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Investigating Legal Consciousness through the Technical Work of Elite Lawyers: A Case Study on Tax Avoidance

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Since the 1990s, legal consciousness has been amply used by sociolegal scholars to better understand the everyday lives of ordinary people, with a strong focus on vulnerable or impoverished people. This article argues that legal consciousness, with some methodological adjustments, could lend itself to the study of the rich and powerful by investigating both the technical work of their lawyers and how that work shapes our broader legal culture. To illustrate this point, this article takes tax avoidance as a case study. Drawing on materials revealed by a recent tax scandal, it suggests that current difficulty in tackling the problem of tax avoidance rests on uneven access to the cultural repertoires related to legal technique and legal innovation, which fosters the tax-avoidance narrative's ambiguity.

Tax avoidance is a complicated story that presents the most profitable multinationals as paying virtually no taxes while still abiding by the letter of the law.[1] It portrays tax authorities as vigorously devoted to hunting down tax evaders but concentrating only on small contractors and black-market workers, thus leaving big businesses and wealthy individuals largely undisturbed (e.g., Spire and Weidenfeld 2015). It is an ambiguous tale about cooperation and competition in which states are committed to creating a level playing field among themselves but create loopholes in their own legislation and indulge the tax havens most beneficial to their nationals (Palan et al. 2009). Tax avoidance is sometimes described as acceptable and efficient and sometimes as aggressive,

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[1] Allegations of multinational corporations paying a near-zero tax rate on their global profits have multiplied over the last decade. For example, Apple paid an effective corporate tax rate of 0.005 percent on its European profits in 2014 (European Commission 2016). The same year, Google paid a 2 percent effective tax rate on its profits made in the United Kingdom (Tax Justice Network 2016).

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abusive, unethical, and, perhaps, even illegal. Some equate it with mere tax planning—simply "the ordering of one's affairs in such a way as to reduce the tax that would otherwise be payable" (Li et al. 2017: 530). Others amalgamate it with fraudulent tax evasion, stressing the shared goal and effect of each (i.e., the rich paying less than their fair share of taxes) and the elusive delineation between avoidance and evasion (Likhovski 2004: 991–95; McBarnet and Whelan 1991). Faced with an issue that the law seems incapable or unwilling to solve, tax activists, nongovernmental organizations, and the media try to reframe the debate in broader terms of morality and justice rather than reduce it to legal technicalities (Christians 2013; Christians 2014: 39–40).

Yet, this narrative speaks little to one of its crucial characters: elite lawyers specialized in tax planning. Whether practicing in multinational law firms or in multidisciplinary firms, such as global accounting firms,[2] that offer legal services, elite lawyers are the experts of legal technicalities underlying most tax-avoidance strategies, but they are also more than this: their technical work shapes our broader legal culture. While several studies have examined the ways professional ideology, career strategies, and the rise of global law firms may influence the development of law (Dezalay and Garth 1996; Faulconbridge et al. 2008; Flood 2007; Sarat 2002; Shamir 1995), few scholars have examined how elite lawyers' technical inventions impact common understandings of law. Previous works have shown that in areas other than tax, elite law firms were a "pillar of globalization" (Flood 2007: 41). By serving as advisers, advocates, lobbyists, and negotiators for both businesses and governments, elite lawyers have been found to contribute to the harmonization of legal solutions worldwide, the construction of global regulatory regimes, and the emergence of a new global law (Arthurs 2001: 275; Faulconbridge and Muzio 2012: 144; Gessner et al. 2001: 18; Lewkowicz and Van Waeyenberge 2010). Their work in corporate and capital-markets law, for instance, is said to enable transnational business deals that, without their involvement, would seem too risky (Flood 2007: 38). In other areas, and in a less visible manner, however, elite lawyers also orchestrate the fragmentation and complexity of law (Arthurs 2001: 275–77; Wainwright 2011: 288–91). Where they wish, they can mount a "highly skilled resistance" (Llewellyn 1930: 459) to regulators by designing strategies to circumvent or to "comply

[2] Since the 1990s, the biggest accounting firms have increasingly emphasized their legal services, becoming significant competitors to the biggest law firms, especially in the tax-planning field. While the relationship between lawyers and accountants has often been described as one of competition and confrontation (e.g., Dezalay and Garth 2004), one should not forget the shared culture of legal professionals working in international taxation (Picciotto 1995: 27).

creatively" (McBarnet and Whelan 1991: 848) with the law. They mastermind the most sophisticated "tax optimization schemes"—intricate contractual and corporate devices designed to push the frontiers of tax legality. Elite lawyers, like all lawyers, know how to "*use* the methods of the law to neutralize its impact" (McBarnet 1992: 257) for the benefit of their clients. Unlike other lawyers, however, these lawyers train and develop knowledge for their broader professional community while positioning their offices as a central node in the transnational networks underlying contemporary capital flows. For this reason, elite lawyers' technical feats hold unparalleled sway over legal practice.

For those interested in exploring the intersection between legal technique and legal culture, the work of elite lawyers on tax-avoidance schemes offers a preferred site of study. Through their technicalities, elite tax lawyers meld practices, discourses, and structures that allow the richest members of society to circumvent the law, and they do so in a way that fosters the moral ambiguity of the tax-avoidance narrative. By taking tax avoidance as a case study, this article seeks to develop tools and concepts that could help sociolegal scholars investigate the technical work of elite practitioners more broadly. It argues that sociolegal scholarship has at its disposal a well-established concept—legal consciousness—that could help comprehend how elite legal practitioners discretely render some problems, such as tax avoidance, more difficult to grapple than others.

Since the 1990s, sociolegal scholars have amply used legal consciousness to better understand the everyday lives of ordinary people, focusing especially on the experiences of impoverished, vulnerable, and marginalized people. With some adjustment, I suggest this notion could be equally useful for the study of the work elite lawyers do for the rich and powerful. Such a proposition might sound controversial—after all, legal consciousness studies were premised on a turn away from "lawyer's law" (Friedman 1994: 29, cited by Silbey 2005: 326) and a desire to find law's imprint where least expected: in informal interactions taking place in neighborhoods, workplaces, families, and a variety of mundane settings far removed from the courtroom or the lawyer's office (Ewick and Silbey 1998: 23–25). Following in this tradition, most sociolegal scholars now assume lawyers' law does not differ significantly from "law on the books" and has, hence, little to offer their line of inquiry. This article is primarily theoretical and methodological in nature: it purposes to explain how legal consciousness allows for a richer understanding of elite lawyers' work and techniques so as to open new avenues for sociolegal research and critique. It does so by taking, as a case study, the work these lawyers do when they craft tax-avoidance devices for their clients.

In part I, I first discuss the original ambitions of legal consciousness: the way it informed research in law and society, criticisms it has raised, and how it could apply to the study of elite lawyers' work. Part II explores new methodological avenues for the study of elite lawyers' legal consciousness. Whereas legal consciousness studies have typically relied on qualitative interviews and ethnographic observations, I propose that empirical sociolegal research could avail itself of the numerous documents produced by elite lawyers and treat them as artifacts of their legal consciousness. Part III illustrates this methodological proposal through a case study based on a tax-avoidance scheme designed by KPMG's Canadian office and recently uncovered by the Canadian media. From this preliminary evidence, part IV sketches the salient features of elite lawyers' legal consciousness, as revealed by their work on tax-optimization schemes. It suggests that elite lawyers do not display a classical or positivist attitude toward law but rather experience law as a global phenomenon, a rule-enabled activity, and a private know-how. It argues that the disconnection between the cultural premises of their legal work and the public discourse about tax law makes the issue of tax avoidance especially difficult to tackle. Finally, the article concludes by stressing the opportunity to develop counterdiscourses and alternative legal knowledge in tax matters: indeed, as the so-called "legality" of many tax-avoidance schemes relies on a far-from-classical stand toward law, legality seems more fragile than what is usually assumed and is, therefore, likely to be undermined by contrary legal argumentation.

Legal Consciousness, in the Everyday Life and Beyond

After decades of empirical research on the administration of the legal system and its social outcomes, law and society scholarship has developed, since the 1980s, a growing interest in the way ordinary citizens, especially the poor and the underprivileged, experience the law in their daily life. "Legal consciousness" soon became, in the United States, the banner of this renewed approach to sociolegal studies. The notion of legal consciousness was rooted both in a broad intellectual movement and a specific theoretical problem. Its broad intellectual movement was the "cultural turn" that swept across the humanities and social sciences during the same years: law, like religion, politics, or almost any other human interaction, can be seen as a cultural practice, a collective process of creating, stabilizing, organizing, and reproducing meanings that both enable and constrain the way we conduct ourselves in the world (Sewell Jr. 1999; Silbey 2005). The specific

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theoretical problem was legal hegemony: despite its failures to live up to the ideals proclaimed by law on the books, law continued to inspire respect and adherence, even among those suffering its injustices, and, thus, this enduring authority of law required explanation (Silbey 2005: 330–33). Previous research on law and society had already shown that unequal resources result in systemic advantages for the "haves" over the "have-nots" (Galanter 1974). With legal consciousness, sociolegal researchers were then able to study unequal access to the repertoires of meanings pertaining to law (Engel 1998: 119; Ewick and Silbey 1998: 41): the concept of legal consciousness was designed to better understand how ordinary citizens used or did not use available cultural tools associated with legality to make sense of their experiences and to evaluate the extent such experience was, on the one hand, significant or anecdotal and, on the other hand, self-evident or open to contestation.

Legal-consciousness studies brought forward a new vision of law in American sociolegal scholarship: a vision where law, power, and resistance have become increasingly decentralized and where "legality is an emergent feature of social relations rather than an external apparatus acting upon social life" (Ewick and Silbey 1998: 17). According to this vision, empirical legal research is needed not merely because legal rules are indeterminate and leave a margin of discretion to those who apply them, as the legal realists had put it (Trubek and Esser 1989: 8–10), but, more fundamentally, because legal symbols and legal meanings imbue all social life well beyond the reach of formal legal institutions. Research in law and society thus began, and continues, to track the subjective experiences of people who are not officially part of the legal system: it collects stories of ordinary people in a variety of situations—former spouses negotiating a divorce (Sarat and Felstiner 1989), working-class people resorting to small-claims courts (Merry 1990), beneficiaries of the welfare system (Cowan 2004; Sarat 1990), same-sex couples (Harding 2006; Hull 2003), victims of street harassment (Nielsen 2000), undocumented immigrants (Abrego 2011), etc.—in search of their own uses of legal imagery. These studies show that heterogeneous conceptions of law typically coexist in people's narratives and that these contradictory assessments of law in the broad culture of ordinary people strengthen law: that is, such contradictions make law more resilient to its criticisms and people less demanding about its achievements (Ewick and Silbey 1998: 230–33). Yet, the plurality of meanings attached to law is simultaneously what creates possibilities for both resistance and alternative readings of reality. In other words, the grounds of legal hegemony also contain the seeds of counterhegemonic practices and discourses (Ewick and Silbey 1998: 233–34; Halliday and Morgan 2013; Morgan and Kuch 2015).

Beyond its attention to multiple meanings associated with legality, legal-consciousness scholarship was never entirely clear about the content of legal consciousness itself: for some, legal consciousness was composed primarily of popular representations of law and the legal system, whereas for others, legal consciousness referred mainly to aptitudes for framing issues or solving problems by using legal categories (Engel 1998: 119–20; McCann 2006: xx). Similarly, while most authors agreed on law's constitutive power over daily life—through which they recognize images and discourses regarding law directly or indirectly shape ordinary people's understandings and behaviors—some also insisted on legal consciousness's instrumental dimension—that popular legal representations not only condition subjective experiences but simultaneously provide tools for acting and advancing one's interests (McCann 2006: xvi–xvii). This dual perspective implies that different experiences with the law translate into different types of legal consciousness, which in turn empower their subjects differently. But attention to legal consciousness's instrumental dimension further paves the way for inquiry into how subjects, individually or collectively, through what has been termed a costly and uncertain process of "cultural retooling" (Swidler 1986: 284), create or gain access to new repertoires of meanings and draw from them new possibilities for transformative action (McCann 2006: xvii–xviii; Sewell Jr. 1992).

Legal-consciousness studies have attracted criticisms that concern the extremely diffuse nature of law they seek to investigate. As engaging as those studies' redescriptions of law as cultural practice and as repertoires of meanings might be, something has been lost in translation: as stated by a friendly critic, "once law is reconceptualized as all forms of power and authority, legal consciousness is no longer meaningfully legal" (Mezey 2001: 165). Over the years, the literature on legal consciousness has tended to shrink into mere analysis of the differentiated attitudes of individuals toward the law, losing sight of the collective construction of legal culture and its propensity to obscure and legitimate social inequalities (Silbey 2005: 324). Law and society scholars who wrote about legal consciousness might have indulged in an uncritical praise of the everyday (Valverde 2003), perversely narrowing the scope of sociolegal research by excluding many specialized contexts and influential actors, such as legal professionals or the corporate elite (McCann 2006: xxi–xxii; Pélisse 2005: 125). While legal-consciousness studies' initial proponents shared the tacit belief that their focus on the experience of law by lower-income or lower-status citizens was the best way to expose the structural inequalities of the legal system, it may be time to revisit that premise. Indeed, there is no reason to think that the collective construction of legal meanings and legal structures should happen

exclusively in the daily routine of ordinary people and that their experience alone should be the key to law's true nature. After nearly two decades of research into legal consciousness, Silbey (2005: 324–25, 360) even concluded, provocatively, that legal consciousness has become "compromised" and suggested "it might be time to move on." She urged law and society scholars to cease marveling at the diversity of attitudes among average or marginalized citizens and to pay more attention to the manufacture of legal consciousness at institutional levels so they might correlate legal consciousness with people's ability to understand and challenge social inequalities.

Heeding the previous criticisms, I believe, nonetheless, that legal consciousness can be rescued for sociolegal studies, albeit on one condition: that it be made clear that its essential component is not the study of law in everyday life but rather the study of law as a cultural practice. Attention to the everyday was a productive detour that helped law and society scholarship part with its former conceptions of law, both as a system of rules (i.e., law on the books) and a series of acts by official agents who claim to be bound by legal rules (i.e., law in action). In the realm of everyday life, law revealed itself as a system of meanings, pluralistic and replete with contradictions, that structures people's experiences and provides them, however unevenly, with resources to formulate claims, justify actions, and achieve ends. Such insights need not be restricted to law in everyday life. On the contrary, they should also be transposed to the study of what most people have in mind regarding the law: the work of legal professionals—judges, lawyers, and civil servants. After all, legal professionals, too, participate in the production, organization, disputation, and reproduction of meanings pertaining to law in society. They, too, in their professional activity, draw on various repertoires of images, narratives, previous interpretations, and common understandings about the law. The legal consciousness of lawyers partakes to the popular legal culture of their fellow citizens but also includes additional, more specialized, materials: legal rules, technical motives, distinct standards of argumentation (often called *legal reasoning*), professional ideologies, and so on. Notably, critical legal studies have used the notion of legal consciousness precisely in this sense since the 1980s,[3] leading to a parallel stream of

[3] Duncan Kennedy describes legal consciousness as "the body of ideas through which lawyers experience legal issues." Lawyers, he writes, "share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind …. These underlying premises concern the historical background of the legal process, the institutions involved in it, and the nature of the intellectual constructs which lawyers, judges, and commentators manipulate as they attempt to convince their audiences" (Kennedy 1980: 5–6).

literature on legal consciousness (see, among others, Kennedy 1980; Klare 1978; Lobel 2007: 939; Trubek 1984: 591–95)—a literature that has found surprisingly little echo in sociolegal scholarship.[4] Critical legal studies have often been criticized for their lack of empirical research and for their quasi-exclusive focus on appellate judgments and legal doctrine.[5] Nevertheless, they gave serious thought to how legal materials both constrain and enable lawyers in the course of their work and to the various interpretive strategies used by the latter to reframe legal issues or to destabilize established meanings (e.g., Kennedy 2008: 157–65) in a way that should speak to sociolegal scholars interested in lawyers' contributions to the construction of legal culture. Like sociolegal scholars, critical legal scholars also insisted that lawyers' legal consciousness was not one but many—that it varied across time and spaces and that it enabled different actors in different manners (see, e.g., Kennedy 2006: 21).

In what follows, I investigate the legal consciousness of elite lawyers by drawing on lessons learned from these two schools. The legal consciousness of elite lawyers is not limited to general attitudes about law and society but is filled with technical constructs, formal reasoning, and specialized legal knowledge that must be considered. In previous sociolegal scholarship, these technical components of legal consciousness were seldom studied. Inquiry into elite lawyers' legal consciousness thus requires its own methodological approach to uncover the cultural significance of legal technicalities. The next part delves into the documents crafted by elite lawyers.

Bridging the Gap between Law on the Books and Law in Action: The Study of Law in Documents

Sociolegal studies have long been structured by a dichotomy between "law on the books" and "law in action" (Pound 1910). Law on the books coincides with positivist accounts of the law: it consists of rules that have normative value because they emanate from a legitimate authority. Law on the books seeks to identify and to communicate what the law commands in various situations—statutes, administrative regulations, well-established

[4] Critical legal studies' work on legal consciousness is rarely discussed or even mentioned in sociolegal literature on the same topic. One notable exception is Silbey (2005: 344–45), who discusses, at length, Duncan Kennedy's use of the concept.

[5] This criticism was initially formulated by Trubek (1984: 612). To be fair, critical legal scholars have studied materials that go beyond appellate judgments and legal doctrine to include a variety of public discourses ranging from political philosophy to expert knowledge and to activist debates (e.g., Halley 2006; Kennedy 2016; Koskenniemi 2005).

legal principles ("black-letter law"), doctrinal works, and written opinions of judges are all instances of law on the books. Law in action, for its part, concerns itself with legal decisions and observable legal behavior: it includes decisions reached by courts (but not necessarily their written justifications), actions taken by government officials, effective conduct of contracting parties, etc. Sociolegal studies have their origin in the acknowledgment of a persistent "gap" between the official legal rules and the effective conducts of legal actors. They found that rules do not suffice to predict conducts, neither of legal officials nor of other subjects or users of the law—the law is indeterminate. Empirical research is, therefore, needed to appreciate the gap between rules and conducts—that is, to measure it, explain it, and explore its operation and effects. Legal-consciousness studies have traditionally sought to understand the tolerance for this gap in everyday life by resorting to qualitative research methods, such as semistructured interviews and ethnographic observations. Legal consciousness, in its different forms, appeared as the way ordinary people, through their narratives, would bridge the gap between law on the books and law in action themselves and so preserve law's legitimacy (Silbey 2005: 360).

Legal professionals, however, have their own ways of resolving indeterminacy of law: a set of tricks and skills called the *legal technique*. Between law on the books and law in action stands an army of lawyers doing legal work: lawyers doing research, lawyers giving advice, lawyers negotiating agreements, lawyers designing litigation strategies, etc.[6] Even more concretely, one could observe that lawyers, in their everyday work, fill the gap between formal legal rules and effective decision making by preparing documents—lawyers write memos, file forms, draft contracts, and revise and edit all kinds of legal papers to insure a given legal rule will result in a desired outcome (e.g., Johns 2013: 129; Latour 2004; Lépinay 2011: 126; Riles 2011: 29). Legal technique, said Riles (2005: 976, 1029), can be summed up as "a way of doing legal knowledge" that deserves to be studied "as a cultural practice of its own". Riles (2005: 1029–30) thus urged sociolegal scholars to "take the technological form seriously" and to "make a methodological commitment not to reduce [legal] technology to the politics, culture, history, or personalities surrounding it." In response, I suggest the numerous documents produced by lawyers in their work could provide a good entry to this specific kind

[6] The part of legal technique in determining law in action varies: it may seem an insignificant aspect of the many phenomena conventionally studied by sociolegal scholars (such as sex work or undocumented immigration), but it is particularly salient in the context of a multinational law firm advising a corporate client.

of cultural practice. Documents, in other words, could provide access to the technical dimension of lawyers' legal consciousness and should, for this reason, be included in legal sociologists' methodological toolkit.

Sociolegal scholars should take interest in legal documents for the same reasons social sciences have long recognized documents as a potent tool of government. A century ago, Weber (1968: 67) identified them as a key element of the modern bureaucratic organization, whether in the public administration or in the capitalist enterprise. Since then, the practice of producing and keeping written records of relevant information, past behaviors, past decisions, and formal assessments of people and things has never receded. Styles of management have changed, but documentation has endured, evolving into a technique of neoliberal governance whereby an ever-increasing number of documents allows for a government at distance of institutions, citizens, workers, and consumers (Hibou 2015: 68). Documents are ubiquitous, and they matter: people spend significant time and money producing them, archiving them, protecting their confidentiality, or, oppositely, securing their dissemination. When leaked, documents have the power to scandalize and reframe public debates—this was illustrated, over the past few years, by the International Consortium of Investigative Journalists on the Offshore Leaks, a series of affairs including the Luxembourg Leaks, the Panama Papers, and, most recently, the Paradise Papers. In addition to their instrumental character within organizations, documents are emblematic of modern practices of knowledge and of power: they embody a utopian vision of transparency that tensely coexists with a desire to maintain zones of opacity and control over information gathered (Riles 2006: 5–6; see also Brenneis 2006: 43). Following the insights of Michel Foucault, many in the social sciences have emphasized the constitutive effect of documents and their propensity to grant reality to the phenomena they are supposed to describe and to shape subjects who use them (Foucault 1976; Foucault 1995; Riles 2006: 10; Reed 2006: 158). Forms and files have their own agency: they make visible some aspects of reality and obscure others, they call for certain responses, and they build networks of people and things across time and space (Riles 2006: 21).[7]

If we take more specifically the work of elite lawyers on tax-optimization schemes, we might expect to find various documents

[7] Science and technology studies have long emphasized the centrality of documents in scientific work, describing forms, files, lists, diagrams, and scientific articles as a long chain of documents that allows scientists to make claims about reality. Legal work also engages with a variety of documents, although on different modes (see Latour 2004; Latour and Woolgar 1986).

that reveal distinct facets of their originator's legal consciousness. Empirical research can be conducted from publicly available documents that were designed to be public and, more interestingly, from private documents that eventually went public via a leak, public hearing, or court proceeding. The first category includes practitioners' journals of international taxation, law- and accounting-firm publications (e.g., newsletters, blog entries, reports, etc.), comments in response to government consultation papers, and testimonies made before parliamentary committees. The second category includes constituent documents of offshore entities, memos, and legal opinions on specific tax-optimization schemes, internal documents on how to sell those schemes to potential clients, and correspondence with tax authorities regarding contemplated transactions. These documents belong to three distinct discourse registers: some are technical documents with which lawyers elaborate, challenge, and disseminate legal arguments and canonical interpretations of legal rules. Some are promotional documents that aim to develop and maintain relationships with clients and potential users of tax-optimization schemes. Some, finally, are political documents, intended to legitimize current tax-avoidance practices and to guide future government action on tax policy. These registers are complementary and confer depth to the tax-planning discourse. Legal technique is key to their articulation: it is the foundation of expertise boasted in promotional documents, and it imbues neutrality to policy recommendations formulated in political documents. Furthermore, technical documents are those documents that most clearly display the lawyer's role in selecting which segments of reality will be recorded for posterity and which will not. At times, their constitutive effect is quite literal: legal documents constitute new legal entities—fictitious persons who will become actual rights-holders and subjects of subsequent negotiations with tax authorities. Technical documents are also the observable supports of multiple networks through which fictional legal entities, tax professionals, and rules from various jurisdictions are assembled into functioning "devices" fit to reduce taxpayers' liabilities.

In short, legal documents may be approached as artifacts of their drafters' legal consciousness—as repositories of meanings that elite lawyers presume, construct, distort, diffuse, and systematize both within and beyond the realm of their profession—hence my invitation, addressed to sociolegal scholars, to look into the "law in documents." When the subjects to be studied are powerful actors, unreachable or reluctant to reveal themselves to sociolegal researchers suspected of critical intent, turning to documents may be a valid substitute to other established research methods such as qualitative interviews or direct observations. But documents may

also provide better access to certain aspects of lawyers' legal consciousness than traditional research methods: whereas interviews can convey a sense of lawyers' perceptions of law in general and of their experience of law as a professional practice in particular, documents may provide a more precise understanding of lawyers' successes in constructing technical legal meanings and in framing legal issues. The two methods would, thus, be complementary, even where the subjects are willing to be interviewed.

In continuation with previous legal consciousness studies, the study of law in documents is meant to seize the objective dimension of cultural schemas, but including this time the technical ones: it aims at understanding the ways differential access to stock of typical arguments, standard explanations, and patterns of justification both enables and constrains legal practitioners' action. In such inquiry, one should avoid reducing the written form of legal documents to the dead letter often imputed to law on the books. By objectifying the constellations of meanings assembled by lawyers, written documents stabilize those meanings' intellectual constructions and facilitate their circulation and transposition in new settings. Documents abstract from the contexts they arise from, and such abstraction, inherent to their written form, strengthens the claims they convey. Thanks to legal documents' materiality and permanency, lawyers are better equipped to advance their arguments and to make their case wherever and whenever they need to.[8] Finally, whereas legal documents most obviously reveal lawyer competence in using legal categories to achieve client ends, one can infer from these instrumental uses deeper assumptions about the law and the legal system that often remain unspoken but which are nonetheless constitutive of lawyer thinking and practices.

With legal consciousness and its methodological requisites thus clarified, I offer, through a case study centered on a specific tax-avoidance scheme recently uncovered by Canadian media—the KPMG's Isle of Man company structure—an illustration of how technical legal documents may be used to better understand elite lawyers' legal consciousness.

A Case Study on Tax Avoidance: The Making of a Hybrid Legal Entity

In March 2016, Canadian journalists revealed a confidential settlement offer addressed by the Canada Revenue Agency (CRA) to wealthy clients of the Canadian branch of the accounting firm

[8] French pragmatic sociology has highlighted that when people make claims or try to justify themselves, they often rely on material objects or devices that will lend support to their assertions (Boltanski and Thévenot 2006).

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KPMG. Under this offer, KPMG clients agreeing to declare their interest in an offshore company incorporated in the Isle of Man and to pay the taxes they avoided over 15 years from 1999 to 2014 would incur no penalty and no criminal charges and would be granted a reduced interest rate on money owed to the government. This revelation sparked a popular outcry, leading to a parliamentary committee that would investigate CRA practices regarding tax evasion and tax avoidance and that would invite KPMG officials to explain their role in this affair. Hundreds of pages of KPMG internal documents were, then, made public, including technical memos, outside legal opinions, model agreements, and promotional materials, which, together, detail the background and the working of the Isle of Man company structure (KPMG, 2016).

This case is reminiscent of the KPMG tax-shelter scandal that occurred in the United States some 15 years ago. In 2002, a U.S. Senate committee initiated an in-depth inquiry into KPMG's practices of developing and promoting abusive tax shelters, leading to a devastating report (U.S. Senate 2003), a criminal investigation against the firm and some of its partners, and, finally, to KPMG admitting tax fraud and agreeing to pay a half-million-dollar fine (Rostain 2006; Rostain and Regan Jr. 2014). Both cases involve tax products designed in the late 1990s, a boom time for the tax-shelter industry, and suggest similar organizational patterns for the design, approval, and marketing of generic tax products to be offered to multiple clients. Contrary to its U.S. counterpart, however, KPMG's Canadian office was never compromised by its tax-planning activities—it was never investigated for tax fraud nor publicly blamed for abusive tax planning. Moreover, the issues raised before the Canadian parliamentary committee remained superficial—all discussion of the Isle of Man company scheme having been barred as *sub judice* because of a KPMG client then and currently still challenging his tax assessment. The report later submitted by the committee contained no criticism of KPMG's practices and merely offered a few recommendations to the government for improving its fight against tax evasion (House of Commons of Canada 2016b). In short, whereas the U.S. case officially became a story of professional and organizational misconduct, the Canadian case was kept within the confines of a more technical debate and was ultimately left to be decided by courts.

Despite the paucity of information regarding their sociological and organizational context—or perhaps precisely thanks to it—the KPMG documents made public after the parliamentary hearing provide a rare insight into the technical work of elite practitioners in connection with a specific tax-avoidance scheme. These documents revealed that the Isle of Man company structure was

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ingenious but not overly complex and that its success did not rest on the use of sophisticated financial instruments. Its scheme was conceived in 1999 in reaction to proposed amendments to Canada's income-tax legislation intended to eliminate tax benefits previously attached to nonresident trusts—foreign trusts hitherto tax exempted would be deemed, under some circumstances, Canadian residents who would be subject to Canadian taxes if they had a Canadian contributor or a Canadian beneficiary.[9] In a foreseeable future, wealthy Canadians who once kept their money in foreign trusts would need to find a new vehicle to lower their tax burden. Fortunately for the tax planning industry, the Canadian situation had precedent: over the previous decade, trusts' tax advantages had eroded in many jurisdictions, including the United Kingdom, and tax practitioners worldwide had begun to develop alternative solutions. One of them was the "guarantee company," a forgotten corporate form in common-law countries undergoing a renaissance in some British dependencies, including the Isle of Man, the British Virgin Islands, and the Turks and Caicos Islands. KPMG's internal documents contain three 1990s articles published from journals specializing in offshore finance and annotated by KMPG staff that promoted the use of guarantee companies instead of trusts for tax-planning purposes (Cain 1993; Taylor 1991/1992; Trowbridge 1998). One of them read, "[t]he time seems ripe to reactivate interest in those companies which though not trusts might be thought to have trust characteristics without being trustees of their assets" (Taylor 1991/1992: 7). The guarantee company became the backbone of KPMG's Isle of Man scheme, as explained in its client planning letter: "[t]he use of a corporation (Offshore Company) rather than a trust to hold the investment should avoid the application of certain rules of the [Income Tax] Act that would deem an otherwise non-resident trust to be resident in Canada … . These rules apply only to trusts" (KPMG, 2016: 17).

KPMG's practitioners' genius was in the design of a legal entity that, by its constituent legislation, could be regarded as a corporation but one for which the rights and obligations created for parties involved did not match those normally conferred to members of a corporation. The Manx company structure was indeed a company of a peculiar kind, one with no Canadian equivalent: a "hybrid" company with liability limited both by shares and by guarantee, shareholder and nonshareholder members, and the power to make discretionary gifts to designated

[9] The proposed amendments underwent significant discussions and modifications before they were finally enacted in 2013—a full 14 years after their initial proposal in 1999 (Income Tax Act, 1985, sec. 94).

"eligible persons" (KPMG, 2016: 28). Its shareholders were two Manx corporations, one controlled by the KPMG Isle of Man branch and the other by the Manx law firm Simcocks; its non-shareholder member had to be a person trusted by the client but not a resident in Canada. Most importantly, under its articles of association, the Isle of Man hybrid company could not freely distribute its profits to its members, nor were the latter entitled to the remainder of its assets after its liquidation. In practice, the sole individuals permitted to receive, by way of gifts, the profits generated by the company or its remaining assets upon liquidation were the eligible persons named in the company's members agreement; yet these eligible persons had no official active role and no enforceable right in the company. Once the Manx company was incorporated, the Canadian tax payer that was KPMG's client would donate her fortune to it, retaining only—at least on paper—the ability to make suggestions as to how and when "gifts" should be made to eligible persons (typically, herself and her family relatives). Conveniently, under Canadian law, gifts are excluded from taxable income and subject to no reporting requirement. What a peculiar company, whose shareholders shared no profits, and whose directors were free to distribute the company's assets to third parties, without consideration! In fact, the Isle of Man company operated like a trust without being characterized as a trust. It established legal relationships between KPMG's client, company members, and the persons eligible to its gifts that closely approximated the relationships between the settlor of a trust, its trustees, and its beneficiaries. But whereas the beneficiary of a trust is formally recognized by tax legislation, the "person eligible to receive gifts from a corporation" is unknown to Canadian tax law and could easily slip beneath the radar of tax authorities.

KPMG's internal documents reveal the various layers of legal interpretation that underpinned the Isle of Man company scheme. The success of the tax-avoidance strategy depended on the company not being characterized as a trust and not being deemed a Canadian resident, its directors not being characterized as agents of KPMG's client, and "eligible persons" not being characterized as shareholders or having an interest in the company. To secure its strategy, KPMG first ordered outside legal opinion from its collaborating law firm in the Isle of Man, Simcocks. This opinion elucidated the legal relationships created in and around the hybrid company under the Isle of Man Companies Act—it confirmed that the company owned its assets for its own account and that eligible persons lacked enforceable rights vis-à-vis the company and were not owed any fiduciary duty from the company's members or directors. KPMG practitioners then worked out the main features of the

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Isle of Man company scheme through a series of memos on various tax issues under Canadian law. They prepared guidelines for avoiding Canadian corporate residence and specified, in the company's constituent documents, that directors shall never meet in Canada and that a majority of the board of directors shall always consist of persons not resident of Canada. They stressed that the directors had full discretion to follow or not follow suggestions regarding the gifts they should make to eligible persons, and so could not be seen as agents of KPMG's client, while underemphasizing the fact that, following the company's constituent documents, if they did not reach a unanimous decision as to the opportunity of making those gifts, the company would dissolve automatically. KPMG finally asked a second outside legal opinion from a Canadian law firm confirming that the hybrid company and its gifts to eligible persons would escape all Canadian taxes and reporting rules.

With all this precious paperwork in hand, KPMG was ready to distribute its new "tax product": it drafted standard letters outlining the workings of the offshore company to clients together with directives regarding appropriate marketing for the scheme. These directives, presented as an "Initial Client Meeting 'Script,'" provide step-by-step instructions as to how to introduce the Isle of Man company structure to potential clients, the first step stressing the secrecy of the proposed strategy: "Explain the proprietary nature of the strategy about to be discussed—KPMG's substantial investment, mutual interest of any clients that may choose to pursue the strategy to make sure that it does not get 'on the streets'" (KPMG, 2016: 125).

For approximately 1 year after, KPMG produced additional memos and updates, tracking the latest legislative changes and deepening some of its previous legal analyses. One of the last documents in this sequence summarizes the findings of the committee responsible for reviewing KPMG's tax products in light of the Canadian general antiavoidance rule:

> After substantial discussion … we have concluded that … this structure may be offered at a "should" level of opinion. However, we were somewhat concerned that it could be difficult to find a user with appropriate facts, and that in the absence of such facts there could be significant obstacles to reach a sufficiently high level of opinion. As that legal/factual analysis is separate from consideration of [the general anti-avoidance rule], we have recorded our sensitivity to the point but have not provided further analysis (KPMG, 16 May 2016: 232).

The committee noted that if the money sent abroad was to find its way back to Canada, the onus would be very heavy on the tax

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payer to prove the bona fide nontax purpose of the scheme. It advised KPMG partners to be "very cautious" in implementing it but nonetheless concluded that KPMG should market this tax product, as the scheme might, with the right facts, survive an anti-avoidance challenge.

Years later, the CRA became aware of the Isle of Man company scheme and concluded the whole structure was a sham. It sought a court order to force KPMG to disclose the list of all its clients having used this tax product and, in the meantime, offered its secret amnesty to these unknown tax payers. As of the time of this article's writing, the legality of the Isle of Man company structure is still being debated before Canadian courts. A KPMG partner testified before the parliamentary committee investigating the matter that the scheme fully complied with all applicable laws and that, seen through the lens of the late 1990s, it constituted an acceptable approach to tax planning. The courts could prove him right: unlike in American law, Canadian courts have repeatedly refused to consider the economic substance of the transactions brought to their attention over their legal form[10] and have developed a rather strict interpretation of the antiavoidance rule (Li et al. 2017: 545). Turning the Isle of Man company controversy into a case study on elite practitioners' role in tax avoidance allows for the interrogation of the conditions of success of their legal techniques and discourses instead of relying on the benefit of the hindsight to recount the story of a professional misconduct or criminal wrongdoing. It also illustrates what sociolegal scholars may expect to find in technical legal documents and how they may shed light on the making of tax-avoidance strategies. Even though this case study, alone, provides only anecdotal evidence as to the various mechanisms of tax avoidance worldwide, it offers a glimpse of the legal consciousness of the professionals who drafted such documents. In the next part, I highlight the salient features of this legal consciousness and their implications for the tax-avoidance quandary.

Legal Consciousness and the Difficulty of Tackling the Problem of Tax Avoidance

The technical work of elite lawyers matters because legal technique is not an autonomous field apart from its broader legal culture. Legal technique draws upon and adds to common-pool ideas about law and legality. The concept of legal consciousness,

[10] *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536; *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 622.

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subject to the adjustments proposed in parts I and II, can help produce such insight. Investigating the legal consciousness of elite lawyers through the documents they produce evinces the plurality of repertoires from which practitioners pull when they design innovative legal strategies and when they explain or justify their tactics. It shows that heterogeneous and even contradictory conceptions of legality coexist, not only in popular understandings of law, as previously demonstrated by Ewick and Silbey (1998: 245–50), but also in professional discourses regarding legal work. In this part, building on the preliminary evidence of my case study, I uncover two strands of legal consciousness that cohabit in elite lawyers' work on tax-optimization schemes. I suggest that elite lawyers, by simultaneously tapping from both repertoires, actively cultivate the ambiguity of the tax-avoidance story.

It has long been established that legal consciousness manifests itself in what people do as much as in what people say (Ewick and Silbey 1998: 46). Observance of elite tax practitioners' work and the documents they produce, however, reveals that their technical work proceeds from cultural premises other than their general discourse about the law. The latter does not differ significantly from the positivist depiction of law or from the conventional law on the books: law, in lawyers' accounts, appears as a system of rules enacted by states that direct the action of legal subjects. Such general discourse—which clusters images about the law, conventional legal wisdom, expected roles from the state and the tax payer, and typical arguments—stems from what I call, for its widely shared and uncontroversial nature, a *classical* legal consciousness. Elite lawyers' technical work, on the other hand, displays a distinct legal imagination, with its own set of schemas and resources, that is typically not found in law books but which suffuses legal documents: a configuration that I term elite lawyers' *technical* legal consciousness in order to mark its departure from the classical discourse about law.

This technical legal consciousness distinguishes itself by three salient features: it experiences law as a *global phenomenon*, as a *rule-enabled activity*, and as a *private know-how*—as opposed to a national, rule-bound, and public means of government. First, elite lawyers' technical legal consciousness shows a global perspective on the law: national law is not the unsurpassable horizon of practitioners' activity but rather a pool of rules, among many, from which those practitioners' legal work can draw. Unlike law on the books, elite lawyers' take on law is inherently pluralistic (Belley 2011): the applicable law is fundamentally a matter of choice among a series of options, as inventoried by skilled professionals. Law, so to speak, has been disconnected from sovereignty and is now up for grabs by global practitioners. The rediscovery of the guarantee

company is a case in point: this forgotten legal form, which had disappeared from most common-law jurisdictions, except a few British dependencies, emerged in the 1990s as a global solution to a host of local challenges caused by amendments to trust, corporate, and tax law. The revival of the guarantee company stems from a global network of practitioners who pooled their expertise and exchanged legal services across jurisdictions to defeat national lawmakers. For example, a document included in KPMG's package featured an article written by a Manx lawyer, enumerating the jurisdictions of choice for incorporating a guarantee company:

> Any jurisdiction which permits companies limited by guarantee can be used, although some jurisdictions are better than others … . The Channel Islands have very restrictive law for guarantee companies, and this greatly diminishes the usefulness of the guarantee company there. In Europe, there are only three jurisdictions effectively available. They are Cyprus, Gibraltar, and the Isle of Man. To my knowledge, however, only Gibraltar and the Isle of Man have endeavoured to develop the concept, and because Gibraltar company law has fallen seriously behind in the past twenty years, it means that usually, the Isle of Man is practioners' preferred choice. In the Caribbean, many jurisdictions can be used … . The British Virgin Islands, for example, has excellent company law for foundations, as do the Bahamas, the Cayman Islands, the Turks & Caicos Islands, and many others (Cain 1993: 32).

This leads to the second feature that characterizes elite lawyers' technical legal consciousness: its productive stance toward legal rules. Rules are not so much a constraint to action as they are a resource or a raw material available for legal work (McBarnet 1984; McBarnet 2010). Lawyers do things with rules: they erect original corporate structures, they craft innovative financial assets, and they trace new paths between remote legal systems in every imaginable way that could benefit their clients. A distant country adopting a new rule on corporate vehicles or announcing its plan to reform rules on taxable capital gains might be an opportunity to design a new tax-optimization scheme. In this article's case study, even the subsequent adoption of more stringent rules on the reporting of foreign transfers became, in the hands of tax practitioners, a "window of opportunity" (KPMG 2016: 169) for the marketing of their tax scheme to seize before the rules come into force:

> As a practical matter, we do not believe that there is a significant market potential for the OC [Offshore Company] in the estate planning, asset protection or philanthropy situations previously

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> targetted because of the expanded information reporting requirement … . However, our focus in marketing the OC for the next 15 months (to 12/31/01) will be on providing a solution to existing offshore trusts and FIEs [Foreign Investment Entities] that will be offside the new rules after 2001 and which have the flexibility built into their constating documents that would permit a direct transfert to the OC, so as not to fall within the information reporting requirements. Furthermore, we will market this product … indirectly through lawyers and financial institutions who have clients with offshore trusts and FIEs that will be offside. (As such, we will revise the toolkit to produce an engagement letter, planning letter, etc., that is taylored specifically to this market …) (KPMG 2016: 149).

The key to elite lawyers' activity is not a capacity to see order and recurrent patterns in past legal decisions to elucidate what the law dictates in a given situation—like doctrinal work usually does—but a faculty to assemble norms derived from disparate legal systems into new functional units. To use the words of Berman (2005: 533–34), if we are to understand law in the context of globalization, we should "look not so much at the power to *enforce* legal norms, but at the ability to *articulate* them". Berman's main concern was international law, where legal actors lacking coercive power show, nonetheless, a force of persuasion that effectively turns them into norm producers: in their tax-planning work, despite having no declared pretension to create law, elite lawyers surely demonstrate an ability to articulate norms, decisively impacting the global tax system.

Proceeding from the above is the third prominent feature of elite practitioners' technical legal consciousness: as elite lawyers have become major producers of innovative knowledge and techniques in tax planning worldwide, the law increasingly conflates with their legal expertise. Whereas law was traditionally conceived as a means of government in the hands of public officers subject to the imperatives that its rules be made public and that their application be strictly checked, the study of law in documents suggests that law might more accurately be seen as private know-how: a practical knowledge held, developed, and jealously guarded by private firms for their own profits. Elite law firms invest heavily in the development of their legal expertise, which is, in turn, rendered into products to be sold to clients. In this article's case study, the Isle of Man company structure, deemed proprietary to KPMG, was protected by a strict confidentiality agreement. The sample client engagement letter, for example, reads

> *Confidentiality.* The plan that we will propose to you, and the supporting analysis, is proprietary to KPMG Canada. It is in the

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> best interests of yourself and other clients with whom we have shared this analysis that information about this approach be kept confidential. If you choose to engage us, you … will be required to execute a separate confidentiality agreement setting out your undertakings in this regard (KPMG 2016: 67).

The confidentiality agreement reiterated KPMG "proprietary rights" in the Isle of Man company scheme and in all copies of its related documents; the client was also forbidden to reuse this strategy without KPMG's prior consent (KPMG 2016: 80–81). The private nature of this expertise is also what allows KPMG and other global firms to present themselves as part of the solution in the fight against tax avoidance: they have concrete knowledge of the global tax system that no government has, and their collaboration is thus essential for an efficient reform of the international tax framework.

The two types of legal consciousness—classical and technical—are fundamentally in contradiction with one another, yet they cohabit smoothly in elite practitioners' work. Indeed, I argue that these two streams of legal consciousness act in concert to prevent any diagnosis of the tax-avoidance problem that would entail consequent solutions. Contradiction sustains hegemony of law: what was observed in the context of everyday legal consciousness (Ewick and Silbey 1998: 230–33) is equally true regarding legal culture's professional construction. The trouble with tax avoidance is that elite lawyers have acquired the capacity to game the tax system on a global scale without, apparently, breaking the rules. A common feeling exists that something is wrong with this situation, but the motives for this feeling remain faltering—hence the blame for the immorality of tax avoidance, which stops short of denouncing outright unlawfulness of such behavior. Apprehended through elite lawyers' classical legal consciousness, the prime responsibility for tax avoidance belongs to states. In fact, it is incumbent on states, not on taxpayer counsels, to enact laws that distribute fairly and effectively the tax burden among citizens. If legislatures and tax authorities intend to subject the biggest corporations and the wealthiest individuals to higher taxes, they must only enact appropriate means to do so. Private actors, for their part, are only playing by the rules set by states—that is what private actors do, and there is nothing reprehensible in such conduct. In my case study, such a view is evidenced in internal memos anticipating a potential challenge of the Isle of Man company structure under the general antiavoidance rule of Canadian tax legislation. A successful antiavoidance challenge was unlikely, according to KPMG practitioners, since specific rules had been legislated regarding every relevant issue of the strategy. Parliament thus indicated clearly what it considered to be appropriate or abusive in various contexts:

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> the Act contains a complex fabric of rules that determine when a Canadian resident person is taxable … with respect to interests in non-resident corporations or trusts. Since very specific rules were legislated in this regard, it is not unreasonable to expect that a Canadian court might find that the proposed arrangement was not a misuse of any specific provision of the Act or an abuse of the Act read as a whole. Furthermore, the courts are likely to be very reluctant to deem Offshore Company to be a resident of Canada without specific legislative authority (KPMG 2016: 24).

However, seen through the lens of elite lawyers' technical legal consciousness, the tax-avoidance picture looks quite different. In their work on tax-optimization schemes, elite lawyers do not exactly play by state rules; they rather use these rules to create something new and unexpected, something that frequently has little in common with initial legislation. Elite practitioners perhaps do not directly create tax-law rules, but their technical constructions determine, to a large extent, how these rules will (or fail to) apply to taxpayers. They are, thus, productive of the law, although this role remains rarely acknowledged officially. Legality, legal-consciousness studies have long stressed, is an emergent feature of social action (Ewick and Silbey 1998: 17); in tax matters, a look to law in documents reveals that legality is indeed an emergent feature of elite lawyers' work in its assembling of a panoply of rules, forms, jurisdictions, and expert opinions.

Elite lawyers' technical legal consciousness, with its implicit awareness of its law-creating capacity, conditions their work on tax-optimization schemes. With access only to cultural codes pertaining to law on the books, these lawyers would lack the creativity necessary to invent their intricate devices that cut across legal regimes and jurisdictions. Yet, as soon as one criticizes or scrutinizes their activity, elite practitioners cling to the rhetorical resources afforded by their classical legal consciousness: they emphasize the rule of law, the role of governments, and the unquestionable legality of their practices while obscuring their own contribution to the inadequacies and to the growing complexity of tax legislation. Before the parliamentary committee set up to investigate the Isle of Man scheme, for instance, KPMG's representative insisted on the complexity of the tax system, both nationally and transnationally, and on KPMG's role in helping its clients *comply* with the rules of this intricate area of law:

> [I]f you think about the evolution of our business from a tax perspective, especially dealing with multinational corporations, it's so complex now that the biggest growth area for us, frankly, was in cross-border taxation … . That now is a larger part of our

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> global business than the domestic part of the business because, heaven knows, it's very hard to comply with Canadian tax rules, but as soon as a business decides it wants to expand in the United States or sell elsewhere in the world, the complexity goes through the roof, and that's the area in which we provide most of our services (House of Commons of Canada 2016a: 9).

According to him, many cases of alleged tax avoidance involve conducts *permitted* by governments, either through specific rules or through tax treaties with countries known as tax havens:

> You would have seen in the press over the last couple of days, I think, talk about tax havens and that Barbados was the number one on the list as far as foreign investment going into Barbados. That's not individuals in Barbados, that's multinational corporations, Canadian based, going into Barbados. The reason they do that is because Canada has a tax treaty with Barbados … . The Canadian government has, by policy, allowed its multinationals, when they expand globally, to use jurisdictions like Barbados to finance their international expansion (House of Commons of Canada 2016a: 12).

At most, he conceded that some past audacious schemes of his firm are perhaps, seen through today's lens, *immoral*, but that they were nevertheless perfectly *legal* (House of Commons of Canada 2016a: 5). In the shadow of classical legal consciousness, tax avoidance acquires an anecdotal appearance and thrives. If, however, elite lawyers were to lose access to its stock of standard images, explanations, and justifications about law, the tax-avoidance narrative would be very different: elite lawyers would be forced to assume their role as producers of law, which would immediately raise a series of difficult questions as to their legitimacy and accountability. If elite practitioners do determine the scope and the outcome of legal tax rules, the question arises: how to control their work and evaluate the law? If their labor defines the contours of legality, how can their contention that their tax-optimization schemes are legal be understood otherwise than as a tautology or as an empty statement? Fortunately for them, few people are ready to openly acknowledge elite lawyers' role in shaping tax law worldwide—not themselves or their clients, nor governments or tax authorities.

In sum, an inquiry into the legal consciousness of tax-law professionals shows that current difficulty in tackling the tax-avoidance problem and in labeling it unambiguously as reprehensible and unlawful, is fostered by elite lawyers themselves. Our difficulty rests on an uneven access to the appropriate repertoires of meanings relating to legal technique and legal innovation, as well as on an unequal distribution of relevant tax-planning legal

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knowledge. Too often, to understand the complex schemes involved in tax planning, judges and tax authorities turn to those same legal experts who designed them in the first place. As counsels, witnesses before courts, or advisers of governments, elite lawyers publicly explain their contribution in designing tax strategies by translating their work into the familiar language of the classical legal consciousness. In the case study on the Isle of Man company, KPMG practitioners twice made this translation: in their testimony before the parliamentary committee that investigated their tax-planning work and in a written argument submitted to the Canadian Tax Court, appealing the assessment made by the CRA when it finally uncovered the Isle of Man scheme. Before the parliamentary committee, they equated the offshore company structure with a foreign trust, a well-known vehicle in Canadian law. The Isle of Man scheme was not reprehensible, as in those years the use of foreign trusts was still permitted as a matter of tax policy:

> The fact is the late 1990s was a time when non-resident trusts were permitted under Canadian law as a matter of government policy. In fact, they were encouraged by the federal government as a way for immigrants with financial means to come to Canada while keeping some of their funds abroad. It was in this environment in 1999 that this tax plan was created (House of Commons of Canada 2016a: 1).

In their court argument, on the other hand, they stressed the uncertainties generated by the government in 13 years of discussion about possible changes to the tax treatment of foreign trusts. In this context, the Isle of Man company structure was a legitimate response to the legal insecurity caused by fluctuating rules on foreign trusts:

> Changes to the rules in section 94 were under discussion by the Canadian Department of Finance prior to and leading up to the time at which it was understood the five-years tax exemption for Orgal Trust would expire. Proposed changes to section 94 went through seven different draft over 13 years … . In response to uncertainties generated by the foregoing fluctuating proposed amendments to section 94 at that time, the Trustees and the Appelant saught and obtained sophisticated professional advice as to possible alternatives to Ogral Trust which would not be subject to those uncertainties (*Cooper v. R.* 9 March 2015: para. 16–17).

These arguments are contradictory, but in both cases, KPMG practitioners reinforced the image of a law consisting of public rules enacted by states, leaving in the shadows the inventiveness of their own contribution. In so doing, they render incomprehensible the

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heart of the tax-avoidance problem: the fact that lawyers' technical work, which stems from another vision of law and which unfolds at a global scale, has acquired the power to solve, in practice, tax law's inherent indeterminacy.

Conclusion

Legal consciousness may still have some original fruit to bear for law and society scholarship. In this article, I have sought to demonstrate that this notion may lend itself to uses other than the study of ordinary people's everyday experience of legality, and to empirical methods other than face-to-face interviews and field observations. Legal consciousness could pave the way for sociolegal investigation into the technical work of lawyers and its power to shape legal culture. Lawyers, too, participate in the production and reproduction of shared understandings about the law, and their contribution is more imaginative and lively than sociolegal scholars imagine when they reduce technical legal work to lifelessness of black-letter law. Lawyers do not stick to the law in books. They may work in the abstract, but their abstractions are operative, original, controversial, and probably more fragile than most would assume. Methodologically, legal-consciousness studies could make use of varied technical, promotional, and political documents fabricated by legal practitioners—a kind of empirical material rarely employed in the field but which deserves serious consideration as it represents the concrete support of practitioners' cultural constructs. Legal documents bear the mark of different and sometimes contradictory styles of legal discourse, which can be modeled through the notion of legal consciousness. The turn to the legal consciousness of elite lawyers could thereby be a gateway to the sociolegal study of a broad array of phenomena that have been relatively neglected by law and society scholarship during past decades: it could, for instance, elucidate legal innovation in banking, in finance, within and around business enterprises, or, as I have illustrated here, in tax planning.

I opened this article by depicting the tax-avoidance story's ambiguity. A critical look at the legal consciousness of elite lawyers, I suggest, can help resolve this ambiguity. The tax-avoidance narrative is confused because it sits at the crossroads of two distinct visions of law and borrows from their respective universes of meanings. One is widely shared and well articulated: the classical legal consciousness, as I have termed it, runs from the everyday apprehension of law to the specialized science set out in legal treatises; the other underlies the work of elite lawyers but remains largely unarticulated—elite lawyers' technical legal consciousness, as I

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called it, is merely sensed, rather than clearly understood, by the broader community and thus confers considerable freedom on those who master its cultural repertoire. Compared to other approaches to tax avoidance that address the lacunas of tax legislation or the challenges of its enforcement by tax authorities, legal consciousness invites sociolegal scholars to focus on the perspective of the initiators of tax avoidance: the tax practitioners themselves. From this vantage, tax avoidance becomes a story wherein the reins of law have been taken by private actors in a way that is difficult to unveil because it contradicts prevailing accounts of legality.

In concluding, I hint at critical perspectives that open with the study of the legal consciousness of elite tax-law practitioners. Few people, while acknowledging the peculiarities of elite lawyers' technical legal consciousness (e.g., its global outlook, creative work upon rules, and privatization of legal expertise), actively work to counterbalance their arguments and techniques. Yet, one of the fundamental insights of the earliest legal-consciousness studies was that the inherent contradictions of legal culture were not only key mechanisms sustaining law's hegemony but simultaneously potential resources for the critique of the legal order. "The same contradictions and openings that underwrite the operation of hegemony," wrote Ewick and Silbey (1998: 233) in conclusion of *The Common Place of Law*, "also make possible counter hegemonic readings and constructions". The contradictory play between elite lawyers' classical and technical legal consciousness, once recognized, could potentially be exploited for the criticism of tax avoidance. Tax law, at a global scale, is indeed in great need of counterdiscourses and of alternative legal knowledge. The tax-avoidance debate is not a mere question of taxpayer morality; it is a debate about conceptions of law, relations to rules, the role of legal technique, and the appropriate publicity of legal constructs. Because tax-optimization schemes rely on a conception of legality that is not widely accepted, they may be more vulnerable to opposite legal argumentation than they seem. To be effective critics, however, sociolegal scholars must treat legal technicalities head on as an integral part of legal culture.

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