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Render Unto Uncle Sam That Which is Uncle Sam's: The IRS and Tax Protest Evangelism

I. INTRODUCTION

April 15 is a day of triumph for the American system. It is the day each year by which the vast majority of United States taxpayers will have discharged their common duty to finance their government,¹ reaffirming Alexis de Tocqueville's observation that every American feels a personal interest in obeying the law.² April 15 is the day the system works; it is the day when Americans voluntarily assess their own income, calculate their tax liability, and send in what they owe.

Such a Pollyannish view is supported by much evidence. For example, in 1979 Americans reported about 93 per cent of their reportable legal income,³ and paid some \$251.5 billion in individual income taxes.⁴ This was despite the fact that the Internal Revenue

1. *See IRS Response to the Illegal Tax Protester Movement: Hearing Before the Commerce, Consumer and Monetary Affairs Subcomm. of the House Comm. on Government Operation*, 97th Cong., 1st Sess. 106 (1981) (statement of Roscoe L. Egger, Jr., Commissioner of Internal Revenue) [hereinafter cited as *IRS Response*] ("[T]he vast majority of taxpayers are honest, and do not attempt to thwart the tax administration system.").

2. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 247-48 (F. Bowen trans. 2d ed. 1946).

[I]n the United States everyone is personally interested in enforcing the obedience of the whole community to the law, for as the minority may shortly rally the majority to its principles, it is interested in professing that respect for the decrees of the legislator which it may soon have occasion to claim for its own. However irksome an enactment may be, the citizen of the United States complies with it, not only because it is the work of the majority, but because it is his own, and he regards it as a contract to which he himself is a party.

3. *The Underground Economy: Hearing Before the Joint Economic Comm.*, 96th Cong., 1st Sess. 13, table 2 (1979) (statement of Jerome Kurtz, Commissioner of Internal Revenue) [hereinafter cited as *The Underground Economy*].

4. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 268, table 446 (1980) [hereinafter cited as *STATISTICAL ABSTRACT*].

Service (IRS)⁵ was able to audit only about two per cent⁶ of the 92,630,000⁷ individual and fiduciary income tax returns filed that year.

However, the evidence also supports a darker view of taxpayer behavior and motivation. Of the more than a quarter-trillion tax dollars paid in 1979, \$195.3 billion had been withheld at the source before ever reaching the hands of the taxpayers.⁸ Wage and salary earners, who are subject to such withholding, reported about 98 per cent of their income,⁹ but only about 62 per cent of self-employment income, which is exempt from tax withholding, was reported.¹⁰ The unreported income is part of a growing¹¹ underground economy¹² which amounts to more than 10 per cent of the United States' legal gross national product,¹³ and which

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5. Citations are to the Internal Revenue Code of 1954, unless indicated otherwise.
 6. *The Underground Economy*, *supra* note 3, at 11 (statement of Jerome Kurtz). This audit percentage has dropped steadily. The IRS audited 5 percent of the returns filed in 1964. In 1981 the figure dropped to 1.8 percent, and in 1982 the Service expects to audit only 1.6 percent of returns. *TIME*, Apr. 12, 1982, at 56.
 7. *STATISTICAL ABSTRACT*, *supra* note 4, at 268, table 446.
 8. *Id.*
 9. *The Underground Economy*, *supra* note 3, at 13, table 2 (statement of Jerome Kurtz).
 10. *Id.*; *Federal Noncompliance with Tax Law Reporting Requirements: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 15 (1980) (statement of Philip Coates, Assistant Commissioner of Internal Revenue) [hereinafter cited as *Federal Noncompliance*].
 11. See *TIME*, Sept. 17, 1979, at 57; see also *infra* note 13.
 12. See *infra* notes 21-24 & accompanying text. Other terms for the same idea include "subterranean economy" and "irregular economy."
 13. An IRS study of the underground economy, *INTERNAL REVENUE SERVICE, DEP'T OF THE TREASURY, ESTIMATES OF INCOME UNREPORTED ON INDIVIDUAL INCOME TAX RETURNS*, PUBLICATION No. 1104 (1979), yielded an estimate that individuals did not report \$75-100 billion of income from legal activities for the tax year of 1976, and that another \$25-35 billion of earnings from drug sales, illegal gambling, and prostitution was not reported. Also for 1976, individuals did not report income taxes of \$142 billion on \$1,073 billion of income. See *The Underground Economy*, *supra* note 3, at 2 (statement of Jerome Kurtz).

The IRS estimates have been criticized as being too low because they did not include many substantial types of illegal income. See *id.* at 35 (statement of Richard L. Fogel, Associate Director, General Government Division, General Accounting Office). Economist Peter Gutmann, using a different method, measured the underground economy to be \$176 billion (in gross national product terms) for 1976, making the underground economy a little larger than 10 percent of the gross national product. However, Gutmann saw this estimate as too low, and said that the actual figure should be 13-14 percent of GNP. *Id.* at 29-30 (statement of Peter Gutmann). Gutmann estimated that the underground economy for 1981 would prove to be about \$420 billion, or 14 percent of the official expected GNP. Francis, *Light on the 'subterranean*

robbed the national treasury of up to \$26 billion in 1976.¹⁴

Government concern about the effects of the underground economy on national revenues¹⁵ and other areas¹⁶ has surfaced in

economy' exposes U.S. policy problems, Christian Science Monitor, July 22, 1981, at 11, col. 1.

For an analysis of the IRS study of unreported income and estimates of the amounts of illegal income from categories not included in the IRS report, see Congressional Research Service, Library of Congress, Analysis of IRS Study of Unreported Illegal-Source Income (Oct. 5, 1979) (memorandum), reprinted in *Underground Economy: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 261 (1979) [hereinafter cited as *Underground Economy*].

14. *Subterranean or Underground Economy: Hearings Before the Commerce, Consumer and Monetary Affairs Subcomm. of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 18, tables 3, 4 (1979) (statement of Jerome Kurtz) [hereinafter cited as *Subterranean or Underground Economy*]. This figure is also likely too low. Peter Gutmann, see *supra* note 13, put the tax loss for 1976 at \$35 billion. For 1979, Gutmann estimated the tax loss to be over \$50 billion. *The Underground Economy*, *supra* note 3, at 31 (statement of Peter Gutmann).
15. This Comment focuses solely on the United States. However, the underground economy and tax evasion are worldwide phenomena. See Ellis, *Italy's Prosperous Anarchy*, FORBES, Apr. 2, 1979, at 36; Willis, *Britain's black market puts cash in pockets*, Christian Science Monitor, Mar. 9, 1981, at 6, col. 1; U.S. NEWS & WORLD REPORT, Oct. 22, 1979, at 53; U.S. NEWS & WORLD REPORT, Apr. 9, 1979, at 39.

Italy in particular is an extreme example of the extent to which "black labor" can permeate a country's economy and culture. Although official statistics for per capita Gross Domestic Production put Italy far down the list of European countries for standard of living, the actual condition of the Italian economy is much better. Off-the-books productivity may increase the official GDP by 13 to 14 percent, and official unemployment figures are off by 45 percent in some areas. Three quarters of the public sector employees moonlight; they are lowly paid and work on the average a six hour day. Badly equipped and underpaid tax collectors, who enjoy scant popular support, are able to nab only a small percentage of tax evaders, and the hopelessly dilatory court system takes years to convict even obvious offenders—reform legislation regularly is killed under lobbying by businesses and professionals. Ellis, *supra*, at 36.

16. For a summary of Prof. Peter Gutmann's conclusions about the underground economy's effects on official statistics and on economic and social policy, see Francis, *supra* note 13. Off-the-books transactions skew official statistics, causing policymakers to take "inappropriate actions which are injurious to the nation's economy." *Id.* For example, the labor force actually is about 5 to 6 percent higher than the Department of Labor believes, the unemployment rate is nearly two points lower, inflation is slightly greater, productivity per worker and per man-hour is greater, economic growth is faster, savings and investments are larger, the actual gross national product is higher, living standards are higher, and poverty is less. In reliance on errant data, the government may overestimate the economy, causing more inflation. Also, because tax evasion is relatively easy in such areas as retailing, services, and construction, too much is invested in those areas, although they normally display low productivity gains relative to areas in which tax evasion is more difficult. *Id.* See also *The Underground Economy*, *supra* note 3, at 36 (statement

recent years,¹⁷ and has generated a number of proposals for dealing with the problem.¹⁸ In some areas actions taken to cope with

of Richard L. Fogel). *But see id.* at 38-47 (statement of James S. Henry). Henry, a lawyer and economist, in explaining the underground economy, puts more emphasis on tax evasion by the self-employed in higher income brackets (rather than the poor working off-the-books in order to cheat on unemployment compensation and welfare), and on such profit motivated crime as gambling and drug traffic.

17. See, e.g., *IRS Response*, *supra* note 1; *Federal Noncompliance*, *supra* note 10; *The Underground Economy*, *supra* note 3; *Underground Economy*, *supra* note 13; *Subterranean or Underground Economy*, *supra* note 14; *Multiple False Filings of Tax Returns for Refunds: Hearings Before the Commerce, Consumer, and Monetary Affairs Subcomm. of the House Comm. on Government Operation*, 96th Cong., 1st Sess. 17 (1979) [hereinafter cited as *Multiple False Filings*].
18. Proposals for countering the underground economy are of three types. One group of suggestions would attack the causes of tax evasion by reducing marginal tax rates, widening tax brackets to give a break to middle income taxpayers, rewriting Social Security rules to allow elderly recipients to earn more without suffering a corresponding reduction in benefits, reducing inflation, or reforming tax laws in general to make them more fair to all (such as eliminating tax loopholes which make the tax system seem unfair to those who cannot use them). Another set of ideas emphasizes enforcement of tax laws and would, for example, require welfare and unemployment compensation recipients to do public service work as a way to deter them from working off-the-books, or strengthen the IRS's enforcement powers to scare people into reporting. The third type of proposals accepts the underground economy as given, and attempts to even out the resulting inequities by rewarding corporations whose internal control systems preclude tax evasion with tax credits proportionate to the cost of maintaining the internal controls, or with a lower tax base or schedule—this to offset somewhat the phantom off-the-book expenses and deflated sales figures claimed by tax evading competitors. See Francis, *supra* note 13; Nigro, *Proposition 13 and Subterranean Income*, USA TODAY, Jan. 1980, at 20.

IRS proposals, of course, fit the second category. Service measures for dealing with the underground economy include: (1) allocate more examination resources to specific areas of noncompliance; (2) match income tax returns with information documents reporting wages, interest, dividends, and other types of income in order to select returns for examination and to give auditors leads to unreported income in audits under the regular process; (3) design a more objective scoring system for identifying the most significant nonfiler leads for investigation; (4) make better use of reports by financial institutions of large currency traffic; (5) cooperate with employers in identifying questionable W-4 forms; (6) pay more attention to bartering as income and audit organizers of bartering exchanges; (7) step up research into causes of noncompliance. *The Underground Economy*, *supra* note 3, at 5-6 (statement of Jerome Kurtz).

Congress recently gave the IRS much of what it wanted to strike back against the underground economy and tax protesters by passing the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-494, 96 Stat. 324 (1982) [hereinafter cited as 1982 Tax Act]. The compliance aspects of the tax increase bill emphasize expanded withholding, *see infra* notes 260, 261 & accompanying text, expanded information reporting, *see infra* notes 174, 260, 261, 273, 275 & accompanying text, and stiffened civil and criminal penalties,

the underground economy have met some success;¹⁹ however, there is little likelihood of a quick solution.²⁰

The subject of this Comment, the illegal tax protest movement,

see infra notes 190, 202, 208, 216, 217, 219, 220, 221, 223, 227, 234, 239, 240, 243, 260, 261, 275 & accompanying text.

Still, the Service has a number of other proposals it wants enacted (with varying degrees of seriousness). The measures were outlined in an option paper sent by the IRS to the Treasury Secretary. *See* Robinson & Simon, *IRS' Secret Game Plan*, Nat'l L.J., Aug. 30, 1982, at 1, col. 1. The want list, entitled "Closing the Gap," includes:

- matching commercial real estate sales data with the tax returns of the parties to the sale in order to detect unreported interest income from "take-back mortgages," and notifying sellers-mortgagees that they must report such interest income;

- requiring states to collect the federal highway user tax;

- reinstating the pre-refund examination program to target returns claiming large refunds, large withholding, large contributions, vows of poverty, or some type of protest adjustment;

- further changing interest and civil penalty provisions;

- granting criminal amnesty to taxpayers who voluntarily disclose their own tax violations before any investigation begins;

- expanding to such businesses as gambling casinos and new car dealers current reporting requirements involving large currency transactions;

- publicizing and revising the rewards program to encourage citizens to report tax violations by other taxpayers;

- recalling all \$100 bills in circulation, replacing them with new pink or red notes, and declaring the old green bills to be worthless.

Prof. Gutmann cautions that the IRS's sole criterion for allocating resources should not be maximization of tax collection. This would push economic resources toward areas in which tax evasion is the least detectable and would promote repressive governmental policies which could lead to a backlash by the citizenry in the form of constitutional or legislative restrictions on the tax system. *Id.* at 31-32 (statement of Peter Gutmann).

19. One program which holds much promise for the IRS is the information returns program, designed to match information documents with tax return data in order to discover discrepancies in reporting. In 1975, the Service was able to match only 43 percent of information returns, yielding additional assessments of \$275 million and refunds of \$94 million, at a cost of \$37 million. By 1977 the matching rate rose to 77 percent. *Federal Noncompliance, supra* note 10, at 16. For 1981 the Service matched 100 percent of documents received on magnetic media, which accounted for 88 percent of all information returns, and matched a 25 percent sample of paper information returns. *IRS Response, supra* note 1, at 81 (statement of Roscoe L. Egger, Jr.). The 1982 Tax Act, *supra* note 18, expanded the information reporting requirements. *See infra* notes 174, 260, 261, 273, 275 & accompanying text.
20. The very existence of the underground economy works against all efforts to eradicate it. Even assuming that reduced taxes and slower inflation would draw people back to the legal economy, the mere fact that many people have learned to operate off-the-books will reduce the speed with which they shift aboveground. *The Underground Economy, supra* note 3, at 63 (statement of Peter Gutmann). Similarly, if proposals to attack the causes of underground activity work at all, they will have an effect only on the aspect of the underground economy which is rooted in legal activity. *Id.* at 69 (letter of Richard L. Fogel).

overlaps the underground economy to some extent, but is just as much a part of the official economy. A simple definition of the underground economy is that portion of economic activity which should be reported to the Internal Revenue Service but is not.²¹ This includes income from both legal²² and illegal sources,²³ but excludes such nonreportable income as church collection plate receipts.²⁴

The IRS defines an "illegal tax protester" as "a person who advocates and/or participates in a scheme with a broad exposure

21. See U.S. NEWS & WORLD REPORT, Oct. 22, 1979, at 49.

22. See *supra* note 13. Typical examples of underground income which would be legal except for the failure to report it include: weekend flea markets; home improvement contractors who take only cash in payment and who give no receipts; cash tips received by waiters (some restaurants discourage customers from including the tip with their credit card payment); taxi drivers who shut off the meter for a fare (cheating both the employer, if any, and the IRS); lawyers who swap legal services for goods or services from the client. Any economic transaction which can be conducted for cash or barter and without leaving a paper trail can become part of the underground economy. Because depositing off-the-books income in bank accounts would leave documentary evidence of an unreported increase in wealth for IRS auditors to find, much of the cash income is converted into large bills and stashed away, thus partly explaining the marked increase in \$100 bills in circulation in recent years. See *The Underground Economy*, *supra* note 3, at 29 (statement of Peter Gutmann); Schultz, *The Untaxed Millions*, N.Y. Times Mag., Mar. 16, 1980, at 42; U.S. NEWS & WORLD REPORT, Oct. 22, 1979, at 49; FORBES, Aug. 19, 1981, at 102.

The Service's most ambitious proposal for countering the trafficking in large denomination bills is to recall all \$100 bills in circulation and replace them with new bills of a different color or a different size. Robinson & Simon, *supra* note 18, at 10, col. 1. The aim would be to force illegitimate users of large bills to acknowledge their unreported stashes or find themselves with worthless paper, to discourage use of big bills, and to fight inflation (assuming criminals with large cash hoards decide to eat the loss rather than reveal themselves). The spur for the rather extreme plan is a 15% annual increase in \$100 bills in circulation over the last decade; they now comprise about 40% of the \$125 billion in cash in circulation, despite the trend toward credit cards, electronic funds transfers, and other non-cash methods of monetary transactions. *Id.*

One related proposal which made it into the 1982 Tax Act, *supra* note 18, § 330 (adding I.R.C. § 6867), allows the Service, when it finds someone in physical possession of more than \$10,000 in cash or its equivalent and when the person denies ownership of it, to levy a jeopardy assessment against it and collect 50% as tax.

23. Those who receive income from illegal sources have a double incentive to not report it to the government: to avoid paying taxes, and to elude detection of the underlying crime. For results of an IRS study of unreported income from illegal gambling and drug traffic, see *The Underground Economy*, *supra* note 3, at 56-60 (statement of Jerome Kurtz).

24. This assumes the church has a valid tax exemption. Receipts by a church set up by a mail order minister in order to evade taxes would be reportable income. See *infra* § II.C.2.b.

that results in the illegal underpayment of taxes.”²⁵ Thus, those tax protesters whose “scheme” includes nonreporting or underreporting of income, legal or illegal, are part of the underground economy.²⁶ However, some tax protesters honestly report all of their income, but refuse to pay all or part of the tax due on the income.²⁷ Thus, these individuals fit within the “illegal tax protester” definition, but are not members of the underground economy.

This duality on the reporting dimension causes problems for IRS attempts to deal with, or even detect, illegal tax protesters.²⁸ More problems are caused by the dual nature of another dimension: motivation of the tax protester.²⁹ While the accountants overseeing the treasury may care little about why certain citizens failed to pay taxes, policymakers should be concerned with whether the “scheme” resulting in underpayment of taxes is rooted in simple greed or is the product of deeply felt moral principles.³⁰ Actually, the motivation dimension should be measured on a sliding scale, with pure principle on one end, amoral greed on the other, and some mix of the two in the middle.

Tax returns which the Service identifies as coming from “illegal tax protesters” are subject to special attention from both auditors³¹ and criminal investigators.³² In this time of cutbacks in government funding,³³ the IRS has established an Illegal Tax Protester Program with a high-priority status.³⁴

This Comment will examine the illegal tax protester phenomenon and IRS efforts to deal with it in light of current and suggested tax policy considerations.

25. INTERNAL REVENUE SERVICE, U.S. DEPT OF TREASURY, REPORT ON THE STUDY OF ILLEGAL TAX PROTESTER ACTIVITY (1979) [hereinafter cited as PROTESTER ACTIVITY], reprinted in *IRS Response*, *supra* note 1, at 127, 129.

This definition is used by the IRS to select returns for special treatment. See *infra* § III. As such, it may be too narrow for our purposes, but it will be used for guidance.

26. See *infra* §§ II.C.2.b-d.

27. See *infra* § II.C.2.a.

28. See *infra* § III.A.

29. See *infra* § II.B.

30. See *infra* § V.

31. See *infra* §§ III.A-B.

32. See *infra* § III.C.; see also *IRS Response*, *supra* note 1, at 79-80 (statement of Roscoe L. Egger, Jr.).

33. See *supra* notes 268-69 and accompanying text.

34. *IRS Response*, *supra* note 1, at 79-80 (statement of Roscoe L. Egger, Jr.).

II. NATURE OF TAX PROTEST MOVEMENT

A. History of Tax Protest

Although some observers of contemporary tax protest see it as a recent phenomenon,³⁵ tax protesters probably have existed as long as there have been taxes,³⁶ and refusals to pay taxes have played an important and colorful role in American history.

In early colonial Massachusetts the Quakers opposed paying taxes to support Puritan schools and churches, and eventually won exemptions from such compulsory taxation.³⁷ This was part of a long tradition of tax resistance among the Quakers and other pacifist groups such as the Brethren.³⁸ British taxation of the North American colonies³⁹ caused widespread colonial hostility and precipitated the American Revolution.⁴⁰ Factions of the Church of the Brethren refused to pay taxes to the new revolutionary government.⁴¹ State taxes consuming one-third of the income of Massachusetts farmers led to an epidemic of foreclosures and tax auctions, which in 1786 touched off Shays' Rebellion, a mobilization of desperate farmers who seized courthouses to halt proceedings and forced the Massachusetts Supreme Court to adjourn.⁴² Although state volunteer militia routed the rebels within a few months, the incident "fed the growing conviction" that the Articles of Confederation were inadequate and that only a strong central

35. See U.S. NEWS & WORLD REPORT, March 30, 1981, at 80; Omaha World-Herald, Feb. 14, 1982, § B, at 4, col. 1; COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, ILLEGAL TAX PROTESTERS THREATEN TAX SYSTEM 13 (1981) (GGD-81-83) [hereinafter cited as GAO REPORT], reprinted in *IRS Response*, *supra* note 1, at 35.

36. An early example was the Zealots, a Jewish faction which revolted against the Roman occupiers of Israel. An opposing sect, the Pharisees, tried to trap Jesus into aligning himself with the Zealots by asking him if it was lawful to pay taxes to Caesar. To elude the trap, Jesus pointed to the image of Caesar superscribed on the Roman coins which the questioners used, and advised, "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's." *Matthew* 22:21; *Mark* 12:17; *Luke* 20:25; see also *Romans* 13:7.

The early Hutterites refused to pay taxes for the hangman's noose. 98 CHRISTIAN CENTURY 837, 837 (1981) (letter by Dale Brown) [hereinafter cited as Brown letter].

37. B. POULSON, ECONOMIC HISTORY OF THE UNITED STATES 133-34 (1981).

38. Brown letter, *supra* note 36, at 837.

39. American Revenue Act (Sugar Act) of 1764; Stamp Act of 1765 (repealed in 1766 because of colonial hostility); Townshend Acts of 1767; Tea Act of 1773 (sparking the Boston Tea Party).

40. H. BEDFORD & T. COLBOURN, THE AMERICANS: A BRIEF HISTORY TO 1877, at 59-65 (1972). See generally B.W. LABAREE, THE BOSTON TEA PARTY (1966).

41. Brown letter, *supra* note 36, at 837.

42. H. BEDFORD & T. COLBOURN, *supra* note 40, at 89.

government could assure law and order.⁴³ Under the new Constitution, drafted in 1787, the strengthened federal government had the authority to levy an excise tax on whiskey to help pay the national war debt. It also had the power to use federal troops to quickly crush the Whiskey Rebellion, an uprising in 1794 by frontier farmers in Pennsylvania in resistance to the new tax.⁴⁴

On a much smaller scale, but still important, was Henry David Thoreau's night in a Concord jail in 1847 for refusing for several years to pay the Massachusetts poll tax as a protest against the Mexican War.⁴⁵

Thus, we have examples of four models of tax protest: refusal for religious reasons to pay taxes to a secular government (or one controlled by another religious sect), use of tax refusal as a rallying point for toppling the government,⁴⁶ revolt by taxpayers en masse against unfair or excessive taxes, and conscientious refusal to pay a tax which the protester believes will be used for immoral or objectionable purposes. A fifth model, needing no specific example, would be the mine-run tax evader who has better things to do with his money than give it to the government. Each of these traditions has counterparts in modern tax protest.⁴⁷

B. IRS Definition

The first four of the above categories of protesters would easily

43. *Id.* at 90.

44. *Id.* at 101. The rebellion evaporated so quickly before the federal onslaught that the troops had trouble finding rebels to arrest. The few that were arrested received pardons from President George Washington. Massachusetts Federalist, Fisher Adams, who agreed with the tax program which caused the rebellion, was troubled by Washington's handling of it: "Elective rulers can scarcely ever employ the physical force of a democracy without turning the moral force, or the power of public opinion against the government." *Id.* See also B. POULSON, *supra* note 37, at 144.

45. H.D. THOREAU, CIVIL DISOBEDIENCE 120 (Beacon Series 1942); Tabac, *War Tax Refusal: Some Code Problems*, 20 CLEV. ST. L. REV. 215, 215 (1971).

Although Thoreau's protest had no effect whatsoever on the war effort—friends paid his tax for that year and for subsequent years in order to keep him out of trouble—it was the "paradigm of civil disobedience." *Id.*; H. BEDAU, CIVIL DISOBEDIENCE: THEORY AND PRACTICE 120-121 (1969).

46. In a nonviolent echo of the American Revolution, Hindu leader Mohandas Karamchand Gandhi worked tax refusal into a revolution which drove the British from India. Tabac, *supra* note 45, at 215.

47. Although no American tax protest has replicated the success of Samuel Adams' Tea Act protesters, a surprisingly similar motivation can be found in the words of Dean Hazel, an organizer of a Michigan group whose members in early 1981 filed thousands of false withholding forms: "We want to bring down the unlawful government of the United States." NEWSWEEK, Mar. 9, 1981, at 33. See *infra* § II.C.2.d.

fit within the IRS definition of illegal tax protesters.⁴⁸ IRS Commissioner Roscoe L. Egger, Jr., explained that the definition is meant to confine the term, "protester," "to those cases where somebody is in a sense preaching a gospel; namely, a philosophy that individuals do not have an obligation to pay taxes, and is attempting to induce others to accept that philosophy."⁴⁹

This definitional net sweeps up both the proselytizer and the proselytized, and includes both Thoreau and the reader of *Civil Disobedience* who refuses to pay the portion of his tax bill which would go to buy nuclear weapons. It is less clear how the fifth category of protester, whose main motive is to hang onto his money, might fit within the definition.

The IRS is not concerned with the motives of people who fail to pay taxes except for concern as to how those motives might help the Service to detect the nonpayment and collect the tax. (At least, the Service should not be concerned with the moral, religious, and political⁵⁰ beliefs of taxpayers, if it is to maintain its position as a neutral tax collector.) Among principled tax refusers, the IRS has properly sensed the danger that tax refusal instigated by a core group of highly motivated adherents to a particular principle might spread to others who share the leaders' beliefs, but lack their willingness to sacrifice, unless the government can deter the followers from joining the movement by punishing the leaders. According to this viewpoint, a policy of making apparent the consequences of tax refusal may not eradicate such behavior altogether, but it will confine the incidence of illegal tax protest to those who believe so deeply that they are willing to accept the

48. See *supra* text accompanying note 25.

49. *IRS Response*, *supra* note 1, at 84-85 (statement of Roscoe L. Egger, Jr.). See also *id.* at 18 (statement of William J. Anderson) ("[P]erhaps the definition of 'tax protester' ought to recognize that we are dealing with schemes where people are trying to propagate the faith, so to speak, rather than a person sitting alone and making that decision to cheat.").

50. Legitimate political activities in opposition to taxes are beyond the scope of this Comment. These include passage of initiatives in California, Massachusetts, and Michigan reducing or limiting state and local taxes.

In the United States, illegal tax evasion has never become the impetus for a significant political movement. By contrast, in Denmark, the Progress Party, which advocates abolition of taxes, won 28 of 179 seats in Parliament in 1973, just a year after its formation, making it Denmark's second largest political party. The Progress Party was founded by Mogens Glistrup, who came to political prominence in 1971 when he proclaimed that he did not pay taxes and that "only idiots pay tax." The party's motto: "Tax evasion is patriotism." One plank in Glistrup's platform was to fire all civil servants. The Progress Party's share of seats has dropped steadily since its 1973 peak. And in late 1981, Glistrup received a four year prison sentence and a \$1 million fine for tax evasion. The owner of one of Denmark's largest law firms, he was barred for life from practicing law. *N.Y. Times*, Nov. 24, 1981, at 5, col. 1.

consequences.⁵¹

In some respects deterrence of unprincipled tax evaders should come more easily. Where the taxpayer has no cause to advance and is not acting out of a Thoreau-like acceptance of the consequences for his civil disobedience, the taxpayer's decision to pay or evade his taxes should be based more directly on how strongly he perceives that he is not going to get away with tax evasion. However, the unprincipled taxpayer may be swayed from the straight-and-narrow path of voluntary self-assessment by influences which resemble principled causes: strongly motivated leaders preach tax-evasion techniques to large numbers of followers who are predisposed to believe what they hear.⁵² Therefore, those who "participate in a scheme with a broad exposure" present the same threat of spreading resistance to voluntary self-assessment as do principled tax refusers, and perhaps a much greater threat because of the pervasiveness of antipathy to taxes.⁵³ As such, they too receive special treatment from the IRS Illegal Tax Protester Program.⁵⁴

51. For a fascinating dialogue among Catholics about war-tax refusal, see Garvey, *Let's Stop Paying War Taxes*, U.S. CATHOLIC, Mar. 1981, at 11. The lead author contended that Christians have a religious obligation to refuse to support nuclear arms. This was followed by an opinion poll of readers on the issue and readers' comments about Garvey's views. The IRS should find comfort in the following letter: "I agree with Mr. Garvey in theory, but I am not prepared to suffer the very real consequences of applying that theory. I do not want to go to jail and be, therefore, unable to pay my bills which would then become a burden to my family." *Id.* at 14 (letter of Marsha Ann Maynard). The readership poll found that 48 percent disagreed that nuclear arms are a necessary evil, but only 25 percent agreed with Garvey that Christians should stop paying war-taxes. *Id.* at 13.

For opposing views among religious pacifists on whether Christians ought to refuse to pay war-taxes, irrespective of the punishment issue, compare Eller, *A Tale That Will Tax the Imagination*, 98 CHRISTIAN CENTURY 506 (1981), with Brown letter, *supra* note 36.

52. See *IRS Response*, *supra* note 1, at 84 (statement of Roscoe L. Egger, Jr.):

Initially the protester identification started because in many areas these schemes were developed by individuals, promoted by people who were more or less in the capacity of zealots. They gathered up groups; they held lectures; they lectured people on everything from constitutional law to every other subject, and so the tax "protester" was attached because they were deemed to be doing this on the basis that they were protesting the system and contending that people did not have a legal obligation to pay taxes.

See also *infra* § III.D.

53. "The protest movement, because of its high visibility and potential for spreading, poses a threat to the voluntary tax system." GAO REPORT, *supra* note 35, at 57.

54. See *infra* § III.

C. Types of "Schemes"

The IRS classifies returns it identifies as illegal protest returns according to ten categories.⁵⁵ The following discussion is based on those categories, but is restructured to reflect the fact that some of the IRS categories relate to the ostensible motivation of the protester, and others relate to methods of nonpayment.

1. Justifications

a. Pacifism

In early 1982, Roman Catholic Archbishop Raymond G. Hunthausen of Seattle, Wash., announced that he would withhold half of his 1981 personal income tax to protest "our nation's continuing involvement in the race for nuclear arms supremacy," and that he would deposit the money in a fund for charitable, peaceful purposes.⁵⁶ The previous June the archbishop, whose archdiocese included a nuclear submarine base, an Air Force base, an Army

55. The IRS began to identify and classify illegal tax protest returns in 1978. In that year the Service identified 7,123 illegal tax protest returns (representing 7,661 individual taxpayers—joint returns were counted as one return by two protesters). In 1979 there were 12,946 identified protest returns, and in 1980 there were 18,226. GAO REPORT, *supra* note 35, at 68.

For 1980 the IRS classified the protest returns as follows:

<u>Schemes</u>	
Constitutional	5930
Family estate trust	4117
Church related	2784
Fair market value	196
Gold/silver standard	167
Nonpayment protest	643
Protest adjustment	533
Blank 1040/1040A	175
Other	1644
Total returns	16,189
<u>Nonreturn items</u>	
Form W-4s (by protesters)	937
Correspondence	97
Total nonreturn items	1034
Total	17,223

(The total by scheme does not agree with the total returns identified because of adjustments, such as counting only one of the two returns involved in a family estate trust for scheme count purposes.) *Id.* at 48.

56. Lincoln (Neb.) Journal, Jan. 28, 1982, at 5, col. 3. The archbishop owed \$250 to the IRS. He enclosed a check for \$125 with his Form 1040 and sent the other half to an escrow account for the proposed World Peace Tax Fund. This Fund would be established by a bill sponsored by U.S. Sen. Mark Hatfield, R-Ore., and would receive the military tax portion of taxes owed by conscientious military tax objectors. McGrory, *Archbishop joins the tax rebels*, Lincoln

post, and the headquarters of one of the nation's largest defense contractors, had called nuclear arms "demonic weapons which threaten all life on earth," urged unilateral disarmament, and asked for citizens to refuse to pay fifty per cent of their federal income taxes to protest defense spending.⁵⁷ The next month, Seattle leaders of the United Methodist and United Presbyterian Churches and the United Church of Christ endorsed the Archbishop's proposal, and urged clergymen elsewhere "to give a similar call to action."⁵⁸

The Seattle uprising was by no means the first episode of war-tax refusal, even in recent years. Pacifists of various persuasions have refused to support every war to date. Although the Illegal Tax Protester Program is the first across-the-board effort to counteract organized tax resistance, the Service had previously focused attention on tax protests against both World War II and the Vietnam War.⁵⁹

Until the 1940's, war-tax protest followed the Thoreau model of purging individual conscience. "Pacifists who had refused historically to drop bombs on people concluded that they could not logically buy the bombs to let others drop them; through tax refusal these pacifists tried to divorce themselves from all complicity with the war-making effort."⁶⁰ But after World War II, war-tax resist-

(Neb.) Journal, Apr. 16, 1982, at 6, col. 3; Mayer, *No Buck, No Bang*, THE PROGRESSIVE, Apr. 1982, at 40.

The alternative fund has long been a device used by principled war-tax refusers to both promote their cause and remove any suggestion of greed as a motive for their protest. During the Vietnam War, tax refusers paid into alternative funds the monies they refused to pay to the government. The funds, in turn, used the money to publicize tax and draft resistance and to financially support resisters who lost employment as a result of their protest. Tabac, *supra* note 45, at 216. The proposed World Peace Tax Fund is different in that donations of tax money to the Fund would have official sanction and would have the effect of a tax credit.

As McGrory, *supra*, pointed out, taxpayers who do not have the will to follow Archbishop Hunthausen's example may join what she calls "the wimp's tax revolt." By contributing to a charitable organization, the taxpayer legally can keep at least some of her money out of government coffers by taking a charitable contribution deduction, and can help whatever cause she believes in.

57. N.Y. Times, July 13, 1981, § A, at 8, col. 1.

58. *Id.* Archbishop Hunthausen's stance caused sharp debate in his archdiocese, but most letters to the chancery on the issue supported him.

The Rev. Joseph Emry told Catholic parishioners on July 13, 1981: "In principle, we agree with the moral question of disarmament. But I say if you disagree with his political action of I.R.S. withholding, then you have the responsibility to come up with alternatives." *Id.*

59. *IRS Response*, *supra* note 1, at 81 (statement of Roscoe L. Egger, Jr.).

60. Tabac, *supra* note 45, at 216.

ance organizations began to appear.⁶¹

However, even during the Vietnam War only a small number of people actually practiced tax refusal.⁶² One commentator attributed this to taxpayer fear of criminal punishment, the pervasiveness of the federal tax lien, and the effectiveness of the withholding system in leaving the taxpayer with little unpaid tax to refuse.⁶³ Even so, despite the barriers and consequences, there exists an active dialogue among pacifists and sectors of the religious community about tax refusal.⁶⁴

61. In 1947 the Peacemaker Movement, a tax refusing pacifist organization, emerged out of the War Resister's League, a traditional pacifist group. By the time of the Vietnam War, the Peacemakers had begun publishing information on techniques for nonpayment of war taxes. Other peace groups also promoted tax refusal as a war protest method. *Id.*

62. *Id.* However, one estimate put the number of telephone excise tax refusers at 100,000. The Peacemaker, Jan. 16, 1971, at 5.

63. Tabac, *supra* note 45, at 216-17.

The federal tax lien is not particularly troubling for those who refuse to pay taxes as a matter of conscience. Even though the government eventually collects the tax (with interest and, perhaps, a civil penalty), "[t]he significance of the protest is found in the fact that the refuser is not paying it." *Id.* at 217. On the other hand, withholding tightly circumscribes the potential for refusing to pay taxes, and the threat of jail tends to drive borderline tax refusers back to safer protest methods. *Id.*

64. See 23 CHRISTIANITY TODAY 698 (1979) (debate within General Conference Mennonite Church about whether to practice tax resistance as a denomination or leave it to individual conscience).

The debate revolves around two axes: whether tax refusal is religiously or morally mandated and whether it is effective. On the former point, Eller, *supra* note 51, views those who benefit from the secular economy (dealing with the money changers) as hypocritical if they refuse to pay the government (Caesar) what is due. The Brown letter, *supra* note 36, counters that no taxes are due to the government for the blasphemous purpose of eradicating all life on earth. As for the effectiveness of tax refusal, Brown posed an analogy: "The right of conscientious objection to war has been granted precisely because our forerunners in the faith willingly and nonviolently suffered for their convictions." *Id.* at 838. In the same vein was the comment of a Quaker in 1756 about why he would not pay the war-tax: "[A]lthough my part might appear at best as a drop in the ocean, yet the ocean, I consider, is made of many drops." Mayer, *supra* note 56, at 40.

Though not a tax refusal case, the recent conviction of Enten Eller illustrates the continuing strength of the link between religious belief and resistance to national military policy. Eller, a member of the Church of the Brethren, and the first person to be convicted of draft dodging since the Vietnam War, told the convicting federal judge, "God told me not to register," and he continued to refuse to register with the Selective Service Administration despite threats that the judge might stiffen his sentence. TIME, Aug. 30, 1982, at 57. The parallel between draft refusal and war-tax refusal was also apparent in the Government's methods of dealing with conscription dissension: the Justice Department moved first against the most vocal and the "most adamant" about refusing to register. Recognizing its inability to prosecute the thousands of other non-registrants, the Government is sending warning let-

b. Religion

Outside of the war-protest area, there is little principled religious tax protest.⁶⁵ Rather, the problem in this category is with phony ministers and bogus churches taking advantage of the favored tax treatment allowed to religion.⁶⁶

The self-proclaimed bishop of the California-based Universal Life Church, Kirby J. Hensley, claims to have ordained more than ten million ministers.⁶⁷ Says he, "If the Government is going to give a free ride to Billy Graham, then why not let everybody participate in these blessings?"⁶⁸ Unknown numbers of people are

ters to all but 160 who were placed on a list of those targeted for prosecution. *TIME*, Aug. 30, 1982 at 57. Consequently, as in tax protest prosecutions, *see infra* notes 255-57, 262, 267, 278-79 & accompanying text, draft protesters have asserted the defense of selective prosecution. But unlike tax protesters, one draft resister was winning with this defense. David Wayte has had the charges against him for refusal to register for the draft dismissed, in part because he was found to be the target of wrongful selective prosecution. *NAT'L L.J.*, Nov. 29, 1982, at 3, col. 1.

65. *But see* *United States v. Carol*, 567 F.2d 955 (10th Cir. 1977) (held: the claim of religious freedom is not a valid defense to criminal tax conviction). *Accord* *United States v. Cotton*, 567 F.2d 958 (10th Cir. 1977).

Amish farmer Ed Lee challenged the requirement that he pay Social Security taxes for his employees. In 1965, Congress exempted self-employed Amish men from paying Social Security taxes on religious grounds. *See* I.R.C. § 1402(g) (CCH 1982) (allowing members of "recognized" religious sects adhering to "established" tenets opposing acceptance of public or private insurance benefits for death, disability, retirement, or medical care (including Social Security benefits) to waive all Social Security benefits in exchange for exemption from the § 1401 self-employment tax). However, this exemption does not cover Amish employees of Amish employers. Lee refused to pay Social Security taxes for 30 Amish men who worked for him for over eight years. Lee won in federal district court, *Lee v. United States*, 497 F. Supp. 180 (W.D. Pa. 1980), but lost by unanimous decision in the United States Supreme Court, *United States v. Lee*, 102 S. Ct. 1051 (1982), *rev'g*, 497 F. Supp. 180 (W.D. Pa. 1980). *See also infra* note 117.

66. The Internal Revenue Code grants several tax benefits to religious organizations and ministers. Most notable is the I.R.C. § 501(c)(3) exemption from the income tax given to religious organizations (but subject to certain broad restrictions, *see infra* note 75). This exemption protects church income from levy and, under § 170, also allows contributors to validly exempt churches to take charitable deductions for (generally) up to half of adjusted gross income.

For ministers, § 107 excludes from gross income the rental value of a home furnished to him or the rental allowance paid to him, if used for a home. Also, ministers are exempt, under § 1402(e), from self-employment taxes.

Testamentary gifts to religious organizations are deducted from the gross estate. I.R.C. § 2055(a)(2). Similarly, gifts to religious organizations completely escape the gift tax. I.R.C. § 2522(a)(2).

67. *N.Y. Times*, Jan. 20, 1981, § A, at 14, col. 1.
 68. Mitchell, *Tax-Haven Ministries Gain on L.I.*, *N.Y. Times*, Aug. 9, 1981, § 21, at 1, col. 1.

trying to reap the tax blessings. Because bona fide tax-exempt religious organizations need not report their income, or even tell the IRS that they claim tax-exempt status,⁶⁹ and because taxpayers who claim charitable deductions for donations to religious organizations need not name which church received the donation,⁷⁰ the IRS cannot detect fraud easily.

The IRS does not try to define what a "church" is. "We don't set doctrine or dogma. If you are sincere in your belief, we will recognize you as a church, even if you worship trees."⁷¹ A California "church" leader agreed: "In this country, anyone can establish a religion, no matter how nuts."⁷² Still, the fact that a "religious" organization has tax-exempt status as a church⁷³ does not allow its members to use it as a tax shield.⁷⁴

The Internal Revenue Code requires that for a church to gain tax-exempt status: (1) It must be organized and operated exclusively for religious purposes; (2) no part of its net earnings may inure to the benefit of any private shareholder or individual; (3) it may not devote a substantial part of its activities to attempting to influence legislation; and (4) it may not intervene in any political campaign on behalf of any candidate.⁷⁵

Mail-order ministry "churches" have been around for many years, but it has been only since the mid-1970's that they have been used extensively to evade taxes.⁷⁶ The most publicized incident occurred in 1976 when 200 of 236 residents of Hardenburgh, N.Y.,

69. I.R.C. § 508(c)(1)(A) (CCH 1982).

70. *IRS Response*, *supra* note 1, at 11 (statement of William J. Anderson).

71. N.Y. Times, Jan. 20, 1981, § A, at 14, col. 1 (quoting IRS spokesman Larry Batdorf).

Belief in a supreme being is not required for a religious tax exemption. *Washington Ethical Society v. District of Columbia*, 249 F.2d 127 (D.C. Cir. 1957). See, *Belief in Supreme Being Not Required For Religious Tax Exemption*, 58 COLUM. L. REV. 417 (1958).

72. CHRISTIANITY TODAY, Apr. 24, 1981, at 42, col. 2 (quoting Ted Swenson, President of the Mother Earth American Fellowship Church).

73. The Universal Life Church, which ordains ministers by mail, received an official IRS exemption in 1976, see INTERNAL REVENUE SERVICE, DEP'T OF THE TREASURY, CUMULATIVE LIST OF ORGANIZATIONS 1057 (1978) (Publication 78), after a federal judge in California ruled that it was entitled to tax exempt status in *Universal Life Church, Inc. v. United States*, 372 F. Supp. 770 (E.D. Cal. 1974).

74. N.Y. Times, Jan. 20, 1981, § A, at 14, col. 1. For example, the Rev. Sun Myung Moon was convicted by a federal jury on May 18, 1982, for conspiring to defraud the federal government and for avoiding payment of income taxes by passing off a personal bank account as belonging to his Unification Church. *United States v. Moon*, 81-CR-705 (D.N.Y. May 18, 1982). See Tell, *Rev. Moon's Litigious Month of May*, Nat'l L.J., June 18, 1982, at 3, col. 1.

75. I.R.C. § 501(c)(3). The first two requirements are the pressure points used by the IRS in attacking bogus churches.

76. N.Y. Times, Jan. 20, 1981, § A, at 14, col. 1.

became Universal Life Church ministers and stopped paying federal income taxes.⁷⁷ By 1980, the IRS had identified 2,784 church-related illegal tax protest returns⁷⁸ and estimated that some 10,000 mail-order ministers were evading taxes.⁷⁹

c. Constitution

Constitutional "rights" are the most frequently asserted reason for nonpayment on returns identified by the IRS Illegal Tax Protester Program.⁸⁰ Arguments made by protesters in this category include:

—Tax collection violates the fourth amendment right "to be secure . . . against unreasonable . . . seizures."⁸¹

—Mandatory disclosure on tax returns violates the fifth amendment prohibition of self-incrimination.⁸²

—The income tax is unconstitutional because Ohio was not a valid state at the time the sixteenth amendment was ratified.⁸³

—The sixteenth amendment term, "incomes," includes only profit or gain, not wages.⁸⁴

77. *Id.* The town residents also claimed state property tax exemptions on their private homes. In reaction, New York passed a law, N.Y. LAWS, ch. 738 (1978) (amending N.Y. REAL PROP. TAX LAW § 436), denying tax exemptions on property owned by members of the clergy unless the property was held in trust for the church. The New York Court of Appeals upheld the new law, and the United States Supreme Court let the decision stand. *Town of Hardenburgh v. State*, 52 N.Y.2d 536, 421 N.E.2d 795, 439 N.Y.S.2d 303 (1981), *appeal dismissed*, 454 U.S. 958 (1981). See N.Y. Times, Nov. 3, 1981, § 2, at 13, col. 3; Nat'l L.J., Jan. 14, 1980, at 7, col. 2.

78. GAO REPORT, *supra* note 35, at 70.

79. N.Y. Times, Jan. 20, 1981, § A, at 14, col. 1.

80. See *supra* note 55.

81. *Reiff v. Comm'r*, 77 T.C. 1169, 1171 (1981); *IRS Response*, *supra* note 1, at 116 (statement of George Dixon, Committee for Constitutional Taxation); GAO REPORT, *supra* note 35, at 16 (statement of William J. Anderson).

82. It is well settled that the fifth amendment does not establish a blanket privilege negating any duty to file tax returns. *United States v. Edelson*, 604 F.2d 232 (3d Cir. 1979). Rather, there must be something peculiarly incriminating about the refusal to file itself, *United States v. Wolters*, 656 F.2d 523 (9th Cir. 1981), or the taxpayer must rest his fifth amendment claim upon the incriminating nature of particular questions on the return, *United States v. Sullivan*, 274 U.S. 259 (1927). Nor may the taxpayer falsify his return in order to avoid self-incrimination. *United States v. Knox*, 396 U.S. 77 (1969).

Nonetheless, the fifth amendment claim is often asserted by protesters to explain their failure to file or to report income fully. See, e.g., *United States v. Campbell*, 619 F.2d 765 (8th Cir. 1980); *United States v. Daly*, 481 F.2d 28, 30 (8th Cir.), *cert. denied*, 414 U.S. 1064 (1973); *IRS Response*, *supra* note 1, at 110-11 (statement of Robert B. Graham, Sr.).

83. *IRS Response*, *supra* note 1, at 10 (statement of William J. Anderson).

84. "The income tax today is grossly misinterpreted. I do not have any income. I do not have a profit or gain which the Constitution says I should have to pay

—Federal Reserve notes do not constitute “income” and are not legal tender because they are not redeemable in gold or silver.⁸⁵

While the courts have repeatedly struck down these arguments,⁸⁶ and they lack legal merit,⁸⁷ the constitutional schemes are difficult to stamp out because of the way in which they are spread. A Nebraska example of the dynamics of tax protest is the criminal prosecution of Alton R. Moss, a/k/a, John L. “Snoopy” Freeman.⁸⁸

Snoopy Freeman was an itinerant tax protester and public

an income tax.” *IRS Response*, *supra* note 1, at 116 (statement of George Dixon, Committee for Constitutional Taxation). *See also* *United States v. Romero*, 640 F.2d 1014 (9th Cir. 1981) (taxpayer’s claim that he was not a “person” and wages were not “income” held to be fatuous); *United States v. Buras*, 633 F.2d 1356, 1358 (9th Cir. 1980) (tax protester claimed nonpayment was not willful because he believed “income” included only profit or gain, not wages; held, defendant lacked sincerity because he had failed to declare gain on sale of house).

85. GAO REPORT, *supra* note 35, at 41.

Courts have rejected this argument repeatedly. *United States v. Jones*, 628 F.2d 402 (5th Cir. 1980), *cert. denied*, 450 U.S. 967 (1981); *United States v. Benson*, 592 F.2d 257 (5th Cir. 1978); *United States v. Wangrud*, 533 F.2d 495 (9th Cir. 1976), *cert. denied*, 429 U.S. 818 (1976). *See also infra* notes 119-120 and accompanying text.

86. *See, e.g., Stonier v. Comm’r*, 42 T.C.M. (CCH) 1674 (1981). The petitioner was assessed with deficiencies for four years and with penalties for failure to file returns, I.R.C. § 6651(a)(1), negligence or intentional disregard of tax rules, I.R.C. § 6653(a), and failure to pay estimated income tax, I.R.C. § 6654. Appearing pro se, he offered no evidence to counter the deficiency amount, relying instead on constitutional arguments. The Tax Court found some of these arguments were “too incomprehensible to deal with or are too specious and frivolous to justify specific attention.” *Id.* at 1675. In the course of disposing of such contentions as the unconstitutionality of the income tax, the Internal Revenue Code, and the Tax Court and the court’s lack of jurisdiction because the petitioner had never voluntarily acquiesced in the jurisdiction of the IRS, the court made this comment:

It is exasperating . . . that we must waste so much time listening to and reading these repetitive arguments from self-proclaimed constitutional lawyers who quote passages from the Constitution, the Declaration of Independence, court opinions, the Bible, etc., all out of context, that lead to nowhere in the pending case. The writer sometimes wishes that these protesters would get better lawyers or salesmen to feed them the literature upon which their pleadings and briefs are based, so that the arguments would be more comprehensible and interesting.

Id. at 1676, n.2.

87. *See supra* notes 81-85 & accompanying text. Among others, one argument that has been shot down by the courts is that a prison sentence for willful failure to provide information to the IRS was unconstitutional imprisonment for debt, *United States v. Douglass*, 476 F.2d 260 (5th Cir. 1973).
88. *United States v. Moss*, Nos. CR 78-L-18, -20 to -23 (D. Neb. Sept. 29, 1978), *aff’d*, 604 F.2d 569 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). Hereinafter the defendant will be referred to as Snoopy Freeman, as that is the name he prefers. Record at 1, 6.

speaker⁸⁹ who travelled throughout the United States giving speeches in which he challenged the constitutionality of the federal income tax laws and described ways to avoid federal withholding taxes.⁹⁰ In late February 1978, the news director of KMMJ Radio in Grand Island, Nebraska, which reached most of Nebraska and parts of Kansas and South Dakota, invited Freeman to appear on a live radio talk show to which listeners called in questions.⁹¹

On the program, Freeman called himself a "constitutional lawyer."⁹² He said that the federal income tax was unconstitutional and that it should not be paid.⁹³ If listeners had refunds coming for the year, they should file a tax return, but if no refund was expected, listeners should file a Form W-4 to claim exempt status.⁹⁴ Freeman spelled out a formula to use for claiming enough withholding allowances so that the employee would have no wages withheld.⁹⁵ Freeman said that if any listeners had problems with the IRS, he would represent them for a fee.⁹⁶ Freeman was on the

89. Amplification of Grounds (for motion to vacate sentence under 28 U.S.C. § 2255) at 2 (Nov. 6, 1980).

90. 604 F.2d at 570.

91. Record at 128.

92. *Id.* at 130, 158, 188, 234. Later Freeman admitted that he was not a member of the bar—he had only a high school education—but said that bar membership was not necessary to be a constitutional lawyer. *Id.* at 192.

93. *Id.* at 130.

94. *Id.* at 234.

95. *Id.* at 130, 188-89, 235. The formula: To compute the number of exemptions necessary to eliminate withholding, divide the highest salary for any single year by \$750, the size of one exemption in 1978. *Id.* at 235.

Under the withholding scheme of I.R.C. § 3402, the employer is required to withhold from "the amount of wages" a percentage set by the Secretary of the Treasury. The term "amount of the wages" means the amount by which the total wages exceed the number of exemptions multiplied by the amount of one exemption (now set at \$1,000; \$750 before 1979). § 3402(a)-(b). The employee may reduce the base wage upon which withholding is computed by filing an exemption certificate. § 3402(f)(2). For periods in which no exemption certificate is in effect, taxes are withheld as if there were no withholding exemptions. § 3401(e). In general, the employee may claim exemptions for himself, his spouse, and each of his dependents, for such personal traits as old age and blindness, and for a zero bracket amount allowance, unless his spouse also claims the same exemptions. § 3402(f)(1). In addition, unless claimed by his spouse, the employee may claim one exemption for each \$1,000 of itemized deductions (over the zero bracket amount) which he expects to claim for the year. § 3402(m). Freeman's formula exploits the self-reporting aspect of the exemption certificate; the employee using this formula attempts to reduce "the amount of wages" to zero by claiming enough phony dependents or exemptions based on estimated itemized deductions to completely offset gross wages, in violation of the prohibition against claiming more exemptions than those to which the employee is entitled. § 3402(2).

96. Record at 131.

KMMJ program again in April and September 1978, and expressed the same views.⁹⁷

On March 6 he spoke to an audience at the Mid-Town Holiday Inn in Grand Island. His message was much the same, and he repeated his advice about filing false Forms W-4. He told the audience to check out what he was saying by going to a Federal Reserve Bank to try to exchange Federal Reserve notes for either gold or silver.⁹⁸ A month later Freeman addressed a two-and-a-half hour meeting at Grand Island's Barr Junior High School, followed by a similar meeting at a high school in nearby Hastings.⁹⁹

Listening to the first KMMJ talk show were several employees of Van's Electric Company of Grand Island. One, Donald Gronewold, attended the speech at the Holiday Inn; he and others in the audience tape recorded Freeman's talk.¹⁰⁰ Gronewold played the tape for his fellow employees, after which Gronewold and three others, including Dennis Vanosdall, a vice-president of the company, filed false Forms W-4. Vanosdall claimed to be exempt,¹⁰¹ and the others, following Freeman's formula, claimed from twenty-two to thirty-two allowances.¹⁰²

Vanosdall and three others attended the Barr meeting, after which Vanosdall invited Freeman to come to the Van's shop. Freeman accepted; on April 8 he talked with the four who already had filed and a fifth worker, Shawn Sanne.¹⁰³ Freeman told the employees that no one had ever gone to jail by following his system for avoiding withholding and that everyone he had defended had "gotten off."¹⁰⁴ Also, Freeman would represent them for a retainer fee of \$2,000 if they got into trouble as a result of submitting the Forms W-4, or, for \$150, they could buy one year of "insurance" for

97. *Id.* at 132. The appearance on September 20 was just a week before Freeman went on trial for five counts of aiding and abetting the filing of false Forms W-4.

98. *Id.* at 218.

99. *Id.* at 191, 209. These public appearances were part of a series of anti-tax speeches Freeman made in several Nebraska towns. Included was a news interview shown on KNOP-TV in North Platte. *Id.* at 142.

100. *Id.* at 160, 162.

101. I.R.C. § 3402(n) eliminates the withholding requirement for wages of employees who certify that they incurred no liability for income tax for the preceding taxable year and that they anticipate no income tax liability for the current year.

102. Information, United States v. Spencer, No. CR 78-L-18 (D. Neb. June 20, 1978); Information, United States v. Sanne, No. CR 78-L-20 (D. Neb. June 20, 1978); Information, United States v. Lilienthal, No. CR 78-L-21 (D. Neb. June 20, 1978); Information, United States v. Gronewold, No. CR 78-L-22 (D. Neb. June 20, 1978); Information, United States v. Vanosdall, No. CR 78-L-23 (D. Neb. June 20, 1978).

103. Record at 167, 191, 209.

104. *Id.* at 193.

the same type of legal representation.¹⁰⁵ The employees chipped in to pay Freeman \$50 for his talk.¹⁰⁶ Two days later Sanne filed a Form W-4 declaring himself to be exempt from withholding.¹⁰⁷

Each of the five Van's employees was charged with filing a false Form W-4,¹⁰⁸ and Freeman was charged with five corresponding counts of aiding and abetting the principal defendants.¹⁰⁹ The principal defendants agreed to plead guilty and to testify against Freeman in exchange for fines of \$100.¹¹⁰ Freeman was convicted by a jury on all five counts and received five 1-year concurrent sentences.¹¹¹

The Freeman case illustrates a pattern the IRS has found elsewhere around the country that threatens voluntary compliance with tax payment "because of the visibility of the tax protest leaders and their sales approach."¹¹²

2. Methods

a. Protest Adjustment or Nonpayment

A protest adjustment is an unallowable deduction, adjustment, or credit declared on a tax return which otherwise correctly states income and other information, where the adjustment is based on philosophical objections to government policy or to how the government will use the tax money.¹¹³ For example, a taxpayer may

105. *Id.* at 240-41.

106. *Id.* at 194.

107. *Id.* at 250.

108. I.R.C. § 7205. The possible sentence may be up to \$500, or up to a year imprisonment, or both. The fine was recently boosted to a maximum of \$1,000. See *infra* note 239 and accompanying text.

109. 18 U.S.C. § 2 (1976). The possible sentence is the same as for the principal crime.

A sixth principal defendant, Joseph Baruch, an employee of a different Grand Island construction company also was charged under I.R.C. § 7205, and Freeman was charged with a sixth count of aiding and abetting. However, Baruch withdrew a guilty plea and was acquitted by a jury, thus voiding the derivative charge against Freeman. *United States v. Baruch*, No. CR 78-L-19 (D. Neb. Nov. 9, 1978) (information against Freeman dismissed Nov. 20, 1978).

110. Judge Robert Van Pelt accepted the plea bargain Aug. 7, 1978.

111. *United States v. Moss*, No. CR 78-L-18, -20 to -23 (D. Neb. Sept. 29, 1978, verdict; Nov. 20, 1978, sentence).

112. *IRS Response*, *supra* note 1, at 9 (statement of William J. Anderson). See also Harsch, *IRS handling autoworkers' tax protest circumspectly*, *Christian Science Monitor*, Feb. 25, 1981, at 4, col. 1.

113. GAO REPORT, *supra* note 35, at 19. A "new twist" to this technique has appeared. Some taxpayers file what appear to be legitimate Forms 1040, but closer scrutiny reveals that they have been altered. The taxpayer reports W-2 wages on the correct line, but adds a line to claim a large deduction labelled "Non-Taxable Receipts" or "Factor Discount Expense" or "Eisner v. Macomber, 252 U.S. 189" (which in 1919 held that Congress could not tax stock

take an impermissible deduction of half of her accurately reported income for "conscientious objection to military expenditures."¹¹⁴

A protest nonpayment involves a correct computation of the tax, but the protester refuses to pay all or part of the balance due because of philosophical objections.¹¹⁵ An example is Archbishop Hunthausen's refusal to pay half of his income taxes as a protest against the nuclear arms race.¹¹⁶

The protest nonpayment is the device best suited for principled protesters. The morality of this type of protest remains unsullied by dishonest reporting, and the purpose of the protest is highlighted for all to see (although "all" may be the clerks and investigators at the IRS). Simultaneously, the honest nonpayer cuts down his exposure to civil penalties and essentially eliminates the danger of criminal conviction.¹¹⁷

dividends without apportionment, despite the sixteenth amendment; the Court narrowly construed the amendment to apply only to types of income barred from unapportioned taxation before its passage). *IRS Response*, *supra* note 1, at 94 (statement of Roscoe L. Egger, Jr.).

114. *E.g.*, *Reimer v. Comm'r*, 42 T.C.M. (CCH) 518 (1981).

For an idiosyncratic example of a protest adjustment, though not fitting the "illegal tax protester" definition because of the lack of potential for spreading, see *Jacobs v. Comm'r*, 40 T.C.M. (CCH) 949 (1980), where the taxpayer incurred a negligence penalty (though not a civil fraud penalty) when she claimed excessive theft losses to draw attention to an alleged conspiracy by the Mormon church and the local government to condemn her land.

115. GAO REPORT, *supra* note 35, at 42.

116. See *supra* notes 56-57 & accompanying text.

117. See *Tabac*, *supra* note 45, at 218-19, 221. However, the protesters who hold back taxes cannot expect their high principles to gain them immunity from taxation. The United States Supreme Court spelled this out clearly in a recent unanimous opinion, *United States v. Lee*, 102 S. Ct. 1051 (1982). The taxpayer, Ed Lee, was a self-employed Old Order Amish farmer who employed other Amish men to work on his farm and in his carpentry shop. For several years Lee failed to file the quarterly Social Security tax returns required of employers, withhold Social Security tax from his employees, or pay his share of the Social Security taxes. The IRS assessed Lee more than \$27,000 for back employment taxes. Lee paid \$91 of this, then sued for a refund. The federal district court found that imposition of the Social Security taxes violated his rights and his Amish employees' rights under the Free Exercise Clause of the first amendment, in light of the Amish aversion to accepting Social Security benefits and to contributing to the Social Security system. *Lee v. United States*, 497 F. Supp. 180 (W.D. Pa. 1980). The Supreme Court reversed, refusing to extend by judicial fiat the I.R.C. § 1402(g) provision exempting from self-employment taxes those who claim a religious objection to Social Security and declining to find that the burden on this bona fide religious belief overrides the "very high" governmental interest in mandatory participation in the Social Security system. Part of the Court's reasoning applies broadly to principled tax protesters of any ilk:

The obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes; the difference—in theory, at least—is that the social security tax revenues are

b. Mail Order Ministry/Vow of Poverty

This scheme has two variations. Under the first, an individual purchases ministerial credentials and perhaps a church charter from a promoter. The person then forms an organization, or becomes a branch of another organization, and claims it to be a tax-exempt church. The person's residence usually houses the "church," and his or her family is usually the "congregation." The person substantially reduces taxes by contributing up to 50 per cent of his or her income—the maximum allowable—to the church and claiming it as a Form 1040 deduction. The church's revenue is used to pay the person's living expenses, such as food, transportation, and housing.

Under the second variation, a person takes a vow of poverty and pledges to obey the orders of the church. The orders, in essence, generally require the person to retain his or her current job and to continue his or her existing lifestyle. The person may file a Form 1040 claiming income, but then takes an adjustment against gross income for an equal amount. This adjustment eliminates any tax liability. Some protesters show no financial data, stating that they are not required to pay taxes as ministers under a vow of poverty.¹¹⁸

The first such "church" to face criminal prosecution is an illustration of the interconnections among tax protest schemes (other than those motivated by principle). Jerome Daly is a "well-known tax protester" from Minnesota who was convicted for failing to file personal income tax returns for 1967 and 1968. In defense to those convictions, Daly had claimed that declaring income violates the fifth amendment protection against self-incrimination, and that his income was worthless and not subject to taxation because Federal Reserve notes are no longer backed by gold or silver.¹¹⁹ The Min-

segregated for use only in furtherance of the statutory program. There is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. . . . Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

102 S. Ct. at 1056.

118. GAO REPORT, *supra* note 35, at 40.

119. *United States v. Daly*, 481 F.2d 28 (8th Cir.), *cert. denied*, 414 U.S. 1064 (1973). An argument similar to Daly's fifth amendment claim was rejected in *United States v. Sullivan*, 274 U.S. 259 (1927).

nesota Supreme Court disbarred Daly from practicing law because, in accord with his "strong belief that the Federal Reserve System is unconstitutional," he demanded in lawsuits that his clients be paid in gold, and he asked a justice of the peace to declare Federal Reserve notes to be illegal tender.¹²⁰

According to federal prosecutors, in 1976 Daly gained control of the Basic Bible Church of Minneapolis, which had an exemption from federal taxes. He then sold packets which buyers could use to claim contribution deductions or exemptions from taxation.¹²¹ Daly claimed that the Basic Bible Church had 15,000 ministers around the world,¹²² and that he was its "archbishop, president and pope."¹²³

Daly's ministers used the church to shelter incomes of up to \$75,000 a year.¹²⁴ One minister was a Texas International airline pilot who was convicted in November, 1980, of felony tax evasion, the first person claiming a religious exemption to be so convicted.¹²⁵ In September 1981, a federal grand jury indicted Daly and ten Braniff International airline pilots on 37 counts of tax fraud.¹²⁶

The basis for levying civil or criminal fraud penalties against taxpayers using a church to shelter income is not that the church is bogus, but because charitable contributions that inure to the benefit of the contributor are not deductible.¹²⁷ However, the con-

120. N.Y. Times, Jan. 20, 1981, § A, at 14, col. 1.

121. Nat'l L.J., Oct. 5, 1981, at 3, col. 1; N.Y. Times, Sept. 5, 1981, at 6, col. 6. The materials for creating ostensible churches sold for \$750 to \$1750 and included forms for spurious vows of poverty, by which "ministers" could claim to tax authorities that they had donated all property to the church and were personally exempt from taxation. *Id.*

122. N.Y. Times, Jan. 20, 1981, § A, at 14, col. 1. Under Daly, the Basic Bible Church had no members. Everyone was a "minister," and each "minister" was his own "church." *Id.*

123. N.Y. Times, Sept. 5, 1981, at 6, col. 6.

124. *Id.*

125. N.Y. Times, Jan. 20, 1981, § A, at 14, col. 1. Charles Kageler was sentenced to four years imprisonment and fined \$5,000. He signed over income of more than \$60,000 a year to his church after becoming a minister and taking a vow of poverty in 1977. His house became a parsonage and the church made the mortgage payments. The church also paid for a small aircraft he said he used in missionary work. *Id.*

For a description of the government's strategy in mail order ministry prosecutions—to concentrate on only a few test cases seeking criminal sanctions, while imposing civil penalties in other cases—see GAO REPORT, *supra* note 35, at 36.

126. N.Y. Times, Sept. 5, 1981, at 6, col. 1.

For an examination of the growth of mail order ministry on Long Island, N.Y., see Mitchell, *supra* note 68.

127. Nat'l L.J., Oct. 5, 1981, at 3, col. 1.

In Rev. Rul. 78-232, 1978-1 C.B. 69, the Service precluded charitable deduc-

stitutional sensitivity of the IRS judging the sincerity of belief of church members and investigating a church's use of its funds adds to enforcement difficulties in this area.¹²⁸ Added to this is the fact that taxpayers who dodge taxes by use of a church-related scheme, like those who invoke constitutional defenses, tend to be hard-core protesters who fight enforcement efforts tenaciously.¹²⁹

c. Family Trust

On the other hand, the family estate trust is the easiest scheme to deal with, because the taxpayers using it often believe that it is a valid tax avoidance device, rather than illegal tax evasion.¹³⁰ The taxpayers involved are persuaded to use the trust scheme by tax advisors of the Snoopy Freeman genre.¹³¹ Thus, although the taxpayers are not tax protesters, the trust scheme presents a similar danger of spreading due to the activities of the promoters. As such, it has been one of the most widely used, and most heavily promoted, evasion devices.¹³²

tions under I.R.C. § 170 for income earned by a typical mail order minister and turned over to his "church," both because the church was not a qualified § 170(c) recipient (because it served private purposes) and because the contributor expected to receive benefits in return for the contribution. Similarly, the Service held in Rev. Rul. 77-290, 1977-2 C.B. 26, that income assigned to a church pursuant to a vow of poverty made by an attorney who was a member of a religious order and who was instructed by his order's superiors to work for a law firm must be included in the attorney's gross income because he was an agent of the law firm, not of the religious order.

128. See *Lauter, Are Churches Under Attack?*, Nat'l L.J., Nov. 2, 1981, at 1, col. 1; PROTESTER ACTIVITY, *supra* note 25, reprinted in *IRS Response*, *supra* note 1, at 139.

The New York City Tax Commission recently discovered the difficulties of trying to pierce the holy veil when the New York Court of Appeals overturned a commission ruling that the Rev. Sun Myung Moon's Unification Church was too political to qualify for a property tax exemption. In *re Holy Spirit Assoc. for the Unification of World Christianity v. Tax Comm'n*, 55 N.Y.2d 512, 435 N.E.2d 662, 450 N.Y.S.2d 292 (1982). The court held that the government may not probe into a religion's own description of its beliefs unless such characterization is found to be a sham or lacking in good faith. Government agencies may not "go behind the declared content of religious beliefs any more than they may examine into their validity." *Id.* at 521, 435 N.E.2d at 665, 450 N.Y.S.2d at 295.

129. Tax protesters often are familiar with IRS compliance procedures and can take advantage of the procedural safeguards to delay enforcement. Protesters also have harassed and threatened IRS agents. PROTESTER ACTIVITY, *supra* note 25, reprinted in *IRS Response*, *supra* note 1, at 142-44.
130. *IRS Response*, *supra* note 1, at 11 (statement of William J. Anderson).

See, e.g., *Mirenda v. Comm'r*, 40 T.C.M. (CCH) 666 (1980) (negligence penalty upheld, even though taxpayer was unaware of IRS position on family trust).

131. *IRS Response*, *supra* note 1, at 11 (statement of William J. Anderson).
132. U.S. NEWS & WORLD REPORT, March 30, 1981, at 80. See, e.g., Wenger v.

The Government Accounting Office explained the scheme at a congressional hearing as follows:

Under this scheme, a person purchases a "trust package" from a promoter. All personal assets (the estate) are then assigned to the trust, and any personal earnings become trust revenues. The promoters misrepresent that (1) a grantor can assign his or her income to either another person or a trust to escape taxation, and (2) substantially all the grantor's living expenses may be deducted on the trust's fiduciary income tax return as business expenses.

Under this scheme, the trust pays many personal expenses of the grantor, such as housing, medical, automobile, and interest expenses. Any remaining trust income is paid to the grantor, who is a trust beneficiary; or the trust income can be divided among several beneficiaries, such as the grantor's minor children who have little or no income. The taxpayer files a form 1041 showing these transactions and a form 1040 return showing any distributions from the trust as income. Our review showed that most users of this scheme attempted to divert personal earnings of between \$15,000 and \$50,000 to the trust.¹³³

A new variation on the family estate trust is the foreign trust organization:

[A]n agent in a foreign tax haven country creates a trust in that country and names the taxpayer as the trustee. The taxpayer transfers assets and income-producing property to a number of other foreign trusts. Then, through a series of sham transactions among the trusts, which are conceived only for tax purposes, the taxpayer attempts to evade the income tax.¹³⁴

The trust schemes resemble other protester schemes in that they often are spread by promoters for profit. However, the family estate trust and, even more so, the foreign trust organizations present a lesser danger of uncontrolled dissemination throughout the taxpaying public in that they are relatively complex devices which most taxpayers could not use without detailed advice from the promoter (either in person or in a book). Thus, public speech alone by an advocate of a trust scheme lacks the danger of provoking imminent actions to evade taxes (unlike the W-4 scheme, which is simple enough that public speech can lead directly to illegal activity).¹³⁵

Comm'r, 41 T.C.M. (CCH) 1615 (1981); Papp v. Comm'r, 41 T.C.M. (CCH) 25 (1981); Hovat v. Comm'r, 40 T.C.M. (CCH) 725 (1980).

133. GAO REPORT, *supra* note 35, at 39. See also Perkins, *The Family Trust: Miracle or Mirage?*, CASE & COMMENT, March-April 1982, at 45. The Service has various arguments for attacking family trusts, depending upon the varying forms the trust instruments take. The major argument is that the grantor's attempt to assign taxable income for personal services is ineffective, so that even income (earned by the assignor) paid directly to the trust is taxable to the assignor. *Id.* at 45-47. See Rev. Rul. 80-321, 1980-2 C.B. 33; Rev. Rul. 75-257, 1975-2 C.B. 251. See also Manual Transmittal 4200-418, L.R.M. 426(26).4:(7) (March 13, 1981).

134. *IRS Response*, *supra* note 1, at 78 (statement of Roscoe L. Egger, Jr.).

135. See *infra* § III.D. of text.

d. False Form W-4

The incident which most dramatically brought home the fear that tax protest could undermine the voluntary self-assessment system was an organized revolt in early 1981 among Michigan blue-collar workers, largely from the automobile industry. About 3,500 false Forms W-4 were filed with employers in order to gain exemption from wage withholding.¹³⁶ One national news magazine asserted: "The tax protesters' massive challenge of this country's self-assessment income tax is the first such test in the 68-year history of that levy."¹³⁷ *The New York Times* called it a "burgeoning tax revolt," and quoted a protesting truck driver: "This thing is so far gone there is no way the I.R.S. can keep up with it. Now that this is out in the open, it's going like wildfire."¹³⁸

The Commissioner of the IRS took a similar stance before Congress: "This situation represents an erosion in compliance which, if permitted to continue, threatens not only the withholding system but also the reporting and collection of taxes."¹³⁹

However, the Michigan uprising apparently evaporated nearly as quickly as did the Whiskey Rebellion.¹⁴⁰ The IRS had detected "a flurry of dubious tax advice" in the area as early as fall of 1980 and had alerted area employers.¹⁴¹ When workers began filing new Forms W-4 by the thousands, claiming special exemption or scores of dependents, they were warned by their employers, and the IRS sent a mass mailing of warning letters. More than half of those who filed false forms quickly turned in corrected W-4's.¹⁴²

Still, the incident was a startling example of what can happen when a Snoopy Freeman-style protester¹⁴³ develops a following among already discontented taxpayers, especially those with conservative, anti-government biases.¹⁴⁴

136. See *supra* note 112. See also *NEWSWEEK*, March 9, 1981, at 33; *TIME*, March 9, 1981, at 63; *Christian Science Monitor*, Feb. 24, 1981, at 2, col. 2.

For an explanation of how the W-4 scheme works, see *supra* note 95 and accompanying text.

137. *U.S. NEWS & WORLD REPORT*, March 30, 1981, at 80.

138. *N.Y. Times*, Feb. 25, 1981, § A, at 17, col. 1 (quoting Ed Marshall).

139. *IRS Response*, *supra* note 1, at 78 (statement of Roscoe L. Egger, Jr.).

140. See *supra* note 44 & accompanying text.

141. Harsch, *supra* note 112.

142. *Id.* Two leaders of the Michigan tax revolt were convicted July 13, 1981, for filing false W-4 forms. Dean Hazel, founder of We the People—American Citizens Tribunal, was sentenced to two years imprisonment on two counts. *N.Y. Times*, Sept. 19, 1981, at 10, col. 2.

143. See Harsch, *supra* note 112. The origin of the Michigan protest was in radio, television, and personal appearances by Irwin Schiff, a Connecticut "tax advisor" who preached that "greenbacks" had no constitutional standing as legal currency. See *infra* § II.D. of text.

144. See *infra* § II.D. of text.

The false W-4 scheme has the advantage (to protesters) of being simple and easy to use. Wage-earning protesters of any strength of motivation may be attracted to it as a way to keep the money out of the government's hands before they get a chance to refuse to pay taxes. If they make it past the false W-4 stage, protesters generally use another scheme to eliminate or evade taxes altogether when returns come due.¹⁴⁵

e. Blank or Protest Form 1040

The IRS includes in the blank 1040 category those returns which contain only the taxpayer's name and address, and perhaps a signature and Form W-2. No financial information is given, and, upon correspondence, the taxpayer is revealed to be a protester.¹⁴⁶ The content of the protest may be anything discussed above. A related method is included in the Service's "constitutional" category: The taxpayer identifies on the return that he refuses to give financial information for constitutional or other reasons.¹⁴⁷

These methods present enforcement problems not caused by protest adjustment and protest nonpayment returns. On the latter, the correct information is included, so the Service can easily assess a deficiency. However, blank returns and returns marked "5th Amendment" give IRS paper shufflers little to go on. Delay and expense are incurred as the auditors have to obtain the information needed for assessment, a process frequently prolonged by uncooperative protesters.¹⁴⁸

f. Nonfiling

The blank Form 1040 at least tells the Service who to investigate. Nonfilers impose the greater burden of detection as a prerequisite to enforcement. In 1979, the IRS had 450,000 uncompleted

145. See GAO REPORT, *supra* note 35, at 40. See also Mitchell, *supra* note 68, at 7.

146. PROTESTER ACTIVITY, *supra* note 25, reprinted in *IRS Response*, *supra* note 1, at 131.

147. *E.g.*, Hatfield v. Comm'r, 68 T.C. 895 (1977).

148. Leaders of the branches of the tax protest movement which object to the tax system itself (as opposed to the use to which tax revenues are put) have become familiar with IRS procedures and have learned how to use administrative procedures to delay or defeat assessment of taxes due. These procedures were developed to allow taxpayers and the Service to work out differences administratively, if possible, in order to save time and expense for all parties. However, illegal tax protesters often have no intention of arriving at a fair and just resolution, so they take full advantage of such procedural safeguards as notice periods and challenges to summonses. For a summary of protester delay tactics and suggestions for improving procedures, see PROTESTER ACTIVITY, *supra* note 25, reprinted in *IRS Response*, *supra* note 1, at 144-55.

nonfiling investigations, most of the leads for which were produced by a newly improved document-matching program.¹⁴⁹

Silent protesters are the most difficult to detect. It is impossible to say how many of the nonfilers detected by the IRS nonfiler program would fit the protester category, and even more impossible to say how many more undetected nonfiling protesters there are. But some nonfilers must be protesters, because protest leaders encourage nonfiling.¹⁵⁰

A Nebraska example of how protest nonfiling works is the 1979 criminal prosecution of William R. Campbell.¹⁵¹

The owner of a farm near Chadron, Campbell was "an outspoken advocate of political reform in the area of taxation" and was active in a Panhandle tax resistance group known as "Posse Comitatus."¹⁵² He had been convicted previously on several counts of tax evasion in state court and now was charged with failure to file federal returns for 1974 through 1976.¹⁵³ Among his defenses were assertions that the Internal Revenue Code was unconstitutional, that the fifth amendment relieved him of any obligation to file a tax return, and that, in any event, he had misinterpreted the law in good faith.¹⁵⁴

One of the defenses Campbell failed to prove was that the government had selectively prosecuted him because of his exercise of first amendment rights in speaking out against tax laws. He contended that IRS agents engaged in such "clandestine operations" as attending tax resister group meetings and recording names and license numbers of those in attendance.¹⁵⁵

Campbell was convicted on all three counts by a jury and was sentenced to three consecutive one-year jail terms and fined \$500 on each count. Judge Warren K. Urbom, who also had presided

149. *The Underground Economy*, *supra* note 3, at 19 (statement of Jerome Kurtz). See *infra* § III.A. of text.

150. *IRS Response*, *supra* note 1, at 4 (statement of William J. Anderson).

151. *United States v. Campbell*, No. CR 79-L-06 (D. Neb. Aug. 8, 1979).

152. Consolidated Motions of Defendant at 2 (April 11, 1979).

153. I.R.C. § 7203. The maximum sentence is one year and/or \$10,000. Campbell, like Freeman, claimed that the court lacked jurisdiction because the failure to file (aiding and abetting filing of false W-4 in Freeman's case) was an "infamous crime" under the fifth amendment, requiring a grand jury indictment, and that Fed. Rule Crim. Pro. 7 to the contrary was unconstitutional. The trial court rejected this, citing numerous decisions which had upheld Rule 7. Memorandum (Judge Robert V. Denney) (May 29, 1979).

Campbell's 1974 return contained only his name and address; for 1975 and 1976 he filed no returns at all. He admitted gross income for each year in excess of \$10,000. *United States v. Campbell*, 619 F.2d 765, 766 (8th Cir. 1980).

154. 619 F.2d at 766.

155. Consolidated Motions of Defendant at 8 (Apr. 11, 1979). See *infra* § III.D. of text.

over Snoopy Freeman's trial,¹⁵⁶ ordered that the sentence be served in the county jail at Chadron, that Campbell be given immediate work release rights, and that he be put on probation after the first six months of imprisonment. The condition for the probation was that Campbell "file full, valid and timely federal income tax returns during the period of probation" and pay the fine within 60 days of final judgment.¹⁵⁷ However, Judge Urbom revoked probation and ordered Campbell to serve the full three-year term, after Campbell failed to pay the fine on time.¹⁵⁸

D. Tax Protest Group Dynamics

Campbell represented a variation of the theme seen in such cases as those involving Freeman, Schiff,¹⁵⁹ and Daly.¹⁶⁰ The latter three were promoters from the outside who sold their anti-tax ideas for profit to individuals and groups who were predisposed to accept the sales pitch. Campbell, on the other hand, was a second-tier protest leader with roots in the community where the ultimate consumers lived. Such local leaders as Campbell and Dean Hazel¹⁶¹ preserve and propagate the ideas coming in from the outside, thus increasing the potency of the anti-tax message and cementing the commitment of the local followers.

This is what Commissioner Egger meant when he told a House Hearing that protester leaders were "preaching a gospel."¹⁶² Such spreaders of the faith as Freeman, Daly, and Schiff are like traveling religious evangelists. They are persuasive public speakers whose sermons in a particular community are sponsored by local fellow believers. The locals drum up interest; the evangelist gains

156. See *supra* notes 88-111 & accompanying text.

Willie Dee Morris, the Montana attorney who represented the sixth principal defendant in the Freeman case (who backed out of the plea bargain and was acquitted), also represented Campbell at trial. Campbell filed his appeal brief pro se. Morris also has represented other tax protesters. See *IRS Response*, *supra* note 1, at 108 (statement of Robert B. Graham, Sr.).

157. Sentence, United States v. Campbell, No. CR 79-L-06 (D. Neb. Sept. 14, 1979). The Eighth Circuit upheld the terms of probation against a fifth amendment challenge. United States v. Campbell, 619 F.2d 765, 766-67 (8th Cir. 1980).

158. Order, United States v. Campbell, No. CR 79-L-06 (D. Neb. Sept. 26, 1980). A Government Accounting Office study of IRS efforts against illegal tax protesters noted that courts often condition probation in criminal cases upon a requirement that the defendant pay taxes and file returns. IRS procedure requires coordination among the Criminal Investigation Division, the Collection Division, and probation officers to ensure that the terms of probation are being met. GAO REPORT, *supra* note 35, at 53.

159. See *supra* note 143.

160. See *supra* notes 119-126 & accompanying text.

161. See *supra* notes 47 & 142.

162. See *supra* note 49 & accompanying text.

new converts at the revival meetings; then the local ministers consolidate the gains among the new recruits and capitalize on the reaffirmed faith of the reinspired old guard.

The Michigan tax revolt followed the evangelism model in surprising detail. In 1977, Irwin Schiff, who operated a tax advisory service in Connecticut, was interviewed on network television. This led to a local radio call-in show in Michigan. A preexisting tax resistance club in Pontiac, named We the People (American Citizens Tribunal), along with other local groups, spread Schiff's message in the Flint and Pontiac area by sponsoring tax advice meetings and helping to distribute Schiff's "tax liberation kit," which consisted of tapes and pamphlets and sold for \$35. A young autoworker, Dean Hazel of Pontiac, became the spokesman and philosopher for the local group, and justified the tax revolt with anti-Communist rhetoric. Even when Schiff went to jail for failure to file a proper return, his Michigan supporters interpreted the conviction as an IRS attempt to undermine their protest movement through harassment, and they pressed on with the W-4 revolt.¹⁶³ Then, when the government moved to stamp out the revolt, the hard-core faithful went to jail for their beliefs, while the less committed abandoned the movement.¹⁶⁴

Thus, close examination of the dynamics of tax protest reveals a surprising similarity between different types of schemes and between the seemingly contradictory motivations of different types of protesters. Every scheme appears to have evangelists, hard-core followers, and fringe followers (all of whom have some claim to principle), along with unprincipled tax evaders who use the same schemes for pecuniary gain.

It may be argued that such constitutional protesters as Campbell and Hazel actually lack principle and are merely using constitutional and political arguments to rationalize greed.¹⁶⁵ However, they share with the war-tax refusers a willingness to sacrifice for

163. Harsch, *supra* note 112. At about the time that the IRS began to strike back at the Michigan protesters, Schiff lost his appeal of an earlier conviction for willful failure to file under I.R.C. § 7203, and began to serve a six-month jail term. He also was fined \$10,000. See Kreig, *Jury convicts tax-rebellion leader; Schiff turns Conn. trial into 2-week spectacle*, Nat'l L.J., June 23, 1980, at 9, col. 1.

164. See *supra* note 140 & accompanying text.

165. While IRS officials recognize that tax protest is a form of social protest, they do not see it as legitimate social protest. "Some of it is just making money for the people that run around peddling these schemes." *IRS Response*, *supra* note 1, at 87 (statement of Roscoe L. Egger, Jr.). See also *id.* at 19 (statement of William J. Anderson) ("[M]ost folks seem to have a streak of larceny in them. When you look at the compliance statistics today, it seems to be very much a function of how likely IRS is to catch them.")

their beliefs and an eagerness to publicize their tax resistance which cannot be explained by greed alone.

III. IRS RESPONSE

A. Identification of Protesters for Special Treatment

The IRS's reason for being is to collect taxes when they become due. To accomplish this, the Service sometimes finds it necessary to give special attention to certain types of taxpayers¹⁶⁶ or to particular types of economic activities¹⁶⁷ which pose collection problems against which the normal compliance procedures work poorly. In general, the special effort devoted to such problem areas reaps collection benefits beyond the cost of the extra effort.¹⁶⁸ However, the special efforts to deal with tax protesters are not cost effective.¹⁶⁹ Rather, the extra costs are justified by the fear that tax protest, if left unchecked, will grow.¹⁷⁰

The special effort tailored most tightly to the fear that an anti-tax gospel could undermine the tax system is the Illegal Tax Protester Program established in November 1978 to identify and control protester returns and documents.¹⁷¹

166. A recent example of a special IRS target was the independent contractor. See McCloughry, *Uncle Sam's War on the Independent Contractor*, 31 NAT'L REV. 1609 (1979); BUSINESS WEEK, July 23, 1979, at 61. The Service persuaded Congress to broaden information reporting to include payments made by businesses to independent contractors in remuneration for services. 1982 Tax Act, *supra* note 18, § 312(a) (adding I.R.C. § 6041A).

Another target is bartering. The IRS in 1980 began a Barter Exchange Project, as part of its larger Unreported Income Program, to enforce its view that barter is taxable income. Rev. Rul. 79-24, 1979-1 C.B. 60; Rev. Rul. 80-52, 1980-8 I.R.B. 15. See *IRS Crackdown on Barter Business*, 68 A.B.A. J. 410 (Apr. 1982). To aid this effort, Congress included in the 1982 Tax Act, *supra* note 18, a provision, section 311(a)(1) (amending I.R.C. § 6045), defining barter exchanges as "brokers" subject to information reporting requirements as to capital gain transactions of their clients.

167. An example is the special audit program for partnership tax shelters. See Comment, *Auditing Partnership Tax Shelters: IRS Procedures and Taxpayer Liability*, 60 NEB. L. REV. 564 (1981).

168. See *The Underground Economy*, *supra* note 3, at 55 (letter of Lauralee A. Matthews, assistant IRS commissioner) (answer to Question 2).

The Service expects to recoup \$21 to \$22 for every dollar it spends trying to collect overdue taxes. Christian Science Monitor, Oct. 6, 1981, at 2, col. 2.

169. *IRS Response*, *supra* note 1, at 15-16 (statement of William J. Anderson). But see *id.* at 103 (statement of Roscoe L. Egger, Jr.) (return in recommended tax and penalties per staff hour was greater in fiscal 1980 and early 1981 for tax protest cases than for regular income tax examinations; however, actually collecting the tax is more costly).

170. *Id.* at 104 (statement of Roscoe L. Egger, Jr.)

171. *IRS Response*, *supra* note 1, at 3 (statement of William J. Anderson). In 1980 the Illegal Tax Protester Program at the district office level consumed 304 staff years, about 1 percent of the estimated 24,000 average total staff years

Illegal tax protester returns are identified by several means. The key to the program is the normal pipelines at the ten service centers. The current IRS Commissioner described the protester program as follows:

The initial detection of illegal protester-type documents usually is made in the returns processing area of our service centers and then referred to a team under the control of the Compliance Division of the service center. This team, which receives suspected protester returns and documents from the returns processing area prior to processing, then determines which returns or documents are considered part of illegal protester activity.

Indications of protester-type activity initially detected in a district office will be referred to the district illegal tax protester coordinator. These may subsequently be referred to the service center for processing . . .¹⁷²

Frequently, the return itself reveals the filer to be a protester, as when the return contains only the filer's name and address or when the return is inscribed, "No Nukes," and the enclosed check covers only half of the accurately stated tax liability. However, protesters who are less eager to broadcast their causes (or who lack any cause other than their own money belt) may have to be detected through other means. One ripe source in recent years is the Questionable Form W-4 Program begun in April 1980 which requires employers to report to the IRS any W-4's they receive which claim ten or more withholding exemptions or which claim total exemption.¹⁷³ As illustrated by the Michigan tax revolt and the Snoopy Freeman case, many of the false exemption claimants fit the illegal tax protester definition.

Another identification source is the Information Returns Program, which attempts to identify taxpayers who underreport income or who fail to file returns. This is done by using computers to match returns against information documents from such sources as employer payrolls, bank records of payments of interest, and records of payments of corporate dividends.¹⁷⁴ Although this pro-

expended by the districts on all compliance enforcement activities, and cost \$8.1 million. GAO REPORT, *supra* note 35, at 44.

172. *IRS Response*, *supra* note 1, at 80 (statement of Roscoe L. Egger, Jr.).

It is crucial that the return processors in the service centers identify tax protest returns as they are coding them for the computer; otherwise the IRS may issue any claimed refund, causing collection problems if the filer turns out to be a protester who refuses to pay taxes. GAO REPORT, *supra* note 35, at 46. About two-thirds of all returns identified in 1978 and 1979 were picked up first by the service centers. *Id.*

173. *Id.* at 13 (statement of William J. Anderson). The IRS may instruct employers to ignore W-4 exemption claims the Service determines to be false, and the employers may not then honor new W-4's unless they meet specified criteria. GAO REPORT, *supra* note 35, at 48.

174. *IRS Response*, *supra* note 1, at 81 (statement of Roscoe L. Egger, Jr.). The Information Returns Program has improved significantly in recent years, al-

gram does not itself identify tax protesters, follow-up inquiries may attach the protester label.

In some cases the Service may not know it is dealing with protesters until an audit occurs. Fewer than two percent of individual returns are audited each year,¹⁷⁵ but the odds of a tax evader being audited (aside from special identification programs) are somewhat greater than that. This is because audits are selected according to the Discriminant Function System (DIF), a complex (and top-secret) computer program which flags returns for examination if the individual values of certain factors fall outside normal ranges.¹⁷⁶

The DIF selective audit differs from the likely public perception that the Service audits at random. However, there is a random audit program called the Taxpayer Compliance Measurement Program; every few years the Service randomly selects a certain

though it began in the 1960's. For tax year 1978, the Service received about one-half billion information returns, about 88 percent of which were filed on magnetic media. The IRS used about 77 percent of the reported information to match against more than 90 million individual income tax returns received that year. *Id.* Still, the Service is not receiving all of the information documents required to be filed, especially those relating to payments made to independent contractors. For example, a 1980 congressional hearing took testimony that several federal departments, including the IRS and GAO, were not filing forms (Form 1099) to report payments to nonemployee independent contractors, as required by I.R.C. § 6041(a). *Federal Noncompliance*, *supra* note 10.

The 1982 Tax Act, *supra* note 18, expands information reporting requirements to several new areas. Payors of interest and dividends, newly required to withhold after June 30, 1983, also will have to file related information returns. Sections 303, 304 (amending I.R.C. §§ 6042, 6044, 6049). Brokers (including barter exchanges and real estate agents) are required to report the gross proceeds of their client's transactions. Section 311(a)(1) (amending I.R.C. § 6045). Trades and businesses which make payments for services of over \$600 a year to independent contractors and to direct sellers of consumer goods must file information returns. Section 312 (adding new I.R.C. § 6041A). State and local governments must report income tax refunds made by them. Section 313(a) (adding new I.R.C. § 6050E). Large food and beverage retailers (with 10 or more employees and where tipping is normal) are required to report annually (a) gross receipts from sales of food and beverage; (b) the amount of charge receipts; (c) the total of tips on the charge receipts, and (d) employee-reported tip income and mandatory service charges of 10% or more. Section 314 (adding new I.R.C. § 6053(c)) (effective Apr. 1, 1983). Reporting requirements for interest are expanded somewhat. Section 309 (amending I.R.C. § 6049).

175. See *supra* note 6 & accompanying text.

176. The Discriminant Function System (DIF) is used in a preliminary analysis of every return. It assigns weights to various items selected for scrutiny as the result of a study of mistakes, omissions, and average deductions in returns from previous years. The DIF score changes each year as the IRS emphasis shifts. Returns with high DIF scores are flagged for review by an agent, who decides whether to conduct an audit. *MONEY*, Feb. 1979, at 74.

number of returns, perhaps 50,000, for audit and requires the audited taxpayers to justify every line of their returns. The purpose is to check what people report against what they should report, so that the Service may fine-tune the DIF and other mathematical formulas used to detect noncompliance.¹⁷⁷

Because the audit programs are based on filed returns, the Service must use other means to detect nonfilers (whether or not they are protesters). The IRS does have a special program to try to detect nonfilers, drawing many of its leads from the Information Returns Program; those nonfilers who reveal themselves to be tax protesters are included in the Illegal Tax Protester Program.¹⁷⁸

Once the return or other document is identified as coming from a tax protester, it is classified as either processible or non-processible. According to the Commissioner:

The nonprocessable have primarily included the blank forms 1040 and the constitutional schemes. In these cases the taxpayer is notified by registered mail that the return is not acceptable. If an acceptable return is subsequently received within 30 days, it is sent back to returns processing for regular processing.

If there is no reply or another protest return is received, the returns and any related prior returns or collection activity information is referred to the Criminal Investigation Division of the district where the taxpayer resides. Cases ultimately found to be lacking prosecution potential are referred to the district Collection and Examination Divisions for review and follow-up.

177. *The Underground Economy*, *supra* note 3, at 20 (statement of Jerome Kurtz); *Multiple False Filings*, *supra* note 17, at 17; McClaghry, *supra* note 166, at 1610.

The Taxpayer Compliance Measurement Program (TCMP) began in 1964. One would expect it to be the best long-term measuring device for both the underground economy and tax evasion. Indeed, between 1965 and 1973 the TCMP found reporting rates for small proprietors to have fallen from 79.2 percent to 57.2 percent. *Id.* at 1611. However, from 1964 to 1979 the TCMP showed only a "very modest" decline in overall compliance, which could be harmonized with the hypothesis of a large and growing underground economy by theorizing that growth in the underground economy has occurred largely in areas undetected by the TCMP, such as illegal income and nonfiling. *The Underground Economy*, *supra* note 3, at 20 (statement of Jerome Kurtz).

178. *IRS Response*, *supra* note 1, at 4 (statement of William J. Anderson); *The Underground Economy*, *supra* note 3, at 19 (statement of Jerome Kurtz). See also, Petrie, *How the IRS detects unreported income*, 54 WIS. B. BULL. 8 (Nov. 1981).

The improved results from the Information Returns Program left the nonfiler program with some 450,000 uncompleted nonfiling investigations in 1978. *Id.*

The Collection Division routinely attempts to determine if persons detected by the nonfiler program are protesters. COMMISSIONER OF INTERNAL REVENUE, IRS COMMENTS ON GAO REPORT ENTITLED, "ILLEGAL TAX PROTESTERS THREATEN TAX SYSTEM," Recommendation 1 (Sept. 3, 1981) [hereinafter cited as IRS COMMENTS], reprinted in *IRS Response*, *supra* note 1, at 157.

In the case of the processible returns, these have primarily included returns for the other types of schemes which typically reflect income but claim clearly unallowable deductions or credits for protest reasons, and which identify the omission of a portion of the income or tax for protest reasons. In these cases, the Chief of the Criminal Investigation Branch at the service center determines whether the return has potential for criminal action. If not, the returns are forwarded to the appropriate division—that is, Examination or Collection of the district where the taxpayer resides for review and followup.

Each concerned division in the district—Criminal Investigation, Examination and Collection—has established procedures for handling these cases. For example, in the Criminal Investigation Division returns will be evaluated within 15 workdays of their receipt and, if selected for investigation, will be designated as priority cases. In the Examination Division, referred returns will be considered priority cases and an examination will be begun within 90 calendar days of their receipt.¹⁷⁹

At each service center is a team which controls the counting and analyzing of illegal tax protester returns. The team compiles relevant information, requisitions prior year returns, and forwards everything to the appropriate district office.¹⁸⁰ Protester returns are flagged for speedy handling at the district level,¹⁸¹ where they are channelled to the appropriate divisions.

Identification of a return as a protest return not only subjects that return and prior year returns to special scrutiny, but subsequent year returns also are targets. The Examination Division, as part of all examinations of protest returns, will inspect subsequent year returns to determine whether they too require examination, or, if no return was filed in a subsequent year, the examiner will secure a return or prepare a substitute return based on information from other sources.¹⁸² Effective in July 1982, taxpayers identified as tax protesters in one year are subjected to annual computerized delinquency checks to ensure continuing compliance.¹⁸³

B. Civil Penalties

The IRS has a sizeable storehouse of statutory weaponry to use against protesters. The deficiency assessment merely covers what the taxpayer owed anyway. On top of this the IRS may stack civil penalties to compensate it for the extra work necessary to collect the unpaid tax.¹⁸⁴ The relevant penalties,¹⁸⁵ which are set by the

179. *IRS Response*, *supra* note 1, at 80 (statement of Roscoe L. Egger, Jr.).

180. IRS COMMENTS, *supra* note 178, Recommendation 5, *reprinted in IRS Response*, *supra* note 1, at 161.

181. *Id.*, Recommendation 6, *reprinted in IRS Response*, *supra* note 1, at 162.

182. *Id.*, Recommendation 4, *reprinted in IRS Response*, *supra* note 1, at 160.

183. *Id.*

184. See Tabac, *supra* note 45, at 220.

185. Strictly speaking, "penalties" are only those fines imposed in §§ 6671 to 6699

Service subject to judicial review, include:

Interest. The most automatic consequence of not paying taxes by the due date is that interest begins to build up on the unpaid amount until the tax is finally paid.¹⁸⁶ Until 1969, the interest rate was a modest six percent—not a particularly onerous deterrent to the early war-tax refusers who were protesting the Vietnam War. However, Congress has added a late payment penalty of one-half percent per month for each month that the taxpayer refuses to pay the amount shown.¹⁸⁷ During the 1970's, the interest rate was raised to try to keep pace with inflation. The current law sets a self-adjusting interest rate of ninety percent of the commercial prime interest rate during September,¹⁸⁸ but the 1982 Tax Act changes the formula as of 1983 so that the rate is adjusted semiannually according to the prime rate over the preceding six months.¹⁸⁹

Failure to File Tax Return or to Pay Tax. On top of interest, the tardy taxpayer is liable for other interest-like civil penalties. Section 6651 creates three additions to the tax which can be used in different ways. An individual who fails to file an income tax return by its due date may be subject to an added tax (nonfiling penalty) of five percent of the amount required to be shown on the return for each month the return remains unfiled, up to a twenty-five percent limit.¹⁹⁰ Separate from that is a one-half-of-one-percent monthly surcharge (first nonpayment penalty) on the amount shown on a return if the amount shown is not paid on time; this also builds up monthly, as long as the amount shown remains un-

of the Code. Fines imposed by §§ 6651 to 6659 are called "additions to the tax" and "additional amounts." For present purposes, the term, "civil penalty," will be used to refer to either.

186. I.R.C. § 6601(a).

187. I.R.C. § 6651(a)(2) (added by the Tax Reform Act of 1969, Pub. L. No. 91-172, § 943(a), 83 Stat. 487, 727 (1969)). Previously § 6651 imposed additions to the tax for failure to file a return, based on the amount required to have been shown on the missing return. However, the only penalty for tardy payment of the tax shown on a return was six percent interest. The 1969 amendment raised the effective interest rate to 12 percent.

188. I.R.C. § 6621(b) (CCH 1982).

Section 6621 also sets the interest rate for the § 6654 addition to the tax for underpayment of estimated tax by an individual.

189. 1982 Tax Act, *supra* note 18, § 345(a) (amending I.R.C. § 6621(b)). Also, section 344(a) adds a new I.R.C. § 6622 that requires that interest accruing after 1982 be compounded daily.

190. I.R.C. § 6651(a)(1) (CCH 1982). In response to a recent study showing that it costs the IRS about \$75 to identify a taxpayer who fails to file a return, the 1982 Tax Act, *supra* note 18, § 318, added a minimum penalty for extended failure to file without reasonable cause. For failure to file for 60 days after the due date (with extensions) the minimum penalty is the lesser of \$100 or the amount of tax due.

paid, to a twenty-five percent limit.¹⁹¹ A third tardiness penalty (second nonpayment penalty) is figured according to the same formula as the penalty for failure to pay the amount shown.¹⁹² It is based on the amount of tax required to be shown on the return but not shown, if the tax is unpaid within ten days of notice and demand.¹⁹³

The total nonfiler would be liable for the nonfiling penalty automatically and for the second nonpayment penalty if payment is not made within ten days after notice and demand; however, because all of the nonfiling penalty would be attributable to the tax for which the notice and demand is made, only the nonfiling penalty would be owed.¹⁹⁴

A protesting purist, who fully discloses income and honestly declares deductions and exemptions, but who simply fails to pay taxes he admits he owes, would have no liability for the second nonpayment penalty (based on taxes now shown on the return), but would be subject to the first (based on taxes shown). Because he filed promptly, neither would the purist owe the nonfiling addition.¹⁹⁵

A late but honest filer would be subject to the nonfiling penalty and the first nonpayment penalty (for failure to pay the amount shown), but would be able to reduce the late filing penalty by the amount of the late payment penalty for the months in which both apply.¹⁹⁶

The taxpayer who files late, underreports tax due, pays the amount shown sometime after he files, and ignores a deficiency assessment for more than ten days will be liable for all three penalties, although they will cover differing time periods and will be based on differing amounts.¹⁹⁷

191. I.R.C. § 6651(a)(2) (CCH 1982).

192. See *supra* note 191 & accompanying text.

193. I.R.C. § 6651(a)(3) (CCH 1982).

194. I.R.C. § 6651(c)(1)(B) reduces the maximum amount of the § 6651(a)(3) penalty by the amount of the penalty under (a)(1) which is attributable to the tax on which the (a)(3) penalty is based. For the total nonfiler, both penalties are based solely on taxes required to be shown but not shown, assuming the taxpayer ignores the 10 day notice and demand.

195. The protest purist, however, cannot avoid all penalties for nonpayment. Each of the § 6651 penalties carries an exception if "such failure is due to reasonable cause and not due to willful neglect." The courts have turned aside claims that reasonable cause not to file or pay on time includes the unconstitutionality of the tax system (or at least the taxpayer's good faith belief along those lines), or the government's intention to do immoral things with the tax money. See, e.g., *Muste v. Comm'r*, 35 T.C. 913 (1961).

196. I.R.C. § 6651(c)(1)(A) (CCH 1982). See *Treas. Reg. § 301.6651-1(f)*, Example 2 (1973).

197. See *Treas. Reg. § 301.6651-1(f)*, Example 1 (1973).

The moral of section 6651 is to file early and pay early.¹⁹⁸ And, if you intend to withhold taxes in protest, file your return on time and declare all taxes honestly, even if you do not pay them.

Failure to File Certain Information Returns. Payers of dividends,¹⁹⁹ patronage dividends by cooperatives,²⁰⁰ and interest²⁰¹ aggregating \$10 or more during a calendar year are required to file information returns reporting such payments. Failure to file such returns leaves the nonreporting payer liable for a penalty of \$10 for each unfiled statement, up to a limit of \$25,000 for any calendar year.²⁰²

A different approach is taken for tips received in the course of employment. Employees are required monthly to report to their employers all tips received during the previous month if they total \$20 or more.²⁰³ An employee who fails to make such a written statement to his employer is liable for an addition to the tax equal

198. I.R.C. § 6651(b) encourages tardy taxpayers at least to make installment payments on unpaid tax debts. The basis on which all three penalties are figured is reduced each month by the amount paid that month. Also, the base taxes on which the (a)(1) and (a)(2) penalties are assessed are reduced by the credit claimed on the return, e.g., taxes withheld at source.

199. I.R.C. § 6042(a)(1) (CCH 1982).

200. I.R.C. § 6044(a)(1) (CCH 1982).

201. I.R.C. § 6049(a)(1) (CCH 1982).

202. I.R.C. § 6652(a) (CCH 1982). The 1982 Tax Act, *supra* note 18, § 309, boosted the annual maximum to \$50,000 and added to the section 6652(a) penalty, the new information returns for interest and dividends withholding required by amended section 6049. These information returns are needed to make the document matching of the Information Returns Program work properly. Also, knowledge by taxpayers that their interest and dividends are being reported likely increases the rate of voluntary reporting of the same income. For example, an IRS study of unreported income for 1976 (part of the Taxpayer Compliance Measurement Program) found that the reporting rate for dividends, which was subject to information reporting alone, was 84 to 92 percent. By contrast, the reporting rate for wages and salaries, subject to both withholding and information reporting, was 97 to 98 percent, and the rate for self-employment income, subject to neither, was 60 to 64 percent. *The Underground Economy*, *supra* note 3, at 2-3 (statement of Jerome Kurtz). Worse still, recent studies have found that only 16% of tip income is reported. *Concise Explanation of the Tax Equity and Fiscal Responsibility Act of 1982*, 1982 P-H FED. TAXES ¶ 163 (Report Bull. No. 36, 2d Extra Issue, Aug. 23, 1982).

In addition, I.R.C. § 6652(b) imposes \$1 penalties for failure to file a miscellany of other information returns, up to a yearly total of \$1,000.

203. I.R.C. § 6053(a) (CCH 1982). The required written statement triggers the employer's duty to collect Federal Insurance Contributions Act (FICA) taxes based on tips, I.R.C. § 3102(c) (CCH 1982) (unless the IRS has authorized the employer to estimate tips and collect taxes based on the estimates, I.R.C. § 3102(c)(3) (CCH 1982), and to withhold income taxes from wages, I.R.C. § 3402(k) (CCH 1982)). See also Treas. Reg. § 31.3401(a)(16)-1 (1969); Treas. Reg. § 31.3401(f)-1 (1969); Treas. Reg. § 31.3402(k)-1(a) (1970).

In a 1976 revenue ruling, the Service tried to require employers to report tips of employees charged by customers on credit cards, but Congress sus-

to half of the tax on the unreported tips imposed by the Federal Insurance Contributions Act (FICA).²⁰⁴

Failure to Pay Tax. Aside from section 6651, failure to pay tax can result in substantial penalties, based on a percentage of the underpayment.²⁰⁵ Section 6653 includes two varieties of underpayment penalties: (1) underpayment of income taxes imposed by the Code due to negligence or intentional disregard of rules and regulations, but without intent to defraud, giving rise to a penalty of five percent of the underpayment,²⁰⁶ and (2) fraudulent underpayment of taxes required to be shown on a return, resulting in a penalty of fifty percent of the underpayment.²⁰⁷ The fraud involved need concern only some part of the underpayment for the entire underpayment to be subject to the fifty percent penalty.²⁰⁸ But if the fraud penalty is assessed, the negligence penalty and the section 6651 delinquency penalty are displaced.²⁰⁹

The distinction between fraud and negligence frequently is an issue in tax protest cases. Here again, the purity of the protester's motives and methods may save him from the hefty fraud penalty. The essence of fraud is concealment with intent to deprive the government of taxes, so the simple refusal to pay a tax candidly acknowledged to be owing is not fraud.²¹⁰

Tax protesters most often run afoul of the negligence penalty by violating the clause penalizing intentional disregard of rules and regulations (but without intent to defraud).²¹¹ The negligence

pendent its implementation. *The Underground Economy*, *supra* note 3, at 8 (statement of Jerome Kurtz).

204. I.R.C. § 6652(c) (CCH 1982). This penalty on the § 3101 FICA tax (or the § 3201 Railroad Retirement Tax Act levy for railroad employees) is considerably less burdensome than it would be if it were based instead on the income tax imposed on the tip. The FICA tax rate for 1982-84 is 5.4 percent. I.R.C. § 3101(a)(5) (CCH 1982).

205. The "underpayment" is the deficiency defined in I.R.C. § 6211(a) (CCH 1982), except that the tax shown on a return may be taken into account in offsetting the amount of tax imposed only if the return was filed on time. I.R.C. § 6653(c)(1) (CCH 1982); Treas. Reg. § 301.6211-1 (1978).

In the context of principled protest, the deficiency upon which the penalties are assessed would be the difference between what the taxpayer recognizes he owes and what he admits he owes, where the taxpayer's return is accurate but he claims to owe only part of the amount he legally owes; the difference is the amount he protests paying. *Penn Mutual Indemnity Co.*, 32 T.C. 653, *aff'd*, 277 F.2d 16 (3d Cir. 1960); *Tabac*, *supra* note 45, at 220 n.17.

206. I.R.C. § 6653(a) (CCH 1982).

207. I.R.C. § 6653(b) (CCH 1982).

208. *Id.* The 1982 Tax Act, *supra* note 18, § 325, applies the 50% penalty not only to the entire underpayment (as under the old law), but also to interest payable on the portion of the underpayment attributable to fraud.

209. *Id.*; I.R.C. § 6653(d) (CCH 1982).

210. *Muste v. Comm'r*, 35 T.C. 913 (1961); *see Tabac*, *supra* note 45, at 219-21.

211. *E.g.*, *Seigler v. Comm'r*, 38 T.C.M. (CCH) 1265 (1979) (§ 6653(a) penalty im-

clause is more likely to be invoked in the family trust cases, where the taxpayer may have honestly believed the scheme was legal, but was negligent in not consulting a lawyer or accountant.²¹²

The fraud penalty, on the other hand, generally requires something more heinous than mere failure to file a return for a year in which the IRS finds taxable income,²¹³ or mere delay in payment because the taxpayer is annoyed with the government.²¹⁴ Fraud usually is found where it appears that the taxpayer is trying to dodge taxes, rather than just making the IRS work harder for the money.²¹⁵

Aiding Tax Understatement. A new penalty added by the 1982 Tax Act is aimed at Snoopy Freeman-style tax "advisers." Any person who directly aids or abets in the preparation of any portion of a tax document, knowing it will be used under the revenue laws and will cause a tax liability understatement, is subject to a \$1,000 penalty for each such return or document (\$10,000 if the document is that of a corporation).²¹⁶

Frivolous Returns. Another provision new with the 1982 Tax Act slaps tax protesters with a flat \$500 penalty for filing a "frivolous" return.²¹⁷ A return is "frivolous" if it does not contain infor-

posed where taxpayer reported only fair market value of Federal Reserve notes as income); *Farr v. Comm'r*, 38 T.C.M. (CCH) 908 (1979) (penalty for intentional disregard where taxpayer underpaid taxes because he objected to the tax collection system); *Reimer v. Comm'r*, 42 T.C.M. (CCH) 518 (1981) (§ 6653(a) penalty imposed where taxpayer took deduction for his "conscientious objection to military expenditures").

212. *E.g.*, *Mirenda v. Comm'r*, 40 T.C.M. (CCH) 666 (1980); *Dombrowski v. Comm'r*, 40 T.C.M. (CCH) 697 (1980); *Taylor v. Comm'r*, 40 T.C.M. (CCH) 966 (1980).

213. *Breland v. United States*, 323 F.2d 492 (5th Cir. 1963); *First Trust & Sav. Bank v. United States (Estate of Kraftmeyer)*, 206 F.2d 97 (8th Cir. 1953). *But see Powell v. Granquist*, 252 F.2d 56 (9th Cir. 1958) (fraud penalty imposed on taxpayer who failed to file returns solely because he disapproved of the way the government was run, and did not believe in paying income taxes); *Stoltzfus v. United States*, 398 F.2d 1002 (3d Cir.), *cert. denied*, 393 U.S. 1020 (1968) (prolonged failure to file is not enough alone to establish fraud, but it is persuasive evidence of attempt to defraud).

214. *Jones v. Comm'r*, 259 F.2d 300 (5th Cir. 1958).

215. *E.g.*, *Sutherland v. Comm'r*, 39 T.C.M. (CCH) 963 (1980) (long-term understatement of income and nonfiling sustained fraud penalty; complaints about state of society and government and taxpayer's assertion that she had to evade taxes to survive held irrelevant); *Cook v. Comm'r*, 40 T.C.M. (CCH) 1334 (1980) (fraud assessed where taxpayer filed false withholding certificates first claiming 12 exemptions, then claiming 99, and finally claiming total exemption).

216. 1982 Tax Act, *supra* note 18, § 324 (adding new I.R.C. § 6701).

217. *Id.* § 326 (adding new I.R.C. § 6702). Both the new aiding or abetting penalty, *see supra* note 216 & accompanying text, and the frivolous return penalty are subject to review by the federal district court if the taxpayer, within 30 days after assessment, pays 15% of the amount and files a claim for refund. Collection actions are stayed until the court acts. The burden of proof as to the

mation from the face of which the correctness of the tax liability can be determined, or if it contains information that, on its face, shows the amount of tax calculated is substantially incorrect. The conduct must be due to a frivolous position or an intent to delay the administration of the tax laws.

Assessable Penalties. In addition to the additions to tax and interest discussed above, the Code imposes a number of other civil penalties, some of which are relevant to tax protesters.

One such penalty cannot be applied directly to the protester, but is still important to the effectiveness of protest schemes. "Any person required to collect, truthfully account for, and pay over any tax imposed" by the Code, who willfully fails to do so or who "willfully attempts in any manner to evade or defeat any such tax or the payment thereof" is liable for the total amount of the tax evaded or not paid over.²¹⁸ For example, an employer whose employee is involved in a false Form W-4 scheme would be liable under section 6672(a), while the employee would be liable for a civil penalty (in addition to any criminal penalty) of \$500 for understating wages or overstating itemized deductions in claiming a withholding allowance.²¹⁹ Due to the section 6672 penalty, the employer has incen-

violation is on the IRS. 1982 Tax Act, *supra* note 18, § 322 (adding new I.R.C. § 6703).

218. I.R.C. § 6672(a). This penalty applies to the person who is obligated to collect and pay over the tax imposed on another person, not to the person directly taxed. Treas. Reg. § 301.6672-1 (1957). The most obvious group affected would be employers who are obligated to withhold and pay over income, FICA, and FUTA taxes. The effects are to boost the incentive for the employer to comply with the withholding obligation, even though the employer himself may sympathize with the employee's protest, and to diminish the effectiveness of the protester's refusal to pay a tax already in government hands. This factor may drive a determined protester, if he is willing to risk heavier civil and criminal penalties, to file a fraudulent withholding exemption certificate in order to keep the government from receiving the tax before the protester has a chance to refuse to pay it.

Although the employer or other person liable under this section is also liable for other penalties (such as the penalty for failure to file information returns, *see supra* notes 199-204), he is not liable for the negligence or fraud penalty under § 6653.

219. I.R.C. § 6682(a) (CCH 1982). Section 306(a) of the 1982 Tax Act, *supra* note 18, amends this provision to include false statements and exemption certificates with respect to newly required withholding of interest, dividends, and patronage dividends. The penalty does not apply if, *inter alia*, the false statement does not result in a decrease in the amount withheld. Formerly, the penalty applied only to claims of withholding exemptions under § 3402(f)(1)(F), allowing one \$1,000 withholding exemption for every \$1,000 worth of estimated itemized deductions, as defined by § 3402(m), and it did not apply to inflated claims of withholding allowances based on such other factors as number of dependents. But the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 721(a), 95 Stat. 172, 341 (1981), broadened the coverage to all claims of allowances or exemption under § 3402 (resulting in a de-

tive to encourage honest reporting from the employee.

Tax protesters are also beginning to feel the bite of a penalty which may be assessed by the Tax Court when the court finds that the taxpayer has instituted proceedings before it "merely for delay."²²⁰ The penalty currently may run as high as \$500,²²¹ thus offering discouragement to low income protesters who would be little deterred by the ad valorem penalties.

New with the 1982 Tax Act is a provision allowing the Tax Court to award to the prevailing litigant reasonable litigation costs, limited to \$25,000. The United States cannot receive such costs as a prevailing party, and the prevailing party can recover only costs allocable to the government. Also, the winner must prove that the government's position was unreasonable.²²²

Other assessable penalties include \$5 for failure to supply an identifying number in a return or other document,²²³ and \$5 for failure to include on the return the taxpayer's place of residence.²²⁴

C. Criminal Penalties

A magazine headline recently read, "Tax Protesters Get Return Fire From Uncle Sam."²²⁵ To draw out the analogy, the civil penal-

crease in taxes withheld, where the employee lacked a reasonable basis for the statement) and raised the penalty from \$50 to \$500.

220. I.R.C. § 6673. The 1982 Tax Act, *supra* note 18, § 292(b), liberalized the ground for imposing the penalty by allowing it if the court finds that the taxpayer brings or maintains the proceedings "primarily for delay or that taxpayer's position in such proceedings is frivolous or groundless" This takes effect for cases brought after Dec. 31, 1982.

This penalty, basically unchanged since the 1939 Internal Revenue Code, has been little used until the recent wave of tax protest began to clog the Tax Court. In *Hatfield v. Comm'r*, 68 T.C. 895 (1977), the court announced that it would give "serious consideration" to imposing § 6673 damages in such frivolous cases as when the taxpayer claims receipt of Federal Reserve notes is not reportable as income. This promise was fulfilled in *Senesi v. Comm'r*, 43 T.C.M. (CCH) 143 (1981), where a protesting couple was socked with the full \$500 penalty on top of a \$203 deficiency and a \$10.15 penalty for neglecting to pay. The *Senesi*'s had refused to pay because of their conscientious objection to the use of their taxes to promote war and violence. *Accord Ballard v. Comm'r*, 43 T.C.M. (CCH) 465 (1982). *See also* U.S. NEWS & WORLD REP., March 30, 1981, at 80; *Lincoln (Neb.) Journal*, Jan. 7, 1982, at 6, col. 2; *Nat'l L.J.*, Sep. 20, 1982, at 3, col. 4.

221. The 1982 Tax Act, *supra* note 18, § 292(b) (amending I.R.C. § 6673) boosts the penalty to \$5,000 for cases beginning after Dec. 31, 1982.
222. 1982 Tax Act, *supra* note 18, § 292(a) (adding new I.R.C. § 7430). This award is available in civil actions started after Feb. 28, 1983, and before Dec. 31, 1985.
223. I.R.C. § 6676(a) (CCH 1982). The 1982 Tax Act, *supra* note 18, § 316, increases the penalty to \$50 per failure, but sets a \$50,000 yearly maximum.
224. I.R.C. § 6687(a) (CCH 1982).
225. U.S. NEWS & WORLD REP., March 30, 1981, at 80.

ties discussed above are the light arms in the IRS arsenal, and the criminal penalties are the heavy artillery. The maximum fines relevant to protesters range from \$1,000 to \$10,000, and the maximum sentences range from one year to five years.

The focal point of the Illegal Tax Protester Program is the Director of the Criminal Investigation Division, who gives priority to protest cases.²²⁶ The statutory weapons are:

Attempt to Evade or Defeat Tax. Section 7201 of the Code is the most imposing deterrent to some types of tax protest. On top of other penalties, "[a]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof" may be fined up to \$10,000 or imprisoned for up to five years or both.²²⁷ The government must prove (1) a substantial deficiency for the year involved;²²⁸ (2) affirmative acts of wrongdoing;²²⁹ and (3) willfulness.²³⁰

226. *IRS Response*, *supra* note 1, at 98 (statement of Roscoe L. Egger, Jr.). During the 30 months preceding April 1, 1981, the Division began 1,151 criminal investigations of illegal tax protesters and recommended prosecution in 548 cases. During this period there were 141 trial convictions and 124 pleas of guilty or nolo contendere. Of those convicted and sentenced, 55 percent received prison terms that averaged 12.1 months. *Id.*

227. I.R.C. § 7201. Upon conviction, the defendant also is liable for the costs of prosecution. A similar provision is contained in § 7203, which punishes willful failure to file a return or pay tax. William Campbell, *see supra* notes 151-58, was convicted on three counts under § 7203, sentenced to three 1-year terms, and fined a total of \$1,500. Prosecution costs, mostly witness fees and travel expenses, added up to nearly \$1,600, and were charged to Campbell.

The § 7201 fine goes up to \$100,000 under the 1982 Tax Act, *supra* note 18, § 329, for individuals and up to \$500,000 for corporations.

228. The government is not required to show the amount of tax unreported, *Graves v. United States*, 191 F.2d 579 (10th Cir. 1951); *Stinnett v. United States*, 173 F.2d 129 (4th Cir. 1949), but case law has imposed the requirement that the underpayment of tax be "substantial." *United States v. Johnson*, 319 U.S. 503 (1943); *United States v. Ragen*, 314 U.S. 513 (1942). But whether the facts of specific cases fit the "substantial" description is relative. *Canaday v. United States*, 354 F.2d 849, 851-52 (8th Cir. 1966). Generally, the courts have been able to juggle the figures to find the deficiency to be "substantial." *E.g.*, *Janko v. United States*, 281 F.2d 156 (8th Cir. 1960) (tax due was \$134 for one year and \$264 for each of two other years in question, but this was found to be "substantial" because the percentage of tax evaded was 20 percent the first year and 37 percent the other two years). Thus, the taxpayer who fails to report a small amount is wiser to defend on the grounds of ignorance, inadvertance, or mistake, rather than try to claim the deficiency was not substantial.

229. The difference between felony tax evasion under § 7201 and misdemeanor failure to file a return or to pay the tax lies in the affirmative action implied by the term, "attempt," in the felony statute. Willful, but passive, neglect of duty might constitute a misdemeanor, but the addition of a positive attempt to evade or defeat the tax lifts the offense to a felony. *United States v. Spies*, 317 U.S. 492 (1943).

Among the acts qualifying as affirmative willful attempts are "keeping a

Willful Failure to Collect or Pay Over Tax. Section 7202 is the criminal counterpart of the section 6672(a) civil penalty applied to those obligated to collect and pay to the government taxes owed by others;²³¹ the only difference in language is that the criminal statute does not include the clause that provides for the punishing of willful attempts to evade or defeat such taxes.²³² The penalty is up to five years imprisonment or a fine of up to \$10,000, or both, plus costs of prosecution.²³³

double set of books, concealment of assets or covering up sources of income, handling of one's affairs to avoid making reports usual in transactions of the kind," *id.* at 499, use of fictitious dependents, *Koontz v. United States*, 277 F.2d 53 (5th Cir. 1960), and filing a false return, *Achilli v. United States*, 353 U.S. 373 (1957).

230. One authoritative definition of "willfulness" is the voluntary, intentional violation of a known legal duty, requiring more than careless disregard for truth, but less than a bad faith motive. *United States v. Bishop*, 412 U.S. 346 (1973). See also *United States v. Pomponio*, 439 U.S. 10 (1976). But see *Spies v. United States*, 317 U.S. 492, 498 (1943) (felony evasion requires "some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer"). The leading case defining willfulness, dealing with the forerunner of I.R.C. § 7203, is *United States v. Murdock*, 290 U.S. 389 (1933):

The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose . . . ; without justifiable excuse . . . ; stubbornly, obstinately, perversely The word is also employed to characterize a thing done without grounds for believing it is lawful . . . , or conduct marked by careless disregard whether or not one has the right so to act

Id. at 394-95.

Negligence or carelessness is not enough to establish criminal intent, *Grant v. United States*, 184 F.2d 284 (1st Cir. 1950), but a consistent pattern of underreporting will support willfulness, *United States v. Frank*, 437 F.2d 452 (9th Cir. 1971).

Ignorance of the law is a defense to prosecution under § 7201, and negates the willfulness element in failure to perform the legal duty, *United States v. Murdock*, 290 U.S. 389 (1933); *Yarborough v. United States*, 230 F.2d 56 (4th Cir. 1956); *United States v. Martell*, 199 F.2d 670 (3d Cir. 1952), but the defendant carries the burden of proving his ignorance, *Edwards v. United States*, 334 F.2d 360 (5th Cir.), *cert. denied*, 379 U.S. 1000 (1964). However, willfulness may be shown by disclosure of efforts of the taxpayer not to learn what his tax obligations are, *United States v. Fahey*, 510 F.2d 302 (2d Cir. 1974), or by a "conscious purpose to avoid enlightenment," *United States v. Callahan*, 588 F.2d 1078 (5th Cir. 1979).

231. See *supra* note 218 & accompanying text.

232. I.R.C. § 7202 (CCH 1982). This omission is logical, because the § 7201 prohibition on attempts to evade or defeat "any tax" covers attempts by one person to evade or defeat the tax of another, and the penalty in each statute is the same.

233. I.R.C. § 7202 (CCH 1982).

Other criminal statutes which may affect employers and other third party obligors include failure to supply, or supplying, a false Form W-2 to an employee, I.R.C. § 7204 (CCH 1982) (one year and/or \$1,000); and failure to com-

Willful Failure to File Return, Supply Information, or Pay Tax. Section 7203 imposes a fine of up to \$10,000 or a jail term of up to a year, or both, on anyone who willfully violates a requirement to pay a tax or estimated tax, to file a return, to keep records, or to supply information at the time required.²³⁴ Government policy is to charge tax protesters with misdemeanor failure to file even when felony evasion occurs or false returns are filed,²³⁵ so tax protest cases frequently turn up under section 7203, especially those involving constitutional protesters.²³⁶ The peculiarities of the constitutional scheme have provoked controversy over what constitutes a valid return for purposes of the statute.²³⁷

Fraudulent Withholding Exemption Certificate. The branch of tax protest receiving the most press recently has involved filing

ply with the § 7512(b) (CCH 1982) requirement for separate accounting of taxes collected and paid over on behalf of another, I.R.C. § 7215(a) (CCH 1982) (one year and/or \$5,000).

234. I.R.C. § 7203 (CCH 1982). This sanction is in addition to any other penalties, civil or criminal, which may attach. A taxpayer may be convicted for the same act under §§ 7201, 7203, and 7207 (filing fraudulent tax return) without violating the constitution. *Sansone v. United States*, 380 U.S. 343 (1965). *But see United States v. Coppola*, 425 F.2d 660 (2d Cir. 1969). The willfulness standard for § 7203 is the same as for the § 7201 felony statute. *United States v. Bishop*, 412 U.S. 346 (1973). Here again, while a good faith misunderstanding of the tax laws may negate willfulness, good faith disagreement with the law does not. *United States v. Karsky*, 610 F.2d 548 (8th Cir. 1979) (tax protester's conviction of willful failure to file a return upheld); *United States v. Ware*, 608 F.2d 400 (10th Cir. 1979).

The 1982 Tax Act, *supra* note 18, § 329, boosts the maximum fine to \$25,000 for individuals and to \$100,000 for corporations.

235. *United States v. Moore*, 627 F.2d 830 (7th Cir. 1980).
236. *E.g.*, *United States v. Tecton*, 539 F.2d 706 (4th Cir. 1976) (willful failure to file found where defendant published a book acknowledging his failure to file because he believed the Internal Revenue Code to be unconstitutional); *United States v. Bray*, 546 F.2d 861 (10th Cir. 1976) (willful failure to file upheld where defendant's return contained no relevant information, but was inscribed, "Fifth Amendment. Go to Hell; do not pass go; do not collect \$200 dollars"); *United States v. Fahey*, 411 F.2d 1213 (9th Cir.), *cert. denied*, 396 U.S. 957 (1969); *United States v. Matosky*, 421 F.2d 410 (7th Cir.), *cert. denied*, 398 U.S. 904 (1970); *United States v. Acker*, 415 F.2d 328 (6th Cir.), *cert. denied*, 397 U.S. 958 (1969).
237. The taxpayer in *United States v. Long*, 618 F.2d 74 (9th Cir. 1980), filed a return containing zeros in the spaces for exemptions, income, tax, and tax withheld. The court held that this was a valid return (falsity aside), although blank spaces would have made it invalid. Because it was a valid return, the taxpayer was not guilty of willful failure to file. The court in *United States v. Moore*, 627 F.2d 830 (7th Cir. 1980), took an opposite view, and held that similar return was not valid under § 7203 because the defendant was not trying to file an accurate return. The *Long* approach would force the government to charge such protesters with felony evasion, I.R.C. § 7201, or felony false return, I.R.C. § 7206.

false Forms W-4 with inflated exemptions.²³⁸ In response, Congress raised the penalty for willfully supplying to employers false information on withholding exemption certificates from \$500 and/or one year to \$1,000 and/or a year imprisonment.²³⁹

Fraud and False Statements. Section 7206 imposes a felony penalty of three years and/or \$5,000, plus prosecution costs, for a variety of fraudulent declarations.²⁴⁰ The most relevant are (1) willfully making a written declaration in a return, statement, or other document under penalty of perjury which the declarer does not believe to be true as to every material matter,²⁴¹ and (2) willfully aiding or advising the preparation of a return or other document under the tax laws which is fraudulent or materially false, no matter whether or not the person being assisted knows of the falsity.²⁴²

Fraudulent Returns, Statements, or Other Documents. Section 7207 imposes a penalty of one year and/or \$1,000 on anyone who "willfully delivers or discloses to the Secretary any list, return, account, statement, or other document, known by him to be fraudu-

238. See *supra* § II.C.2.d.

239. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 721(b), 95 Stat. 172, 341 (1981) (amending I.R.C. § 7205). The 1982 Tax Act, *supra* note 18, § 306(b), expanded the I.R.C. § 7205 liability to cover the new withholding rules, i.e., willful filing of a false exemption certificate or failing to cancel an obsolete certificate under § 3452(f) (1) with respect to dividends and interest withholding.

The misdemeanor penalty is in lieu of any other penalty, except that of I.R.C. § 6682, see *supra* note 219 & accompanying text; *United States v. Williams*, 644 F.2d 696 (8th Cir. 1981). The section applies to any individual required to supply information under I.R.C. § 3402 who willfully supplies false information or who willfully fails to supply such information, thus causing an increase in tax withheld under § 3402.

It is no defense that the employee was dramatizing opposition to government policies, *United States v. Malinowski*, 472 F.2d 850 (3d Cir.), *cert. denied*, 411 U.S. 970 (1973), or bad laws, *United States v. Bray*, 546 F.2d 851 (10th Cir. 1976), or the tax system, *United States v. Stephen*, 569 F.2d 860 (5th Cir. 1978). Convictions have been upheld where the employee has claimed 20 dependents, *Shea v. United States*, 506 F.2d 1226 (4th Cir. 1974), 30 to 50 dependents, *United States v. Hinderman*, 528 F.2d 100 (8th Cir. 1975), and 99 exemptions, *United States v. Hudler*, 605 F.2d 488 (10th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980) (the taxpayer believed "99" was a computer method of symbolizing tax exempt status and would result in zero withholding, although neither the employer nor the IRS recognized such a code). However, an employee who claimed three billion dependents was acquitted because the claim was so completely implausible, and because he explained his protest in a letter. *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974).

240. The 1982 Tax Act, *supra* note 18, § 329, increases the fine to \$100,000 for individuals and to \$500,000 for corporations.

241. I.R.C. § 7206(1).

242. I.R.C. § 7206(2).

lent or to be false as to any material matter"²⁴³ The most obvious utility of this section is to deter taxpayers from supplying doctored documentation of their tax claims. But another possible use would be to punish sympathetic employers who forward to the IRS withholding certificates from their employees which they know to be false.

Failure to Obey Summons. The IRS has the broad power to summon taxpayers and record holders to appear for testimony and to produce records.²⁴⁴ Any duly summoned person who fails to appear may be fined up to \$1,000 and/or jailed for up to a year, and may be charged for prosecution costs.²⁴⁵

Interference with Administration of Internal Revenue Laws. Use of force or threats of force to attempt to intimidate or impede federal agents acting under authority of the Internal Revenue Code may net the offender a felony penalty of three years and/or \$5,000, except that the penalty is only one year and/or \$3,000 where the offense involves threats of force alone.²⁴⁶ This section is a possible answer to Commissioner Egger's complaints about harassment of IRS agents by tax protesters.²⁴⁷

Non-Code Crimes. Aside from the criminal statutes of the In-

243. The fine was raised to \$10,000 for individuals and to \$50,000 for corporations by the 1982 Tax Act, *supra* note 18, § 329.

244. See I.R.C. §§ 6420(e)(2), 6421(f)(2), 6424(d)(2), 6427(h)(2), 7602, 7603 & 7604(b).

245. I.R.C. § 7210 (CCH 1982).

246. I.R.C. § 7212(a) (CCH 1982).

247. See *IRS Response*, *supra* note 1, at 104 (statement of Roscoe L. Egger, Jr.):

For example, employees have been harassed by telephone, receiving abusive or obscene calls at home at all hours. The mails have similarly been used for harassment. Unwanted merchandise may also be ordered for delivery to the employee at home and a request made that the employee be billed. Pornographic materials have been ordered as well as every conceivable form of merchandise including subscriptions to magazines, record and book clubs, etc. Harassment has even carried over to employers who are trying to carry out our new W-4 regulations. In one recent case an employer representative passing out notices explaining the W-4 requirements was told he might "disappear" if he continued.

In some parts of the country, more rural than urban, protester resistance has turned violent, especially when seizure of property for nonpayment of taxes was involved. Often protesters take advantage of conferences with IRS agents to stage mass demonstrations, where groups of 5 to 20 protesters will descend on the IRS office and will confront the agent with verbal harassment and veiled threats. Tax protest publications sometimes mention IRS employees in an "uncomplimentary fashion." *PROTESTER ACTIVITY*, *supra* note 25, reprinted in *IRS Response*, *supra* note 1, at 142-43.

For a colorful account of similar confrontations with government officials from the perspective of the harassers (though in the context of welfare rather than taxation), see Wolfe, *Mau-Mauing the Flak Catchers*, reprinted in T. WOLFE, *RADICAL CHIC & MAU-MAUING THE FLAK CATCHERS*, 95-153 (1970).

ternal Revenue Code, tax protesters also have been charged under the general criminal statutes prohibiting aiding and abetting,²⁴⁸ and conspiracy.²⁴⁹ Both of them relate back to the tax crimes, which are the principal offenses. An example of this is the conviction of Snoopy Freeman for aiding and abetting the filing of fraudulent withholding exemption certificates by several of his followers.²⁵⁰

D. IRS Strategy

Two shock waves hit IRS policymakers in the late 1970's and early 1980's. First, statistics from the new Illegal Tax Protester Program seemed to show that the number of identified protesters nearly tripled from 1978 to 1980.²⁵¹ While one obvious explanation for this increase is that program statistics tend to be cumulative in nature (protesters identified the first year stay on the rolls for annual audits while new protesters are identified by improved detection methods the second year, and so forth), the interpretation of many, including the Congressional overseers²⁵² and the press,²⁵³ has been that the tax protest movement has been growing. Second, the increase in protesters known to the Service has been accompanied by a number of highly publicized "tax revolts," most prominently the one among Michigan auto workers, in which the leaders brazenly challenged the government's ability to punish the lawbreakers.²⁵⁴

The Service's reaction has been to emulate Marshall Matt Dillon holding off a lynch mob on the jailhouse steps: "I'll shoot the first man who takes a step forward."²⁵⁵ Rather than challenge protest groups en masse, the Service has taken a more selective approach. While several members of the Posse Comitatus in Chadron, Nebraska, likely were equally guilty of failure to file returns and failure to pay taxes, the government selectively prosecuted one of the leaders,²⁵⁶ and hoped that this would deter the

248. 18 U.S.C. § 2 (1976).

249. 18 U.S.C. § 371 (1976).

250. See *supra* notes 88-111 & accompanying text.

251. GAO REPORT, *supra* note 35, at 68.

252. IRS Response, *supra* note 1, at 1 (statement of Rep. Benjamin S. Rosenthal, Chairman, Commerce, Consumer, and Monetary Affairs Subcomm.).

253. E.g., U.S. NEWS & WORLD REP., March 30, 1981, at 80.

254. See *supra* notes 136-39 & accompanying text.

255. One observer used a different analogy: "The truth is . . . that the IRS's enforcement power has deteriorated. Like the Wizard of Oz, who hid his timidity behind a screen, the IRS tries to disguise its own limited enforcement capabilities by playing up a reputation for toughness." TIME, March 9, 1981 at 63.

256. See *supra* notes 151-58 & accompanying text.

rest in the future. In the meantime, by taking names and license numbers at anti-tax rallies, the Service puts attendees on notice that their tax returns will receive special scrutiny.

The strategy is to demoralize those who already are protesters, by guaranteeing annual audits, interest, and civil penalties, and by prosecuting their leaders and enough of their fellow believers to bring home the reality of criminal punishment. By doing this, the Service hopes to cast a chill on those who have not yet joined the tax protest movement.²⁵⁷

The Service's early warning system picked up signs of protest activity in Michigan. This allowed the Service to warn area employers and to prepare to strike back once the insurrection began.²⁵⁸ The Service already had in effect new regulations that required employers to report W-4's which contained claims of unusually large numbers of allowances. Thus, the IRS was able to tell the employer to ignore potentially fraudulent Forms W-4.²⁵⁹

However, withholding is the foundation of the collection system. Dean Hazel and the auto workers were striking at the Service's strong point. The revolt was easily detectable and was vulnerable to swift suppression—the government already had the taxes, by way of withholding and the cooperation of the employers. Therefore, the Service's success in Michigan should not be generalized to other types of protests.

Playing to its strength, the IRS convinced Congress, after several tries, to extend the withholding requirement to dividends, interest, patronage dividends, and payouts from qualified retirement plans,²⁶⁰ and to stiffen information reporting and penalties related to withholding.²⁶¹

The Service has adapted its surgical-strike strategy to church-related schemes, concentrating for the moment on a few major court challenges of the more blatant mail order ministers.²⁶² But

257. *IRS Response*, *supra* note 1, at 9 (statement of William J. Anderson).

The difficulty of the Service's task in deterring protesters is shown by the early results of the Illegal Tax Protester Program. A GAO study of the program focused on 167 cases identified as protesters in three IRS districts in 1978-79. This random sample was projected to a universe of 3,870 protesters in those districts. *Id.* at 2. Of the 3,870, five hundred sixty-seven filed a protest return for 1979, the year after the Service started investigating them, and 928 did not file at all in 1979. *Id.* at 6.

258. *See supra* notes 140-42 & accompanying text.

259. *IRS Response*, *supra* note 1, at 78-79 (statement of Roscoe L. Egger, Jr.).

260. 1982 Tax Act, *supra* note 18, § 301.

261. *Id.* §§ 309, 306(a), 306(b). *See IRS Response*, *supra* note 1, at 79 (statement of Roscoe L. Egger, Jr.).

262. *See supra* note 125.

because of the sensitivity of the issues involved, the potential for chilling and demoralizing bogus churches is severely limited.

Here the other aspect of the Service's strategy is more effective: publicity. The IRS Public Affairs Office has committed a disproportionate amount of its resources to countering tax protest schemes.²⁶³ The tactic taken has been to inform the public about the IRS's position on such issues as family trusts and vows of poverty. There may be more potential in targeting specific pockets of noncompliance with information countering particular claims by protest leaders.²⁶⁴ The Service has asked for Congressional permission to publicize tax returns of protest leaders, as a way to discredit their sales pitches.²⁶⁵ Even without revealing return information, the Service could pursue this course more aggressively.²⁶⁶

The IRS strategy of deterrence is motivated by a fear that a few well publicized examples of successful tax resistance could build protesters' confidence in their ability to beat the system and could draw a snowballing number of previously compliant taxpayers into the protest movement. Thus, the normal economic considerations of tax enforcement are distorted by the unmeasurable costs to the tax system of the feared degeneration of voluntary compliance. The Service acknowledges that the Illegal Tax Protester Program is "enforcement-oriented more than revenue-oriented."²⁶⁷

The main problem with the deterrent strategy is the limited ca-

263. *IRS Response*, *supra* note 1, at 8 (statement of William J. Anderson).

264. *PROTESTER ACTIVITY*, *supra* note 25, reprinted in *IRS Response*, *supra* note 1, at 140-42.

265. *NEWSWEEK*, Oct. 5, 1981, at 69.

IR.C. § 6103 generally bans disclosure of tax return information other than to specified categories of officials who have a need to know. However, § 6103(k)(3) allows disclosure of any information about specific taxpayers to the extent necessary to correct misstatements of fact about the taxpayers' returns or transaction with the IRS. But such disclosure may be made only following approval by the Congressional Joint Committee on Taxation.

266. See *PROTESTER ACTIVITY*, *supra* note 25, reprinted in *IRS Response*, *supra* note 1, at 142; *USA TODAY*, June 1981, at 9.

267. *IRS Response*, *supra* note 1, at 104 (statement of Roscoe L. Egger, Jr.).

That the IRS's anti-protester activities are based on fear of cancer-like growth of the movement is shown by Egger's remarks to Congress:

[L]et me reemphasize my concern over the effects the tax protester "movement" may have on tax administration. At the present time, however, we can not say that there is a discernible relationship between the illegal tax protester "movement" and our ability to maintain an effective compliance system.

In terms of absolute numbers, the illegal tax protesters that we have identified are not a serious problem. For example, in 1980 some 143,446,000 tax returns and supplemental documents of all types were filed with the IRS, yet only 18,225 returns or documents were identified as protest returns. I think this reinforces my assertion that the

capacity of the Service to carry it out. Reagan Administration budget cutting has not spared the IRS. The number of employees was cut from 86,000 in 1981 to 84,358 in 1982, far below the 91,519 employees budgeted for 1982 by the Carter Administration.²⁶⁸ The Administration plans to add 5,225 employees in 1983,²⁶⁹ perhaps because it sees bolstering the IRS as a way to bring in more tax money without raising tax rates.²⁷⁰

Unless the IRS receives much of the staffing increase it wants,²⁷¹ the 1982 Tax Act promises to strain further the Service's already overloaded paper-shufflers.²⁷² A major thrust of the new tax compliance provisions is to expand information reporting requirements.²⁷³ This will boost the Service's potential for nabbing tax cheats, but may have the reverse effect on enforcement effectiveness by flooding compliance agents and prosecutors with data. On the other hand, IRS policymakers are counting on the mere existence of information reporting in new areas to chill tax evaders by informing them that those with whom they do business must inform the government of transactions.²⁷⁴ Indeed, key parts of the

vast majority of taxpayers are honest, and do not attempt to thwart the tax administration system.

But at the same time it is possible for public confidence in the government's ability to fairly and firmly administer the tax laws to be jeopardized if the illegal tax protester "movement" continues to grow. For this reason, we think it is essential, despite the cost and effort, to enforce the laws violated by these individuals, and to demonstrate to the public that these tactics should not be attempted by others.

Id. at 105-06.

268. *TIME*, Apr. 12, 1982, at 57.

Understaffed and overburdened investigators count primarily on fear to help bring about public compliance with the law. A few well-publicized tax prosecutions, especially around tax-filing time, undoubtedly bring in millions of dollars of additional revenue. IRS officials bluntly admit that they are trying to create an atmosphere of "paranoia" about taxes. Each criminal case is evaluated not only for the flagrancy of the violation but also for how much publicity the prosecution will create.

Id.

269. *Id.*

270. In one of his weekly nationwide radio speeches, President Ronald Reagan appealed to listeners to pay taxes on money that they earn in the underground economy. He noted that the \$95 billion in taxes lost to the treasury because of hidden income would come close to wiping out the projected budget deficit for 1983. *Lincoln (Neb.) Journal*, Apr. 24, 1982, at 1, col. 3.

271. An IRS option paper, "Closing the Gap," recommended adding 917 positions to the non-filers program and 1,000 to the examination division. Robinson & Simon, *IRS' Secret Game Plan*, *Nat'l L.J.*, Aug. 30, 1982, at 1, col. 1.

272. *See supra* notes 268-69 and accompanying text.

273. *See supra* notes 174, 260, 261 & accompanying text and *infra* note 275 & accompanying text.

274. *See supra* note 202.

new information reporting provisions are requirements that those who must report transactions and payments to the IRS must also send to the taxpayer a statement containing the same information forwarded to the Service.²⁷⁵

IV. JUDICIAL RESPONSE

The courts, in their interpretations of civil and criminal penalty statutes, have left the government in a strong position to strike back at tax protesters. Each of the protesters' constitutional arguments has been repudiated so often that Tax Court judges are beginning to fine taxpayers for reraising them before the court.²⁷⁶

Further, the Tax Court has streamlined procedures to handle the onslaught of protest cases. For example, most protest cases are assigned to special trial judges to free other judges to hear ordinary disputes. Protesters who raise no significant factual issues, but argue only well worn constitutional or moral arguments, will receive little opportunity to air their protests at trial, and their pleas will be disposed of in brief, standardized opinions.²⁷⁷

Still, protest cases occasionally raise significant legal issues. Two issues which the government has been winning arose in the Snoopy Freeman case: selective prosecution, and public speech as aiding and abetting.

It is essential to the IRS deterrence strategy that the government be able to pick out highly visible and vocal protesters for prosecution. This also helps to obtain the most deterrent value for each dwindling enforcement dollar. The tests developed by the courts to deal with defenses of selective prosecution and of free speech infringement allow the Service to do just that.

275. The 1982 Tax Act, *supra* note 18, requires certain payors to whom information reporting has been extended to inform their payees of the reports. Section 311(a)(1) of the Act requires brokers (including barter exchanges and real estate agents) to report their clients' capital gains transactions and to furnish the clients the information sent to the government. Section 312(a) (adding new I.R.C. § 6041(a)) subjects businesses making payments for services by independent contractors and direct sellers of consumer goods to information reporting; it also requires statements to the payees. Section 313(a) requires state and local governments to report income tax refunds paid by them and to send statements to the refund recipients. Section 314 requires large food and beverage retailers to report their employees' tips made on credit cards, tips reported by employees, and mandatory service charges over ten percent, and the employer must provide a statement to the employee. Accordingly, each new statement requirement (except that aimed at refund payors) carries a new penalty for noncompliance. Sections 311(a)(2), 312(b), 314(b) (all amending I.R.C. § 6678). Section 315(c) raised the assessable penalty under I.R.C. § 6678 to \$50 per offense, limited to \$50,000 a year.

276. *See supra* note 220 & accompanying text.

277. U.S. NEWS & WORLD REP., Mar. 30, 1981, at 80.

To establish a defense of impermissible selective prosecution, a criminal defendant must show that the prosecution was selective and that the selection was based on some impermissible ground.²⁷⁸ Although the courts recognize that exercise of free speech or associational rights are impermissible grounds for selection, they have upheld prosecution of outspoken protest leaders.²⁷⁹

Similarly, those appellate courts which have considered the issue have affirmed aiding and abetting convictions based on public speech where protest "evangelists" at public meetings gave spe-

278. *United States v. Catlett*, 584 F.2d 864, 866 (8th Cir. 1978):

To establish the essential elements of a *prima facie* case of selective discrimination, a defendant must first demonstrate that he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted. Second, the defendant must demonstrate that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race, religion or his exercise of his first amendment right to free speech. *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974).

Accord, *United States v. Moss*, 604 F.2d 569, 572-73 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980); *United States v. Swanson*, 509 F.2d 1205, 1208-09 (8th Cir. 1975).

Selective prosecution as a defense to tax fraud has not been asserted successfully. *Tax Fraud, White Collar Crime: Second Annual Survey of Law*, 19 AM. CRIM. L. REV. 427, 435 & nn.2138-2140 (1981). For a criticism of how eager the courts are to uphold tax protest prosecutions against selective enforcement objections, see Note, *Selective Prosecution of Tax Protesters: Did the Ninth Circuit Go Too Far?*, 12 GOLDEN GATE U.L. REV. 325 (1982).

279. The defendant in *United States v. Catlett*, 584 F.2d 864 (8th Cir. 1978), was a Quaker who had long been active in protesting government policies by refusing to file returns. When prosecuted for willful failure to file, Catlett tried to show that the IRS selectively investigated tax noncompliance by focusing on those with notoriety as tax protesters. The court said that even if this were true, the second prong of the test would not be satisfied:

While the decision to prosecute an individual cannot be made in retaliation for his exercises of his first amendment right to protest government war and tax policies, the prosecution of those protesters who publicly and with attendant publicity assert an alleged personal privilege not to pay taxes as part of their protest is not selection on an impermissible basis.

Id. at 867.

Similarly, Snoopy Freeman claimed that he was singled out because of his public speeches about the unconstitutionality of the tax system. However, the court found neither of the two prongs to have been established. *United States v. Moss*, 604 F.2d 569, 573 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980). See also *United States v. Tibbetts*, 646 F.2d 193 (5th Cir. 1981) (selection by IRS of those most vocal in opposition to tax laws is permissible); *United States v. Ojala*, 544 F.2d 940 (8th Cir. 1976) (conviction of political candidate who announced at press conference his refusal to file tax returns as a protest against Vietnam War held valid); *United States v. Swanson*, 509 F.2d 1205 (8th Cir. 1975) (prosecution under IRS "Project Ace," giving special priority to prosecution of tax crimes by attorneys and certified accountants, held valid).

cific advice on how to violate tax laws.²⁸⁰

Favorable resolution of these two legal issues, assuming the Supreme Court does not step in with a more restrictive constitutional viewpoint, frees the Service to go after the spreaders of the faith and to concentrate government resources on cutting off the head of the protest movement without having to make a similarly intensive attack on the much larger body. Early reactions to the Michigan tax revolt accurately expressed the IRS's inability to prosecute thousands of tax protesters, but as the Service sees it, this missed the point. With the ability to pick off the leaders, to prosecute the first to step forward from the lynch mob, the government hopes to persuade the followers to break ranks.

280. *E.g.*, *United States v. Moss*, 604 F.2d 569 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980); *United States v. Buttorff*, 572 F.2d 619 (8th Cir.), *cert. denied*, 437 U.S. 906 (1978).

Like Snoopy Freeman, Gordon Buttorff and Charles Dodge travelled the tax protest circuit, making speeches about the unconstitutionality of income taxation. They were convicted on 17 counts of aiding and abetting the filing of fraudulent withholding forms. The aiding and abetting occurred at a series of public meetings in Iowa sponsored by a group of workers at a farm machinery plant. Buttorff and Dodge presented their ideas on taxes and discussed common tax evasion methods. The only non-speech activity was the providing of a Form W-4 to one of the 15 persons who were convicted as principals. The appeals court found that the speech involved went beyond mere advocacy of law violation, which is protected, to become speech which incites imminent lawless activity, which may be punished under *Brandenburg v. Ohio*, 395 U.S. 444 (1960).

Although the speeches here do not incite the type of imminent lawlessness referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue. 572 F.2d at 623-24.

Although the Supreme Court declined to review *Buttorff*, a strong argument can be made that the decision does not give sufficient deference to first amendment values and does not adhere to the *Brandenburg* test. See Comment, *Constitutional Law: Speech That Aids and Abets Tax Fraud*, 63 MINN. L. REV. 641 (1979). *Brandenburg* requires both a content analysis to determine that the speaker intended unlawful consequences to occur immediately, and a context analysis to show that the setting in which the words were spoken makes it likely that criminal activity would follow immediately. Comment, *supra*, at 644-45. Arguably this test of imminence was not met in either *Buttorff* or *Moss*, because the circumstances of the speech allowed the listeners time to interpose their own rational consideration of contrary ideas, and allowed time for government authorities to counteract the inciteful speech before the listeners normally would have a chance to react to the speech with illegal actions. *Id.* at 646, 656, 659.

V. TAX AND SOCIAL POLICY

Policy makers addressing the illegal tax protester movement must take into account two broad questions of policy. First, what is it the government wishes to achieve? Second, how might it best be achieved, in light of possible effects on other goals?

A. Ends

Government policy goals have been alluded to throughout this Comment. The IRS wants to bring in all of the revenue owed to it with as little effort and expense as possible. The President and Congress want the missing revenue to offset record budget deficits. IRS and Justice department officials want to prevent the tax protest movement from growing; they see as a serious threat the possibility that law abiding citizens who observe their neighbors getting away with tax evasion will join them. Cutting across these short- and long-range goals is the policy that everyone should carry his fair share of the tax burden (as defined by the Internal Revenue Code), and that no one should be able to escape that burden for any reason, principled or not, because it increases the burden of others.

Another broad policy involves the nature of the republic. The alternative fund concept promoted by Archbishop Hunthausen and the war-tax refusers²⁸¹ strikes at the heart of representative democracy; so does the idea that individuals ought not to pay taxes when the money will be used for purposes with which they disagree. We elect representatives to decide what the best interests of the entire nation are and how those interests might best be achieved. As de Tocqueville observed, the faction out of power has an interest in obeying the laws set by the faction in power, because the minority today may be the lawmaking majority tomorrow.²⁸² There are political channels through which discontent taxpayers may work to change laws they dislike. In the meantime, everyone must pay the taxes needed to carry out the policies set by the current majority. According to this view, taxes are neutral; they should not be tools of political action. To withhold taxes out of disagreement with government policies or to divert taxes into a fund set up to counteract government policy is to undermine the established political machinery and to polarize the citizenry.²⁸³

281. *See supra* note 56 & accompanying text.

282. *See supra* note 2 & accompanying text.

283. The representative democracy model outlined above necessarily rests on the assumption that the loyal opposition has some chance of gaining power. Those ideological factions, ethnic or racial minorities, and religious sects which perceive little likelihood of gaining or participating in the exercise of effective political power have no self-interest in adhering to the edicts of the

Similarly, our often lauded system of voluntary self-assessment is an appendage of the national self image. Generally, we see ourselves through the same Rousseau-colored glasses that de Tocqueville wore over a century ago: Every citizen is a party to a social contract. While we realistically recognize that not everyone will adhere to the contract (and we build expensive court and prison systems to deal with that eventuality), we expect the vast majority of citizens to stick to the terms of the deal most of the time. Without such voluntary compliance, the system breaks down (or the true coercive nature of the social order begins to reveal itself, as some social critics would say). The result may be the emergence of a more overtly coercive compliance system that undercuts our self image as a free society, and actually restricts what freedoms we now have.²⁸⁴

B. Means

It is axiomatic that policies established as means for carrying out other policies should be consistent with the goals of the larger policies. The IRS does not always adhere to this axiom. Efforts to deal with the tax protest movement provide an example of means conflicting with their ends. Or it may be that the means currently used to deal with tax protest are consistent with certain short-range or tangible goals, which themselves are in conflict with more ethereal, yet more important, long-range goals.

What ought the government to do about tax protest? Before answering this, we must assess what the government already is doing. The IRS sets up early warning systems to detect growing pockets of tax resistance. It demands more information from taxpayers and devises better ways to use it. It identifies tax protesters and subjects them to intensive and repeated examination, both by auditors and intelligence agents. It selectively (but permissibly) prosecutes protest leaders, then publicizes the convictions so as to deter others from following. It displays a tough image to cover an inability to deal with massive noncompliance,

majority, other than to avoid repression by the majority controlled forces of law enforcement. To the extent that significant portions of the citizenry lack hope of democratic participation, the established political machinery deserves to be undermined, as the citizenry already is polarized.

284. Congress heard testimony April 26, 1982, before the House Ways and Means Subcommittee on Oversight from taxpayers complaining of harassment by the IRS in its compliance tactics. See *IRS Collection Tactics Examined*, 15 TAX NOTES 508 (May 10, 1982). Congressman Don Young, R-Alaska, proposed to the subcommittee legislation to restrict IRS abuses. *Id.* The 1982 Tax Act, *supra* note 18, §§ 347-350, partially redressed such grievances by giving taxpayers more protection from levy against their property.

and hopes (generally accurately) that the policy of terror will have the intended deterrent effect.

On the other hand, the government is not doing much about many of the causes of taxpayer discontentment. Explanations for tax evasion include inflation, government regulation,²⁸⁵ the "fiendish" complexity of the IRS's "incomprehensible forms,"²⁸⁶ and increasing cynicism about the fairness of tax laws.²⁸⁷ While inflation has eased somewhat (or has become transmogrified into recession and unemployment) and the Reagan Administration has taken an anti-regulation viewpoint, complexity retains its death-grip on the Internal Revenue Code, and recent tax breaks have bolstered the perception that the rich grow richer at the expense of the common workers.²⁸⁸

This puts the government's tough-guy campaign in a new light. When people believe that the tax laws are fair, they logically are sympathetic to government efforts to enforce them because they see that the tax evader is hurting them. However, those who see tax laws as biased in favor of the rich should be more likely to identify the tax evader as a symbol of resistance against the unfair system. The IRS crackdown then comes to be viewed as oppression of the poor by the rich (to throw a slightly Marxist interpretation on the matter).

The IRS is right in assuming that people can be terrorized into voluntary compliance. But the formula for determining how much terror is necessary is altered by the shift in perception about the fairness of the tax system. Psychological studies and theories are revealing on this point.

Many psychologists view behavior in terms of a balance of pain and pleasure. The potential lawbreaker, if rational, will choose to obey the law if the perceived risk of punishment outweighs the

285. USA TODAY, Sept. 1980, at 45. "Inflation has undermined much of the moral support for income taxation." *Id.* (quoting James Wetzler, chief economist for Congress's Joint Committee on Taxation). "Inflation is only one reason for the underground economy. The financial and emotional impact of all-consuming government regulation and control is a second. For many people, not reporting cash income has become their only route to economic survival." *Id.*

286. Hoffman, *Privilege riddles U.S. tax law*, Lincoln (Neb.) Journal, Apr. 21, 1982, at 8, col. 3 (opinion column). Hoffman attributes this complexity to Congress in creating "the swamps and thickets of exceptions, deviations, hidden provisions and wig-wam clauses, lease-backs, reach backs and recaptures, limited partnership subsections and cutie pie paragraph J's, all devised to get someone off from having to pay taxes. The reason for the complexity is privilege; there is no other." *Id.*

287. See TIME, Apr. 12, 1982, at 57; Maital, *The Tax-Evasion Virus*, PSYCHOLOGY TODAY, Mar. 1982, at 74; Reeves, *Underground Economics*, ESQUIRE, May 22, 1979, at 8.

288. Maital, *supra* note 287, at 78.

prospect of gain.²⁸⁹ But this is a complex calculus. People who view themselves as law abiding citizens and who believe the tax system to be fair may derive pleasure from obeying the law and paying their taxes (or, at least, these people would feel a heightened sense of pain if they were to violate their moral precepts by violating the law). Others may see the tax system as corrupt or unfair and would themselves feel little agony over violating tax laws (independent of punishment considerations). Still others may take great pleasure in overtly declaring rebellion against the tax laws, and invite punishment as proof of the rightness of their cause. Presumably the martyr group is small in numbers and not likely to grow. But the growing perception of unfairness may shift people from the good citizen group toward the cynical middle position, in which case they will be more receptive to tax evasion ideas.²⁹⁰

Because of differing points of reference, taxpayers who see taxes as the rightful property of the government are less prone to evade taxes than are those who see the taxes as their own rightful property which is being taken from them.²⁹¹ Whether this latter group will evade taxes is more a question of how strong they perceive the risk of punishment to be. Why more members of this group do not evade taxes may be because the risk of being audited and the penalties which would follow are exaggerated.²⁹²

Thus, by doing nothing to counteract the growing perception of unfairness, the government forces itself to increase the perception of likely punishment. Lacking the resources necessary to increase the actual odds of detection, the government must increase penal-

289. *Id.* at 76.

290. A psychological experiment found that subjects in a simulated taxation situation were most likely to evade taxes if they felt that they were paying higher rates than everybody else, and least likely to evade if they believed they were paying lower rates. *Id.* at 78.

291.

Psychological studies show that people will take risks to avoid certain loss, and that they prefer sure gains to risky bets. This applies to tax evasion, too. Those whose point of reference is *income after deduction of full, honest taxes* are less likely to take the risk of gaining income by evasion than those whose point of reference is before-tax income. The latter will compare the sure loss from paying full taxes to the uncertain loss from evading (and possibly being apprehended, or, possibly, escaping notice), and they are more likely to choose evasion. The more that people believe that tax money is rightly theirs, the more evasion will take place, according to this reference-point effect.

Id. at 76 (emphasis in original).

292. The actual probabilities of detection and the likely size of the resulting penalties make tax evasion a profitable pursuit. However, psychologically, people tend to see small probabilities as larger than they actually are, even if they know the real odds. *Id.*

ties²⁹³ and create a false impression of likely detection by publicizing the prosecution of visible tax evaders. The effectiveness of even this effort at deterrence is undermined by the psychological fact that "the more tax evaders a taxpayer knows, the more likely he is to evade taxes himself."²⁹⁴ Thus, prosecution of the high voltage tax revolt leader a taxpayer does not know is not likely to have as much impact as the taxpayer's personal acquaintance with unpunished tax evaders who he knows to be ordinary people like himself. The IRS is attacking the travelling evangelist, but leaving the local faithful to recruit converts door-to-door.

This leaves us with a contradiction. The government is stepping up law enforcement efforts against people who see the government less and less as the representative of their own interests, and is expecting that this will encourage voluntary compliance. To put it another way, the government is turning to fear and coercion to make work a system founded on self-interested cooperation. As the perception of unfairness increases, more and more people will find their self-interests lying with the underground economy rather than with voluntary self-assessment. And they will be more receptive to increasingly sophisticated sales pitches from tax revolt evangelists.

On the other side of the street, principled protesters will be able to use the stepped up governmental repression to justify continued tax resistance. Protesters who use refusal to pay taxes as a tool for advancing unrelated causes may become indistinguishable from protesters who are merely fed up with what they see as an unbalanced tax system. The group dynamics are already similar. The convergence will likely occur in the direction of strength of belief. War-tax refusers will come to share with constitutional protesters and with others who do not fit the evangelistic model a depth of belief not now present in most tax evaders.

On the other hand, the government may be successful in striking a balance between deterrence (in pursuit of short-range reve-

293. One study found that large fines are more effective in deterring tax evasion than are increased chances of detection. *Id.* at 76, 78. Another study found that when taxpayers knew that they would benefit from part of their tax money, they were more likely to pay their taxes, and that they were more likely to pay when they knew they stood a chance of being audited; the degree of compliance was greatest when the taxpayer perceived both the personal benefit and the risk of audit, and least when neither perception was present. *Id.* at 78.

Apparently, the government is taking the tactic of stiffening penalties to deter tax evasion, as shown by the 1982 Tax Act, *supra* note 18. See *supra* §§ III. B. & C., and IRS proposals for still tougher penalties, *supra* note 18.

294. Maital, *supra* note 287, at 74 (quoting a study by economist Michael Spicer and psychologist Sven Lundstedt).

nue gains) and maintenance of the loyalty of the bulk of the citizenry. To the extent that taxpayers comply because they fear punishment, the Service must silence or discredit those who preach that punishment is unlikely and that tax evasion is profitable. But, in so doing, the Service must avoid enhancing the perception that this government no longer is worth paying for.

VI. CONCLUSION

The government accurately senses a danger to the system of voluntary self-assessment and payment of federal income taxes resulting from the illegal tax protest movement (which is not a unified movement at all, but is a bundle of unconnected principled causes and unprincipled schemes). However, government reaction to this perceived threat creates a new danger of validating the complaints many of the protesters use to rationalize their illegal tax refusal. In pursuing short-range revenue gains, the government misconceives how its strategy of selective enforcement may have the side effect of bolstering the widespread perception that the tax system unfairly bleeds the middle class for the benefit of the rich and the poor (who have fallen out of sympathy in recent years). This may push more people into the underground economy as the increasing economic imperative to evade taxes converges with mounting evidence of unfairness and uneven repression.

The IRS's efforts to pick out self-declared tax protesters for special treatment take the form of a tightly tailored program for surgically removing the most malignant cells from the national taxpaying body. However, the Service may be deceiving itself. By coming out with a highly visible campaign against tax evaders who are stupid (or principled) enough to tell the IRS that they are refusing to pay taxes, the Service hopes to drive protesters into compliance. But an equally likely effect would be to transform the now visible protest into less detectable forms of evasion. Once the word gets around that the government comes down hard on protesters who scrawl "Fifth Amendment" across their tax returns, people with such a motivation will simply stop filing returns. This will narrow the ambit of the Illegal Tax Protester Program to suppression of truly principled protest and the prosecution of archbishops.

There may not be a good solution to tax protest or the underground economy, now that so many people have survived tax evasion with no harsh consequences. Stepping up the harsh consequences may be one answer, but one in conflict with our self-image as a free society. A more permanent solution is to wring out of the tax code the complexity and privilege which motivates tax protest.

As for the protesters for a cause, the government cannot accede to their demands (*i.e.*, dismantle nuclear weapons, etc.) without violating the principle of majority rule. Nor can the government allow the principled protesters to keep their tax money; that also would violate the majoritarian concept and would spread a perception of another type of privilege. However, the government can only do itself harm by jailing the archbishops and Amish farmers who operate on a sense of a higher law, as repression of such a sympathetic lot would only help their cause. An alternative is to exercise the government's powers to impose civil penalties and tax liens so that Caesar can take what is his without throwing the Christians into the lion's den.

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