

# Doing the Full Monty: Will Publicizing Tax Information Increase Compliance?

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## I. Introduction

To most Americans and many people throughout the world, America is, as its national anthem proclaims, “the land of the free”—in its economy as well as its government. Lately, however, many Americans are taking these words too literally. They no longer want music, movies or cable TV at the best price a competitive market can produce; they want them free. The same is true for government. Some people no longer think that it is enough to have no taxation without representation. They want representation without taxation.<sup>1</sup> And they are matching actions to attitudes. They “pirate” movies and music and evade taxes, often without guilt, shame, or even viewing their actions as wrong.<sup>2</sup> In the short run, this “something for nothing” strategy may work well for the individual actors, but in the long run, such conduct is destabilizing. No industry can sustain itself—let alone develop—without some profit. Similarly, a stable government in the long run needs a tax system with which taxpayers voluntarily comply.

States—even minimalist ones—require money to exist, and a voluntary tax system is the most effective way to obtain it.<sup>3</sup> A voluntary tax system, in the sense that people comply with the tax laws without any state enforcement actions, maximizes revenues because administration costs are low in both the economic and psychic sense. The government wastes little money in collecting the tax and taxpayers suffer little alienation in parting with their money. When taxpayers do not

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1. See Daniel A. Smith, *Tax Crusaders and the Politics of Direct Democracy* (New York, Routledge, 1998) at 18.
2. See, e.g., Mary Madden & Amanda Lehnart, “Music Downloading, File-sharing and Copyright Memo” (July 2003), online: Pew Internet & American Life Project [www.pewinternet.org](http://www.pewinternet.org). (survey showed that 67% of Internet users who download music don’t care that it is copyrighted, an increase from 61% in July-Aug. 2000). It is not just the young who ignore copyright laws. *The Wall Street Journal* carried a full-page ad about illegally downloading of movies. “You Can Click But You Can’t Hide” *The Wall Street Journal* (17 August 2004) A7 (“Illegal Downloading Inappropriate for All Ages”). In 2003 almost 20% of taxpayers thought cheating was acceptable, an increase since 1993. Message from the Board, IRS Oversight Committee, Annual Report, available at 2004 TNT 150-16 (August 4, 2004) (Cheating has gained acceptability especially among the young.)
3. Governments have three major sources of steady revenue—debt, state ownership, and taxation. Debt is expensive and must eventually be repaid and government ownership of revenue producing assets has not had a great history of success, and regardless of success, is contradictory to the free market central to American democracy. Taxation is the best, provided it is voluntary. As an International Monetary Fund Report said, “voluntary compliance and self-assessment are the foundation of modern tax administrations.” Carlos Silvani & Katherine Baer, “Designing a Tax Administration Reform Strategy: Experiences and Guidelines” (Washington D.C.: 1997) IMF Working Paper WP/97/30 at para. 30. [97 TNI 149-31 at para. 30.]

voluntarily pay their taxes—whether intentionally or not—the resulting tax gap reduces gross revenues as well as net revenues (because the costs of collection increase). Just as importantly, non-compliance often begets more non-compliance.

The tax gap in the United States caused by both unintentional and willful non-compliance is huge—currently estimated at over \$300 billion.<sup>4</sup> Non-compliance is an issue at all income levels, not just for the large corporations or high-income individuals that are in the news. In fact, many tax officials and scholars believe that the biggest non-compliance issues exist at lower income levels, especially in sole proprietorships and in the cash economy, generally.<sup>5</sup>

The conventional explanation for compliance (and non-compliance) with tax law—as with any law—had long been a neoclassical economic one. People obey laws when it is in their self-interest to do so. In other words, compliance results from “an individual’s rational choice aimed at maximizing individual outcomes.”<sup>6</sup> Consequently, under this theory, tax compliance decreases when audit rates decline because the fear of getting caught cheating diminishes. The cure, then, is to change the cost/benefit analysis. Increasing the dollar amount of the penalty for under-reporting income and/or increasing the number of audits, for example, should decrease non-compliance by increasing the costs of non-compliance. Simplifying the tax laws, under this theory, should also increase compliance by decreasing the costs of knowing what the law is.

Although wealth-maximizing economic theories are useful, they do not explain all instances of compliance or non-compliance. Some people obey laws even when it is against their short-term interest to do so. Most people, for example, don’t run traffic lights when no one else is on the road or freeload on other people’s willingness to pay for parks or roads. On the other hand, some people do not comply with laws even though they know arrest or fines are unavoidable—as in the freedom marches of the 1960s or peace tax protestors today who refuse to pay taxes that will be used to pay for the military.

Non-economic factors such as social norms, sense of fairness, and moral constraints also influence compliance by creating what Professor Dan Kahan calls a “Logic of Reciprocity.”<sup>7</sup> Compliance will increase in an atmosphere of trust and

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4. See, e.g., Allen Kenney, “IRS Oversight Board Calls for Tighter Enforcement, More Funds” (Aug. 4, 2004) 2004 TNT 150-1 (estimating a gap of \$311 billion). The cost of abusive tax schemes alone has been estimated to be between \$20 and \$40 billion. GAO, Internal Revenue Service: Challenges Remain in Combating Abusive Tax Schemes I, GAO-04-50 (November 2003) (estimating that approximately 740,000 taxpayers were engaged in some abusive tax scheme). Recently, IRS Commissioner Mark Everson refused to estimate the size of the tax gap, claiming there was not yet enough information, but that a study of taxpayer behavior was currently being conducted, with results available in early 2005. Allen Kenney, “Senate Taxwriters Put Tax Gap Under Microscope” (July 26, 2004) 104 Tax Notes 338 at 340.

5. Kenney, *ibid.* at 339.

6. Michael Wenzel, “Tax Compliance and the Psychology of Justice: Mapping the Field” in Valerie Braithwaite, ed., *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Burlington, VT: Ashgate, 2003) 41.

7. Dan M. Kahan, “The Logic of Reciprocity: Trust, Collective Action, and Law” (2003) 102 Mich. L. Rev. 71 at 79-83. See, e.g., “Taxing Democracy: Understanding Tax Avoidance and Evasion” in Braithwaite, *supra* note 6; Kristina Murphy, “The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders” (2004) 28 L. & Human Behavior 187; Leandra Ledreman,

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cooperation because a person feels that others are acting in a reciprocal manner. Similarly, compliance will decrease in an environment of distrust and suspicion when a person believes that others are not complying. These theories indicate—and empirical studies support—for example, that people may experience a decreased obligation to pay taxes for a variety of reasons, not just wealth maximizing ones. People are more likely to cheat on their own taxes, for example, if they perceive a weakening in the social norm against cheating. This will occur if they learn that more people are cheating—or even if they just believe that more people are cheating. People are more willing to comply with laws that they think are fair and fairly administered. As more people cheat (or are believed to), an individual may begin to think the tax laws are less fair and therefore he also will be more willing to cheat. Individuals' willingness to pay taxes may also decrease if they disagree with how the money is spent, or if they just generally become more alienated from their government.

Compliance, in short, is a very complicated phenomenon in which a variety of factors influence attitudes and behaviors, with attitude not necessarily matching behavior. Actions and beliefs do not always mesh—hence the old adage, “Do as I say not as I do.” Sometimes people may want to align behavior and belief but some outside force prevents them from doing so. In the tax area, the complexity of the law, for example, may frustrate taxpayers' desire to comply. The velocity of change itself may impair compliance, regardless of the law's complexity. Ignorance, or confusion, about what the law requires may result from yearly changes in the law—due either to newly enacted provisions or to provisions that phase in or out.

As every parent and teacher knows, people can be induced to change behavior through either carrots or sticks. Traditionally, in line with the economic theory of compliance, the stick of enforcement has been the most common method of altering taxpayer behavior—especially if it is intentional non-compliance. Although enforcement procedures (e.g. audits) and penalties can be effective, and are undoubtedly a necessary tool in any tax system, they are not sufficient. They may be the most direct way of influencing economically minded taxpayers who focus on wealth-maximization, but they are costly in both monetary and psychic terms. First, and most obviously, increased enforcement increases the costs of collection, thereby decreasing net revenues. More importantly—as studies about social norms and compliance show—increasing enforcement can be counter-productive and actually reduce compliance. Enforcement procedures are by their very nature intrusive and generate resistance from taxpayers. The greater the extent of enforcement powers and the more often they are used, the more hostility they will generate. As National

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“The Interplay Between Norms and Enforcement in Tax Compliance” (2003) 64 Ohio St. L. J. 1453. See, also, Eric A. Posner, “Law and Social Norms: The Case of Tax Compliance” (2000) 86 Va. L. Rev. 1781 and John T. Scholz & Neil Pinney, “Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behavior” (1995) 39 Am. J. Pol. Sci. 490. Recently behavioral economics has begun to incorporate non-rational behavior into its theory generally and in the field of tax compliance generally. See, e.g., Edward J. McCaffery & Joel Slemrod, “Toward an Agenda for Behavioral Public Finance,” online: SSRN <http://ssrn.com/abstract=590201>.

Taxpayer Advocate Nina Olson has observed, increased emphasis on enforcement can actually decrease taxpayer trust and confidence in the tax system.<sup>8</sup> Enforcement techniques can backfire. For example, publicizing the amount of evasion that occurs or using the conviction of tax evaders as an example to others can cause taxpayers to believe that evasion is higher than it actually is. This belief, in turn, may lead them to cheat. They don't want to be a "chump" and pay taxes while others don't; they no longer think the tax system is fair, or they believe cheating is now acceptable and they need not feel any shame by doing what everyone else is doing.<sup>9</sup>

The complexity of the non-compliance problem requires a variety of remedies. Some seem obvious in theory, but harder to implement in practice, such as reducing complexity through tax simplification and increasing certainty by reducing the velocity of change. This essay concentrates on one mechanism of enhancing compliance that has both carrot and stick aspects: publicizing tax information. Part II briefly reviews the treatment of tax information as public records—the traditional method of publicity in the tax context. After discussing the role of publicity in democracy, its frequent clash with privacy principles and arguments both for and against publicity, Part II suggests re-evaluating publicity as a tax compliance tool in light of the legal and social changes regarding privacy that have occurred since the last experiment in tax publicity. Part III first redefines 'publicizing tax information' more broadly to mean simply the transmission or dissemination of information, in accordance with its common dictionary meaning. So re-defined, publicity can be a better tool to attack intentional and unintentional non-compliance with the tax laws. Using this expanded definition, which includes a large educational component, Part III proceeds to sketch out several publicity proposals. Part IV provides a short conclusion.

## II. Overview of Publicity

Publicity is a fundamental principle of American democracy, enshrined in the first amendment right to free speech.<sup>10</sup> The right to free speech contains within it the right to hear or to know. The combination of these two rights ensures a democratic government operating under the rule of law and free from the corrupting influences of powerful, wealthy, and/or just simply venial individuals or groups. The same rationale underlies the argument for tax publicity.

Publicity, however, often clashes with another fundamental right—the right to privacy. The debate about any publicity law, then, revolves around whether the benefits of publicity outweigh the intrusions into privacy that publicity produces. In

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8. Heidi Glenn & Allen Kenney, "Increased Enforcements Could Erode Taxpayer Trust, Olson Says" (May 17, 2004) 103 Tax Notes 806 at 806 (quoting Taxpayer Advocate Nina Olson). Also available at 2004 TNT 91-3 (May 11, 2004).

9. See, e.g., Kahan, *supra* note 7 at 79-83, and generally Braithwaite, *supra* note 6.

10. Publicity is a key tenet of the progressive movement in the United States, but is also supported by many philosophers as a basic democratic value, especially because of its relationship to accountability. See, e.g., "The Value of Publicity" (ch. 3) in Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (Cambridge, MA: Belknap Press, 1996) at 97.

the income tax area, the arguments both for and against publicity have been relatively consistent over the course of the income tax. Proponents claim that publicity can prevent taxpayer fraud and evasion as well as prevent “maladministration” of tax laws, including “favoritism” by tax officials.<sup>11</sup> Taxpayers, they claim, will not file fraudulent returns or even engage in the more tenuous legal tax avoidance because they would be shamed by others’ knowledge of this behavior. Moreover, open returns help keep the system honest because members of the public can discover schemes not caught by the tax officials and they can insure that officials are administering the system honestly. By keeping the system honest, publicity increases taxpayer confidence in the fairness of the system, which in turn has the salutary effects of increasing voluntary compliance and revenues.

Proponents argue that privacy should not be a barrier to publicity because the right of privacy is not invaded, or if it is, the invasion is minimal and/or necessary for democracy to function.<sup>12</sup> Much of the information, they maintain, is already public. Moreover, they state, there is no right to privacy in regards to a tax return; since paying taxes is a duty, the information contained on the returns belongs to the public. The public has a right to know that others are paying their fair share. If private matters in a contract dispute become public records once they resort to the court, why shouldn’t every taxpayer’s tax information be public?<sup>13</sup> In 1898 Benjamin Harrison stated, “Each citizen has a personal interest, a pecuniary interest,

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11. 79 Cong. Rec. 4444 (March 26, 1935) (Sen. La Follette speaking) and 79 Cong. Rec. 4510 (March 27, 1935) (Sen. Norris stating, “Publicity is the greatest cure for evils which may exist in government. We should have publicity and more publicity”). Accord, Theodore S. Sims, “Corporate Returns: Beyond Disclosure” (July 29, 2002) 96 Tax Notes 735 at 737 and online at 2002 TNT 146-33 (July 30, 2002) (public corporate returns will help shut down corporate tax shelters because the “prospect of energetic private scrutiny and challenge will quickly put a very high premium on a documented reputation for . . . transparent and self-evidently clean.”); George Guttman, “The Confidentiality Statute Needs Rethinking” (January 17, 2000) 86 Tax Notes 318 at 318-19 and online at 2000 TNT 225-5 (February 7, 2000) confidentiality “is often used more as a shield to protect the IRS from oversight and outside scrutiny rather than to protect taxpayer information or to advance good tax administration.” Although the primary purpose of the first publicity provision in 1862 appeared to be a practical one of providing taxpayers notice of their assessment and collection, in 1863—after much vacillation, the Internal Revenue Commissioner ruled that the returns themselves would be open to public so as to provide “the amplest opportunity may be given for the detection of any fraudulent returns . . .” Congressional Research Service, Report #74-211A, 557/275, (1974) 5 “Legislative History of Tax Return Confidentiality: Section 6103 of the Internal Revenue Code of 1954 and Its Predecessors”. The Commissioner had first ruled that the returns would not be open to inspection.

The Corporate Excise Tax Act of 1909 (an excise tax based on income) was not concerned with tax fraud but with corporate fraud, specifically stockwatering, a mechanism by which incorporators would over value the assets they contributed to the corporation to induce others to invest. President Taft, among others, saw the publicity feature as a means to regulate the corporations and cure the abusive problem of stock-watering. The tax returns would provide potential investors with accurate information that would lead them to invest only in soundly capitalized companies. See Marjorie E. Kornhauser, “Corporate Regulation and the Origins of the Corporate Income Tax” (1990) 66 Ind. L. J. 53.

12. See, e.g., 79 Cong. Rec. 4513 (March 27, 1935) (Sen. La Follette supporting publicity on the grounds that secrecy is “antagonistic” and “inimical” to democracy).

13. See, e.g., 65 CR 9405 (1924)(Sen. Caraway speaking). See, also, Guttman, *supra* note 11 at 320 (“doesn’t the public have a right to know if a taxpayer is not fulfilling his basic obligation and at least filing a return?”). Guttman suggests that as a minimum, the public has a right to know the names of taxpayers and the amount of taxes paid.

in the tax return of his neighbor. We are members of a great partnership, and it is the right of each to know what every other member is contributing to the partnership and what he is taking from it.”<sup>14</sup> If one person shirks his taxpaying duty, the burden falls unjustly on others to make up the difference. Consequently, as Senator Huey Long bluntly said, “[I]t is my business to find out whether you are making me pay an abnormal part of the taxes by reason of the fact that you are conducting a swindling game to save yourself from paying your rightful share.”<sup>15</sup>

Publicity opponents, on the other hand, claim that publicity is un-American; it constricts liberty, and infringes basic constitutional rights, especially the fourth amendment and the right to privacy.<sup>16</sup> This invasion of privacy is not just an abstract problem, but creates daily, adverse consequences to individuals and businesses. Publicity, opponents argue, not only exposes a person’s private affairs to everyone—nosy neighbors, salesmen and even criminals looking for victims to rob or blackmail, but also can injure businesses by presenting an incomplete financial picture to competitors or by revealing trade secrets.<sup>17</sup>

Finally, opponents argue that the invasion of privacy does not produce any benefits. In their view, publicity is unnecessary so long as tax officials and Congress have taxpayer information needed to enact and enforce tax laws and statistical data exist to give a picture of compliance more generally to the public. Moreover, they argue that publicity is useless. If there is only partial publicity, then the public does not have enough information for it to be meaningful; if the full return is open to the public, then the return is too complicated to be understood, especially since most taxpayers don’t even file their own returns.<sup>18</sup>

Although publicity has triumphed over privacy in many other areas of American government (such as securities laws, “sunshine laws”, and the freedom of information act), the reverse has occurred in income taxation. The general rule under section 6103 of the Internal Revenue Code is confidentiality of tax return information, although there are many statutory exceptions, granting access—primarily to federal, state, and local officials—for both tax and non-tax purposes.<sup>19</sup>

14. 79 Cong. Rec. 3403 (March 11, 1935) (Rep. Sauthoff quoting Pres. Harrison).

15. 79 Cong. Rec. 4451 (March 26, 1935) (Sen. Long speaking).

16. The objections are often stated more dramatically. See, e.g., 79 Cong. Rec. 4450 (March 26, 1935) (Sen. Tydings stating that the logic of publicity would also “permit a neighbor to come in another man’s house to see if that man was violating the law .... If we keep on whittling away what few liberties we have there will not be any use of having any Government, because we will all be automations, goose-stepping along.”).

17. See, e.g., Allen D. Madison, “Point: Don’t Publicize Corporate Tax Returns or Privatize Enforcement, 22 Section of Taxation” (Fall, 2002) 22 ABA Tax Section News Q. 15 at 16 (tax returns can reveal trade secrets such as merchandising data, supply sources, payroll information, costs and pricing, 79 Cong. Rec. 2305-07 (February 20, 1935) (Rep. Bacon speaking) and 79 Cong. Rec. 3395-6 (March 11, 1935) (Reps. Bacon and Dondero stating that publicity exposed business affairs to competitors and humiliations because net income not show true economic picture and could cause bankruptcy if creditors saw information).

18. The response, of course, is that even if most taxpayers couldn’t understand it, some tax experts and scholars would analyze it and in that way help the IRS enforce the law fairly. Moreover, if it turns out that the returns are so complicated that no one will understand them, then the no harm, no foul rule applies. If no one can understand the returns, then there is no violation of privacy and no harm in publicizing them. See, e.g., 79 CR 4506 (March 1935) (Sen. Norris speaking).

19. §6103 mandates confidentiality. Some of these disclosures are for non-tax purposes, such as §§6013(i) and (l). Section 6104 opens non-profit returns to the public.

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Additionally, the IRS publishes statistics regarding tax returns (such as the amount of charitable deductions taken by taxpayers in various brackets), but this information is published in an anonymous form.<sup>20</sup>

Despite this general confidentiality rule, there have been four periods in the United States in which income tax information has been public record.<sup>21</sup> Twice (during the Civil War and under the Corporate Excise Tax Act of 1909) disclosure was complete—the Full Monty, that is, the entire tax return was subject to public inspection. The publicity laws in the other two periods (mid-1920s and mid-1930s) only mandated limited disclosure. None of these statutes was of long duration. The Civil War provisions remained in effect until the income tax was repealed in 1870. The Corporate Excise Tax's provision was repealed the year after enactment, but regulations continued to subject publicly traded corporations to publicity.<sup>22</sup> The limited 1920's experiment, however, lasted only two years, and the 1934 publicity provision was repealed less than one year later, thus ending the last experiment in publicity before it had even begun. Publicity's brief lifespan can be attributed to a combination of factors such as a lack of administrative support (by the Treasury, the Internal Revenue Bureau and/or the President), lack of support by many congressmen (perhaps because most were personally subject to the provisions) and constituent opposition (organized to varying degrees by small lobbying groups).

At least three factors suggest that now is an appropriate time to re-evaluate the merits of publicizing income tax information and attempt another experiment with it. First, current tax evasions and scandals heighten the need to increase compliance. Second, the recent scholarly research referred to in the Introduction indicates that publicity is a more powerful tool in augmenting compliance than previously thought. Finally, the world is a much more public place than it was seventy years ago when publicity was last tried, both in legally required or permissible disclosures and in what people voluntarily reveal about themselves.

Why should tax information remain confidential in a world where privacy has been so constricted—both voluntarily and involuntarily—that it seems to be a vanishing commodity? From a voluntary perspective, privacy is a fading social norm.

20. §6103(j).

21. The first period of publicity occurred during the Civil War, the origins of the income tax in the United States. While the Revenue Act of 1862 only required the publication of taxpayer names and amounts of taxes owed, the Internal Revenue Commissioner opened the returns to the public. See note 12 above. This continued until the income tax was repealed in 1870. The Corporate Excise Tax of 1909 was not an income tax per se, but measured the excise tax by income. Although the original Act made all corporate returns open to public inspection, it was amended in 1910 so that returns would be open to public inspection at the discretion of the president. 36 Stat. 11, 112 §38 (1909), amended by 36 Stat. 494 (1910). President Taft opened returns only of corporations whose stock was offered to the public. T.D. 1665, 13 Treas. Dec. Int. Rev. 117 (1910). The Revenue Act of 1924, opened to the public the names and addresses of taxpayers, the amounts of tax paid, and also provided for the publication of amounts of refunds. Revenue Act of 1924, §257(b), 43 Stat. 293, 1924). In 1926, the law was changed so that only the names and addresses of taxpayer were public, not their amount of tax. Revenue Act of 1926, §257(e), 44 Stat. 52. This remained the law until 1966, at which point the law was changed to require publishing only whether a taxpayer had filed a return. P.L. 89-713, §4, 80 Stat. 1109. The Revenue Act of 1934, 48 Stat. 680, 698, §55(b), was repealed in 1935, before it could take effect. It made public six pieces of tax return information, discussed in note 36 below with accompanying text.

22. T.D. 1165 in 13 T.D. (IR) 117 (1910).

We put our most intimate thoughts on blogs, allow cameras to film us in childbirth and then insist that our friends view the happy event. We beg for the opportunity to live with strangers in a house with 24/7 cameras that broadcast our daily lives on television to millions of strangers, and we compete for the chance of experiencing major personal events (meeting and marrying a spouse, being hired) in front of a national audience. Individuals give away information in order to get products or services, especially if it is at a cheaper price. Soon people will have computer chips implanted with their medical records, and the use of biometrics while working or shopping is the wave of the future, that is already here to some extent.<sup>23</sup> Some of the information people disclose may be technically voluntary, such as revealing tax information to obtain a home mortgage loan or financial aid for college, but in the practical sense it is involuntary since these are common goods that most people cannot obtain without a loan.

Legally, the realm of privacy has also contracted. Not only does the government have more access to more information about us, but so does the general public. Internet spyware annoyingly—but legally (for the most part)—tracks our buying habits and preferences. Strangers and friends alike can use their cell phones to snap our pictures on the street or in the park and then post these pictures on the Internet—all without our knowledge or consent. If we want to travel by airplane, we must submit our belongings and our selves to search by strangers and soon, if we want to travel abroad, we must record biometric data in our passports.

Much financial data is also already available to the public. The exact salaries of many people already are public records due to SEC requirements, state laws regarding public employees, and tax laws regarding salaries of non-profit employees, many of which are easily obtained on-line not only officially at SEC websites for example, but through sites such as [www.ecomponline.com](http://www.ecomponline.com). Some individuals also volunteer their salaries publicly, such as in the annual salary article in the Sunday newspaper *Parade Magazine*. The Bureau of Labor publishes salary data by occupation and these too are easily available on Internet web pages such as [www.salary.com](http://www.salary.com), which gives salaries ranges by occupation and geographic area.

Even tax information is widely disseminated. Large numbers of individual taxpayers themselves voluntarily disclose their income tax information for a variety of purposes—to get a home mortgage, to rent an apartment, to obtain financial assistance in college. Current confidentiality laws have so many exceptions that in 1998, the IRS made over 2.5 billion disclosures, which means that “some or all of the information on every individual’s tax return was disclosed an average of 20 times.”<sup>24</sup>

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23. See, e.g., “Chip Implants Arm Doctors with Data” *The Wall Street Journal* (14 October 2004) D2 (medical records); Kathy Chu, “Retailers Go Biometric for Cashless Purchases” *The Wall Street Journal* (1 September 2004) D7, and Naomi Aoki, “Future Shop: It’s What’s in Store for Retail: Touch Screens, Radio Frequency ID Chips, Flashing Price Tags” *Boston Globe* (20 September 2004) C1.

24. Guttman, *supra* note 11 at 318 (stating that the number of disclosures is really much larger because disclosure to Social Security Administration and other parts of Treasury were not included in that number). The proposed privatization of tax collection would greatly increase the amount of tax information divulged to others. These exceptions to confidentiality are limited, that is, the law requires that when others receive this tax information they must keep it confidential. Nevertheless, clearly—due to human (and Internet) nature—more disclosures to the public will occur as more people have access to tax information.

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Much of this information is revealed for non-tax purposes, such as to enforce child support payments or for criminal law enforcement.

These three factors—increased non-compliance, increased value of publicity, and decreased privacy—have shifted the publicity/privacy balance enough that experimentation in tax publicity merits another consideration. Enough privacy concerns remain, however, that despite some calls for full disclosure,<sup>25</sup> many people—even most people—would oppose it. Consequently, if it were to exist, hostility might actually increase non-compliance. Full disclosure, however, is not necessary. Although there are rationales to support the Full Monty, the goals of publicity can be accomplished with provisions that are at the same time more limited and broader.

### III. Publicity Proposals

#### A. Redefining Publicity

Traditionally, when people think of publicity in the context of income taxation, they think of treating all or a portion of tax return information as public records so that the general populace, including the press, has access to the information. This conception not only generates hostility that can be counter-productive to increasing compliance but also limits the opportunities to use publicity as a compliance tool even if there were no hostility. Publicity, however, need not be viewed so narrowly and, in fact, one common dictionary meaning is simply “the dissemination of information.”<sup>26</sup>

The value of publicity, that is to say, of publicizing, rests in the fact that the “right to know” is a prerequisite of good government. In regards to taxes, individual citizens essentially have two rights to know: a right to know what the tax laws are and a right to know that these laws are being administered fairly. Publicity better serves both these functions when it is understood more broadly than only making tax returns into public records. That form of publicity is essentially a communication of taxpayers’ specific return information by the government to the public as a whole and usually in a totally identifiable manner. Publicity, under the dictionary’s more broadly construed meaning, however, includes communications that encompass a wide array of communications that vary as to both content and audience. A large portion of publicity in this broad sense, then, can be—and should be—educational. Voluntary tax compliance requires this type of publicity. Taxpayers must know the law and know something about tax administration in order to comply.<sup>27</sup> Some publicity of this sort already exists, such as the publication

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25. Marc Linder, for example, raised the possibility of full disclosure of the returns of millionaires. See Marc Linder, “Tax Glasnost for Millionaires: Peeking Behind the Veil of Ignorance Along the Publicity-Privacy Continuum” (1990-91) 18 Rev. L. & Soc. Change 951 at 976 and Guttman, *supra* note 11.

26. See, e.g., *Webster’s Ninth New Collegiate Dictionary* (Springfield, MA: Merriam-Webster, 1990) at 952.

27. See, e.g., Silvani & Baer, *supra* note 3 at paras. 85-86.

of the law, regulations, IRS pronouncements (e.g. Revenue Rulings) various internal agency communications such as the IRS Manual and technical advice memoranda. Most of this type of publicity does not involve specific taxpayer data, but even when it does, it is not necessary to strip away all privacy. Again, there are existing examples of publicity of taxpayer information that protect privacy—statistical compilations, for example, reveal taxpayer data without breaching privacy at all and even redacted private letter rulings maintain privacy in most situation.

Conceived broadly as simply the provision of information, publicity is a more effective compliance tool than the narrower view of publicity. It provides significantly more opportunities to further both rights to know. Additionally, since much of this publicity can be accomplished without seriously compromising any taxpayer's privacy, it can improve compliance without generating as much opposition as publicity traditionally defined.

### ***B. Rationale of the Proposals***

A successful campaign to reduce non-compliance must be a multi-pronged attack on the tax gap using both incentives and penalties. Publicity, broadly defined, can be an effective tool in such a campaign because it encompasses both. It encourages taxpayers to follow the law by strengthening the social norm of compliance by, for example, providing information about compliance rates, reasons for taxes, and increasing trust in the system. At the same time, publicity strengthens penalties because it increases the chance of getting caught (since members of the public, especially tax experts, can study returns) and it increases chances of public shaming for non-compliance.

Publicity can improve taxpayers' knowledge of the tax law, which in turn, can diminish both intentional and unintentional non-compliance.<sup>28</sup> No matter how compliant a taxpayer wants to be, she will fail if she (or her tax preparer) does not know the law sufficiently well to determine the proper amount of tax. Obviously, knowledge of the specifics of the tax law as it applies to the individual taxpayer can eliminate all sorts of unintentional failures to comply ranging from failure to file, claiming improper deductions, or misstating income. Knowledge about the tax system can also eliminate intentional non-compliance by increasing perceptions that the system is fair. If my marginal rate is 28% and I think that is also my effective

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28. Information can change attitudes. See, e.g. *supra* note 7 and below. Changed attitudes, in turn, can change behavior. See, e.g., Michael Wenzel, "Misperceptions of Social Norms About Tax Compliance (1): a Prestudy" Working Paper No. 7 (June 2001), online: Centre for Tax System Integration <http://ctsi.anu.edu.au/publications> (experimental study corrected participants' misperception of prevalence of tax non-compliance and increased compliance). See, also James S. Fishkin, *The Voice of the People: Public Opinion and Democracy* (New Haven, CN: Yale University Press, 1995) at 214-20 (information and deliberation reduced support for a flat tax from 44% to 30% and increased support for government spending on health and education. Of course, increased information from publicity will not always increase compliance. See, e.g., Marsha Blumenthal, Charles Christian & Joel Slemrod, "Do Normative Appeals Affect Tax Compliance? Evidence from a Controlled Experiment in Minnesota" (2001) 54 Nat'l Tax J. 125 (letter reminding taxpayers of duty to pay tax did not increase compliance). Even worse, increased information may sometimes decrease compliance, as discussed below.

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(or average) rate of tax, I may intentionally cheat because I think 28% is too high a rate. Once I learn what marginal rate means—that it is only the rate on my last dollars earned and that my average is lower—I may willingly pay the proper amount of tax. Similarly, I may know that I am in the 20% bracket, but I may also think the person with an income fifty times larger than mine pays the same rate. If I believe that it is unfair that we both pay the same rate, then I may intentionally pay less than 20%. Such ignorance is widespread. For example, a 2003 poll found that only 60% of respondents knew that high-income taxpayers pay a higher percentage of tax than low-income taxpayers.<sup>29</sup> Publicity that provides this type of information obviously does not impinge on any taxpayers' privacy and should create no objections—at least on privacy grounds.

Publicity can also increase a sense of fairness in the system and a belief that others are complying via comparisons with other taxpayers. These comparisons can be made in a meaningful way but with less invasion of a taxpayer's privacy than fully publicizing a tax return. In fact, many meaningful comparisons can be made statistically without revealing any personal data at all. Even comparisons that require publicizing portions of tax returns, however, can be done in such a way as to minimize privacy invasions.

The four proposals sketched out in Part III.C below attempt to reach a balance between publicity and privacy that will encourage taxpayer compliance while rousing minimal resistance on privacy grounds. They focus on individual taxpayers, although the fourth could apply to all types of taxpayers. The individual is the focus because if compliance rests on taxpayer attitudes, then the government must win the hearts and minds of individuals. Ultimately it is people who decide whether to fill out returns and whether to fill them out truthfully, even if the return is that of a corporation, partnership or some other entity.

The proposals are: 1) Require the IRS to provide each taxpayer an annual tax statement, 2) Include a short insert in the 1040 booklet containing basic information about the tax system and taxes paid, 3) Require each taxpayer who has income withheld to file an annual W-4, and 4) Limited traditional publicity of taxpayer information. Not each proposal will apply to every taxpayer. Some will be more effective with certain types of taxpayers and certain types of income—or levels of income—than others. An annual W-4, for example, will not do much to increase compliance among sole proprietors. Even if taxpayers use tax preparers, the proposals may increase compliance since the preparer works from information that the taxpayer provides. If the Annual Statement, for example, gives the taxpayer a better understanding of the tax system and a better sense of its fairness, then he may be more apt to tell the preparer about cash income that might otherwise go unreported or less likely to label personal expenses as business expenses.

The first three proposals apply solely to individuals and involve publicity only in the expanded sense used in this essay, that is, the government (via the IRS)

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29. Q12, NPR/Kaiser poll, Question 20, NPR/Kaiser/Kennedy School of Government, National Survey of Americans' Views on Taxes 6 (April, 2003), online: National Public Radio [www.npr.org/news/special/polls/taxes/soo3/20030415\\_taxes\\_survey.pdf](http://www.npr.org/news/special/polls/taxes/soo3/20030415_taxes_survey.pdf) at 4 [NPR/Kaiser poll]. (11% thought the rates were the same and 28% didn't know enough to say).

conveys no identifying tax information to the public at large. Rather the communications are solely between the taxpayer and the IRS. These proposals aim solely to increase taxpayer willingness to comply without any increased penalty or threat of enforcement.

Education lies at the core of these three proposals. Much of the information in these proposals is already available to the public, but the mere existence of public information is not enough. It must be delivered effectively so that taxpayers not only receive the information but also can turn it into usable knowledge. Elsewhere I have sketched out an educational campaign aimed at the public at large using the media.<sup>30</sup> These three proposals involve communications between the IRS and the taxpayer on a one-on-one basis. Each however, could be combined with an educational publicity campaign aimed at the public at large, as the brief discussion following the second proposal explains.

The fourth proposal differs in many significant ways from the previous three. First, it is directed at all taxpayers, whether they are individuals or entities. Second, unlike the other three proposals, it involves publicity in the traditional sense of making a portion of tax returns available to the public at large. Third, this proposal carries far greater dangers than the other three. Although there is a possibility that the information conveyed in the first three will increase some taxpayers' antipathy to tax (and so increase their non-compliance), empirical studies—such as those described previously—suggest a greater possibility of the positives outweighing the negatives and thereby increasing compliance. Where the balance falls with the fourth proposal is less clear, especially if the publicity retains characteristics that identify specific taxpayers. By providing taxpayer information to the public at large, this proposal may inevitably contain some stick aspect. Whereas the right to publicity (to know) does not clash with the right to privacy in the first three proposals; there is a direct, head-on collision in the fourth. This clash undoubtedly will create more controversy and more heated opposition than opposition to the other proposals, which probably will be based largely on purely objective administrative grounds of costs and benefits.

These proposals are not presented as fully developed programs ready for implementation but rather as springboards for discussion about increasing tax compliance. They are designed to broaden our thinking and suggest new perspectives from which to attack the tax gap problem. Consequently, some readers may consider them a little “outside the box”, or in the case of the fourth one, “way outside the box”.

### *C. Proposals*

#### *1. Annual Tax Statement*

Every year the Social Security Administration in the U.S. sends wage earners two documents: a four-page document titled “Your Social Security Statement” and a

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30. Marjorie E. Kornhauser, “Educating Ourselves Towards a Progressive (and Happier) Tax” 45 Boston C. L. Rev. [forthcoming 2004].

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two-page document *Thinking of Retiring? Consider Your Options*.<sup>31</sup> The Statement contains both general and personal information. After briefly explaining the purpose of Social Security and how it works, the Statement then provides a record of the individual's own earnings history and projects her estimated benefits. The Options document describes options on retirement and lists sources of more information. The two documents fulfill multiple purposes beyond allowing individuals to check the accuracy of their work history. They educate people as to purpose and funding; they provide a realistic picture of what people have contributed to the system and what they will receive from it. The mere fact that there is a yearly communication helps reduce a sense of distance from the bureaucracy and gives people a sense of ownership.

This proposal suggests that the IRS annually send each taxpayer a similar multi-purpose form—perhaps similarly titled “Your Income Tax Statement”—that provides both personal and educational information designed to increase taxpayers' compliance by increasing their understanding and confidence in the tax system. It would be relatively brief, perhaps six pages like the two combined Social Security documents and provide four types of information: general information about the tax system; some specific information about the individual's last two tax years; comparisons between the individual's tax return and other taxpayers; and information about obtaining more information. An ideal time to send it might be in January shortly after taxpayers receive their tax return forms for the year, when their interest in taxation is particularly high, and sentiments are possibly extremely negative.

The statement should provide clear and concise general information to help diminish, if not eliminate, taxpayers' misunderstanding and ignorance of basic facts about taxation that create barriers to compliance. This information should be provided at several levels and in several places. An introductory section, for example, might convey briefly some of the most basic information about income taxes, such as why a country needs a tax system, why the United States uses an income tax as one of the several taxes it imposes. It might also outline how the income tax system works—explaining, for example, how (and why) deductions and credits work and defining basic terms such as gross income, marginal rates, and progressive tax. Finally, it might explain any major changes in the tax laws from previous years, such as changed rates.

This basic information can help dispel many misperceptions that alienate taxpayers from the system. For example, many people are unaware of the connection between taxing and spending. They may be less averse to paying taxes once they are reminded that these taxes pay for government services they receive. If people understand that some of the law's complexity arises out of a desire to provide greater equity, they often are less frustrated by that complexity.<sup>32</sup> Explaining the difference between marginal and effective rates might decrease reluctance to

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31. Form SSA-7005-SM-S1.

32. See, e.g., Andrew D. Cuccia & Gregory A. Carnes, “A closer look at the relation between tax complexity and tax equity perceptions” (2001) 22 *J. Econ. Psych.* 113.

comply because “tax rates are too high”, when that opinion rests on the incorrect belief that all income is taxed at the marginal rate. If taxpayers underestimate the compliance rate, setting it down on paper may, as the studies show, actually induce other taxpayers to comply. Describing major tax reforms can decrease hostility because many taxpayers are unaware of beneficial changes such as reductions in tax rates.<sup>33</sup>

Some of this basic knowledge would be repeated later in the statement, in connection with a taxpayer’s personal tax history that would record the highlights of a taxpayer’s last two income returns. These highlights might be limited to a few basics such as gross income, taxable income, tax liability, tax credits, marginal and effective rates of tax. The items listed, however, could be more detailed. For example, different sources of income and their tax rates could be listed (e.g. capital gains, interest income) as well as certain important exclusions, deductions, and credits (such as pension exclusions; home interest, retirement, and charitable deductions; and child tax and learning credits). The deductions and credits listed should, at a minimum, be the same ones listed in proposals #2 and #4. The Statement should note prominently which of these deductions and credits become public pursuant to proposal #4.

The statement should also include statistical comparisons between the individual taxpayer’s own tax situation and the average and median of other taxpayers, broken out into income brackets. The statistical information and personal data might be combined in one chart or table. For example, assume the history contains information on tax years 2002 and 2003 consisting of gross income, home mortgage interest deduction, taxable income tax liability, marginal rate of tax, and effective rate of tax. Each year would have a different table that would list the taxpayer’s own relevant data and, at a minimum, next to it the average (and median) for other taxpayers in her income bracket. The Statement might go even further and show the average (and median) for taxpayers in some (or all) of higher or lower brackets.

Although this statistical data are already available to the public, most taxpayers don’t know it exists. If they do know it exists, they may not know how to get it, or may not bother getting it and then comparing it to their own tax situation. Yet knowing this information could have a significant impact on their attitudes towards the fairness of the tax system. It can give them a sense of whether horizontal and/or vertical equity exists. If the information causes them to think the system fair, then, as studies show, their willingness to comply might increase. On the other hand, it is good for the tax system—even if they think the comparisons reveal inequities—because then they may pressure Congress to correct the inequities. For example, a breakdown by income level of the home mortgage interest deduction may decrease support for an unlimited deduction. Thus, the comparisons can help motivate tax reform or simplification.

Since any deduction or credit listed in the annual statement will attract attention (and some not favorable), which deductions are included undoubtedly will be a

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<sup>33</sup> For example, a 2003 poll found that only 50% of respondents knew that there had been tax cuts in the past two years. Q11, NPR/Kaiser poll, *supra* note 27. Knowing that rates are decreasing rather than increasing or staying the same can change one’s attitude about the tax system.

matter of contention. For deductions that are tax expenditures, one method of choosing which deductions to list is the size of the deduction. The process of choosing which deductions to list might itself be useful, regardless of which deductions and credits actually get chosen.

Annual Statements will create some additional costs for the IRS. First, the IRS will have to develop and implement a program that will generate each taxpayer's Annual Statement. Second, the statements will have to be mailed. This latter cost could be eliminated if the Statement were not sent separately in a special mailing but rather were included with the tax return packet that every taxpayer receives at the end of the year. Combining the two into one mailing, however, decreases the number of contacts the taxpayer has with the IRS and so probably decreases the number of times the taxpayer looks at the information. If the two are combined, the Annual Statement should be either physically separate from the 1040 or at least detachable from the 1040 so that the taxpayer can save it separately. A separate Statement would make it more visible and more likely to be read, especially by taxpayers who do not fill out their own returns.

### *2. Insert for 1040 Booklet: Know Your Taxes*

The distribution of income tax forms and instructions provides a wonderful opportunity to disseminate information and educate since people are most interested in the income tax during that painful period when they are actually filling out their return. Of course, many people never fill out their own returns. Nevertheless, they might look at a short, well-designed, easily locatable insert before handing on their forms to a tax preparer.

The *Know Your Taxes* booklet would be linked to the income tax form, making references to specific lines on the form when possible, such as to line 39, viz., taxable income. Much of its information would be similar to the general information contained in the Annual Statement, minus the personalized data. The similarity, however, is a strength, not a weakness, since repetition has recognized educational value. Moreover, the booklet, despite its brevity, could contain more information than provided in the Annual Statement because it would have none of the personalized data. The booklet, however, should—in prominent type—refer the taxpayer to his or her Annual Statement.

*Know Your Taxes*, like the Annual Statement, could begin with a very short explanation of the need for taxes along the lines of: "Taxes provide government with the revenue it needs to fund the goods and services that your representatives in Congress have decided that government should provide." Again repeating the Annual Statement, it could set the income tax within the context of all federal taxes, perhaps adding a graph or pie chart illustrating the sources of federal revenues.

After this brief introduction, the booklet would focus on the basic elements of the tax form, leading the taxpayer through gross income to amount of payment owed (or refund due) and explaining concepts as it does so. For example, it might explain that the income tax does not tax all income that a person receives. It could point out, for example, that even line 22 (gross income) does not include all income

received since it excludes certain types of income such as gifts, certain pension contributions, and the value of health care premiums provided by employers. It would then explain deductions and credits that many people take, such as the home mortgage interest, retirement, and charitable deductions, the personal exemption, and child tax and learning credits. Additionally, it could repeat the average and mean amounts for these deductions for various income groups that were initially provided in the Annual Statement. The items listed here might track those in the Annual Statement and similarly, the insert should note which ones would be subject to public disclosure under proposal #4. Finally, a paragraph or two explaining why certain deductions and credits are phased out could help decrease the frustration taxpayers feel when they are doing a complex computation. If they see its purpose, they will tolerate the complexity more willingly, especially if it benefits them (e.g., a lower capital gains rate) or increases equity (phase outs). The Statement would conclude with an explanation of the difference between marginal and effective tax rates.

In connection with the *Know Your Taxes* booklet and/or the Annual Tax Statement the IRS might present educational “tax information seminars” throughout the country. The purpose of these programs would not be to teach taxpayers how to fill out forms, but like the Statement and the booklet, would be to broaden American taxpayers’ basic understanding of the tax system. The information provided would be similar to that in the annual statements (minus the personal data) and *Know Your Taxes* booklet: why a tax system is needed, how the income tax fits into the tax system, and basics of the income tax. The ideal time to present these seminars is shortly after the Annual Statement and/or 1040s are delivered to households. Receipt of the forms heightens people’s awareness of taxes, but levels of anxiety (and hostility) have not yet peaked since most people will not have begun to fill out the forms.

As with the Annual Statement and the booklet, there is a possibility of a backlash against income taxes. Increased knowledge may increase hostility rather than decrease it. The more people learn, the less they may like what they know—and in a seminar of several hours much can be learned. Nevertheless, the seminars would at least help diminish ignorance of and correct misconceptions about taxes so that any position taxpayers would take—positive or negative—would be more reasoned. Such seminars, then, like the other publicity proposals, would enhance the democratic process by enlightening the populace so that they could knowledgeably express their preferences.<sup>34</sup>

### 3. Annual W-4

Requiring taxpayers to fill out a W-4 annually would serve several purposes. First, it should increase the accuracy of withholding, which in turn, might improve taxpayer attitudes. Periodically, changes in the tax laws<sup>35</sup> or in the taxpayer’s life (e.g.,

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34. See, e.g., James S. Fishkin & Bruce Ackerman, *Deliberation Day* (New Haven, CN: Yale University Press, 2004).

35. Sometimes withholding automatically adjusts, as when rates change, but not always.

miscellaneous income, divorce or change in number of dependents) create a situation in which the amount withheld is no longer adequate to cover a person's tax liability. Although taxpayers are free to file a new W-4, many taxpayers are unaware that they should, or just never get around to doing so. Consequently, an annual compulsory form would better ensure that the proper amount is withheld. Regardless of whether the adjustment is upwards or downwards, the taxpayer's attitude should improve. If it is an upward adjustment, he may be annoyed at the moment, but less annoyed than he will be on April 15th when he realizes he owes more taxes (and possibly penalties for failing to pay estimated taxes). If the adjustment is downward, the taxpayer, of course will be glad to be getting a bigger take-home paycheck.

An annual W-4 might also decrease some intentional non-compliance caused by deliberately claiming too many dependents. If a taxpayer has to claim the deductions every year, he must commit this deception annually. His commitment may have changed due to a change in attitude about taxation or simply because of a reevaluation of the risks. This change may not be enough to motivate him to proactively request a new W-4 to fill out, but it may be enough to cause him to report accurately when he is required to fill out a new form. An annual W-4 could be even more accurate if it required additional information from taxpayers. Many countries require enough information that withholding can be matched so accurately with tax liability that a large portion of taxpayers do not even need to file returns.<sup>36</sup> A return-free system for the majority of taxpayers not only decreases underpayments but also improves taxpayer attitudes since they are no longer plagued by the chore of filling out a return and paying more money. Additionally, the costs of administering a return-free system are significantly lower than systems requiring everyone to file returns.

The Employer should distribute the annual W-4 at the end of the year along with other administrative and tax-related forms such as Flexible Spending Account and health plan forms. This can reduce the irritation caused by having to fill out the form annually because it becomes just one of several forms that an employee must submit as part of the terms of employment. Moreover, including the W-4 in a packet with forms that provide benefits to employees emphasizes the helpful aspect of the W-4 rather than the negative fact that it relates to taxes.

#### *4. Partial Publicity of Tax Returns*

This proposal is the most controversial and the one whose merit is the most questionable. It is most controversial because it is the only one to involve classic tax publicity—that is, the revelation of specific taxpayer information to the public. As such, it is most likely to arouse objections, many of them quite heated on the usual grounds of invasion of privacy—although these may be muted depending on how the information is presented, as discussed below. This proposal's merits are also more questionable than those of the prior proposals because it has a greater downside

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<sup>36</sup> See, William J. Turnier, "PAYE as an Alternative to an Alternative Tax System" (2003) 23 Va. Tax Rev. 205 (describing a more exact withholding system that would eliminate the need for most wage earners to file income tax returns, as is the case in many countries such as the U.K.).

in that objections to it are more likely to generate hostility that can negatively impact compliance. Moreover, it is unclear whether partially publicizing taxpayers' data on a case-by-case basis will add anything to the statistical comparisons made easily available to taxpayers by the first three proposals.

Nevertheless, this publicity proposal has enough positive aspects to merit considering. The particular always gains more attention than the abstract. Americans are very generous to a poor individual whose adversities become widely known via national news, but they are less generous to "the Poor" as a group. We will help to specifically "free Willy" but not to "Save the Whales" as a group. It is especially hard to focus people's attention on tax statistics due to a widespread aversion to—and ignorance of—both anything mathematical and technical. Consequently, publicizing the particulars of taxpayers' information may cause people to concentrate more clearly on tax problems than would otherwise occur. Moreover, a new experiment in publicity may be worth considering in light of the changing nature of privacy and the degree of non-compliance.

Under a partial publicity statute all taxpayers who are required to file a tax return also would be required to file at the same time another form, which I will call a "pink slip," after a similar form required by the Revenue Act of 1934, and so named because of the pink paper on which it was printed.<sup>37</sup> Once filed this form would be a public record, open to inspection and not subject to the confidentiality rules applicable to the returns themselves. Partial publicity can apply to all taxpayers or just certain categories of taxpayers, such as public corporations. Limiting publicity to public corporations has distinct advantages. Not only would it target some of the largest taxpayers (with the largest deficiencies, but it would also focus on a compliance problem much in the public awareness. Moreover, privacy concerns would be less salient when applied to public corporations. Since others have discussed publicity in this area, however, this proposal focuses on publicizing individual returns.

Partial publicity covers a wide spectrum ranging from very narrow to very broad disclosure. There are however, four major continua to consider: quantity of informational items provided (how many different types), degree of specificity of amounts in each category; degree to which identifying taxpayer characteristics are retained, and manner of publicizing the information on the pink slip. On the first continuum, viz., quantity of information, the pink slip could require as little as one piece of information: the name of each taxpayer filing a return. Even this minimalist form could provide information that the public does not currently know because it would reveal the identity of individuals or corporations, known to be prosperous through other public information, who paid no income tax. Although there may be legitimate reasons why a wealthy taxpayer occasionally pays no taxes (huge losses for example), a more frequent lack of any tax liability might indicate that some evasion was occurring, although it would give no indication of what that evasion was. Even if the failure to pay taxes were totally legitimate because of loop-

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37. Revenue Act of 1934, 73rd Cong., 2nd Sess., 48 Stat. 680, 698, §55(b). This form was called the pink slip because of the color of the paper on which it was printed.

holes in the law, the fact that wealthy taxpayers paid no taxes might pressure Congress to eliminate the loopholes, as occurred in 1934 when Senate Hearings revealed that many wealthy people such as J. P. Morgan paid no taxes because of then legitimate losses.<sup>38</sup> Although the IRS already publishes the number of taxpayers paying no tax—without identifying those taxpayers—publicizing actual names generally receives more attention and creates more political pressure for change.

The 1934 pink slip required six pieces of information: name, address, gross income, total deductions, taxable income and tax liability.<sup>39</sup> A modern day pink slip should require all this data, with the possible exception of individual taxpayer's address (to minimize individual's privacy concerns). More information, however, would make it easier to pinpoint where problems arise in the tax system. Consequently a pink slip might include at an individual level some of the same data listed on the annual statement, that is, certain types of income (e.g., capital gains, interest, dividends) and certain important deductions (e.g., home mortgage interest deductions, investment interest deductions, charitable deductions). Any item included in the pink slip should also be included in the annual statement and *Know Your Taxes* booklet, with a notation that these items are subject to disclosure. This prior inclusion not only gives notice to taxpayers that the items are subject to public disclosure but educates taxpayers about them.

Once the items of information are decided upon, the next question is with what precision should they be reported. The more precise the information is, the more helpful it might be, but it is also a greater invasion of privacy. Reporting home mortgage interest, for example, as an exact figure is both more helpful to the public and more intrusive to the individual taxpayer than reporting that the interest falls within a certain range—which is the practice with certain financial disclosures (Congress, for example). Wider ranges protect privacy more, but reveal less meaningful information. If the range is too wide, the information is so vague as to be meaningless.

Perhaps the best compromise between accuracy of information and protection of privacy is to require a taxpayer to report a particular item only if it exceeds the mean (or median) for the taxpayer's income bracket by a certain amount, determined either by absolute variation, percent variation or standard deviations from the mean, which amount would be listed on the pink slip. If an item does need to be reported then the precise amount would be listed. Precision, with its greater invasion of privacy, would be justified at this point because the information obtained is more meaningful.

Moreover, as to deductions that are tax expenditures, there is an even greater justification for this compromise: the taxpayer is receiving a benefit the cost of which is the loss of some privacy. The taxpayer voluntarily cedes some privacy

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38. See, e.g., Kenneth S. Davis, *FDR, The New Deal Years 1933-1937: A History* (New York: Random House, 1986) at 138-40 and Mark H. Leff, *The Limits of Symbolic Reform: the New Deal and Taxation, 1933-1939* (Cambridge and New York: Cambridge University Press, 1984) at 61-62. These revelations occurred in the Senate Banking and Currency hearings on stock market failures.

39. Act of May 10, 1934 §55(b), 48 Stat. 680, 698 (1934).

at this point. If she does not want to do it, then she can limit her deduction to the mean (or median)—which will be listed on the pink slip and will have been printed on the annual statement and in the *Know Your Taxes* booklet. Not only has she received ample prior notification of the publicity but her real actions are not affected: she can still give huge sums to charity or take out a jumbo mortgage. All that will occur is that she will not get as large a deduction as she would if she gave up some privacy. Unlike other invasions of privacy, this one is her choice. Moreover, this type of tradeoff occurs in the commercial world. Consumers, for example, can get free or reduced priced goods or services (especially in connection with the Internet) if they give up some of their privacy. The government is even contemplating this tradeoff in connection with airport security.<sup>40</sup>

On the third continuum, degree of identifying information, publicity can co-exist with a high degree of anonymity. It would be possible, for example, to publish all the information on the pink slip but black out the taxpayer's name. The IRS already removes identifying data from many of the documents it publishes under the Freedom of Information Act, such as private letter rulings. In most cases this preserves the taxpayer's privacy, although in a few cases, the information might be unique, so knowledgeable third parties could determine who the taxpayer is. In the pink slip context, it would probably be rare for the information to be so unique as to reveal a taxpayer's identity. Although the IRS already makes this information available, for a fee, this fact is not widely known outside of scholarly circles. Making pink slips into public records would make more people aware of the availability of the information and because of the limited amount of data on the form, presumably reduce its cost. Although stripping the identity off the pink slip reduces privacy invasions, it also reduces the ability to motivate the general public to action, as described above.

The last continuum—form of permissible dissemination of information—can have important consequences but in actuality there may be no real choice. In theory, the law could define publicity narrowly by requiring each taxpayer to apply to the IRS to access the information and then forbidding further dissemination. Such limited dissemination would significantly lessen the impact of publicity as compared to a law that allowed the tax information to be accessed on the Internet and freely disseminated. Total dissemination, however, seems more likely and in some ways more desirable. On a practical level, given the state of technology and human nature, such restrictions on publicity seem impossible to enforce. If some people will inevitably gain access to the information, it seems fairer to make it accessible to all. Moreover, limiting the access to the information seems to contradict the very reason publicity would be enacted.<sup>41</sup> Consequently, these proposals assume that

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40. The tradeoff in this context is that passengers will have a speedier security check-in if they have submitted detailed information in advance.

41. Such limitations would make it hard for many people, especially poorer people, to get access to the information and would also lessen the effectiveness of the publicity. In 1925, the Supreme Court permitted newspaper publication of lists of taxpayers and the amounts of tax paid, stating that such publication was within congressional intent when it made this information a public record. *United States v. Dickey*, 268 U.S. 378 (1925).

any information made public could be re-broadcast without regard to the medium or manner of the republication.

As to the other continua, this essay suggests a moderate approach. Publicizing the exact amount of income plus many deductions and credits would generate so much hostility that near instantaneous repeal (assuming the law could even be passed) is practically assured. Moreover, such detailed information might not even be necessary to increase compliance. On the other hand, requiring only taxpayer name and amount of tax would only minimally invade privacy but, unfortunately, would not produce enough information to be meaningful. Nevertheless, it might still arouse enough hostility to force a repeal, thereby ending the publicity experiment, as in the past, without really having tested its merits. A moderate approach, on the other hand, minimizes the invasion of privacy while still publicizing enough information to promote increased compliance. Under this approach, the pink slip would contain:

1. **Taxpayer's name.**
2. **Taxpayer's (almost) exact address.** Many people feel that the revelation of their exact address is both an invasion of privacy and an invitation to criminals. This information, however, is already available in many places such as property tax rolls, phone books (for the majority of people who have listed numbers). The advent of the Internet has made this information widely and easily accessible. Without the exact address of the taxpayer, it is impossible to tell which John Smith the taxpayer is. Possibly, the address could omit the house number and just list the block (e.g., the 100 block of Main Street, or even between 100 and 300 Main St.). This less precise address would still identify the taxpayer but would provide some minimal protection from casual curiosity seekers. If they wanted to know the taxpayer's house, they would have to go through an additional step to find out, via the Internet most likely, the exact address.
3. **Income.** Gross and taxable income should be listed within narrow income ranges that give more privacy protection than exact amounts but are narrow enough to provide meaningful information.
4. **Capital gains:** This could include dividends taxed at capital gains rates. The amount could alternatively be listed as a narrow range, as in #2, and/or as a percent of income. Alternatively, the form could simply state whether the amount of the taxpayer's capital gain exceeds the mean and median for the income range by more than a certain percentage such as 5 or 10%. Of course, the means and median would be listed on the form as well. If this item is on the pink slip then it should also be included in the Annual statement and the *Know Your Taxes* booklet. Such inclusion will increase taxpayers' knowledge of capital gains as well as provide them with advance notice that this item is subject to publicity.
5. **Exclusions, deductions, and credits.** The items in this category would mirror those in the Annual statement and the *Know Your Taxes* booklet. They would be chosen based on criteria that might influence compliance such as the overall

(national) dollar amount of the item, whether it is a tax expenditure, and its equitable distribution among taxpayers. Using these criteria, items such as retirement/pensions, home mortgage interest and charitable deductions, and Hope and Learning credits would be listed. For each item the pink slip would list the mean/median for the income brackets. If the taxpayer's amount exceeded those amounts by more than a certain percentage, the form would so note.

6. **Tax rates:** The pink slip would note the taxpayer's marginal and effective tax rates next to the mean/median for taxpayers in a similar bracket.

The above listed items (and the manner of reporting them) are suggestions only. They were chosen either because they provide basic information needed for publicity (such as name) or because they have important implications for tax policy and compliance because of their large economic and/or equitable effects. Further debate and reflection can fine-tune the details of the first pink slip. If a pink slip is actually enacted, actual experience will certainly alter it further.

#### IV. Conclusion

Modern research shows that a variety of factors—not just fear of getting caught—motivate compliance with tax laws. Since publicizing tax information can foster social norms of compliance as well as strengthen more traditional enforcement techniques, it can be a powerful tool in the battle to lower the tax gap. Unfortunately, publicity as conventionally defined—making taxpayer return information public records—also eliminates taxpayer privacy. Although privacy norms and the public/private divide today are far different than they were when tax publicity was tried in the past, many people would still view classic full tax publicity as a serious invasion of privacy, which could arouse hostility that might, ironically, lead to more non-compliance.

This essay suggested broadening the conception of tax publicity beyond the traditional notion of broadcasting particular taxpayer information to the public at large. It adopted a dictionary definition of publicity as the dissemination of information. Tax publicity, using this expanded definition, can further citizens' fundamental right to know by effectively transmitting tax information from the government to individual. Moreover, since much of this type of publicity is educational only, it encroaches far less on privacy than traditional publicity. Consequently, it should also generate far less opposition, thus increasing publicity's effectiveness as a compliance tool.

The essay then outlined four publicity proposals to stimulate discussion. Not every proposal will reach every type or income level of taxpayer, but as a totality, they should reach a broad range of taxpayers. Three used the expanded definition of publicity and focused on individual taxpayers. They are essentially education programs that should deliver general tax information to taxpayers more effectively than currently occurs. The fourth, and most controversial, used traditional publicity, but attempted to lessen the negative impact such publicity creates because of invasions of privacy. All the proposals, of course, will cost some money, but probably

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less than the costs of enforcing compliance only through increased audits and litigation. They may also have psychic and political costs. Although recent studies show that more informed taxpayers are often more compliant, some of the information may trigger negative attitudes which would decrease compliance and/or create pressure for lower taxes.

In light of the possibly adverse consequences of more publicity, some people may think more knowledge and transparency in the tax system is not desirable. Indeed, it has even been suggested that what is needed in the tax arena is less publicity—less transparency—not more.<sup>42</sup> Such a policy, however, seems unduly cynical given the evidence that knowledge and deliberation can change attitudes and behavior. Moreover, such a policy is certainly inconsistent with democratic governance. More publicity—in the sense of a wider, more effective dissemination of information—could have salutary effects regardless of taxpayer reactions to the increased information—especially if it occurred in the context of a rational debate by elected officials about tax policy (instead of the current inflammatory rhetorical sound bites they now produce). On the one hand, if taxpayers react positively to publicity, compliance would increase. If taxpayers act negatively, and their hostility to taxes increase, at least the publicity will arm them with more precise information that will allow them to focus their objections to the income tax and thereby lobby more effectively for real tax reform.

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42. See, e.g., Thomas F. Field, "The Emperor Has No Clothes" (1 December 2003) 101 *Tax Notes* 1125 online at 2003 TNT 231-22 (because people object to taxes, we should replace visible taxes such as the income tax with less visible taxes such as sales and consumption taxes).