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TAX LAWYERS, TAX DEFIANCE, AND THE ETHICS OF CASUAL CONVERSATION

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I. CASUAL CONVERSATIONS PROFESSIONALS ENDURE

Each profession entails a risk for a different kind of casual conversation its members must endure. Medical doctors probably endure casual conversations about pains and rashes, second guesses of primary care physicians, and disorganized thoughts about health care reform, prescription drugs, vitamin C, and chelation. Pastors, priests, and rabbis probably endure unbridled enthusiasm for ecumenical dialogue and experience. Lawyers listen to horror stories of divorce and custody battles, disorganized thoughts on tort reform, and, of course, lawyer jokes, most of which are not new, few of which are funny, and none of which are clever.

Specialists within each profession suffer with specific conversations. The psychiatrist and the dermatologist risk different conversations, as do the tax lawyer and the criminal defense lawyer. The conversational risks of tax lawyers are fairly predictable. First are those conversations premised on confusing us with accountants, usually beginning with an inquiry as to our annual April 15th-related workload.¹ Second are political conversations, usually about tax rates—especially those on capital gains, corporations, and

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1. This lamentable lumping of tax lawyers and accountants in the public mind may be beyond remedy, despite Erik Jensen's 1991 work in which he identified this enduring problem, rightly distinguishing tax lawyers as the ones who are "bright, engaging, and athletic" and "combine animal magnetism with erudition" from accountants who have "thick spectacles, green eyeshades, cluttered minds, and unlimited capacities for boredom." Erik M. Jensen, *Aside, The Heroic Nature of Tax Lawyers*, 140 U. Pa. L. Rev. 367, 367 (1991).

estates. Some while back, the conversation was likely to begin with the wonders of the so-called flat tax, and no doubt the flat tax proposals will circle back again in our casual conversations. (Recently a medical doctor engaged me on the wonders of the flat tax, and given his conversation ensued during a medical procedure, I found myself more enamored with the proposal than ever before.) Perhaps the most common political tax topic at the moment is the income tax burden borne at the top and the income tax ease enjoyed on the bottom. The third common casual conversation topic for tax lawyers has to do with tax gimmicks and, especially, rumors of tax gimmicks. With this kind of conversation, tax lawyers are fairly skilled in conversational evasiveness, worrying about unintentionally forming an attorney-client relationship. Our fears related to this kind of conversant are not merely avoiding ethical issues or providing undeserved free legal advice but more so avoiding inviting him or her into a professional relationship. Clients interested in the latest tax gimmicks must be avoided, and those willing to chat-up strangers about tax advice are especially to be avoided.

Casual conversations with tax lawyers seem to be changing, however. One change has been the form of conversation, or more often, at least, the form of a solicitation to conversation. These days it is not only at the barbeque, picnic, or party where one risks an unwanted conversation but simply while checking one's e-mail. There, one may be invited into discussions that one would not want to enter, much less document via e-mail, with most clients and friends, much less the acquaintance with whom one swapped electronic addresses—or the acquaintance who found your address through an internet search or firm web site. But there has been another change recently in such conversations, and it has to do with both tone and subject matter. Otherwise seemingly reasonable and pleasant individuals are increasingly repeating the inanities of anti-tax conspiracy theorists. These are not opinions that are merely critical of current tax policies, as those opinions have long occurred in casual conversations with tax lawyers (and may make for perfectly good conversation). No, these are statements that deny the government the right to tax, defy the authority of the tax system as it is, or otherwise seek to destroy the taxation system of the federal government. The new tone and subject matter is that of defiance, denial, and destruction.² The conversant may be located at any spot on the continuum from curiosity to militancy. Not all are true believers. This is the good news; but that they are open to becoming so is the sobering news. Below, in Part II, I devote several pages to describing what is alarming about these conversations, trying carefully to distinguish between these conversations and those that are run-of-the-mill political conversations. The latter may be aimed at reforming

2. To sample the potential tone and subject matter, I recommend watching Aaron Russo's *America: From Freedom to Fascism* (2006), available at <http://freedomtofascism.com>, as an introduction.

government, while the former more likely imply revolution. Just as there is a material difference between libertarianism and anarchy, there is a material difference between alleging the tax system to be inefficient but remediable, and alleging it to be irredeemably illegitimate.

This essay is to help tax lawyers decide how to handle casual conversations centered on denying, defying, or destroying the tax system. One option is to walk away, ending the conversation and silencing the dialogue. The next option is to engage. I want to persuade tax lawyers that they should usually engage in the conversation. I try to do this in Part III.

There are two kinds of legal ethics essays, and one must choose which kind to write, and it is useful to the reader to know upfront which kind the author chose to write. One kind begins with the ethics rules of a state, or the American Bar Association, or, for tax lawyers, perhaps Circular 230 and provisions of the Internal Revenue Code, such as Section 6694, as the self-evident premises, and then proceeds deductively and categorically to opine for all. This Essay is not of that kind. Rather it is a collection of my thoughts, helpfully organized, I hope, offered as suggestions to help tax lawyers handle an awkward situation that, with increasing regularity, it seems, must be handled—whether it is by walking or talking. I hope to put the problem into the greater context of tax ethics and legal ethics and policy and legal problems in order to generate greater light on handling the situation. I want to encourage tax lawyers who feel they ought to engage in conversation with the tax protestors and anti-tax conspiracy theorists and those of similar moods and minds to do so—and to do so aware of the greater context.³ And for those tax lawyers who are inclined to walk away, I want to give enough reason to them to pause and reflect on the rippling consequences that even one wildly misinformed person can have.

I also want to share some thoughts about how tax lawyers ought to prepare for these conversations so as to be ready when they arise, and I turn to this in Part IV. Finally, in Part V, I describe some public responses along these lines, commending the tax lawyers who responded and offering their seizing of a teachable moment as an example for the rest of us.

3. I am not the first to suggest that tax lawyers have law-related ethical duties in casual conversations, though it is not a well-known suggestion. This suggestion was made almost a half-century ago by Merle H. Miller, a prominent tax attorney in Indianapolis, Indiana. Mr. Miller cautioned against tax lawyers “aiding and abetting taxpayers in their suspicion, distrust and even animosity toward those who are writing and enforcing our tax laws.” Merle H. Miller, *Morality in Tax Planning*, 10 N.Y.U. Ann. Inst. on Fed. Tax’n 1067, 1081 (1952). Mr. Miller wrote that tax lawyers ought to be held to a high degree of accuracy in their comments about the tax system because “[t]he people who hear him, think that he speaks with authority and therefore give more weight to his pronouncements than they would to the ordinary citizen.” *Id.*

Having written that it is good for an essayist to alert the reader upfront to the type of arguments to be presented, it also seems helpful to disclose what the reader may otherwise guess to be a hidden agenda. I will make my greater agenda clear up front, so that the reader will not be burdened with guesses, and so I will not be burdened with slipping it in here and there rather than offering it up in full. In general, I favor a robust professionalism, that is, one that takes seriously that professions are granted a monopoly on their business in exchange for the promise that the profession will benefit the public good—and not merely the professionals' business. In contrast, there is what I consider to be a weak professionalism, that is, one that seeks to drive the hardest bargain with the public that the profession can with respect to the exchange for the business monopoly. A weak professionalism considers the ideal professional responsibility duties to consist of the minimum constraints necessary to satisfy the public's demands. A robust professionalism emphasizes that the professional has no right to engage in the business, but only a privilege conditioned on an overriding and greater duty to the public good (in the case of lawyers, the legal system). Both lawyers with a weak professional sense and lawyers with a robust professional sense may behave ethically. Lawyers with a weak professional sense are likely to understand the self-interest in avoiding bar discipline and malpractice suits and otherwise being known as a diligent, competent, and personable professional. But lawyers with a robust professional sense tend to identify ethical considerations as the essence of their profession—not merely as the best practices required for avoiding discipline and suit. This Essay is of absolutely no use for avoiding discipline or suit. However, I hope it is still of interest, premised upon lawyers having professional duties outside the confines of the business of law.

II. TAX DEFYING RHETORIC

Taxation is a political topic, apt to pop up or be dropped into a casual conversation much as discussions of wars, education, health care, and environmental regulation. There are many legitimate and important disagreements about tax policy, just as there are legitimate and important disagreements about wars, education, health care, and environmental regulation. There is a range of reasonable disagreement, even if some of the positions seem more reasonable to me than the positions of those with whom I disagree most strongly. There ought to be ample space in our conversations for disagreement. Indeed, it is in that space we are most likely to have the most useful conversations. Thus, it is essential that I distinguish between ordinary political positions on taxation and tax defying rhetoric.

The term “tax defier” today is used much as the term “tax protester” was once used.⁴ It refers not to those who advocate a lower tax burden or a different allocation of the tax burden, but rather those who advocate frivolous legal arguments against the validity of the tax system (especially that it is unconstitutional), or refuse to file tax returns or take other actions that defy the administration of the tax system, or deny its legitimacy, or seek to undermine or destroy it.⁵ The term may have different meanings for different purposes, and, perhaps, in some marginal situations, one may ponder the line between tax defying rhetoric and legitimate tax politics. But, on the whole, differentiating the two is both possible and practical.

Before focusing on tax defiance, I want to make a point about American income taxation that seems is not often enough the focus of casual conversation. It is commonly understood that our federal income tax system is one of voluntary self-assessment, which simply refers to the requirement that each of us assess his or her own tax liability each year, submitting a check to the IRS on or before April 15. What may be less well understood is that Americans do so with a remarkable reliability: well over 80% of American taxpayers voluntarily pay the (right amount of) taxes owed.⁶ This is one of the highest voluntary compliance rates in the world.⁷ And it applies

4. See Nathan J. Hochman, *Tax Defiers and the Tax Gap: Stopping “Frivolous Squared” Before It Spreads*, 20 *Stan. L. & Pol’y Rev.* 69, 69 & n.6 (2009).

5. *Id.* at 69-70.

6. U.S. Dep’t of the Treasury, Office of Tax Policy, *A Comprehensive Strategy for Reducing the Tax Gap* 5 (2006), available at <http://www.ustreas.gov/press/releases/reports/otptaxgapstrategy%20final.pdf> [hereinafter *Tax Gap*].

7. Dave Rifkin, *A Primer on the “Tax Gap” and Methodologies for Reducing It*, 27 *Quinnipiac L. Rev.* 375, 381 (2009) (citing U.S. Dep’t of the Treasury, Treasury Inspector Gen. for Tax Admin., *Additional Actions are Needed to Effectively Address the Tax Gap* (2008), available at <http://www.ustreas.gov/tigta/auditreports/2008reports/200830094fr.pdf>); see also Danshera Cords, *Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs*, 2005 *BYU L. Rev.* 1515, 1516-17 (2005) (citing National Taxpayer Advocate’s Report to Congress: Fiscal Year 2006 Objectives 6 (2005); Steve Johnson, *The 1998 Act and the Resources Link Between Tax Compliance and Tax Simplification*, 51 *U. Kan. L. Rev.* 1013, 1015 (2003); Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 *Ohio St. L.J.* 1453, 1459 (2003); Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 *U. Kan. L. Rev.* 971, 973 (2003); James Andreoni, Brian Erard & Johnathan Feinstein, *Tax Compliance*, 36 *J. Econ. Lit.* 818, 819 (1998); Phil Brand, *IRS’s Worker Classification Program—An Inside Look at New Ways to Resolve the Problems*, 85 *J. Tax’n* 17, 19 (1996)). Of course, in a system that increasingly relies on third-party withholding and reporting, it bears noting that more and more taxpayers have more and more limited opportunities to choose not to comply.

to “over 138 million taxpayers filing over 235 million returns annually.”⁸

Empirically, this high degree of compliance is inexplicable merely in terms of a deterrence model, which would be “a function of the risk of detection and the penalty applied to discovered noncompliance.”⁹ In other words, the high degree of compliance cannot be explained merely in terms of fear among taxpayers of being caught and punished. After all, only about 1-2% of individual tax returns are audited.¹⁰ Were we to consider the very low risk of audit and that the penalty for understatement of tax liability is usually only 20%, “the deterrence model wildly over-predicts the level of noncompliant behavior” we should expect.¹¹ In other words, Americans have a relatively good “tax morale.”¹² The majority of Americans consider it a matter of integrity to pay their taxes.¹³ Unlike their counterparts in some other countries, Americans trust their government to provide valued services funded with the tax revenue, and, generally, trust that their fellow “citizens are not shirking their [tax paying] duties.”¹⁴ This makes the trust mutual: the government trusts citizens to calculate correctly their own tax liabilities, and the citizens trust the government. This mutual trust “may be important in symbolizing that the powers of the government are indeed (in the words of the Declaration of Independence) derived ‘from the consent of the governed.’”¹⁵ No doubt, most American taxpayers, like most taxpayers anywhere, would prefer a lower to a higher personal tax burden, but in the final analysis, Americans tend to trust the system.

The essential aspect of the problematic anti-tax system rhetoric is that it denies the trustworthiness of the American tax system. It is squarely at odds with the tax morale of Americans who pay their taxes and trust the

8. Hochman, *supra* note 4, at 70 (citing Internal Revenue Service Data Book 4 (2007), available at <http://www.irs.gov/pub/irs-soi/07databkrevise.pdf>); see also Cords, *supra* note 7, at 1516-17.

9. Richard Lavoie, *Flying Above the Law and Below the Radar: Instilling a Taxpaying Ethos in Those Playing by Their Own Rules*, 29 *Pace L. Rev.* 637, 640 (2009).

10. Internal Revenue Service, *Fiscal Year 2007 IRS Enforcement and Service Statistics 3*, available at http://www.irs.gov/pub/newsroom/irs_enforcement_and_service_tables_fy_2007.pdf.

11. Lavoie, *supra* note 9, at 641.

12. *Id.* at 642.

13. Cords concludes it is a matter of patriotism and integrity. Cords, *supra* note 7, at 1516-17. Rich Lavoie has recently considered the influence of patriotism in his *Tea Parties and Taxes: What’s Patriotism Got to Do with It?* (Aug. 2, 2010) (U of Akron Legal Studies Research Paper No. 10-09), available at <http://ssrn.com/abstract=1653527>.

14. Lavoie, *supra* note 9 at 646, 650-55 (discussing trust in government), 655-60 (discussing trust in fellow taxpayers); see also Hochman, *supra* note 4, at 70.

15. Lawrence Zelenak, Justice Holmes, Ralph Kramden, and the Civic Virtues of a Tax Return Filing Requirement, 61 *Tax L. Rev.* 53, 64 (2007).

system.¹⁶ (It also reveals that those who claim the system is untrustworthy do not know what an untrustworthy system looks like: Pakistan, for example.¹⁷) The threat the rhetoric has is in its ability to erode the sense of trustworthiness, and, thereby, the compliance rate. Thus, whatever other difficulties there are in dividing legitimate criticisms of the tax system from illegitimate system-bashing, the latter, inevitably, alleges that the tax system as such is inherently untrustworthy.

Abstractly, it may seem difficult to distinguish legitimate from illegitimate criticisms of the tax system, especially insofar as the system itself benefits from critique and the political involvement of citizens who have fundamental disagreements about tax policy. Yet, therein lies much of what distinguishes the two. Those who make fair, even if marginal or unpopular, criticisms of the tax system presume a general legitimacy to it, even if there are any number of specific Internal Revenue Code sections, or Treasury Regulations sections, or case law holdings, or economic, legal, or policy concepts that they argue ought be changed. Radical critics may have radical agendas, but still work within the tax system rather than seeking to destroy it. They may lobby Congress or the IRS, argue before courts, or otherwise “channel their protest to the details of the taxes themselves.”¹⁸ Even if their criticism amounts to claiming it would be better to kill the system as we know it in order to resurrect an improved system, there is a presumption that the political process related to taxation is legitimate. Thus to refer to tax defying rhetoric is not to refer to criticisms that happen to be marginal or unpopular, but rather those that allege an irremediable illegitimacy to the tax system.

Distinguishing between legitimate and illegitimate tax law arguments is not an academic undertaking. Courts “have had to strike a balance between welcoming honest taxpayers with legitimate tax claims . . . and spurning tax defiers with rejected, meritless claims.”¹⁹ The Fifth Circuit put it: “[w]e are sensitive to the need for the courts to remain open to all who seek in good faith to invoke the protection of law. . . . However, we are not obliged to suffer in silence . . . unsupported assertions, irrelevant platitudes, and legalistic gibberish.”²⁰ Given that the courts recognize a difference between legitimate and illegitimate tax system criticism, I am confident that

16. Lavoie, *supra* note 9, at 646, 650-55 (discussing trust in government), 655-60 (discussing trust in fellow taxpayers); Hochman, *supra* note 4, at 70.

17. See *Pakistan’s Elite Pay Few Taxes, Widening Gap*, N.Y. Times, July 19, 2010, at A1, available at <http://www.nytimes.com/2010/07/19/world/asia/19taxes.html>.

18. Hochman, *supra* note 4, at 69.

19. *Id.* at 77-78.

20. *Crain v. Commissioner*, 737 F.2d 1417, 1418 (5th Cir. 1984); see Hochman, *supra* note 4, at 78.

the latter can be identified in a manner that allows the former its due space for operation.

By “tax defying rhetoric,” I do not narrowly mean the defier arguments identified in the courts, but more broadly mean any claims of denying the trustworthiness of the tax system. By the “tax system” I mean not only the Internal Revenue Code, Treasury Regulations, IRS publications, and IRS administration, but also those individuals involved in drafting legislation and regulations, implementing the tax law, and adjudicating tax law disputes, and the democratic processes of affecting the legislation, regulation, court cases, and administration of the tax system. I mean not only the law and procedures as we have them, but also the mechanisms we have for changing them.

Rather than beginning with an exact definition, I will offer some illustrations of what I mean. For example, tax defying rhetoric includes any claims that violence to protest the tax system is justifiable.²¹ In early 2010, when an IRS building in Austin, Texas was destroyed by a tax protesting pilot, he left a suicide note that ranted about the tax system, concluding that violence was not only a justifiable means but also the only means of response.²² The suicide notes of anti-tax terrorists are an example of the anti-tax system rhetoric.

Relatively speaking, however, it seems unlikely that there are many anti-tax system activists who will be motivated to violence, or even willing to publicly endorse the violent activities of others.²³ Though not physically

21. While few anti-tax activists may engage in violence, their rhetoric is likely sufficient to cause “lone-wolf violence” such as the attack on the IRS building in Austin. Benedict Carey, *When Does Political Anger Turn to Violence*, N.Y. Times, Mar. 28, 2010, at WK1, available at <http://www.nytimes.com/2010/03/28/weekinreview/28carey.html?scp=1&sq=%22mad+as+hell%22&st=nyt>.

22. Michael Brick, *Man Crashes Plane Into Texas IRS Office*, N.Y. Times, Feb. 19, 2010, at A14, available at <http://www.nytimes.com/2010/02/19/us/19crash.html>; *Murder-Suicide Letter from Pilot Joe Stack* (Feb. 18, 2010), available at <http://graphics8.nytimes.com/packages/pdf/us/20100218-stack-suicide-letter.pdf>. [hereinafter *Murder-Suicide Letter*]; see also *Tax Lawyer’s Blog, Deconstructing a Tax Wacko*, <http://blog.pappastax.com/index.php/2010/02/23/deconstructing-a-tax-wacko> (Feb. 23, 2010) (Tax lawyer and blogger Peter Pappas took the time and energy to deconstruct the detailed rant against the IRS left by the pilot beginning with the observation that the ill of “no taxation without representation” was cured with the right to vote – not the end of taxation.) [hereinafter *Wacko*].

23. Considering how few people with radical political ideologies actually turn violent, Professor Kathleen Blee, a sociologist at the University of Pittsburgh, said that “[i]n the white power groups I study, people can have all kind of crazy racist ideas, spend their evenings reading Hitler online, all of it, . . . but many of them never do anything at all about it.” Carey, *supra* note 21. Researchers have identified two factors that increase the chances of actual violence among political extremists: a morally shocking event and a specific target connected to it. *Id.*

violent, these activists may make any number of illegitimate criticisms of the tax system. The IRS has cataloged the most common frivolous tax arguments: the filing of a tax return is not necessary; the payment of taxes is not necessary; federal reserve notes are not income; the United States consists only of the District of Columbia, federal territories, and federal enclaves; only employees of the federal government must pay taxes; and, of course, the various arguments that the tax system is unconstitutional—whether the argument is based on the First Amendment (religious opposition to taxation), the Fifth Amendment (taxes are an unjust takings or filing a return is self-incrimination), the Thirteenth Amendment (taxation is slavery), or the Sixteenth Amendment (the amendment was not properly ratified or does not authorize a direct non-apportioned income tax).²⁴

Similar to tax defying rhetoric undermining the validity of the tax laws is rhetoric that frivolously criticizes the IRS or some other part of the tax administration system. This may be a universal description of IRS employees as corrupt, inept, or vindictive. Or it may be a mis-description of the IRS as the source of the tax law rather than the enforcer of it.²⁵ Or it may be one of a number of other frivolous claims attacking the authority of the IRS employees or standard tax collection procedures, such as claiming that due process notices or federal tax liens are invalid if not signed by the Treasury Secretary.²⁶ Or it may be a claim that the U.S. Tax Court does not have the authority to decide legal issues,²⁷ or that any court holding session in a room with a gold-fringed U.S. flag is not a legitimate court.²⁸

24. Internal Revenue Service, *The Truth About Frivolous Tax Arguments* (2010), available at <http://www.irs.gov/taxpros/article/0,,id=159853,00.html> (last visited Oct. 20, 2010) [hereinafter *IRS, Frivolous Tax Arguments*]; Notice 2010-33, 2010-17 I.R.B. 609 (list of frivolous positions that can result in imposition of civil penalties or prosecution for criminal tax fraud).

25. Interestingly, members of Congress, which is the author of the Internal Revenue Code, may attempt to shift attention from Congress to the IRS, such as by using the phrase “the IRS Code.” Presumably, very few of these elected representatives believe the tax system to be irremediably illegitimate (insofar as they are the very ones with the authority), yet their willingness to use this phrase may indicate how susceptible we are becoming to passing along such inaccuracies – and doing so in emotionally and politically-charged ways. For example, the web site of J. Randy Forbes (R-Virginia, 4th) criticizes the complexity of “the IRS code” (by citing its word count). See Congressman J. Randy Forbes Fourth District Virginia, <http://forbes.house.gov/Issues/Issue/?IssueID=3339> (last visited Oct. 22, 2010). While many of us would like to see the Internal Revenue Code simplified by the act of Congress, there is no code passed by the IRS.

26. *IRS, Frivolous Tax Arguments*, supra note 24.

27. *Id.* As an Article I court, the U.S. Tax Court does have a very limited jurisdiction, even as with respect to tax matters. It only hears cases involving deficiencies asserted by the IRS. If a taxpayer pays the deficiency alleged by the IRS, then the taxpayer can seek a refund in the federal district court or the United

Tax defying rhetoric is any rhetoric that explicitly discourages or otherwise would tend to reduce compliance. Explicitly, it may assert a frivolous claim that the tax laws are invalid. Or it may assert a frivolous claim that the tax laws are unenforceable. Or it may assert that the tax laws are so unjust that non-compliance is a moral right or a political good. It may explicitly misinform about the potential tax penalties for non-compliance, or it may simply fail to include the potential penalties in whatever argument it forwards the conclusion of which is to encourage non-compliance. The penalties for failing to file a tax return, or under-reporting income include not only significant fines, but prison terms.²⁹ These are consequences directly borne by some anti-tax activists, and consequences we all should prefer would have been avoided by lawful compliance. At least one former tax protester maintains an internet presence warning others of the foolishness of tax protesting, offering his sad personal experience as evidence.³⁰

Tax defying rhetoric may also encourage non-compliance in other ways. For example, by encouraging the idea that only chumps pay taxes.³¹ By undermining taxpayers' confidence in other taxpayers, anti-tax system rhetoric undermines the tax system itself. Anti-tax system rhetoric may also encourage non-compliance by characterizing a failure to comply as something not worthy of shame or guilt.

Another mark of tax defying rhetoric is that it entails no appropriate solution to the alleged grievance. It is not aimed at affecting the relevant legal institutions in order to implement reform. Rather, it may deny the

States Court of Federal Claims. The U.S. Tax Court cannot hear claims, "other than when a refund is determined to be due a taxpayer in the course of an action on an asserted deficiency." Joshua D. Rosenberg & Dominic L. Daher, *The Law of Federal Income Taxation* § 1.05[3] (2008). Given that there are substantial restrictions on the U.S. Tax Court's jurisdiction, it is always legitimate to query which issues are within it. The illegitimate claim, of course, is simply that the court lacks authority to hear any issue.

28. Kevin D. Hill, *Popular Delusions & the Law in the Age of the Internet: A Review of Damian Thompson's Counterknowledge*, 35 *Ohio N.U. L. Rev.* 801, 811-12 (2009).

29. IRC §§ 7201 (willful attempt to evade or defeat tax punishable by imprisonment of not more than 5 years), 7202 (willful failure to collect or pay over tax punishable by imprisonment of not more than 5 years), 7203 (willful failure to file return, supply information, or pay tax in some circumstances punishable by imprisonment of not more than 5 years), 7206 (fraud and false statements punishable by imprisonment of not more than 3 years).

30. *Tax Fool: The Truth About Income Tax*, <http://taxfool.net> (last visited July 12, 2010).

31. Professor Larry Zelenak has studied sitcoms produced from 1940 to 2006 focusing on how tax compliance is portrayed in the popular culture and documenting the transformation of tax-paying as a civic virtue to tax evasion as generally acceptable. See Zelenak, *Civic Virtues*, *supra* note 15, at 62-64.

necessity of appealing to legal institutions or the usefulness of doing so. Anti-tax system rhetoric offers no legally legitimate proposals to solve the problems it claims. Tax defying rhetoric denies the trustworthiness of the American tax system and also denies the possibility of improving its trustworthiness. Its essential claim is that compliance is inevitably and inherently unwarranted.

III. WHY NOT JUST WALK AWAY?

Having laid out my terms, I now turn to the question, why not just walk away? Suppose yourself to be standing at a reception, exchanging small talk pleasantries with a new acquaintance when, upon hearing that you are a tax lawyer, he remarks on his recently being told by a close friend—perhaps a conspiracy theorist buff, perhaps a history professor at the local college, perhaps even a lawyer—that the Sixteenth Amendment was never properly ratified. Why not just slip away without protest? Surely this is covered by the rule to avoid religion and politics in small talk. And not knowing where on the conspiracy theory continuum he is (merely curious? militantly confrontational?), why not avoid the risk of significant annoyance and perhaps even explosive argumentation by declaring your sudden hunger and heading for the tabled hors d'oeuvres? He is not a client to whom you are compelled to speak. And there is no hope for a fee in return for investing your time and energy.

Now I shall lay out what I think are good reasons not to walk away, despite the perhaps strong impulse to do so. First, have some sympathy for the fellow. He may be sincerely unclear on the legal obligation to pay income taxes. After all, the argument goes, if the Sixteenth Amendment were not properly ratified, then no one properly owes incomes taxes. It may be the fellow is not at all convinced this is true, but having heard it from someone he considers reliable—who perhaps electronically forwarded a rather detailed-looking memorandum—he sincerely seeks clarification. He may not be a conspiracy theory nut—yet. You may be able to save him from that dangerous condition with relative ease. Tax protestor arguments do not raise hard tax issues involving subchapter K basis computations, consolidated returns, or carried interests. The issues raised are covered in the introductory lectures of law school income tax classes. (The practical problem may be remembering what was read and said those many years ago.)

But why would I describe his condition as potentially “dangerous,” if you do not save him with rudimentary information? For one, he may become a criminal if he becomes convinced of the conspiracy to conceal the Sixteenth Amendment’s true status.³² If he decides not to file a return or decides that he needs not pay the tax owed under the Code, he may be

32. See *infra* text at notes 67-68.

subject to conviction for willfully evading his legal obligations.³³ He may be fined and imprisoned. It seems there is a general duty of all citizens, or at least an interest of all citizens, to discourage crimes. If one's neighbor or sister-in-law discusses her intention to shoplift next weekend or to write a hot check, surely there is some basic civic duty to try to correct her path. Even though the small talk acquaintance at the reception is not the lawyer's client, it seems the lawyer has the same kind of general civic duty to try and correct his path as the lawyer would have if chatting with someone about her plans to shoplift or steal by hot check. It may be that only a tax lawyer appreciates that it is a felony to evade rather than avoid taxation, and so it may be that only a tax lawyer is able to correct the potential tax criminal. This small talk acquaintance may not be a client, but we ought to acknowledge an interest in his situation, either a general civic interest or a personal interest, given the social connection reflected in sharing the reception. He may be the father or brother-in-law of a close friend, after all. Or, to tweak the example, perhaps he is an uncle at a family reunion or a former classmate at a school reunion. So, why not just walk away? You may be able to prevent a crime.

By engaging in the conversation you are also enlisting in the fight to close the tax gap. The "tax gap" is "the difference between the amount of tax that taxpayers should pay under the tax law and the amount they actually pay on time."³⁴ And the tax gap is significant. The most recent study estimates it is \$345 billion.³⁵ Congress, the IRS, and the Department of Justice are all fighting to close the tax gap, and special attention is on tax defiers.³⁶ But the

33. See *infra* text at notes 67-68. On the issue of willfulness, a mistaken belief may be a defense, so long as it is in good faith, even if it is not objectively reasonable. However, the more unreasonable the belief is, the less likely it is the taxpayer will be found to have held in good faith. And, importantly in this context, a mistaken belief about the constitutionality of the income tax is not a defense to failing to comply with its demands. See *Cheek v. United States*, 498 U.S. 192 (1991), on further proceedings, *United States v. Cheek*, 3 F.3d 1057 (7th Cir. 1993), cert. denied, 510 U.S. 1112 (1994); *United States v. Bonneau*, 970 F.2d 929 (1st Cir. 1992); *United States v. Lindsay*, 184 F.3d 1138 (10th Cir. 1999), cert. denied, 528 U.S. 981 (1999). See generally Boris I. Bittker, Martin J. McMahon, Jr. & Lawrence A. Zelenak, *Federal Income Taxation of Individuals* ¶ 50.08[2] (3d ed. 2002) *Willful Attempts to Evade Tax*.

34. Tax Gap, *supra* note 6. The tax gap has become a Congressional focus, especially as "Congress views it as an easier way to raise revenue and lower the deficit, as compared to raising taxes." Rifkin, *supra* note 7, at 386.

35. Tax Gap, *supra* note 6.

36. Congress has pushed the IRS to focus on the tax gap, which has substantially increased its enforcement workers and enforcement budget in response. Rifkin, *supra* note 7, at 385-87. The IRS Commissioner has made reducing the tax gap one of his major objectives. *Id.* at 387.

Additionally, the U.S. Department of Justice has specifically focused on aggressively pursuing "tax defiers," (i.e., those who make frivolous anti-tax

tax gap is not merely “official” business. It is the business of every compliant taxpayer. Those who bear the burden of the tax gap are those who pay what they owe on time. The cost of the tax gap to each compliant taxpayer is \$2,000 per year—that is, if the tax gap were eliminated, “each compliant taxpayer . . . could receive a check for approximately \$2,000 from the government.”³⁷ And it is not merely the honest taxpayer’s business to the extent of \$2,000. It is a consequential matter of principle.

Now, what do honest, law-abiding taxpayers expect in return [for paying their taxes] from the government? They expect that, if they are honoring their legal obligation to truthfully and accurately file their returns and pay their taxes, their neighbors on their right and their neighbors on their left are going to do so as well. And if they don’t, they expect the government to enforce tax laws equally on everyone. One of the greatest challenges to tax compliance is the perception, today and in the past, that everyone may not be paying their fair share of taxes.³⁸

No one alleges that the tax gap is wholly allocable to tax defiers either underreporting their income or failing to file. The threat tax defiers pose to the tax system is in their rhetorical attacks on the legitimacy of the system itself.³⁹ Their failure to comply likely leads in turn to other taxpayers failing to comply.⁴⁰ As one commentator explained,

If honest taxpayers were to become convinced that either (i) the income tax system violated the articles or amendments of the Constitution, or did not statutorily require them to file a tax return or pay the tax due and owing; or (ii) there was a class of taxpayers making these arguments with impunity, then the voluntary compliance component necessary for the nation’s tax system to properly operate would be jeopardized

arguments) by creating the National Tax Defier Initiative. *Id.* at 405. This is intended to “reinvigorate the Tax Division’s commitment to investigate, pursue, and, where appropriate, prosecute those who take concrete action to defy and deny the fundamental validity of tax laws.” *Id.*

37. *Id.* at 383 (citing Joann M. Weiner, *Truth and Taxes*, 119 *Tax Notes* 249, 250 (2008)).

38. Nathan J. Hochman, *Transcript Available of DOJ Press Conference on Tax Defier Initiative*, 2008 *Tax Notes Today* 70-57 (2008).

39. Hochman, *supra* note 4, at 79.

40. Rifkin, *supra* note 7, at 376. The risk that tax “outlaws” undermine others’ respect for the tax system, thereby threatening the system has long been noted. It was noted at least as early as 1952. See, e.g., E. Barrett Prettyman, *A Judge Answers Some Questions, Questions Prepared and Propounded by Robert N. Miller and Given by E. Barrett Prettyman*, 10 *NYU Inst. on Fed. Tax’n* 1053, 1062-64 (1952).

and the Tax Gap would be in danger of growing significantly.⁴¹

In other words, the anti-tax system rhetoric of the tax defiers has the potential to undermine the trust in the fairness of the tax system that supports the very high compliance rate of the American tax system.⁴² Without that compliance rate, the tax system itself is jeopardized.

And so here is another reason not to walk away: closing the tax gap. It is not that the small talk acquaintance's potential financial contribution to the tax gap is likely to be significant. But his willingness to pass along a tax defying attitude may be. This attitude may be contagious in those with information deficiencies, and it may be infecting ever greater numbers of our citizens, especially through electronic transmissions.⁴³ If more and more honest taxpayers come to believe that there are no ill consequences, then the system may be weakened further. Even the smallest instances of resistance may prove increasingly important in minimizing the threat.

Unfortunately, the threat is not merely to the revenue. Another reason not to walk away from the conversion is that tax defiance may lead to violence. Even the most ardent tax defier may not become violent, just as the most ardent racist may fail to strike physically.⁴⁴ Yet, innocent people are

41. Hochman, *supra* note 4, at 79-80.

42. *Id.* at 83.

43. It is interesting to note the correlation between the increase in communication transmissions and the increase in tax protestor returns. For example, tax protestor returns increased more than eight-fold between 1980 and 2001. Cords, *supra* note 7, at 1517-18 (regarding tax protestor returns). Like other outlandish conspiracy theories and immortal urban legends, the explosion of Internet use has facilitated the spread of anti-tax system rhetoric. Hochman, *supra* note 4, at 81-82; Hill, *supra* note 28, at 802-06, 809. Much like the poodle-in-the-microwave story, or the "Stella Awards" for outrageous tort suits (which never occurred), anti-tax system rhetoric spread by mass e-mail lists and blogs "informs" the public. *Id.* at 802-06, 812. The speed of such communication, and the ease with which it is broadcast, likely means that the threat of anti-tax system rhetoric increases in the future. Urban legends and other misinformation may have once travelled from the water cooler to the family dinner table to the bowling alley to the water cooler, but, today, it travels at the speed of light, filling the in-boxes and browser search results of otherwise honest taxpayers who lack the education to recognize it for what it is: wrong. Two tangential aspects of anti-tax system rhetoric bear mentioning. First, some anti-tax system activists make money from peddling the conspiracy. *Id.* at 801. Second, an anti-IRS sentiment in the country may serve to benefit high income tax payers. David M. Schizer, *Enlisting the Tax Bar*, 59 *Tax L. Rev.* 331, 341 (2007). It bears remembering that this rhetoric services the financial interests of some, even while undermining the financial interests of others.

44. Considering how few people with radical political ideologies actually turn violent, Professor Kathleen Blee, a sociologist at the University of Pittsburgh,

killed by tax protestors, just as innocent people are killed by racists.⁴⁵ More than 900 threats against IRS employees are investigated each year.⁴⁶ The Southern Poverty Law Center has cataloged some of the more dramatic threats.⁴⁷ In Reno, Nevada, an IRS building was targeted by a tax protester who placed a drum of ammonium nitrate and fuel oil in its parking lot.⁴⁸ In Colorado Springs, Colorado, an IRS building was torched.⁴⁹ In Austin, Texas, a decorated Vietnam veteran was murdered when a tax protesting terrorist struck an IRS building.⁵⁰ Tax defiance is a delusion that may be cured, and a delusion that may kill if not cured. The small talk opportunity may be a chance to treat the delusion, and perhaps the best chance there will be.

Of course, it may be too late: the acquaintance may be suffering a full-blown delusion. True believers of any sort are rarely persuaded, and there may be no use in engaging a true believer, and it may even be that a true believer walks away from an encounter emboldened for having confronted a member of the pro-tax conspiracy. Common sense suggests that militantly confrontational tax defiers need not be entertained. But there is a much greater chance that one encounters the merely curious rather than the

said that “[i]n the white power groups I study, people can have all kind of crazy racist ideas, spend their evenings reading Hitler online, all of it . . . but many of them never do anything at all about it.” Carey, *supra* note 21. Researchers have identified two factors that increase the chances of actual violence among political extremists: a morally shocking event and a specific target connected to it. *Id.*

45. While Professor Blee, emphasizes how few individuals with “crazy racist ideas” ever “do anything,” *supra* note 44, the Southern Poverty Law Center maintains reports on those with “crazy racist ideas” who do engage in actual violence. See Southern Poverty Law Center, Intelligence Files, <http://www.splcenter.org/get-informed/intelligence-files> (last visited Sept. 9, 2010).

46. Andrea Ball, Hatred Toward IRS Nothing New, *The Dallas Morning News*, Mar. 3, 2010, http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/DN-irsworkers_03tex.ART.State.Edition1.4bdd764.html.

47. Posting of Heidi Beirich to Southern Poverty Law Center Hatewatch Blog, IRS Long a Target of Antigovernment Extremists, <http://www.splcenter.org/blog/2010/02/18/irs-long-a-target-of-antigovernment-extremists> (Feb. 18, 2010).

48. *Id.*

49. *Id.*

50. Associated Press, Hundreds Salute IRS Worker Killed in Plane Crash, *Dallas Morning News* (Feb. 26, 2010), <http://www.dallasnews.com/sharedcontent/APStories/stories/D9E44QE00.html>; Jeremy Schwartz & Melissa B. Taboada, Family, Friends Gather at Home of Missing Man, *Austin American-Statesman* (Feb. 19, 2010), <http://www.statesman.com/news/local/family-friends-gather-at-home-of-missing-man-257976.html>; Orangeburg Native Killed as Plane Hits IRS Building, *Times & Democrat (S.C.)* (Feb. 21, 2010), <http://thetandd.com/articles/2010/02/21/news/doc4b80bf4c5d00a962267536.txt> [hereinafter Orangeburg]; see *supra* note 22 and accompanying text.

militantly confrontational. The merely curious are those who have heard rumors on the golf course, the Sunday school class, or online that the tax system is unconstitutional, for example, and, while open to being persuaded of a vast conspiracy, they have not been. Walking away when they raise what strikes them as an important set of reasonable questions may be taken by them as evidence that they are on to something.

Choosing to respond in the casual conversation may itself be enough to satisfy the tax defying curiosity in the small talk acquaintance. Responding reveals a personal identification with the tax system, and the personal conclusion that it is legally legitimate. The small talk acquaintance's questions about the system's legitimacy become questions about your integrity. Sharing a social connection increases the chance that your professional involvement with the tax system is interpreted as evidence of its legitimacy. But even more so is that as a tax lawyer, you are professionally devoted to reducing tax liabilities. As someone undeniably sympathetic with lowered tax liabilities, the defense of the tax system's legitimacy is even likely more persuasive. Simply by responding rather than walking away, a great deal is communicated.

Identifying with the fundamental integrity of the system may have significant personal consequences as well. It strengthens professional identity, and deepens the personal sense of professional duty. It is a reminder of what it means to be a professional, what it means to have professional duties. It is reminder of our interest in the system as tax lawyers specifically. But it also reminds us of the duties all lawyers have as public servants, as officers of the legal system that is attacked by tax defiers. It is an instance of robust professionalism, acting professionally while acting outside of our business context. It is a practical reminder that our professional identity is not as consultants or information specialists but as lawyers.⁵¹

51. Professor Tanina Rostain has argued that over the past thirty years, CPAs intentionally moved their primary professional orientation from that of tax return preparers and auditors to that of tax reduction consultants. Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 *Yale J. on Reg.* 77, 89 (2006). Professor Rostain explored this development in connection with the rise of abusive tax shelters in the 1990s, contrasting how CPAs and tax lawyers appeared to perceive their professional duties. In addition to the 2006 article in the *Yale Journal on Regulation*, Professor Rostain continues to work analyzing the role of tax professionals in the tax shelter industry. Her work is expected to be published as a book by MIT Press in 2011. See her biography at http://www.law.georgetown.edu/faculty/facinfo/tab_faculty.cfm?Status=Faculty&ID=2597 (last visited Oct. 26, 2010). Professor Rostain concluded that the organized tax bar was unwilling to reduce their professional identity as a lawyer to that of a "mere consultant or legal information specialist[]." *Id.* at 120. Professor Rostain considers this a stark counter-example to securities lawyers who are increasingly and willingly "refashioning themselves as 'consultants' or 'information specialists.'" *Id.*

IV. TAX LAWYERS AS PUBLIC EDUCATORS

What does it mean to identify as a lawyer rather than merely a consultant? It means not merely being in the business of earning fees from clients, but being a member of a profession in which we serve clients in particular but the system in general. We are members of a learned profession, obligated to cultivate and use knowledge beyond its use for clients.⁵² A lawyer's professional responsibilities are difficult to summarize because, as a professional, a lawyer's role is multifaceted and cannot be reduced to one or two principles. In describing the lawyer's responsibilities, the Preamble to the Model Rules references the multifaceted nature of the profession: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."⁵³ Acknowledging the many facets of the legal profession has several important consequences described in the Model Rules. Lawyers should "demonstrate respect for the legal system and for those who serve it;"⁵⁴ "further the public's understanding of and confidence in the rule

at 82 (citing Robert Eli Rosen, "We're All Consultants Now:" How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services, 44 *Ariz. L. Rev.* 637 ((2002)). Professor Simon is concerned with this same phenomenon, which he characterizes as involving "the most fundamental claim of modern professionalism—that professionals can simultaneously serve their client's interest and the public's interest." William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 *Fordham L. Rev.* 1453, 1454 (2006). Professor Simon writes that his interest is in how securities lawyers' and tax lawyers' "general understanding of their obligations to law and the public interest and how that understanding shapes their conception of their role." *Id.* at 1456. Thus, tax lawyers have been contrasted with CPAs, on the one hand, and with securities lawyers, on the other, insofar as the organized tax bar has insisted on viewing tax lawyers as gatekeepers with a duty to the system—and not as mere consultants with duties only to clients.

52. "As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend upon popular participation and support to maintain their authority." Model Rules of Prof'l Conduct Pmb. ¶ 6 (2004).

53. *Id.* at ¶ 1. The Preamble to the Model Rules provides the "general orientation" to the professional considerations that should inform a lawyer. *Id.* at Scope ¶ 21.

54. "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." *Id.* at Pmb. ¶ 5.

of law and the justice system;⁵⁵ and be “competent, prompt and diligent” with respect to all their “professional functions.”⁵⁶ These duties transcend the many duties a lawyer has when representing a client, and instead reflect a lawyer’s more general professional duties. All of these duties help describe how lawyers and their relationship to the legal system “play a vital role in the preservation of society.”⁵⁷

Inasmuch as “[t]axes are what we pay for civilized society,”⁵⁸ the tax lawyer’s role in preserving the tax system is his role in preserving civilized society.⁵⁹ Some have located the tax lawyer’s duty to the tax system within a citizen’s sense of gratitude: each American should be grateful “for the freedom and security the U.S. government provides” and “if we feel grateful, we [as tax lawyers] should want to preserve the government’s lifeline, the tax system.”⁶⁰ The tax lawyer’s duty to the tax system may be conceptualized as

55. *Id.* at ¶ 6.

56. “In all professional functions, a lawyer should be competent, prompt and diligent.” *Id.* at ¶ 4.

57. “Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system.” *Id.* at ¶ 13.

58. *Compania General De Tabacos De Filipinas vs. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes J., dissenting).

59. Nathan J. Hochman considers tax defiers in the context of our civilized society:

The irony of the tax defiers’ situation is that the very system that they reject pays for their ability to live in and reject that system. While tax defiers refuse to pay their fair share of taxes, they have no problem accepting their fair share of the benefits paid for by that tax system, including the courts they litigate in, the roads they drive on, the police and fire departments they call during emergencies, the military that defends them, the sanitation trucks they rely on to pick up their garbage, and the regulators they count on to ensure the safety of the food they eat, the water they drink, and the air they breathe.

Hochman, *supra* note 4, at 70. The obligation to fund civilized society has been emphasized in patriotic terms, such as when, after September 11, 2001, corporations that expatriated themselves for tax purposes were characterized as anti-patriotic, refusing to fund the military in a time of threat. Anthony C. Infanti, *Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar*, 22 *Va. Tax Rev.* 589, 595 (2003).

60. Schizer, *supra* note 43, at 370. Tax lawyer Merle Miller, almost a half century before, wrote that the tax lawyer

owes a great duty to the country that has educated him, and made possible his present success. He must do his best to maintain in his fellow citizens a proper respect for the methods we have set up under a democratic system for the collection of each citizen’s share. . . . He must inculcate in each citizen a respect for the

a duty to all “who ascribe value to a well-functioning tax system,” that is a duty to the public’s “abiding interest in protecting the government’s ability to fund itself and in ensuring that each taxpayer pays her fair share of governmental costs as allocated by democratic processes.”⁶¹

The tax system needs the help of tax lawyers as public educators. The tax bar should enlist itself into the public service to combat the anti-tax system rhetoric that threatens the public interest.⁶² This is a call to fulfill the duty of lawyers as “public citizen[s] having special responsibility for the quality of justice.”⁶³ Professor Mark Tushnet has made a general call for lawyers to serve as public educators to improve constitutional knowledge.⁶⁴ Lawyers, after all, have more knowledge on these matters than “ordinary” people do.⁶⁵ But, unlike constitutional law which flavors our daily political discussions, or criminal law that reflects much, even if not most, of our moral intuitions, tax law is neither commonly discussed nor commonly an object of reliable intuition. The public “remains blissfully ignorant” of most of the tax law.⁶⁶

So how would a lawyer prepare to become an “educator” for the chance conversation about tax defiance? There is no way to anticipate accurately what the small talk acquaintance may have heard, read, or experienced. There is no script to rehearse; no lecture to deliver. The tax lawyer, however, can read and think about the tax system generally, and her personal, professional, and political relationship to it.

system, and a proper respect for the part which honesty plays in that system.

Merle Miller, *Morality in Tax Planning*, 10 N.Y.U. Ann. Inst. on Fed. Tax’n 1067, 1083 (1952).

61. Linda Galler, *The Tax Lawyer’s Duty to the System*, 16 Va. Tax Rev. 681, 693-94 (1997) (reviewing Bernard Wolfman et al., *Ethical Problems in Federal Tax Practice* (1995) (quoting, in part, Ann Southworth, Note, *Redefining the Attorney’s Role in Abusive Tax Shelters*, 37 Stan. L. Rev. 889, 912 (1985))).

62. This draws on Dean David M. Schizer’s proposal to enlist the tax bar to combat aggressive tax planning. As Dean Schizer argues, the resources of the government to defend the tax system are too meager to be sufficient. Schizer, *supra* note 43, at 331-33.

63. Model Rules of Prof’l Conduct Pmb. ¶ 1 (2004) (preamble sets forth duties in a general way).

64. Mark Tushnet, *Citizen as Lawyer, Lawyer as Citizen*, 50 Wm. & Mary L. Rev. 1379 (2009).

65. *Id.* at 1385.

66. Schizer, *supra* note 43, at 343. There may be multiple reasons for the public ignorance of tax law. Contemporary empirical studies into educating the public on tax policy concepts suggest that some tax policy concepts may be “too difficult for most of the public to grasp.” Lawrence Zelenak, *The Conscientious Legislator and Public Opinion on Taxes*, 40 Loy. U. Chi. L.J. 369, 375 (2009). All the more reason for the tax bar to enlist itself as educators.

As a first step towards that end, the tax lawyer should remind herself of the issues in distinguishing between tax avoidance and tax evasion. This is not a subject most responsible advisors must often consider, but discussing the penalties for the latter may be useful in the conversation. There are both civil and criminal penalties, potential fines and prison time. Civilly: section 6702 imposes a penalty for filing a frivolous return; section 6662 imposes various accuracy-related penalties; and section 6663 imposes a civil penalty for fraud. Criminally: section 7201, which imposes up to a \$100,000 fine and five years imprisonment for willfully attempting to evade or defeat taxation and section 7203, which imposes up to a \$25,000 fine and one year jail term for willfully failing to file a return, supply information, or pay tax. The courts have their own authority for sanctioning frivolous anti-tax arguments.⁶⁷ It may be eye-opening for the acquaintances to learn about the standards for tax advice, and the penalties applicable to lawyers who provide unreasonable advice as to return positions, as well as the organized tax bar's concern with upholding standards for tax advice.⁶⁸

Considering the same topic but from a personal perspective, the tax lawyer should ponder and come to some clarity as to how she personally relates to the tax system as a professional. Does she understand the "duty to the system" tax lawyers are usually said to have, and how does she consider that duty personally and in her daily practice?⁶⁹ If taxes are the price of

67. See, e.g., IRC § 6673; Fed. R. Civ. P. 11.

68. IRC § 6694; Reg. § 301.7701-15; Dep't of Treasury Circular No. 230, 31 C.F.R. §§ 10.2(a)(4), 10.21, 10.22, 10.33, 10.37 (2007); Rostain, *supra* note 51, at 83.

69. Tax lawyers are said to have a "duty to the system." Bernard Wolfman et al., *Standards of Tax Practice* § 101.2 (5th ed., 1999). Professor Deborah Schenk has written that the self-assessment nature of the tax system means that the tax system cannot permit the "absolute adversarial" relationship that lawyers might have in other situations. Deborah H. Schenk, *Book Review: Tax Ethics*, 95 *Harv. L. Rev.* 1995, 2005 (1982). The idea that "[t]ax ethics . . . must be approached from a special perspective" as a consequence of self-assessment nature of our tax system seems the most common argument for tax lawyers' duty to the system. *Id.* at 2005; see also *Infanti*, *supra* note 59, at 606. Dean David M. Schizer has described other unique aspects of tax administration that may justify a duty to the system. "First, government tax lawyers are not backstopped by private attorneys general as they are, for instance, in the securities field by the plaintiff's bar. Second, tax rules generally are written narrowly and precisely. . . [and as] a result, the tax authorities are more likely to face conduct that violates the spirit, but not the letter. . . . Third, the tax regime—for capital, especially—may be more malleable than other regimes. . . . [For example,] a tax lawyer can easily shift certain types of income from one jurisdiction to another without changing anything substantive. . . ." Schizer, *supra* note 43, at 338. However, some have criticized this conception of the tax lawyer. See, e.g., David J. Moraine, *Loyalty Divided: Duties to Clients and Duties to*

civilization, how does her working to ensure her clients pay no more than they must provide civic benefit? She should have developed significant clarity on these fundamentals of a professional identity as a tax lawyer. How she fits within the tax system is likely to become an issue when she tries to make the case for the system's legitimacy. She is lending her personal standing to the system in this conversation by identifying as a professional part of the system. Thus, she should have reflected on what it means to be a professional part of the system.

Of course, she need not over-identify with the system. She should be prepared to admit the problems with the system that she sees. The problems may be political, such as her preferences for changes in the tax base or tax rates. Or the problems may be administrative, such as the frustration in dealing with incompetent IRS agents or inefficient IRS procedures. To express her professional obligation and commitment to the legitimacy of the tax system does not imply she considers the system to be perfect—or even in good shape. Sometimes tax lawyers are so focused on the technical aspects of the issues that recur in their daily practice that they do not step back and consider the tax system as a whole.⁷⁰ Of course, any highly specialized field likely tempts its members into technical myopia. But in order to effectively engage in a casual conversation about the system's legitimacy, the tax lawyer needs to put the system as a whole into perspective, considering her professional relationship to the system, her personal opinions on its problems, and her political preferences for fixing those problems.

Her small talk acquaintance may have personally experienced some of these problems. For example, she may have experienced a sense of powerlessness during an audit, as well as reasonably concluding that the IRS agents involved were ill-prepared or ill-motivated, or both. She may deserve considerable sympathy for what he personally experienced in the tax system. But he also may need help putting his personal experience into a greater perspective, provided by the tax lawyer describing the burdens on the system abstractly but on the IRS agents particularly. There are, after all, well over two hundred million returns filed each year, and need for systematic integrity.⁷¹ But there is also the pressure on the professionals at the IRS, pressure that comes with holding a position essential to protecting the system's integrity but also widely despised, as well as involving material

Others—the Civil Liability of Tax Attorneys Made Possible by the Acceptance of a Duty to the System, 63 *Tax Law.* 169, 190 (2009).

70. “As tax practitioners, we generally focus on the trees, particular branches, or even leaves. We rarely stand back and look at the forest. Most lawyers are specialists, and tax lawyers are more specialized than most.” Robert W. Wood, *What Good Is a Tax Opinion Anyway?* 2010 *Tax Notes* 1071, 1071 (Sept. 6, 2010).

71. Hochman, *supra* note 4, at 70 (citing IRS, *Statistics of Income Data Book 4* (2007), available at <http://www.irs.gov/pub/irs-soi/07databkrevise.pdf>), see also Cords, *supra* note 7, at 1516-17.

personal risk.⁷² These professionals work under the burden of representing all the taxpayers when determining the honesty and accuracy of any given taxpayer; the taxpayer under review cannot be cut slack without considering all of the taxpayers who are not being cut slack. And, yes, of course, there are bad IRS revenue agents. But that is also true of employees in banks, insurance companies, utilities, universities, and hospitals. Bad service, bad attitudes, and bad people are real problems—inside and outside the IRS. These are human problems; not tax problems.

Although the tax lawyer's small talk acquaintance may have had a negative personal experience with the IRS (it is quite unlikely any of us would consider any personal audit as "positive," of course), the more difficult issue may be his being convinced by any number of tax protestor arguments. Most practicing tax lawyers have probably never considered the issues these arguments raise, and, upon being briefed on the arguments, may themselves come to wonder. All tax lawyers should take time to read the IRS's *The Truth About Frivolous Tax Arguments*.⁷³ There are also law review articles on these arguments.⁷⁴ Some tax protestor arguments are constitutional. For example, one common argument is that requiring tax returns violates the Fifth Amendment's right against self-incrimination, or that tax collection violates the Fifth Amendment's guarantee of due process.⁷⁵ Another argument is that income taxation is a form of slavery outlawed by the Thirteenth Amendment.⁷⁶ Several arguments are made that

72. Andrea Ball, *Hatred Toward IRS Nothing New*, Dallas Morning News, Mar. 2, 2010, http://www.dallasnews.com/sharedcontent/dws/news/texasouthwest/stories/DN-irsworkers_03tex.ART.State.Edition1.4bdd764.html.

73. IRS, *Frivolous Tax Arguments*, *supra* note 24.

74. See, e.g., Christopher S. Jackson, *The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar—Whatever His Demands*, 32 *Gonz. L. Rev.* 291 (1997); Cords, *supra* note 7. Unfortunately, sources of good information are far fewer than sources of misinformation. Online searches for information are especially likely to result in substantial misinformation. There is, at least, one reliable source of information online: For example, George Washington University School of Law Professor Jonathan R. Siegel maintains <http://docs.law.gwu.edu/facweb/jsiegel/Personal/taxes/F2F.htm> (last visited July 12, 2010) [hereinafter, Siegel]. It is a very useful site, and stands out among search results as an anti-tax protestor site.

75. See Jackson, *supra* note 74, at 307-08. As to the first argument, filing a tax return is not in and of itself an incriminating act, so requiring it is not requiring a self-incrimination. As to the second, "because the government cannot operate without revenue, it must collect taxes. Moreover, because the means of collecting taxes must be efficient, the courts have repeatedly allowed summary tax collection proceedings where they were followed by an opportunity for judicial review." Cords, *supra* note 7, 1539.

76. See Jackson, *supra* note 74, at 310. Those who make this argument equate taxation with slavery. Of course, at the time the 13th Amendment was adopted, Americans did not believe they were amending the Constitution in order to

the Sixteenth Amendment was not properly ratified.⁷⁷ One variation is that Ohio was not a state until 1953, thus President Taft (who hailed from Ohio) had no authority to convene Congress when the amendment was ratified.⁷⁸ Other arguments focus on clerical mistakes, typographical irregularities, or states failing to follow internal procedures.⁷⁹ Many of the arguments are not constitutional, however. Some rely on technical readings of the Internal Revenue Code, such as arguing that provisions on foreign-source income exempts wages earned by U.S. citizens.⁸⁰ There is also the argument that the taxpayer is not a “U.S. citizen,” but rather a citizen of a particular state.⁸¹ There is an argument that no one is obligated to pay income tax except by contract.⁸² Another argument (occasionally made with biblical citations) is that Federal Reserve Notes are not real money insofar as the gold standard has been abandoned.⁸³ Familiarizing oneself with the tax protestor arguments

forbid taxation—it was to forbid slavery. At that time, Americans were very familiar with real slavery. Siegel, <http://docs.law.gwu.edu/facweb/jsiegel/Personal/taxes/IncomeTax.htm> (last visited Aug. 30, 2010).

77. See Jackson, *supra* note 74, at 301-07.

78. *Id.* at 305. “This contention improperly uses Public Law 204, which Congress passed in 1953 to settle a dispute as to the precise date in 1803 that Ohio became a state. This argument is clearly erroneous because the 1953 resolution did nothing more than confirm that Ohio became a state in 1803.” Cords, *supra* note 7, at 1515.

79. See Jackson, *supra* note 74, at 302-05. These superficial defects were known at the time, and were addressed at the time. The conclusion, then and now, was that the irregularities were irrelevant as a substantive matter. See, e.g., *United States v. Benson*, 941 F.2d 598 (7th Cir. 1991); *United States v. Foster*, 789 F.2d 457 (7th Cir. 1986); *Cook v. Spillman*, 806 F.2d 948 (9th Cir. 1986); *United States v. House*, 617 F.Supp. 237, 238-39 (W.D. Mich. 1985). See generally Siegel, <http://docs.law.gwu.edu/facweb/jsiegel/Personal/taxes/16th.htm> (last visited, Aug. 30, 2010).

80. See Cords, *supra* note 7, at 1542. Those who are neither citizens nor residents of the United States are only subjected to income tax to the extent their income is earned in the United States. This argument confuses complex provisions intended to distinguish between domestic and foreign income for those who owe U.S. income tax to the extent of U.S.-source income. Siegel, <http://docs.law.gwu.edu/facweb/jsiegel/Personal/taxes/861.htm> (last visited Aug. 30, 2010).

81. See Jackson, *supra* note 74, at 310-11. Of course, one is a citizen of both one’s state and the United States. This is made clear in the 14th Amendment, among other places. Siegel, <http://docs.law.gwu.edu/facweb/jsiegel/Personal/Personal/taxes/sovereign.htm> (last visited Aug. 30, 2010).

82. See Jackson, *supra* note 74, at 320-21. The Internal Revenue Code imposes the obligation, not a contract. See IRC §§ 1, 61, 63, 6012, 6051, 6072. Siegel, <http://docs.law.gwu.edu/facweb/jsiegel/Personal/taxes/JustNoLaw.htm> (last visited, Aug. 30, 2010).

83. See Jackson, *supra* note 74, at 316-17.

is educational (and entertaining) but also exasperating: some of the arguments invoke a good number of obscure historical details, while others are so fundamentally misguided that the real problem is the fundamental ignorance of the person making the argument, not the details of the allegations or inferences. A casual conversation with someone sincerely convinced by these arguments could be very challenging for the casually prepared, but the arguments are so numerous, and subject to so many variations, that moderate familiarity with the generalities of the arguments, coupled with a tax lawyer's specific expertise in tax and general training as a lawyer, should go towards making the convinced less so.

While the tax lawyer could exhaust herself studying tax protestor arguments, and while some study is probably helpful, the essential goal of the conversation is to increase the small talk acquaintance's trust in the tax system. And, as I mentioned above, by "tax system," I do not mean merely the laws and administrative procedures that are in place, but the mechanisms for changing those laws and procedures. The conversational objective is to re-direct distrust of the system into legitimate work to improve the system. This involves emphasizing that it is Congress that writes the laws, so writing one's congressional representatives may be in order. And also that there are opportunities to comment on regulations and procedures adopted by the IRS, and that public participation and involvement is solicited and welcomed. It may be useful to be prepared to explain the history of the income tax specifically, how it replaced tariffs and is theoretically intended to be a tax on the ability to pay tax, as well as explaining commonly suggested changes in the tax base, such as to a consumption tax and what that would mean. An even greater familiarity with the history of taxation may be rhetorically useful, even if it is no more than to point out that taxes are older than money itself, and that the rally to end taxation without representation was a call for representative government—not the end of taxation.⁸⁴ Ultimately, it is also a matter of civic duty. Those who refuse to comply with the tax system are criminals threatening the fabric of our system—and cost each honest American who pays what she owes when she owes it.⁸⁵ Ultimately, there must be an appeal to the gratefulness Americans should have for our standard of living and our mode of government, and an urging to use the latter to try to improve the former, but not to undermine both through tax defiance.

On one hand, the conversational goal is to convince the other person not to engage in defying the tax system, and not to spread misinformation about the tax system. On the other hand, the goal is to improve the tax system. Increasing the public's understanding and confidence in the tax system is also likely to improve the law itself, which is a general duty

84. See Wacko, *supra* note 222.

85. *Id.*

lawyers are to undertake.⁸⁶ Citizens who understand the law are presumably better equipped to work for improvement in the law, and those citizens who trust that the system will respond to their work for improvement in the law are presumably more likely to undertake such work. Channeling citizens out of anti-tax system activism and into tax system reform efforts is also likely to increase the confidence that citizens have in the law.⁸⁷ Participating in the process to change laws tends to increase compliance with laws—even for those whose reform proposals “lose.”⁸⁸ Thus, not only would a better tax system likely result from increased public education and participation, but better compliance with the tax system would likely result—merely from the informed understanding and participation. And this is a very good reason not to walk away from conversations about tax defiance.

V. MURDER AND TAXES: CONCLUDING EXAMPLES

On February 26, 2010, Vernon Hunter was mourned at the St. James Missionary Baptist Church in Austin, Texas.⁸⁹ A 68 year-old father of six, described by friends “as an exceptionally kind man who was the glue in both his neighborhood and at work,” a “spiritual man” and a patriot, Vernon Hunter had grown up in Orangeburg, South Carolina, joining the United States Army after graduating from high school in 1959.⁹⁰ He served twenty years in the Army, including two tours of duty in Vietnam.⁹¹ He was killed when a suicidal pilot flew his plane into an IRS office building in Austin.⁹² The pilot, who according to his father-in-law, intended “to damage the IRS,” left a six page murder-suicide note that identified the IRS and the Internal Revenue Code as the primary sources of his rage.⁹³ Vernon Hunter was an IRS employee. After retiring from the Army, he had worked for the IRS for twenty-seven years.⁹⁴ He was buried with full military honors.⁹⁵

The pilot who killed Vernon Hunter was hailed as a “hero” by some Americans: “The Web was studded with praise for [the pilot] almost immediately after his plane slammed into the Austin office complex

86. *Id.*

87. Lavoie, *supra* note 9, at 652-53.

88. *Id.*

89. Associate Press, *supra* note 50.

90. *See id.*

91. Orangeburg, *supra* note 50.

92. *Id.*

93. *See sources cited supra* note 222.

94. Orangeburg, *supra* note 50.

95. Obituary for Vernon Hunter, *Austin American-Statesman* (Feb. 25, 2010), <http://www.legacy.com/obituaries/statesman/obituary.aspx?n=vernon-hunter&pid=140008570>.

Thursday morning.”⁹⁶ ABC News reported that the Federal Bureau of Investigation requested that an internet service provider remove the pilot’s “angry rant against the IRS and the government” from a web site on which it had been posted the morning of the attack—after it had received around 20,000,000 hits.⁹⁷ The president of the service provider said that “within minutes of taking the note down,” thousands of e-mails were received demanding it be reposted—some with the threats of additional violence.⁹⁸ Most of the e-mail praised the pilot.⁹⁹ There was even a Facebook page for his admirers, one of whom posted “He sacrificed his life to inspire the quest for TRUTH.”¹⁰⁰

It seems appropriate to commend two tax lawyers who used the attack that killed Vernon Hunter and the tax defiance alleged to justify it, as an opportunity to explicitly address anti-tax system rhetoric, and who did so in public and useful ways. Robert Wood took the opportunity to write a *Forbes* article educating the public about frivolous tax arguments.¹⁰¹ He explained the accuracy-related, civil fraud and other penalties that taxpayers should know about, and he explained the “top 10” tax arguments taxpayers should avoid—if they wish to avoid the risks of making frivolous tax arguments.¹⁰² Tax lawyer Peter Pappas took the time and energy to deconstruct the detailed rant against the IRS left by the pilot, beginning with the observation that the ill of “no taxation without representation” was cured with the right to vote—not the end of taxation.¹⁰³ Mr. Pappas also explained that the complexity of the tax code is not evidence of totalitarianism, as well as addressing convoluted arguments claiming the American tax system is a nightmare, churches should not be tax exempt, and that accountants are part of a conspiracy that should be stopped.¹⁰⁴ Mr. Pappas wrote: “I am no fan of big government and inefficient bureaucracy, but I loath to the core anti-government maniacs who would do harm to federal employees. They are terrorists of the worst kind—even worse than the Islamofascist true believers

96. Lee Ferran, *Joe Stack Hailed As Hero in American ‘Patriot’ Resurgence*, ABC News (Feb. 19, 2010), <http://abcnews.go.com/TheLaw/patriot-movement-calling-joe-stack-hero/story?id=9889443>.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Robert W. Wood, *Ten Tax Protester Claims to Avoid*, *Forbes.Com*, Feb. 19, 2010, http://www.forbes.com/2010/02/19/irs-tax-protestor-stack-snipes-personal-finance-robert-wood_3.html. See also Wood & Porter, *A Professional Corporation*, <http://www.woodporter.com/> (last visited July 12, 2010).

102. Wood, *supra* note 101.

103. Wacko, *supra* note 222.

104. *Id.*

formerly hunkered down in the caves of Damadola.”¹⁰⁵ In addition to his workload advising clients on how to comply with the tax system, Mr. Pappas took upon himself the burden of using his special knowledge to limit the negative effects that this anti-tax system rant otherwise may have had. Hopefully, variations on Mr. Wood’s and Mr. Pappa’s public responses were articulated privately by tax lawyers across the country who also took the opportunity as a “teachable moment” for their family members, friends, and colleagues. May Mr. Wood’s and Mr. Pappas’s public responses encourage each of us to engage in private conversations when those teachable moments arise—even if our first impulse is to walk away.

105. Characteristics of Extreme Anti-IRS Wackos, Tax Lawyer’s Blog (Mar. 14, 2010), <http://blog.pappastax.com/index.php/CATEGORY/absurd-protester-arguments>.

