378. *Id.* at 20-27.

379. *Id.* at 26-27. Kahn-Freund was proved correct when the Industrial Relations Act of 1971 was "repealed in 1974 after the Labor Party's election victory." Stein, *supra* note 356, at 201.

380. Kahn-Freund, *supra* note 356, at 27.

381. *Id.*

382. *Id.*

*B. Watson's Perspective on Legal Cloning*

A few months following the publication of Kahn-Freund's article, Alan Watson published the first edition of his book, *Legal Transplants: An Approach to Comparative Law*.<sup>383</sup> Since that time, Watson "has produced a torrent of books and articles on the relationship between law and society and the factors that account for legal change; nearly all emphasize the importance of borrowing from others in the development of law."<sup>384</sup> Indeed, Watson has repeatedly stated his belief that "transplanting is . . . the most fertile source of [legal] development. Most changes in most systems are the result of borrowing."<sup>385</sup> Watson has, nevertheless, acknowledged the possibility that "a powerful legal system [can] be developed by native talent without the help of transplants."<sup>386</sup> Despite the rather far-reaching nature of some of his statements, Watson has generally confined his studies, and the theory of legal change that they have produced, to the development of private law in Western countries.<sup>387</sup>

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383. Watson, *Legal Transplants I*, supra note 356; Watson, *Law Reform*, supra note 356, at 79 (indicating the relative timing of Kahn-Freund's and Watson's publications).

384. Wise, supra note 182, at 1 (footnote omitted). For a cataloguing of many of Watson's articles that are relevant to this subject, see Ewald, supra note 354, at 489 n.1. Since the time that Ewald compiled this list, Watson has continued to publish on the subject of legal transplants. See, e.g., Watson, *Evolution*, supra note 187; Watson, *Reception*, supra note 187; Alan Watson, *Legal Transplants and European Private Law*, 4.4 *Electronic J. Comp. L.* (2000), at <http://www.ejcl.org/44/art44-2.html> (last visited Sept. 12, 2003) [hereinafter Watson, *European Private Law*].

For criticism of Watson's theory of legal change, see, e.g., Allison, supra note 375, at 12-16; Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 *Mich. L. Rev.* 785 (1982); Bruce W. Frier, *Why Law Changes*, 86 *Colum. L. Rev.* 888 (1986); Legrand, supra note 185; and Pierre Legrand, *John Henry Merryman and Comparative Legal Studies: A Dialogue*, 47 *Am. J. Comp. L.* 3, 49-50 (1999) (indicating Merryman's concurrence in Legrand's criticism of Watson).

385. Watson, *Legal Transplants II*, supra note 170, at 95; see also *id.* at 7, 118; Watson, *Evolution*, supra note 187, at 193 ("With a significance that is hard to grasp, borrowing has been the most important factor in the evolution of Western law in most states at most times."); Watson, *Aspects of Reception of Law*, supra note 384, at 335 ("In most places at most times borrowing is the most fruitful source of legal change."); Watson, *European Private Law*, supra note 384 ("I believe I have indicated, though by example rather than by express statement, that borrowing is usually the major factor in legal change."); Watson, *Legal Change*, supra note 187, at 1125 ("Borrowing from another system is the most common form of legal change.").

386. Watson, *Legal Transplants II*, supra note 170, at 77.

387. See *id.* at 8 (quoting S.F.C. Milsom for the proposition that "[s]ocieties largely invent their constitutions, their political and administrative systems, even in these days their economies; but their private law is nearly always taken from others."); *id.* at 111 ("In keeping with my interests, the stress in *Legal Transplants* is on Western law,

Watson is careful to note that what he views as being borrowed “is rules – not just statutory rules – institutions, legal concepts, and structures . . . , not the ‘spirit’ of a legal system.”<sup>388</sup> Watson does not contemplate that these rules will be borrowed without alteration or modification; rather, he indicates that voluntary transplants would

almost always – always in the case of a major transplant – involve[] a change in the law, which can be due to any number of factors, such as climate, economic conditions, religious outlook . . . or even chance largely unconnected either with particular factors operating within the society as a whole or with the general historical trend.<sup>389</sup>

Neither does Watson expect that a rule, once transplanted, will “operate in exactly the way it did in its other home.”<sup>390</sup>

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especially private law.”); Watson, *Evolution*, supra note 187, at xi (same); Watson, *Society & Legal Change*, supra note 354, at 6, 126-27 (same); Watson, *Legal Change*, supra note 187, *passim* (same); see also Ewald, supra note 354, at 503 (Watson’s “theories are based principally on his investigations of Roman law, and specifically of Roman *private* law. He is therefore not entitled to claim that law in other, non-Western cultures obeys the Insulation Thesis: this may well be true, but it is a conclusion that requires further argument. Nor, indeed, by the same token can he claim that European *public* law is insulated from political, economic, and social forces. That conclusion is most likely false, and when Watson is being precise he is careful to state his conclusions as conclusions about private law only.” (footnotes omitted)); cf. Watson, *Evolution*, supra note 187, at 138-92 (intermittently discussing the public-law dimension of water rights because it served to illuminate his discussion of the private law of water rights).

388. Watson, *European Private Law*, supra note 384; see also Watson, *Evolution*, supra note 187, at 265-66 (“I am concerned with the development of the legal rules themselves, not with how the legal rules operate in society.”); Alan Watson, *Comparative Law and Legal Change*, 37 *Cambridge L.J.* 313, 315 (1978) [hereinafter, Watson, *Comparative Law*] (“What is borrowed . . . is very often the idea.”); Watson, *Law Reform*, supra note 356, at 79 (“What, in my opinion, the law reformer should be after in looking at foreign systems was an idea which could be transformed into part of the law of his country.”).

389. Watson, *Legal Transplants II*, supra note 170, at 97; see also *id.* at 20 (“When a legal rule is transplanted from Germany to Japan it will interest us whether it can be moved unaltered, or whether, and to what extent, it undergoes changes in its formulation.”); *id.* at 116 (“Transplanting frequently, perhaps always, involves legal transformation.”).

390. Watson, *European Private Law*, supra note 384; see also Watson, *Evolution*, supra note 187, at 14-18 (describing the difficulties attendant to the Turkish reception of the Swiss Civil Code and Swiss Law of Obligations); Watson, *Legal Transplants II*, supra note 170, at 20 (“It cannot be doubted either that a rule transplanted from one country to another, from Germany to Japan, may equally operate to different effect in the two societies, even though it is expressed in apparently similar terms in the two countries.”); *id.* at 27 (“A successful legal transplant – like that of a

Watson has identified a number of factors that affect which rules will be borrowed, including: (i) accessibility (i.e., is the rule in writing, in a form that is easily found and understood, and readily available),<sup>391</sup> (ii) habit (i.e., “[o]nce a system becomes used as a quarry, it will . . . be borrowed from again, and the more it is borrowed from, the more the right thing to do is to borrow from that system, even when the rule that is taken is not necessarily appropriate”),<sup>392</sup> (iii) chance (e.g., “a particular book may be present in a particular library at a particular time,” or lawyers from one country may train in, and become familiar with the law of, another country),<sup>393</sup> and (iv) the need for authority and the prestige of the legal system from which rules are borrowed.<sup>394</sup>

In contrast to Kahn-Freund, Watson believes that, in the context of law reform, systematic knowledge of the home environment is not necessary; all that is necessary is knowledge of the recipient environment.<sup>395</sup> Responding directly to Kahn-Freund’s arguments, Watson draws attention to the fact that it can often be difficult to determine how closely a rule is tied to the home country’s political power structure – “[b]ut on the other hand, when a legal

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human organ – will grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parent system.”); *id.* at 116 (“Even when the transplanted rule remains unchanged, its impact in a new social setting may be different. The insertion of an alien rule into another complex system may cause it to operate in a fresh way.” (footnote omitted)).

391. Watson, *Legal Transplants II*, *supra* note 170, at 113; see also Watson, *Evolution*, *supra* note 187, at 159.

392. Watson, *Legal Transplants II*, *supra* note 170, at 113; see also Watson, *Evolution*, *supra* note 187, at 159.

393. Watson, *Legal Transplants II*, *supra* note 170, at 92; Watson, *Reception*, *supra* note 187, at 339-41.

394. Watson, *Legal Transplants II*, *supra* note 170, at 57-60, 88-94.

395. *Id.* at 17 (“What [the law reformer] is looking for in his investigation of foreign systems is an idea which can be transformed into part of the law of Scotland and will there work well. A rule of Swedish law which is successful at home might be a disaster in the different circumstances existing in Scotland; a rule of French law which there works badly might provide an ideal rule for Scotland.”); Watson, *Law Reform*, *supra* note 356, at 79 (“Successful borrowing could be achieved even when nothing was known of the political, social or economic context of the foreign law.”); *id.* at 82 (“Now, should an attempt be made to introduce English-style divorce law into Ireland, it would be enough on my view to look at the Irish power structure to know that the attempt would fail. For that success or failure in Ireland, the power structure in England and any knowledge or appreciation of it is quite irrelevant.”); see also Watson, *Evolution*, *supra* note 187, at 132-34 (addressing the notion that “legal rules, when available in an accessible form, can readily be borrowed often without an inquiry into their effectiveness”). Compare the discussion of Kahn-Freund’s views in the text accompanying notes 357-371.

change is suggested for a particular country it is not so difficult to spot the factors which would favour, or militate against, the success of the reform.”<sup>396</sup> Watson does, however, admit that a law reformer who possesses a systematic knowledge of the home environment “would be more efficient.”<sup>397</sup> In enumerating the benefits of comparative law (which he distinguishes from a knowledge of foreign law), Watson asserts that

[i]t can enable those actively concerned with law reform to understand their historical rôle and their task better. They should see more clearly whether and how far it is reasonable to borrow from other systems and from which systems, and whether it is possible to accept foreign solutions with modifications or without modifications.<sup>398</sup>

As the foregoing discussion illustrates, Watson’s writings are peppered with statements that evince a need for sensitivity to extra-legal concerns in order to ensure the success of a legal transplant.<sup>399</sup>

The basis for Watson’s heterodox views<sup>400</sup> can be found in the following passage, which restates the paradox that caused him to take issue with the mainstream view of the transplantability of legal rules:

A perennial question is “Do legal rules reflect a society’s desires, needs and aspirations?” The answer which is

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396. Watson, *Law Reform*, supra note 356, at 82. Watson also disputes Kahn-Freund’s assertion “that environmental factors are now less important, political factors more important, in determining the difficulties for a legal transplant.” *Id.* at 83. Watson simply believes that Montesquieu “overestimated the extent to which environmental factors hindered legal borrowing.” *Id.*

397. *Id.* at 79; see also Watson, *Legal Transplants II*, supra note 170, at 9 (a knowledge of foreign legal systems can be valuable to the law reformer), 17 n.4 (“Nothing here is meant to deny that a law reformer with a systematic knowledge of foreign law or of Comparative Law will operate more efficiently.”).

398. Watson, *Legal Transplants II*, supra note 170, at 16.

399. See supra notes 396, 397; see also Watson, *Legal Transplants II*, supra note 170, at 99 (“reception is possible and still easy when the receiving society is much less advanced materially and culturally, though changes leading to simplification, even barbarisation, will be great”); Watson, *Law Reform*, supra note 356, at 81 (“Of course, where a rule of Roman law was inimical to the political, social, economic or social circumstances of a later state, its chances of being borrowed by that later state would be greatly diminished . . . Without hesitation one can accept the proposition that a foreign legal rule will not easily be borrowed successfully if it does not fit into the domestic political context. The word ‘political’ is used . . . with a rather wide meaning, with reference not only to the structure of government and governmental institutions but also to powerful organised groups . . .”).

400. Ewald, supra note 354, at 490 (“Watson’s theory flies in the face of some of the most treasured preconceptions of modern legal thought.”).

ordinarily given or is just assumed is positive though minor qualifications are usually urged. And yet, the two most startling, and at the same time most obvious characteristics of legal rules are the apparent ease with which they can be transplanted from one system or society to another, and their capacity for long life. With transmission or the passing of time modifications may well occur, but frequently the alterations in the rules have only limited significance.<sup>401</sup>

As this passage implies, Watson's theory of legal change is based on his historical observations,<sup>402</sup> primarily of the reception of Roman law in civil law countries and the spread of English common law throughout its former colonies.<sup>403</sup> These observations led Watson to make a number of general reflections at the conclusion of his book, *Legal Transplants*, including the following four: (i) "the transplanting of individual rules or of a large part of a legal system is extremely common";<sup>404</sup> (ii) "transplanting is, in fact, the most fertile source of development";<sup>405</sup> (iii) "to a truly astounding degree law is rooted in the past";<sup>406</sup> and (iv) "the transplanting of legal rules is socially easy."<sup>407</sup> On the basis of these four reflections, Watson concluded that "usually legal rules are not peculiarly devised for the particular society in which they now operate and also that this is not a matter for great concern."<sup>408</sup>

Watson later wrote that this disconnect between the rules of private law and a particular society "was the main point [he] was trying to make in *Transplants*."<sup>409</sup> This point was further developed in *Society and Legal Change*, where Watson explored the frequently-observed disconnect between a society

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401. Watson, *Comparative Law*, supra note 388, at 313 (footnotes omitted); see also Watson, *Evolution*, supra note 187, at 113; Watson, *Legal Transplants II*, supra note 170, at 21.

402. Watson, *Evolution*, supra note 187, at x.

403. Watson, *Comparative Law*, supra note 388, at 313-14; Watson, *Legal Change*, supra note 187, at 1125; Watson, *Law Reform*, supra note 356, at 80; see also Watson, *Evolution*, supra note 187, at 218-30 (discussing other instances of "massive" transplantation, including the borrowing of the medieval *Libri Feudorum*, which concerns feudal law, and the French *Code civil*).

404. Watson, *Legal Transplants II*, supra note 170, at 95.

405. *Id.*

406. *Id.*; see, e.g., Watson, *Evolution*, supra note 187, at 113-37.

407. Watson, *Legal Transplants II*, supra note 170, at 95.

408. *Id.* at 96. See Mattei, supra note 354, for an exposition of the manner in which law and economics "can add to the theory of legal transplants by discussing the role of efficiency in their occurrence." Ugo Mattei, *Comparative Law and Economics* 98 (1997).

409. Watson, *Law Reform*, supra note 356, at 81 n.12; see also Watson, *Society & Legal Change*, supra note 354, at 43.

and its legal rules – a disconnect that persists despite the ruling elite’s awareness of it and despite the ruling elite’s ability to close the gap between its needs (or the needs of the society as a whole) and the legal rules in force:

It is the thesis to be maintained in this book that, though there is a historical reason for every legal development, yet to a considerable extent law in most places at most times does not progress in a rational or responsible way, and that the divergence between law and the needs or wishes of the people involved or the will of the leaders of the people is marked. There is a divergence in the sense in which I am using the term when the legal rule, principle or institution is inefficient for its purpose in satisfying the needs of the people or the will of its leaders and when a better rule could be devised, *and* where both the inefficiency and the possibility of marked improvement are known to the persons concerned.<sup>410</sup>

In an article published a few years after *Legal Transplants* and shortly after *Society and Legal Change*, Watson stated that, notwithstanding the fact “that a considerable disharmony tends to exist between the ‘best’ rule that the society envisages for itself and the rule that it has,” there must be “some degree of correlation . . . between law and society.”<sup>411</sup> In that article, Watson delineated the factors that he considers relevant to legal change and that “control the relationship between legal rules and the society in which they operate.”<sup>412</sup> These factors include:

- The nature of the predominant source(s) of law;
- Pressure force, which consists of the organized groups that believe that they would benefit from a change in the law;
- Opposition force, which is the converse of pressure force and consists of the organized groups that believe that harm will result from a change in the law;

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410. Watson, *Society & Legal Change*, supra note 354, at 5; see also *id.* at 34, 58, 72; Watson, *Legal Change*, supra note 187, at 1134-46; Alan Watson, *Society’s Choice and Legal Change*, 9 *Hofstra L. Rev.* 1473, 1474-76 (1981) [hereinafter *Watson, Society’s Choice*].

411. Watson, *Comparative Law*, supra note 388, at 321; see also Watson, *Society & Legal Change*, supra note 354, at 4-5, 125; Watson, *Society’s Choice*, supra note 410, at 1473.

412. Watson, *Comparative Law*, supra note 388, at 321-22.

- Transplant bias, which is Watson’s theory that legal change primarily occurs through borrowing, with rules often being borrowed again and again from the same foreign legal system;
- Law-shaping lawyers, who are the legal elite that shapes the law and whose knowledge, imagination, training, and experience strongly influence the end product of any change in the law;<sup>413</sup>
- Discretion factor, which is the implicit or explicit discretion that exists either to enforce (or not to enforce) the law or press (or not to press) one’s legal rights;
- Generality factor, which is the extent to which legal rules regulate more than one recognizable group of people or more than one transaction or situation, thereby making it difficult to find a rule that precisely fits the situation of each group, transaction, or situation being regulated;
- Inertia, which is “the general absence of a sustained interest on the part of society and its ruling élite to struggle for the most ‘satisfactory’ rule”; and
- Felt needs, which are the purposes that the legal rule will fulfill, which are known to, and thought appropriate by, the pressure force.<sup>414</sup>

Watson posited that the relationship between a society and its legal rules could be roughly expressed as a mathematical equation: legal change will occur only when (i) the force of felt needs, weakened by the discretion factor, activate the pressure force, as affected by the generality factor, to work on a source of law – all as modified by the transplant bias (and law-shaping lawyers) – is greater than (ii) the force of inertia plus the opposition force.<sup>415</sup>

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413. Note that, at the time of this article, Watson did not consider law-shaping lawyers to constitute a truly separate factor because their role in legal change was covered by the source of law and transplant bias factors. *Id.* at 328. Nevertheless, Watson discussed law-shaping lawyers separately and included them parenthetically in the equation in the text below because they “give law such a particular flavour that their role deserves to be stressed.” *Id.* Law-shaping lawyers later came to play a much more central role in Watson’s views of legal change. See *infra* text accompanying notes 416-428.

414. Watson, *Comparative Law*, *supra* note 388, at 322-32.

415. *Id.* at 333.



In a later article that reflects on, and attempts to synthesize the points made in, four of his books,<sup>416</sup> Watson revisited his enumeration of the factors that affect legal change and indicated that “what has emerged from these four books is [his] appreciation of the enormous power of the legal culture in determining the timing, the extent, and the nature of legal change.”<sup>417</sup> Thus, over time, Watson’s formulation of the factors that affect legal change has itself evolved. Originally, “law-shaping lawyers” did not merit enumeration as a separate factor<sup>418</sup> and appeared only parenthetically in the mathematical equation that he formulated;<sup>419</sup> at present, however, Watson places primary emphasis on the role of legal culture in shaping legal change.<sup>420</sup>

Watson now argues that, while society as a whole may have some input on the content of its laws, the actual laws that are produced are shaped by the legal tradition: “law is largely autonomous and not shaped by societal needs; though legal institutions will not exist without corresponding social institutions, law evolves from the legal tradition.”<sup>421</sup> Lawyers tend to seek authority for the positions that they take, which results in the “enormous extent [to which] law develops by borrowing from another place and even from another time.”<sup>422</sup> While lawyers may sometimes search for the “best” rule, Watson contends that lawyers more typically choose one legal system as “the prime quarry” and borrow rules from that system without fully investigating their appropriateness.<sup>423</sup> Normally, lawyers will be satisfied with a foreign rule from the prime quarry if it “is not obviously and seriously inappropriate.”<sup>424</sup>

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416. The four books are: Alan Watson, *Legal Transplants: An Approach to Comparative Law* (1974); Alan Watson, *Society and Legal Change* (1977); Alan Watson, *The Making of the Civil Law* (1981); and Alan Watson, *Sources of Law, Legal Change, and Ambiguity* (1984).

417. Watson, *Legal Change*, supra note 187, at 1154; see also Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (pt. 1), 39 *Am. J. Comp. L.* 1 (1991); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (pt. 2), 39 *Am. J. Comp. L.* 343 (1991); Alan Watson, *From Legal Transplants to Legal Formants*, 43 *Am. J. Comp. L.* 469 (1995). For an application of law and economics to Sacco’s theory of legal formants, see Mattei, supra note 408, at 101-21.

418. See supra note 413.

419. See supra text accompanying note 415.

420. See Watson, *Evolution*, supra note 187, at 264 (“Legal change comes about through the culture of the legal elite, the lawmakers, and it is above all determined by that culture.”). For a re-examination of the factors affecting legal change “from the angle of their involvement with the legal tradition,” see Watson, *Society’s Choice*, supra note 410, at 1477-81.

421. Watson, *Evolution*, supra note 187, at 264; see also *id.* at 136, 262-63.

422. *Id.* at 263.

423. *Id.*

424. *Id.*

Social, economic, and political factors affect the shape of the law that is produced only to the extent that they are present in the consciousness of lawmakers (i.e., the subgroup of lawyers who control the “mechanisms of legal change”).<sup>425</sup> The lawmakers’ consciousness of these factors may be heightened by pressure from other parts of society, but, even then, Watson asserts that “the lawmakers’ response [will be] conditioned by the legal tradition: by their learning, expertise, and knowledge of law, domestic and foreign.”<sup>426</sup> For example, societal pressure may bring about a change in the law, but “the resulting law will usually be borrowed, from a system known to the legal elite, often with modifications, to be sure, but not always those deemed appropriate after full consideration of local conditions. The input of the society often bears little relation to the output of the legal elite.”<sup>427</sup> Watson has hypothesized that the similarity between the legal rules of very different societies can be explained by the general similarity of legal culture from one Western country to another.<sup>428</sup>

Despite some rather categorical statements about the lack of a relationship between law and society (as well as a generally irreverent attitude toward the relationship between law and society),<sup>429</sup> Watson has not contended that law and society completely lack any connection.<sup>430</sup> Rather, Watson has argued that there is no “simple correlation” between law and society.<sup>431</sup> William Ewald has summarized Watson’s argument against the strong versions of the mirror theory of the relationship between law and society as follows: “History shows that, because of the nature of the legal profession, legal change in European private law has taken place largely by transplantation of legal rules; therefore, law is, at least sometimes, insulated from social and economic change.”<sup>432</sup> Ewald describes this interpretation of Watson’s argument as open[ing] the door to a view of law that is subtler and more nuanced than any of the theories that have hitherto prevailed. Watson has shown that law does not reduce to economics (or

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425. *Id.* at 263-64.

426. *Id.* at 264.

427. *Id.* at 263.

428. Watson, *Legal Change*, *supra* note 187, at 1157.

429. Ewald, *supra* note 354, at 491-92, 503-04 (differentiating between “strong” Watson and “weak” Watson, or, more precisely, “categorical” Watson and “nuanced” Watson). Evidence of Watson’s irreverence is found in a number of the points that have been made in the course of this discussion. In particular, see notes 401, 408, 410, 421, 424, 427, 428 and accompanying text. I would like to take this opportunity to acknowledge a debt of gratitude to my colleague, Vivian Curran, for the adjective “irreverent” in the text above.

430. Watson, *Legal Change*, *supra* note 187, at 1136.

431. Watson, *Legal Transplants II*, *supra* note 170, at 108.

432. Ewald, *supra* note 354, at 503.

politics or philosophy or society); but, as we saw, he need not claim that law is entirely unrelated to these subjects, and this means that he need not abandon altogether the insights of the great legal thinkers of the past. Something can be salvaged from the work of Marx and Savigny, of Montesquieu and Jhering. But the point is that their ideas must now be coupled with a cautious awareness of the complexity of the relationship between law and society, and must be grounded in a deep investigation of the history of law.<sup>433</sup>

### *C. Common Ground*

Although Kahn-Freund and Watson differ on many points, they do share some common ground that proves particularly relevant to the instant inquiry. At a basic level, Kahn-Freund and Watson differ on the ease with which legal rules can be cloned and implanted in a new legal environment. They also differ on the need for knowledge of the home legal environment of a rule that is to be cloned and implanted – while Kahn-Freund believes that knowledge of the social and political context of a rule is necessary to determine its transplantability, Watson generally believes that such knowledge, although helpful, is unnecessary. They both, however, agree that knowledge of the recipient legal environment is indispensable to the successful cloning and implantation of a legal rule. Knowledge of the recipient legal environment is necessary because the cloned rule must be examined to determine whether any adjustments or alterations must be made in order to tailor the rule to the recipient environment and thereby minimize the risk of its rejection by that environment. Thus, both Kahn-Freund and Watson would seem to agree that American neutral experts should advocate legal cloning as a part of the tax reform process in a transition country *only* if they have a thorough knowledge of its legal, political, social, and economic context and have tailored the rule to that context.<sup>434</sup>

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433. *Id.* at 509.

434. In at least one instance, the rejection of tax reform advice proffered by Western experts to a developing country has been attributed to the failure of those experts to take the legal, political, social, and economic context of that country into account. Vicki L. Beyer, *The Legacy of the Shoup Mission: Taxation Inequities and Tax Reform in Japan*, 10 *UCLA Pac. Basin L.J.* 388, 396-99 (1992); M. Bronfenbrenner & Kiichiro Kogiku, *The Aftermath of the Shoup Tax Reforms: Part I*, 10 *Nat'l Tax J.* 236 (1957); M. Bronfenbrenner & Kiichiro Kogiku, *The Aftermath of the Shoup Tax Reforms: Part II*, 10 *Nat'l Tax J.* 345 (1957); Barry M. Freiman, *The Japanese Consumption Tax: Value-Added Model or Administrative Nightmare?*, 40 *Am. U. L. Rev.* 1265, 1275-77 (1991); see *supra* note 25.

A necessary adjunct to knowledge of the recipient environment is knowledge of its language(s).<sup>435</sup> Although not specifically discussed above, the importance of language proficiency is underscored by the comparative law literature on legal translation.<sup>436</sup> It has been said that effective legal translation requires more than just linguistic skills – it also requires training in comparative law: “The translator must possess the skill to compare the legal content of terms in one language (one legal system) with the legal content of terms in another legal language (the other legal system).”<sup>437</sup> This is especially true when the legal systems and languages involved are not closely related,<sup>438</sup> which is the case here. A translator who lacks sufficient familiarity with both legal systems may not choose appropriate equivalent terms for the ideas being communicated, but will, nevertheless, wield a great deal of discretion in how the translation is performed.<sup>439</sup> As a result, an American neutral expert who is unfamiliar with the local language(s) and relies on translation both to become familiar with the recipient environment and to draft legislation (or otherwise communicate legal ideas) places herself at the mercy of the translator, risking misunderstanding and miscommunication.

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435. See *supra* note 154 and accompanying text.

436. See, e.g., Michael Beaupré, *La Traduction Juridique: Introduction*, 28 *Les Cahiers de Droit* 735 (1987); G. Leroy Certoma, *Problems of Juridical Translations in Legal Science*, in *Org. Comm. of the 12th Int’l Cong. of Comparative Law, Int’l Acad. of Comparative Law, Law and Australian Legal Thinking in the 1980s: A Collection of the Australian Contributions to the 12th International Congress of Comparative Law* 67 (1986); Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 *Am. J. Comp. L.* 43, 54-59 (1998) [hereinafter *Curran, Cultural Immersion*]; Vivian Curran, *On the Shoulders of Schlesinger: The Trento Common Core of European Private Law Project*, 2 *Global Jurist Frontiers* (2002), at <http://www.bepress.com/gj/frontiers/vol2/iss2/art2/> (last visited Sept. 12, 2003); G.-R. de Groot, *La Traduction Juridique: The Point of View of a Comparative Lawyer*, 28 *Les Cahiers de Droit* 793 (1987); Jan Engberg, *Legal Meaning Assumptions – What Are the Consequences for Legal Interpretation and Legal Translation?*, 15 *Int’l J. Semiotics L.* 375 (2002); Sofie M.F. Geeroms, *Comparative Law and Legal Translation: Why the Terms Cassation, Revision and Appeal Should Not Be Translated . . .*, 50 *Am J. Comp. L.* 201 (2002); Rodolfo Sacco, *La Traduction Juridique: Un Point de Vue Italien*, 28 *Les Cahiers de Droit* 845 (1987).

437. de Groot, *supra* note 436, at 797; see also Certoma, *supra* note 436, at 69; Curran, *Cultural Immersion*, *supra* note 436, at 54-59; Engberg, *supra* note 436, at 376, 385-88; Sacco, *supra* note 436, at 849.

438. de Groot, *supra* note 436, at 798-800; see also Certoma, *supra* note 436, at 69-70.

439. Beaupré, *supra* note 436, at 740-43; Certoma, *supra* note 436, at 70-72; see also Bernhard Grossfeld & Edward J. Eberle, *Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers*, 38 *Tex. Int’l L.J.* 291, 310-11 (2003).

Less obviously, the writings of Kahn-Freund and Watson should give American neutral experts reason to be chary of advocating tax cloning when advising transition countries – even when they do possess both a thorough knowledge of the recipient environment and the requisite language skills. Tax rules are rules of public (as opposed to private) law.<sup>440</sup> On Kahn-Freund's continuum of transferability, public law rules are considered to be closest to the organic end of the spectrum, and, therefore, to be the most resistant to transplantation. Moreover, Watson has expressly limited his views concerning the ease of transferability to rules of private law.<sup>441</sup>

The risks generally entailed in legal cloning include outright rejection of the cloned rule as well as unintended consequences that “can turn out to be a pleasant surprise . . . [or] very disappointing.”<sup>442</sup> When tax rules are being cloned, these risks are magnified. If an incipient tax system is peppered with rules that are rejected in practice or do not function as anticipated, the stability

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440. Restatement (Third) of Foreign Relations Law of the United States § 483 reporter's note 2 (1987); Hans W. Baade, *The Operation of Foreign Public Law*, 30 *Tex. Int'l L.J.* 429, 447 (1995); William S. Dodge, *Breaking the Public Law Taboo*, 43 *Harv. Int'l L.J.* 161, 161 (2002); Philip J. McConaughay, *Reviving the “Public Law Taboo” in International Conflict of Laws*, 35 *Stan. J. Int'l L.* 255, 303 n.227 (1999).

441. See *supra* note 387 and accompanying text.

442. Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 *Am. J. Comp. L.* 839, 839 (1997); see John H. Beckstrom, *Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia*, 21 *Am. J. Comp. L.* 557, 582 (1973) (“The limited empirical evidence available suggests only that it [i.e., the transplanted legal system] is not yet working. That evidence shows a country hardly aware of the new codes and a judiciary still struggling to comprehend them in basic particulars – even in the major urban areas.”); M.R. Belgesay, *Social, Economic and Technical Difficulties Experienced as a Result of the Reception of Foreign Law*, 9 *Int'l Soc. Sci. Bull.* 49 (1957) (highlighting instances where cloned rules implanted in the Turkish legal system did not work because they were at variance with Turkish cultural norms); Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 *Am. J. Comp. L.* 227, 232 (2000) (describing the recent Italian importation of the American adversary model of criminal procedure and indicating that the result was “that the transplant ended up being little more than an acoustic imitation, in which the mixture of the new ‘adversarial’ elements with the old non-adversarial ones produced effects diametrically opposed to those expected: the defendant in the Italian legal system is today less protected against abuses of power than he was prior to the introduction of common law adversarial elements” (footnote omitted)); I.E. Postacioglu, *The Technique of Reception of a Foreign Code of Law*, 9 *Int'l Soc. Sci. Bull.* 54, 55-56 (1957) (making observations similar to those of Belgesay, and noting that (i) it took twenty-five years before the imported rules began to be interpreted in the same manner that they were interpreted in their home environment and (ii) “[i]t must indeed be admitted that with the completion of the reception everything did not go smoothly all at once. Against its undoubted advantages, reception unquestionably had its drawbacks, some of them resulting from the extraordinary rapidity of the whole operation, others more difficult to obviate, still require most delicate handling if the remedy is not to be worse than the disease.”); see *supra* note 381 and accompanying text.

and integrity of that system may be undermined.<sup>443</sup> Frequent amendments to the tax laws to correct these problems may “upset the expectations of investors and make it difficult for taxpayers to understand and comply with the laws,”<sup>444</sup> which, in turn, may negatively impact government revenues. Given the indeterminate nature of the transferability of public law rules, American neutral experts should not rule out the use of tax cloning when advising transition countries, but should take the risks attendant to tax cloning into account and proceed with the requisite level of caution.

#### *D. Ethical Guidelines for Tax Cloning*

Using the principle of nonmaleficence as a foundation and this common ground as the building blocks, we can now begin to construct ethical guidelines for tax cloning. The principle of nonmaleficence imposes an obligation to refrain from harmful action. In the context of providing advice to transition countries, the harm that may be caused by tax cloning is relatively serious – if cloned rules are rejected or unexpectedly operate in a detrimental manner, the stability and integrity of an incipient tax system may be undermined and, as a result, the transition country’s ability to collect revenue and fund its activities may be threatened. It is with this potential harm in mind that the ethical boundaries that circumscribe the activities of American neutral experts should be drawn.

To set these ethical boundaries, we will turn once again to our chosen benchmark for guidance.<sup>445</sup> Given that the relationship between American neutral experts and transition countries is analogous to the relationship between attorneys and clients, we may be able to minimize the potential harm that tax cloning can cause to transition countries by imposing on American neutral experts something akin to the lawyer’s general duty of loyalty.<sup>446</sup> As part of this duty of loyalty, an American neutral expert would owe both a duty of competence and a duty to avoid conflicts of interest to any transition country

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443. An established tax system, like that of the United States, should more easily be able to withstand the rejection of cloned rules as well as the consequences of cloned rules that do not function as anticipated. Nevertheless, care should be taken in choosing the rules to be cloned and in tailoring those rules to the recipient environment. See generally Anthony C. Infanti, *Spontaneous Tax Coordination: On Adopting a Comparative Approach to Reforming the U.S. International Tax Regime*, 35 *Vand. J. Transnat’l L.* 1105, 1142, 1226-31 (2002).

444. Gordon & Thuronyi, *supra* note 24, at 3.

445. See *supra* Part I.

446. As discussed above, see *supra* Part IV.B.2.a, this general duty of loyalty represents an application of the principle of nonmaleficence to the attorney-client relationship; the purpose of imposing this duty is to prevent the attorney from harming her client.

that she advises. The content and meaning of these duties would be supplied by the common ground shared by Kahn-Freund and Watson on the question of legal cloning. Accordingly, the duty of competence would require an American neutral expert to refrain from advocating tax cloning unless she not only possessed the requisite technical tax expertise, but also (i) possessed a thorough knowledge of the legal, political, social, and economic context of the transition country, (ii) was proficient in the language(s) of that country, and (iii) had tailored the cloned tax rules to the specific context of that country. The duty to avoid conflicts of interest would work in tandem with the duty of competence by requiring that the cloned tax rules not only be tailored to, but also for the benefit of, the transition country.

Even armed with the requisite technical expertise and language and cultural skills, the general duty of loyalty would nonetheless require an American neutral expert to proceed with caution when advocating tax cloning, because the public law nature of tax rules may render their successful cloning and implantation both difficult and risky. It is worth recalling at this juncture that the simple change in terminology from legal “transplants” to legal “cloning,” which was advocated earlier in this article,<sup>447</sup> should go far in helping to remind neutral experts of the need to pause and reflect before advocating tax cloning, because the debate over human cloning has given that term a decidedly negative connotation.

## VI. CONCLUSION

With these ethical guidelines in mind, American neutral experts should revisit the advice that they render to transition countries. They should reflect on whether they have complied with the duty of competence and the duty to avoid conflicts of interest when they have rendered advice to transition countries in the past. They should also take this opportunity to consider how they can go about complying with these duties when (if?) they render advice to transition countries in the future. The need for such reflection is underscored by the fact that each of the neutral experts described in Part II of this article has, in some respect, fallen short in complying with the general duty of loyalty.

Although the U.S. Treasury Department does demonstrate some sensitivity to the need for its tax experts to have language and cultural skills, it does not require such skills as a prerequisite for, or as a condition of, hiring.<sup>448</sup> These skills are not required of Office of Technical Assistance resident advisors even though they are expected to remain in a host country for no less than one year – and optimally should remain there from two to four years. OTA appears to focus more heavily on technical tax expertise when hiring and to hope that

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447. See *supra* Part III.

448. See *supra* note 47 and accompanying text.

it can compensate for a lack of language and cultural skills by hiring local assistants who can serve as translators and provide advice on navigating the culture and customs of the host country. While the hiring of local assistants may, to some extent, mitigate the failure to require resident advisors to possess relevant language and cultural skills, the discussion above of the comparative law literature on legal translation indicates that this approach entails a serious risk of miscommunication and misunderstanding, because legal translation requires legal as well as linguistic skills. OTA does offer resident advisors support for optional local language training; however, it would seem that the duty of competence would militate in favor of (i) making such training mandatory and (ii) requiring resident advisors to undergo such training prior to placement in the host country.

The International Tax and Investment Center describes its agenda as spreading “best international practices”<sup>449</sup> (a euphemism for Western-style tax rules). This agenda bespeaks a lack of restraint in advocating tax cloning as well as a failure to take into account the legal, political, social, and economic context of the transition countries that ITIC advises. More troubling, however, is the fact that ITIC’s description of its own activities raises the specter of a conflict of interest in providing advice to transition countries. Despite styling itself as “an independent nonprofit research and education foundation” that is “a neutral forum for discussion and resolution of legislative, regulatory, and administrative problems in tax and investment policy,”<sup>450</sup> ITIC seems to be overly solicitous of the needs and desires of its corporate sponsors. On its website, ITIC describes how its sponsors benefit from the advocacy of ITIC staff, how ITIC’s efforts help to improve its sponsors’ bottom lines, and how ITIC provides its sponsors with advance information on tax developments in the transition countries where it operates.<sup>451</sup> This description of the myriad of ways in which ITIC can benefit its sponsors raises the question whether spreading best international practices in fact helps transition countries, or whether it actually helps ITIC sponsors by providing them with a familiar (and favorable) tax framework within which to conduct business.

The Basic World Tax Code and Commentary suffers from the same lack of restraint in advocating tax cloning and failure to take into account the legal, political, social, and economic context of the transition countries that it aims to help.<sup>452</sup> The BWTC has been criticized as too American in its flavor and content, and has even been called a “clone of the U.S. Internal Revenue Code.”<sup>453</sup> The BWTC also generally fails to present alternative provisions that

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449. See *supra* note 54 and accompanying text.

450. About ITIC, *supra* note 54.

451. See *supra* notes 85-90 and accompanying text.

452. See *supra* notes 115-124 and accompanying text.

453. Vann, *supra* note 105, at 274.



embody policy choices different from those preferred by its authors. While Hussey and Lubick contemplate that the BWTC will have to be adapted to the needs of each individual transition country, their failure to discuss alternative provisions makes such adaptation more difficult and creates the possibility that an uninformed advisor who turns to the BWTC for guidance may unintentionally (and inappropriately) incorporate a whole host of policy choices into the transition country's tax laws.

Interestingly, it is the two-volume set entitled *Tax Law Design and Drafting* – which was published by the International Monetary Fund, an entity that was classified as a stakeholder and *not* as a neutral expert for purposes of this article – that demonstrates the most sensitivity to the ethical guidelines formulated above. The chapter on the tax legislative process in the first volume of that set contains advice concerning the issues that should be considered when choosing and employing foreign legal advisors. In that chapter, transition countries are counseled to employ foreign advisors who (i) are familiar with the local language; (ii) are experts in the tax laws of any country from which legal rules are to be borrowed; (iii) are not seeking to impose the law of their own country on the transition country, or who, regardless of intentions, are only equipped to do so; and (iv) will consult local lawyers to ensure that the draft tax legislation “is fully suited to the country's circumstances,” and, more particularly, that it is consistent with the rest of the country's legal system.<sup>454</sup> Transition countries would be well-advised to take these admonitions to heart, because they incorporate much of the substance of the duty of competence described above.

It must readily be acknowledged, however, that, in practice, it may prove quite difficult to locate individuals who combine technical tax expertise with the language and cultural skills required by the duty of competence. A search on the Martindale-Hubbell Lawyer Locator found that, of those lawyers in private practice who listed taxation as one of their practice areas, only fifty speak Russian, seven speak Ukrainian, three speak Czech, three speak Polish, and just one speaks Latvian.<sup>455</sup> The difficulty of finding lawyers with the requisite language and cultural skills is underscored by the small number of

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454. Gordon & Thuronyi, *supra* note 24, at 11-13. See *supra* text accompanying notes 153-163 for a more detailed account of this advice.

455. The Martindale-Hubbell Lawyer Locator is an online search engine that can be found at <http://www.martindale.com>. This search was performed on November 8, 2002, and, therefore, reflects only lawyers listed in the database as of that time. Neither the postings of government nor of academic lawyers were included in this search because the search tabs for government and academic lawyers do not provide a field for narrowing the search by reference to language skills.

individuals graduating from American universities with bachelor's, master's, and doctor's degrees in East European languages and literatures.<sup>456</sup>

The brief description in Part II of the activities of American tax experts who are advising transition countries evidences a level of activity that far surpasses the capacity of the small pool of candidates with the requisite combination of technical, language, and cultural skills. Nevertheless, a dearth of fully qualified experts is not a license to disregard ethical proscriptions and to foist inappropriate – and potentially harmful – advice on unsuspecting recipients. By drawing attention to the ethical dimension of this activity, this article hopes to spur American neutral experts to reflect on the nature and quality of the advice that they have already rendered to transition countries and, more importantly, on the nature and quality of the advice – if any – that they will render to these countries in the future.

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456. During 1999-2000, only 371 people were graduated with a bachelor's degree in East European languages and literatures, only 83 people were graduated with a master's degree in East European languages and literatures, and only 40 people were graduated with a doctor's degree in East European languages and literatures. Thomas D. Snyder & Charlene M. Hoffman, U.S. Dep't of Educ., *Digest of Education Statistics 2001*, at 307 tbl. 258 (2002).