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# In Defense of Individual Tax Privacy

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## IN DEFENSE OF INDIVIDUAL TAX PRIVACY

*Joshua D. Blank\**

*The debate over whether tax privacy—a set of statutory rules that prohibits the federal government from publicly releasing any taxpayer’s tax return—promotes individual tax compliance is as old as the income tax itself. It dates back to the Civil War and resurfaces often, especially when the government seeks innovative ways to collect tax revenue more effectively. For over 150 years, the tax privacy debate has followed predictable patterns. Both sides have fixated on the question of how a taxpayer would comply with the tax system if he knew other taxpayers could see his personal tax return. Neither side, however, has addressed the converse question: How would seeing other taxpayers’ returns affect whether a taxpayer complies? This Article probes that unexplored question and, in doing so, offers a new defense of individual tax privacy: that tax privacy enables the government to influence individuals’ perceptions of its tax-enforcement capabilities by publicizing specific examples of its tax-enforcement strengths without exposing specific examples of its tax-enforcement weaknesses. Because salient examples may implicate well-known cognitive biases, this strategic-publicity function of tax privacy can cause individuals to develop an inflated perception of the government’s ability to detect tax offenses, punish their perpetrators, and compel all but a few outliers to comply. Without the curtain of tax privacy, by contrast, individuals could see specific examples of the government’s tax-enforcement weaknesses that would contradict this perception. After considering this new defense of individual tax privacy in the context of deterrence and reciprocity models of taxpayer behavior, I argue that the strategic-publicity function of tax privacy likely encourages individuals to report their taxes properly and that it should be exploited to enhance voluntary compliance.*

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## INTRODUCTION

*The IRS has always been like the Wizard of Oz in some respects: you lift up the curtain and you see the ropes and pulleys. It appears to be all-powerful and all-seeing, yet it really isn't.*

—Jerome Kurtz

Commissioner of Internal Revenue (1977–1980)<sup>1</sup>

The debate over whether tax privacy promotes individual tax compliance is as old as the income tax itself.<sup>2</sup> In 1862, when Congress first instituted the income tax to pay for the Civil War, it required the names of taxpayers and their tax liabilities to be open to public inspection.<sup>3</sup> Since then, Congress has repealed,<sup>4</sup> enacted,<sup>5</sup> and repealed again<sup>6</sup> similar measures, each time after vigorous discussion of the relationship between tax privacy and individual tax compliance. Today, our tax privacy rules prohibit the federal government from publicly releasing the details of any specific taxpayer's tax return or audit history unless the taxpayer consents.<sup>7</sup> But debate over this question resurfaces often,<sup>8</sup> especially when the government seeks innovative ways to address the "tax gap," or the difference between the amount of tax that taxpayers should pay and the amount that they actually pay voluntarily and on time, which was estimated at \$345 billion annually in 2006.<sup>9</sup>

Defenders of tax privacy have long contended that it encourages individual tax compliance because, without it, taxpayers would limit the information that they disclose to the government. Because the individual tax return contains so much sensitive personal information, defenders of tax privacy suggest that taxpayers might feel vulnerable to embarrassment or harassment if others

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<sup>1</sup> Alex Taylor III, *Testing Time for the Tax Collectors*, FORTUNE, Apr. 14, 1986, at 82, 82 (internal quotation marks omitted).

<sup>2</sup> As Boris Bittker commented in 1981, this question "was not invented yesterday." Boris I. Bittker, *Federal Income Tax Returns—Confidentiality vs. Public Disclosure*, 20 WASHBURN L.J. 479, 480–81 (1981).

<sup>3</sup> Act of July 1, 1862, ch. 119, §§ 15, 19, 12 Stat. 432, 437, 439 (repealed 1870). Congress actually passed the first income tax in 1861, though it went into effect in January 1862 and was repealed later that year before any taxes were collected. Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 292, 309 (repealed 1862).

<sup>4</sup> Act of July 14, 1870, ch. 255, § 11, 16 Stat. 256, 259.

<sup>5</sup> Revenue Act of 1934, ch. 277, § 55(b), 48 Stat. 680, 698 (repealed 1935).

<sup>6</sup> Act of Apr. 19, 1935, ch. 74, 49 Stat. 158, 158–59.

<sup>7</sup> I.R.C. §§ 6103(a), (b)(2), (c) (2006).

<sup>8</sup> See, e.g., Anna Bernasek, *Should Tax Bills Be Public Information?*, N.Y. TIMES, Feb. 14, 2010, at BU11.

<sup>9</sup> OFFICE OF TAX POL'Y, U.S. DEP'T OF THE TREASURY, A COMPREHENSIVE STRATEGY FOR REDUCING THE TAX GAP 5–6 (2006).

could view it.<sup>10</sup> As a result, many defenders of tax privacy have speculated that individual taxpayers will comply with the tax system only if they trust that their personal tax information “stops with the government.”<sup>11</sup>

The contemporary tax-compliance literature, however, reveals palpable skepticism toward the taxpayer-trust theory of tax privacy. Many scholars have questioned the hypothesis that, in the absence of tax privacy, individuals would withhold important personal information from the IRS.<sup>12</sup> Several of these scholars have suggested that tax privacy no longer plays as critical a role in fostering tax compliance as it did in the past.<sup>13</sup> By lifting the curtain of tax privacy, these scholars argue that public access to tax return information would cast “[m]illions of eyes”<sup>14</sup> on tax returns, serving as an “automatic enforcement device.”<sup>15</sup>

For over 150 years, the tax privacy debate has followed familiar patterns. Because neither side has offered a convincing prediction of taxpayers’ reactions to the threat of public disclosure of their tax returns, the question of whether tax privacy promotes individual tax compliance has swung back and forth between these two sides. Both sides have fixated on the question of how a taxpayer would comply with the tax system if she knew other taxpayers could see her personal tax return. Neither side, however, has addressed the converse

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<sup>10</sup> See, e.g., 79 CONG. REC. 2594 (1935) (statement of Rep. Alfred Beiter).

<sup>11</sup> 1 OFFICE OF TAX POLICY, DEP’T OF THE TREASURY, REPORT TO THE CONGRESS ON SCOPE AND USE OF TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS 19 (2000) (attributing the quote to Andrew Mellon).

<sup>12</sup> See, e.g., Marjorie E. Kornhauser, *Doing the Full Monty: Will Publicizing Tax Information Increase Compliance?*, 18 CAN. J.L. & JURISPRUDENCE 95, 113 (2005) (proposing the enactment of a modern-day “pink slip” statute for the public disclosure of some tax information); Marc Linder, *Tax Glasnost’ for Millionaires: Peeking Behind the Veil of Ignorance Along the Publicity–Privacy Continuum*, 18 N.Y.U. REV. L. & SOC. CHANGE 951 (1990–1991) (proposing the publication of millionaires’ tax returns); Stephen W. Mazza, *Taxpayer Privacy and Tax Compliance*, 51 U. KAN. L. REV. 1065, 1120–43 (2003) (proposing additional disclosure exceptions to I.R.C. § 6103); Paul Schwartz, *The Future of Tax Privacy*, 61 NAT’L TAX J. 883, 895–96 (2008) (arguing that, due to the wide availability of information about individuals, tax privacy laws’ effects are generally reduced); Joseph J. Thorndike, *Show Us the Money*, 123 TAX NOTES 148, 148–49 (2009) [hereinafter Thorndike, *Show Us the Money*] (arguing for public access to individual taxpayers’ tax returns); Joseph J. Thorndike, *The Thorndike Challenge*, 122 TAX NOTES 691, 691–92 (2009) [hereinafter Thorndike, *The Thorndike Challenge*] (arguing for the release of politicians’ tax returns); Bernasek, *supra* note 8 (quoting Professor Laurence J. Kotlikoff as saying that “[d]isclosure could be an automatic enforcement device” (internal quotation marks omitted)).

<sup>13</sup> See, e.g., Kornhauser, *supra* note 12, at 101–03; Schwartz, *supra* note 12, at 895–96; Thorndike, *The Thorndike Challenge*, *supra* note 12, at 691.

<sup>14</sup> Thorndike, *The Thorndike Challenge*, *supra* note 12, at 691.

<sup>15</sup> Bernasek, *supra* note 8 (internal quotation mark omitted) (quoting Professor Kotlikoff’s statement).

question: How would seeing *other* taxpayers' returns affect whether a taxpayer complies?

This Article probes that unexplored question and, in doing so, offers a new defense of individual tax privacy: that tax privacy enables the government to influence individuals' perceptions of its tax-enforcement capabilities by publicizing specific examples of its tax-enforcement strengths without exposing specific examples of its tax-enforcement weaknesses. The government publicizes specific examples whenever it reveals the details of any named individual's tax controversy.<sup>16</sup> Because salient examples may implicate well-known cognitive biases, this strategic publicity function of tax privacy can cause individuals to develop an inflated perception of the government's ability to detect tax offenses, punish their perpetrators, and compel all but a few outliers to comply. Without the curtain of tax privacy, by contrast, individuals could see specific examples of the government's tax-enforcement weaknesses that would contradict this perception. After considering this new defense of individual tax privacy in the context of deterrence and reciprocity models of taxpayer behavior, I argue that the strategic publicity function of tax privacy likely encourages individuals to report their taxes properly and that it should be exploited to enhance voluntary compliance.

An initial reaction to my portrayal of tax privacy may be one of skepticism. After all, the government releases voluminous tax-enforcement statistics to the public every year.<sup>17</sup> But this reaction ignores how the human brain processes specific examples compared to anonymous statistics. Specific examples may include a description of a person's identifying traits, such as a name, occupation, and physical features. Unlike anonymous statistics, these examples may cause individuals to create vivid mental images of particular people or events that they "see[] with the mind's eye."<sup>18</sup> Drawing on behavioral research, I show that information about specific tax-enforcement actions, where the taxpayers are named and their tax controversies are described, are much more likely to influence individual taxpayers than faceless tax-enforcement statistics posted on the IRS website. Salient examples may implicate an individual taxpayer's cognitive biases, or mental shortcuts, that she uses to make

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<sup>16</sup> See Joshua D. Blank & Daniel Z. Levin, *When Is Tax Enforcement Publicized?*, 30 VA. TAX REV. 1, 8 (2010).

<sup>17</sup> See, e.g., IRS, DEP'T OF THE TREASURY, INTERNAL REVENUE SERVICE DATA BOOK, 2010 (2011), available at <http://www.irs.gov/pub/irs-soi/10databk.pdf>.

<sup>18</sup> Marlene Behrmann, *The Mind's Eye Mapped onto the Brain's Matter*, 9 CURRENT DIRECTIONS PSYCHOL. SCI. 50, 50 (2000) (internal quotation marks omitted).

decisions and judgments.<sup>19</sup> By provoking these cognitive biases, salient tax-enforcement examples may influence the individual's perceptions and beliefs regarding certain elements of the tax system, which, in turn, may affect her decision to comply with the tax law.

In developing my defense of individual tax privacy, I perform the following thought experiment: I compare examples of tax enforcement involving specific taxpayers that individuals see under our current tax privacy rules to the examples of tax enforcement against specific taxpayers that they could see in a regime in which all tax return information—taxpayers' tax returns, tax liabilities, audit statuses, and settlement agreements with the IRS—were publicly accessible. By comparing a world with tax privacy to a world without it, this experiment highlights the effects of tax privacy on individual taxpayers' perceptions. I then examine the impact of these different examples on individual tax compliance under both deterrence<sup>20</sup> and reciprocity<sup>21</sup> models of taxpayer behavior.

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<sup>19</sup> For a review of a small portion of this massive body of literature, see generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 17–39 (Penguin Books rev. ed. 2009) (2008); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: A Response to Market Manipulation*, 6 ROGER WILLIAMS U. L. REV. 259 (2000) (arguing that, in response to market manipulation that exploits psychological mental shortcuts, enterprise liability provides a solution); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999) (detailing the evidence of market manipulation by companies seeking to exploit psychological traits of consumers); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999) [hereinafter Hanson & Kysar, *The Problem*] (suggesting the existence of market manipulation by economic actors controlling the form of presented information and thereby exploiting consumers' psychological traits); Howard Latin, "Good" Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193 (1994) (arguing that certain kinds of product warnings may take advantage of consumers' cognitive biases and therefore wrongfully insulate manufacturers in tort suits); Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295 (2003) (suggesting that the connection between behavioral economics and law should be illuminated by a study of social influences' effects on individuals' behavior); and Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3 (Daniel Kahneman et al. eds., 1982) (explaining various cognitive biases). For a discussion of cognitive biases in the tax context, see Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1961 (1994); Edward J. McCaffery & Jonathan Baron, *Heuristics and Biases in Thinking About Tax*, in 96 PROC. ANN. CONF. ON TAX'N 434 (2003); Edward J. McCaffery & Joel Slemrod, *Toward an Agenda for Behavioral Public Finance*, in *BEHAVIORAL PUBLIC FINANCE* 3 (Edward J. McCaffery & Joel Slemrod eds., 2006); and Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. ON REG. 253 (2011).

<sup>20</sup> See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (discussing the deterrence justification, among others, of criminal punishment); Alex Raskolnikov, *Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 COLUM. L. REV. 569 (2006) (discussing the deterrence model and applying it to strategies to decrease tax avoidance).

<sup>21</sup> See Ernst Fehr & Simon Gächter, *Reciprocity and Economics: The Economic Implications of Homo Reciprocans*, 42 EUR. ECON. REV. 845 (1998) (applying reciprocity theory to various economics scenarios);

By placing specific examples of strong tax-enforcement actions in front of the curtain of tax privacy, the government plays an active role in shaping perceptions of individual taxpayers. First, salient examples of the government's detection of the abusive tax activities of specific taxpayers may cause individuals to increase their own subjective probabilities that the government will detect them if they engage in aggressive or abusive tax planning. The media often work in tandem with the government by publicizing the government's tax-enforcement actions against specific taxpayers.<sup>22</sup> Second, individuals may also perceive that tax penalties are significantly greater than they are under the tax law because the government's public announcements and media reports regarding specific taxpayers who have received tax penalties almost exclusively highlight criminal sanctions and high civil tax penalties.<sup>23</sup> Finally, individuals may perceive that an IRS agent's challenge would likely mean a government victory in court because the government wins the overwhelming majority of publicly announced criminal and civil tax disputes with specific taxpayers.<sup>24</sup>

If the curtain of tax privacy were lifted, however, many contradictory examples could appear that could alter individuals' perceptions of the government's tax-enforcement capabilities. First, public access could decrease individuals' current perceptions of the IRS's ability to detect abuse by enabling the media, and ultimately ordinary citizens, to observe concrete examples of specific celebrities, politicians, and personal acquaintances who engaged in sophisticated tax-avoidance schemes or failed to report income, yet appeared to escape IRS detection.<sup>25</sup> Second, in a public-access regime, the media could uncover memorable examples that would lower individuals' perceptions of the magnitude of tax penalties, such as instances in which well-known taxpayers paid low tax penalties or entered into IRS amnesty programs without paying

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Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71 (2003) (discussing the reciprocity model and applying it to collective-action problems); Samuel Bowles & Herbert Gintis, *Is Equality Passé? Homo Reciprocans and the Future of Egalitarian Politics*, BOS. REV., Dec. 1998/Jan. 1999, at 4 (explaining variations of reciprocity theory and tracing their histories).

<sup>22</sup> See *infra* note 148 and accompanying text (discussing the availability heuristic).

<sup>23</sup> See *infra* notes 194–98 and accompanying text (discussing the anchoring bias created by publicized, strong tax penalties).

<sup>24</sup> See *infra* note 206 and accompanying text (discussing the availability heuristic related to publicized examples of government victories in tax controversies).

<sup>25</sup> See *infra* notes 249–50 and accompanying text (discussing the availability heuristic related to public perception of recognizable taxpayers claiming improper tax positions without facing IRS penalties or detection).

any tax penalties, civil or criminal.<sup>26</sup> Last, without tax privacy, the media could alter individuals' perceptions of the IRS as a litigation Goliath by publicizing specific tax controversies in which the government made legal concessions or entered into settlements to avoid facing uncertain odds in court.<sup>27</sup> Because the media tend to focus closely on any missteps of the IRS,<sup>28</sup> it would likely disseminate these specific examples widely.

By enabling the government, with the help of the news media, to influence individual taxpayers' perceptions of its tax-enforcement capabilities, tax privacy may bolster the government's deterrence efforts. Because tax privacy allows the government to publicize examples of strong tax enforcement against specific taxpayers almost exclusively, the government may inflate taxpayers' perceptions of the two principle determinants of deterrence: the probability of detection and the expected costs of noncompliance.<sup>29</sup> Without tax privacy, examples of weak tax enforcement against specific taxpayers could surface and have the opposite effect on individuals' perceptions and tax-compliance decisions.

In addition to enhancing deterrence, the strategic-publicity function of tax privacy may also enable the government to increase confidence among compliant individual taxpayers who are motivated by feelings of reciprocity. According to reciprocity theory, these types of taxpayers will comply with the tax system only if they believe that other taxpayers are paying their taxes honestly.<sup>30</sup> Because tax privacy primarily causes individuals to see examples of tax enforcement that show the government catching tax cheats and subjecting them to harsh punishment, compliant individuals may perceive that few of their fellow taxpayers cheat and that those who do face dire consequences. Without tax privacy, visible examples of the government's failure to detect or penalize noncompliant taxpayers could appear and have negative tax-compliance effects on individuals whose voluntary compliance is conditional on that of other taxpayers.

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<sup>26</sup> See *infra* Part II.B.2.b (discussing the availability heuristic and anchoring bias created by publicized examples of weak tax penalties).

<sup>27</sup> See *infra* notes 276–77 (discussing the availability heuristic arising from publicized examples of IRS concessions in tax controversies).

<sup>28</sup> See *infra* notes 272–75 and accompanying text.

<sup>29</sup> See sources cited *supra* note 20.

<sup>30</sup> Kahan, *supra* note 21, at 80–85; *cf.* Fehr & Gächter, *supra* note 21, at 854–57 (discussing reciprocity theory as it relates to the enforcement of various social norms); Bowles & Gintis, *supra* note 21 (discussing reciprocity theory generally).

Should we embrace tax privacy's role in supporting the government's efforts to influence individuals' perceptions of its tax-enforcement capabilities, or should we pay more attention to the "man behind the curtain"?<sup>31</sup>

I offer three arguments in support of individual tax privacy and its strategic-publicity function. First, even though tax privacy may enable the government to influence individuals' perceptions, it does not cause the government to sacrifice transparency, a hallmark of liberal democracy.<sup>32</sup> Because the government discloses actual tax-enforcement statistics on the IRS website and in other public sources regularly, it is not guilty of deception or dishonesty. Second, it is more politically feasible for the government to rely on tax privacy to influence individuals' subjective probabilities of detection and punishment, rather than to raise *actual* tax penalties or audit rates.<sup>33</sup> Finally, the strategic-publicity function of tax privacy may have a beneficial effect on "tax morale," or the "intrinsic motivation" of citizens to cooperate with the government and pay taxes,<sup>34</sup> by preserving individuals' trust in the government and its ability to deliver goods and services.<sup>35</sup> For these reasons, the strategic-publicity function of tax privacy should be exploited as a means of enhancing voluntary compliance.

Potential objections to my defense of individual tax privacy include that the strategic-publicity function of tax privacy causes the government to act in a paternalistic manner, which some may view as a threat to individuals' freedom of choice,<sup>36</sup> that it invites uninformed public debate over tax reform, and that it presents a risk of harm to the government's credibility.<sup>37</sup>

None of these objections, however, is strong enough to outweigh the potential tax-compliance benefits of the strategic-publicity function of tax privacy. The primary implication of my analysis, consequently, is that individual tax return information should remain private except when the government engages in a public tax-enforcement action against an individual

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<sup>31</sup> THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939) (Dorothy: "Who are you?" Oz's Voice: "Oh—I—Pay no attention to that man behind the curtain. Go—before I lose my temper! The Great and Powerful—Oz—has spoken!").

<sup>32</sup> See *infra* notes 333–49 and accompanying text.

<sup>33</sup> See *infra* notes 353–68 and accompanying text.

<sup>34</sup> Bruno S. Frey & Benno Torgler, *Tax Morale and Conditional Cooperation*, 35 J. COMP. ECON. 136, 140 (2007).

<sup>35</sup> See *infra* notes 365–83.

<sup>36</sup> See, e.g., Richard A. Epstein, *Second-Order Rationality*, in BEHAVIORAL PUBLIC FINANCE, *supra* note 19, at 355.

<sup>37</sup> See *infra* Part III.B.2–3.

taxpayer. After providing support for my defense of individual tax privacy and responding to potential objections, I consider its implications for proposals to publicize individual tax return information that have been offered in recent years.

Before proceeding, I should emphasize that the analysis in this Article is confined to the effects of tax privacy on individual tax compliance. As a result of significant differences between corporations and individuals,<sup>38</sup> I do not examine the effect of tax privacy on tax compliance by corporate taxpayers here. Further, because my primary objective in this Article is to investigate how tax privacy affects the tax-compliance decisions of individual taxpayers, I do not examine tort, constitutional, and other justifications for tax privacy or for a right to privacy generally.<sup>39</sup>

The remainder of this Article is presented as follows: Part I reviews the debate over the relationship between tax privacy and individual tax compliance. Part II presents the strategic-publicity function of tax privacy and applies it to deterrence and reciprocity models of tax compliance. Part III offers normative support for the strategic-publicity function of tax privacy, addresses potential objections, and outlines possible implications.

## I. THE TAX PRIVACY DEBATE

Proposals to make all or a portion of individual income tax returns publicly accessible have appeared frequently throughout the history of the United States, particularly when the government has sought innovative ways to collect

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<sup>38</sup> For general discussion on this point, see V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1497–1512 (1996) (describing differences between individual criminal liability and corporate criminal liability). In the tax-compliance context, special considerations include the inside knowledge of corporate tax directors regarding IRS tax-enforcement practices, lack of personal liability for tax penalties at issue, noncompliance that is observable from a corporate tax return compared to an individual tax return, and preexisting public access to information regarding the tax affairs of other corporations from sources other than tax returns. I may reexamine my analysis of tax privacy and tax compliance in the context of corporate taxpayers in future work. In addition, as a result of differences between individuals and tax-exempt organizations, I do not consider the tax-compliance effects of the publication of IRS, DEP'T OF THE TREASURY, OMB No. 1545-0047, FORM 990: RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX (2010).

<sup>39</sup> For discussion, see *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (describing constitutional “zones of privacy”); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960) (stating elements of privacy under tort law); and Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 211 (1890) (arguing that the common law right to privacy protects each individual’s “inviolable personality”). For further history on the right to privacy, see generally Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1 (1979).

tax revenue more effectively. Debate over these proposals always addresses the question of whether tax privacy causes individuals to be more or less likely to comply with the tax system. This Part reviews the evolution of tax privacy from the Civil War to the present, summarizes the traditional justification for tax privacy as a means of encouraging individual tax compliance, and describes—then critiques—recent opposition to the traditional justification.

### A. *The Evolution of Tax Privacy*

Public access to individual tax return information in the United States has fluctuated widely over time, ranging from broad accessibility when the income tax was first introduced<sup>40</sup> to the extensive restrictions on public disclosure that are in effect today.<sup>41</sup>

*The Civil War.* As the financial costs of the Civil War mounted and borrowing became an unsustainable source of funding,<sup>42</sup> Congress enacted the nation's first income tax in 1861<sup>43</sup> and added public-access provisions in 1862.<sup>44</sup> Soon after creating the new tax system, Congress required the Commissioner to permit public inspection of complete tax returns and the “proceedings of the assessors.”<sup>45</sup>

Within the next two years, major newspapers began publishing the details of individuals' tax returns. By 1865, the *New York Times* regularly published a front-page feature titled *Our Internal Revenue*, which listed the income tax liabilities of prominent New Yorkers.<sup>46</sup> A July 8, 1865 feature, for example, listed the tax liabilities of rich and famous citizens such as William B. Astor (\$1.3 million), Cornelius Vanderbilt (\$576,551), and Samuel Lord

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<sup>40</sup> See Act of July 1, 1862, ch. 119, §§ 15, 19, 12 Stat. 432, 437, 439 (repealed 1870).

<sup>41</sup> I.R.C. § 6103 (2006). For detailed discussion of the history of public access to tax returns, see HOWARD M. ZARITSKY, CONG. RESEARCH SERV., HJ5001A, LEGISLATIVE HISTORY OF TAX RETURN CONFIDENTIALITY: SECTION 6103 OF THE INTERNAL REVENUE CODE OF 1954 AND ITS PREDECESSORS (1974); PRIVACY PROTECTION STUDY COMM'N, THE CITIZEN AS TAXPAYER 1–3, 25–28, 54 (1977); Richard D. Pomp, *The Disclosure of State Corporate Income Tax Data: Turning the Clock Back to the Future*, 22 CAP. U. L. REV. 373, 378–405 (1993); and Schwartz, *supra* note 12, at 884–87.

<sup>42</sup> See ZARITSKY, *supra* note 41, at 3; JOHN F. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX 67 (1985).

<sup>43</sup> Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 292, 309 (repealed 1862).

<sup>44</sup> Act of July 1, 1862 §§ 15, 19.

<sup>45</sup> Act of June 30, 1864, ch. 173, § 19, 13 Stat. 223, 228.

<sup>46</sup> See, e.g., *Our Internal Revenue: The Eighth Collection District and Its Official Lists*, N.Y. TIMES, July 11, 1865, at 1; *Our Internal Revenue: The Fifth Collection District in Full*, N.Y. TIMES, July 16, 1865, at 5; *Our Internal Revenue: The Sixth Collection District in Full*, N.Y. TIMES, July 8, 1865, at 5; *Our Internal Revenue: The Third (Brooklyn) District Complete*, N.Y. TIMES, June 30, 1865, at 1.

(\$183,630).<sup>47</sup> The paper's editors noted that they chose to publish only information that was "not a source of annoyance to the parties concerned," rather than publishing entire income tax returns "for the gratification of an idle or morbid curiosity."<sup>48</sup>

In just a few years, however, public support for the income tax waned and so too did support for making returns public. Congress prohibited the publication of income tax return information in 1870,<sup>49</sup> just before repeal of the income tax itself.<sup>50</sup>

*Early Twentieth Century.* The issue of tax privacy next arose in the early twentieth century, shortly after the Sixteenth Amendment was ratified to authorize an income tax.<sup>51</sup> In 1913, Congress instructed that all tax returns would be open to public inspection, subject to an order of the President under rules prescribed by the Treasury Secretary.<sup>52</sup> In 1924, progressive U.S. Senators expanded public access by spearheading legislation that permitted the public to view the amount of income tax paid by every taxpayer.<sup>53</sup>

Throughout late 1924 and much of 1925, individuals' tax return information received extensive coverage in the press. After months of anticipation,<sup>54</sup> on October 24, 1924—the day after the Commissioner of Internal Revenue released the tax lists—the *New York Times* published a front-page article titled, in large, bold letters, *INCOME TAX RETURNS MADE PUBLIC; J.D. ROCKEFELLER JR. PAID \$7,435,169* and subtitled *Anyone*

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<sup>47</sup> *Our Internal Revenue: The Sixth Collection District in Full*, *supra* note 46, at 5. Citizens were also eager to review the performance of the local tax collector, especially when they felt that he was avoiding audits of certain taxpayers. For example, in 1865, after reviewing the list of published tax return information in the newspaper, one reader wrote a letter to the editor of the *New York Times*, titled *Women's Income Taxes*, which expressed dismay at the IRS's apparent lack of tax audits of female taxpayers, even though they may have been capable of enabling tax evasion by others. Letter to the Editor, *Women's Income Taxes*, N.Y. TIMES, Jan. 28, 1865, at 2.

<sup>48</sup> *Our Internal Revenue: The Sixth Collection District in Full*, *supra* note 46, at 5.

<sup>49</sup> Act of July 14, 1870, ch. 255, § 11, 16 Stat. 256, 259. Congress reaffirmed this prohibition when it later reinstated the income tax in 1894. Act of Aug. 27, 1894, ch. 349, § 34, 28 Stat. 509, 557–59.

<sup>50</sup> Act of July 14, 1870 § 6 (providing that the income tax would expire in 1872).

<sup>51</sup> U.S. CONST. amend. XVI.

<sup>52</sup> Act of Oct. 8, 1913, ch. 16, § II(G)(d), 38 Stat. 114, 177.

<sup>53</sup> Revenue Act of 1924, ch. 234, § 257(b), 43 Stat. 253, 293; *see also* MARK LEFF, *THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION, 1933–1939*, at 67 (1984) (describing the legislative policies behind the 1924 Act).

<sup>54</sup> *See, e.g.*, W.M. Kiplinger, *New "Peeping Tom" Law Worries the Taxpayer*, N.Y. TIMES, Aug. 17, 1924, at 6 (anticipating the coming law publicizing tax information).

*Who Calls at Collector's Office May See the Returns Made for 1923.*<sup>55</sup> The article reported on the tax liabilities of prominent citizens, including Rockefeller, Henry Ford, J.P. Morgan, and Charles M. Schwab.<sup>56</sup> On the next day, the *Chicago Daily Tribune* published an article, titled *Movie Salary Lists Revealed by Tax Payment*,<sup>57</sup> that included estimates of the taxable incomes of Hollywood icons, including Douglas Fairbanks, Charlie Chaplin, and Gloria Swanson.<sup>58</sup> In noting the low taxable incomes of certain well-known actors,<sup>59</sup> the article predicted that “[t]he returns may prove a sharp shock to those who in the past have listened to tales by press agents on the salaries of the various stars.”<sup>60</sup>

The Treasury Department, headed by Secretary Andrew Mellon (who paid the most income tax of Pittsburgh residents in 1923),<sup>61</sup> and President Calvin Coolidge vigorously opposed the publication of tax return information.<sup>62</sup> Amid their persistent lobbying efforts, in February of 1926, Congress enacted a new statute that required the Commissioner of Internal Revenue to make public lists of names and addresses, but not the tax liabilities, of all persons who filed income tax returns.<sup>63</sup>

*The Pink-Slip Requirement.* The stock market crash of 1929 and the Great Depression caused Congress to consider public access to income tax returns once again, this time as a way to prevent tax evasion and the exploitation of tax loopholes.<sup>64</sup>

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<sup>55</sup> *Income Tax Returns Made Public; J.D. Rockefeller Jr. Paid \$7,435,169; Ford Family and Company Pay \$19,000,000*, N.Y. TIMES, Oct. 24, 1924, at 1.

<sup>56</sup> *Id.*; *accord Income Revelation Stirs Wall Street*, N.Y. TIMES, Oct. 25, 1924, at 1 (canvassing the reactions of various citizens upon the publication of taxpayer information); *La Follette Hails Publicity of Taxes*, N.Y. TIMES, Oct. 26, 1924, at 3 (discussing the release of tax information and the leads it provided for the investigation of tax evaders); *New York—Its Big Income*, N.Y. TIMES, Oct. 25, 1924, at 2 (listing a variety of New Yorkers' tax information).

<sup>57</sup> *Movie Salary Lists Revealed by Tax Payment*, CHI. DAILY TRIB., Oct. 25, 1924, at 3.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (noting the 1923 salaries of Cecil B. De Mille—\$741—and Eric von Stroheim—\$321—among others).

<sup>60</sup> *Id.* In 1925, the U.S. Supreme Court upheld the public-access law in the face of a statutory challenge. *United States v. Dickey*, 268 U.S. 378, 385–86 (1925).

<sup>61</sup> *Movie Salary Lists Revealed by Tax Payment*, *supra* note 57, at 2 (reporting Mellon's tax paid for 1923 as \$1,173,987).

<sup>62</sup> *See Revenue Revision, 1925: Hearings Before the H. Comm. on Ways and Means*, 69th Cong. 8–9, 107 (1925) (statements of Andrew W. Mellon, Secretary of the Treasury, and M.L. Seidman, Member, New York Board of Trade and Transportation).

<sup>63</sup> Revenue Act of 1926, ch. 27, § 257(e), 44 Stat. 9, 51 (amended 1934).

<sup>64</sup> *See* Marjorie E. Kornhauser, *Shaping Public Opinion and the Law: How a "Common Man" Campaign Ended a Rich Man's Law*, 73 LAW & CONTEMP. PROBS. 123, 129–30 (2010).

While the Senate again passed legislation that would have allowed for the publication of tax returns in full,<sup>65</sup> the legislative compromise in 1934 was a single sheet of paper known as the “pink slip.”<sup>66</sup> As a result of the 1934 legislation, each taxpayer was required to attach to her annual federal income tax return a pink sheet of paper that contained her name and address, total gross income, total deductions, net income, total credits, and tax liability.<sup>67</sup> The pink slip, and not the entire tax return, would be open to public inspection.<sup>68</sup>

Opposition to the pink-slip requirement was fierce. In early 1935, a conservative group called the “Sentinels of the Republic” launched a campaign to repeal the law.<sup>69</sup> Opponents warned repeatedly that the pink-slip requirement would aid kidnappers.<sup>70</sup> At the same time, the nation’s citizens were mesmerized by the trial of Bruno Hauptmann, who was charged with the kidnapping and murder of the infant son of famous aviators Charles and Anne Morrow Lindbergh.<sup>71</sup> After a surge of public outcry, Congress repealed the law in April 1935<sup>72</sup> before it went into full effect.<sup>73</sup>

*The Nixon Administration.* Congress did not revisit the issue of public access to tax return information until the years immediately following impeachment proceedings against President Richard M. Nixon. In its articles of impeachment, the House Judiciary Committee charged that President Nixon had sought to use the IRS—and, specifically, tax return information—for illegal ends.<sup>74</sup> According to the Committee, the Nixon Administration regularly requested tax return information regarding specific individuals, including then-Governor George Wallace and the head of the Democratic National Committee.<sup>75</sup> The impeachment proceedings<sup>76</sup> and subsequently released audio

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<sup>65</sup> See LEFF, *supra* note 53, at 67–68.

<sup>66</sup> Kornhauser, *supra* note 64, at 130 (explaining the publicity provision of the Revenue Act of 1934 § 55(b)).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See Kornhauser, *supra* note 64, at 135–38; Raymond Pitcaim, *The Pink-Slip Strike*, SATURDAY EVENING POST, June 8, 1935, at 23, 44.

<sup>70</sup> See 79 CONG. REC. 2594 (1935) (statement of Rep. Alfred Beiter); Kornhauser, *supra* note 64, at 140–41; *Income Publicity Called Kidnap Aid*, N.Y. TIMES, Feb. 25, 1935, at 2.

<sup>71</sup> See LLOYD C. GARDNER, *THE CASE THAT NEVER DIES: THE LINDBERGH KIDNAPPING* 2–3 (2004); Kornhauser, *supra* note 64, at 140–41.

<sup>72</sup> Act of Apr. 19, 1935, ch. 74, 49 Stat. 158.

<sup>73</sup> See Kornhauser, *supra* note 64, at 129.

<sup>74</sup> H. COMM. ON THE JUDICIARY, *IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES*, H.R. REP. NO. 93-1305, at 3 (1974).

<sup>75</sup> *Id.* at 141–43.

<sup>76</sup> *Id.*

recordings<sup>77</sup> exposed President Nixon's personal requests for tax audits of political opponents, their supporters, and other members of Nixon's "enemies list,"<sup>78</sup> though the Commissioner of Internal Revenue refused to comply.<sup>79</sup>

*The Present.* As a result of the Tax Reform Act of 1976,<sup>80</sup> which responded to abuses that occurred during the Nixon administration,<sup>81</sup> current law contains a general presumption that tax return information and tax returns are confidential and may not be disclosed by the IRS or other federal and state employees except under certain circumstances.<sup>82</sup> Section 6103 of the Internal Revenue Code protects the confidentiality of "returns" and "return information" and broadly defines both terms to include "any tax or information return"; any amendments filed with the IRS;<sup>83</sup> and any taxpayer's identity, income, tax deductions and credits, or audit and penalty history, among many other items.<sup>84</sup> Section 6103 provides, however, that its confidentiality protections do not extend to statistics that cannot be associated with a particular taxpayer.<sup>85</sup>

The statute contains several exceptions under which returns and return information may be disclosed by the IRS.<sup>86</sup> Many of these exceptions concern tax administration, such as exceptions that permit the IRS to provide a taxpayer with a copy of his own tax return<sup>87</sup> or to share return information with state

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<sup>77</sup> *E.g.*, RICHARD REEVES, *PRESIDENT NIXON: ALONE IN THE WHITE HOUSE* 369 (2002) (quoting an audio recording of President Nixon stating, "Are we going after their tax returns? . . . Do you know what I mean? . . . And on the IRS, you could—are we looking into Muskie's return? . . . Hubert? Hubert's been in a lot of funny deals" (third alteration in original) (internal quotation marks omitted)).

<sup>78</sup> Bob Kuttner, *Dean Tells of Nixon Pressure on IRS*, WASH. POST, July 19, 1974, at A9.

<sup>79</sup> See Patricia Sullivan, *IRS Chief Successfully Fought Efforts to Use Tax Audits Against Nixon Foes*, WASH. POST, Feb. 6, 2009, at B6. Ironically, President Nixon's own personal tax returns were riddled with erroneous and abusive tax positions. See William D. Samson, *President Nixon's Troublesome Tax Returns*, 107 TAX NOTES 635, 635–36 (2005) (detailing irregularities in Nixon's 1969–1972 personal tax returns).

<sup>80</sup> Pub. L. No. 94-455, 90 Stat. 1520 (codified as amended in scattered sections of 26 U.S.C.).

<sup>81</sup> See IRS, DEP'T OF THE TREASURY, PUB. NO. 4638, DISCLOSURE & PRIVACY LAW REFERENCE GUIDE 1-7 to 1-9 (2007).

<sup>82</sup> I.R.C. § 6103(a) (2006). It is not possible to request tax return information regarding a particular taxpayer under the Freedom of Information Act. 5 U.S.C. § 552(b)(3).

<sup>83</sup> I.R.C. § 6103(b)(1).

<sup>84</sup> *Id.* § 6103(b)(2).

<sup>85</sup> *Id.* Individuals who make unauthorized disclosures of returns or return information may face civil penalties, see *id.* § 7431, and criminal penalties of up to five years in prison, see *id.* § 7413.

<sup>86</sup> See *id.* §§ 6103(c)–(o).

<sup>87</sup> *Id.* § 6103(c).

taxing authorities.<sup>88</sup> But the exceptions implicate non-tax-administration purposes as well.<sup>89</sup>

There are limited circumstances under which the public may gain access to a specific taxpayer's return information. If a taxpayer is involved in a public civil or criminal trial with the government over tax matters, the public may learn about the taxpayer's return information. The government currently takes the position that, in these cases, it may publicly disclose information that has become part of a public court record.<sup>90</sup> Further, a taxpayer may enter into a civil settlement agreement with the IRS and, as part of the settlement, sign a waiver of the tax privacy protections described above.<sup>91</sup> Last, if a taxpayer is delinquent in paying federal income taxes, the government may file a Notice of Federal Tax Lien on the taxpayer's property, which publicly notifies the taxpayer's creditors of the government's claim.<sup>92</sup>

### B. *Taxpayer Trust*

The traditional justification for tax privacy has been that individuals will disclose information to the government only if they can trust that the government will keep this information private. Andrew Mellon contended that taxpayers are willing to make "truthful disclosure[s]" on their tax returns primarily because they trust that, when they reveal this information to the government, "[i]t is like confiding in one's lawyer."<sup>93</sup> This view of the purpose of tax privacy continues to be the official position of the IRS today.<sup>94</sup> This section describes the most familiar arguments that tax privacy defenders have offered in support of their hypothesis that, unless taxpayers can trust that the government will protect their tax return information from public eyes, they will reduce their disclosure of information to the government.

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<sup>88</sup> *Id.* § 6103(d).

<sup>89</sup> The statute, for instance, allows the IRS to disclose tax return information to other law enforcement agencies if the disclosure is relevant to any terrorist incident or threat. *Id.* § 6103(i)(3).

<sup>90</sup> IRS, *supra* note 81, at 2-28. Although this issue has been disputed, several courts have sided with the government's position. *See, e.g.,* Lampert v. United States, 854 F.2d 335, 337 (9th Cir. 1988) (citing several lower court decisions finding that tax information is no longer confidential once disclosed to a court).

<sup>91</sup> *See* Treas. Reg. § 301.6103(c)-1(b) (2003), for a description of procedures that the IRS must follow in obtaining a waiver.

<sup>92</sup> *File a Notice of Federal Tax Lien*, IRS, <http://www.irs.gov/businesses/small/article/0,,id=108339,00.html#Notice> (last updated Dec. 19, 2011).

<sup>93</sup> OFFICE OF TAX POLICY, *supra* note 11, at 19.

<sup>94</sup> *See* IRS, *supra* note 81, at 1-7 ("By the single act of filing a tax return, a record is created and also a trust.").

*Harassment (or Worse).* Without tax privacy, its defenders argue, taxpayers' fear of harassment, or even danger to their personal safety, would weaken their incentive to cooperate with the government. Congressmen arguing against public-access proposals have predicted that, without strong tax privacy protections, individuals would be "hounded by . . . every kind of person[ ] trying to get a commission selling stocks or bonds or wildcat schemes"<sup>95</sup> and threatened by "kidnapers[ ] and racketeers."<sup>96</sup> During the pink-slip debates of 1934 and 1935, newspapers like the *Wall Street Journal* ran editorials warning that public access would expose taxpayers "to the vexatious and in some cases dangerous attentions of mendicants, racketeers and other varieties of unemployables."<sup>97</sup>

*Loss of Credit.* Similarly, tax privacy defenders argue that public access could cause individuals whose income tax returns reveal declining income or business losses to encounter difficulty in borrowing from creditors. While advocating for a law prohibiting the publication of tax return information in the newspaper, Representative James A. Garfield (who would later be elected President) hypothesized that, if "a man has had serious losses during the year," he might not be willing to disclose that information "so as to alarm his creditors and bring them all down upon him when otherwise he would come out safely."<sup>98</sup> During the pink-slip-provision debate, the House Ways and Means Committee pointed out that, in Wisconsin, the only state that had attempted full public access to state tax returns at the time, public access had not raised additional tax revenue and, instead, had benefited "credit organizations which ha[d] men on hand almost constantly digging into the files."<sup>99</sup>

*Advantage to Business Competitors.* Tax privacy encourages taxpayer trust, Andrew Mellon and others asserted, because it shields strategic information about the performance of a taxpayer's business from the eyes of "rivals

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<sup>95</sup> 78 CONG. REC. 2602 (1934) (statement of Rep. Allen Towner Treadway).

<sup>96</sup> 79 CONG. REC. 2594 (1935) (statement of Rep. Alfred Beiter).

<sup>97</sup> *Senseless Publicity*, WALL ST. J., Feb. 13, 1935, at 4; accord Walter Lippmann, *Pink Dynamite*, L.A. TIMES, Feb. 13, 1935, at 4 (predicting that the publication of taxpayers' information will bring "malice, envy, uncharitableness, as well as racketeering, extortion, kidnaping, and what not" upon the taxpayers); *Press Comment on Publicity for Income Tax Returns*, N.Y. TIMES, Oct. 25, 1924, at 3 (suggesting that, if taxpayers' taxes were made public, they may "become the target of all sorts of attacks, legal and otherwise, upon [their] means and resources").

<sup>98</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2789 (1866); cf. Kiplinger, *supra* note 54, at 6 (suggesting similar hypothetical situations to demonstrate the general problem of compromised privacy).

<sup>99</sup> THOMAS H. CULLEN, REPEAL CERTAIN PROVISIONS RELATING TO PUBLICITY OF CERTAIN STATEMENTS OF INCOME, H.R. REP. NO. 313, at 2 (1935).

and . . . those having some ulterior motive.”<sup>100</sup> Scholars have noted that this argument has been made in the context of sole proprietorships, like “mom and pop” shops, rather than large corporations.<sup>101</sup> A perennial argument of tax privacy defenders, consequently, is that, if tax return information were publicly accessible, taxpayers would be wary to disclose certain information that could advantage their business competitors.

### C. *Sunlight and Social Norms*

As the government has in recent years searched for ways to reduce the \$345 billion annual tax gap,<sup>102</sup> a resurgence of interest in the issue of public access to individual tax return information has occurred in the tax-compliance literature. In addressing the tax gap, tax scholars and policymakers have once again examined the relationship between tax privacy and tax compliance.

A review of the contemporary tax-compliance literature reveals palpable skepticism toward the taxpayer-trust theory of tax privacy. Scholars such as Joseph Thorndike,<sup>103</sup> Marjorie Kornhauser,<sup>104</sup> Laurence Kotlikoff,<sup>105</sup> and Paul Schwartz,<sup>106</sup> among others,<sup>107</sup> have questioned the hypothesis that, in the absence of tax privacy, individuals would withhold important personal information from the IRS. Several of these scholars have suggested that tax privacy no longer plays as essential a role in fostering tax compliance as it did in the past.<sup>108</sup>

Instead of a regime of tax privacy, which its opponents have described as allowing “crime [to] thrive in the dark,”<sup>109</sup> several of these contemporary scholars have suggested that the government should release some or all individual tax return information to the public. They argue that, by shining sunlight on individuals’ tax returns, the government may encourage taxpayers

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<sup>100</sup> *Cost of Publicity Scored in Treasury*, N.Y. TIMES, Sept. 3, 1925, at 2.

<sup>101</sup> See, e.g., Pomp, *supra* note 41, at 377.

<sup>102</sup> OFFICE OF TAX POL’Y, *supra* note 11, at 6.

<sup>103</sup> Thorndike, *Show Us the Money*, *supra* note 12, at 148–49; Thorndike, *The Thorndike Challenge*, *supra* note 12, at 691–92.

<sup>104</sup> Kornhauser, *supra* note 12, at 113.

<sup>105</sup> See Bernasek, *supra* note 8.

<sup>106</sup> Schwartz, *supra* note 12, at 895–96.

<sup>107</sup> See, e.g., Linder, *supra* note 12; Mazza, *supra* note 12, at 1120–43.

<sup>108</sup> See, e.g., Kornhauser, *supra* note 12, at 101–03; Schwartz, *supra* note 12, at 883; Thorndike, *The Thorndike Challenge*, *supra* note 12, at 691.

<sup>109</sup> *La Follette Hails Publicity of Taxes*, *supra* note 56, at 3 (quoting Senator Robert M. La Follette).

to report their taxes honestly. The following are the primary assertions they have made in predicting taxpayer behavior.

*Perceptions of Detection.* Public access, its proponents have contended, would bolster individual tax compliance by causing taxpayers to perceive that the probability of detection by the IRS is greater than it is in a regime of tax privacy. Kornhauser, for instance, has argued that public access to tax return information “strengthens penalties because it increases the chance of getting caught (since members of the public, especially tax experts, can study returns).”<sup>110</sup> Likewise, Thorndike has argued that a reduction in tax privacy would decrease tax evasion by casting “[m]illions of eyes on a tax return,”<sup>111</sup> and Kotlikoff has characterized public access as an “automatic enforcement device.”<sup>112</sup> These arguments are consistent with those offered by lawmakers in the late nineteenth and early twentieth century that public access to tax returns would benefit the IRS because citizens would be eager to report their friends and neighbors to the IRS if they were cheating on their tax returns.<sup>113</sup>

*Social Norms.* Public-access proponents have also argued that social norms would reduce abusive tax planning if citizens could view each other’s tax returns. As Kornhauser has argued, a regime of public access would “increase[] chances of public shaming for non-compliance.”<sup>114</sup> Similarly, Thorndike has embraced public access as a means of promoting tax compliance by encouraging “social auditing,” which may cause individuals to ostracize those who have cheated on their taxes.<sup>115</sup> The implication of these arguments is that, if tax returns were publicly accessible, individual taxpayers would refrain from engaging in abusive tax activities out of fear of social stigma.

This argument is almost identical to the arguments of nineteenth-century public-access proponents. For example, when delivering an address on taxes at the end of the nineteenth century, former President Benjamin Harrison asserted that, because “[w]e are members of a great partnership, . . . it is the right of each to know what every other member is contributing to the partnership.”<sup>116</sup>

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<sup>110</sup> See Kornhauser, *supra* note 12, at 105.

<sup>111</sup> See Thorndike, *The Thorndike Challenge*, *supra* note 12, at 691.

<sup>112</sup> Bernasek, *supra* note 8 (quoting Professor Kotlikoff) (internal quotation mark omitted).

<sup>113</sup> See, e.g., 53 CONG. REC. 13,291 (1916) (statement of Sen. Paul O. Husting).

<sup>114</sup> See Kornhauser, *supra* note 12, at 105.

<sup>115</sup> See Thorndike, *The Thorndike Challenge*, *supra* note 12, at 691.

<sup>116</sup> BENJAMIN HARRISON, *The Obligations of Wealth* (Feb. 22, 1898), in *VIEWS OF AN EX-PRESIDENT* 331, 355–56 (Mary Lord Harrison ed., 1901).

Similarly, after reversing its position in the 1860s on the publication of tax return information, the editors of the *New York Times* asserted that, if the press continued to “[s]how every taxpayer’s *sworn* return of income to his nearest neighbors, his most intimate friends, [and] to himself,” it would encourage tax compliance in a way that “no laws, no oaths, and no scrutiny, has or can furnish.”<sup>117</sup>

*Willingness to Disclose.* Many contemporary scholars have argued that, because individuals disclose their tax return information to multiple parties other than the IRS today, public access would not have a significant chilling effect on their willingness to disclose information on their tax returns.<sup>118</sup> In commenting on the importance of tax privacy in modern times, Kornhauser has asked, “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?”<sup>119</sup>

Proponents of this view observe that taxpayers today disclose sensitive information contained in their tax returns to a host of third parties, such as mortgage brokers and college financial-aid officers. In a 2009 article titled *The Future of Tax Privacy*, for example, Schwartz commented that, while the tax return once “constituted the single most detailed source of personal information,” in current times, “there are multiple sources of information about all Americans found in databases of public and private organizations,” some of which are publicly accessible, such as property taxes.<sup>120</sup> Further, these scholars observe that, as a result of information-reporting rules, many taxpayers have little control over wage and investment information that is reported to the IRS, so public disclosure of tax return information would not impede the reporting of that information.<sup>121</sup>

#### D. *Clouds on the Horizon*

As the discussion above demonstrated, proponents of public access contend that sunlight would improve individual tax compliance by increasing individual taxpayers’ subjective probabilities of detection and by introducing

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<sup>117</sup> *The Publication of Incomes*, N.Y. TIMES, July 9, 1866, at 4.

<sup>118</sup> E.g., Schwartz, *supra* note 12, at 896; Thorndike, *Show Us the Money*, *supra* note 12, at 148; cf. George Guttman, *The Confidentiality Statute Needs Rethinking*, 86 TAX NOTES 318, 319 (2000) (suggesting that because census data is made public, tax return information should be made public, as well).

<sup>119</sup> Kornhauser, *supra* note 12, at 102.

<sup>120</sup> Schwartz, *supra* note 12, at 896.

<sup>121</sup> See, e.g., *id.* at 898–99.

social norms to tax-compliance decisions. Their arguments, however, are clouded by several significant assumptions.

First, public-access proponents assume that the IRS would have the audit capability to investigate the tips from citizens and reporters that could result from a public-access regime,<sup>122</sup> even though many of them may not lead to the discovery of tax noncompliance. This assumption is not realistic. Under current circumstances, IRS officials report a lack of audit resources to investigate potential compliance issues that they have identified themselves, much less those identified by third-party tips that they receive through much more limited means than full public access.<sup>123</sup> For example, in 2006, Commissioner of Internal Revenue Mark Everson commented that the lack of resources prevented the IRS from closing nearly 90,000 cases and conducting over 25,000 correspondence audits.<sup>124</sup> Unless the IRS's operating budget were to be enlarged significantly, public access to tax return information would not necessarily lead to increases in actual tax enforcement.

Second, public-access proponents assume that citizens may be willing to inform the IRS of possible cases of tax noncompliance by people they know personally. The claim that individuals would report their neighbors and friends to the IRS upon discovering that they had failed to report cash income or had claimed deductions for phony dependents, however, may ignore countervailing social norms among neighbors and friends. Even though public access might pique an individual's curiosity regarding her neighbor's tax return information, it would not necessarily supersede norms that prevent neighbors from acting against each other's interests.<sup>125</sup> Just as an individual might not report her neighbor to the local, municipal authorities for performing construction on her house without a zoning permit, an individual might not pick up the phone to contact the IRS when she discovers that her neighbor has engaged in tax fraud.<sup>126</sup>

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<sup>122</sup> See, e.g., Kornhauser, *supra* note 12, at 105 (describing how, in a public access regime, "members of the public, especially tax experts," could study returns and report noncompliance).

<sup>123</sup> See IRS OVERSIGHT BD., FY2011 IRS BUDGET RECOMMENDATION SPECIAL REPORT 9–11 (2010), available at <http://www.treasury.gov/irsob/reports/2010/IRSOB%20FY11%20BUDGET%20REPORT.pdf>.

<sup>124</sup> Press Release, U.S. Senate Comm. on Finance, IRS Budget Cut Translates to Huge Tax Loss, (May 22, 2006), <http://finance.senate.gov/newsroom/ranking/release/?id=199e5e96-5e83-40fe-b567-01f4e9bf3b31>.

<sup>125</sup> See ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 123–36 (1991) (discussing the social-control function of societal norms).

<sup>126</sup> Since 2006, new statutory rules have authorized the IRS to pay to whistle-blowers rewards of up to 30% of the proceeds that the IRS collects as a result of information provided. I.R.C. § 7623(b)(1) (2006). Although individuals have filed whistle-blower claims with the IRS, it is unclear whether this program will continue to cause individuals to report information regarding friends, neighbors, and other associates. *Cf.*

Third, public-access proponents assume that the fear of social stigma would encourage taxpayers to report their taxes honestly. For some individual taxpayers, especially those holding positions of public trust, public access would likely have this beneficial effect. But, for other individuals, assumptions regarding the stigmatic nature of aggressive tax avoidance, and even tax evasion, may be dubious. For example, some sophisticated individuals claim aggressive tax positions that rely on unsettled interpretations of the tax law<sup>127</sup> (indeed, tax lawyers are paid to advise on these murky areas). It is unclear whether, and which, individual taxpayers would fear public exposure of their claim of an aggressive, but arguably legal, tax position to claim a tax benefit. As another example, tax protestors—individuals who do not believe in the government's authority to levy taxes—engage in blatant tax fraud and often boast about it publicly.<sup>128</sup> It is unlikely that a public-access regime would cause these types of extreme offenders to change their behavior in response to the threat of social stigma.

As this discussion demonstrates, the arguments of public-access proponents rest on a shaky foundation. However, compared to the arguments of taxpayer-trust advocates, which may seem outdated, the public-access arguments appear to be more compelling to contemporary scholars. Consequently, the trend among many of these scholars has been to suggest that public access to individual tax returns should be attempted as a way to increase individual tax compliance.<sup>129</sup>

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TREASURY INSPECTOR GEN. FOR TAX ADMIN., DEP'T OF THE TREASURY, REFERENCE NO. 2009-30-114, DEFICIENCIES EXIST IN THE CONTROL AND TIMELY RESOLUTION OF WHISTLEBLOWER CLAIMS 11–12 (2009), available at <http://www.treasury.gov/tigta/auditreports/2009reports/200930114fr.pdf> (describing the lengthy time lapse between submission of whistle-blower claims and payment of rewards); David S. Hilzenrath, *Change in IRS Rules Could Block Rewards for Whistleblowers*, WASH. POST, July 1, 2010, at A11 (describing the elimination of tax-whistle-blower rewards for information that leads to determinations that do not yield payment). For a discussion of the potential social cost of whistle-blower programs generally, see Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 651 (2004) (arguing that the informant institution may “erode the relationship between high-crime communities and law enforcement”).

<sup>127</sup> Cf. Joshua D. Blank, *What's Wrong with Shaming Corporate Tax Abuse*, 62 TAX L. REV. 539, 543–45, 567–71 (2009) (discussing the effect of aggressive tax positions taken by corporations in the absence of settled law).

<sup>128</sup> See *infra* notes 171–72 and accompanying text.

<sup>129</sup> See *supra* notes 103–08.

## II. THE STRATEGIC-PUBLICITY FUNCTION OF TAX PRIVACY

Throughout the past 150 years, the contours of the tax privacy debate have remained remarkably unchanged. Tax privacy advocates speculate that individuals would fear embarrassment and other consequences if tax returns were publicly accessible. Public-access proponents, by contrast, hypothesize that potential tax evaders would fear increased chances of IRS detection and social stigma; tax privacy advocates refute these claims, and so forth.

One explanation for the recurrent nature of the tax privacy debate is that its focus thus far has been incomplete. Both sides have fixated on the question of how taxpayers would comply with the tax system if they knew that other taxpayers could see their personal tax returns. Neither side, however, has addressed the converse question: How would taxpayers comply with the tax system if they could see *other* taxpayers' tax returns?

In this Part, I investigate possible answers to that unexplored question. To consider the relationship of tax privacy and individual tax compliance from this new perspective, I perform the following thought experiment: I compare specific tax-enforcement examples that individuals see today under current tax privacy rules to the specific examples that they could see in a regime in which all tax return information—including tax returns, liabilities, audit notices, and settlement agreements with the IRS—were publicly accessible.<sup>130</sup> The purpose of this thought experiment is not to respond to others' proposals to publicize tax return information or to advocate for a specific public-access proposal myself. Rather, by comparing a world with tax privacy to a world without it, this experiment highlights the effects of tax privacy on individual taxpayers' perceptions.

My focus on the interaction between tax privacy and specific examples of tax enforcement is motivated by behavioral research. Public reports of specific tax-enforcement actions, where taxpayers are named and the contents of their tax returns are revealed, serve as vivid, specific examples of tax enforcement. Salient examples of taxpayers paying tax penalties and heading off to prison—or not—are much more likely to influence individual taxpayers than tax-enforcement statistics posted on an IRS website or printed in a Statistics of Income Division publication. Drawing on the findings of behavioral research, I argue that these types of salient examples are likely to cause individuals to rely

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<sup>130</sup> In other words, I invert the privacy protections of return information under current law. For the current law, see I.R.C. § 6103(b)(2).

on a variety of cognitive biases to make decisions and judgments that may depart from rationality, including those regarding whether and how to comply with the tax system.<sup>131</sup>

This Part examines the power of tax-enforcement examples on individual perceptions, considers the specific tax-enforcement examples that individuals see—and do not see—as a result of tax privacy today, and explores the effects of the strategic-publicity function of tax privacy on individual tax compliance under both deterrence and reciprocity models of taxpayer behavior.

### A. *The Power of Examples*

As every good lawyer, teacher, and storyteller knows, an explanation that includes specific examples involving real people or places can help the audience visualize an otherwise abstract concept or issue. Vivid examples may include a description of a person's identifying traits, such as her name, occupation, and physical features.<sup>132</sup> Statistics, on the other hand, consist of factual information, such as numbers or percentages, which can be used to make calculations or measurements. Over many decades of research, cognitive psychologists have demonstrated that specific examples, involving vivid descriptions of people or events, may have significant power over individuals' perceptions and actions.<sup>133</sup> But their research should come as no surprise, for as the old adage reminds us, a picture is worth a thousand words.<sup>134</sup>

In this Article, I use the term *example* to refer to a tax-enforcement action involving a specific taxpayer who is identified by name. When the government announces that it has indicted a particular taxpayer for engaging in tax fraud and names the taxpayer in a press release, it provides a specific tax-enforcement example. An individual who learns about this tax-enforcement action can associate it with a specific taxpayer—perhaps a celebrity, politician, or friend. The following subsections examine the importance of specific

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<sup>131</sup> See *infra* Part II.A.1.

<sup>132</sup> See Philip J. Mazzocco & Timothy C. Brock, *Understanding the Role of Mental Imagery in Persuasion: A Cognitive Resources Model Analysis*, in *CREATING IMAGES AND THE PSYCHOLOGY OF MARKETING COMMUNICATION* 65, 65–67 (Lynn R. Kahle & Chung-Hyun Kim eds., 2006) (describing the importance of the “vividness” of a story or description to the salience of images).

<sup>133</sup> For an overview of imagery research, see generally STEPHEN M. KOSSLYN ET AL., *THE CASE FOR MENTAL IMAGERY* 3–23 (2006); and Stephen M. Kosslyn & William L. Thompson, *When Is Early Visual Cortex Activated During Visual Mental Imagery?*, 129 *PSYCHOL. BULL.* 723 (2003).

<sup>134</sup> See Fred R. Barnard, *One Look Is Worth a Thousand Words*, *PRINTERS' INK*, Dec. 8, 1921, at 96–97 (describing the superiority of an advertisement containing a picture over an advertisement containing only words).

examples and the interaction between specific examples and individuals' cognitive biases.

### 1. *Why Examples Matter*

Cognitive psychologists have demonstrated that specific examples can have a profound effect on an individual's creation of mental images, which, in turn, can help them understand concepts or arguments.<sup>135</sup> Examples that include a description of a person's identifying traits, such as a name, occupation, and physical features, may create a vivid image of that person in the mind of an individual.<sup>136</sup> For instance, a television advertisement that includes a vivid example of a sports celebrity applying a certain brand of shaving cream to his face may cause viewers to create or recall mental images that could influence their decisions to purchase that particular product.<sup>137</sup> Neuroscientists have confirmed that an individual's brain activity is linked to the vividness of an example of a person or thing that is described to the individual.<sup>138</sup>

This behavioral research suggests that specific examples of tax enforcement are likely to influence individuals' perceptions of certain elements of the tax system, which, in turn, may affect their decisions to comply with the tax law. Individuals have articulated beliefs about the audit rate, magnitude of tax penalties, and rates of compliance that are directly at odds with the publicly available tax-enforcement statistics.<sup>139</sup> The specific examples of various aspects of tax enforcement, such as tax audits or tax penalties involving particular taxpayers that individuals encounter, may encourage these beliefs.

Individuals are most likely to encounter a specific example of tax enforcement when they learn about a tax-enforcement action against a taxpayer who is identified by name and the subject matter of her tax controversy. For instance, on April 14, 1988, when Rudolph Giuliani, then a U.S. Attorney, announced publicly that a federal grand jury had indicted billionaire Leona

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<sup>135</sup> See, e.g., Nick Ellis, *Word Meaning and the Links Between the Verbal System and Modalities of Perception and Imagery or In Verbal Memory the Eyes See Vividly, but Ears Only Faintly Hear, Fingers Barely Feel and the Nose Doesn't Know*, in MENTAL IMAGES IN HUMAN COGNITION 313, 314 (Robert H. Logie & Michel Denis eds., 1991).

<sup>136</sup> See Mazzocco & Brock, *supra* note 132, at 65–67 (describing importance of the “vividness” of a story or description to the salience of images).

<sup>137</sup> See *id.* at 66–67 (discussing the ways imagery effects a change in attitude in its viewers).

<sup>138</sup> See, e.g., K.M. O'Craven & N. Kanwisher, *Mental Imagery of Faces and Places Activates Corresponding Stimulus-Specific Brain Regions*, 12 J. COGNITIVE NEUROSCIENCE 1013 (2000) (detailing various experiments mapping cognitive function during mental images).

<sup>139</sup> See *infra* notes 310–12 and accompanying text.

Helmsley for engaging in tax fraud, he provided a vivid example of tax enforcement.<sup>140</sup> An individual who learned about this tax-enforcement action by reading reports from print news sources could quickly associate the tax-enforcement action with a specific taxpayer and develop a mental image.

Cognitive psychology research suggests that individuals are much less likely to be influenced by tax-enforcement statistics than by specific tax-enforcement examples involving real people.<sup>141</sup> Despite the accessibility of tax-enforcement statistics today, individuals may find it harder to visualize the tax enforcement described in response to this information, compared to specific examples, because the information does not identify the taxpayers involved or describe the content of their tax returns. For example, the 2009 IRS Data Book states that, in 2008, the IRS audited 343,952 income tax returns for individuals with income under \$200,000 and that, on average, it recommended an average additional tax of \$9,536 following field audits of these returns.<sup>142</sup> While these figures inform individuals of the extent of the IRS's audits of certain taxpayers and its recommended adjustments, they are less likely to evoke a memorable mental image in the minds of individual taxpayers than the Leona Helmsley example described above.

## 2. *Examples and Cognitive Biases*

Specific examples involving real people or events may implicate an individual's cognitive biases. Cognitive biases are mental shortcuts that lead individuals to make decisions that are inconsistent with objective rational behavior.<sup>143</sup> By provoking the following cognitive biases, examples may influence individuals' perceptions and beliefs.

*Saliency.* Saliency generally refers to something that is prominent as opposed to hidden.<sup>144</sup> In their foundational work on biases and heuristics, Amos Tversky and Daniel Kahneman posited that "saliency . . . affect[s] the

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<sup>140</sup> Ronald Sullivan, *The Helmsleys Are Charged with \$4 Million in Tax Evasion*, N.Y. TIMES, Apr. 15, 1988, at A1; see also *United States v. Helmsley*, 866 F.2d 19, 20 (2d Cir. 1988).

<sup>141</sup> Cf. Mazzocco & Brock, *supra* note 132, at 65–67 (observing that literature has found vivid and descriptive mental imagery to be more persuasive than verbal statements).

<sup>142</sup> IRS, DEP'T OF THE TREASURY, INTERNAL REVENUE SERVICE DATA BOOK, 2009, at 22, 24 (2010), available at <http://www.irs.gov/pub/irs-soi/09databk.pdf>.

<sup>143</sup> See Tversky & Kahneman, *supra* note 19, at 3–4.

<sup>144</sup> For discussion of the saliency bias, see generally Raj Chetty et al., *Saliency and Taxation: Theory and Evidence*, 99 AM. ECON. REV. 1145, 1145–47 (2009); Schenk, *supra* note 19, at 254; Sunstein, *supra* note 19, at 1301; and Tversky & Kahneman, *supra* note 19, at 11.

retrievability of instances.”<sup>145</sup> Tversky and Kahneman comment that an individual probably will be more influenced by seeing a house burning to the ground than by simply reading about the same fire in the local newspaper.<sup>146</sup> The salience bias, they explain, causes individuals to focus on the image of the house fire, which is prominent, as opposed to data about the house fire in the form of the newspaper article, which is not nearly as visible.<sup>147</sup>

*Availability.* Salient examples may cause individuals to rely upon the availability heuristic, which leads individuals to draw conclusions regarding the probability that future events will occur by accessing memorable mental images.<sup>148</sup> If an individual hears that a colleague has been the victim of an armed robbery while walking home from work, for instance, this salient example may cause the individual to conclude that armed robbery is a common occurrence near the office.

*Anchoring.* Salient examples may also provoke the anchoring bias, which causes individuals to become mentally wedded to certain impressions.<sup>149</sup> It is reasonable to assume that these impressions may be formed by prominent examples involving specific people or events that individuals encounter. Even though individuals may eventually encounter new or conflicting data, they may find it difficult to detach from the initial impression that the example created.<sup>150</sup>

*Representativeness.* The representativeness bias causes individuals to assume that one thing belongs to another group of things because it contains certain traits.<sup>151</sup> An individual who sees a panhandler on the subway, for example, may assume that all panhandlers look like that example and, conversely, that people who look like that example may be panhandlers.

*Confirmation.* Last, salient examples may implicate the confirmation bias, which causes individuals to focus on evidence that is partial to their beliefs or

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<sup>145</sup> Tversky & Kahneman, *supra* note 19, at 11.

<sup>146</sup> *Id.*

<sup>147</sup> *See id.*

<sup>148</sup> *See* Hanson & Kysar, *The Problem*, *supra* note 19, at 662–64; Latin, *supra* note 19, at 1233; Sunstein, *supra* note 19, at 1297; Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *COGNITIVE PSYCHOL.* 207, 207–08 (1973).

<sup>149</sup> *See* Hanson & Kysar, *The Problem*, *supra* note 19, at 667; Latin, *supra* note 19, at 1235; Tversky & Kahneman, *supra* note 19, at 14–18.

<sup>150</sup> *See* Hanson & Kysar, *The Problem*, *supra* note 19, at 667.

<sup>151</sup> *See id.* at 664–67; Tversky & Kahneman, *supra* note 19, at 4.

expectations.<sup>152</sup> For instance, if an individual enjoys smoking cigarettes, she may think about her elderly uncle who has smoked happily for years. Because these salient examples are easily accessible, the confirmation bias may cause individuals to seek them first to confirm a preexisting hypothesis.<sup>153</sup>

### *B. Why Not Seeing Is Believing*

When the government describes tax-enforcement actions against specific taxpayers today, it seeks to portray itself as capable of detecting abuse effectively and applying tax penalties, whether civil or criminal, aggressively. Because the government has the unilateral power to pursue a public tax-enforcement action against a specific taxpayer,<sup>154</sup> it plays a unique role in promoting strong tax enforcement examples.

Statistics released by the IRS and other government agencies, however, reveal that these examples do not fully represent reality. If we were to lift the curtain of tax privacy by making tax return information that is currently confidential—tax returns, records of tax-penalty payments, and audit histories, among other items—open to public inspection, individuals would see many salient examples of weak tax enforcement against specific taxpayers that could detract from the perception of the government as strong and effective.<sup>155</sup>

This section examines the way in which tax privacy filters the specific examples of tax enforcement that individuals see—and do not see—and examines their potential behavioral effects on individuals due to their perceptions of the government's tax-enforcement capabilities.

#### *1. Tax-Enforcement Examples We See*

By carefully publicizing salient examples of tax-enforcement actions against specific taxpayers, the government actively attempts to influence individual taxpayers' perceptions of its ability to detect abusive tax activities,

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<sup>152</sup> See Asher Koriat, *When Confidence in a Choice Is Independent of Which Choice Is Made*, 15 PSYCHONOMIC BULL. & REV. 997, 1000 (2008); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

<sup>153</sup> See Nickerson, *supra* note 152, at 175–76.

<sup>154</sup> See 28 C.F.R. § 0.70 (2011) (granting to the Assistant Attorney General of the Tax Division authority to prosecute virtually all civil and criminal proceedings under the internal revenue laws).

<sup>155</sup> Cf. IRS OVERSIGHT BD., 2010 TAXPAYER ATTITUDE SURVEY 14 (2011), available at <http://www.treasury.gov/irsob/reports/2011/IRSOB%202010%20Taxpayer%20Attitude%20Survey.pdf> (reporting that 46% of surveyed taxpayers believed the IRS maintained an effective balance between enforcement activities and customer service).

levy strong tax penalties against offenders, and achieve legal victories. The following discussion describes the specific examples of strong tax-enforcement actions that individuals see today.

*a. Detected Abuse*

The government deliberately attempts to raise public awareness of its ability to detect abusive tax activities by showcasing memorable instances of its detection successes. Salient examples of the government's detection of the abusive tax activities of specific taxpayers may cause individuals to increase their subjective probabilities that the government will detect them if they engage in aggressive or abusive tax planning.

The government pursues public tax-enforcement efforts against specific taxpayers in part to influence the perceptions of the general public. A former head of the IRS's Criminal Investigation Division acknowledged that the IRS seeks to "generate multiple press stories nationwide about particular cases"<sup>156</sup> to "deter . . . potential cheaters."<sup>157</sup> To aid its publicity efforts, the Criminal Investigation Division assigns dozens of "public information officers" in each of its field offices to serve as "the local . . . media contact[s] to provide public record information to the media about the field office[s]' cases."<sup>158</sup> Further, government officials have revealed that they carefully monitor the "publicity rate," a measure of the extent to which publicly announced civil and criminal tax cases receive press coverage.<sup>159</sup>

The media often work in tandem with the government by publicizing the government's tax-enforcement actions against specific taxpayers, particularly when these actions involve criminal sanctions, celebrities, or both. Reporters often print descriptions of tax-enforcement actions that they excerpt directly from government press releases and announcements.<sup>160</sup> The media's tendency

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<sup>156</sup> Mark E. Matthews, *New IRS Publicity Strategy*, U.S. ATT'YS' BULL., July 2001, at 15.

<sup>157</sup> *Id.* at 16; accord Kristen A. Parillo, *Korb: Tax Press Plays Key Role in IRS Communications Strategy*, 118 TAX NOTES 478, 478–79 (2008) (describing and quoting similar statements by former IRS Chief Counsel Donald Korb).

<sup>158</sup> Jeremiah Coder, *Conversations: Eileen Mayer*, 116 TAX NOTES 738, 740 (2007).

<sup>159</sup> *See, e.g., id.*

<sup>160</sup> *See, e.g.,* Amy Bonawitz, "Girls Gone Wild" Founder Indicted, CBSNEWS.COM (Feb. 11, 2009, 5:03 PM), <http://www.cbsnews.com/stories/2007/04/11/entertainment/main2673413.shtml> (citing Press Release, Dep't of Justice, Creator of Girls Gone Wild Indicted for Tax Evasion (Apr. 11, 2007), available at <http://www.justice.gov/tax/txdv07237.htm>).

to publicize specific tax-enforcement examples peaks reliably during the weeks leading up to Tax Day each year.<sup>161</sup>

The government often provides the public with concrete examples of its successful detection efforts regarding abusive tax activities that are pervasive or that have the potential to spread. Several examples of these types of public tax-enforcement announcements are described below.

*Tax Fraud.* Every year, the government announces specific cases in which it has detected taxpayers who have engaged in tax fraud. In addition to issuing its annual “dirty dozen” list of tax scams that bear these traits,<sup>162</sup> the government provides specific examples of taxpayers who have attempted to engage in these strategies and have failed to escape detection, including celebrities and other prominent taxpayers. Recent public examples of the government’s successful detection of tax fraud by specific high-profile individuals include Joe Francis, the creator of the *Girls Gone Wild* videos, who attempted to deduct \$20 million in phony business expenses;<sup>163</sup> Richard Hatch, the former star of the reality television show *Survivor*, who attempted to omit his \$1 million prize and other items from taxable income;<sup>164</sup> and actor Nicolas Cage, who improperly deducted over \$3 million for meals, gifts, and expenses associated with his Gulfstream jet as business expenses.<sup>165</sup>

*Sophisticated Tax Evasion.* Often the government’s publicly announced tax-enforcement efforts involve more sophisticated forms of tax evasion by prominent business figures and other wealthy individuals. For example, in April 2010, following its settlement with UBS, the Swiss global financial services company, regarding its promotion of offshore banking activities, the U.S. Department of Justice Tax Division announced separate criminal pleas and civil settlements involving specific former clients of UBS on each of the three days leading up to and including Tax Day, when seven individuals were charged on that single day with hiding over \$100 million in foreign bank

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<sup>161</sup> See Blank & Levin, *supra* note 16, at 18.

<sup>162</sup> See, e.g., *Beware of IRS’ 2009 “Dirty Dozen” Tax Scams*, IRS (Apr. 13, 2009), <http://www.irs.gov/newsroom/article/0,,id=206370,00.html>.

<sup>163</sup> Press Release, Dep’t of Justice, *supra* note 160.

<sup>164</sup> Press Release, U.S. Dep’t of Justice, “Survivor” Winner Richard Hatch Is Sentenced to 51 Months in Prison for Tax Evasion (May 16, 2006), *available at* [http://www.justice.gov/tax/usaopress/2006/txdv06\\_RH\\_TaxEvasion.pdf](http://www.justice.gov/tax/usaopress/2006/txdv06_RH_TaxEvasion.pdf).

<sup>165</sup> Janet Novack & William P. Barrett, *Nic Cage’s Other Weekend Premiere: IRS Settlement*, FORBES.COM (Sept. 5, 2008, 3:11 PM), *available at* [http://www.forbes.com/2008/09/05/hollywood-taxes-cage-biz-media-cz\\_wb\\_jn\\_0905cage.html](http://www.forbes.com/2008/09/05/hollywood-taxes-cage-biz-media-cz_wb_jn_0905cage.html).

accounts.<sup>166</sup> The government also uses specific examples to publicize its detection of prominent or wealthy individuals who have failed to file required disclosure forms regarding suspicious tax activities with the government.<sup>167</sup>

*Cash Economy.* The government regularly issues public announcements regarding its successful detection of “cash economy” taxpayers, or those taxpayers who have engaged in transactions that are not subject to third-party information reporting or withholding.<sup>168</sup> A typical example is the government’s 2009 announcement of the conviction of Bruce Lapierre, Albert Martin, and Lorraine Martin, owners of a Rhode Island machine shop, who intentionally used cash and money orders for amounts less than \$10,000 to avoid U.S. Currency Transaction Reports.<sup>169</sup> Other salient examples include instances in which the government has prosecuted or enjoined sole proprietors who have operated businesses out of their homes and have attempted to deduct personal expenses as business expenses.<sup>170</sup>

*Tax Protestors.* Other frequent subjects of the government’s publicity efforts are tax protestors, or individuals who refuse to pay federal income taxes on unsupported constitutional or other legal grounds. For instance, in 2004, the government issued several public announcements regarding its successful indictment of Irwin Schiff, who had advised nearly 5000 clients to file tax returns filled in with zeros on all lines.<sup>171</sup> Other examples include the government’s public announcement of the detection of individuals, such as

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<sup>166</sup> See Press Release, Dep’t of Justice, Former UBS Client Pleads Guilty to Hiding Assets in Secret Offshore Bank Accounts (Apr. 13, 2010), available at <http://www.justice.gov/opa/pr/2010/April/10-tax-401.html>; Press Release, Dep’t of Justice, Seven UBS Clients Charged with Hiding over \$100 Million in Secret Swiss Bank Accounts to Defraud the IRS (Apr. 15, 2010), available at [http://www.justice.gov/tax/txdv10\\_USB\\_Clients.htm](http://www.justice.gov/tax/txdv10_USB_Clients.htm); Press Release, Stacey A. Levine & Michael C. Vasiliadis, U.S. Dep’t of Justice, Former UBS Client Pleads Guilty to Failing to Report over \$1 Million in Swiss Bank Accounts (Apr. 12, 2010), available at <http://www.justice.gov/usao/nj/Press/files/pdf/2010/Abrahamsen,%20Harry%20Plea%20PR.pdf>.

<sup>167</sup> For instance, in 2011, the government announced that it had discovered that Arthur Joel Eisenberg, a resident of Seattle, had failed to file with the IRS a Report of Foreign Bank and Financial Accounts form (FBAR) regarding his large Cayman Islands bank account. Press Release, Dep’t of Justice, Former UBS Client Sentenced for Hiding Millions in Offshore Bank Accounts (Mar. 4, 2011), available at <http://www.justice.gov/opa/pr/2011/March/11-tax-279.html>.

<sup>168</sup> For a discussion of these kinds of taxpayers, see Susan Cleary Morse et al., *Cash Businesses and Tax Evasion*, 20 STAN. L. & POL’Y REV. 37, 39–40 (2009).

<sup>169</sup> Press Release, Dep’t of Justice, Rhode Island Machine Shop Owners Convicted of Tax Fraud (Mar. 30, 2009), available at <http://www.justice.gov/tax/txdv09283.html>.

<sup>170</sup> See, e.g., Press Release, Dep’t of Justice, Justice Department Sues to Stop Home-Based Business Tax Scam (Apr. 10, 2003), available at <http://www.justice.gov/tax/txdv03225.htm>.

<sup>171</sup> Press Release, Dep’t of Justice, Irwin Schiff and Two Associates Indicted for Tax Fraud (Mar. 24, 2004), available at <http://www.justice.gov/tax/txdv04182.htm>.

Daniel Edward Turner, who, in 2004, attempted to submit over \$491,000 to the Treasury in “Bills of Exchange,” some of which appeared similar to regular checks but referenced nonexistent accounts.<sup>172</sup>

*Timing.* Not only does the government publicize specific examples of its detection successes, but it also announces them disproportionately during the weeks leading up to Tax Day compared to the rest of the year. In an empirical study on this issue, Daniel Levin and I examined all press releases issued by the U.S. Department of Justice Tax Division during the seven-year period from 2003 through 2009 in which the agency announced a civil or criminal tax-enforcement action against a specific taxpayer by name.<sup>173</sup> We found that in the two weeks leading up to Tax Day, the government issued more than double the number of tax-enforcement press releases per week than it did during the rest of the year.<sup>174</sup>

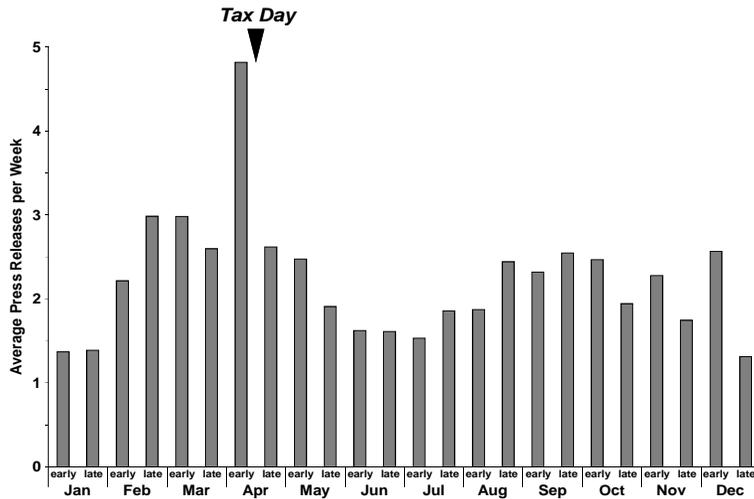
The chart below shows a graphic illustration of our findings of the average frequency of tax-enforcement press releases issued throughout the year from 2003 through 2009:

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<sup>172</sup> Press Release, Dep’t of Justice, Tax Protestor Convicted in Gainesville (Mar. 5, 2009), available at [http://www.justice.gov/tax/usaopress/2009/txdv09\\_Convict\\_Tax\\_Protest.pdf](http://www.justice.gov/tax/usaopress/2009/txdv09_Convict_Tax_Protest.pdf).

<sup>173</sup> See Blank & Levin, *supra* note 16, at 4.

<sup>174</sup> See *id.* at 17. For the time window from April 1 to Tax Day, we found that the government issued 128% more tax-enforcement press releases per week than during the rest of the year. *Id.*

FREQUENCY OF TAX-ENFORCEMENT PRESS RELEASES (2003–2009)<sup>175</sup>

The disproportionately large number of tax-enforcement press releases issued during the two weeks prior to Tax Day compared to the rest of the year was highly statistically significant.<sup>176</sup> In other words, this analysis strongly supported the hypothesis that the difference did not occur by chance. As we stated in our study, the timing of the government’s public announcements of tax-enforcement actions against specific taxpayers coincides with the weeks leading up to Tax Day, the time of year when the vast majority of individual taxpayers are in the process of preparing their own individual tax returns.<sup>177</sup>

*Behavioral Effects.* By publicizing salient examples of specific taxpayers engaged in abusive tax activities whom the government has detected successfully, especially during the weeks leading up to Tax Day, the government may take advantage of the availability heuristic of individual

<sup>175</sup> *Id.* at 18.

<sup>176</sup> “The negative binomial regression model’s likelihood ratio chi-square [was] 23.48 . . .” *Id.* at 16. The *p*-value was only .0000013. *Id.* These statistics mean, essentially, that there is a one-in-791,637 chance that this difference in the issuance of tax-enforcement press releases was random. *Id.*

<sup>177</sup> *Cf. id.* at 13 (“[T]he vast majority of annual individual income tax returns are filed with the [IRS] between February 1 and Tax Day each year. In 2008, for example, nearly 80% of all annual individual income tax returns were filed during this period.” (footnote omitted)).

taxpayers.<sup>178</sup> After encountering salient examples of specific taxpayers whom the government has detected, individual taxpayers who might otherwise be inclined to claim a questionable tax position may overestimate the IRS's capacity to detect abuse. Compared to faceless tax-enforcement statistics, concrete examples of specific taxpayers whom the government has caught, whether celebrities, local business figures, or officials, are memorable and thus available.

*b. Strong Tax Penalties*

While the Internal Revenue Code contains a myriad of tax penalties that apply in varying degrees of severity, the government's public announcements and media reports regarding specific taxpayers who have received tax penalties almost exclusively involve criminal sanctions or high civil tax penalties. These salient examples may lead individuals to overvalue the tax penalties that may apply to many tax offenses.

*Strong Criminal Tax Penalties.* In the examples of detected abuse described above, not only did the government publicly announce its success in catching noncompliant taxpayers, but in many cases, it also announced that these taxpayers would face criminal sanctions. When the government announces a public tax-enforcement action against a celebrity taxpayer who has engaged in a flagrant omission of taxable income, it frequently reveals that the taxpayer could face prison time.<sup>179</sup> Similar results occur in public tax-enforcement actions against individuals who have used more sophisticated tax-evasion methods, such as many former UBS clients who used offshore bank accounts to hide income and received prison or probation sentences as a consequence.<sup>180</sup> Further, when the government announces that it has detected habitual cash-economy tax evaders, it often states its intention to pursue criminal sanctions.<sup>181</sup> Consistent with the timing patterns described above, the government's announcements of criminal tax sanctions against specific

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<sup>178</sup> For a description of the availability heuristic, see *supra* note 148 and accompanying text.

<sup>179</sup> See, e.g., Press Release, Dep't of Justice, Wesley Snipes Surrenders on Tax Charges (Dec. 8, 2006), available at [media.tbo.com/graphics/120806snipes.pdf](http://media.tbo.com/graphics/120806snipes.pdf); Press Release, U.S. Dep't of Justice, *supra* note 164.

<sup>180</sup> For the government's announcement of UBS clients who have received criminal sentences, see *Offshore Tax-Avoidance and IRS Compliance Efforts*, IRS, <http://www.irs.gov/newsroom/article/0,,id=110092,00.html> (last updated Dec. 13, 2011).

<sup>181</sup> See, e.g., Press Release, Dep't of Justice, *supra* note 169 (describing potential fifteen-year prison sentences for cash-economy taxpayers).

taxpayers occur disproportionately in the weeks leading up to Tax Day compared to the rest of the year.<sup>182</sup>

Popular culture mirrors the specific examples of tax penalties that the government's public tax-enforcement actions create. Lawrence Zelenak reviewed eighty-nine radio and television situation comedy episodes from the 1940s to the early 2000s in which the federal income tax played a major role.<sup>183</sup> In about *half* the episodes that he studied, the possibility of criminal tax penalties for tax fraud was discussed.<sup>184</sup> Vivid examples of memorable characters, such as Archie Bunker<sup>185</sup> or Homer Simpson,<sup>186</sup> facing prison time for tax evasion may further solidify individuals' perception that the penalties for tax noncompliance are significant.

*Strong Civil Tax Penalties.* In addition, when the government announces a plea agreement with a specific taxpayer who has agreed to receive criminal sanctions rather than face trial, it often declares the size of the *civil* tax penalty that the taxpayer has paid. For example, in 2011, when the government announced the guilty plea of Arthur Joel Eisenberg for failing to file a Report of Foreign Bank and Financial Accounts (FBAR) for his offshore UBS bank account, it also announced that Eisenberg paid a \$2.1 million civil tax penalty to the IRS.<sup>187</sup> The government has announced similar plea agreements involving dozens of wealthy individuals who have pled guilty for failing to report offshore bank accounts and who have paid hefty civil penalties, ranging from \$1 million<sup>188</sup> to \$20.8 million.<sup>189</sup>

Further, the public may learn about the civil tax penalties owed by particular taxpayers as a result of the federal government's filing of tax liens against taxpayers who have failed to submit payments to the IRS. Even though the Notice of Federal Tax Lien does not explicitly state the amount of a taxpayer's civil tax penalty itself, tax liens are attributable to tax, interest, and

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<sup>182</sup> Blank & Levin, *supra* note 16, at 18.

<sup>183</sup> Lawrence Zelenak, *Six Decades of the Federal Income Tax in Sitcoms*, 117 TAX NOTES 1265 (2007).

<sup>184</sup> *Id.* at 1266–67.

<sup>185</sup> *All in the Family: Archie's Fraud* (CBS television broadcast Sept. 23, 1972).

<sup>186</sup> *The Simpsons: The Trouble with Trillions* (20th Century Fox television broadcast Apr. 5, 1998).

<sup>187</sup> Press Release, Dep't of Justice, *supra* note 167.

<sup>188</sup> See *Offshore Tax-Avoidance and IRS Compliance Efforts*, *supra* note 180.

<sup>189</sup> Press Release, Dep't of Justice, Former UBS Client Pays \$20.8 Million Penalty for Hiding over \$41 Million in Swiss Bank Accounts (Sept. 21, 2010), available at <http://www.justice.gov/usao/nys/pressreleases/September10/robbinsjulesentencingpr.pdf>.

*tax penalties* owed.<sup>190</sup> When celebrity taxpayers are subject to the tax liens, the media typically feature multiple stories about the size of their taxes and tax penalties.<sup>191</sup> In some cases, the media may focus on the size of the tax lien, rather than the notoriety of the taxpayer. For example, in 2010, the IRS filed a \$172 million tax lien against Marcos Esparza Bofill, who lived in New York for only a year while working as a day trader.<sup>192</sup> The media's investigation of this lien revealed that a large portion of this bill was due to large unreported gross gains (because Bofill failed to file tax returns, the IRS did not receive information regarding his losses).<sup>193</sup> It is possible that the high dollar amounts involved in many of these liens may lead taxpayers to believe, often accurately, that the taxpayer involved is liable for significant tax penalties.

*Behavioral Effects.* Salient examples of specific taxpayers' tax penalties, such as those described above, may encourage individuals to develop an exaggerated perception of tax penalties and the government's willingness to impose them on taxpayers. Individuals often become mentally wedded or anchored to certain images or values.<sup>194</sup> When the anchoring bias takes hold, individuals may find it difficult to detach themselves from their initial impression, even though they may encounter new or conflicting data.<sup>195</sup> Government officials appear to exploit this bias further by issuing taxpayer guidance that warns individuals that, if they "willfully fail to meet their tax obligations," they may face tax penalties, including "criminal prosecution."<sup>196</sup> While only a tiny percentage of taxpayers face criminal prosecution for tax evasion each year<sup>197</sup> and many taxpayers do not face civil tax penalties at

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<sup>190</sup> See I.R.C. § 6321 (2006); IRS, DEP'T OF THE TREASURY, CAT. NO. 60025X, FORM 668(Y)(c): NOTICE OF FEDERAL TAX LIEN (2004); *Topic 201—The Collection Process*, IRS, <http://www.irs.gov/taxtopics/tc201.html> (last updated Dec. 22, 2011).

<sup>191</sup> See, e.g., Lois Weiss & Dan Mangan, *It's Lien Streets for 'Tardy' Marty: Scorsese Slapped with \$2.85M Back-Tax Bill*, N.Y. POST, Mar. 8, 2011, at 5 (describing a tax lien as resulting from "taxes and related interest and penalties" (emphasis added)).

<sup>192</sup> See Bill Hutchinson, *Thought You Had IRS Problems? Failed Day-Trader Nailed with \$172M Bill*, N.Y. DAILY NEWS, Aug. 24, 2010, at 8.

<sup>193</sup> See *id.*

<sup>194</sup> *Supra* notes 149–50 and accompanying text.

<sup>195</sup> *Id.*

<sup>196</sup> Press Release, Dep't of Justice, North Carolina Attorneys Plead Guilty to Failing to File Tax Returns (Apr. 6, 2005), available at <http://www.justice.gov/tax/txdv05168.htm> (quoting then-Assistant Attorney General Eileen J. O'Connor).

<sup>197</sup> In 2009, the federal government authorized the prosecution of 1210 criminal tax cases. TAX DIV., U.S. DEP'T OF JUSTICE, FY 2011 CONGRESSIONAL BUDGET 25 (2010), available at <http://www.justice.gov/jmd/2011justification/pdf/fy11-tax-justification.pdf>. This number represents .00086% of the total individual tax returns filed in 2009. See *Individual Complete Report (Publication 1304), Table 1.6, SOI Tax Stats—Individual Statistical Tables by Size of Adjusted Gross Income*, IRS, <http://www.irs.gov/taxstats/indtaxstats/>

all,<sup>198</sup> the examples of specific, recognizable taxpayers facing such penalties may cause some individuals to become anchored to the impression that most penalties for tax noncompliance are high.

*c. Tax-Controversy Victories*

Last, the government may publicize its successes in both criminal and civil tax litigation to foster the perception that taxpayers have a low chance of prevailing in a tax controversy against it. Government officials have stated publicly that they believe that government victories in criminal and civil tax controversies “receive wide media coverage” and, as a result, have “a significant multiplier effect on voluntary compliance.”<sup>199</sup> Consistent with these words, the government reinforces the perception that it prevails in most tax controversies by publicizing vivid descriptions of its victories against specific taxpayers in criminal and civil tax litigation in the public courts.

*Criminal Tax Victories.* The most memorable public tax disputes often involve criminal tax cases against specific taxpayers. The Tax Division litigates these cases, and its lawyers win almost all of them. In 2009, for example, the government won 98% of all criminal tax controversies that it prosecuted.<sup>200</sup> Just two years earlier, this success rate was 100%.<sup>201</sup> Consequently, when individuals hear about a criminal tax-enforcement action against a specific taxpayer through news reports or other sources, they almost always learn that the taxpayer involved has entered a guilty plea or received a criminal sanction, such as a prison sentence. Even when the government loses on the merits on the heftiest criminal charges against a particular taxpayer, it often succeeds in obtaining a conviction on lesser charges or enters into a plea agreement with the taxpayer.<sup>202</sup>

*Civil Tax Victories.* Although the government’s success rate in civil tax controversies is not as high as its near-perfect record in criminal tax controversies, its record of success in civil tax litigation is strong. The IRS

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article/0,,id=96981,00.html (follow “2009” hyperlink) (last updated Nov. 23, 2011) (reporting that 140,494,127 individual tax returns were filed in 2009).

<sup>198</sup> See TREASURY INSPECTOR GEN. FOR TAX ADMIN., DEP’T OF THE TREASURY, REFERENCE NO. 2010-30-059, ACCURACY-RELATED PENALTIES ARE SELDOM CONSIDERED PROPERLY DURING CORRESPONDENCE AUDITS 5 (2010), available at <http://www.treasury.gov/tigta/auditreports/2010reports/201030059fr.pdf>.

<sup>199</sup> TAX DIV., *supra* note 197, at 2.

<sup>200</sup> *Id.* at 23.

<sup>201</sup> *See id.*

<sup>202</sup> *See, e.g., Wesley Snipes Gets 3 Years for Not Filing Tax Returns*, N.Y. TIMES, Apr. 25, 2008, at C3 (noting that the defendant was acquitted of tax fraud but convicted of willful failure to file a federal tax return).

Office of Chief Counsel wins the majority of civil tax disputes in U.S. Tax Court involving the most litigated issues.<sup>203</sup> For example, according to the Taxpayer Advocate Service, in 2009, the IRS won civil tax controversies in U.S. Tax Court involving the following issues: gross income (95% government success rate), accuracy-related penalties (84%), collection due process (92%), summons enforcement (96%), trade or business expenses (65%), and frivolous issue penalties (94%).<sup>204</sup> These results should not be surprising because the IRS Appeals Division openly considers the “hazards of litigation” when determining whether to litigate or settle tax controversies.<sup>205</sup> If a tax controversy reaches a public court, the government believes it has a high probability of success.

*Behavioral Effects.* Salient examples of government victories in tax disputes involving specific taxpayers implicate at least two cognitive biases that may cause an individual to overestimate the odds that the government will succeed on the merits in litigation. Because so many of the highly publicized tax disputes involve celebrities and other prominent individuals, the availability heuristic<sup>206</sup> may cause the individual to conclude that government victories in tax litigation are the norm. And if her tax position leads to litigation, the anchoring bias<sup>207</sup> may cause her to concede issues to the government. The reason for this reaction is that she may be anchored to the perception that, if the tax controversy were to reach court, the government would prevail on at least some of the disputed issues.

## 2. *Tax-Enforcement Examples We Do Not See*

The examples of tax enforcement that are visible today portray the government as enforcing the tax law effectively and efficiently. It catches tax cheats, wins in court, and ensures that strong punishments for tax noncompliance are levied. Yet these examples of successful tax enforcement feature only a tiny sampling of taxpayers. We cannot see the details of other taxpayers’ tax returns or their disputes with the government. They are not visible because tax privacy hides them from public view.

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<sup>203</sup> See 1 TAXPAYER ADVOCATE SERV., DEP’T OF THE TREASURY, NATIONAL TAXPAYER ADVOCATE: 2009 ANNUAL REPORT TO CONGRESS 406 tbl.3.0.2 (2009).

<sup>204</sup> See *id.* (listing the total number of cases litigated involving each issue and comparing the number of successes of pro se litigants with those of represented litigants).

<sup>205</sup> See David M. Fogel, *The Inside Scoop About the IRS’s Appeals Division*, 99 TAX NOTES 1503, 1503–04 (2003) (internal quotation marks omitted).

<sup>206</sup> See *supra* note 148 and accompanying text.

<sup>207</sup> See *supra* notes 149–50 and accompanying text.

What would we see in a world without individual tax privacy? To explore the possibilities, let us imagine a regime of public access in which the tax return information of individuals that is protected by tax privacy could be viewed by the media and the general public. In this hypothetical public-access regime, a taxpayer's tax return and related information could be made publicly available in a searchable online database, so that the reporters and ordinary citizens could examine any taxpayer's tax returns, audit history, settlement agreements, and other tax return information.

As the discussion below reveals, by lifting the curtain of tax privacy, we would see very different examples of tax enforcement involving specific taxpayers compared to those we see today. In contrast to the examples we see today, a public-access regime could enable us to see concrete examples of the government failing to detect abusive tax activities, declining to apply tax penalties (whether criminal or civil), and offering taxpayers concessions in its substantive legal challenges.

Privacy rules in the tax context serve a unique function in enhancing public confidence in the government. Imagine, for example, that a local police department attempted to win public support by announcing only the murder cases that it had solved and by not revealing any information about murder cases that remained unsolved. Would the public believe that the police had successfully solved *all* murder cases? Most likely, the answer is no. In quests for justice, at least some family members of the victims of the unsolved murders would speak out publicly about the failure of the police to catch the murderers. By contrast, the only direct "victim" of tax noncompliance is the government itself (society, of course, is the indirect victim). Consequently, in the tax context, the government possesses the unique ability to refrain from revealing instances of undetected tax noncompliance to the public, while only emphasizing instances in which its agents have successfully enforced the tax law.

*a. Undetected Abuse*

Without the curtain of tax privacy, the media—and ultimately ordinary citizens—could observe concrete examples of taxpayers who may have engaged in abusive tax activities, yet escaped detection by the IRS. The media's focus on instances in which the IRS appeared to fail to detect abuse could lead individuals to reduce their own subjective probabilities of being detected by the IRS.

Despite the government's dramatic public announcements of its successful detection of tax noncompliance, ranging from blatant tax fraud<sup>208</sup> to sophisticated tax shelter activity,<sup>209</sup> publicly available tax-enforcement statistics strongly suggest that many taxpayers engage in abusive tax avoidance or tax evasion without prompting an IRS audit or other investigation. For example, as a result of the IRS's limited budgetary resources, the audit rate for individual taxpayers perennially hovers around 1% (in 2009, for example, it was 1.03%).<sup>210</sup> Other public reports indicate that hundreds of thousands of citizens simply fail to file tax returns at all, and the IRS lacks the resources to investigate these cases.<sup>211</sup> Publicly available statistics also reveal that the IRS has reduced its audit coverage of wealthy taxpayers over the last decade (for example, by 36% from 2007 to 2008),<sup>212</sup> yet studies show that taxpayers with adjusted gross incomes of \$500,000 to \$1,000,000 fail to accurately report 21% of their income on average.<sup>213</sup> Consistent with this data, IRS officials have conceded that they do not audit many instances of abuse.<sup>214</sup>

Instead of anonymous statistics, the elimination of tax privacy would reveal the identities of taxpayers who have engaged in abusive tax planning and whom the IRS has failed to pursue. Especially in the case of celebrities and government officials, public access to tax return information could generate a media frenzy over tax returns that appear to show low taxable income compared to these individuals' apparent wealth or other suspicious items that may imply the use of abusive tax-planning techniques. Likewise, for curious citizens, public access to tax return information could offer examples of friends and neighbors who may have claimed improper tax positions on their tax returns.

If individuals were to encounter examples of specific taxpayers who had engaged in abusive tax activities, they may conclude that the IRS has failed to detect these instances unless the publicly available tax return information

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<sup>208</sup> See *supra* notes 162–65 and accompanying text.

<sup>209</sup> See *supra* notes 166–67 and accompanying text.

<sup>210</sup> *Fiscal Year 2009 Enforcement Results*, IRS, [http://www.irs.gov/pub/newsroom/fy\\_2009\\_enforcement\\_results.pdf](http://www.irs.gov/pub/newsroom/fy_2009_enforcement_results.pdf) (last visited Feb. 22, 2012).

<sup>211</sup> See generally DAVID CAY JOHNSTON, *PERFECTLY LEGAL* 204–05 (2003).

<sup>212</sup> See *IRS Audit Rate for Millionaires Plummet*, TRAC IRS (Mar. 23, 2009), <http://trac.syr.edu/tracirs/latest/204/>.

<sup>213</sup> See, e.g., Andrew Johns & Joel Slemrod, *The Distribution of Income Tax Noncompliance*, 63 NAT'L TAX J. 397, 404, 413 (2010).

<sup>214</sup> JOHNSTON, *supra* note 211, at 200 (quoting Frank Keith, former senior IRS spokesman, as stating that, "with limited resources[,] the I.R.S. must often choose which cases to pursue" (internal quotation marks omitted)).

shows otherwise. Upon discovering a specific taxpayer's apparent abuse, the media, or even ordinary individuals, could review the taxpayer's publicly available tax return information to determine whether the IRS had sent the taxpayer an audit letter (a "Summary of Proposed Changes")<sup>215</sup> or a statutory notice of deficiency,<sup>216</sup> whether the taxpayer had filed a protest with the IRS Appeals Division in response to a revenue-agent letter,<sup>217</sup> or whether the taxpayer had filed any amended tax returns that revised the original abusive tax position. If none of these items were present, then the media's discovery of a case of abuse involving a specific taxpayer could lead to the perception that the IRS had failed to detect this abuse on its own.

What types of undetected abuse would a public-access regime expose? Several categories are discussed below.

*Rich and Famous.* Public access to tax return information would provide the media with a treasure trove of information about the tax affairs of prominent individuals, politicians, and celebrities. While tax returns are currently not available to the media, reporters have seized on any opportunity in recent years to reveal the tax irregularities of high-profile individuals, especially when the public may view these irregularities as indicative of hypocrisy or worse.

A hint of the media's likely reaction to public access can be found by reviewing its coverage of political candidates and nominees for executive appointments over the past decade. For example, while running for Governor of Georgia in 2010, Roy Barnes released his personal tax returns, which reflected large depreciation deductions for certain years.<sup>218</sup> After reviewing the returns and comparing them to property records, investigative journalists discovered that Barnes had improperly claimed these depreciation deductions for property that he did not own.<sup>219</sup> Other examples have occurred in many presidential-appointment nomination cycles.<sup>220</sup> When President Obama

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<sup>215</sup> *CP 2000 Sample Contents Page 1*, IRS, <http://www.irs.gov/individuals/article/0,,id=169287,00.html> (last updated Sept. 9, 2011).

<sup>216</sup> I.R.C. § 6212(a) (2006).

<sup>217</sup> *See Letters and Notices Offering an Appeal*, IRS, <http://www.irs.gov/individuals/article/0,,id=160744,00.html> (last updated July 25, 2011) (describing IRS Letter 525—General 30 Day Letter).

<sup>218</sup> Larry Peterson, *Barnes Takes Tax Break on House that Isn't His*, SAVANNAH MORNING NEWS, Oct. 14, 2010, at A6.

<sup>219</sup> *E.g., id.*

<sup>220</sup> *See, e.g.,* Matt Kelley, *Tax Snafus Add Up for Obama Team*, USA TODAY, Feb. 6, 2009, at A1 (describing the unpaid tax liability of Hilda Solis, Obama's nominee for Secretary of Labor); Claudia Wallis, *The Lessons of Nannygate*, TIME, Feb. 22, 1993, at 76 (describing the tax troubles of President Clinton's

presented Congress with his slate of nominees for executive appointments in 2009, the media reported hundreds of stories on the tax problems of nominees, such as former U.S. Senator Tom Daschle, nominee for Health and Human Services Secretary, who failed to report the value of free car service from his employer as taxable income;<sup>221</sup> and Timothy Geithner, nominee for Treasury Secretary, who failed to pay self-employment taxes for several years on income received while working for the International Monetary Fund.<sup>222</sup>

While these examples reveal the tax noncompliance of prominent individuals, they also expose the IRS's failure to detect the improper items through audits or other means. Without the public release of their tax returns and the accompanying media and political interest that followed, these individuals likely would not have voluntarily alerted the IRS to these errors or filed amended tax returns to correct them. Public access would only enhance the media's ability to showcase high-profile, recognizable individuals who had engaged in tax avoidance or evasion. In the cases where the featured celebrity did not undergo a formal IRS audit or investigation, the public would see memorable examples of the government's failure to detect abuse.

*Perceived Abuse.* Public access could also encourage the media to report instances in which taxpayers claim tax positions that *appear* to be abusive, even though they are consistent with Congress's intent. For instance, in 2010, after causing millions of gallons of oil to spill into the Gulf of Mexico, British Petroleum created a \$20 billion fund to compensate individuals and businesses that suffered harm as a result of the spill, and also incurred other clean-up costs.<sup>223</sup> When British Petroleum revealed that it would claim these amounts as a tax deduction and use the deduction to offset taxable income from a prior year, the mainstream media and the general public appeared to perceive that

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nominees for Attorney General, Kimba Wood and Zoe Baird); Michael J. Sniffen, *Nominees Sunk by Tax and Nanny Problems for Years*, SEATTLE TIMES (Jan. 14, 2009, 12:47 PM), [http://seattletimes.nwsources.com/html/politics/2008628347\\_apnanniesandtaxes.html](http://seattletimes.nwsources.com/html/politics/2008628347_apnanniesandtaxes.html) (describing tax noncompliance by presidential nominees from 1993 through 2004); *Tax Issues Prompt Obama Nominee to Withdraw*, CNN POL. (Feb. 3, 2009), [http://articles.cnn.com/2009-02-03/politics/performance.nominee.withdraws\\_1\\_nancy-killefer-chief-performance-officer-unemployment-tax?\\_s=PM:POLITICS](http://articles.cnn.com/2009-02-03/politics/performance.nominee.withdraws_1_nancy-killefer-chief-performance-officer-unemployment-tax?_s=PM:POLITICS) (describing the withdrawal of Nancy Killefer, nominated by President Obama to serve as Deputy Director for Management of the Office of Management and Budget).

<sup>221</sup> Jeff Zeleny, *Daschle Ends Bid for Post*, N.Y. TIMES, Feb. 4, 2009, at A1.

<sup>222</sup> Jackie Calmes, *Treasury Nomination Hits Snag over Issue of Past Unpaid Taxes*, N.Y. TIMES, Jan. 14, 2009, at A1.

<sup>223</sup> Barack Obama, President, Remarks Following a Meeting with BP Leadership (June 16, 2010), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201000503/html/DCPD-201000503.htm>.

the corporation had engaged in an abusive tax shelter.<sup>224</sup> Even the White House Press Secretary acknowledged American taxpayers' outrage that they would foot the bill for British Petroleum's disaster.<sup>225</sup> The tax position of British Petroleum, however, was clearly intended by Congress and consistent with a normative income tax base (that is, a business should be able to deduct ordinary and necessary business expenses from its taxable income).<sup>226</sup> A public-access regime could cause the media to focus on similar types of perceived "abuse" by individual taxpayers, such as when they realize income that they do not recognize for tax purposes<sup>227</sup> or when they bequeath valuable property to others without recognizing taxable gain.<sup>228</sup>

*Cash Economy.* Another category of specific examples of the government's failure to detect abuse that could emerge as a result of public access are stories regarding businesses that conduct most of their operations by engaging in transactions that are not subject to information-reporting or withholding rules.<sup>229</sup> Although the government publicizes its success in cracking down on cash-economy businesses that fail to report the proper amount of taxable income, in reality, the compliance rate among small businesses and sole proprietorships generally is about 50%.<sup>230</sup>

Public access to tax return information could enable the media, on both a national and local level, to produce salient news stories about the low reported taxable income of certain cash-economy businesses. For example, as a result of its own investigative reporting, in 2000, the *New York Times* published a story

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<sup>224</sup> See, e.g., Jia Lynn Yang, *BP to Cut Its U.S. Tax Bill by \$10 Billion*, WASH. POST, July 28, 2010, at A4 (quoting Rep. Eliot L. Engel of New York, who declared, "I call on BP to show, for once, a glimmer of humanity in this situation and halt its claim for this tax break immediately" (internal quotation marks omitted)).

<sup>225</sup> *Id.*

<sup>226</sup> See I.R.C. §§ 165, 172 (2006) (describing net operating loss deductions).

<sup>227</sup> See, e.g., Jesse Drucker, *Buffet-Ducking Billionaires Avoid Reporting Cash Gains to IRS*, BLOOMBERG (Nov. 21, 2011, 12:01 AM), <http://www.bloomberg.com/news/2011-11-21/billionaires-duck-buffett-17-tax-target-avoiding-reporting-cash-to-irs.html> (describing taxpayers who hold appreciated stock and utilize "strategies that reap hundreds of millions of dollars from those valuable shares in ways the IRS often doesn't classify as taxable income").

<sup>228</sup> See, e.g., Josh Kosman, *Steve Jobs' Heirs to Avoid Big Tax Hit if They Sell Apple Stake Right Away*, N.Y. POST (Oct. 6, 2011, 11:48 PM), [http://www.nypost.com/p/news/business/techie\\_avoided\\_tax\\_man\\_jKZ3b9dhOGZSZqtnXhcqUI](http://www.nypost.com/p/news/business/techie_avoided_tax_man_jKZ3b9dhOGZSZqtnXhcqUI) (noting Jobs's use of I.R.C. § 1014).

<sup>229</sup> See Susan Cleary Morse et al., *supra* note 168, at 41.

<sup>230</sup> See IRS, U.S. DEP'T OF THE TREASURY, REDUCING THE FEDERAL TAX GAP 13 fig.4, 14 fig.5 (2007), available at [http://www.irs.gov/pub/irs-news/tax\\_gap\\_report\\_final\\_080207\\_linked.pdf](http://www.irs.gov/pub/irs-news/tax_gap_report_final_080207_linked.pdf) (reporting that non-farm-proprietor income is underreported at a rate of 57%).

titled *Defying the I.R.S., Anti-Tax Businesses Refuse to Withhold*,<sup>231</sup> which featured small-business owners who openly boasted on the Internet and in other venues that they had stopped paying income taxes and stopped withholding or paying over Social Security or Medicare taxes. A later story reported that one small business, Kristi Tool Company of Magnolia, Massachusetts, had not withheld taxes since 1979 and had never faced an audit or inquiry from the IRS.<sup>232</sup> After investigating the blatant tax evasion of twenty-three small businesses, a 2000 article commented that “there is no public record showing litigation or enforcement actions like liens against the companies’ assets.”<sup>233</sup> The lack of IRS action in this case became the primary focus of the story, as it concluded that “[t]he failure of the IRS to act even against those who openly defy the tax laws raises questions about the agency’s ability to stop tax cheating.”<sup>234</sup> A public-access regime could provide the media with even more information about the underreporting of income by cash businesses that have failed to comply with the tax law but have avoided IRS detection.

*Tax Protestors.* The tax returns of tax protestors, especially where the government has not pursued an audit or other legal action, would likely cause reporters to produce vivid examples of taxpayers who seemingly claimed far-fetched tax positions on their tax returns without suffering consequences. For example, in 2003, David Cay Johnston, then a reporter for the *New York Times*, discovered through investigative journalism that the actor Wesley Snipes was an adherent to the “861 position,” a frequent legal argument of tax protestors.<sup>235</sup> Johnston’s reporting revealed that Snipes had filed refund claims for millions in paid taxes and that he had even altered the jurat—the text at the bottom of the tax return that requires taxpayers to declare that the tax return is correct “under penalties of perjury”—by inserting the word “no” between the words “under” and “penalties.”<sup>236</sup> Because Johnston had uncovered this information three years *before* Snipes was indicted on tax-fraud charges in 2006, it may have appeared to some observers at the time as though Snipes had

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<sup>231</sup> David Cay Johnston, *Defying the I.R.S., Anti-Tax Businesses Refuse to Withhold*, N.Y. TIMES, Nov. 19, 2000, § 1, at 1.

<sup>232</sup> David Cay Johnston, *IRS Going After Businesses on Withholding Tax*, N.Y. TIMES, Feb. 10, 2001, at C1.

<sup>233</sup> Johnston, *supra* note 231, § 1, at 45.

<sup>234</sup> *Id.*

<sup>235</sup> JOHNSTON, *supra* note 211, at 195–96. The IRS has defined this argument as “frivolous” in Rev. Rul. 2004-30, 2004-1 C.B. 622.

<sup>236</sup> JOHNSTON, *supra* note 211, at 195–96 (internal quotation marks omitted).

successfully relied upon a tax-protestor argument without being detected by the IRS. Government officials admit that review of tax protestors' tax returns "places a severe administrative burden on the I.R.S." by consuming thousands of work hours from IRS agents<sup>237</sup>—in many cases, likely without producing counterbalancing tax revenue.

*Friends, Neighbors, and Personal Associates.* While a public-access regime would likely cause the media, with its investigative resources, to serve as the primary source of specific examples of the government's lack of detection of abusive tax activities, public access would also empower individuals to research the tax activities of their friends, neighbors, and personal associates. The annual individual income tax return, IRS Form 1040,<sup>238</sup> contains a wealth of information that could enable some individuals to determine whether their personal associates had claimed improper tax positions, such as whether a taxpayer filed a tax return at all; how much a taxpayer reported as adjusted gross income;<sup>239</sup> whether the taxpayer paid self-employment tax;<sup>240</sup> whether the taxpayer paid taxes resulting from a household employee;<sup>241</sup> how many dependents the taxpayer claimed;<sup>242</sup> whether the taxpayer reported alimony;<sup>243</sup> and whether the taxpayer claimed special tax credits, such as the Earned Income Credit<sup>244</sup> or the First-Time Homebuyer Credit.<sup>245</sup>

Consequently, if tax returns were publicly accessible, an individual could determine whether her neighbor, who runs a cash business out of his basement, had paid self-employment tax or even reported taxable income.<sup>246</sup> An individual could determine whether her friend who clearly employs a live-in housekeeper had paid household employment taxes.<sup>247</sup> Or an individual who

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<sup>237</sup> *Id.* at 200 (quoting the affidavit of Rae Ann Thurell, an IRS manager) (internal quotation marks omitted).

<sup>238</sup> IRS, DEP'T OF THE TREASURY, OMB No. 1545-0074, FORM 1040: U.S. INDIVIDUAL INCOME TAX RETURN (2011).

<sup>239</sup> *Id.* at l. 37.

<sup>240</sup> IRS, DEP'T OF THE TREASURY, OMB No. 1545-0074, SCHEDULE SE (FORM 1040): SELF-EMPLOYMENT TAX (2011).

<sup>241</sup> IRS, DEP'T OF THE TREASURY, OMB No. 1545-1971, SCHEDULE H (FORM 1040): HOUSEHOLD EMPLOYMENT TAXES (2011).

<sup>242</sup> IRS, *supra* note 238, at l. 6(c).

<sup>243</sup> *Id.* at l. 11.

<sup>244</sup> *Id.* at l. 64(a).

<sup>245</sup> *Id.* at l. 67.

<sup>246</sup> *Id.* at ll. 12, 56.

<sup>247</sup> IRS, *supra* note 241.

knows her coworker has only one child could discover that this individual claimed erroneous exemptions for an additional phony dependent.<sup>248</sup> Where such tax positions did not result in an IRS audit (again, that information would be publicly accessible as well), individuals could discover that taxpayers whom they know personally and respect had claimed abusive tax positions without triggering government detection.

*Behavioral Effects.* Just as cognitive biases may cause individuals to overvalue salient examples of detection successes publicized by the government,<sup>249</sup> they may have the same effect on individuals' perceptions of specific examples of the government detection failures. The salient examples of specific, recognizable taxpayers who claimed improper tax positions without facing IRS detection that would appear in a public-access regime could cause individuals to alter their perceptions of the government's ability to detect abuse. If the media were to publicize the government's apparent failure to audit a well-known citizen, or if an individual were to discover this failure regarding one of her own friends or neighbors, the availability heuristic<sup>250</sup> could cause her to perceive that the chances of government detection are not nearly as high as individuals appear to believe they are today.

*b. Weak Tax Penalties*

A public-access regime would also likely enable the media to publicize instances in which tax evaders *were* detected by the IRS but did not bear strong criminal or civil tax penalties. As opposed to the specific examples of tax penalties that individuals encounter today, the statutory and administrative exceptions and standards inherent in these tax-penalty rules prevent the government from applying hefty civil or criminal tax penalties in the vast majority of tax controversies.

*Weak Criminal Tax Penalties.* The government pursues criminal tax penalties against individual taxpayers in a minute number of cases.<sup>251</sup> A public-access regime, consequently, would likely reveal memorable examples of high-profile individuals who participated in fraudulent tax schemes without facing criminal prosecution. The primary reason for the government's

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<sup>248</sup> IRS, *supra* note 238, at 1. 6(c).

<sup>249</sup> See *supra* note 178 and accompanying text.

<sup>250</sup> See *supra* note 148 and accompanying text.

<sup>251</sup> See TAX DIV., *supra* note 197, at 1, 14, 23, 25 (discussing the number of authorized criminal prosecutions in given years).

reluctance to seek criminal tax penalties is that it must prove in court that the taxpayer intended to defraud the government.<sup>252</sup> Thus, one explanation for the government's reluctance to pursue criminal tax sanctions against taxpayers who have participated in tax fraud is that the available evidence may not satisfy the heightened burden of proof.

Instead of pursuing criminal tax sanctions in many cases, the government attempts to reach a civil settlement with the taxpayer or even creates special amnesty programs that encourage taxpayer disclosure by removing the threat of criminal tax penalties. For example, in September 2009, after reaching an exchange-of-information agreement with UBS,<sup>253</sup> the IRS created an amnesty program under which taxpayers could voluntarily disclose their use of offshore accounts and, in exchange, avoid the imposition of criminal tax-fraud penalties.<sup>254</sup> Within weeks of the IRS's announcement of the amnesty program, 15,000 taxpayers participated.<sup>255</sup> Even though some rich and famous individuals probably participated in the amnesty program, tax privacy prevented the media from reporting their identities.<sup>256</sup>

With public access to tax return information, however, the media could generate vivid news stories of recognizable, high-profile taxpayers who engaged in tax fraud but avoided the criminal or civil penalties by participating in IRS amnesty programs. These examples would stand in stark contrast to the government's public announcements describing the convictions of wealthy and prominent individuals who have hidden income from the IRS in offshore bank accounts.<sup>257</sup>

*Weak Civil Tax Penalties.* In addition, a public-access regime would provide the media with an abundance of examples of specific taxpayers who committed civil tax offenses but paid low or no monetary tax penalties. To

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<sup>252</sup> U.S. TAX CT. R. PRAC. & P. 142(b).

<sup>253</sup> *IRS to Receive Unprecedented Amount of Information in UBS Agreement*, IRS (Aug. 19, 2009), <http://www.irs.gov/newsroom/article/0,,id=212124,00.html>.

<sup>254</sup> *Voluntary Disclosure: Questions and Answers*, IRS (Feb. 8, 2011), <http://www.irs.gov/newsroom/article/0,,id=210027,00.html>. The IRS announced a second special offshore voluntary disclosure initiative on February 8, 2011. *Second Special Voluntary Disclosure Initiative Opens*, IRS (Feb. 8, 2011), <http://www.irs.gov/newsroom/article/0,,id=235695,00.html>.

<sup>255</sup> *Second Special Voluntary Disclosure Initiative Opens*, *supra* note 254.

<sup>256</sup> For speculation on this point, see Arden Dale, *Rich and Famous Stay Hidden in IRS Probe*, DOW JONES FIN. ADVISER BLOG (July 29, 2010), <http://financialadviserblog.dowjones.com/blog/stay-ahead-of-your-clients/rich-and-famous-stay-hidden-in-irs-probe>.

<sup>257</sup> See *supra* notes 166–67 and accompanying text (discussing examples of public announcements of high-profile taxpayers who engaged in tax fraud).

apply accuracy-related and civil-fraud tax penalties, the IRS must rebut the taxpayer's defenses that are contained in the Internal Revenue Code and the Treasury Regulations.<sup>258</sup> For instance, in response to an accuracy-related tax penalty, which applies when taxpayers submit incomplete or incorrect information on their tax returns, a taxpayer may avoid the penalty by demonstrating that she had "reasonable cause" for claiming the tax position at issue.<sup>259</sup>

Publicly available statistics show that the IRS frequently declines to levy tax penalties against taxpayers who have failed to comply with the tax law or that the IRS declines to apply the proper penalties. In 2010, for example, the Treasury Inspector General for Tax Administration, an organization within the Treasury Department that provides oversight of the IRS, found that, in a statistical sample of correspondence audits closed in the 2008 fiscal year, IRS agencies failed to consider the application of accuracy-related tax penalties in 92% of the cases.<sup>260</sup> Even though each of these audits resulted in the payment of additional taxes by taxpayers of at least \$5000, the IRS applied accuracy-related tax penalties against almost none of the taxpayers involved.<sup>261</sup> Another study by this organization showed that, in 2007, the IRS failed to consider accuracy-related penalties in almost half of its audits of sole proprietors.<sup>262</sup>

A public-access regime would likely produce examples of named taxpayers, such as politicians, prominent business figures, and celebrities, who claimed erroneous tax positions but did not pay civil tax penalties. These types of wealthy and sophisticated taxpayers likely have greater abilities than others to hire counsel that can help them avoid the imposition of tax penalties, either by relying on one of the tax-penalty exceptions or by taking advantage of a government-sponsored amnesty program. If the media had access to tax return information, it could determine when a specific taxpayer had filed an amended return to report previously omitted income that an IRS agent had discovered through an audit, but had not paid a civil tax penalty as a result of this conduct.

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<sup>258</sup> See I.R.C. §§ 6664(c)–(d) (2006); Treas. Reg. § 1.6664-4 (2003).

<sup>259</sup> See I.R.C. § 6664(c)(1); Treas. Reg. § 1.6664-4.

<sup>260</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., *supra* note 198, at 5.

<sup>261</sup> *Id.*

<sup>262</sup> See TREASURY INSPECTOR GEN. FOR TAX ADMIN., DEP'T OF THE TREASURY, REFERENCE NO. 2010-30-024, SIGNIFICANT TAX ISSUES ARE OFTEN NOT ADDRESSED DURING CORRESPONDENCE AUDITS OF SOLE PROPRIETORS 4 (2010), available at <http://www.treasury.gov/tigta/auditreports/2010reports/201030024fr.pdf> (noting that, in 129 of 298 correspondence audits, sole proprietors may have avoided assessments of tax and interest).

Public access to tax return information would also produce examples of specific ordinary citizens who paid low or no tax penalties. Under current law, a taxpayer who owes the IRS a tax deficiency, interest, and penalties may submit an Offer in Compromise to the IRS to attempt to settle the total liability.<sup>263</sup> According to the U.S. Government Accountability Office, in fiscal year 2005 cases where the IRS accepted the taxpayer's offer, the taxpayer paid an average of sixteen cents per dollar of tax liability, including tax penalties, owed.<sup>264</sup> Even though these statistics are available publicly today, the repeal of tax privacy would allow individuals to see vivid examples of their friends and neighbors who owed significant tax penalties but paid only a small fraction of them to the IRS as a result of a successful Offer in Compromise.

*Behavioral Effects.* By promoting examples of specific taxpayers who participated in tax noncompliance of varying grades but nonetheless failed to pay substantial tax penalties, a public-access regime could cause taxpayers to develop a more realistic perception of the tax-penalty structure. News reports featuring celebrities and other prominent officials who avoided high significant tax penalties, even when they committed tax fraud by, for example, hiding income offshore or participating in an abusive tax shelter, could trigger the availability heuristic and cause individuals to perceive that most taxpayers do not face civil and criminal tax penalties. Further, the anchoring bias could lead them to perceive that, even if tax penalties do apply, for most taxpayers they are low or nonexistent and deviate from this low anchor only in extreme cases.

*c. Tax-Controversy Concessions*

Last, in a public-access regime, the media would likely focus on tax controversies in which the government made legal concessions or entered settlements to avoid facing uncertain odds in court. Reporters would also likely investigate instances in which IRS agents made errors in applying the law that were subsequently reversed by other IRS officials. These reports would conflict with the strong examples of legal victories against taxpayers that the government publicizes widely today.

*Settlement Decisions.* Even though the tax disputes involving specific taxpayers that individuals see today overwhelmingly feature government victories, in reality, the IRS regularly settles tax controversies and reverses the

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<sup>263</sup> *Offer in Compromise*, IRS, <http://www.irs.gov/businesses/small/article/0,,id=104593,00.html> (last updated Dec. 8, 2011).

<sup>264</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-525, IRS OFFERS IN COMPROMISE 12 (2006).

positions of its field agents.<sup>265</sup> The IRS Appeals Division settles over 85% of all disputes.<sup>266</sup> The Appeals Division may review a field agent's notice of deficiency after the taxpayer files an appeal with the IRS and determine that the IRS's legal claim is not strong enough to merit litigation in a public forum.<sup>267</sup> And as was discussed above, the IRS frequently creates taxpayer-amnesty programs in which it agrees not to pursue litigation against a taxpayer in exchange for certain information.<sup>268</sup>

Public access to tax return information would enable the media to publicize those examples by revealing settlement agreements and instances in which specific taxpayers paid the IRS lower amounts than those contained in the original statutory notices of deficiency. There is reason to suspect that the media would pay close attention to these settlements, especially when they involve high-profile taxpayers. For example, in December 2010, the IRS lost a \$1 billion transfer-pricing case in U.S. Tax Court involving Veritas Software Corporation.<sup>269</sup> After the decision by the court, even though the IRS stated that the court's "factual findings and legal assertions [we]re erroneous," it decided not to initiate an appeal of the decision.<sup>270</sup> Following this public statement, news reports described how the IRS had conceded the issue in the case.<sup>271</sup> Public access to tax return information would probably result in similar coverage of IRS settlement agreements and decisions not to pursue litigation involving specific individual taxpayers.

*IRS "Mistakes."* IRS field agents also make substantive legal errors when auditing taxpayers, and the IRS National Office reverses the findings of these agents after hearing taxpayers' appeals.<sup>272</sup> In a public-access regime, these instances involving specific taxpayers could also be expected to generate significant media interest. Even today, when tax privacy shields the details of

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<sup>265</sup> See Fogel, *supra* note 205, at 1504.

<sup>266</sup> B. John Williams, Jr., Chief Counsel, Internal Revenue Serv., Resolving Tax Shelters: By Settlement or Litigation, Address Before the Chicago Bar Association Federal Taxation Committee (Feb. 25, 2003) (on file with author).

<sup>267</sup> See Fogel, *supra* note 205, at 1503-04.

<sup>268</sup> See, e.g., *Voluntary Disclosure: Questions and Answers*, *supra* note 254.

<sup>269</sup> *Veritas Software Corp. v. Comm'r*, 133 T.C. 297, 311-12, 320 (2009), *action on dec.*, 2010-05 (Dec. 6, 2010).

<sup>270</sup> *Action on Decision: VERITAS Software Corp. v. Commissioner, IRS* (Dec. 6, 2010), <http://www.irs.gov/pub/irs-aod/aod201005.pdf>; accord Amy Miller, *IRS Throws in Towel on Closely Watched International Tax Case*, RECORDER (Nov. 11, 2010), <http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202474787058>.

<sup>271</sup> See, e.g., Marie Leone, *No Taxation Without Ramifications*, CFO, Jan.-Feb. 2011, at 37; Miller, *supra* note 270.

<sup>272</sup> See Fogel, *supra* note 205, at 1503-04.

most tax returns from public view, news reporters tend to focus on real or perceived mistakes of the IRS.

For instance, in 2010, IRS agents arrived at Harv's Metro Car Wash in Sacramento, California, to collect an outstanding tax liability from 2006.<sup>273</sup> The taxpayer, Aaron Zeff, told reporters the amount of his outstanding tax liability: four cents.<sup>274</sup> Regardless of whether the visit by the IRS agents was justified, news media described the IRS agents involved in the incident as "confused" and as having made a mistake.<sup>275</sup> Public access to tax return information, including notices of deficiency and settlement agreements, could cause the media to publish similar stories that imply, rightly or wrongly, IRS incompetence.

*Behavioral Effects.* Instead of becoming anchored to the view that the government is always successful when challenging taxpayers' tax positions, public access to tax return information could cause individuals to relax that assumption. The availability heuristic<sup>276</sup> could even cause individuals to assume that these sorts of government weaknesses are common. The media appear to focus on stories that reveal even a slight appearance of government mistake or misconduct,<sup>277</sup> making it possible that these types of stories could receive more media attention than the government's tax-enforcement victories that dominate the news today.

### 3. *Would the Media Care?*

An assumption underlying the discussion so far is that the news media would publicize the specific examples of the government's tax-enforcement weaknesses that would appear in a world without tax privacy. This is an important assumption because several empirical studies show that news reports regarding tax enforcement have a much greater impact on the perceptions of individuals than descriptions of tax enforcement by friends and personal

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<sup>273</sup> Bob Shallit, *IRS Visits Carwash, Tells Owner to Come Clean over 4 Cents*, SACRAMENTO BEE, Mar. 13, 2010, at B1.

<sup>274</sup> *Id.*

<sup>275</sup> *Car Wash Owes 4 Cents to IRS*, CNNMONEY, [http://money.cnn.com/video/news/2010/03/16/n\\_irs\\_taxes\\_car\\_wash.cnnmoney/](http://money.cnn.com/video/news/2010/03/16/n_irs_taxes_car_wash.cnnmoney/) (last visited Feb. 22, 2012); *Four Cent Fiasco: Tiny Tax Debt Lands Sacramento Car Wash in Hot Water with IRS*, NEWS10 (Mar. 14, 2010, 12:45 PM), <http://www.news10.net/news/story.aspx?storyid=77240&catid=2>; *IRS Comes Knocking . . . for Four Cents*, CBS NEWS (May 15, 2010, 4:13 PM), <http://www.cbsnews.com/stories/2010/03/16/national/main6303887.shtml>.

<sup>276</sup> See *supra* note 148 and accompanying text.

<sup>277</sup> See, e.g., sources cited *supra* notes 273, 275.

associates.<sup>278</sup> As I argue below, there is significant reason to expect that public access would cause the media to highlight instances in which taxpayers participated in abusive tax activities but failed to trigger IRS detection or face serious punishment.

*Media Coverage Today.* Today, the news media exhibits a strong interest in the personal tax activities of prominent individuals. One example of this interest is the mainstream media's constant reporting of the IRS's imposition of tax liens on the property of high-profile celebrities. For instance, when Martin Scorsese, famed director of the classic film *Taxi Driver*, was subjected to a \$2.85 million federal tax lien in 2011, the image on the front page of the *New York Post* was a photograph of Scorsese atop the words "Tax-ie Dodger."<sup>279</sup> Websites like TMZ.com and TheSmokingGun.com regularly publicize the tax liens and other problems of movie and television stars and politicians.<sup>280</sup> During the weeks leading up to Tax Day, this type of coverage only increases.<sup>281</sup> It is likely that if a public-access regime revealed the types of weaknesses described above, especially when they implicate high-profile individuals, the media would publicize these examples widely.

Further, journalists appear to be very interested in specific tax controversies that are not visible today as a result of tax privacy. In January 2011, Julian Assange, the founder of WikiLeaks, which publishes secret and classified information obtained from anonymous sources, announced that his organization had obtained from a former Swiss bank executive the identities and detailed financial information of more than two thousand prominent individuals, including "politicians and 'pillars of society,'" who had used offshore bank accounts to hide income from taxing authorities.<sup>282</sup> When Assange announced that he would publish this information within the weeks

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<sup>278</sup> See, e.g., Jeffrey A. Dubin, *Criminal Investigation Enforcement Activities and Taxpayer Noncompliance*, 35 PUB. FIN. REV. 500, 502 (2007) (finding that the media play a large role in the dissemination of stories on tax enforcement, which increases tax compliance); Robert M. Melia, *Is the Pen Mightier than the Audit?*, 34 TAX NOTES 1309, 1310–11, 1311 n.3 (1987) (observing that the media play a large role in the dissemination of tax-enforcement stories and overall tax compliance, whereas word-of-mouth stories have less effect or even the opposite effect).

<sup>279</sup> *Tax-ie Dodger*, N.Y. POST, Mar. 8, 2011, at 1.

<sup>280</sup> See, e.g., *Al Pacino—Targeted by IRS over \$188k Debt*, TMZ.COM (Mar. 7, 2011, 6:00 AM), <http://www.t TMZ.COM/2011/03/07/al-pacino-irs-taxes-debt-kenneth-starr-monica-lewinsky-movies-actor-internal-revenue-service-debt/>; *IRS Files \$350,000 Tax Lien Against Designer Vera Wang*, SMOKING GUN (Sept. 16, 2010), <http://www.thesmokinggun.com/buster/irs/irs-files-350000-tax-lien-against-designer-vera-wang>.

<sup>281</sup> See Melia, *supra* note 278.

<sup>282</sup> See Ravi Somaiya & Julia Werdigier, *Ex-Banker Gives Data on Taxes to WikiLeaks*, N.Y. TIMES, Jan. 18, 2011, at B1 (quoting Rudolf M. Elmer, a former executive of Swiss bank Julius Baer).

following his receipt of it,<sup>283</sup> the news media generated intense speculation about the potential contents of the release.<sup>284</sup>

*Non-U.S. Experience.* The experience of other countries with public access to individuals' tax return information offers another reason to expect that public access in the United States would generate substantial media and public interest. In the 1950s, Israel implemented a public-access system in which it published registers containing the names and reported taxable incomes of wage earners who earned more than 25% of their income from sources other than wages, self-employed individuals, and corporations.<sup>285</sup> The purpose of the program was to subject underreporting taxpayers to "community censure."<sup>286</sup> The public-access program generated significant public attention<sup>287</sup> but ultimately was disbanded as taxpayers challenged the validity of their publicly available tax assessments.<sup>288</sup> As a more recent example, Norway publishes its citizens' tax return information on the Internet, and reports indicate that the site receives heavy traffic.<sup>289</sup> Each year when new tax return information is released, the Norwegian tabloid press features extensive coverage of the tax affairs of the rich, famous, and notorious.<sup>290</sup> In addition, Norwegian citizens themselves have been described as "treat[ing] the list like 'tax porno'—furtively checking neighbors' or co-workers' incomes."<sup>291</sup> Finally, in 2008, Italy published the 2005 tax returns of forty million of its citizens online.<sup>292</sup>

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<sup>283</sup> *Id.*

<sup>284</sup> See, e.g., Chuck Bennett, *Wiki Soon: Big-Name Tax Cheats*, N.Y. POST, Jan. 18, 2011, at 29; Walter Pavlo, *Wikileaks to Disclose U.S. Tax Cheats—and the IRS Is All Ears*, FORBES (Jan. 19, 2011, 8:44 PM), <http://www.forbes.com/sites/walterpavlo/2011/01/19/wikileaks-to-disclose-u-s-tax-cheats-and-the-irs-is-all-ears/>.

<sup>285</sup> See HAROLD C. WILKENFELD, *TAXES AND PEOPLE IN ISRAEL* 131 (1973).

<sup>286</sup> Assaf Likhovski, "Training in Citizenship": *Tax Compliance and Modernity*, 32 LAW & SOC. INQUIRY 665, 674 (2007).

<sup>287</sup> See, e.g., *Tax Assessments Published for Self-Employed Earners*, JERUSALEM POST, Sept. 10, 1955.

<sup>288</sup> See Likhovski, *supra* note 286, at 675.

<sup>289</sup> See Elizabeth Davies, *Frenzy of Snooping as Norway Puts All Tax Records Online*, INDEPENDENT (Oct. 12, 2005), <http://www.independent.co.uk/news/world/europe/frenzy-of-snooping-as-norway-puts-all-tax-records-online-510577.html>; *Norwegians Drool over Fresh Tax Records*, BBC NEWS, <http://news.bbc.co.uk/2/hi/business/4318382.stm> (last updated Oct. 7, 2005).

<sup>290</sup> See Davies, *supra* note 289.

<sup>291</sup> Ian MacDougall, *Tax Porn or a Transparent Society? Norway Publishes All Tax Returns Online*, WATERLOO CHRON. (Ontario), Oct. 22, 2009, at 1 (quoting Jan Omdahl, a columnist for the Norwegian tabloid *Dagbladet*).

<sup>292</sup> Ian Fisher, *Do the Rich Pay Taxes? Italy Tells All*, N.Y. TIMES, May 2, 2008, at A6 (describing the Italian tax return experiment).

Within hours of launching the website, visits by Italian citizens overwhelmed the website, and the government shut it down.<sup>293</sup>

*Past Media Coverage.* A review of past public-access experiments in the United States provides additional support for these predictions. In the Civil War period, when individual tax returns were open to public inspection, the *New York Times* published a regular column that featured the editors' analysis of the performance of specific tax-collection districts at identifying abusive tax positions claimed by citizens.<sup>294</sup> In one column in 1865, the editors chronicled their own discovery of abuses, such as one tax return where "a person returned his income at \$11,000, when his books revealed the delightful figuring of \$80,000 to his credit," among many other "wonderful frauds" that were only "discernable to the close observer."<sup>295</sup> Sixty years later, when tax return information was again public, the *Times* published a list of wealthy individuals who had paid no tax at all.<sup>296</sup> The editors dubbed this list of citizens the "'non-taxable' list[]" and questioned why they had not been investigated for "suspicious" tax positions.<sup>297</sup>

In modern times, especially as the public's fascination with the personal lives of others—whether celebrities or professional acquaintances—has only intensified,<sup>298</sup> a public-access regime would likely provoke even stronger public interest and, in turn, greater news-media coverage than in the past.

### C. *Strategic Publicity and Tax Compliance*

As tax privacy enables the government to influence the perceptions of individual taxpayers by publicizing—with the help of the news media—tax-enforcement successes to the exclusion of tax-enforcement failures, it may also enable the government to influence the tax-compliance decisions of individuals. The effects may vary depending upon whether one applies the deterrence model of taxpayer behavior, which proposes that some individuals attempt to weigh the expected benefits and costs of tax noncompliance rationally,<sup>299</sup> or the reciprocity model of taxpayer behavior, which

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<sup>293</sup> *Id.*

<sup>294</sup> *See, e.g., Our Internal Revenue: The Third (Brooklyn) District Complete, supra* note 46.

<sup>295</sup> *Id.*

<sup>296</sup> *Names of Wealthy on Non-Taxable List*, N.Y. TIMES, Sept. 4, 1925, at 1.

<sup>297</sup> *Id.* (internal quotation marks omitted).

<sup>298</sup> *Cf.* DAVID KIRKPATRICK, THE FACEBOOK EFFECT 66–85 (2010) (detailing the social phenomenon surrounding the rise of social-networking websites, such as Facebook.com).

<sup>299</sup> *See infra* notes 301–03 and accompanying text.

hypothesizes that many taxpayers are willing to pay their taxes honestly, but only if they believe that other taxpayers are paying honestly as well.<sup>300</sup> The strategic-publicity function of tax privacy likely enhances individual tax compliance under both models of taxpayer behavior.

### 1. Deterrence

Tax privacy enables the government to publicize strong tax-enforcement examples that may cause individuals to overestimate the government's ability to detect tax avoidance and evasion and punish noncompliant taxpayers; thus, tax privacy may facilitate the government's efforts to deter aggressive and abusive tax positions. By contrast, producing examples of weak tax enforcement against specific taxpayers could have the opposite effect on individuals' perceptions and tax-compliance decisions. As a result of the power of examples and their effect on individuals' perceptions, the strategic-publicity function of tax privacy may bolster deterrence.

The deterrence model of taxpayer behavior is an appropriate tool for addressing the tax-compliance decisions of individuals who consider the obligation to pay taxes to be a game in which the prize is paying the lowest amount of tax possible.<sup>301</sup> Many tax scholars have argued that these taxpayers attempt to act rationally when determining whether to pursue a tax-avoidance or tax-evasion strategy.<sup>302</sup> They explain that these taxpayers weigh the possible expected benefit of claiming a particular tax position (the tax savings, discounted by the probability that the IRS will detect the position) against the expected cost of claiming the tax position (tax penalties and interest, discounted by the probability that the IRS will not detect the position).<sup>303</sup>

By producing specific examples that demonstrate its tax-enforcement strengths, the government often endeavors to deter specific groups of taxpayers who contribute heavily to the tax gap. When the government announces criminal prosecutions of individuals who engaged in abusive tax shelters or hid income in offshore tax havens, the government attempts to deter wealthy and sophisticated individuals. When the government reports its detection of

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<sup>300</sup> See *infra* notes 313–19 and accompanying text.

<sup>301</sup> Cf. JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 325 (C.K. Ogden ed., Richard Hildreth trans., Routledge & Kegan Paul Ltd. 1931) (1802) (observing that, to deter crime generally, the threat of punishment must outweigh the benefit of the act); Becker, *supra* note 20 (same).

<sup>302</sup> See, e.g., James Andreoni et al., *Tax Compliance*, 36 J. ECON. LITERATURE 818, 845 (1998); Raskolnikov, *supra* note 20.

<sup>303</sup> See Andreoni et al., *supra* note 302, at 845; Raskolnikov, *supra* note 20, at 576–80.

individuals who failed to report cash income that was not subject to third-party reporting, it attempts to deter tax avoidance among a broad group of individuals who operate sole proprietorships and small businesses. And when the government publicizes the guilty pleas and criminal convictions of individuals who have claimed tax positions that are clearly fraudulent, such as those that claim zero wages or involve writing *nunc pro tunc* (Latin for “now for then”) on tax returns as a justification for not paying tax,<sup>304</sup> it attempts to deter individuals who may be tempted to participate in mass-marketed, fraudulent tax strategies.

The strategic-publicity function of tax privacy may influence the tax-compliance calculus, at least in terms of rational taxpayers, in favor of the government by increasing their perceptions of the two principle determinants of deterrence: the probability of detection and the costs of tax noncompliance.<sup>305</sup> Imagine an individual who is deciding whether to divert a portion of her personal business income into a Cayman Islands bank account that traditionally has been subject to strong secrecy rules and, thus, has been safe from IRS scrutiny. As this individual considers whether to engage in the tax-evasion strategy, examples of celebrities and prominent businessmen who have pled guilty to pursuing similar tactics using Swiss bank accounts weigh heavily in her mind. These examples lead her to believe that there is a high chance that she will be caught, causing the expected benefit of engaging in the transaction to seem low to her. After assessing the expected costs and benefits, the individual decides not to engage in the Cayman Islands transaction.

Salient examples of tax enforcement may also deter an individual from engaging in a tax-avoidance strategy even if the offense featured in the example differs from the strategy that the individual is considering. Consider a taxpayer who is weighing whether to claim a tax deduction for charitable contributions that the taxpayer did not actually make. Even though examples of

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<sup>304</sup> See IRS Announces “Dirty Dozen” Tax Scams for 2006, IRS (Feb. 7, 2006), <http://www.irs.gov/newsroom/article/0,,id=154293,00.html>.

<sup>305</sup> See Becker, *supra* note 20, at 176 (discussing crime deterrence generally); Raskolnikov, *supra* note 20, at 576–80 (discussing the application of the deterrence model to tax-compliance problems); see also Sarah B. Lawsky, *Probably? Understanding Tax Law’s Uncertainty*, 157 U. PA. L. REV. 1017, 1023 (2009) (describing statements about the probability of tax audits and other enforcement actions as expressions of “belief about whether the event[s] will occur”); Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 21 (1998) (finding that survey respondents were more unwilling to take positions of tax noncompliance when criminal sanctions were at least possible); Gordon P. Waldo & Theodore G. Chiricos, *Perceived Penal Sanction and Self-Reported Criminality: A Neglected Approach to Deterrence Research*, 19 SOC. PROBS. 522, 533 (1972) (discussing perceptual deterrence).

taxpayers receiving prison sentences for hiding income in Swiss bank accounts involve a different type of tax evasion, they may still influence the individual's tax-compliance calculus. Salient examples of taxpayers bearing heavy criminal or civil penalties may trigger the individual's cognitive biases by causing her to perceive an exaggerated probability of detection and heightened costs of noncompliance in the case of *any* type of tax-avoidance strategy that the IRS could determine constitutes fraud.

Studies have shown that salient examples of tax-enforcement actions against specific taxpayers, especially those that involve criminal sanctions, have a significant and positive deterrent effect. Alan Plumley, for instance, has found a correlation between the number of criminal tax convictions and individual tax compliance; his work shows that the prosecution of criminal tax cases "has a highly significant and positive impact on income reporting."<sup>306</sup> Similarly, a study by Jeffrey Dubin of the impact of the IRS's Criminal Investigation Division on individual tax compliance found that criminal tax cases have significant general deterrence effects and that the "the media play a large role in fostering tax compliance."<sup>307</sup> Another study determined that, compared to personal conversations about tax audits with friends and associates, individuals are more likely to be deterred by examples of tax enforcement reported by the media "because the media tend[] to focus on cases where taxpayers go to prison or pay large fines."<sup>308</sup>

The presence of vivid examples of IRS detection of specific taxpayers may help create an individual's distorted perception of the probability that she will be subject to a tax audit if she claims an aggressive tax position. As discussed above, in 2009, 1.03% of all individual tax returns were subject to an IRS field or correspondence audit.<sup>309</sup> In a study of individual taxpayers' beliefs, however, Harold Grasmick and Wilbur Scott found that 37.9% of individuals believed they would be caught if they attempted to evade tax.<sup>310</sup> Another study by John Scholz and Neil Pinney found that individual taxpayers believed that the probability that their tax returns would be audited by the IRS was 48%,

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<sup>306</sup> ALAN H. PLUMLEY, IRS, CATALOG NO. 22555A, THE DETERMINANTS OF INDIVIDUAL INCOME TAX COMPLIANCE 36 (1996).

<sup>307</sup> Dubin, *supra* note 278, at 502.

<sup>308</sup> Melia, *supra* note 278, at 1311 n.3.

<sup>309</sup> *Fiscal Year 2009 Enforcement Results*, *supra* note 210.

<sup>310</sup> Harold G. Grasmick & Wilbur J. Scott, *Tax Evasion and Mechanisms of Social Control: A Comparison with Grand and Petty Theft*, 2 J. ECON. PSYCHOL. 213, 222 (1982).

were they to file false returns.<sup>311</sup> It is not surprising, then, that, in the annual study of taxpayer attitudes conducted by the IRS Oversight Board in 2010, over 60% of individual taxpayers reported that “[f]ear of an audit” either had somewhat of an influence or had a great deal of influence on their decision to pay their taxes honestly.<sup>312</sup>

By enabling the government to provide concrete examples of strong tax enforcement against specific taxpayers, which the media publicizes, tax privacy may influence an individual’s tax-compliance calculus. Public access to tax return information, on the other hand, could cause individuals to perceive a lower probability of detection and lower costs of noncompliance and, thus, could weaken the government’s deterrence efforts. For example, if the individual who is considering diversion of income to the Cayman Islands bank account were to see not only examples of taxpayers who received prison sentences for engaging in similar transactions but also examples of prominent taxpayers who engaged in such transactions and paid low or no tax penalties or possibly escaped IRS detection altogether, her tax-compliance calculus could lead her to pursue the tax strategy. Tax privacy, consequently, may allow the government to deter taxpayers more effectively than it could in a regime in which tax return information were open to public inspection.

## 2. *Reciprocity*

The strategic-publicity function of tax privacy may also enable the government to increase confidence among compliant taxpayers who are motivated by the belief that other taxpayers are paying their taxes honestly. Because tax privacy causes individuals to see examples of tax enforcement that primarily show the government catching specific tax cheats and subjecting them to harsh punishment, compliant individuals may perceive that few of their fellow taxpayers cheat and that those who do face dire consequences. Memorable examples of the government’s failure to detect or penalize noncompliant taxpayers, however, could have negative tax-compliance effects on individuals whose voluntary compliance is conditional on that of other taxpayers.

Reciprocity theory proposes that some individuals contribute toward a public good only if they perceive that other individuals are contributing as

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<sup>311</sup> See John T. Scholz & Neil Pinney, *Duty, Fear, and Tax Compliance: The Heuristic Basis of Citizenship Behavior*, 39 AM. J. POL. SCI. 490, 497–98 (1995).

<sup>312</sup> IRS OVERSIGHT BD., *supra* note 155, at 5.

well, in effect reciprocating their good behavior.<sup>313</sup> If these individuals perceive that others are free riding off of their efforts by not contributing, however, they may reduce their own contributions toward the public good. Numerous public-goods experiments have demonstrated that individuals will cooperate in collective-action settings only until they perceive that other participants are not cooperating.<sup>314</sup> Some social scientists have theorized that individuals may respond to the perception that others are free riding by reducing their own cooperation because “public-spirited contributors want to retaliate against free-riders, and the only way available to them . . . is by not contributing themselves.”<sup>315</sup> A more basic explanation for this response is that no one wants to feel like a chump for following the law while others cheat.<sup>316</sup>

Reciprocity theory thus could provide insight into the study of individual tax compliance. In a self-assessment tax system, such as the federal income tax system, tax compliance represents the model collective-action problem.<sup>317</sup> Individuals in the United States appear to care about the tax compliance of other taxpayers. In 2010, for example, when the IRS conducted its annual survey of taxpayer attitudes, 44% of surveyed individuals reported that their beliefs that their “neighbors are reporting and paying honestly” had at least “somewhat of an influence” on their own decisions to report and pay their taxes honestly.<sup>318</sup> In accordance with reciprocity theory, scholars have argued that some individuals will comply with the tax system as long as they believe that other taxpayers are also complying.<sup>319</sup>

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<sup>313</sup> For discussion of reciprocity theory, see sources cited *supra* note 21.

<sup>314</sup> See, e.g., James Andreoni, *Cooperation in Public-Goods Experiments: Kindness or Confusion?*, 85 AM. ECON. REV. 891 (1995); Joyce Berg et al., *Trust, Reciprocity, and Social History*, 10 GAMES & ECON. BEHAV. 122 (1995); Christina M. Fong et al., *Strong Reciprocity and the Welfare State*, in 2 HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY APPLICATIONS 1439, 1447–56 (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006).

<sup>315</sup> HERBERT GINTIS, *GAME THEORY EVOLVING* 255 (2000) (citing Andreoni, *supra* note 314).

<sup>316</sup> Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1487 (2003) (citing Janet Novack, *Are You a Chump?*, FORBES, Mar. 5, 2001, at 122).

<sup>317</sup> Kahan, *supra* note 21, at 80.

<sup>318</sup> IRS OVERSIGHT BD., *supra* note 155, at 5.

<sup>319</sup> See, e.g., Kahan, *supra* note 21, at 80–86. Only a small number of experiments have indicated how individual taxpayers might adjust their own tax compliance in response to beliefs that other taxpayers are cheating. As a result, Alex Raskolnikov has cautioned that “it is premature to conclude that reciprocity is the primary cause of tax compliance.” Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689, 700 (2009). Yet as experiments in various collective-action settings appear to confirm the real-world applicability of reciprocity theory, Raskolnikov does not dismiss the potential relevance of reciprocity theory to individual tax compliance, concluding that it is “reasonable to view reciprocity as just one more nonrational explanation of taxpayer behavior, alongside many others.” *Id.*

The strategic-publicity function of tax privacy may prevent compliant taxpayers from altering their tax-compliance calculus in response to examples of other taxpayers who have engaged in tax avoidance or evasion without consequence. Take, for example, an individual who employs a full-time nanny to care for her young children during the day. Even though the tax reporting and withholding requirements for household employees are onerous and expensive,<sup>320</sup> the individual may comply with these rules because they are the law and because she believes that society benefits from the taxes paid and that other taxpayers who employ nannies bear this compliance burden as well. If the curtain of tax privacy were lifted and this individual could see that many of her friends and neighbors who also pay household employees do not comply with the tax law by failing to report their nannies' wages, withhold tax from their nannies' paychecks, or pay the employer's share of payroll taxes,<sup>321</sup> the individual may feel like a chump for attempting to follow the tax law and may stop complying. Consistent with reciprocity theory, tax privacy may cause compliant taxpayers to perceive that their fellow taxpayers contribute toward the public good by paying their taxes honestly even though this is often not the case.

When the government announces criminal prosecutions of specific individuals who have engaged in tax fraud or civil settlements with specific high-profile individuals, it enhances compliant individuals' perceptions of the government as effective in detecting and preventing tax noncompliance. For compliant taxpayers, vivid examples of the government's tax-enforcement successes may lead them to conclude that other taxpayers are probably paying their taxes honestly because the government's ability to detect abuse is so high. Even though the publicly released statistics show that many taxpayers do not comply with the tax law and escape government detection,<sup>322</sup> the availability heuristic may lead compliant individual taxpayers to draw these conclusions.

Further, as some of the most memorable examples of tax enforcement against specific individuals involve extreme examples of tax noncompliance, such as criminal tax fraud, compliant individuals might assume that the

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<sup>320</sup> See Lisa Belkin, *Paying Nanny Taxes (or Not)*, N.Y. TIMES MOTHERLODE BLOG (Mar. 10, 2010, 4:00 PM), <http://parenting.blogs.nytimes.com/2010/03/10/paying-nanny-taxes-or-not/>.

<sup>321</sup> See IRS, DEP'T OF THE TREASURY, CATALOG NO. 64286A, HOUSEHOLD EMPLOYER'S TAX GUIDE FOR WAGES PAID IN 2011, at 2-7 (2011) (explaining taxation requirements relating to household employees).

<sup>322</sup> For example, over 50% of non-farm proprietors' income is underreported. IRS, *supra* note 230, at 13 fig.4, 14 fig.5; see also Susan Cleary Morse, *Using Salience and Influence to Narrow the Tax Gap*, 40 LOY. U. CHI. L.J. 483, 484 (2009).

government has effectively deterred other taxpayers in their peer group from avoiding or evading their taxes. The types of tax-enforcement examples that individuals see today may cause compliant individuals to believe that tax evasion is not an activity that their friends and neighbors pursue. This assumption is most likely incorrect because their neighbors may have avoided taxes improperly by fudging the amount of their charitable contributions or claiming an inflated tax basis upon reporting a capital gain.<sup>323</sup> However, the representativeness bias<sup>324</sup> may cause these individuals to develop a perception of tax noncompliance that leads them to believe that their peers could not possibly belong to the group of individuals known as tax cheats.

Salient examples of tax return preparation by an individual's friends and colleagues may also cause compliant individuals to believe that the government is effective in encouraging other taxpayers to follow the tax law. Every spring, individuals provide concrete examples of tax return preparation when they say things like, "I can't go out tonight because I have to work on my taxes," or when they line up at the post office on April 15.<sup>325</sup> For individuals who condition their compliance with the tax system on the reciprocal actions of other taxpayers, salient examples of tax return preparation may cause them to rely on confirmation bias to assume that other taxpayers are not only filing forms with the IRS but that they are also reporting their taxes correctly (of course, it is possible that their neighbors are filing tax returns that contain improper tax positions).

While there is limited experimental data that links tax compliance and feelings of reciprocity explicitly, there is support for the proposition that the perception of cooperation by other taxpayers leads to increases in overall cooperation. In one notable study from the mid-1990s, the Minnesota Department of Revenue conducted an experiment involving the cover letters that it mailed to individual taxpayers with their annual tax return forms.<sup>326</sup> The Department mailed several different letters to test subjects, but only one letter

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<sup>323</sup> Cf. U.S. DEP'T OF THE TREASURY, UPDATE ON REDUCING THE FEDERAL TAX GAP AND IMPROVING VOLUNTARY COMPLIANCE 2 (2009), available at [http://www.irs.gov/pub/newsroom/tax\\_gap\\_report\\_final\\_version.pdf](http://www.irs.gov/pub/newsroom/tax_gap_report_final_version.pdf) (describing various efforts to increase tax compliance).

<sup>324</sup> See Tversky & Kahneman, *supra* note 19, at 4.

<sup>325</sup> Cf. Jen Chung, *It's Tax Day! Farley Post Office Open Till Midnight*, GOTHAMIST (Apr. 15, 2010, 11:02 AM), [http://gothamist.com/2010/04/15/its\\_tax\\_day\\_farley\\_post\\_office\\_open.php](http://gothamist.com/2010/04/15/its_tax_day_farley_post_office_open.php) (advising readers to get to the post office early to avoid the last-minute rush on Tax Day).

<sup>326</sup> See STEPHEN COLEMAN, MINN. DEP'T OF REVENUE, THE MINNESOTA INCOME TAX COMPLIANCE EXPERIMENT: STATE TAX RESULTS (1996).

attempted to create the perception of widespread tax compliance.<sup>327</sup> The letter stated:

Audits by the Internal Revenue Service show that people who file tax returns report correctly and pay voluntarily 93 percent of the income taxes they owe. Most taxpayers file their returns accurately and on time. Although some taxpayers owe money because of minor errors, a small number of taxpayers who deliberately cheat owe the bulk of unpaid taxes.<sup>328</sup>

The study found that the state realized an average tax gain of \$278 per taxpayer.<sup>329</sup> As a result, the study concluded that this approach exhibited “[t]he most cost-effective potential for increasing voluntary compliance.”<sup>330</sup>

Government officials have confirmed that one of their most important objectives in publicizing tax-enforcement strengths is to enhance confidence among compliant taxpayers in accordance with reciprocity theory. Government officials often make public statements like that of Eileen Mayer, who was then Chief of the IRS Criminal Investigation Division, who commented that “[p]ublicity of criminal tax fraud helps keep the honest taxpayers honest and also assures them that the system is fair.”<sup>331</sup> Statements such as these reveal that government officials acknowledge and take advantage of the power of specific tax-enforcement examples to influence the perceptions of taxpayers whose willingness to calculate and report their taxes honestly is conditional on the voluntary compliance of other taxpayers.

### III. IN DEFENSE OF INDIVIDUAL TAX PRIVACY

By enabling the government to influence individual taxpayers’ perceptions of its tax-enforcement capabilities with the help of the media, tax privacy may cause individuals to develop beliefs that are inconsistent with reality. These beliefs, in turn, may influence the way in which individuals report their tax liabilities. In the most negative light, one could characterize the strategic-

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<sup>327</sup> See *id.* at 48–51.

<sup>328</sup> *Id.* at 51.

<sup>329</sup> *Id.* at 25.

<sup>330</sup> *Id.* Other studies show some positive relationship between individuals’ tax compliance and their perceptions that other taxpayers share “norms of taxpaying morality and responsibility.” Michael Wenzel, *Misperceptions of Social Norms About Tax Compliance (2): A Field-Experiment 22* (Austl. Nat’l Univ. Ctr. for Tax Sys. Integrity, Working Paper No. 8, 2001); accord Michael Wenzel, *Misperceptions of Social Norms About Tax Compliance (1): A Prestudy* (Austl. Nat’l Univ. Ctr. for Tax Sys. Integrity, Working Paper No. 7, 2001).

<sup>331</sup> Coder, *supra* note 158, at 740.

publicity function of tax privacy as a form of manipulation or distortion.<sup>332</sup> Should we embrace tax privacy's role in supporting the government's efforts to influence individual taxpayers' perceptions, or should we reconsider this role on normative grounds?

This Part argues that the government should exploit the strategic-publicity function of tax privacy to increase voluntary compliance. It then responds to potential objections to this position and outlines possible implications of this new defense of individual tax privacy for recent public-access proposals.

### A. *Why Less Is More*

Even though tax privacy provides the public with less information about specific taxpayers' tax activities than would a regime of public access, the strategic-publicity function of tax privacy is justified. Below, I offer three principal arguments in support of tax privacy and its strategic-publicity function: it achieves its ends without sacrificing transparency, it is more politically feasible than alternative means of enhancing voluntary compliance, and it can strengthen tax morale among individual taxpayers.

#### 1. *Transparency*

The strategic-publicity function of tax privacy enables the government to promote voluntary compliance without sacrificing transparency, a normative goal of any liberal democracy.<sup>333</sup> Transparency requires the government to share information regarding its laws and actions with the public openly.<sup>334</sup> Government policies that lack *any* transparency may be illegitimate because they prevent individual citizens from considering these policies in public debates.<sup>335</sup> While philosophers and legal scholars concur that there must be limits on transparency so that the government can function, they nevertheless

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<sup>332</sup> See *infra* notes 350–52 and accompanying text.

<sup>333</sup> As James Madison wrote in 1822, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." Letter from James Madison, former President, to W.T. Barry, Ky. Lieutenant Gen. (Aug. 4, 1822), in 9 WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910).

<sup>334</sup> For discussion of the normative basis of transparency, see generally Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 888–910 (2006).

<sup>335</sup> See JOHN RAWLS, A THEORY OF JUSTICE 14–15 (rev. ed. 1999) (arguing that publicity allows individuals to make an informed decision when choosing to participate in a society); cf. Fenster, *supra* note 334, at 895–99 (describing the democratic benefits of transparency according to contemporary transparency advocates and classic liberal philosophers).

agree that some transparency is necessary for the government to implement policies with the implied consent of the people.<sup>336</sup>

One way to judge whether a government policy is sufficiently transparent is to determine whether it complies with the publicity principle.<sup>337</sup> In the original formulation of the principle, Immanuel Kant stated that “[a]ll actions which relate to the right of other men are contrary to right and law, the maxim of which does not permit publicity.”<sup>338</sup> Many scholars have interpreted this statement to mean that a policy of the government is illegitimate unless it provides enough information to the people to allow them to engage in democratic deliberation.<sup>339</sup> Nearly two hundred years later, John Rawls adopted this principle but posed it in a more hypothetical manner.<sup>340</sup> Under Rawls’s version of the publicity principle, the government should only pursue policies that it could defend *if* they were ever exposed publicly.<sup>341</sup>

Does the strategic-publicity function of tax privacy cause the government to violate the publicity principle articulated by Kant and Rawls? As this Article has demonstrated, the government reveals different types of tax-enforcement information to the public in different ways. It catches the public’s attention most effectively when it uses vivid examples involving real people to emphasize its tax-enforcement strengths. It does not provide the public with similarly vivid examples of its tax-enforcement weaknesses, and the tax privacy rules encourage this result. But because the government offers the public the opportunity to learn about these weaknesses through the publication of statistics regarding *all* tax-enforcement activities and because it shares information with the public regarding its communication strategy, I contend that the strategic-publicity function of tax privacy allows the government to satisfy the publicity principle.

Even though the government exploits tax privacy to influence perceptions by publicizing its tax-enforcement successes, it nonetheless publishes copious

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<sup>336</sup> See, e.g., David Luban, *The Publicity Principle*, in *THE THEORY OF INSTITUTIONAL DESIGN* 154, 192 (Robert E. Goodin ed., 1996) (stating that the most persuasive argument for publicity is that a policy or action cannot garner popular consent if it cannot withstand publicity, yet at the same time, some issues are better left to experts).

<sup>337</sup> IMMANUEL KANT, *Eternal Peace*, in *THE PHILOSOPHY OF KANT* 430, 470 (Carl J. Friedrich ed. & trans., 1949); JOHN RAWLS, *POLITICAL LIBERALISM* 66 (1993).

<sup>338</sup> KANT, *supra* note 337, at 470 (internal quotation marks omitted).

<sup>339</sup> See, e.g., STEPHEN ELSTUB, *TOWARDS A DELIBERATIVE AND ASSOCIATIONAL DEMOCRACY* 69–70 (2008).

<sup>340</sup> RAWLS, *supra* note 337, at 66–71.

<sup>341</sup> *Id.* at 69–71.

statistics regarding its tax-enforcement activities. The IRS Data Book, which is publicly accessible and available online, provides the audit rates for individuals and businesses within different income brackets explicitly and describes, in aggregate dollars, the amount of civil tax penalties assessed and abated for various types of tax offenses.<sup>342</sup> This practice should satisfy Kant's version of the publicity principle, which requires the government to provide enough information to encourage public debate.<sup>343</sup> If the government did not provide these statistics to the public and only publicized its tax-enforcement successes, it would surely be guilty of disregarding the publicity principle. Without access to comprehensive statistics, advocacy groups such as Citizens for Tax Justice<sup>344</sup> or the Transactional Records Access Clearinghouse<sup>345</sup>—groups that possess the sophistication necessary to interpret this information—would have no ability to engage policy makers in debate over the government's tax-enforcement practices.

In addition to providing statistical information, the government is also forthcoming regarding its strategic publicity of tax-enforcement examples to influence perceptions. Government officials have commented publicly that they purposefully litigate cases involving high-profile taxpayers and publicize them using the media to deter tax noncompliance and enhance taxpayer confidence.<sup>346</sup> In 2008, for example, in advance of Wesley Snipes's sentencing for his conviction for willfully failing to file tax returns for several years, government lawyers recommended that the judge apply a prison sentence, noting that “[t]he parking lot next to the courthouse was filled with television satellite trucks.”<sup>347</sup> The government argued that the defendant's celebrity status offered the judge a “momentous opportunity to instantaneously increase tax compliance on a national scale.”<sup>348</sup> Statements such as this would satisfy Rawls's version of the publicity principle, which asks whether the government policy could be defended if publicly exposed.<sup>349</sup> In this case, the government's

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<sup>342</sup> See IRS, PUB. 55B, INTERNAL REVENUE SERVICE DATA BOOK, 2008 (2009), available at <http://www.irs.gov/pub/irs-soi/08databkrevised.pdf>; see also *Tax Statistics—Produced by the Statistics of Income Division and Other Areas of the Internal Revenue Service*, IRS, <http://www.irs.gov/taxstats/index.html> (last updated July 27, 2011).

<sup>343</sup> ELSTUB, *supra* note 339, at 69–70; KANT, *supra* note 337, at 470.

<sup>344</sup> See CITIZENS FOR TAX JUST., <http://www.ctj.org/> (last visited Feb. 22, 2012).

<sup>345</sup> See TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE, <http://trac.syr.edu/> (last visited Feb. 22, 2012).

<sup>346</sup> See *supra* notes 156–59 and accompanying text.

<sup>347</sup> United States' Sentencing Memorandum Regarding Defendant Wesley Trent Snipes at 20, United States v. Snipes, No. 5:06-cr-22-Oc-10GRJ (M.D. Fla. Apr. 14, 2008).

<sup>348</sup> *Id.*

<sup>349</sup> RAWLS, *supra* note 337, at 66–71.

transparency regarding its practice of selectively publicizing specific examples of tax enforcement could enable it to defend its use of the strategic-publicity function of tax privacy if it ever were to become a focus of public discussion.

Some scholars have argued that actions that do not portray an event or person accurately may be morally questionable as deceptive or dishonest. Frederick Schauer and Richard Zeckhauser have commented that certain actions may be morally questionable if they constitute “paltering,” which they define (using a dictionary definition) as “acting insincerely or misleadingly.”<sup>350</sup> As an example of paltering, Schauer and Zeckhauser describe a marketing strategy where an advertiser sends a potential consumer an envelope without a return address and marked “government warning.”<sup>351</sup> Schauer and Zeckhauser characterize this act as paltering because the advertiser intentionally endeavors to mislead a consumer into thinking that the letter was sent by a government agency so that the consumer will be tempted to read its contents.<sup>352</sup>

Because the government does not withhold tax-enforcement data or lie about its contents, it can defend itself against claims that it acts in a deceptive manner when it attempts to promote strong tax-enforcement examples to exploit the cognitive biases of individual taxpayers. In Schauer and Zeckhauser’s example of the solicitation envelope, the consumer lacks any ability to determine whether the letter is really from the government without opening the envelope, performing the marketer’s intended response. By contrast, when the government produces an example of a well-known public figure who has pled guilty to criminal tax fraud, the government’s published tax-enforcement reports contain statistics that disclose the rarity of criminal tax-enforcement actions.

## 2. *Political Feasibility*

Another reason to embrace the strategic-publicity function of tax privacy is that it is a more politically feasible approach to enhancing voluntary compliance than increasing either the actual detection capability of the IRS or tax penalties. While such alternatives would promote voluntary compliance

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<sup>350</sup> Frederick Schauer & Richard Zeckhauser, *Paltering*, in *DECEPTION: FROM ANCIENT EMPIRES TO INTERNET DATING* 38, 39 (Brooke Harrington ed., 2009) (citing *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 1305 (3d ed. 1992)).

<sup>351</sup> *Id.* at 44.

<sup>352</sup> *Id.*

under both deterrence and reciprocity models of taxpayer behavior, lack of political will makes both alternatives unlikely.

The IRS can increase its ability to detect abusive tax activities only if Congress increases the IRS's operating budget. IRS officials and other government agencies frequently cite a decline in full-time IRS agents and other personnel as an obstacle that prevents the IRS from detecting tax noncompliance. From 1996 to 2000, a period when the IRS faced intense scrutiny by Congress, the audit rate for high-income taxpayers declined by 70% and for low-income taxpayers by 67%.<sup>353</sup> Although the IRS's budget was increased in nominal dollars from 2002 to 2011, in some years, such as the 2007 fiscal year, the budget was actually decreased when inflation was taken into account.<sup>354</sup> As these examples illustrate, political support for increasing the IRS's audit resources has been, at best, erratic.

Statutory changes that would strengthen the tax-penalty rules are also unlikely as a result of political obstacles. As many scholars have observed, tax penalties under current law are too low to deter rational taxpayers.<sup>355</sup> Many of the civil tax-penalty rules contain exceptions and taxpayer defenses, such as a showing of "reasonable cause"<sup>356</sup> or reliance on "substantial authority,"<sup>357</sup> that make them inapplicable. While Congress has occasionally enacted more stringent tax penalties to target specific types of abuse, it generally has not been willing to increase tax penalties or question the lack of their enforcement by the IRS.<sup>358</sup> As the Joint Committee on Taxation observed in a report on civil tax penalties in 1998, because "policy makers are . . . more likely to hear from taxpayers who are unhappy with enforcement actions," they "face pressures to set enforcement at levels lower than would be most appropriate."<sup>359</sup>

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<sup>353</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-484, IRS AUDIT RATES: RATE FOR INDIVIDUAL TAXPAYERS HAS DECLINED BUT EFFECT ON COMPLIANCE IS UNKNOWN 7-8 (2001).

<sup>354</sup> IRS OVERSIGHT BD., *supra* note 123, at 11.

<sup>355</sup> See, e.g., Kyle D. Logue, *Tax Law Uncertainty and the Role of Tax Insurance*, 25 VA. TAX REV. 339, 351-52 (2005); Raskolnikov, *supra* note 20, at 582-83.

<sup>356</sup> Treas. Reg. § 1.6664-4 (2011).

<sup>357</sup> *Id.* § 1.6662-4(d).

<sup>358</sup> See Leigh Osofsky, *The Case Against Strategic Tax Law Uncertainty*, 64 TAX L. REV. (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1907927](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1907927).

<sup>359</sup> 1 STAFF OF JOINT COMM. ON TAXATION, 106TH CONG., STUDY OF PRESENT-LAW PENALTY AND INTEREST PROVISIONS AS REQUIRED BY SECTION 3801 OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998 (INCLUDING PROVISIONS RELATING TO CORPORATE TAX SHELTERS) 36 (Comm. Print 1999).

The political constraints on increasing tax enforcement and tax penalties cause the strategic-publicity function of tax privacy to be an attractive means of promoting voluntary compliance. Instead of depending on Congress to increase audit resources or fortify the statutory tax-penalty rules, the government can use tax privacy to produce specific tax-enforcement examples that highlight its strengths, to the exclusion of specific examples of its weaknesses, and achieve the illusion that the chances of detection and the magnitude of tax penalties are high.

As an example of how the government might affirmatively exploit the strategic-publicity function of tax privacy, consider the health care mandate's tax penalty,<sup>360</sup> which Congress enacted in 2010 as part of the Patient Protection and Affordable Care Act.<sup>361</sup> As a result of this legislation—assuming the legislation is ultimately upheld by the U.S. Supreme Court<sup>362</sup>—starting in 2014, individuals will be required to maintain health insurance coverage, which can be provided through an employer's health insurance plan or purchased by individuals directly.<sup>363</sup> If an individual fails to maintain "minimum essential coverage," she will be subject to a penalty that, by 2016, will equal \$695 or 2.5% of taxable income, whichever is greater.<sup>364</sup>

The political pressures on Congress regarding the health care penalty<sup>365</sup> caused it to enact a penalty that will be difficult for the IRS to enforce. The enacted legislation explicitly prohibits the IRS from applying criminal tax penalties, liens, or levies against individuals who fail to pay a penalty for failing to maintain minimum essential coverage.<sup>366</sup> Further, without third-party reporting, the IRS may not be able to detect the failure by many individuals to maintain minimum essential coverage.

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<sup>360</sup> I.R.C. § 5000A (2006).

<sup>361</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010). The health care mandate was found unconstitutional by the Eleventh Circuit. *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3297 (U.S. Nov. 14, 2011) (No. 11-398).

<sup>362</sup> See Ashby Jones, *Nearly Everything You Need to Know About the Health Care Decision*, WALL ST. J. L. BLOG (Nov. 14, 2011, 1:30 PM), <http://blogs.wsj.com/law/2011/11/14/nearly-everything-you-need-to-know-about-the-health-care-decision/?mod=WSJBlog> (announcing that the Supreme Court has decided to rule on the constitutionality of several aspects of the health care act, including the constitutionality of the health care mandate, with oral arguments to be held in March 2012).

<sup>363</sup> I.R.C. § 5000A(f).

<sup>364</sup> *Id.* § 5000A(c).

<sup>365</sup> A sizeable number of Americans appear to fear the tax penalties that may occur if they violate the health insurance mandate. See *Health Policy*, POLLINGREPORT.COM, <http://www.pollingreport.com/health.htm> (last visited Feb. 22, 2012).

<sup>366</sup> I.R.C. § 5000A(g).

In spite of these limitations, the strategic-publicity function of tax privacy could help the IRS encourage compliance with the health care legislation. Consistent with the publicity strategy described above, the IRS could publicize instances when it applied the health care penalty against specific individuals for failing to maintain minimum essential coverage. As a technical matter, it could achieve this publicity by seeking waivers of tax privacy from these taxpayers in exchange for a concession regarding some other aspect of their tax returns.<sup>367</sup> By publicizing just one or two memorable examples of a taxpayer whom the IRS penalized for failing to maintain minimum essential health insurance, the IRS could cause taxpayers to perceive that its ability to detect failure to maintain health insurance is significant. Meanwhile, the identities of thousands, or even millions, of specific individual taxpayers who failed to maintain health insurance<sup>368</sup> yet escaped IRS detection would remain hidden behind the curtain of tax privacy.

The strategic-publicity function of tax privacy, thus, could enhance the IRS's ability to encourage individuals' compliance without waiting for Congress to revise the tax-penalty rules or increase funding to the IRS.

### 3. *Tax Morale*

Finally, the strategic-publicity function of tax privacy may have a beneficial effect on tax morale, the "intrinsic motivation" of citizens to cooperate with the state by paying taxes.<sup>369</sup> Tax morale differs from the feelings of reciprocity discussed above.<sup>370</sup> While reciprocity refers to taxpayers' beliefs regarding the actions of other taxpayers, tax morale refers to taxpayers' beliefs regarding the actions of government. As Benno Torgler and Friedrich Schneider have described the concept, tax morale is "closely linked to . . . 'the norms of behaviour governing citizens as taxpayers in their relationship with the government.'"<sup>371</sup> Citizens possess high tax morale when

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<sup>367</sup> See *supra* note 91 and accompanying text.

<sup>368</sup> See Stephen Ohlemacher, *Nearly 4M People Could Pay Without Health Coverage*, WASH. EXAMINER (Apr. 22, 2010), <http://washingtonexaminer.com/news/business/nearly-4m-people-could-pay-without-health-coverage> (noting that around four million people could still lack health insurance when the penalty would become effective).

<sup>369</sup> Frey & Torgler, *supra* note 34, at 140.

<sup>370</sup> See *supra* Part IIC.2 (discussing reciprocity).

<sup>371</sup> Benno Torgler & Friedrich Schneider, *What Shapes Attitudes Toward Paying Taxes? Evidence from Multicultural European Countries*, 88 SOC. SCI. Q. 443, 444 (2007) (quoting Young-dahl Song & Tinsley E. Yarbrough, *Tax Ethics and Taxpayer Attitudes: A Survey*, 38 PUB. ADMIN. REV. 442, 444 (1978)); accord John T. Scholz, *Contractual Compliance: Tax Institutions and Tax Morale in the U.S.*, in TAX EVASION, TRUST, AND STATE CAPACITIES 51 (Nicolas Hayoz & Simon Hug eds., 2007) (describing the "tax morale" concept).

they believe that the government is acting in a trustworthy manner and providing services and benefits in exchange for the tax revenue received.

Scholars have shown that tax morale affects tax compliance. In recent years, tax-compliance scholars have demonstrated that countries with low tax morale may experience higher rates of tax evasion.<sup>372</sup> Other scholars have shown that when tax morale is low, people do not find tax evasion to be morally wrong and may not think badly of their friends and neighbors who pursue it.<sup>373</sup> Indeed, low tax morale may cause people to engage in abusive tax activities themselves. Italy and Greece are often cited as examples of countries with low tax morale, where tax avoidance or evasion is akin to a national sport.<sup>374</sup> Compared to these European states, tax morale in the United States is high. According to recent surveys, over 95% of U.S. individuals either completely or mostly agree that paying taxes is “every American’s civic duty.”<sup>375</sup>

The strategic-publicity function of tax privacy may enhance tax morale, and ultimately tax compliance, in the United States in several important ways. It may cause taxpayers to develop an overly optimistic view of the simplicity of the tax law, the government’s consistency in enforcing the tax law, and the government benefits and services that taxpayers receive in exchange for their tax payments. Each of these effects is discussed below.

*Simplicity.* The strategic-publicity function of tax privacy may cause individuals to perceive that important aspects of the tax law are simple and, thus, administrable. The specific examples of tax enforcement that individuals see today showcase taxpayers who have committed clear violations of the tax law, such as by failing to report cash income<sup>376</sup> or claiming dead people as dependents.<sup>377</sup> These clear examples of tax noncompliance may lead some

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<sup>372</sup> See BENNO TORGLER, TAX COMPLIANCE AND TAX MORALE: A THEORETICAL AND EMPIRICAL ANALYSIS 64–77 (2007).

<sup>373</sup> See, e.g., Michael R. Welch et al., “*But Everybody Does It . . .*”: *The Effects of Perceptions, Moral Pressures, and Informal Sanctions on Tax Cheating*, 25 SOC. SPECTRUM 21, 29 (2005) (observing that tax compliance may be directly affected by an individual’s sense of moral obligation and civic duty).

<sup>374</sup> See James Surowiecki, *Dodger Mania*, NEW YORKER, July 11 & 18, 2011, at 38 (describing low tax morale in Greece); Sari Gilbert, *Italians on Tax Evaders List. So What Else Is New?*, STRANITALIA (Mar. 10, 2008, 12:00 AM), [http://www.stranitalia.com/home/index.php?option=com\\_content&task=view&id=37](http://www.stranitalia.com/home/index.php?option=com_content&task=view&id=37) (describing the popularity of the effort to avoid reporting income among Italian citizens).

<sup>375</sup> IRS OVERSIGHT BD., *supra* note 155, at 2.

<sup>376</sup> See Press Release, Dep’t of Justice, *supra* note 169.

<sup>377</sup> See Alice McQuillan, *Tax Returns of the Living Dead*, NBC N.Y. (Apr. 9, 2010, 2:38 PM), <http://www.nbcnewyork.com/news/local/Tax-Returns-of-the-Living-Dead-90266732.html> (describing the indictment

individuals to perceive that failure to comply with the tax law is unambiguous and, perhaps, even immoral. More importantly, the clarity of the tax offenses that appear in the news today may cause taxpayers to perceive that the government is capable of identifying taxpayers who cross a bright line between compliance and noncompliance. Images of strong tax enforcement against specific individuals, consequently, may bolster tax morale.<sup>378</sup>

A public-access regime, however, would likely cause the media to produce examples of specific taxpayers, especially wealthy individuals, who have engaged in complex, abusive tax shelter transactions that subsist on the abundant ambiguity in the tax law. These complex transactions take advantage of literal readings of the tax law and enable taxpayers to claim tax benefits that Congress never intended.<sup>379</sup> Although the IRS may designate these types of tax strategies as “listed transactions”—those it believes are abusive tax shelters<sup>380</sup>—the propriety of the strategies is often unclear.<sup>381</sup> By allowing the media and, by extension, members of the public to inspect individuals’ tax return information, a public-access regime could generate examples of tax noncompliance that are more difficult to define as tax evasion than are the examples of tax fraud that taxpayers see today. Tax morale could decrease as individuals question the government’s ability to define, let alone prevent, tax noncompliance.

*Consistency.* The strategic-publicity function of tax privacy may also enhance individuals’ trust in the government by causing them to see specific

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of twenty-six New York tax preparers for claiming \$95 million in refunds by causing taxpayers to claim dead people as dependents).

<sup>378</sup> Some commentators, such as Dan Kahan, appear to believe that strong examples of tax enforcement may actually weaken tax morale. *See, e.g.,* Kahan, *supra* note 21, at 83. The rationale behind this view is that when the government reveals examples of taxpayers who have engaged in abusive tax activities, it may cause individuals to perceive that other taxpayers are engaging in the same activities. *See id.*; Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane*, 16 VA. TAX REV. 155, 199 (1996). As Leandra Lederman has responded, however, these examples more likely strengthen tax morale by showing that the government has been successful in detecting and punishing abuse. Lederman, *supra* note 316, at 1494–95.

<sup>379</sup> *See* DEP’T OF THE TREASURY, THE PROBLEM OF CORPORATE TAX SHELTERS: DISCUSSION, ANALYSIS AND LEGISLATIVE PROPOSALS 130 (1999); Joseph Bankman, *The New Market in Corporate Tax Shelters*, 83 TAX NOTES 1775, 1777 (1999); *see also* Joshua D. Blank, *Overcoming Overdisclosure: Toward Tax Shelter Detection*, 56 UCLA L. REV. 1629, 1667 (2009) (discussing overdisclosure as a method of tax evasion).

<sup>380</sup> *See Instructions for Form 8886 (03/2011)*, IRS, <http://www.irs.gov/instructions/i8886/ch01.html#d0e82> (last visited Feb. 22, 2012).

<sup>381</sup> *See* Blank, *supra* note 127, at 543–46; Peter C. Canellos, *A Tax Practitioner’s Perspective on Substance, Form and Business Purpose in Structuring Business Transactions and in Tax Shelters*, 54 SMU L. REV. 47, 52 (2001).

examples of tax enforcement that portray the government as applying the tax law in a consistent and fair manner. For example, when, in the weeks leading up to Tax Day, the government announces dozens of criminal prosecutions of specific wealthy individuals who have pled guilty to hiding income offshore,<sup>382</sup> it may foster the perception that it applies the law equally to similar tax offenses. Likewise, when the government publicizes its civil injunctions against, and criminal investigations of, tax protestors or individuals who have used cash businesses to avoid tax,<sup>383</sup> it provides the public with assurances that it deals with these offenders harshly and consistently.

A public-access regime, however, could detract from this image of consistency by exposing instances in which the government has treated similar tax offenses very differently. As the earlier discussion illustrated, a public-access regime could cause the media to publicize competing examples of sophisticated taxpayers who engaged in abusive tax strategies yet paid low or no tax penalties—or did not even trigger an IRS audit.<sup>384</sup> Further, public access could reveal specific examples of sympathetic taxpayers, such as single mothers who erroneously claimed the Earned Income Tax Credit (EITC) and were subject to tax penalties for noncompliance while prominent wealthy taxpayers succeeded in avoiding tax penalties and, possibly, findings of deficiency.<sup>385</sup> And as the IRS is not bound by a duty of consistency to taxpayers,<sup>386</sup> public access could enable the media to highlight discrepancies in the IRS's decision to seek tax penalties in certain tax controversies and not in others. All of these examples could weaken the perception of individuals that the government applies the tax law consistently and fairly, and, in turn, could weaken tax morale as well.

*Services.* Last, the strategic-publicity function of tax privacy may lead individuals to perceive that the government is using their tax dollars to provide benefits and services. As at least one tax scholar has explained, the perception that the government is “providing valued goods and services with the

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<sup>382</sup> See *supra* notes 180, 187–89 and accompanying text.

<sup>383</sup> See *supra* notes 168–72 and accompanying text.

<sup>384</sup> See *supra* notes 251–57 and accompanying text.

<sup>385</sup> For discussion of the magnitude of audit resources allocated to EITC audits, see *Waste, Fraud, & Abuse: Hearing Before the H. Comm. on Ways & Means*, 108th Cong. 100–03 (2003) (statement of Leonard E. Burman, Senior Fellow, Urban Institute). As Burman put it, “Although the IRS is doing many things right . . . its preoccupation with EITC noncompliance is not one of them.” *Id.* at 96.

<sup>386</sup> See Stephanie Hoffer, *Hobgoblin of Little Minds No More: Justice Requires an IRS Duty of Consistency*, 2006 UTAH L. REV. 317, 318.

revenues”<sup>387</sup> is critical to the creation of positive tax morale. When the government publicizes its detection and prosecution of tax cheats, it does more than simply deter taxpayers from cheating on their own taxes. It also signals to taxpayers that it is capable of collecting the maximum amount of tax dollars and allocating them to government programs.

A public-access regime could produce vivid contradictory examples, however, that could alter individuals’ perceptions of the government’s ability to maximize revenue collection. Public access to tax return information would enable the media to report memorable stories of specific taxpayers who engaged in egregious tax offenses but appeared to fail to elicit the attention of IRS agents. For example, in 2010, the Treasury Inspector General for Tax Administration reported that 1295 prisoners, including 241 serving life sentences, requested and received \$9.1 million in first-time homebuyer credits, even though they were in prison during the period in which they allegedly purchased their first homes.<sup>388</sup> An increase in stories like this would diminish tax morale by illustrating memorable instances in which the government distributed funds not to provide valuable social programs or services but, instead, to enable tax fraud.

As this discussion illustrates, the strategic-publicity function of tax privacy may contribute to current positive tax morale in the United States by preserving individuals’ trust of the government and its ability to deliver goods and services. Without tax privacy, tax morale and, ultimately, individual tax compliance could each decline.

### *B. Risks and Responses*

Three possible drawbacks of my defense of individual tax privacy are that it may represent a paternalistic government policy, encourage uninformed

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<sup>387</sup> Ronald G. Cummings et al., *Effects of Tax Morale on Tax Compliance: Experimental and Survey Evidence* 4 (Leitner Program in Int’l & Comparative Political Econ., Working Paper No. 2005-22, 2005), available at <http://www.yale.edu/leitner/resources/docs/botswana.pdf>.

<sup>388</sup> TREASURY INSPECTOR GEN. FOR TAX ADMIN., DEP’T OF THE TREASURY, REFERENCE NO. 2010-41-069, ADDITIONAL STEPS ARE NEEDED TO PREVENT AND RECOVER ERRONEOUS CLAIMS FOR THE FIRST-TIME HOMEBUYER CREDIT 7 (2010), available at <http://www.recovery.gov/Accountability/inspectors/Documents/201041069fr.pdf>. Another report indicates that, in 2009, approximately 45,000 prisoners filed fraudulent tax returns with the IRS, many of which requested refunds, and that the government distributed hundreds of millions of dollars to them in response. TREASURY INSPECTOR GEN. FOR TAX ADMIN., DEP’T OF THE TREASURY, REFERENCE NO. 2011-40-009, SIGNIFICANT PROBLEMS STILL EXIST WITH INTERNAL REVENUE SERVICE EFFORTS TO IDENTIFY PRISONER TAX REFUND FRAUD 1 (2010), available at <http://www.treasury.gov/tigta/auditreports/2011reports/201140009fr.pdf>.

public debate over tax reform, or create the risk of harm to the government's credibility. I respond to each of these possibilities below.

### 1. *Paternalism*

A potential libertarian objection to the strategic-publicity function of tax privacy is that it encourages the government to act in a paternalistic manner toward citizens.<sup>389</sup> Libertarians, such as Richard Epstein, object to paternalism in governance, contending that the “conditions for paternalism are not remotely satisfied when the state wishes to impose its authority over adults of full age and intelligence, no matter how great their . . . emotional flaws.”<sup>390</sup> Libertarians could argue that, if the government misleads individuals by showing them examples that cause them to overvalue the magnitude of tax penalties or the probability of tax audit, the government may cause them to adopt different tax-reporting positions—and possibly pay *more* tax than is legally due—in response to the specific examples. Consequently, they might argue that the strategic-publicity function of tax privacy impinges upon individual choice.

Libertarians would probably sustain their objection even if the strategic-publicity function of tax privacy were recharacterized as “libertarian paternalism.”<sup>391</sup> Richard Thaler and Cass Sunstein have defined libertarian paternalism as a “nonintrusive” type of paternalism where the government does not restrict or dictate individuals’ choices but instead exploits individuals’ cognitive biases to encourage them to make choices that will make them better off.<sup>392</sup> In response to the claim that the strategic-publicity function of tax privacy influences individuals’ perceptions without forcing them to fill out their tax returns in a particular way, libertarians might respond “that there is no sharp line between libertarian and non-libertarian paternalism.”<sup>393</sup> One consequence of this policy, they might argue, is that the government’s decision

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<sup>389</sup> See, e.g., Epstein, *supra* note 36, at 355 (describing “paternalistic regulations” as those “whose main purpose is to protect individuals from their own biases and excesses”).

<sup>390</sup> *Id.* at 373.

<sup>391</sup> See THALER & SUNSTEIN, *supra* note 19, at 5.

<sup>392</sup> *Id.*

<sup>393</sup> *Should Policies Nudge People to Make Certain Choices?*, WALL ST. J. ECONOBLOG (May 25, 2007), <http://online.wsj.com/article/SB117977357721809835.html> (quoting Mario Rizzo in an online debate with Richard Thaler). For further criticism of libertarian paternalism, see On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098, 2120–21 (2008) (book review); Pierre Schlag, *Nudge, Choice Architecture, and Libertarian Paternalism*, 108 MICH. L. REV. 913 (2010) (book review); and Will Wilkinson, *Why Opting Out Is No “Third Way”*: *The Perplexing Banality of “Libertarian Paternalism,”* REASON, Oct. 2008, at 64 (book review).

to display a nonrepresentative group of specific tax enforcement examples to influence individual taxpayers' decisions could cause the government to coddle individuals by not allowing them to learn for themselves the true nature of tax audit rates and tax penalties and make their own responsible tax reporting decisions.<sup>394</sup>

A response to these potential objections is that the government does not restrict freedom of choice when it influences individuals' perceptions to encourage individuals to comply with the tax law. Unlike decisions regarding whether to invest part of their salary increases in retirement accounts or whether to engage in certain potentially dangerous activities, like smoking, individuals are not entitled to choose whether to pay their taxes.

The government regularly exploits cognitive biases to encourage individuals to obey the law. For example, when a city places a sign in a public park that states, "It's The Law: Clean Up After Your Dog" followed by, "Penalty Up to \$100,"<sup>395</sup> it exploits the anchoring bias of individuals by causing them to focus on the maximum fine rather than the realistic one. When a state police force places a sign on the highway that reads, "Surveillance Cameras in Use,"<sup>396</sup> it causes individuals to overestimate the probability that police officers will detect their speeding. These actions are difficult to criticize as intrusions upon individual freedom because they aim to encourage individuals to obey the law.

Even if the strategic-publicity function of tax privacy can be characterized as a form of paternalism or libertarian paternalism, the requirement to pay the correct amount of tax liability to the government on time is *not a choice at all*. Instead, tax compliance is the law, which is coercive by definition.

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<sup>394</sup> Cf. Jonathan Klick, *The Dangers of Letting Someone Else Decide*, CATO UNBOUND (Apr. 9, 2010, 8:43 AM), <http://www.cato-unbound.org/2010/04/09/jonathan-klick/the-dangers-of-letting-someone-else-decide/> (criticizing libertarian paternalism generally).

<sup>395</sup> Cf., e.g., N.Y. PUB. HEALTH LAW § 1310 (McKinney Supp. 2011) (imposing a duty on dog owners to clean up after their dogs in public parks, the violation of which is punishable by a fine of \$100).

<sup>396</sup> Cf., e.g., John Metaxas, *NYC Wants to Use Speed Cameras to Catch Lead Foot Drivers*, CBS N.Y. (Jan. 10, 2011, 7:49 PM), <http://newyork.cbslocal.com/2011/01/10/nyc-wants-to-use-speed-cameras-to-catch-lead-foot-drivers/> (describing a New York City policy of posting cameras along roadways that could capture vehicles' speeds and take a picture of their license plates, which could result in summons being sent to speeding drivers' homes without any law enforcement stop).

## 2. *Uninformed Public Debate*

Another potential objection to acceptance of tax privacy as a normatively attractive means of encouraging voluntary compliance is that it could prevent members of the public from engaging in informed debate over tax reform. Public-access proponents argue that tax privacy may distort debates over tax-reform issues by preventing members of the public and Congress from seeing examples of specific taxpayers as they are affected by the tax policies at issue.<sup>397</sup> In arguing for public access to tax return information, Joseph Thorndike has commented that “[t]he best way to evaluate the operation of the tax system is to see what real people are actually paying” and that, if tax returns were public, “voters [could] prevent tax favoritism.”<sup>398</sup> In particular, Thorndike and others argue that tax privacy may prevent voters from addressing loopholes in the tax law and the relative distribution of tax burdens.<sup>399</sup>

*Loopholes.* Public-access proponents argue that tax privacy prevents members of the public from seeing examples of specific taxpayers’ tax noncompliance and that society might benefit if Congress were to revise tax provisions that encourage abusive tax shelters that result in inefficiency and lost revenue.<sup>400</sup> Because members of the public cannot see examples of specific taxpayers who have engaged in abusive tax shelters to reduce tax liability, the salience of these types of transactions and the underlying tax provisions may be low. As a result, public-access proponents assert that the public may have little interest in seeking needed reform of tax loopholes because they do not see concrete examples of this problem.

*Relative Tax Burdens.* In addition, public-access proponents predict that, by repealing tax privacy, we would expose memorable examples of wealthy

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<sup>397</sup> See Kornhauser, *supra* note 12, at 112–14 (advocating publicity of wealthy taxpayers’ return information for the benefit of public policy making); Linder, *supra* note 12, at 951–52, 975–83 (arguing that millionaires’ taxable incomes should be public information to better inform the public debate); Thorndike, *Show Us the Money*, *supra* note 12, at 148–49 (suggesting that publicity of return information could spark “interest in fundamental tax reform”); Thorndike, *The Thorndike Challenge*, *supra* note 12, at 691 (proposing public release of politicians’ tax returns to increase awareness and enhance public debate).

<sup>398</sup> Thorndike, *Show Us the Money*, *supra* note 12, at 148.

<sup>399</sup> E.g., Linder, *supra* note 12, at 975–83 (advocating for publication of millionaires’ tax returns to prompt a reevaluation of tax burdens among the wealthy); Thorndike, *Show Us the Money*, *supra* note 12, at 148–49 (promoting tax publicity to pressure Congress into closing loopholes).

<sup>400</sup> See Kornhauser, *supra* note 12, at 112–13; Linder, *supra* note 12, at 977–81; Thorndike, *The Thorndike Challenge*, *supra* note 12, at 691.

individuals who have paid very little tax.<sup>401</sup> These examples, they argue, would spur informed public debate over relative tax burdens and could lead to legislative reform.<sup>402</sup> Some proponents of tax reform attempt to provide these specific examples today in spite of tax privacy. For instance, Warren Buffett, one of the wealthiest individuals in the world, has been eager to reveal publicly that he generally pays an average tax rate of 17.7% (on \$46 million of annual income) due to his income from capital investments, while his secretary pays an average tax rate of 30% (on \$60,000 of annual income).<sup>403</sup> Public-access proponents, consequently, would argue that, by embracing tax privacy to foster tax compliance, salient examples of specific taxpayers' benefits and burdens would remain hidden, even though they could facilitate tax reform.

A response to this objection is that, if tax return information were public, opposing interest groups in tax-reform debates could mine publicly accessible tax returns for specific examples that they could use to influence the cognitive biases of legislators and voters. Differences in the resources of the interest groups involved and the media interest in the particular tax reform at issue, consequently, would likely cause certain examples to gain more prominence than others. To consider the effects of public access to tax return information on tax-reform debates, imagine a public-access regime in which interest groups attempt to influence public debate over the two tax-reform issues described above.

*Loopholes.* Even though a public-access regime could enable pro-government interest groups that desire to reduce tax loopholes, such as Citizens for Tax Justice,<sup>404</sup> to produce vivid examples of real taxpayers taking advantage of these loopholes to avoid tax, public access could also benefit organizations that have opposing interests. The 1998 IRS Oversight Hearings before the U.S. Senate Finance Committee provide a preview of the types of specific examples that these interest groups could produce with ease in a public-access regime.<sup>405</sup> At the 1998 hearings, nearly a dozen sympathetic

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<sup>401</sup> See, e.g., Linder, *supra* note 12, at 975–81 (advocating the publication of millionaires' tax returns to provide the public with data and examples of potential tax evasion or the use of tax loopholes).

<sup>402</sup> E.g., *id.*; Thorndike, *Show Us the Money*, *supra* note 12, at 148.

<sup>403</sup> Tom Bawden, *Buffett Blasts System that Lets Him Pay Less Tax than Secretary*, *TIMES* (London), June 28, 2007, at 56.

<sup>404</sup> CITIZENS FOR TAX JUST., *supra* note 344.

<sup>405</sup> *IRS Oversight: Hearings Before the S. Comm. on Fin.*, 105th Cong. (1998) (recounting the testimony of several individuals, many of whom described disparaging stories about their own or others' personal encounters with the IRS).

taxpayers, including a pastor,<sup>406</sup> a single mother,<sup>407</sup> and a former U.S. Senator,<sup>408</sup> described in vivid detail their own personal IRS “horror stories.”<sup>409</sup> After hearing these specific examples of abuse, even though many of them were greatly exaggerated,<sup>410</sup> Congress eventually passed legislation that hampered the IRS’s enforcement capabilities.<sup>411</sup> In a public-access regime, when the topic of closing tax loopholes reached the legislative agenda, anti-tax-reform interest groups could use publicly available tax returns to find similar memorable examples that they could use to exploit the cognitive biases of individual legislators and members of the public.

*Relative Tax Burdens.* Thorndike and others<sup>412</sup> argue that public access to tax return information would cause the public to see specific examples of wealthy individuals who bear low tax burdens, such as Warren Buffet.<sup>413</sup> It is equally possible, however, that opposing interest groups could take advantage of public access to tax returns to find salient examples of sympathetic taxpayers that may distort the perceptions of voters. As Michael Graetz and Ian Shapiro have recounted, in 2001, opponents of the estate tax carefully presented specific sympathetic taxpayers to the public as typical taxpayers who were burdened by the estate tax.<sup>414</sup> For example, anti-estate-tax interest groups arranged for Chester Thigpen, an eighty-three-year-old tree farmer from Montrose, Mississippi, to testify before Congress that his tree farm “could be worth more than a million dollars” but that, as a result of the federal estate tax, his “children might have to break up the [t]ree [f]arm or sell off timber to pay the estate taxes.”<sup>415</sup> Even though individuals like Thigpen were not at all representative of most taxpayers who faced the estate tax,<sup>416</sup> the public latched onto these salient examples, and they played a significant role in shifting

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<sup>406</sup> *Id.* at 293–97 (statement of Tony Alamo, Pastor, International Coalition for Religious Freedom).

<sup>407</sup> *Id.* at 298 (statement of the National Audit Defense Network).

<sup>408</sup> *Id.* at 182–85 (statement of Hon. Howard H. Baker, Jr., former U.S. Sen. from Tenn.).

<sup>409</sup> *Id.* at 45 (statement of Sen. Orrin Hatch, Member, S. Comm. on Fin.) (“[W]e hear enough of these complaints and enough of these horror stories that literally we want to do something about it and we need your help to help us know what to do.”); *see also* JOHNSTON, *supra* note 211, at 145–46 (describing several more stories that were told in the 1998 hearings).

<sup>410</sup> *See* JOHNSTON, *supra* note 211, at 145–48.

<sup>411</sup> *See id.* at 150–52.

<sup>412</sup> *See supra* note 397.

<sup>413</sup> *See* Bawden, *supra* note 403.

<sup>414</sup> MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 62–73 (2005).

<sup>415</sup> *See id.* at 62–63 (quoting Chester Thigpen) (internal quotation mark omitted).

<sup>416</sup> *See id.* at 5–6 (observing that 97.7% of adults who died in 1999 owed no estate tax).

public support to estate tax repeal.<sup>417</sup> In addition to Thorndike's predictions, elimination of tax privacy could provide interest groups with salient taxpayer examples that they could use to attempt to influence the tax-reform debate.

### 3. *Government Credibility*

A final potential objection to my defense of individual tax privacy is that it creates credibility risks for the government. Research in the consumer-marketing field has shown that consumers' confidence in retailers may decline if they feel that the retailer has engaged in duplicitous acts, such as by presenting the price for a good in different segments rather than as a single number.<sup>418</sup> The strategic-publicity function of tax privacy appears to work well as long as taxpayers do not question the government's use of strong tax-enforcement examples to portray its tax-enforcement efforts or levels of tax compliance by other taxpayers. However, if examples of the government's tax-enforcement failures emerge that conflict with examples of its successes, individual taxpayers may lose trust in the government.

This objection is not persuasive. Our tax privacy rules make it highly unlikely that contradictory examples that could cause individuals to question the government's trustworthiness will appear. As this Article has demonstrated, tax privacy prevents examples of the government's tax-enforcement errors or oversights from emerging. Today, few taxpayers publicize instances where the IRS has made a mistake regarding their tax returns or audits.<sup>419</sup> Of course, when new presidents nominate individuals for executive appointments, the public views salient examples of sophisticated taxpayers who have failed to report their tax liabilities correctly yet have not been detected by the IRS.<sup>420</sup> But these exposures occur infrequently and most likely escape most individuals' memories during the interim.

It is more probable, however, that, if tax return information were public, the government could face even greater credibility risks than it does today, when

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<sup>417</sup> See *id.* at 63–65.

<sup>418</sup> See, e.g., David Gamage & Darien Shanske, *Three Essays on Tax Salience: Market Salience and Political Salience*, 65 TAX L. REV. (forthcoming 2012) (manuscript at 7–11), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1779382](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1779382); Yih Hwai Lee & Cheng Yuen Han, *Partitioned Pricing in Advertising: Effects on Brand and Retailer Attitudes*, 13 MARKETING LETTERS 27, 28–29 (2002).

<sup>419</sup> For an isolated example of a taxpayer publicizing such a success, see Victor Fleischer, *Fleischer 1, IRS 0*, TAXPROF BLOG (Nov. 25, 2008), [http://taxprof.typepad.com/taxprof\\_blog/2008/11/fleischer-1-irs-0.html](http://taxprof.typepad.com/taxprof_blog/2008/11/fleischer-1-irs-0.html) (describing tax law professor Victor Fleischer's victory over an IRS determination of deficiency regarding his personal "away from home" deductions).

<sup>420</sup> See *supra* notes 220–22 and accompanying text.

tax return information is private. Even in a public-access regime, the government would likely continue to attempt to highlight salient examples of prominent taxpayers whom the government has prosecuted or penalized for engaging in abusive tax activities as a way to deter tax evasion and bolster taxpayer confidence. However, in a public-access regime, if the government were to produce examples of its strong tax-enforcement actions against specific individuals, such as those who used an offshore bank account to hide income, the media could use publicly available disclosure forms to question why other taxpayers who used similar tax strategies were not audited or penalized.<sup>421</sup> Such reports on inconsistent tax enforcement against specific individuals could directly contradict the examples of successful detection that the government deliberately attempts to create.

### C. *Implications*

None of these potential objections to the strategic-publicity function of tax privacy are powerful enough to outweigh its benefits as a means of enhancing voluntary compliance. As a result, the primary implication of normative acceptance of the strategic-publicity function of tax privacy is that individual tax return information should remain private, except for instances when the government engages in a public tax-enforcement action against an individual taxpayer, such as civil or criminal tax litigation.

In recent years, tax scholars have proposed varying degrees of public access to individual tax return information. I consider the implications of my defense of individual tax privacy for some of these proposals below.

#### 1. *Full Public Access*

Several tax scholars have proposed full or nearly full public access to individual tax return information. Commentators such as Joseph Thorndike<sup>422</sup> and Laurence Kotlikoff<sup>423</sup> have argued that individual tax returns should be

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<sup>421</sup> Under current law, individuals are required to file disclosure forms along with their tax returns when they engage in certain activities that the IRS views as potentially abusive. *See, e.g.*, DEP'T OF THE TREASURY, OMB No. 1545-2038, TD F 90-22.1: REPORT OF FOREIGN BANK AND FINANCIAL ACCOUNTS (2011), available at <http://www.irs.gov/pub/irs-pdf/f90221.pdf>; IRS, DEP'T OF THE TREASURY, OMB No. 1545-1800, FORM 8886: REPORTABLE TRANSACTION DISCLOSURE STATEMENT (2011), available at <http://www.irs.gov/pub/irs-pdf/f8886.pdf>.

<sup>422</sup> Thorndike, *Show Us the Money*, *supra* note 12, at 148–49; Thorndike, *The Thorndike Challenge*, *supra* note 12, at 691–92.

<sup>423</sup> *See* Bernasek, *supra* note 8.

publicly accessible to enhance voluntary compliance. Popular-culture commentators have offered similar proposals.<sup>424</sup> In response to concerns about malicious uses of sensitive personal information, such as Social Security numbers and addresses, they suggest that this information could simply be redacted.<sup>425</sup>

While full public access could lead some individuals to refrain from engaging in aggressive or abusive tax planning, it presents a significant risk of revealing instances of tax noncompliance involving specific taxpayers. As this Article has argued, full-public-access proposals should be rejected because they would interfere with the government's efforts to present memorable examples of its tax-enforcement successes to individual taxpayers.

## 2. *Partial Public Access*

Other scholars, such as Marjorie Kornhauser, have suggested that *partial* public access would satisfy the tax-compliance objectives described above.<sup>426</sup> Under Kornhauser's proposal, a taxpayer would file a publicly accessible form with her annual tax returns that would contain her name, address, income, capital gains, exclusions, deductions and credits, and marginal and effective tax rates.<sup>427</sup> Kornhauser acknowledges that the exact contours of the form should be fine-tuned to maximize tax-compliance benefits while minimizing invasions of personal privacy.<sup>428</sup>

While such a proposal would limit the scope of tax return information that would be publicly available, partial public access could create even *more* harmful tax-compliance effects than full public access. If individuals could see only part of a specific taxpayer's tax return, such as the amount of taxable income, instead of the entire return, they might wonder about the reasons for this figure. If the partial-access regime were to reveal that a prominent individual reported surprisingly low taxable income, the media would likely speculate or imply that the individual had engaged in a dubious or abusive tax strategy. The history of public-tax-return experiments supports this objection

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<sup>424</sup> See, e.g., *60 Minutes: Andy's Tip for the IRS* (CBS television broadcast Apr. 19, 2009), available at <http://www.cbsnews.com/video/watch/?id=4955238n>. As the late commentator Andy Rooney stated, "I have an idea how the IRS could get more money out of the tax cheaters, and it wouldn't cost the government a nickel. They would make tax records open to all of us." *Id.*

<sup>425</sup> See Thorndike, *Show Us the Money*, *supra* note 12, at 149.

<sup>426</sup> Kornhauser, *supra* note 12, at 111–16.

<sup>427</sup> *Id.* at 115–16.

<sup>428</sup> *Id.* at 116.

to partial-public-access proposals. In 1924, when individuals' tax liabilities and names, and no other information, were made publicly available, newspaper reporters questioned why certain wealthy individuals had paid little or no income tax.<sup>429</sup> This conjecture could detract from the strategic-publicity function and hinder the government's efforts to encourage voluntary compliance.

Public reports that rich and famous individuals, identified by name, might have reported low tax liabilities because they had engaged in abusive tax planning could cause individuals to rely on the availability heuristic and assume the presence of widespread tax evasion or, at least, tax avoidance.<sup>430</sup> As partial public access to tax return information could generate even more speculation of tax noncompliance than full-public-access proposals, it is far less desirable from a tax-compliance perspective than its advocates suggest.

### 3. Targeted Public Access

Scholars have also proposed more targeted forms of public access aimed at only certain types of taxpayers or tax information. Mark Linder, for instance, has proposed that, to cause citizens to recognize the "widening differentials between high- and low-paid occupations," individuals earning \$1 million or more should be required to publish their tax returns.<sup>431</sup> Other targeted-publicity proposals include the mandatory public release of complete tax returns by members of Congress or candidates for certain public offices.<sup>432</sup>

Advocates of these proposals acknowledge that targeted public access would probably reveal tax-reporting irregularities, whether intentional or not, of prominent citizens and public officials. For instance, following the public display of the tax problems of President Obama's nominees, when Joseph Thorndike advocated for public access to the tax returns of U.S. senators, he commented: "How many of these erstwhile colleagues would survive the sort of intense tax vetting that these nominees have received? Not many, I suspect.

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<sup>429</sup> See, e.g., *Names of Wealthy on Non-Taxable List*, *supra* note 296.

<sup>430</sup> See Tversky & Kahneman, *supra* note 148, at 207–08.

<sup>431</sup> See Linder, *supra* note 12, at 977.

<sup>432</sup> See, e.g., Thorndike, *The Thorndike Challenge*, *supra* note 12, at 691 ("I challenge the nation's top political leaders to release their tax returns. And I mean *all* our leaders.").

Maybe not even most.”<sup>433</sup> A 2009 survey of sitting U.S. senators revealed that several of them have made errors in reporting their tax liabilities in the past.<sup>434</sup>

Targeted-public-access proposals are especially troublesome when the strategic-publicity function of tax privacy is taken into consideration. Because proposals such as these affect the *most* recognizable taxpayers, they have the potential to serve as some of the most salient examples of tax noncompliance.<sup>435</sup> Wealthy individuals are more likely to engage in abusive tax strategies than other individuals.<sup>436</sup> They are also more likely to possess the financial resources necessary to avoid civil or criminal tax penalties if detected.<sup>437</sup> Again, even if targeted-public-access proposals revealed just a small number of such cases involving celebrity taxpayers or recognizable government officials, the availability heuristic, among other cognitive biases, could cause individuals to conclude that the publicized cases are common.<sup>438</sup> As a result, targeted-public-access proposals that would expose the tax return information of the most prominent individuals should be avoided.

## CONCLUSION

By examining the relationship of individual tax privacy and individual tax compliance from a new perspective, this Article has offered a new defense of individual tax privacy: that tax privacy enables the government to influence individuals’ perceptions of its tax-enforcement capabilities by publicizing specific examples of its tax-enforcement strengths without exposing specific examples of its tax-enforcement weaknesses. Because salient examples may implicate well-known cognitive biases, this strategic-publicity function of tax privacy can cause individual taxpayers to develop inflated perceptions of the government’s ability to detect tax offenses, punish perpetrators, and compel all

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<sup>433</sup> *Id.*

<sup>434</sup> *For Senators, Tax Questions Are Taxing*, POLITICO.COM (Feb. 11, 2009, 4:27 AM), <http://www.politico.com/news/stories/0209/18696.html> (showing that, of fifty-eight U.S. senators surveyed, nine admitted to having made mistakes on their tax returns and seven admitted to having paid back taxes).

<sup>435</sup> For recent examples, see David Kocieniewski, *House Panel Finds Rangel Guilty*, N.Y. TIMES, Nov. 17, 2010, at A24 (describing the failure of U.S. Representative Charlie Rangel of New York to report rental income to the IRS); and Josh Meyer, *U.S. to Shelve Stevens Case*, CHI. TRIB., Apr. 2, 2009, at C14 (describing the failure of former U.S. Senator Ted Stevens of Alaska to report taxable income correctly).

<sup>436</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-493, ABUSIVE TAX AVOIDANCE TRANSACTIONS: IRS NEEDS BETTER DATA TO INFORM DECISIONS ABOUT TRANSACTIONS 9 (2011), available at <http://www.gao.gov/assets/320/318337.pdf> (observing that advice on how to structure abusive tax-avoidance transactions is generally marketed and sold to wealthy individuals and corporations).

<sup>437</sup> *Id.*

<sup>438</sup> See Tversky & Kahneman, *supra* note 148, at 207–08.

but a few outliers to comply. Without the curtain of tax privacy, by contrast, individual taxpayers could see specific examples of the government's tax-enforcement weaknesses that would contradict this perception.

This Article has shown that the strategic-publicity function of tax privacy likely encourages individuals to report their taxes properly. The strategic-publicity function of tax privacy may facilitate the government's deterrence efforts by causing individuals to overestimate the government's ability to detect tax avoidance and evasion and to punish noncompliant taxpayers. Likewise, it may enable the government to increase confidence among compliant taxpayers, enriching feelings of reciprocity by causing them to perceive that most people pay their taxes honestly, even if this is not often—or ever—the case.

Even though tax privacy may enable the government to create perceptions that are not representative of reality, the strategic-publicity function of tax privacy should be exploited to enhance voluntary compliance. I have offered three principal arguments in support of tax privacy and its strategic-publicity function: it may enhance voluntary compliance without sacrificing transparency, it may offer a more politically feasible tax-compliance approach than actual changes to the tax penalty rules or the allocation of tax-enforcement resources, and it may improve tax morale by preserving individuals' trust of the government and its ability to deliver goods and services. The primary implication of this analysis is that individual tax return information should remain private, except for instances when the government engages in a public tax-enforcement action against an individual taxpayer, such as a civil lawsuit or criminal tax proceeding.

While increased public access to information is usually considered a virtue of liberal democracy and good governance, this Article has argued that, in the context of individual perceptions and individual tax compliance, *less* may indeed be more.