A Helpful and Efficient IRS: Some Simple and Powerful Suggestions

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A Helpful and Efficient IRS:
Some Simple and Powerful Suggestions

BY JOSHUA D. ROSENBERG*

I. INTRODUCTION

In a display of almost unimaginable political, practical, and academic unity,¹ almost every citizen of this country (including

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¹ Having been a law professor for 19 years, I have read and contributed my share of legal scholarship. I have been teaching and writing about tax courses in law school for 19 years (see, e.g., Joshua D. Rosenberg, Better to Burn Out Than to Fade Away? Tax Consequences on the Disposition of a Tax Shelter, 71 CAL. L. REV. 87 (1983); Joshua D. Rosenberg, The Psychology of Taxes: Why They Drive Us Crazy and How We Can Make Them Sane, 16 VA. TAX REV. 155 (1996) [hereinafter Rosenberg, Psychology of Taxes]; Joshua D. Rosenberg, Tax Avoidance and Income Measurement, 87 MICH. L. REV. 365 (1988) [hereinafter Rosenberg, Tax Avoidance]). I have been teaching and writing about Negotiation and Alternative Dispute Resolution courses for about ten years (see, e.g., Joshua D. Rosenberg & H. Jay Folberg, Alternative Dispute Resolution: An Empirical Analysis, 46 STAN. L. REV. 1487 (1994); Joshua D. Rosenberg, In Defense of Mediation, 33 ARIZ. L. REV. 467 (1991); Joshua D. Rosenberg, The Psychology of Mediation, RECORDER-ADR Supp., Spring 1994, at 9 [hereinafter Rosenberg, Psychology of Mediation]). Four years ago I began teaching Constitutional Law (the mastering of which has done more than anything else to reinvigorate my interest in taxation for no other reason than the fact that in tax, every once in a while a question has a determinable answer). In all of these areas, I never cease to be amazed at how so many smart people can disagree so cleverly and vehemently about so much. Often a single sentence in an opinion or a statute can generate volumes of apoplectic agony from all sides. It is against this background that I view
Congresspersons, the President, and the Treasury Department itself) seems recently to have agreed that the Internal Revenue Service ("IRS") should become more "customer-friendly." After initially rejecting the very idea of any "customer-friendly" law enforcement agency, I have now come full circle to embrace the notion that the new, friendly IRS can not only result in more efficient tax collection, but also can provide an outstanding model for every other law enforcement agency serious about its role. In this essay, I suggest several major steps the IRS can take towards fully achieving its objectives of better service to taxpayers and concurrent improvement in tax compliance.

My initial rejection of the notion of a customer-friendly IRS was driven by the belief that most people avoid paying taxes whenever they can. According to recent estimates, the taxpayers of this country cheat the federal government out of approximately $195,000,000,000 annually, or about $1600 per taxpayer per year. As a taxpayer who will ultimately bear the cost of others' noncompliance, I have no desire to see the government do anything to make it even easier for people to cheat. To me, the idea of a "customer-friendly" IRS seemed no more sensible than the idea of an "enemy-friendly army," or a "criminal-friendly police force."

My worst fears about the "friendly" IRS seemed confirmed by top IRS officials making public statements such as "tax officials recognize that the vast majority of people [in this country] want to pay the taxes that they owe. In fact, most of them are like my father who, if there was even a doubt, he paid more." While I greatly appreciated sentiments such as these, and had great respect for the official's father, I was scared by the extent to which the expressed factual assumptions about the rest of America's taxpayers were just plain wrong.

Before immersing myself in fears of utter disaster that would be occasioned by the almost complete taxpayer noncompliance I was envisioning, I decided to find out more clearly what the IRS meant by "friendly" service to its taxpayers. I was moderately relieved to see IRS Commissioner Charles Rossotti take pains to point out the importance of preventing noncompliance so that "taxpayers who do not comply are not allowed to place a burden on those who do comply." Nonetheless, I had

with shock and suspicion anything approaching consensus.

2 See Rosenberg, Psychology of Taxes, supra note 1, at 157


4 John D. LaFaver, IRS Deputy Commissioner for Modernization, quoted in Bryan E. Gates, At the Back End of the Parade, TAX NOTES TODAY, Mar. 3, 1999.

5 Rossotti, supra note 3, at 1195.
some trouble at first understanding how a more friendly IRS could do anything either to change the current popular conception that others are often not complying with the law, or to make that conception less accurate than it is today.

In the off-chance that maybe customer-friendly service could somehow be compatible with increased taxpayer compliance, I began to consider what the IRS might learn from other customer-friendly and successful enterprises. I noted that when I go to Nordstrom's Department stores, an enterprise nationally known for being customer-friendly, an associate is always available and attentive, guiding me, helping me figure out what to select, and ringing up the sale. The customer is encouraged, in a very helpful and friendly way, to buy what the store has to sell, and, often without knowing it, is subjected to numerous subtle encouragements and enticements to buy the items on which the store makes a significant profit.

Essentially, successful retailers shepherd the potential customer to the places they want her to go, ensure that she see and take note of the things they want her to see, and encourage her to engage in the behaviors they want. Rather than simply stand by and wait for potential customers to make choices, successful retailers create an environment that affirmatively encourages some choices (i.e., the choices that are most profitable for the store) and discourages others.

On the other hand, at some less well-run stores, the customer may be left alone to wait endlessly for assistance. This very lack of guidance and oversight that leaves the customer confused and dissatisfied not only makes it harder to purchase (because she may have trouble locating the items she wants and selecting the specific brands that suit her best), but also both makes it easier to steal (because no one is watching) and engenders a frustration and hostility that may well encourage theft not only as "self-help," but also as retribution. Conversely, at the well run store, the same

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6 For example, whenever I shop at Department Store "X" (the editors of the law review asked me not to use the store's real name, but if you live near one (and they're all over) you know the store I mean), I stand around for a few minutes waiting for a salesperson before I eventually break down and call out for help. I become frustrated and begin to fume as a salesperson comes by only to tell me to please be quiet and wait because she is busy with someone else (although I can never figure out who she is helping, because when I look around I notice that all the other customers I can see seem, like me, to be futilely searching for assistance). I finally decide to take care of things on my own. Very quickly I become frustrated because I cannot begin to figure out how to find what I need. It is never long before I develop an urge to cause damage to the store, but I always manage to leave before I actually act on that urge.
service and environment that make it easy and pleasant for customers to engage in the behaviors that the company seeks to encourage (purchasing) simultaneously make it extremely difficult for would-be cheaters to engage in any undesired behaviors (such as vandalism or stealing), if for no reason other than that sales assistants are always nearby watching (helpfully, of course).

In many ways, our tax collection system has resembled a poorly run retail operation: “customers” typically feel like they have been left on their own to ferret out where to go and what to do. Their available choices often appear unclear and confusing; while attempting to figure out how to do the “right” thing (pay what they owe), they are met with numerous temptations to do wrong (cheat or exaggerate, at least a little). They end up frustrated, and often engage in behaviors that are frustrating to the IRS, if not downright illegal. In the end, both sides have suffered, and both sides feel that they have been wronged.7 “Sales” (tax revenues, to be exact) are way

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7 While not exactly comparing the IRS to a retail store, tax policy analysts have noted a likely relationship between inadequate guidance by the IRS and noncompliance with tax laws. Deborah Schenk pointed out that in the absence of proper guidance, taxpayers:

[D]o a rudimentary cost-benefit analysis and determine it is not worth the time and money to comply. Playing the audit lottery, they predict that it is cheaper and more efficient not to comply, on the assumption that they will not be part of the 1% of taxpayers who are caught.

Deborah H. Schenk, Simplification for Individual Taxpayers: Problems and Proposals, 45 TAX L. REV 121, 166 (1989). Worse, what may begin as noncompliance with complex recordkeeping requirements, often in turn breeds noncompliance in other areas. See id.

While the current system functions in a way that delights a few very clever tax lawyers and, from time to time, some of their clients, it may actually increase taxpayer hostility towards the IRS. Taxpayers spend significant amounts of money, time and energy worrying about what to do. Unless they win the audit lottery, they are less satisfied with the ultimate result than they would otherwise be, at least in part because their hopes for successful tax avoidance had been inappropriately raised. Inevitably, some taxpayers who take positions they believe are legally permissible and economically rational will end up being punished, by way of tax liability plus possible liability for interest and, occasionally, penalties.

[P]unishing people for engaging in behaviors that are generally rewarding can result in increased neurotic and hostile behavior[, so that] the current system of allowing, and financially encouraging, taxpayers to take questionable positions, and then later punishing them for having taken those positions, can drive people crazy. Equally problematic, the current system
down, but the customers remain angry at the IRS rather than pleased with their ability to pay less than they should. To the substantial credit of the IRS, it neither denies nor attempts to cover-up its past failures. Indeed, Commissioner Rossoottí himself has emphasized the importance of changing the IRS’s approach in order to further the goals of both increased “consumer” happiness and increasing overall compliance.8

In this Article, I first point out that some of what the IRS has done in the past, and continues to do today, is to “shepherd” us through the taxpaying process. I then suggest what it might do in the future to both enhance its image as helpful and to substantially increase compliance with the law. My suggestions spring from the very premises upon which the idea of a customer-friendly IRS is based, but they go well beyond anything suggested by or for the IRS to date.

II. HOW THINGS WORK NOW

A. The Taxpaying Process

As Professor Graetz has pointed out, filling out a tax return continues to be the most common form of participation in our governmental process. More people file tax returns every year than vote in presidential elections.9 Unfortunately, this necessary and common form of citizen participation is not a simple one.

Compliance with the tax laws requires action long before a taxpayer’s return is due on April 15 of the following year. Taxes for the entire year must be predicted even before the year begins, so that the taxpayer can have the proper amount withheld from wages and can, if necessary, file appropriate quarterly estimated tax returns. Taxes on wages are withheld from each paycheck, and taxes on nonwage income must be paid quarterly 10.

Records must be properly maintained throughout the year to document income and potentially tax-significant expenses. According to the IRS’s own best estimates, the average filer of a Form 1040 with no other forms also results in both the loss of substantial amounts of revenue and the misdirection of taxpayer energy towards confusing, rather than cooperating with, the government.

Rosenberg, Psychology of Taxes, supra note 1, at 196.

8 See Rossoottí, supra note 3, at 1195.


or schedules to complete must spend over three hours per year on recordkeeping alone. If she plans to take any itemized deductions, her recordkeeping time expands to over six hours. If she has income other than wages (such as interest or dividends), another one-half hour of recordkeeping is required. If she is self-employed, she can count on another six and one-half hours of annual recordkeeping on top of everything else. Before even beginning to deal with the actual preparation of a tax return, taxpayers must find and gather these required mountains of records. The best estimates of the costs of keeping these records exceed $100,000,000,000 per year.

For most taxpayers, these advance recordkeeping requirements, though burdensome, are far less burdensome than the rest of the tax filing process. The Internal Revenue Code ("the Code") is complicated. Regulations, cases, letter rulings, etc., not only fail to significantly clarify and simplify the Code, but in their attempts to do so add even more material through which to sort. Even for uncomplicated returns (Form 1040 with no itemized deductions or nonwage income), the IRS estimates that merely learning about the relevant law and/or tax forms takes almost three hours. Not surprisingly, the time and expense it takes to fill out the tax forms is, for most taxpayers, significantly greater than the time it takes to either keep records or simply learn about the law and/or forms.

B. The IRS as Shepherd

While the IRS does provide important assistance to all taxpayers, few of us ever notice. The IRS employs thousands of individuals to give advice and answer form-related questions over the phone, but the benefits of this service are mixed and the costs are high. Phone lines are busy, people get frustrated, people complain that they cannot get the advice they need, or that the advice they get is incorrect, and when they get correct advice they may misunderstand or misapply what they have been told. Often the IRS's best efforts are seen as nothing more than added irritation.

Of more significant benefit to all taxpayers than any individual assistance the IRS makes available is its continuing development and

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12 See id. at 8-12. For wage earners, much recordkeeping, form filling and filing, and taxpaying is done by their employers. The time spent on these pursuits by employers is not included in the time estimates noted above. See id.
13 See discussion infra Part II.C.
14 See HALL & RABUSHKA, supra note 11, at 8-12.
15 See id.
updating of appropriate tax forms. Any doubters might simply imagine what it would be like to comply with the tax laws in the absence of the forms, schedules and instructions provided by the IRS. These papers that we have grown to hate actually represent the IRS’s best efforts to turn an incredibly complex and complicated Code into some manageable form.

Decades ago, these forms, and the schedules and tables that accompanied them, made it relatively simple for most people to calculate their own taxable income and ultimate tax liability. Indeed, for years the IRS did a yeoperson’s job of integrating the numerous diverse (and often apparently conflicting) requirements of the Code into tax forms that could be used by most, if not all, taxpayers. Almost no individual taxpayer needed to understand the Code itself, and, more significantly when compared to today’s world, very few individual taxpayers needed any complex instructions to complete their required forms. For the vast majority of people, filling out taxes was easy, and it was made so by the IRS.

C. The IRS as Enforcer

Unfortunately, it seems as if the days are gone when the IRS could make anything about taxpaying easy. We now live in a world where the tax forms are complicated, the schedules that accompany those forms are more complicated, and the instructions and worksheets that accompany the schedules that accompany the forms are even more complicated. It is news to no one that we are past the days when tax forms are easy for the average person to fill out. Indeed, while it may be a little less obvious, we are also well past the days when tax forms are easy for the tax expert to fill out. If my own experience is an indicator, by last year we passed the time when tax forms were even possible for an expert to fill out. After years of doing my own taxes by hand on the forms, I finally gave up. As a result of the increased complexity of the Code and forms, it would be difficult to find any taxpayer who actually looks at those forms as any type of help or guidance. Instead, we tend to see the forms as some cruel torture devices that must have been intended only to prolong and intensify the already painful experience of paying taxes.

By far, the most frequent interactions between the IRS and taxpayers occur only after the taxpayers have suffered through “[t]he Kafkaesque

\[16\] I do not mean to say that I could not complete any of the forms. In fact, I could complete almost all of them. It was only the form that dealt with the foreign tax credit that held me back. Unfortunately, completion of even a vast majority of the relevant forms would not have been enough to satisfy the IRS.
costs of being in a process without knowing how to help oneself."\textsuperscript{17} That occurs on April 15.\textsuperscript{18} These post-filing interactions typically take place only if the IRS has reason to believe that the taxpayer in question has violated the law. These interactions are usually hostile and confrontational, and they consume over two-thirds of the IRS's total annual budget.\textsuperscript{19} As a result of actual or feared confrontations with the IRS, people tend to see the IRS as something very different from an actual provider of any kind of "service" they would ever want to use.\textsuperscript{20}

On the whole, the IRS has concentrated extensively on going after the "bad guys" after they have robbed the store, rather than on shepherding all

\textsuperscript{17} Edward J. McCaffery, The Holy Grail of Tax Simplification, 1990 Wis. L. Rev. 1267, 1311 (quoting GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 132 (1978)).

\textsuperscript{18} As Commissioner Rossotti pointed out, currently only about eight percent of the IRS budget goes to any pre-filing activities. The vast majority of the IRS's budget expenditures and efforts are directed towards audits and enforcement actions after returns have been filed. See Rossotti, supra note 3, at 1203.

\textsuperscript{19} See id. at 1202.

\textsuperscript{20} See Rosenberg, Psychology of Taxes, supra note 1, at 186.

The segregation of a single agency to do nothing but the "dirty work" of tax enforcement tends both to exaggerate the temporal and physical discontinuity between taxes and governmental benefits, and to increase public hostility towards tax and its enforcement. Because most of us share a dislike for taxes and a desire to avoid them, we are united in our view of the Internal Revenue Service as our enemy. Indeed, few would dispute the suggestion that the [IRS] is the single most hated governmental agency. We dread the possibility of an audit, and many people see the [IRS] as having no socially redeeming features other than the fact that it may be sufficiently bureaucratized, disorganized and generally inefficient to overlook our own individual return errors.

Our view of the [IRS] as the [big], badhearted and insensitive enemy tends to persist even when it is someone other than ourselves who has fallen into its clutches, and we tend to see every tax dispute as one that pits some taxpayer against our common enemy—the big, mean-spirited, good-for-nothing-[IRS]. Even those who usually side with the poor against the wealthy often view the upper-middle-income and the rich as the oppressed underdog when they are confronted by the [IRS]. We tend to ignore the fact that what comes from the wealthy taxpayers inevitably goes to some other, often less wealthy, individuals. We see only that those who take from the wealthy are the same ones who are taking from us, and we feel allied against a mutual foe.

\textit{Id.} at 186-87
potential customers through the taxpaying process in a way that maximizes positive interactions and desired behaviors while minimizing opportunity or incentive to act wrongfully. They have basically taken on the role of "security guard" rather than "salesperson." In turn, we have tended to focus only on what the IRS can do to us and not what it can do for us. Taxpayers view the tax recordkeeping, preparation, and payment process as one for which they are individually responsible, and see the IRS as the "enforcer" ready to come in at the end to make sure that the taxpayers did what they were supposed to do.

III. AN ALTERNATIVE

A. Real Help to Taxpayers

As the laws, records, forms, and schedules have increased in complexity, a continually growing number of taxpayers have turned to paid recordkeepers and tax preparers. Many of those who do not pay others to do their taxes and keep their records have turned to tax preparation software. Often, neither the taxpayers themselves nor the paid preparers actually use the tax forms prepared by the Treasury Department. Whoever does the taxes may well just answer whatever questions pop-up on a computer screen, while the software gives a running account of tax liability and ultimately prints out the information in a format acceptable to the IRS. For the paid tax preparers who use the tax software on a daily basis, and even for those who use it only once a year for their own taxes, tax preparation software is becoming (although it has not yet become) easier to use than the forms were, even in the days before the forms became the intricate behemoths that they are today.

With the use of good tax preparation software, the complexity of the Code need no longer equate with a complex tax preparation process. What the tax forms did for taxpayers three decades ago is what tax preparation software does today.

Just as the IRS did not leave development of forms to private enterprise then, it ought not to leave the software development to private enterprise now. Rather than forcing individuals to pay a tax preparer or to purchase

21 See Tom Herman, A Special Summary and Forecast of Federal and State Tax Developments, WALL ST. J., May 26, 1999, at A1. "The IRS says paid preparers signed 55.5% of all individual income-tax returns received through April [1999] up from 54% a year earlier." Id.
privately developed and marketed software in order to determine their tax liability, the IRS could develop and make freely available its own tax software. As do the currently popular, privately produced programs, the programs developed and made available by the IRS would be able to avoid any requirement that taxpayers either know the underlying tax law or engage in any complicated calculations or comparisons.

Essentially, the tax benefits or costs of even the most complicated provisions affecting most individual taxpayers are based on facts that can be determined relatively easily. When the number-crunching based on these facts is done by a computer, the entire process can become relatively straightforward. Much of the information could be imported from past years, so that after their first filing taxpayers would have to do little more than enter certain changes in status, income, or expenditures from past years.

The IRS currently both encourages electronic filing and offers to do some of the number-crunching for some filers, but neither of these options alone, nor both together, are anything like tax preparation software. The electronic filing now encouraged by the IRS requires the taxpayer to fill out a return on her own, and merely allows that completed return to be transferred to the IRS via the Internet. Although the IRS is now willing to calculate the tax liability for certain taxpayers, that calculation is done only after the taxpayer sends in her signed return. Most people do not want to send in a form with those calculations left undone; whether or not they trust the IRS, people hesitate to commit to an unknown liability. Were the IRS to develop and make available user-friendly tax preparation software that does not simply promise to calculate tax liability in the future but does so for the taxpayer at the time that data is entered, “customers” might actually come to regard the IRS as the agency that helps them do their taxes rather than the agency that forces them to confront dauntingly complex instructions and then persecutes them for failing to understand them. The IRS could reach, in a helpful rather than merely coercive way, all taxpayers.

22 But see Schenk, supra note 7, at 129-30.

23 Of course, those who do not trust the IRS (read “everyone except IRS employees”) will likely suggest that software prepared by the IRS is likely to be slanted towards the IRS’s perspective. The answers to this argument are that it is no more likely to be slanted than are current forms, and in any event, the program will be freely available to everyone, and, as a result, will be subject to the kind of scrutiny that will likely produce accuracy.
B. Real Benefits to the IRS

1. Increased Compliance

a. The Idea

Of course, the goal of any customer-friendly enterprise cannot be simply to make the customer happy, but it is to make the customer happily do what the enterprise wants her to do. Just as good sales help makes it more likely that a customer will buy a product, the development and widespread distribution of free tax preparation software could make it more likely that taxpayers will properly compute their tax liability

By developing good tax preparation programs, the IRS could essentially turn the tax preparation process into one in which the taxpayer does nothing other than respond to the prompts provided by the IRS. As a result, the IRS would not only be in a position to make the process a simpler one of responding to fact-based questions, but it could also control the way in which those questions are asked and the information that is communicated along with the questions.

The IRS could ensure that taxpayers are prompted to include all items of income. A friendly pop-up helper could remind taxpayers that certain items they wanted to deduct are actually not deductible and that others are deductible only if they can be properly substantiated.\(^\text{24}\) It could explain the kinds of substantiation required by law, explain that taking the deductions without having the required records is fraudulent, and reveal the penalties for fraud at appropriate times during the process.\(^\text{25}\) The program could firmly suggest that certain actions or questions that typically tend to generate untruthful responses may be watched closely, and it could make its point most forcefully at times by pointing out some of the more severe and intimidating penalties for noncompliance.

While gently (but firmly and clearly) pointing out the dangers of attempting to underpay taxes, the IRS could also work into its program information and affirmative incentives to enter data correctly. Substantial research suggests that people cheat on taxes in large part because they believe that others are cheating (so that they will come out a loser if they do not also cheat).\(^\text{26}\) Unfortunately, while the general public has remarkably


\(^{25}\) See id. § 6662.

\(^{26}\) See John S. Carroll, How Taxpayers Think About Their Taxes: Frames and Values, in Why People Pay Taxes 43, 47 (University of Mich. ed., 1992) ("One of the most consistent findings in survey research about taxpayer attitudes and
little accurate information about the realities of taxpayer compliance or noncompliance, much of the "information" it does get is from taxpayers who are bragging about their own "triumphs" over the IRS. This is exactly the kind of situation that exaggerates taxpayers' sense that they ought not to comply. A program that simply and clearly highlights any facts, the knowledge of which tends to improve compliance, could have a substantial positive impact.

In addition to setting forth encouragements towards honesty and disincentives to cheat on taxes, by setting the parameters of the tax filing process, the IRS could take a more aggressive role in encouraging taxpayers to take a more positive attitude towards the IRS and towards taxes in general. Again, this could provide substantial behavioral benefits in both the short and long term.

b. Will It Really Work?

Of course, to some extent, taxpayers may act as they otherwise would, and may be unaffected by even very specific prompts, suggestions, or warnings. The economically rational taxpayer can compute her chances of cheating successfully, compare the penalties for being caught, and make a cost-benefit analysis of whether or not to respond accurately regardless of the prompts and cues on a computer screen. Indeed, the vast majority of people vehemently assert that their decisions about whether or not to comply with the tax laws are based on ideas, attitudes and beliefs that are not likely to be changed by prompts on a computer screen. An honest taxpayer will typically explain her behavior by reference to "integrity," "honesty," or maybe even "fear of getting caught," and a dishonest taxpayer will explain her tax cheating by reference to facts such as "others cheat," or "the system is not fair," etc.

Significant research suggests that, in this regard, the vast majority of people incorrectly explain their own reasons for acting as they do. A large behaviors is that those who report compliance believe that their friends (and taxpayers in general) comply, whereas those who report cheating believe that others cheat.

27 See Rosenberg, Psychology of Taxes, supra note 1, at 198-99.
28 See Carroll, supra note 26, at 48-50.
29 To date, I have personally asked this question of over 500 law students (during tax classes), and have uniformly been told that their taxpaying behavior is determined only by reference to their beliefs about right and wrong, and not by anything trivial.
30 See Carroll, supra note 26, at 48-50.
part of our behavior is the result of unconscious learned responses to stimuli of which we are either unaware or only marginally aware at the time we act. The shopper who buys brands she saw advertised by famous people on television, or the items suggested by the sales assistant (whom she will never see again, whose taste is a total unknown, and whose comments are neither written nor subject to enforcement), is simply reacting to some very obvious prompts. Recovering alcoholics learn that certain places or situations "trigger" drinking, and they can substantially reduce the likelihood of relapse simply by avoiding those triggers. Examples of our responses to more or less overt stimuli abound. Behavior that people contend is a result of ex ante rational analysis is just as likely to be the result of unconscious responses to unnoticed (on a conscious level) stimuli. In addition, the person's expressed reasons for acting are just as likely to be a rationalization that comes after the behavior and is prompted by the behavior as it is to be a motivator that actually prompted the behavior it "explains."

31 See Rosenberg, Psychology of Taxes, supra note 1, at 199-200 & n.111.
32 See id. at 161.

For [most] tax-evaders, the notion that they are stealing from the government basically because they think they can get away with it is inconsistent with [the sense of self which they have developed as a basically good, law-abiding citizen]. In order to allow themselves to maintain that positive sense of self, the "rational" part of their minds develops an understanding of what they are doing and why they are doing it that allows them to perceive their tax evasion as consistent with being a good, honest citizen. Whether this rationalization takes the form of "knowing" that the tax system is unfair, or "knowing" that the government is bad and misguided, is less important than the fact that, regardless of how individuals explain their tax evasion behavior to themselves and others, that explanation is likely to be some ex post rationalization rather than some guiding vision that motivates the behavior of tax evasion. Once this rationalization takes hold, it then self-perpetuates and excuses tax evasion—in the individual's mind—for years to come.

Id. at 200-01 (footnotes omitted).

Empirical studies have demonstrated, for example, that for any taxpayer, if every factor is constant (including attitude, total income and tax liability, and knowledge of the likely results of noncompliance), that taxpayer is significantly more likely to cheat in filling out her forms if the tax is due on April 15 than if she has previously paid the tax and is entitled to a refund on April 15. See Elizabeth F Loftus, To File, Perchance to Cheat, PSYCHOL. TODAY, Apr. 1985, at 34.

[In one simple experiment that I have conducted in my own classes, people are divided into two groups; each group is sent to a separate room
Even now, the IRS has some opportunity to attempt to gain favorable publicity from time to time, and every once in a while it puts some wealthy tax-evader in jail, but its ability actually to influence taxpayers' attitudes or behaviors is at best minimal. The IRS simply has no opportunity to influence taxpayers, consciously or not, at the moment when any influence would be most effective—when they are in the process of filling out their returns. As a result, anything the IRS does to change taxpayer behaviors is simply too far removed from the behavior it seeks to influence to be effective.

Most of us are aware that things closer to us seem larger than objects of equal size that are far away (for example, we pretty much know that in reality our hand is not bigger than the moon), and that sounds close to us seem louder than sounds of equal decibel level far away, but we tend not to realize that distance or proximity (both temporal and geographic) has an equally significant impact on the psychological effect of events on feelings, thoughts, attitudes, and behavior. Objects and occurrences physically

and asked to pitch pennies against a wall; and the remaining students "observe" one of the two groups. One group's penny pitching is met with complete silence by its observers. The other group is constantly praised for their ability to get pennies close to the wall, for their good form, etc. The second group invariably continues to pitch pennies long after the first group stops. When asked why they continue for as long as they did, they responded with statements such as "it reminds me of when I was a kid, so it brings back fond memories," or "it was a good challenge." Almost none responded that they continued because they were getting cheered on by others. To bring in a more personal note, I was recently in Las Vegas, putting money into slot machines. I would tell myself statements such as "this feels like a lucky quarter," or "this machine is due," or (towards the end) "I only have six more quarters; I might as well use them up." Like most gamblers, I actually believed [that] these explanations at the time [were sensible even if somewhat whimsical,] and if someone had asked me why I was throwing my money into those damned machines, those are the reasons I would have given. Upon returning home (with empty pockets), I did a little research and discovered, to no surprise, that slot machines had been configured with the assistance of experimental psychologists to generate a payout schedule that mirrored the type of reinforcement schedule that maximally sustains learned behavior. In other words, I wasn't gambling because the machine was "due," I was throwing my money away because I was being conditioned to do so.

Rosenberg, Psychology of Taxes, supra note 1, at 200 n.111.

33 I have referred to this phenomenon elsewhere as "psychological perspective distortion." See Rosenberg, Psychology of Mediation, supra note 1.
closer to us have more emotional impact than similar objects or events at
great distances, and actions and objects closer to us in time take on more
significance than temporally distant events. Yesterday’s news recedes from
our memory, tomorrow’s plans get put off until that day is upon us, and
today’s minor crises get much more of our attention than rationality would
dictate.55 When we are filling out our taxes, we are quite close to the
frustration caused us by the IRS, but we are far from any prompts, facts, or
evidence that might positively influence our attitudes or behavior towards
taxpaying.

By developing and distributing software that guides taxpayers through
the entire filing process, the IRS could gain significant access to taxpayers’
attention at the time it would do the most good, and the impact on
compliance could be huge. Indeed, the extent of the real impact of properly
timed and placed early intervention is best understood by analogizing the
taxpayer to a traveler. If the traveler begins a 100 mile journey by going in
a direction that is only fifteen degrees off course, she will end up approxi-
mately twenty-five miles away from her intended destination. If she
receives proper guidance only after going 100 miles in the direction she
began, she will have to travel that extra twenty-five miles to get to her
original destination. If, however, she received the same guidance at the

34 See id. at 10.
Most of us have, at some time, seen an animal that seemed hungry for
affection and have either stopped to pet it or at least felt a twinge of
sympathy for it. We all knew, and would have said so if anyone had asked,
that at that exact moment children in other parts of the world were starving
to death, yet we felt more concern for the cat that wanted to be petted than
we did for the starving children. This happened not because we are bad or
selfish or unconcerned, but because all people pay attention to things close
to them. Some readers will doubtless think to themselves that the reason
that we might pay more attention to a kitten in front of us than to a starving
child half way around the world is that it is easier to do something about the
kitten than it is to help the child. While this may be true, it does not account
for the human behavioral differences. Experiments have been done in which
subjects were assured that they could impact equally on different people,
only one of whom was in front of the subject. Almost uniformly, the person
who was present received more favorable treatment than the absent person.
Rosenberg, Psychology of Taxes, supra note 1, at 180 n.58.

35 In The Seven Habits of Highly Effective People, Stephen Covey stated that
those who can overcome this tendency to focus on the temporally proximate events
rather than on the events most deserving of attention are significantly more likely
than others to be successful. See STEPHEN R. COVEY, THE SEVEN HABITS OF
beginning of her journey, the extra time, effort, frustration, and conflict would have been avoided. By positioning itself with the taxpayer at the beginning of her journey through the filing process, and by figuratively looking over her shoulder as she goes through that process, the IRS could assure both more compliance and less frustration with the laws.

With the investment of less time and energy than the IRS currently spends on taxpayer assistance, it could reach all taxpayers in a way that is both helpful and self-promoting. The IRS software could be made freely accessible on the World Wide Web, as are (for a fee, of course) current tax preparation programs. Those without a computer could gain access to computers at libraries or at IRS offices. Those without computer skills could be assisted in their tax return preparation. The time saved by the IRS in transferring data from forms to its own computers would save more than enough money to sponsor taxpayer assistance programs sufficient to allow noncomputer-users to file quite easily

36 For those who prefer pictures, it looks like this:

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  /
|| extra effort needed
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37 In this land of the free, many of our laws tend to give people choices to do right or wrong, and then to punish them if they do wrong. As gun control advocates point out, we tell people that it is wrong to shoot others, but we do not make it difficult to get and use weapons. We tell people that it is wrong to speed, but we allow them to purchase cars that go 110 miles per hour. Rather than create a system that reduces the possibility of crimes and bad acts at the beginning, we tend to leave in place incentives to do wrong, and then assign responsibility to the wrongdoer and punish her. I do not suggest that holding people responsible for their actions is inappropriate; it is essential. On the other hand, assigning blame to the actor ought not to become an excuse for failure by the rest of us to do what we can to improve compliance with the laws. Rather than wait to see what people do, we ought to do all we can as early as possible to encourage them to do the right thing. While a broader discussion of this notion is beyond the scope of this Article, it is necessary

38 "The two major [tax preparation] software companies are Intuit Inc., makers of Turbo Tax and MacInTax, and a [H&R] Block division that makes Kiplinger Tax Cut." Herman, supra note 21.
2. Other Benefits

a. A Fairer Tax?

As others have pointed out, tax laws have become more and more complicated every year for decades. In the early 1980s, Congress labeled its tax acts as “simplification” (even though every act so labeled or referred to actually was more complicated than what it replaced), but more recently Congress seems to have at least progressed to the point of ceasing to pretend that the tax laws are becoming more simple. To be sure, the unrelenting march towards complexity in the Code is fueled by many and varied sources. But many of the “complicating” changes in recent tax acts suggest that the trend towards complexity has been fueled in surprisingly large part by nothing other than a Congressional desire to be “fair.”

In the Taxpayer Relief Act of 1997, Congress included several new deductions, credits, and exclusions designed to help people save, purchase homes, and pay for schooling. Congress sought to provide this assistance to the low and middle-income taxpayers Congress believed needed it most. Congress realized, however, that whether it provided this assistance by way of exclusion, deduction, or credit, those who were most likely to learn about it, take advantage of it, and save the most from it were the high-income individuals that Congress had no interest in helping (at least not in this particular manner) rather than the low and middle-income taxpayers

39 See GRAETZ, supra note 9, at 111-22.
40 See id. at 123-24.
42 See discussion infra Part III.B.2.c.
44 See, e.g., I.R.C. §§ 24, 25A, 220, 221, 408, 408A, 530 (1994 & Supp. 1997) (pertaining to child and educational credits, medical savings accounts, interest on education loans, regular individual retirement accounts (IRAs), Roth IRAs, and education IRAs).
46 In an effort to keep this particular Article short and focused, I am attempting to avoid concluding either that legislators really do want to help the poor or really do not want to help the poor. At this point, for purposes of this Article, I would only suggest that legislators have many different motives, and that some pieces of legislation are motivated primarily by attempts to help lower or middle-income taxpayers (read “people who are not major campaign contributors”) while other, sometimes seemingly contradictory and sometimes simultaneous pieces of legislation, are motivated primarily by other concerns, whether those concerns be
at whom the bills were aimed. In order to properly target these behavioral incentives and tax benefits to those in need, without sacrificing significant revenue to the less needy and more tax-sophisticated high bracket taxpayers, Congress made use of the kind of "phaseouts" that are becoming more and more common in the Code. 47

Basically, phaseouts work by setting an income level at or below which taxpayers get full enjoyment of the tax benefit. Taxpayers with incomes above that level get their benefit reduced proportionately, until incomes reach the level at which the benefit disappears entirely. 48 While such provisions have been around for quite some time, they seem to be gaining in popularity as Congress attempts to target certain tax benefits more specifically to low-income individuals.

Phaseouts of tax benefits, including those appearing in the 1997 Taxpayer Relief Act, 49 have not always been met with the generous understanding and appreciation that Congress would like to see, and they often fail to work as well as expected or hoped. They make the Code significantly more complicated, lead to the creation of more complicated instructions, worksheets and forms, and often provide relatively small benefits in return for the substantial aggravation they create for individual taxpayers. 50 Those for whom the tax benefits are intended are the least likely to employ tax advisors to guide them towards maximizing their benefits and the least likely to be able to sort through the forms, tables, and worksheets necessary to claim the benefit. The benefits end up being substantially less helpful to their intended beneficiaries than Congress intended.

The development and implementation of user-friendly tax compliance software would do much to make phaseouts and similar provisions in the Code work well. Despite an increasingly complex statute, the software could make determination of each specific tax benefit quick and easy. People would get the benefit they were entitled to, and they would

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understand the benefit they were getting (because the program could have a pop-up helper point out both that they were getting it and why they were getting it). The tax benefit could reach its intended targets simply and efficiently

b. A More Efficient System

Like most tax benefits, the education and savings benefits enacted in 1997 were intended not simply to help middle-income taxpayers, but to encourage them to do certain specific things: to save, to pursue education, etc. If the result of these provisions is simply that taxpayers who engage in those activities end up with more money, most of the provisions' drafters would see the laws as being less than successful. Instead, success would require that the provisions act as incentives to their intended beneficiaries to allocate money in the intended ways; success is measured by the extent to which the law changes taxpayer behavior as much as (or in many cases, more than) by the extent of the benefit delivered. Unfortunately, when the tax laws enacted to provide those incentives are complicated and when the average taxpayer is told to “speak to your tax advisor” (those with incomes low enough to entitle them to the tax benefits in the 1997 Taxpayer Relief Act may employ tax “preparers” such as H&R Block, but few, if any of them actually employ tax “advisors”) to determine whether she can take advantage of the new program, the behavioral incentives cannot work well, because no clear message about the incentive (“do this and you get a good tax break”) ever gets through to those at whom it is aimed.

If the IRS were to create appropriate software, the complexity of the Code might continue to exist, but for the average taxpayer it would become irrelevant. What would remain relevant and would properly become the focus of taxpayer attention would be the end results originally intended to get their attention rather than the complexity of whatever mechanisms were developed to implement the desired goal. One can now only imagine the difference between having heard of some vague education tax benefit program, and having a friendly image and voice pop up on the taxpayer’s computer telling her in a straightforward way that she did or can save exactly $400 in taxes by simply depositing $1000 in her own savings account.

53 In order to really enable tax incentive provisions to work well, provisions giving credits or deductions for certain expenditures or savings ought generally to be amended so as to allow a taxpayer to take into account for a prior year any such
c. Complexity and Public Discussion of Taxes and Tax Reform

As noted above, despite loud and repeated cries for simplification, the Code becomes more complex each year. Indeed, we have by now become so accustomed to the complexity of the tax laws that tax experts are bemoaning not just the complexity of the Code itself (which we all take for granted by now), but the complexity of the discussion of tax complexity.

payments made on or before the due date for filing a return for that prior year (that is, for most taxpayers, April 15 of the succeeding year). If that were to take place, then the taxpayer who responds to the prompt could immediately benefit by taking the desired action. The taxpayer who must wait a year to reap a benefit is much less likely to take the action. See discussion supra Part III.B.1.b.

See generally HALL & RABUSHKA, supra note 11.

Deborah Paul does an impressive job of laying out some of the discussion in this area in The Sources of Tax Complexity: How Much Simplicity Can Fundamental Tax Reform Achieve?, 76 N.C. L. REV 151 (1997). Professor Paul has compiled a list of articles on the subject:

As discussed below, all of this complexity has numerous causes, is of several kinds, and has many and disparate effects. Unfortunately, because the process of recordkeeping and filling out proper forms and schedules is now so overwhelmingly complex for most taxpayers, public discussion tends to lump all of the many aspects of tax complexity into a single image of this overly complex compliance process. If the return preparation process alone could be simplified, the public discussion of taxation could be greatly advanced simply because we might be able to evaluate the different reform proposals on their own merits, rather than simply clinging to anything that promises to free us from our current struggles with the forms.

In fact, much of the tax laws’ complexity is completely unrelated to the complexity of tax forms. To begin with, the very concept of “income” is vague and complex. Measuring “income” as defined by most economists would require continuous monitoring of every person in the country, so

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57 See Rosenberg, Tax Avoidance, supra note 1, at 368.
we find other substitutes, or proxies, for income.\textsuperscript{58} We measure those proxies only by reference to particular transactions in which people engage,\textsuperscript{59} so that from the start we are measuring proxies for income substitutes. Because those proxies are sometimes inaccurate and unfair, we make exceptions and amendments.\textsuperscript{60} As business transactions get more complex, the Code correspondingly takes on more complexity if for no other reason than to explain how those new complex transactions are to be taxed. In addition, taxpayers pay billions of dollars to very smart tax lawyers to make both new and old transactions look more like transactions which they are not (but which are not taxed) than like the (taxable) transactions they are (or at least used to be).\textsuperscript{61}

Beyond the complexities involved in merely attempting to get a somewhat accurate approximation of income or its substitutes, the drafters of tax laws frequently have altogether different objectives in mind: perceived fairness (which, of course, can vary by 180 degrees, depending on the philosophical outlook of whoever is doing the perceiving); minimizing disturbance to the economy (efficiency, as perceived by some); helping those who need it by decreasing their tax burden; providing incentives for certain behaviors and investments; providing disincentives for other expenditures or behaviors; pleasing campaign contributors; avoiding antagonizing old tax lawyers who know all of the old provisions and do not want to see them repealed; impressing lawyers with the technical expertise of the drafters; drafting laws that no one could possibly understand in order to keep the public from knowing the special individualized benefits certain powerful individuals or corporations are getting; compromising for the sake of agreement or alliance (logrolling); or making it more difficult to cheat. These are just a few of these divergent and often conflicting purposes. Even this list, though infinite in its possibilities, is far from exhaustive.\textsuperscript{62} Numerous provisions of the Code are complex for no reason other than to make it easier for individuals to do their taxes.\textsuperscript{63}

\textsuperscript{58} See Paul, \textit{supra} note 55, at 155 (explaining that "where the law is unclear, lawmakers respond by producing new authorities that clarify but complicate the law").

\textsuperscript{59} See id.

\textsuperscript{60} See id.

\textsuperscript{61} See Rosenberg, \textit{Tax Avoidance}, \textit{supra} note 1, at 378-84.

\textsuperscript{62} See \textit{WHY PEOPLE PAY TAXES}, \textit{supra} note 26'; McCaffery, \textit{supra} note 17, at 1284-91, Paul, \textit{supra} note 55.

\textsuperscript{63} For example, Code sections 62, 63, and 168 (discussing adjusted gross income, taxable income, and accelerated cost recovery, respectively), would be difficult for any person to simply read and understand, and would be impossible for
Along with many different reasons for complexity, there are also many different kinds of complexity (the number and names of which vary somewhat from commentator to commentator). There is technical complexity (the Code is hard to read and understand), substantive complexity (even if one can read the words, it is difficult to comprehend the transactions spelled out), complexity born of indeterminacy or non-transparency (even if one understands exactly what the Code means, it is impossible to predict how it might apply to certain transactions not spelled out in the Code or to variations on other transactions), compliance complexity (how in the world does one fill out the forms), recordkeeping complexity, administrative complexity, static complexity, dynamic complexity, and more.

Finally, all of this complexity has numerous independent and often conflicting consequences. For sophisticated taxpayers, the complexity generates some new opportunities and forecloses some old ones. For tax lawyers, the complexity of the Code generates lots of billable hours, as well as lots of hours spent in continuing education and Tax LL.M. programs. For unsophisticated taxpayers, complexity generates fear, alienation, suspicion, and, at times, an inability to calculate the proper tax due along with their returns. Since people tend to distrust what they do not understand, the complexity of tax laws fosters distrust of the government.

Despite the numerous and often independent reasons for, kinds of, and impacts of the tax laws' complexity, for most commentators and for the general public, all this complexity equates directly and forcefully with a complex compliance process, and vice versa. Many advocates of tax reform stress "complexity" as the single strongest argument for reform. The clarion cry of many has become the notion of a postage-stamp size return. Others suggest we just repeal the income tax and substitute an entirely different tax law in its place because any other law would be less complex.

a normal taxpayer to not only understand but also integrate into the determination of her proper tax liability. These sections are complex to the reader in large part because they were not really drafted to be read. They were drafted in a way that would make it possible to develop tax forms that people could fill out.

64 See, e.g., McCaffery, supra note 17, at 1284-91; Paul, supra note 55.
65 See Paul, supra note 55, at 154 & n.4.
66 See McCaffery, supra note 17, at 1284-91.
67 See, e.g., HALL & RABUSHKA, supra note 11, at 1-70; McCaffery, supra note 17, at 1267-69.
68 See, e.g., HALL & RABUSHKA, supra note 11, at 52-82.
69 See, e.g., id. at 1-70.
While there is nothing inherently wrong with short and simple tax laws, there is much wrong with focusing on complexity as a single issue with a single solution. Our response to problems with taxes is too often like my own response when the tow-truck operator I had called asked me to explain the problem with my unmoving car: “It’s the engine,” I explained. While that answer was not (and almost never can be) totally incorrect, neither was it useful. Indeed, since the problem that necessitated towing (admittedly, it was a problem with the engine) turned out to be an absence of gas (for the engine), my diagnosis was worse than simply useless, because it kept me from attending to a specific, and easily fixable, problem that could have saved me substantial towing bills. Similarly, our unified railing against complexity qua complexity conflates and ignores the numerous separate and very different causes and effects of complexity, and at the same time it takes the focus of discussion away from other potential areas of reform, such as fairness, efficiency, etc. Since the apparent problem is the single problem of “complexity,” the apparent solution to that problem must be simplification. In fact, it is not true that if we phaseout certain deductions intended for the poor we must also do away with graduated tax rates or favorable capital gains rates. Nor is it true that we cannot subject complicated commercial transactions to tax unless we also want to complicate the taxation of simple individual transactions.

A very public example of the misdirection that results from a focus on “complexity” as a single issue is the popularity of a proposed “flat tax.” While many people agree that a flat tax would be good, and many equate its value with its presumed simplicity, few of those people who support a “simple, flat tax” agree on what a flat tax is, and much of the confusion about what a flat tax may be arises from the “complexity problem.”

Many people believe that a flat tax is good because it will result in a simple and small return. Others believe that a “flat tax” simply means the same tax rate for everyone, regardless of income, and they like it because of that feature. Some point to the elimination of all the complexity generated by a differential rate for “capital gains.” Others point instead (or in addition) to the elimination of certain deductions such as the home mortgage interest deduction or the deduction for charitable contributions. All of these features appear integrally and inevitably related. In fact, they are not, and they may well have competing or self-canceling results.

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70 See GRAETZ, supra note 9, at 212-43.
71 See id.
If the extreme images of either an incredibly complicated Code or an incredibly simple postage-stamp-sized return were not presented as alternatives, we would be left with discussion of two very different and very important substantive questions raised by the flat tax proposals: (1) should we have a flat rate or progressive rates?; and (2) since the tax laws necessarily benefit some and hurt others, and since they necessarily encourage some activities and discourage others, with what particular benefits and incentives should we end up? Of course, there are arguments to be made on either side of each of these issues, and tax scholars, practitioners, and legislators have made convincing arguments all around.\textsuperscript{72} But, surprisingly, these are not typically the issues that dominate discussion of alternatives like the flat tax, and they are issues that rarely even make it to the light of public discussion. Instead, public discussion tends to focus on an issue that need not exist at all for most taxpayers—the complexity of compliance.\textsuperscript{73}

An easy-to-use tax compliance program could quickly turn the tax reform debate towards the important substantive issues. While turning the debate more towards issues such as efficiency and fairness would not alone solve those issues, it would do much to make them understandable, and that alone would greatly enhance public discussion and consideration of the tax debate.

C. A Cheaper Alternative

The IRS already cooperates with the producers of most tax preparation software, if only in ways that enable convenient electronic filing. Rather than start from scratch in developing software, the IRS might simply expand its cooperation with some of the current private producers of such software. Programs that properly prompt taxpayers to do the "right thing" rather than prompt them to look for ways they might escape audit or find new deductions might be approved for use by the IRS, and with that approval could go reduced chances of audit, increased financial incentives, or other ways to encourage their use. The IRS could condition its approval upon satisfying itself that the program as developed and as used will have sufficient prompts, encouragements and warnings about complying that it will be effective to increase honesty among those who use it.

\textsuperscript{72} See HALL & RABUSHKA, supra note 11.
\textsuperscript{73} See McCaffery, supra note 17, at 1272.
IV RECORDKEEPING

A. Third-Party Reporting

As noted earlier, it is not just filling out the forms that makes tax compliance so difficult for the average person. Currently, the burden of recordkeeping for income other than wages, and for most deductions, falls entirely on the taxpayer, resulting in substantial work for the scrupulously honest and substantial temptation for others. If the IRS could relieve taxpayers of some of this burden, it could save significant time and trouble all around.

In the past, taxpayers have not only not asked for the IRS’s help in this area, but have struggled hard against legislative or administrative actions that would have led to a transfer of more of the recordkeeping burden to the IRS. Indeed, the reasons that taxpayers have chosen to avoid IRS assistance in recordkeeping are the very reasons why the IRS itself could benefit substantially from assisting taxpayers in this endeavor.

Generally, tax compliance is very high only among those who have no choice but to comply, while cheating is high among those who have the opportunity to do so. Wage earners, who have their income reported by their employers and have their taxes withheld from paychecks, do not even try to cheat (at least with respect to that wage income). On the other hand, when individuals earn money in ways for which the receipt is not reported by the payer to the IRS, opportunities to underreport that income (or to not report at all) exist, and where such opportunities exist, many taxpayers find them irresistible.

If more sources of income were reported directly to the IRS by payers, the recipients of income might be relieved of independent recordkeeping responsibilities, and at the same time they would be less able to cheat successfully and less likely to even try to do so. We have made significant progress in the area of third party reporting in the last years, but there is more that can be done.

B. Automatic Taxpayer Reporting

Of course, much of the recordkeeping burden that falls on taxpayers is the result of their desire to substantiate deductions, rather than to simply

74 See discussion supra Part II.
75 See GRAETZ, supra note 9, at 93-100.
76 See Rosenberg, Psychology of Taxes, supra note 1, at 206.
77 See id.
78 See id. at 207
79 See, e.g., GRAETZ, supra note 9, at 93-98.
report income. The amount and detail of records needed has grown significantly in the last twenty years.\textsuperscript{80}

Within a very short time, however, the government’s ability to circumvent the need for much of the taxpayers’ independent recordkeeping could grow geometrically. Americans use credit cards for much of their purchasing.\textsuperscript{81} It would be quite easy for the IRS to work with some of these credit card issuers to devise a system that would allow records of tax-significant transactions to be made accessible to the IRS. Transaction records could be maintained for purchasers and sellers, and data regarding the time, place and substance of the transaction could be automatically forwarded to and retained by the IRS. Independent recordkeeping requirements for taxpayers could be decreased substantially, and the accuracy and completeness of the Service’s own data could be much improved.

The recordkeeping I suggest is already done by banks, brokerages, service providers, and sellers of goods; the information is often sold (with the consumers’ written consent, but without their actual knowledge because they usually fail to read the fine print) to other would-be service providers, sellers or advertisers.\textsuperscript{82} Essentially, I am suggesting only that information that is already available to private parties for a fee, and that is necessary to ensure compliance with tax laws, ought not to be restricted in a way that makes ensuring tax compliance significantly less efficient, more costly, and, in the end, more burdensome to everyone.

I have little doubt that many would think that the notion of direct IRS access to the daily transaction histories of taxpayers is, to put it mildly, awful. Many Americans place a high value on privacy,\textsuperscript{83} and many of us have trouble adjusting to the fact that records about our lives may be maintained by sellers, purchasers, credit card companies, computer and software manufacturers, and internet service providers.\textsuperscript{84} People are even now concerned about annoying sales and solicitation efforts generated by

\textsuperscript{80} See \textsc{Hall \& Rabushka, supra} note 11, at 20-35.
\textsuperscript{82} See Richard S. Murphy, \textit{Property Rights in Personal Information: An Economic Defense of Privacy}, 84 \textsc{GEO. L.J.} 2381, 2402-07 (1996).
\textsuperscript{83} See \textit{id.} at 2381-417.
the disclosure of their financial transaction records. Surely the last thing some people might want to do is to provide this kind of information to the IRS, which might proceed to use it for political or personal blackmail or vengeance.

If one can struggle past the initial revulsion that my suggestion might trigger, however, the suggestion, in at least a limited form, may indeed prove appealing. First of all, transaction histories would need to be forwarded to the IRS only when individuals are engaging in potentially tax-significant actions (as determined by the individual herself). Records of any expenditures that the taxpayer determines to be a personal (for tax purposes) need not be forwarded to the IRS.

Additionally, the information that would assist in tax-relevant recordkeeping is already “out there” and is currently accessible not just by the IRS, but by private parties. The proper question is not whether the relevant data should be kept confidential: it already is not confidential. Nor is the question whether the information can be kept out of the grasp of the IRS. The IRS already can gain access to it, at least after showing that the records may tend to substantiate or refute taxpayer claims. Although most taxpayers never actually have to present the data to the IRS (because a very small percentage of taxpayers are ever audited and asked to actually substantiate their deductions), the law requires not only that they present the data when it is requested (for example, on audit), but that they maintain the data whether or not it is requested by the IRS, and that they keep it ready for the IRS should it wish to inspect the records. In other words, the data that might be automatically made available to the IRS would only be data that was not and could not be kept confidential from the IRS in any event.

If, as might well be likely, privacy concerns would carry enough weight to prevent even an attempt by the federal government to gather and maintain all of the necessary (to a proper determination of tax liability) information in the absence of individual consent, the IRS could present such access as merely a service offered to taxpayers who desire to take advantage of it. The government need not require every taxpayer to enable direct IRS access to accounts, but it could simply offer the possibility to taxpayers who seek relief from recordkeeping requirements and who want

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85 This would include the cost, description, date of purchase, and use of items acquired for use in any business or other income-producing activity, and the specifics of any charitable, medical, or business-related repair or maintenance expense, etc.

86 See GRAETZ, supra note 9, at 95.

87 See id.
to further simplify their own tax compliance process. Those who opt into
the direct access would save time for themselves and for the IRS, and
would be significantly less likely (or able) to cheat. In return, they might
well become less subject to audits in the areas covered by direct access.
Taxpayers who choose to keep their own records in a manner that is
inaccessible to the IRS, absent an audit, might expect to be watched more
closely than those who take advantage of the IRS’s offer, but they would
forfeit no rights to privacy from the government that they now enjoy.

Were the IRS to offer significant recordkeeping services to most
taxpayers, the offer itself ought to, and perhaps would, bring about a major
shift in public discussion of tax. While some taxpayers might continue to
complain, those complaints would not be that it is difficult and complicated
to keep the proper records, but only that it is difficult to keep those records
temporarily secret from the IRS. As more and more people are beginning
to realize, the kind of privacy that most people would prefer to maintain
with respect to their expenditures, whether or not those expenditures have
any tax significance, is a kind of privacy that does not exist now and has
not existed for several years. The difference is that the information is now
in the hands of private enterprise, which often acquires it without the
knowledge of the consumer and uses it (or sells it) in order to maximize
profits, rather than in the hands of the IRS, who could acquire the
information directly only after knowing consent of the taxpayer and would
(hopefully) use the information to calculate and collect proper tax
liabilities.

V WHITHER THE TAX LAWYER?

As a tax professor, the last thing I want to do is anything that takes
potential jobs away from my students. Fortunately, the implementation of
technology to make recordkeeping and compliance relatively straightforward need not interfere with the need for lawyers to do effective tax
planning. Indeed, increased access to and use of accurate tax preparation
might well increase the use of tax planners. When it becomes more
difficult to engage in post hoc tax planning (by simply cheating), the need
for prudential foresight may become clear. I have heard several outstanding
tax attorneys say that their job is to help their clients do what Congress
wants them to do, and to help direct transactions so that money goes where
it is supposed to go. Early and accurate assessment of the taxes that result
from those transactions will neither lessen nor interfere with the need for
such activities.
VI. CONCLUSION

The Internal Revenue Service has expressed a sincere desire to take steps that will make filing easier and compliance with the laws more likely. It is in the process of reorganizing and reprioritizing. My suggestions simply usher the IRS down the path it has chosen to follow. The same development and implementation of software that will eliminate the burdensome complexity of tax recordkeeping, preparation, and filing will also enable the IRS to make huge progress towards both eliminating opportunities for noncompliance and clarifying public discussion of taxes.