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FEDERAL TAX AMNESTY: CRIME AND PUNISHMENT REVISITED

Leo P. Martinez*

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I. INTRODUCTION

Dostoyevsky's classic novel *Crime and Punishment*, portrays a man so ravaged by guilt that he voluntarily confesses his crimes, seeking the punishment he subconsciously realizes he deserves.¹ A similar theme is played out by Edgar Allen Poe in *The Telltale Heart*, in which the anti-hero is driven to confess, overcome by the delusion that his crime has been detected.² In addition to enriching the Western literary tradition, these works validate the premise fundamental to modern theories of punishment, that crime is followed (or should be followed) by punishment.³

The popularity of state tax amnesties and the recent spate of federal tax amnesty proposals, however, show an apparent disregard for this readily accepted premise.⁴ The congruence reflected in the literature is ignored for the immediate gratification (in terms of increased revenues) offered by the amnesty programs. Though the federal government has avoided such a scheme, it now seems that it may seek the same immediate gratification by enacting its own tax amnesty.

The proponents of a federal tax amnesty argue that it will raise revenue and thus reduce the federal budget deficit.⁵ This justification is seductive. The size of the federal budget deficit, and its rate of growth, is an urgent and unwieldy national dilemma.⁶ The short

¹ F. Dostoyevsky, *Crime and Punishment* (1886).
³ In his seminal work, "General Principles of Criminal Law," Professor Hall justified punishing criminals on grounds that include significant components of retribution, deterrence, and correction. J. Hall, *General Principles of Criminal Law* 303 (2d ed. 1960). According to Professor Hall, "the principle of legality-the 'rule of law'-refers to and requires not only a body of legal precepts but also supporting institutions, procedures, and values." Id. at 27; see Mabbott, *Punishment*, 48 *Mind* 152, 158 (1939), cited in J. Hall, *General Principles of Criminal Law* 30 (2d ed. 1960).
⁴ See infra notes 23 and 44.
⁶ The federal budget deficit reached a high of $221.2 billion in fiscal year 1986. The *Budget and the Economy: Hearings Before the House Committee on the Budget*, 101st Cong., 2nd Sess. 307 (1990) (report by Richard G. Darman, Director, Office of Management and Budget) [hereafter *Budget and Economy Hearings*]. Although the deficit has steadily
term focus to stop the deficit cash flow has been on cutting spending and raising taxes. Spending cuts have been championed by many, although few legislators seem inclined to cut any spending affecting their own constituents. Similarly, most consider raising taxes a political pill too bitter to swallow. In short, there appears to be no national consensus on where to cut spending or how to raise revenue.

While either solution to the budget deficit problem has political costs, doing nothing is also costly. The public clamors for answers. Economic and political pressures demand that Congress and the President do something to reduce the deficit. It is not surprising then that federal tax amnesty proposals have circulated in Congress and have gained considerable currency during the last several years.

been reduced through measures such as the Gramm-Rudman-Hollings Deficit Reduction Act of 1985, it remains exorbitantly high and continues to be one of the most pressing issues the federal government faces. See The Budget Deficit, the State of the U.S. Economy, and Federal Budget Policy for Fiscal Year 1990 and Beyond: Hearings Before the House Committee on Ways and Means, 101st Cong., 1st Sess. 7 (1989) (statement by Senator Robert W. Kasten Jr.). The federal budget deficit for fiscal year 1990 is projected to be either $122 billion reduced to $84.7 billion in fiscal year 1991 (based on the Gramm-Rudman-Hollings Baseline Deficit), or $121.4 billion reduced to $64 billion in fiscal year 1991 (based on the "President's Policy Deficit/Surplus"). See Budget and Economy Hearings, supra, at 309.

According to the Congressional Budget Office, the decrease in U.S. domestic savings, the inflow of foreign capital, and enormous trade imbalances can be attributed, in part, to the large budget deficits of the 1980's. Cong. Budget Office, Reducing the Deficit: Spending and Revenue Options, Part II (March 1988). Individuals, businesses, and the economy as a whole have all been profoundly affected by the huge budget deficits. See Impact of the Deficit and the National Debt on the Business Community: Hearings Before the Senate Comm. on the Budget., 101st Cong., 1st Sess. (1989).

* Silk, Candidates Wary on Budget Deficit, N.Y. Times, July 15, 1986, at D2, col. 1. Rather than increase tax rates, the Congress with the support of a popular president resorted primarily to tax base broadening as a means of adding to the treasury's coffers. See J. Pechman, Federal Tax Policy 94-95, 138 (5th Ed. 1987); Silk, The Power of an Idea, N.Y. Times, Oct. 29, 1986, at D2, col. 1. Base broadening is politically attractive because it implies that the existing base excludes some who should be bearing their fair share of the tax burden. Unfortunately, the base already is as broad as it can get and thus offers little in the way of expansion to raise revenues. See R. Hershey Jr., In Washington Today There's No Dodging the Tax Issue, N.Y. Times, Jan. 1, 1989, sec. 4, at 1, col. 1; Critical Issues and Problems Facing the New Administration and Congress: Hearing Before the Senate Governmental Affairs Committee, 100th Cong., 1st Sess. 139-140 (1989).

10 This is likely because of the bipartisan support the tax amnesty idea apparently enjoys. See infra note 44.
Enactment of a federal tax amnesty looms as an especially likely possibility in light of the nation's generally reactive tax policy.\textsuperscript{11} On the surface, at least, amnesty appears to be a panacea for our growing domestic budget deficit problems. Amnesty seems to target those who are not bearing their fair share and is thus a politically viable and safe concept. Amnesty would also make it possible to raise revenue without increasing tax rates, an appealing notion to both taxpayers and politicians.

An amnesty, according to its proponents, would fill government coffers without hurting anyone.\textsuperscript{12} Tax evaders would simply admit their past indiscretions and pay the taxes and interest they owe. In return, the government would forego criminal prosecution and the imposition of civil penalties. Revenue would increase with minimal political cost.

Unfortunately, the case for amnesty is not as convincing as its proponents argue. The justifications advanced do not dispel what are compelling doubts. Is amnesty truly a creative and timely solution to the nation's fiscal crisis, or is Congress just grasping at political straws?

The author believes that to enact a federal tax amnesty would be to conduct an experiment in the national laboratory. Notwithstanding the apparent success of the state amnesty programs, the outcome of the experiment would be largely unpredictable. Some may profess to understand both the fiscal laws that govern the budget and the psychological and sociological principles that govern individual compliance with a tax system. In reality, our knowledge is limited, the predictions no better than guesses.

Congress, relying on the apparent success of state amnesty programs, may decide to proceed with the experiment, betting that the benefits outweigh the harm. Compliance with the tax laws, like any other type of behavior, can be modified by instituting the ap-

\textsuperscript{11} See Witte, supra note 8, at 248-249. Webber and Wildavsky question whether the deficit is in the budget or in society. C. Webber & A. Wildavsky, A History of Taxation and Expenditure in the Western World 590-594 (1986).

\textsuperscript{12} Amnesty is seen as benefiting all concerned. Noncompliant taxpayers who fear fines and embarrassment would be encouraged to comply; the government would gain without hurting anyone because revenue would be collected only from those who believe the benefits from complying outweigh the costs. A. Malik & R. Schwab, The Economics of Tax Amnesties (November 1988), reprinted in Tax Notes Doc. No. 89-276 (Jan. 9, 1989); see Jackson, Amnesty and Creative Tax Administration, 39 Nat'l Tax J. 317 (1986).
propriate rewards and punishments. It appears that the states have learned to be more deliberate, skillful, and successful in implementing these behavior modification mechanisms - and have thus realized increased tax compliance through tax amnesty programs. However, the states' relative success with amnesty programs is dangerously misleading. The federal government is unlikely to see the same success.

Amnesty itself is probably not the most significant factor in increasing compliance. Collateral aspects of amnesty, including increased publicity and enforcement, may account for the significant increases in compliance. The intriguing alternative to amnesty is to simply increase publicity and enforcement.13

This article discusses the ramifications of a federal tax amnesty and how it fits, if at all, in the federal system of taxation. The discarding of a federal tax amnesty as even a partial solution to the nation’s budget woes requires discussion of two considerations: (1) a perspective that a federal tax amnesty lacks utility, and (2) that amnesty is fundamentally unfair in light of the traditional justifications for punishment. Considering the unpredictable aspects of an amnesty experiment and the realities of administering a federal tax system, the author concludes that the potential damage to the fragile fabric of tax compliance ultimately makes any tax amnesty a losing proposition.

II. AN AMNESTY PRIMER

Conceptually, a grant of amnesty is related to a pardon, though the two acts are distinguishable. Amnesty is an exercise of sovereign power granting forgiveness for a past offense, usually one committed against the state.14 Unlike pardons which are aimed at


14 E.g., Brown v. Walker, 161 U.S. 591, 601 (1896) (Supreme Court upheld as an amnesty an act by Congress granting immunity from prosecution to all witnesses testifying before the Interstate Commerce Commission). “Amnesty,” from the Latin “amnestia,” derives from Greek terms meaning “oblivion” and “not remembering.” Specifically, amnesty is “an act of oblivion, a general overlooking or pardon of past offences, by the ruling authority.” 1 The Oxford English Dictionary 406 (2d ed. 1989). While amnesty usually precedes trial and conviction, it may occasionally follow conviction. See Ex Parte Garland, 71 U.S. (4 Wall.) 333,
individuals, amnesties target a class of individuals, and take no account of individual circumstances. Amnesties may cover all classes of offenders (referred to as a general amnesty) or apply only to special groups (a particular amnesty). An amnesty may be conditional, in which case the recipients must satisfy conditions before or after it becomes effective, or it may be unconditional. See Encyclopedia of the Social Sciences 36-39 (1937); Weisman, A History and Discussion of Amnesty, 4 Col. Hum. Rts. L. Rev. 529 (1972).


See Burdick, 236 U.S. at 94-95. Amnesty can be an act of justice because it takes into account variables that the strict legal system does not observe and can be used to ensure that people are not punished more than they deserve. K. Moore, Pardons, Justice, Mercy and the Public Interest 129 (1989).
onomic issues, not political or moral ones. Second, amnesty is generally intended to promote social healing and encourage disagreeing parties to peacefully co-exist after a socially divisive event. No such curative component exists in the case of amnesty from taxes; since the basic disagreement is essentially economic, the potential for harmonious co-existence is hardly relevant. Thus, no healing of permanence or significance will occur with a tax amnesty.

Finally and most importantly, unlike other types of crimes in which the wrongdoer is forever spared from committing the same act, for example, draft evasion or desertion in time of war, the beneficiary of a tax amnesty may still commit the same crime. While recidivism is not likely to be a significant issue with most amnesties, a tax amnesty does not do away with the obligation to pay taxes in subsequent periods. Beneficiaries of the amnesty will

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19 Concededly the "morality" of tax evasion is difficult to discern. Morally justified crimes, such as avoiding the draft, may be pardoned on the ground that "there is no 'sin' for which the criminal 'deserves to suffer.'" K. Moore, supra note 17, at 157. In this vein Professor Hall qualified Kant's pure retributive theory of punishment, stating that retribution is justified only where the criminal "has broken an ethically valid law." J. Hall, supra note 3, at 301. Tax evasion does not seem to be either a matter of ethics, in Professor Hall's sense, or of morality. It more nearly is a matter of positive law. In this sense, the evidence of society's expression of the immorality of tax evasion is nearly overwhelming. For example, both criminal sanctions and civil penalties are imposed for evasion of the tax laws. See I.R.C. § 7201 (tax evasion is a crime); I.R.C. § 7206 (false statement on a tax return is criminal); I.R.C. § 6662 (tax fraud is subject to civil sanction). Penalties also are imposed for the filing of "frivolous" tax returns, usually by so-called "tax protesters." I.R.C. § 6702. The courts have been notoriously unsympathetic to the claims of tax protesters. See Miller v. United States, 868 F.2d 236 (7th Cir. 1989) (penalty upheld in face of claim of unconstitutionality of the sixteenth amendment); Nelson v. United States, 796 F.2d 164 (6th Cir. 1986), cert. denied, 477 U.S. 905 (1986) (penalty upheld in face of taxpayer's first amendment objection to payment of taxes); McKee v. United States, 781 F.2d 1043 (4th Cir. 1986) (penalty upheld for taxpayer's diversion of taxes for world peace).

On the other hand, the birth of our nation is founded upon the evasion of a tax exacted and collected through the use of stamps. See Webber & Wildavsky, supra note 11 at 31; Haws, A Brief History of American Resistance to Taxation, in Income Tax Compliance 113 (ABA 1983); C. Parkinson, The Law and the Profits 45 (1960). Criminal sanctions, civil penalties, and unsympathetic courts arguably can be explained by pragmatic concerns without any resort at all to moral justification. A cynical view is that tax avoidance by conscientious taxpayers is justified because otherwise the conscientious would pay more than their fair share. See Wallace, Penalties and Prosecutions for Evasion of the Federal Income Tax, 1 Tax L. Rev. 329 (1946); Crowe, The Moral Obligation of Paying Taxes (1944). For the sake of brevity, the morality of tax evasion will not be explored in this piece.

19 See Weisman, supra note 14, at 538-39; see also Freeman, supra note 15, at 517.

20 Those who support amnesty for army deserters or draft evaders feel that amnesty is
still be responsible for filing returns and paying their fair share of
taxes.

While Congress and the President both have the power to grant
amnesty for federal offenses, the actual exercise of the power is
relatively rare.\textsuperscript{21} The limited resort to federal amnesties suggests
that the concept, while attractive, is not without disadvantage. In
addition to the moral and policy considerations that attach to pun-
ishment for crime, the idea of amnesty is inherently contradictory.
On one hand, government plays the role of law administrator re-
sponsible for enforcement. On the other hand, by granting amnesty
government jeopardizes the effective enforcement of the law by re-
mittling punishment for those who disobey it.\textsuperscript{22} Before weighing va-
rious aspects of amnesty, a review of state amnesties and federal
proposals is apt.

A. State Tax Amnesties

Over the past decade, at least 29 states and the District of Co-


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granted in unique situations and is not a guarantee that future amnesties will be granted;
\end{footnotesize}
rather than encouraging desertion or evasion in the future, one proponent argues that am-

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nesty builds confidence in the laws by demonstrating the government's flexibility in partic-
\end{footnotesize}
lar situations. Weisman, supra note 14, at 537-38. While the government should show flexi-

\begin{footnotesize}
bility in dealing with both draft evaders and tax evaders, tax evasion is neither unique nor
\end{footnotesize}
based on a unique event. Thus, the rationale which applies to amnesties for other than tax

\begin{footnotesize}
related offenses loses some of its persuasion.
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\textsuperscript{21} The Constitution specifically authorizes the President to grant reprieves and

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pardons. U.S. Const. art. II, § 2; see Ex Parte Garland, 71 U.S. (4 Wall.) 333, 380 (1866). This grant
\end{footnotesize}
has been interpreted to include the power to grant amnesty. United States v. Klein, 80 U.S.

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(13 Wall.) 128, 147 (1872). Although Congress has no such specific grant of power, the Su-
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preme Court held that it can also pass acts of general amnesty. Brown v. Walker, 161 U.S.

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591, 601 (1896). See Comment, supra note 15, at 112-125; see also Comment, supra note 14,
\end{footnotesize}
at 505; Weisman, supra note 14, at 529.

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\textsuperscript{22} K. Moore, supra note 18, at 27-28.
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\textsuperscript{23} The states include: Alabama, Arizona, California, Idaho, Illinois, Kansas, Massachu-

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setta, Minnesota, Missouri, North Dakota, Oklahoma, Texas [Miscellaneous Tax Bills, supra
\end{footnotesize}
note 5, at 63 (testimony of Senator Chafee, Chairman of Subcommittee on Taxation and

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Debt Management)]; Colorado, Louisiana, New Mexico, New York, Oklahoma, Pennsylvania,
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Rhode Island, Wisconsin [Mikesell, supra note 5, at 512-15]; Florida (S. 777) [see Doug-

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las, Florida Extends Sales Tax to Services; Will Hold Tax Amnesty, 35 Tax Notes, 485 (May
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4, 1987) [hereafter Florida Amnesty]; Iowa [1986 Iowa Acts Ch. 1007]; Michigan [(HB 706);

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see Douglas, Michigan Legislature Approves Tax Amnesty, 30 Tax Notes 1143 (March 17,
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[(HB 266); see Douglas, Maryland Lawmakers Approve Tax Amnesty, 35 Tax Notes 167
\end{footnotesize}
(April 13, 1987)]; Mississippi [see Douglas, Mississippi Tax Amnesty Brings in Nearly One
programs varied in terms of objectives, features, and results, some generalizations can be made.\textsuperscript{24} The programs were generally designed by state lawmakers to achieve at least one of three objectives: 1) reap a one-time revenue windfall; 2) increase future revenues by adding the names of non-filers to state tax rolls; and 3) improve the tax compliance rate.\textsuperscript{25} In order to accomplish these goals, the states usually abated both criminal and civil penalties for those who had failed to file or understated their liabilities if the taxpayer paid delinquent taxes.\textsuperscript{26}

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\textsuperscript{24} The length of the state amnesty programs indicates their high degree of uniformity. The bulk were in effect for two to three months. See Mikesell, supra note 5, at 509-11. Texas's amnesty was the shortest, lasting only 29 days; Oklahoma's and Florida's the longest, at six months. Id. at 511; Florida Amnesty, supra note 23, at 485. The Massachusetts tax amnesty program ran from October 17, 1983 to January 17, 1984, a period of 93 days. See Mikesell, supra note 5, at 510. The California State tax amnesty program was conducted from December 10, 1984 through March 15, 1985, a period of 96 days. Id. at 509.

\textsuperscript{25} Miscellaneous Tax Bills, supra note 5, at 102, \textit{reprinted in} Tax Notes Doc. No. 85-5600 (Jul. 1, 1985) (statement of Thomas D. Herman, Massachusetts First Deputy Comm. of Revenue); Id. at 75 (statement of Philip J. Rock, President, Illinois Senate); Mikesell, supra note 5, at 507; Ross, supra note 5, at 145; Tax Compliance: Benefits of State Tax Amnesties Go Beyond Revenue Raised, Tax Administrators Say, BNA, Daily Tax Report (July 2, 1986); Congressman Urges Tax Amnesty, Tax Notes Today 89-4639 (April 27, 1989). In fact, many of the states which have held amnesties regard the revenue generated as a secondary benefit to be realized. Ross, supra note 5, at 164.

One difficulty in using the states' experience to predict the results of a federal amnesty is the extent to which the state amnesty programs are, or are not, analogous to a federal tax amnesty. As discussed below, there is much to suggest that any federal tax amnesty program would be fundamentally different from the state programs. See infra notes 44-53 and accompanying text.

\textsuperscript{26} The Massachusetts plan was typical in this regard. For example, section 98 of 1983 Mass. Acts 233 provided:

In order to encourage the voluntary disclosure and payment of taxes owed to the Commonwealth, the Commissioner of Revenue is hereby authorized during the fiscal year ending June thirtieth, nineteen hundred and eighty-four to establish a three-month period during which all penalties, imposed by sections thirty-three and thirty-four of chapter sixty-two C of the General Laws will be waived if any taxpayer voluntarily files delinquent returns and pays taxes owed. Such waiver shall apply to the non-reporting, under-reporting of tax liabilities or to the non-payment of tax previously assessed, but shall extend only to penalties attributable to the taxes paid during
The scope of the amnesty programs varied considerably. Most states extended amnesty to include all state tax obligations.27 A few were less generous: California, for example, restricted its amnesty to personal income and sales and use taxes.28 Some states offered amnesty only to those persons who had not previously filed tax returns.29 Many others also included within their scope taxpayers who had understated past tax liabilities.30 The most successful programs generally further extended amnesty to include taxes already assessed by the state.31

Just as the amnesty programs differed from state to state, the amount of revenue they raised varied significantly. The variations can be attributed to three factors: the size of the state’s taxpaying population; the extent to which the state’s officials promoted the amnesty program; and the scope of the amnesty itself. By revenue raised, New York’s program was the most successful, generating a revenue high of $401.3 million.32 New Jersey’s program followed, bringing in $179.7 million.33 Other top revenue raisers were California, Illinois, and Massachusetts, pulling in $154 million,34 $152.4...
million\textsuperscript{38} and $83.2 million, respectively.\textsuperscript{36} At the other end of the spectrum, more than half the states which conducted amnesties raised less than $10 million each.\textsuperscript{37}

Given the broad objectives of many state amnesty programs, revenue raised is not necessarily the sole indicator of success.\textsuperscript{38} To many analysts and lawmakers, the long term effects are of equal concern. Many states hoped amnesty would increase their tax base by adding more names to the tax rolls. Indeed, one study showed that states implementing tax amnesty enjoyed an annual tax revenue growth rate 0.5\% higher than did non-amnesty states.\textsuperscript{39} Another aim of most amnesties was to raise the overall compliance rate. Preliminary studies indicate this goal was also achieved.\textsuperscript{40}

It would be a mistake, however, to attribute the states' success in increasing compliance and revenue growth to amnesty alone. Other factors, such as increased enforcement (including increased audits), stiffer penalties for non-compliance, and the widespread

\textsuperscript{38} See Mikesell, supra note 5, at 516.

\textsuperscript{36} Miscellaneous Tax Bills, supra note 5, at 225 (report of Mass. Dep't of Revenue). The difficulty of assessing amnesty's results is illustrated by two differing reports on California's amnesty program. One analyst emphasized that the program raised $154 million, more than double the state's projections, and representing a windfall of $26 for every $1 spent on administration and promotion. See Ross, supra note 5, at 163. However, another commentator describes a less successful California amnesty: "The gross revenue from California's income tax amnesty was about $103 Million or approximately one percent of California's annual income tax receipts. Informal estimates from California's tax administrators indicate that net amnesty revenue after subtracting revenue that would have been collected anyway, foregone penalties, and costs of administration was under $20 million, or less than 0.2 percent of one year's tax receipts." Lerman, Tax Amnesty: The Federal Perspective, 39 Nat'l Tax J. 25, 329 (1986).

\textsuperscript{37} See Klett, supra note 32.

\textsuperscript{38} According to its proponents, not only do amnesties create a short-term revenue windfall, but they also produce a number of other benefits. See Miscellaneous Tax Bills, supra note 5, at 76 (statement of Philip J. Rock, President Illinois Senate); Tax Compliance: Benefits of State Tax Amnesties Go Beyond Revenue Raised, Tax Administrators Say, BNA, Daily Tax Reports (July 2, 1988); Ross, Federal Tax Amnesty: Reflecting on the States' Experiences, 40 Tax Law. 145, 164 (Fall 1988); Congressman Urges Tax Amnesty, Tax Notes Today, June 12, 1989. In fact, many of the states which have held amnesties regard the revenue generated as a secondary benefit. See Ross, supra. One of the primary benefits sought is to bring forward delinquent taxpayers who would not otherwise be identified by tax collection agencies. See Miscellaneous Tax Bills, supra note 5, at 94 (testimony of Senator Alan Dixon).


\textsuperscript{40} See Miscellaneous Tax Bills, supra note 5, at 98 (statement of Thomas D. Herman, First Deputy Commissioner, Massachusetts Department of Revenue).
publicity given to amnesty, could be equally significant.\textsuperscript{41} Assessing the results realistically, the long term effects of amnesty itself remain uncertain.\textsuperscript{42} Isolation of causes and effects is an impossible task.\textsuperscript{43}

B. Federal Amnesty Proposals

The idea of a federal tax amnesty has progressed beyond the stage of academic debate and media speculation. In recent sessions, Congress has considered numerous bills containing amnesty

\textsuperscript{41} Some of the more successful state amnesties focused expressly on public education. One of the primary aims of the Massachusetts program was to change public perceptions of tax evaders and of the Department of Revenue. As the First Deputy Commissioner of the Massachusetts Department of Revenue testified before the Senate Subcommittee on Taxation and Debt Management:

In preparation for the Amnesty program, authorized as part of REAP, we conducted a carefully orchestrated seizure drive, hitting at least two seriously delinquent businesses a day in different parts of the state. Naturally, all this was done carefully and in full observance of everyone's due process and other legal rights. In the summer, we moved the seizure drive from restaurants and retail establishments to luxury yachts on which the sales or use tax hadn't been paid. In the fall we began scouring airports across the state for planes on which the tax had been illegally avoided. 1985 Miscellaneous Tax Bills-I: Hearing before the Subcommittee on Taxation and Debt Management of the Senate Finance Committee, 99th Cong., 1st Sess. 104-105 (1985) (Testimony of Thomas D. Herman, First Deputy Commissioner, Massachusetts Department of Revenue).

Likewise, the California amnesty plan also stressed publicity. It specified that the amnesty program should be "adequately publicized so as to maximize public awareness of and participation in the program." Act of Sept. 26, 1984, ch. 1490, § 7075, § 19306, 1984 Cal. Stat. 5216, 5221, 5234.

Publicity, though it represents a significant factor in increasing compliance, is especially difficult to isolate.

\textsuperscript{42} Notwithstanding the lack of conclusive data, some officials from states which held amnesties enthusiastically support a federal amnesty. Testifying before a Senate Subcommittee, the Massachusetts Deputy Commissioner of Revenue conceded that it is difficult to extrapolate the state tax agencies' experiences to an agency like the IRS. He argued though that such a comparison may be irrelevant, pointing out that "[t]he IRS today has a $100 billion tax gap and another $30 billion in accounts receivable. . . . Why not go after these problems with every proven and every possible weapon?" Miscellaneous Tax Bills, supra note 5, at 108 (testimony of Thomas D. Herman, First Deputy Commissioner, Massachusetts Department of Revenue).

\textsuperscript{43} Even in the case where one would expect an abundance of information, such as precise intelligence on non-compliance, there is confusion. Graetz & Wilde, The Economics of Tax Compliance: Fact and Fantasy, 38 Nat'l Tax J. 355, 356-57 (1985). This illustrates that the integration of any social science in the legal process is at best difficult. See, Faigman, To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy, 38 Emory L. J. 1005, 1079-81 (1989).
proposals.\textsuperscript{44} The proposals, quite uniform in scope and structure, generally call for a one-time, short term amnesty from civil and criminal penalties for underpayment of federal taxes.\textsuperscript{45} Common features of these proposals include: 1) extending amnesty to liabilities incurred in any previous tax period; 2) withholding amnesty from both those who had already been contacted or were already under investigation by the I.R.S. regarding a tax deficiency prior to applying for amnesty, and those who had fraudulently applied for amnesty; 3) creating a simple amnesty application procedure;\textsuperscript{46} and 4) allowing amnesty participants to pay in installments.\textsuperscript{47}


Although included in the scope of this Article, the following bills were in some respects anomalous, and are not considered to be within the main body of amnesty bills: S. 1152, 99th Cong., 1st Sess., 131 Cong. Rec. 6323 (1985) (not proposing an amnesty, but resembling several amnesty proposals in its provisions calling for increased enforcement, including an emphasis on publicity, stiffer penalties, use of private collection agencies, public disclosure, information sharing between state and federal governments, monitoring of compliance of federal government contractors and licensees); H.R. 2770, 99th Cong., 1st Sess. § 4, 131 Cong. Rec. 4280 (1985) (primarily proposing a 10% flat tax rate, but also including an extreme plan for a permanent amnesty).


\textsuperscript{46} Most bills propose the same application procedure, though a few are silent on the point. See, e.g., S. 1152, 99th Cong., 1st Sess., 131 Cong. Rec. 6323 (1985); H.R. 2770, 99th Cong., 1st Sess. §4, 131 Cong. Rec. 4281 (1985).

\textsuperscript{47} Presumably, availability of an installment plan would encourage the participation of those unable to make a full and immediate payment. Two bills, however, make no provision for installment payments of delinquent taxes and interest owed. H.R. 2770, 99th Cong., 1st Sess., 131 Cong. Rec. 4281 (1985); S. 1152, 99th Cong., 1st Sess., 131 Cong. Rec. 6323 (1985).
Of course the bills also differed in a number of respects. Some proposals, in addition to forgiving criminal and civil penalties, would excuse up to fifty percent of the interest owed on unmet obligations. Some bills earmarked all amnesty proceeds for certain purposes such as reducing the budget deficit. A few bills specifically stated that amnesty would not apply to those whose income was derived from illegal sources, while most did not address the issue. Finally, many bills, utilizing the "carrot and stick" approach, supplement amnesty with enhanced follow up enforcement measures such as stiffer penalties, more frequent audits, additions to the IRS workforce, and a prohibition against awarding federal contracts to persons with delinquent tax accounts.

While all the amnesty bills implied a concern for the amount of unpaid, unreported taxes, many of them were explicitly aimed at

All bills allowing installment payments state that should the Treasury find the installment arrangement "not appropriate," the taxpayer must pay the entire amount owed within 30 days. Some bills explicitly provide that failure to meet an installment will accelerate payments, bringing the entire debt immediately due. See, e.g., H.R. 2530, 99th Cong., 1st Sess., 131 Cong. Rec. 3312 (1985); H.R. 4286, 99th Cong., 2d Sess., 132 Cong. Rec. E557 (1986).

44 See, e.g., S. 254; H.R. 4292; S. 387 (all supra note 44). The amount of interest owed is a significant element distinguishing the various amnesty plans. All bills require payment of at least 50% of interest owed, except for the anomalous bills. See H.R. 2770, supra note 45 ("No person shall be liable for any tax imposed by Chapter 18 of the Internal Revenue Code of 1954"). Bills requiring payment of interest state that the taxpayer will be notified of the amount of interest owed and that that amount must be paid within 30 days after notification. See, e.g., H.R. 200; S. 203 and its counterpart, H.R. 2031; H.R. 2530; H.R. 3219; S. 2110; H.R. 4286; H.R. 4253; H.R. 4292; S. 387; H.R. 4725 (all supra note 44).

This diversity of approaches reflects a fundamental policy consideration regarding amnesty. If all or part of the interest owed on the back taxes is forgiven, then the delinquent taxpayer comes out ahead when compared to law-abiding taxpayers. See Mikesell, supra note 5, at 523; Ross, supra note 5, at 157. Tax-evaders who participate in an amnesty which forgives all or part of accrued interest would essentially have been given the benefit of a low or no-interest rate loan from the government. See Godfrey, Tax Amnesty No Mother Lode, Officials Warn House Panel, 48 Tax Notes 530 (July 30, 1990); Mikesell, supra note 5, at 523; Ross, supra note 5 at 157.

45 See, e.g., H.R. 1590, supra note 44.

46 See, e.g., S. 203, and its counterpart, H.R. 2031; S. 387 (all supra note 44). The fact that the other bills implicitly extend amnesty to include income earned illegally suggests that recovery of such income may be a primary objective of amnesty. Since income from illegal sources is difficult to identify using traditional enforcement means, an amnesty that encourages voluntary compliance could theoretically be much more effective. However, it seems unlikely that many taxpayers with income from illegal sources would jeopardize their current operations by participating in a tax amnesty.

47 Miscellaneous Tax Bills, supra note 5, at 87 (testimony of Senator Alan Dixon, sponsor of S. 203). See, e.g., H.R. 2530; S. 387 (both supra note 45).
eliminating the tax compliance gap (the difference between taxes owed and taxes voluntarily paid).\textsuperscript{52} The amnesty provisions contained in these bills were only one component of an overall plan to encourage compliance with the tax code. In addition to amnesty and the improved enforcement measures described above, these bills provide for aggressive publicity campaigns designed to remind taxpayers of their obligations and to increase public awareness that “tax evasion is not a harmless and socially acceptable lark, but a serious crime, a crime with real victims.”\textsuperscript{53}

The differences between the amnesty proposals are significant in that they could affect the ultimate success of a federal tax amnesty. Except as noted, however, the bills do not appear to reflect any fundamental differences regarding objectives. It is therefore likely that if a consensus in favor of a federal amnesty were to develop, agreement on the details of the program itself would be achieved relatively easily.

C. Amnesty Analogs

1. Voluntary Disclosure Policy

Until 1952, the Internal Revenue Service had a policy of not prosecuting those who made a voluntary disclosure of their tax frauds before such wrongdoing was detected.\textsuperscript{54} During the period

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\textsuperscript{52} See, e.g., S. 2110 and its counterpart H.R. 4253; H.R. 2530 (all supra note 44).

\textsuperscript{53} Miscellaneous Tax Bills, supra note 5, at 102-103 (testimony of Thomas D. Herman, First Deputy Commissioner, Massachusetts Department of Revenue). Indeed, the conventional wisdom in England is that the amnesty should be the vanguard of a concerted anti-evasion push to increase the rate of compliance among taxpayers. Pepper, Tax Amnesties, 1966 Brit. Tax Rev. 284. Taking this cue, most bills combine the general amnesty with a directed post amnesty enhanced enforcement plan. See, e.g., S. 203 and its counterpart, H.R. 2031; H.R. 2530; S. 2110; H.R. 4286; H.R. 4253; H.R. 4292 (all supra note 44). At least two bills made no reference to increased enforcement or penalties. H.R. 200; H.R. 3219 (both supra note 44). Some plans specifically call for a 50\% increase in penalties following the amnesty period. S. 203 and its counterpart, H.R. 2031; H.R. 4292; S. 387 (all supra note 44). Sen. Kerry's 1985 proposal also called for increasing many penalties by 50\%. S. 1152, supra note 45. Many plans also call for an increase of IRS personnel, often by as much as 2500 or 3000 agents. See, e.g., S. 203 and its counterpart, H.R. 2031; H.R. 2530; S. 2110; H.R. 4286; H.R. 4253; H.R. 4292; S. 1152 (all supra note 44). From the bills, it is unclear whether this increase is for the amnesty period only, or if it is meant to be permanent. Other bills provide a more aggressive enforcement by specifically authorizing public disclosure of those found guilty of tax evasion. S. 2110; S. 1152; H.R. 4253 (all supra note 44).

\textsuperscript{54} See Horvitz & Tallichet, An Examination of the IRS's Voluntary Disclosure Policy, 11 Tax Advisor 545 (1980); ABA Section of Taxation letter to Secretary of the Treasury and
of the policy, evidence of criminal noncompliance could be suppressed if a taxpayer could demonstrate substantial compliance with the policy prior to the initiation of an investigation.\textsuperscript{\textcircled{65}} Although not currently in force, that policy continues in the form of a factor to be taken into account along with other pertinent facts in deciding to pursue criminal sanctions against a taxpayer.\textsuperscript{\textcircled{66}} How-

IRS Commissioner, June 12, 1961 (W.R. Spofford, Chairman), \textit{reprinted in} Readings on Income Tax Administration 537 (P.L. Kelley & O. Oldman eds. 1973); see United States v. Hebel, 668 F.2d 995, 998 (9th Cir. 1982), cert. denied, 456 U.S. 946 (1982) [hereafter \textit{Hebel}]. Under a "voluntary disclosure" policy prosecution, fines and penalties are waived for those who come forward and admit evasion before detection in contrast to amnesty which is blanket a waiver with a definite cut off time used on a one time basis. See ABA Section of Taxation letter to Secretary of the Treasury and IRS Commissioner, June 12, 1961 (W.R. Spofford, Chairman).

The policy was begun in 1919 when the Bureau of Internal Revenue (now the Internal Revenue Service) decided to consider offers to compromise criminal liability in cases of voluntary disclosure. This policy was repealed on July 2, 1934 and the Bureau's official policy was not to accept offers under any circumstances, though the Bureau continued to recommend no criminal prosecution in cases of voluntary disclosure. See Ross, supra note 5, at 147. In 1945, according to J.P. Wenchel, then Chief Counsel of the Internal Revenue Service, the official position of the Service was to not recommend prosecution of a taxpayer who voluntarily came to the Service. 1947 PH Fed. Taxes par. 76,169 (J.P. Wenchel speech to the Tax Executives Institute); Wallace, Penalties and Prosecution for Evasion of the Federal Income Tax, 1 Tax L. Rev. 329, 341-42 (1946). The impetus for the policy was a drive to tax the income of black marketeers and to collect revenue. See Guttmann, IRS Tax Amnesty, 22 Tax Notes 1363-64 (Mar. 26, 1984). The Service officially abandoned the policy on January 10, 1952, with an announcement by then Treasury Secretary Snyder. Id. (citing Treas. Dep't Info. Rel. No. S-2930 (Jan 10, 1982)).

The voluntary disclosure policy has some vague constitutional underpinnings which are alluded to in Shotwell Manufacturing v. Unuid States, 371 U.S 341, rehearing den. 372 U.S. 950 (1963). In \textit{Shotwell} a fraudulent disclosure was held to not be a voluntary disclosure made in reliance on promised immunity. Actually, the trial court's denial of the taxpayer's motion to suppress evidence contained in the alleged voluntary disclosure was upheld by the Court. Justice Black in a dissent in \textit{Shotwell} suggested that voluntary disclosure might be inadmissible under a fifth amendment self incrimination theory. Id. at 371 (Black, J., dissenting).

\textsuperscript{\textcircled{65}} In \textit{re Liebster}, 91 F.Supp. 814, 817 (E.D. Pa. 1950).

\textsuperscript{\textcircled{66}} Current Dep't of Justice policy provides that voluntary disclosure is considered on a case by case basis and is not by itself dispositive of a prosecution decision. See U.S. Dep't of Justice, I Criminal Tax Manual 4.01[1] (1985); see also Horvitz & Tallichet, supra note 54. In \textit{Hebel}, the court stated that the Service takes voluntary disclosure into account when deciding whether to prosecute a taxpayer but reserves the right to prosecute even individuals who come forward of their own accord. 668 F.2d at 998-999. "[T]he fact that a taxpayer seeks voluntarily to rectify a false return without prodding by investigators or the threat of investigation is given some weight in determining whether to prosecute but is not conclusive of the issue." Id. (citing U.S. Dep't of Justice Manual for Criminal Tax Trials, at 5 (1973)).

The last official Treasury position on voluntary disclosures was expressed thirty years ago in a news release from the Commissioner of Internal Revenue Service, Mortimer M. Caplin:
ever, prosecution of those who make “true” voluntary disclosures is unusual. A taxpayer who admits tax delinquencies to the Service before notice of investigation — that is, who makes a “truly voluntary” disclosure — is less likely to be prosecuted than one who waits for the authorities to discover the delinquencies. Still, the Service seldom characterizes disclosures as “truly voluntary.”

“[E]ven true voluntary disclosure of a willful violation will not, of itself, guarantee prosecution immunity. At the same time, the Service will carefully consider and weigh it, along with all other facts and circumstances, in deciding whether or not to recommend prosecution.” I.R.S. News Rel. IR-61-342 (Dec. 13, 1961); See Comment, Daincentives to Voluntary Disclosure: United States v. Hebel and Deleet Merchandizing Corp. v. Commissioner, 3 Va. Tax Rev. 401, 406 (1984). In spite of this policy, the IRS Enforcement Division Manual § 707 provided from May 1969 to May 1974 that “a timely good faith disclosure will ordinarily be dispositive of a prosecution recommendation.” I.R.S. Enforcement Division Manual 707 (May 1, 1969). The IRS revoked § 707 in 1974 to make it clear that voluntary disclosure was only one of many factors considered in a decision whether to prosecute. IRS Order No. 3000.3 (April 19, 1974), reprinted in Trattner & Pastor, IRS Disclosure Policy: The Internal Revenue Service Again Abandons Voluntary Disclosure, 1 L.A. Law. 30, 48 n.27 (May 1978).

77 See Jackson, Amnesty and Creative Tax Administration, 39 Nat'l Tax J. 317-320 (1986). An independent prosecutor recently reported that although Attorney General Meese had failed to report income from sales of securities on his tax return, and that even though a jury would probably find the Attorney General guilty of willfully filing a false return and failing to pay taxes, prosecution of Meese was “not warranted.” Report of Independent Counsel in In re Edwin Meese III, D.C. Cir. Division for the Purpose of Appointing Independent Counsels, Ethics in Government Act of 1978, Div. No. 87-1. According to the report, among circumstances mitigating Meese's situation was that he “intended at some future time to file an amended return and to pay the tax due,” and that “before the independent counsel began his investigation, Mr. Meese had taken some steps to gather the information needed to complete his amended return.” The prosecutor's report cites Hebel as authority that the policy of the Service is to consider “a taxpayer's efforts to bring himself into compliance with his obligations before an investigation of his affairs begins . . . in determining whether to bring criminal charges.” Id.

78 The popular view since the revoking of the voluntary disclosure provisions in 1974 seems to be that voluntary disclosure, at least alone, rarely immunizes the taxpayer from prosecution: See Moriarty, ‘Voluntary Disclosure’ Rarely Successful in Deflecting Criminal Prosecution, 42 Tax Notes 1168, 1168 (Mar. 6, 1989); Trattner & Pastor, supra note 57, at 45.

This is due to the fact that genuine voluntary disclosures that were not prompted or “triggered” by a concern of imminent government detection of the crime are rare, according to Brian Bruh, Deputy Assistant Commissioner of Internal Revenue for Criminal Investigations. Moriarty, supra at 1168-1169. One commentator estimated that only one out of every 1,000 voluntary disclosures is a “true” voluntary disclosure, noting that the de facto policy (at least in 1979) was so oriented to the Service's view that virtually no disclosure would be truly voluntary. See Trattner & Pastor at 34.

Therefore, in spite of the voluntary disclosures, prosecutions have occurred. For example, the taxpayers in Hebel argued that their conviction for tax evasion should be overturned because they had made voluntary disclosures of their false returns in the belief that they would be protected by the Service's policy of non-prosecution in such circumstances.
A tax evader faces more uncertainty under the current disclosure policy than under amnesty. Amnesty would grant immunity from prosecution to those who come forward. Under the current IRS policy, a delinquent taxpayer has no such guarantee; prosecution is a possible result of tax evasion even when the taxpayer voluntarily comes forward. In addition to its unpredictable outcome, the current policy also suffers from the perception that it is available only to a privileged few who have the resources to appreciate the nuances of the tax system.68

2. Compromises of Tax Liability

Every settlement entered into by a taxpayer and the government at less than the true amount owed is effectively an ad hoc tax amnesty. There is no great mystery to this fact; settlement of tax liability at an amount far less than that claimed due by the government is the goal of every self respecting tax lawyer and tax accountant.

The difficulty with such settlements is that only the privileged few who can afford the best tax lawyers and accountants have access to this informal tax amnesty.69 Moreover, the routine practice of settlement, as well as the voluntary disclosure policy, have no standards for implementation. Thus, the Internal Revenue Service

F.2d at 998. Despite the disclosures and despite the fact that both taxpayers had been advised by their attorneys that voluntary disclosure made prosecution unlikely, the Eighth Circuit held there was no official Internal Revenue Service policy guaranteeing immunity and therefore prosecution was appropriate. Id. at 998-99; see also Badaracco v. Commissioner, 464 U.S. 386 (1984) (fraud conviction upheld in the face of a correctly amended tax return following the filing of fraudulent return).

68 Then-Commissioner Lawrence Gibbs stated in an interview that he sympathized with the view that the current program is not fair because not everyone knows it is available, adding, "I'm hopeful that we might be able to find a way to have some more communications about the voluntary disclosure program." Uhfelder & Sheppard, An Interview with IRS Commissioner Gibbs, 33 Tax Notes 433, 439 (1986); see also Namorato and Timbie, Voluntary Disclosure Policy: An Alternative to Legislative Amnesty, 45 Institute on Federal Taxation 38-1 (1987) (advocating publicity of the policy and establishment of uniform voluntary disclosure policy guidelines).

There have been discussions about formalizing the IRS voluntary disclosure policy. Senator Max Baucus of Montana introduced a provision in May 1986 into the Finance Committee's pending tax revision measure that would grant taxpayers immunity from criminal prosecution if they voluntarily disclose tax underpayments to the Service. See Harris, Finance Bill Would Codify IRS Voluntary Disclosure Program and Stiffen Penalties for Tax Cheats, 31 Tax Notes 650 (May 19, 1986).

69 See Jackson, supra note 57, at 320.
has broad discretion in deciding who can participate.\textsuperscript{61} The availability of this informal amnesty to a sophisticated few contributes to a sense that the tax collection system is unfair - an inequity which only an amnesty could correct. Of course, any amnesty would correct this perceived inequity only once and the practice of informal and ad hoc amnesty would continue as a necessary component of collecting revenue.

3. **Statutes of Limitation**

The tax statutes of limitation also operate as a kind of tax amnesty.\textsuperscript{62} Once a politic amount of time has passed, the policy underlying the statutes is that those who have underpaid taxes are legally beyond the reach of the tax collector.\textsuperscript{63} This policy is grounded in fairness.\textsuperscript{64} At the same time, the primary tax statute of limitation excepts from protection both false returns and tax evasion so that there is no limitations period for either.\textsuperscript{65} As such, the amnesty effects of tax statutes of limitation are extremely narrow.

### III. **Fundamentals of Tax Administration**

John Stuart Mill postulated that justice is not an abstraction but is instead grounded in utility and morality.\textsuperscript{66} More than a century later, Mill's theory still applies, inasmuch as utility and fairness remain fundamental to the formulation and administration of federal tax policy.\textsuperscript{67}

\textsuperscript{61} Id. at 317; Ross, supra note 5, at 148.
\textsuperscript{62} See Leonard & Zeckhauser, supra note 13, at 58.
\textsuperscript{63} See I.R.C. § 6501(a) (general three-year statute of limitations); I.R.C. § 6501(e)(1) (six-year statute of limitations for 25% omission of gross income).
\textsuperscript{65} See I.R.C. § 6501(c); Badaracco, 464 U.S. at 386 (1984).
\textsuperscript{67} The primacy of these two considerations is underscored by a recent Internal Revenue Service study of reform of the penalty system. Executive Task Force, Internal Revenue Service, Report on Civil Tax Penalties, ch. III, at 3-4 (1989). The Service labels the two components fairness and effectiveness, but the thrust of the study is essentially similar. Professor, now Judge, Sneed theorized that the two dominant criteria of federal tax policy are equity and practicality. See Sneed, The Criteria of Federal Income Tax Policy, 17 Stan. L. Rev. 567, 601 (1965). According to Judge Sneed, the seven "pervasive purposes" of the federal tax
A. Voluntary Compliance with Tax Laws

Compliance with the federal tax laws in the United States is almost purely voluntary.\textsuperscript{68} This system of self-assessment, unique among Western nations,\textsuperscript{69} has two major advantages: it is minimally intrusive and economically efficient.\textsuperscript{70} However, the system also offers to those so inclined the opportunity to avoid their tax obligations by failing to self-assess.\textsuperscript{71} One effort to circumvent this problem while preserving the virtues of efficiency and inobtrusiveness, is the withholding of employee wages.\textsuperscript{72} Taxes are withheld at the source and thus taxpayers are induced to "voluntarily" report the receipt of taxable funds.

While a federal tax amnesty would almost certainly affect compliance with federal tax laws, it is not clear that the effect would

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\textsuperscript{68} See United States v. Generes, 405 U.S. 93, 104 (1972) (the tax system is largely dependent on voluntary compliance).

\textsuperscript{69} See Mikesell, Federal Individual Income Tax Collection Costs: The Burden of Compliance and Administration [hereafter "Tax Collection Costs"], reprinted in Examination of Basic Weaknesses of Income as the Major Federal Tax Base 34-35 (R.W. Lindholm ed. 1986) [hereafter "Basic Weakness of Income"].

\textsuperscript{70} Executive Task Force, supra note 68, at 1. The United States has a cost of collection on the order of 50 cents for each 100 dollars collected. Mikesell, supra note 69, at 34-35. Other Western countries spend two to three times as much on collection. Id. at 37.


\textsuperscript{72} See Mikesell, supra note 69, at 38 (high rate of compliance attributed to sophisticated withholding at source system). To be sure, the system contains other devices which serve to insure that taxpayers "voluntarily" comply. See Martinez, Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Case, 39 Hastings L.J. 239, 271-72 (1988). Accordingly, the tax system encourages the preservation of records held by the taxpayer so as to avoid the easy concealment of tax obligations. Id. at 280. Similarly there is resort to mechanisms in the Code through which parties to a transaction, other than the taxpayer, are encouraged or required to report the involvement of the taxpayer. See, e.g. I.R.C. § 215(c); VITEZ, INFORMATION REPORTING AND WITHHOLDING AS STIMULANTS OF VOLUNTARY COMPLIANCE, in ABA INCOME TAX COMPLIANCE 191 (1983).
be positive.\textsuperscript{73} The relationship between amnesty and compliance is complex and bears significantly on the wisdom of embracing a federal tax amnesty as a solution to the federal deficit problem. An amnesty makes sense only if it generates revenue efficiently. There would be little utility to amnesty if it collects revenue only at the cost of reduced compliance.

Considering the voluntary nature of the system, the United States enjoys a relatively high compliance rate.\textsuperscript{74} Different motivations explain this willingness to pay taxes. Many Americans believe it is their duty as citizens to pay their fair share.\textsuperscript{75} Others pay their taxes not out of patriotism, but because they fear detection.\textsuperscript{76} Of course, there are those who, for whatever reason, choose not to comply with tax laws. While estimates vary as to the actual rate of non-compliance, studies indicate that there is a significant gap between taxes owed and taxes actually paid.\textsuperscript{77}

\textsuperscript{73} As used in this Article, the term "compliance" means the rate at which those upon whom a tax burden falls voluntarily meet their tax obligations. See Research Division, Office of the Assistant Commissioner, Internal Revenue Service, Income Tax Compliance Research: Estimates for 1973-1981 5 (1983) (noncompliance is the "difference between the total amount of income tax which is voluntarily paid for a given tax year, and the correct tax liability for that year"); Groves, Empirical Studies of Income-Tax Compliance, 11 Nat'l Tax J. 291 (1958) reprinted in Readings on Income Tax Administration 434 (P. Kelley & O. Oldman eds. 1973).

\textsuperscript{74} Generally, the United States is considered to have a much higher compliance rate than many Western nations. See, e.g., Miscellaneous Tax Bills, supra note 5, at 158 (testimony of Dennis Ross, Deputy Tax Legislative Counsel, Department of the Treasury). According to a recent IRS estimate, the voluntary compliance rate was 83.6\% in 1988. See Internal Revenue Service, Trend Analyses and Related Statistics, 1988 Update 27 (1988) reprinted in Tax Notes Doc. No. 88-5794 (July 4, 1988).

\textsuperscript{75} If, however, these taxpayers feel the system is unfair, they might not be so patriotic. Thus, amnesty could actually reduce their compliance. See infra notes 194-204 and accompanying text.

\textsuperscript{76} This idea is demonstrated easily in areas in which detection is unlikely. For example, the compliance rate of heroin sellers is only 9\%. See S. Crane & F. Nourzad, Federal Income Tax Evasion, reprinted in Examination of Basic Weaknesses of Income as the Major Federal Tax Base 145, 220-21 (R. Lindholm ed. 1986); See ABT Associates, Unreported Taxable Income from Selected Illegal Activities 61, 108, 147 (1984) (estimating that the unreported taxable income in 1982 related to drugs was $22.15 billion, to gambling was $2.39 billion and to prostitution was $11.58 billion); Commission on Taxpayer Compliance, ABA, Report and Recommendations on Taxpayer Compliance, 41 Tax Law. 329, 342 (1988) (opportunity to underreport income without detection a major factor affecting compliance).

Non-compliance is not a new problem; tax evasion has a long and notorious history. It seems that even the most thorough detection efforts and the harshest penalties will never completely eradicate tax non-compliance. Resistance to taxation then appears to some degree to be based in human nature. Predictions of a successful federal tax amnesty presuppose that a fair number of Americans have not paid their federal taxes. Taking into account, however, that noncompliance may be innate, there is absolutely no guarantee that persons who did not comply with tax laws originally would come forward under an amnesty.

B. The Utility of a Federal Tax Amnesty

The utility of a federal tax amnesty depends on its success in achieving its stated aims. As noted above, recent amnesty programs have been designed to achieve several objectives, including: (1) reaping a one-time revenue windfall; (2) increasing future revenues by adding new names to the tax rolls; and (3) improving the voluntary tax compliance rate. However, close scrutiny reveals that amnesty does not significantly advance these popular objectives.

I. Amnesty, Revenue, and the Price of Confidence

Because the federal tax collection system relies on voluntary self assessment, compliance depends largely upon popular confidence in the system. A federal tax amnesty might decrease compliance by eroding taxpayer confidence in the system's fairness and effective-
Any such decrease would be costly. According to one estimate, each percentage point reduction in the compliance rate would result in a revenue loss of five billion dollars. With this relationship between the compliance rate and revenue generated, amnesty makes sense only if its benefits clearly outweigh its potentially adverse consequences.

The primary benefit cited by amnesty proponents is that it will raise revenue. But even the most successful state amnesty programs generated revenues that represented but a small portion of total state revenues. In California, for instance, gross amnesty collections totaled only 0.6% of the state’s tax collections that year. California’s experience was not unique; Massachusetts’ amnesty collections totaled only 1.65% of total annual tax revenue.

These relatively small monetary rewards represent only part of the economic doubts about amnesty. First, it is unclear how much of the states’ relatively small amnesty revenues are attributable to amnesty itself. No one knows, for example, how much of the $85.1 million yielded by Massachusetts’ program can be attributed to the 50% increase in the enforcement budget that accompanied the amnesty. Indeed, increased enforcement may explain much of the states’ revenue gains.

Second, and of even greater concern, much of the states’ success

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82 See infra notes 94-104 and accompanying text; Zelinsky, Efficiency and Income Taxes: The Rehabilitation of Tax Incentives, 64 Tex. L. Rev. 973, 1027 n.106 (1986).
84 See Miscellaneous Tax Bills, supra note 5, at 58 (Statement of Senator Kerry); Lerman, supra note 13, at 325 (acknowledges that the principal goal of amnesty is to raise revenue but contends that, relying on the states’ experiences with amnesty, the net revenue from a federal tax amnesty would only be $1 billion).
85 In 1985, California collected $27.2 billion in taxes. California Franchise Tax Board, California Amnesty Program 5 (1986). California’s gross amnesty revenues totalled $154 million. Id. at 21 (November 1986).
86 See Ross, supra note 5, at 157.
87 According to the Massachusetts Department of Revenue, allocations to the Department were increased by 50% for the two year period immediately preceding and coinciding with amnesty. Miscellaneous Tax Bills, supra note 5, at 236 (report of Massachusetts Department of Revenue). While other commentators have noted that Massachusetts raised its enforcement budget only 30% in the year amnesty took place, the two year figure of 50% is more illuminating since Massachusetts’ amnesty was but one component of the state’s two year long comprehensive Revenue Enhancement and Protection (REAP) program. See Ross, supra note 5, at 171 (noting a budget increase of 30%); Miscellaneous Tax Bills, supra note 5, at 226 (report of Massachusetts Department of Revenue).
is illusory. The California Franchise Tax Board estimated that 78% of the $154 million in amnesty proceeds would have been collected eventually, even without an amnesty;\footnote{See California Franchise Tax Board, California Amnesty Program at 21 (November 1986).} similarly, Illinois officials estimate that 75% of the $160.5 million collected would have been collected without amnesty.\footnote{See Ross, supra note 5, at 167.} Viewed in this light, the success of even the most lauded state amnesties seems questionable. Other less successful programs may be even more suspect.\footnote{Lerman, supra note 13, at 326.}

With this perspective on state amnesty results, it seems clear that even the most successful federal amnesty would not come close to solving the nation's budget problems. In fact, amnesty proponents tacitly admit this fact; estimates are that a federal amnesty would bring in no more than $15 billion.\footnote{See Miscellaneous Tax Bills, supra note 5, at 160 (testimony of Dennis Ross, Deputy Tax Legislative Counsel, Treasury Department).} This $15 billion, though a considerable sum, represents only 12.5% of the fiscal year 1990 budget deficit of $123.8 billion and a scant 1.5% of annual federal revenues.\footnote{The fiscal year 1989 budget deficit of $152 billion was reduced to $123.8 billion in fiscal year 1990. H.R. Doc. No. 101-22, 101st Cong., 2d Sess. 2 (1990) (Budget of the United States Government for fiscal year 1991). The estimated total receipts collected by the United States government in fiscal year 1990 equalled $1,073.5 billion. Of this total, 43% was collected through individual income taxes, 11% was collected by corporate income taxes, 34% was from social insurance receipts, 5% was from borrowing, 3% was from excise taxes and 4% came from other sources. Id.} If the states' experiences are any guide, approximately 75% of the $15 billion would be raised even without amnesty, meaning that amnesty itself would actually raise only about $4 billion. By comparison, the $5 billion decrease in revenue accompanying a 1% drop in the compliance rate makes the amnesty a poor risk if it causes lower compliance.\footnote{A more accurate measure of the risk exposure of a drop in compliance would be to account for the presumably continuing lower compliance. That is, the amnesty revenue must be "capitalized" for accurate comparison. If the amnesty revenue is capitalized over a relatively short period, e.g. five years, at a rate of 7%, an annual revenue decrease on the order of one billion dollars would more accurately describe the break even point if amnesty revenues were on the order of four billion dollars. This one billion dollar decrease in revenue translates to a drop in the compliance rate of about 0.2%. To be fair and consistent in analysis, the increased revenue stream from the newly law abiding amnesty participants would result in increased revenue estimates. With small exception, amnesty proponents have ignored this possibility. See Leonard & Zeckhauser, supra note 13, at 69.} The relatively small monetary rewards simply are not worth the considerable possibility
that amnesty would actually decrease compliance rates. The utility of an amnesty in that case would be nil.

As an additional concern, the relative costs of an amnesty cannot be accurately compared with the costs of enforcement. First, the cost savings, if any, associated with an amnesty would probably be transitory in nature because it is a one-time affair.\textsuperscript{84} Second, all agree that enforcement efforts after an amnesty should be enhanced or increased.\textsuperscript{86} The threat of future enhanced enforcement makes participation in an amnesty more attractive than continuing evasion.\textsuperscript{88} A non-complying taxpayer must feel an imminent danger of discovery if he or she does not participate.\textsuperscript{97} This increased enforcement, however effective it may be, will be costly and must be factored in the evaluation of amnesty’s cost effectiveness. Even without the cost consideration, the cumulative effect of amnesty combined with increased enforcement cannot be accurately attributed to either. Thus, the comparison of amnesty costs to current enforcement efforts is inapt and cannot yield a meaningful result.

2. \textit{Adding to the Tax Rolls}

In theory, amnesty provides an incentive for those not paying taxes at all to come forward, pay taxes owed, and have their names added to the tax rolls. According to this scenario, the government gains not only an immediate revenue windfall, but also realizes an increased tax base. However, in many states, amnesty programs did not significantly enlarge the tax rolls. For example, in Illinois, only 25\% of amnesty participants were non-filers;\textsuperscript{98} in California,

\textsuperscript{84} See Readings on Income Tax Administration 536 (P. Kelley & O. Oldman eds. 1973); But see, Pepper, supra note 53, at 546.

\textsuperscript{86} See Mikesell, supra note 5, at 521 (1986); Ross, supra note 5, at 153-157; Guttman, IRS Tax Amnesty, 22 Tax Notes 1361 (March 26, 1984); Pepper, Tax Amnesties, supra note 53, at 544.

\textsuperscript{88} See Mikesell, supra note 5, at 521; Ross, supra note 5, at 153-157; Guttman, supra note 95. The Massachusetts amnesty program was part of a comprehensive plan to increase compliance through aggressive enforcement. See Dukakis, Tax Amnesty Is Not Unfair, Wash. Post, Mar. 15, 1986, at 1, col. 2.

\textsuperscript{97} One commentator has suggested that amnesty would work best if aggressive pre-amnesty measures were taken to demonstrate government seriousness in collecting taxes. Pepper, supra note 53, at 549.

\textsuperscript{98} Miscellaneous Tax Bills, supra note 5, at 90 (testimony of Alan J. Dixon, U.S. Senator, Illinois).
the figure was 27%.99

A federal amnesty might be even less successful in this regard than were the state programs. IRS studies have shown that more than 90% of persons who came forward under state amnesty programs were already federal filers.100 This figure is in line with estimates that 70% of the tax gap is attributed to taxpayers who file returns but who underreport income.101 Further, since federal tax obligations are generally significantly higher than state tax obligations, tax evaders likely owe much more to the IRS than to state tax agencies. Therefore, participation in a federal amnesty would cost much more than participation in a state amnesty. Practically speaking, citizens may have a greater economic incentive to continue evading their federal taxes.102 As a result, a federal amnesty would probably see lower participation levels and fewer new names on the tax rolls than did the state programs.

Finally, adding to the tax rolls through a federal tax amnesty is an unrealistic objective because much of the income that goes unreported is derived from illegal activities.103 Prior state amnesties have not addressed directly the scope of tax amnesty. The various state programs appear to forgive punishment only for tax related crimes arising in connection with non-compliance (i.e., tax code violations). More difficult is the problem of non-compliance associated with substantive crimes.

Much tax crime is related to other illegal activities; criminals don’t pay taxes on illegally earned income for fear their substantive crimes will be revealed. It is well documented that drug dealing, theft and prostitution generate large amounts of taxable income which is unreported.104 An amnesty could allow criminals to

99 California Franchise Tax Board, California Amenity Program 48 (November 1986). Illinois’ first tax amnesty raised little revenue - a fact that may be attributed to Illinois’ limitation of participation in the amnesty to non-filers. Ross, supra note 5, at 166 n.66.
100 Miscellaneous Tax Bills, supra note 5, at 160 (testimony of Dennis Ross, Deputy Tax Legislative Counsel, Treasury Department).
102 Aaron & Galper, Assessing Tax Reform 42 (The Brookings Institution 1985) (increase in marginal rates of taxation makes tax avoidance profitable); Mikesell, supra note 69, at 41-47 (taxpayer cost of compliance significantly affects compliance rates).
103 See ABT Associates, supra note 76.
104 D. Witte, The Underground Economy in the United States and Western Europe in Examination of Basic Weaknesses of Income as the Major Federal Tax Base 204, 220-21 (R. Lindholm, ed.) (1986); ABT Associates, supra note 76 at 108, 147 (estimating that the unre-
escape tax penalties for not reporting their illegal income. 106 Yet, to date, state amnesty plans and the proposed federal amnesty plans do not include immunity provisions for the underlying substantive crimes which account for the unreported income. Thus, a taxpayer whose income is derived from illegal means may have civil and criminal tax penalties absolved by the tax amnesty but would remain theoretically liable for the substantive crime. 106 Given this scenario, it is highly unlikely the tax rolls will be augmented by those whose income is procured through criminal activities.

Some state plans and proposed federal plans avoid the problem by excluding entirely from amnesty those taxpayers whose noncompliance is the result of illicit activities. 107 Given the already low level of tax compliance among those engaged in criminal activity, one would not reasonably expect such non-complying taxpayers to participate in any federal tax amnesty. If such is the case, then a decision to exclude criminals from amnesty may be well placed. At the same time, by completely eliminating the opportunity for non-

ported taxable income in 1982 related to drugs was $22.15 billion, to gambling was $2.39 billion, and to prostitution was $11.58 billion).

106 None of the state programs or proposed federal programs appear to take into account the possibility that conviction of tax crimes may be the only feasible means of prosecuting a taxpayer who for some reason or another successfully evades punishment for a substantive non-tax crime. The infamous Al Capone is a good example. Capone, a Chicago gangster, was indicted and convicted of wilfully attempting to evade and defeat income tax laws from 1922-1930, stemming from income generated through illegal casinos and liquor sales. Capone's income totaled $1,036,655.84 between 1925-1929 and the tax assessment amounted to $219,260.12, with a penalty of $164,455.09. J. Kobler, Capone 114 (1971); J. Mulroney, For the Prosecution 109 (1933).

107 Taxpayers remain liable for the payment of taxes from illegal activities. United States v. Sullivan, 274 U.S. 259 (1927); James v. United States, 366 U.S. 213 (1961). While fifth amendment concerns with respect to compulsory incrimination on tax returns have been answered judicially with the admonition that taxes remain due, taxpayers may nonetheless claim fifth amendment privilege with respect to the source of income. Garner v. United States, 424 U.S. 648, 663 n.18 (1976). However, a taxpayer may not make a blanket refusal to file a return or to pay taxes simply because the evidence obtained may be used in a later criminal investigation. United States v. Daly, 481 F.2d 28 (8th Cir.) cert. den., 414 U.S. 1064 (1973). Whether source disclosure could be required in an amnesty program is an interesting and unresolved question. By analogy, the federal government could theoretically condition participation in an amnesty on the disclosure of source information under the theory that amnesty, being voluntary, lacks the requisite element of compulsion. On the other hand, amnesty operates as a kind of tax return substitute so that condition amnesty participation upon the disclosure of what would otherwise be constitutionally protected might exceed the government's authority.

107 See supra notes 23 & 50 and accompanying text.
taxpaying criminals to come forward and avoid punishment at least for their tax crimes, the stated goal of adding to the tax rolls will be further diminished.

3. Increasing Voluntary Compliance

Amnesty proponents claim that, in the long run, amnesty increases voluntary tax compliance. To support this contention they cite several state amnesty success stories. Massachusetts, for example, experienced a substantial growth in revenue in the years following its amnesty program that could not be explained by growth in GNP, income, or inflation.\textsuperscript{108} State officials attributed a “substantial percentage” of that revenue growth to the effects of tax amnesty.\textsuperscript{109}

However, some non-amnesty states have experienced similar rises in compliance after having increased their enforcement efforts. Ohio, for instance, rejected a proposed amnesty, and instead enacted tougher tax enforcement provisions.\textsuperscript{110} Ohio has since reported that its crackdown increased voluntary compliance with state tax laws.\textsuperscript{111}

The comparison between Massachusetts and Ohio is complicated by the fact that Massachusetts’ amnesty program also provided for significant increases in enforcement. This illustrates the difficulty inherent in trying to isolate the causes of increases in voluntary compliance. Ohio’s experience suggests that Massachusetts’ success is at least partially attributable not to amnesty itself, but to its stepped up enforcement efforts. While it is possible that amnesty and stricter enforcement work together to raise compliance, it is at least equally likely that increased enforcement alone will achieve the desired result without jeopardizing compliance rates.

4. Amnesty Analogs

Voluntary disclosure can be viewed as merely a kind of perma-

\textsuperscript{108} Miscellaneous Tax Bills, supra note 5, at 98 (statement of Thomas D. Herman, First Deputy Commissioner, Massachusetts Department of Revenue).
\textsuperscript{109} Id.
\textsuperscript{110} State Tax Conference Focuses on Unitary, Mergers and Compliance, Tax Notes Today 89-114-2 (May 31, 1989).
\textsuperscript{111} Id.
nant amnesty policy. The tax statutes of limitation, because they are narrow in scope, do no intrude significantly into the public psyche. As such, neither voluntary disclosure or statutes of limitation merit special discussion. The remaining amnesty analog discussed above, the compromise of tax disputes, is different.

Compromises of tax liabilities serve a useful function by allowing the tax collector to assess the cost and benefits of prosecuting particular taxpayers. In such assessment the costs, including resources spent for prosecution as well as the loss of deterrent effect if the case is lost, can be weighed against the benefits, including revenue gain and the possibility of serving retributive and deterrent goals of punishment. Because this process is limited to certain taxpayers, its limited use would not normally be expected to undercut as much the fabric of compliance. Moreover, the settlement of tax controversies centers about the resolution of legal and factual disputes. Thus compromises of tax liability are more nearly harmonious with existing tax policy.

C. Fairness

The tax system in the United States is a major vehicle of social and economic policy. The tax system exists to raise revenue and to ensure stable economic growth while maintaining vertical equity (distributing the incidence of tax fairly by income classes) and horizontal equity (treating those in similar economic circumstances equally). A tax amnesty, by allowing those who cheat on taxes to escape liability for their transgressions, disrupts the system’s horizontal equity because it treats those occupying similar economic circumstances unequally. Some commentators suggest that horizontal equity will be enhanced with a federal tax amnesty because former tax cheats will come forward to pay their taxes and thus

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112 See infra notes 126-206 and accompanying text.
114 See J. Pechman, Federal Tax Policy 2 (5th ed. 1987); see J. Witte, supra note 8.
115 See Miscellaneous Tax Bills, supra note 5, at 178 (Statement of David R. Burton, U.S. Chamber of Commerce).
bear their fair share of the tax burden.\textsuperscript{116} However, allowing cheats to escape liability for tax evasion seems a poor equity substitute.\textsuperscript{117}

Inextricably woven into the fabric of our tax system is a fundamental notion of fairness.\textsuperscript{118} A postulate of any system of taxation is that the burden of paying the tax should be borne equally or that the burden should at least be levied in a consistent and rational fashion.\textsuperscript{119} Lawmakers often cite fair distribution of the tax

\textsuperscript{116} Ross, supra note 5 at 151.

\textsuperscript{117} See J. Mill, Utilitarianism, ch. V, \textit{reprinted in} Bentham & Mill, The Utilitarians 448-70 (1961) ("The precept of returning good for evil has never been regarded as a case of the fulfillment of justice . . . .").

\textsuperscript{118} Perception of the present system of taxation as fundamentally unfair often is cited as a root cause of avoidance of tax obligations. See infra notes 194-204. A pre-Christian tax reformer, Manu, was among the first to point out the inequity of uniform or "flat" rate taxes. G. Carson, The Golden Egg 13-14 (1977); see Graetz, To Praise the Estate Tax, Not to Bury It, 93 Yale L.J. 259 (1983); Bankman & Griffith, Social Welfare and the Rate Structure: A New Look at Progressive Taxation, 75 Cal. L. Rev. 1905 (1987). The advent of the simplified two-tier rate structure created by the Tax Reform Act of 1986 would perhaps disappoint Manu with the little progress made. But see Blum & Kalven, The Uneasy Case for Progressive Taxation, 19 U. Chi. L. Rev. 417 (1952).


The Constitution prohibits direct taxes unless such taxes are levied in proportion to the populations of the states. U.S. Const. art. I, § 9, cl. 4. The second United States federal income tax was held unconstitutional because, as a direct tax, it was not levied in proportion to the states' populations. Pollack v. Farmers Loan & Trust Co., 157 U.S. 429 (1895), on rehearing 158 U.S. 601 (1895). The constitutional prohibition against disproportional direct taxes apparently had its genesis in the concern that the levy of taxes be fair and consistent. See Pollack 157 U.S. at 533-86, 158 U.S. at 617-37. Of course, the sixteenth amendment overrules the result in \textit{Pollack} by expressly providing for an income tax despite the section 9 prohibition. Pennsylvania Mut. Indem. Co. v. Commissioner, 277 F.2d 16, 19-20 (3d Cir. 1960). The author assumes that any federal tax amnesty would be consistent with art. 1, § 9 and with the sixteenth amendment.

The Constitution requires that "all duties, impost and excises shall be uniform throughout the United States . . . ." U.S. Const. art. I, § 8. Literally absent from this uniformity requirement is the power to lay and collect taxes other than the indicated duties, imposts and excises. Despite the possibility that this apparent omission suggests inequity or unfairness, the Supreme Court has held that this omission is a recognition that as long as taxes are geographically uniform they may apply to particular individuals in a non-uniform manner. Knowlton v. Moore, 178 U.S. 41, 83-109 (1900); see Tribe, American Constitutional Law 245 (1977); C. Parkinson, The Law and the Profits 45-46 (1960).
burden as a central concern in enacting tax legislation.\textsuperscript{120}

Fairness is essential to the system because it increases taxpayer morale and enhances voluntary compliance.\textsuperscript{121} Yet, even when the system is fair, the power to tax inevitably results in resistance.\textsuperscript{122} It follows therefore, that where there is perceived inconsistency or unfairness in the system, the public's reaction is even stronger and more negative.\textsuperscript{123}

A federal tax amnesty may well add to the pervasive belief that the system of taxation is unfair. Amnesty would reward those who have broken the law at the expense of the law abiding. The real issue to be confronted is whether the cost of an amnesty, and the perceptions of inequity it would foster, is prohibitive.

The success of a tax amnesty is determined in part by its effects on existing tax enforcement mechanisms. A primary method of enforcement within the tax system is punishment through the system of criminal and civil penalties. Tax penalties are said to establish the fairness of the tax system by giving the noncompliant taxpayer what she deserves.\textsuperscript{124} A tax amnesty, by excusing civil and criminal penalties for avoidance of tax obligations, effectively severs the relationship between crime and punishment and compromises the


\textsuperscript{122} See Guttman, supra note 95. This resistance to what appears to be socially fundamental has led some to suggest that "[a]n across the board attack on the budgetary base is equivalent to revolution." Webber & Wildavsky, A History of Taxation and Expenditure in the Western World 31 (1986). Notwithstanding (or perhaps by reason of) the revolutionary aspect of resistance to taxation, the United States enjoys an extensive tradition of avoiding the tax collector. D. Forsythe, Taxation and Political Change in the Young Nation 1781-1833 (1977); Haws, A Brief History of American Resistance to Taxation, in Income Tax Compliance 113 (ABA 1983); C. Parkinson, The Law and the Profits 22-35 (1960). Of course, one person's perception of tax equity is another's unfairness or inconsistency. See Bittker, Income Tax "Loopholes" and Political Rhetoric, 71 Mich. L. Rev. 1099 (1971).

\textsuperscript{123} Edmund Burke once noted that "[t]o tax and to please, no more than to love and be wise, is not given to men." Burke, quoted in Webber & Wildavsky, A History of Taxation and Expenditure in the Western World 1 (1986).

fairness of the tax system.\textsuperscript{125} This effect should not be taken lightly. To the extent that punishment is fair, amnesty is unfair. Accordingly, amnesty should be examined for its consistency or inconsistency with the traditional justifications for punishment.

IV. PUNISHMENT AND AMNESTY

That crime should be punished is intuitively fair. In addition to ensuring fairness, punishment may accomplish other, more utilitarian purposes. Professor Hall, in his influential work "General Principles of Criminal Law" justifies punishment on the grounds that it serves rehabilitative, retributive, and deterrent functions.\textsuperscript{126} If amnesty undermines the objectives of punishment, then it makes little sense and can be said to be unfair. Therefore, amnesty must be examined in relation to the traditional justifications for punishment.\textsuperscript{127}

A. Rehabilitation

At the outset, rehabilitation as a justification of punishment for tax wrongdoing is inappropriate. According to the rehabilitative ideal, the primary purpose of penal treatment is to reform the character, attitudes and behavior of convicted offenders; not only to prevent future crimes, but also for the offender's benefit.\textsuperscript{128} It focuses neither on the crime committed nor on the overall utility to society, but instead on the needs of the particular offender.\textsuperscript{129}

Criticism of rehabilitation as justification for punishment has in-


\textsuperscript{127} Traditionally, the three main theories of punishment have been considered separately; i.e., a retributionist would reject deterrence and rehabilitation as justifications for punishment. See J. Hall, General Principles of Criminal Law 303 (2d ed. 1960); Mabbott, Punishment, 48 Mind 152, 158 (1939) cited in J. Hall, General Principles of Criminal Law 308 (2d ed. 1960). Within the last several decades, however, this has begun to change and several "inclusive" theories of punishment have emerged. See, e.g., J. Hall, General Principles of Criminal Law 308 (2d ed. 1960); A. von Hirsch, Doing Justice 15 (1976); Gardner, The Renaissance of Retribution-An Examination of Doing Justice, 1976 Wis. L. Rev. 781 (1976).


\textsuperscript{129} A. von Hirsch, supra note 127, at 14.
creased in recent years; support for rehabilitation began a precipitous decline in the mid-70's, and continues to lose credibility.130 The lack of enthusiasm for rehabilitation can be attributed to two factors.

First, statistics indicate that rehabilitation is not particularly effective in preventing recidivism.131 A tax amnesty, however, may actually be effective in preventing recidivism, at least as to amnesty participants. As indicated above, the beneficiary of the amnesty remains exposed to the possibility of committing the same crime.132 A tax amnesty will not do away with the obligation to pay taxes in periods subsequent to the amnesty; beneficiaries of the amnesty will still be responsible for filing returns and paying taxes. While exposed to the temptation to commit further wrongs, an amnesty participant may well be more compliant with the tax laws under the belief that she will be subject to heightened scrutiny subsequent to the amnesty.133 In this sense, amnesty is consistent with the rehabilitative ideal.

Second, serious ethical concerns about rehabilitation remain unresolved. Rehabilitation allows for dissimilar penalties because it focuses on the make-up of the individual offender.134 This runs counter to the belief that the tax system should be horizontally equitable, that taxpayers in identical economic circumstances should be treated identically.135 Taxpayers would view as unfair any attempt to isolate particular taxpayers and provide them with

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130 See F. Allen, The Decline of the Rehabilitative Ideal 5-7 (1981). Allen posits that rehabilitation's loss of credibility has been caused as much by changing social and political causes as by any rational disenchantment with rehabilitation itself. Id. at 10. In effect, Allen argues, echoing President Carter, that a national “malaise” has caused Americans to lose faith in the possibility that criminals can be reformed. Id. at 18-19.

131 A. von Hirsh, supra note 127, at 13-18 (1976). It seems that personal factors, rather than the form of treatment, are generally more important in determining whether a particular criminal can be “reformed.” Id.

132 See supra note 20 and accompanying text.

133 See Mikesell, supra note 5, at 507 (1986); Ross, supra note 5, at 153-57; Guttman, supra note 96; Pepper, supra note 53, at 544.


135 J. Pechman, supra note 113, at 5 (5th ed. 1987); see J. Witte, supra note 8, at 31.
better or worse treatment.\textsuperscript{136}

The foregoing supports the idea that rehabilitation is not a significant concern in the evaluation of punishment for tax cheats.\textsuperscript{137} With the focus of tax penalties on retribution and deterrence, neglect of rehabilitation as a factor in justifying punishment is acceptable.

\textbf{B. Retribution}

Retribution is the oldest theory of punishment.\textsuperscript{138} Retribution is not founded on any utilitarian ideal because it does not seek to accomplish anything beyond giving the criminal what he deserves.\textsuperscript{139} Rather, retribution is retrospective and finds its justification in the criminal's past acts.\textsuperscript{140}

Because our tax system depends on voluntary compliance, it is largely dependent on taxpayer belief that the system is fair.\textsuperscript{141} Tax evaders receive the punishment they deserve, no more, no less.\textsuperscript{142}

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\textsuperscript{138} LaFave and Scott, Criminal Law 25 (2d ed. 1986). It is reflected, for example, in the idea of "an eye for an eye" expressed in the Code of Hammurabi. Code of Hammurabi § 196, cited in H. Boecker, Law an Administration of Justice in the Old Testament and Ancient East 122 (1976). Put in more modern terms, there are two considerations in determining what persons who break the law deserve: liability and moral desert. K. Moore, Pardons, Justice, Mercy and the Public Interest 122 (1989). That is, punishment is inapt without liability or profit. Thus amnesty is appropriate in such circumstances. This first aspect of this formulation is obvious - if a person is legally innocent or innocent because he is "incapable of responsible wrongdoing", amnesty is justified because there is no liability. K. Moore, Pardons, Justice, Mercy and the Public Interest 132 (1989). The second aspect is consistent with a pure retributive just deserts approach - a person can also be given amnesty if he has gained nothing tangible or intangible from his crime, because he gained no unfair advantage through his wrongdoing and does not deserve to be punished. K. Moore, Pardons, Justice, Mercy and the Public Interest 143-44 (1989).
\textsuperscript{140} See, e.g., Bogart, supra note 139, at 426 (1987); Executive Task Force, supra note 124, at 1.
\textsuperscript{141} See supra notes 68, 118, 121 & 123 and accompanying text.
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Tax penalties are thus retributive, ensuring, in theory at least, that those who fail to meet their tax obligations get their just desserts. If retribution is justified, the corollary must be that amnesty is not justified. By excusing punishment, amnesty overlooks the tax offender’s transgressions and ignores the retributive ideal. The reality, however, is that many citizens already believe that tax cheats do not get what they deserve. This perception underlies the pervasive belief that the system is not fair. A federal tax amnesty, by excusing “deserved” punishment, would only strengthen this belief.

Immanuel Kant is generally credited with expressing the modern conception of the retributive ideal. In essence, he argues that the criminal deserves punishment because he has freely “willed” a punishable action. Retribution returns “like for like;” that is, the punishment imposed must be proportional to the offense committed.


Executive Task Force, supra note 124, at 2. A recent IRS study underscores the fact that tax penalties, while serving a deterrent function, are also intended to be retributive. Id.; see, M. Saltzman, IRS Practice and Procedure 7-3 (1981).

See L. Yudkin, A Legal Structure for Effective Tax Administration 61 (1971); Executive Task Force, supra note 124, at 1-2.

See, e.g., Pillsbury, Emotional Justice: Moralizing the Passions of Criminal Punishment, 74°Cornell L. Rev. 655, 658 (1989); Murphy, The Significance of Victim Harm: Booth v. Maryland and the Philosophy of Punishment in the Supreme Court, 55 U. Chi. L. Rev. 1303, 1307 (1988); Goldman, Beyond the Deterrence Theory: Comments on Van Den Haag’s “Punishment as a Device for Controlling the Crime Rate”, 33 Rutgers L. Rev. 721, 723 (1981); but see Murphy, Does Kant Have A Theory of Punishment? 87 Col. L. Rev. 509, 532 (1987) (Kant’s copious writings on subject may be no more than a series of “random remarks”).

I. Kant, The Metaphysical Elements of Justice 105 (J. Ladd trans. 1965). Hegel justifies a retributive theory of punishment on somewhat different, but related grounds. According to Hegel, punishment serves to right a wrong; it annuls the crime committed and restores law. Hegel, Philosophy of Right 70-72, 141 (T. Knox Trans. 1952).

It follows that the only appropriate punishment for a murderer, according to Kant, is death. Id. at 102. Kant does not, however, intend that proportional mean either proportionately deterrent or proportionately immoral (i.e., he does not advocate the torture of a torturer). Id.; see also Murphy, supra note 145, at 530-31.

Some commentators assert that Kant’s theory of retribution seeks to maintain a moral equilibrium. When a person fails to exercise self-restraint, and infringes on another’s freedom, she voluntarily gains an unfair advantage over others who have restrained themselves. The transgressor therefore deserves to be punished in order to restore the balance; having taken an unfair advantage, she owes a debt to society. H. Morris, On Guilt and Innocence
This Kantian ideal of proportionality represents an intuitive concept of justice that punishment should be commensurate with the seriousness of the crime.\textsuperscript{148} This concept of proportionality is incorporated in the tax penalty system.\textsuperscript{149} Penalties for tax offenses should be equitable, and to be equitable, they must be proportional.\textsuperscript{150}

The relationship between amnesty and retribution, however, is more subtle and complicated than this simple equation suggests. The premise that retribution justifies punishment is not universally accepted. Indeed, for the first six decades or so of this century, the theory was considered by most to be barbaric and anachronistic.\textsuperscript{151} Therefore, any conclusion about amnesty in relation to retribution must be considered in light of the most common criticisms of the retributive theory.

The greatest objection to the retributive theory of punishment is that it is morally indefensible. This argument is often founded on utilitarian ideals; critics argue that the infliction of suffering is not

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33-34 (1976); K. Moore, Pardons, Justice, Mercy and the Public Interest 143-44 (1989). This interpretation, however, is not universally accepted. See Murphy, supra note 145, at 516-18 (1987).

\textsuperscript{148} See Solem v. Helm, 463 U.S. 277, 284-88 (1983) (the Court has long recognized the Constitutional principle of proportionality); Murphy, supra note 148, at 532 (1987). This intuitive nature is reflected, for example, in Lord Justice Denning’s report to the Royal Commission on Capital Punishment: “The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not . . . .” Royal Commission on Capital Punishment, Minutes of Evidence, Ninth Day, Dec. 1, 1949, at 207 (Memorandum Submitted by the Rt. Hon. Lord Justice Denning). The U.S. Supreme Court, quoting Lord Justice Denning’s remarks, has cited retribution as justifying capital punishment. Gregg v. Georgia, 428 U.S. 153, 184 (1976).

\textsuperscript{149} Executive Task Force, supra note 124, at 2. According to one IRS official, the proliferation of tax penalties over the past decade has created a situation in which penalties are more severe than the conduct punished warrents. Meriary and Guttman, IRS Official Discloses New Penalty Study, 39 Tax Notes 1371 (June 20, 1988). Recognizing this phenomenon, former IRS Commissioner Kurtz and others agree that the penalty provisions of the Internal Revenue Code should be revised so that the severity of penalties is commensurate with the seriousness of the act being punished. Kurtz, Penalty Revision and the Case for Section 6661, 42 Tax Notes 1617, 1618 (Mar. 27, 1989).

\textsuperscript{150} Executive Task Force, supra note 124, at 2-3. The gravity of the tax avoidance, the motivations of the taxpayer and other factors are considered when determining what punishment is appropriate. Id. at 4.

justified unless its benefits to society outweigh the suffering it
causes. 152 Jeremy Bentham, the utilitarian philosopher and lawyer,
analyzed punishment from this perspective. He believed that laws
and legal institutions serve the public welfare and that punishment
is necessary to deter criminals from crime and, hence, foster the
happiness and health of society. 153 Under this theory, amnesty
could be justified if the harm caused to society by imposing pun-
ishment were greater than that caused if punishment were
eliminated.154

Utilitarian critics of retribution might thus contend that am-
nesty has no associated disadvantage. Not only would society avoid

152 See, e.g., J. Bentham, An Introduction to the Principles of Morals and Legislation, in
Bentham & Mill, The Utilitarians 162, 166 (1961). A second, more broadly based, philosop-
ical objection is that man has no right to judge and punish the actions of his fellow men.
"Vengeance is mine, saith the Lord." Romans 12:19. In a similar vein, Blackstone states that
atonement or expiation "must be left to the just determination of the Supreme Being." 4
Blackstone, Commentaries 11.

It also has been argued that since our capitalist society is inherently unfair, immoral, and
unjust, "retributive justice" is, in fact, a contradiction in terms. See Murphy, Marxism and
Retribution, 2 Phil. & Pub. Affairs 217 (1973). An analysis of this criticism of retribution
depends on a value judgement that is not specific either to the system of taxation or to the
concept of amnesty. As such it is beyond the scope of this article.
153 See Bentham, supra note 152.

Hegel's views on deterrence as justifying punishment differ sharply: "To base a justifica-
tion of punishment on threat is to liken it to the act of a man who lifts his stick to a dog. It
is to treat a man like a dog instead of with the freedom and respect due to him as a man."
Hegel, Philosophy of Right 246 (T.Knox Trans. 1952). An attempt to reconcile the views of
Bentham and Hegel, however, is beyond the scope of this article.
154 K. Moore, supra note 147. In weighing costs and benefits, Bentham looked to the so-
cial costs of punishment. For example, it might be wise to forgo punishment in the follow-
ing situations: where a large number of people commit a crime (e.g., draft evasion); where a
person commits a crime but can render such a great service to the community that impris-
onment would be a great loss; or where punishing a criminal would so anger a foreign coun-
try that the nation would be endangered. Bentham, The Principles of Morals and Legisla-
tion 171-172 (1948); Id.

Another rationale for amnesty is that it reflects a balance between the rule of law and
forgiveness.

"By going beyond the strict rule of law to overlook an offense, an act of amnesty
reflects flexibility in the hierarchy of values within a society. Although the rule of law
is a strong value consideration in our society, an act of amnesty may be undertaken in
the spirit that laws are imperfect servants of men [and] amnesty is an expression . . .
of the temporary predominance of one social value (forgiveness, reconciliation) over
another social value (rule of law). Amnesty is a recognition that sometimes and in
some situations it is healthier for the society to forgive offenses than to risk a contin-
uesance of resentment and hatred from within."
6, 1972).
needless punishment and suffering, but it would also benefit from the most prominent positive effects of a tax amnesty — a revenue windfall, increased tax base, and higher compliance rates. As discussed above, whether a federal amnesty would in fact achieve these objectives is at best doubtful.\footnote{See supra notes 85-112 and accompanying text.} Looking at the issue pragmatically, however, people crave retributive justice, whether it is morally justified or not, and lose faith in the system if they perceive that justice is not done.\footnote{An attempt by the Swiss Parliament in 1965 to enact a tax amnesty was rejected by popular referendum because of public distaste for treating tax cheats favorably at the expense of discouraging honest taxpayers. Pepper, supra note 53, at 550. One commentator has noted that any amnesty is inherently inequitable. Id. at 445. Public sentiment, as reflected in recent legislative enactments, seems increasingly to favor retribution. For example, the 1976 amendment to California’s Penal Code provides: “The Legislature finds and declares that the purpose of imprisonment for Crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense . . . .” Cal. Pen. Code § 1170 (West 1985). This is consistent with John Stuart Mill’s dictum that “[t]he precept of returning good for evil has never been regarded as a case of the fulfillment of justice . . . .” J. Mill, Utilitarianism ch. V, reprinted in Bentham & Mill, The Utilitarians 449 (1961).} Oliver Wendell Holmes observed that punishment is justified in part because it satisfies the public’s desire for revenge.\footnote{O. Holmes, The Common Law 40-42 (1881). Holmes does, however, also express doubts as to whether retribution should in fact justify punishment. Id. at 42-45. He concludes that prevention seems “the chief and only universal purpose of punishment.” Id. at 46.} Holmes theorized that by “channelling” society’s desire for vengeance, retribution discourages vigilantism and strengthens the rule of law.\footnote{Id.} Thus, the benefits to society of retaining punishment for tax evasion for its retributive effect may largely outweigh the harm that would be caused by eliminating punishment. Further, the long and short term effects of the loss of faith in the tax system could be devastating and could greatly outweigh the immediate economic benefits realized by an amnesty. In a sense, utility justifies retribution. It fosters perceptions of fairness - which increases confidence in the tax system and society in general.

C. Deterrence

Deterrence theory provides another, essentially utilitarian, justi-
fication for punishment. With a purely deterrent model of punishment, the focus is away from giving the wrongdoer his just desserts; moral culpability, proportionality, and the gravity of the harm are irrelevant in determining the type and degree of punishment. Instead, the aim is to inflict enough pain to deter the commission of unlawful acts; or, as Bentham put it, "[t]he punishment must be more an object of dread than the offence is an object of desire." In this same spirit, a prime objective of tax penalties is to deter tax evasion.

Deterrence theory posits that undesirable behavior can be prevented by first threatening and then imposing punishment. In contrast, amnesty's aim is to encourage desirable behavior, that is, the payment of what the tax laws oblige. By excusing punishment, however, a tax amnesty may actually encourage the behavior tax penalties are designed to deter. Thus amnesty appears fundamentally opposed to the basic premise of deterrence and it may well diminish the deterrent effect of tax penalties.

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159 In his work On Crimes and Punishments, Cesare Beccaria declared that "[t]he purpose (of punishment) can only be to prevent the criminal from inflicting new injuries on (the State's) citizens and to deter others from similar acts." C. Beccaria, On Crimes and Punishments 42 (H. Paolucci trans. 1963). Jeremy Bentham expanded on this idea. He postulated that punishment is itself an evil, and therefore that the only valid justification of punishment is that it may prevent greater evils. J. Bentham, supra note 153, at 166 (1961).

160 See J. Hall, General Principles of Criminal Law 306-307 (2d ed. 1960). Such a purely utilitarian approach is subject to the criticism that it would allow punishment beyond that deserved, or even for the punishment of innocents, if this would successfully deter a greater number of potential criminals. See H. Packer, The Limits of the Criminal Sanction 64-66 (1968); J. Andenaeus, Punishment and Deterrence 77 (1974); Goldman, Beyond the Deterrence Theory: Comments on Van Den Haag's "Punishment as a Device for Controlling the Crime Rate," 33 Rutgers L. Rev. 721, 722 (1981). Bentham, addressing this dilemma, states that maximization of happiness requires that the least evil means be used that will accomplish the desired objective. J. Bentham, Rationale of Punishment 28-29 (1830) cited in J. Hall, General Principles of Criminal Law 312-13 (2d ed. 1960). According to Bentham, "[i]f hanging a man in effigy, would produce the same salutary impression of terror upon the minds of the people, it would be folly or cruelty ever to hang a man in person." Id (emphasis in original).

161 J. Bentham, supra note 153.

1. Deterrence Theory and Amnesty

Under modern deterrence theory, punishment has both specific and general components. Specific deterrence (sometimes called "prevention") focuses on the actual effect of punishment on an individual in the future.¹⁶³ Specific deterrence is a strictly limited concept applicable only to the already identified and convicted offender.¹⁶⁴ Because participants in a tax amnesty would be neither convicted nor punished there is no specific deterrent effect to analyze in relation to amnesty. Moreover, amnesty is by definition a broad based function and not individual in focus as is a pardon.

Philosophically, however, an amnesty might be said to have a specific deterrent effect, in the sense that although amnesty does not involve an identified wrongdoer, it may modify the future behavior of individuals.¹⁶⁵ This potential behavioral modification could have positive and negative compliance effects.

Through participation in an amnesty, the identified offender might recognize the economic and moral benefits of voluntary compliance. An amnesty could prevent noncompliance by increasing the fear of detection. Once a person admits to tax evasion by participating in an amnesty, it is likely the Service will monitor his tax activities in the future. With this in mind an amnesty participant will probably comply with, rather than evade, the tax laws in the future. Hence, a specific deterrent effect might be realized through an amnesty.

On the other hand, it is equally likely that the increased possibility of detection after participation in an amnesty might discourage initial participation by making amnesty less economically attractive. With this view, amnesty's specific deterrent effect would not be realized. While these opposed conjectures cannot be reconciled or resolved, it must be kept in mind that it remains inaccurate to describe as specific deterrence any effect on the tax-offender who never suffered the unpleasant experience of conviction and punishment.

¹⁶³ See J. Andenaes, supra note 134, at 9 (discussing individual versus general prevention); Report on Civil Tax Penalties, supra note 68, at 2; H. Packer, supra note 161, at 45.
¹⁶⁵ Of course, the modification of behavior without isolation and identification of individuals simply restates a component of general deterrence. See Henderson, supra note 164, at 988.
General deterrence is concerned with government's ability to compel the public at large to obey the law.\textsuperscript{168} Punishment acts as a general deterrent in two ways that are relevant here. First, it has a classic utilitarian deterrent effect: the threat of punishment is intended to outweigh the temptation to commit crime.\textsuperscript{167} For our purposes, this means that the potential tax offender, rationally weighing costs and benefits, should find the risk of punishment more compelling than the potential rewards of tax evasion.\textsuperscript{168}

Second, punishment, as a symbol of society's disapproval of criminal behavior, has a moralizing effect. By reinforcing the message that crime is wrong, punishment serves to strengthen moral inhibitions against crime.\textsuperscript{169} Likewise, tax penalties also serve to reinforce the message that tax evasion is wrong, hence, they strengthen moral and social inhibitions against tax evasion.\textsuperscript{170} By effectively doing away with punishment, a tax amnesty turns this premise on its head. A federal tax amnesty, thus, would clearly be antithetical to the general deterrent effect of tax penalties.

In a backhanded validation of the effectiveness of societal norms, noncompliance, whatever its motivations, has a cumulative effect. As noncompliance increases, its social acceptability likewise increases, which in turn leads to even greater noncompliance.\textsuperscript{171} Penalties for noncompliance disrupt this cycle by alerting others that tax evasion is not socially acceptable and that those who choose to evade will be punished. Again, amnesty defeats the salutary goals of tax penalties.

Penalties also increase the satisfaction of those who do pay their true taxes.\textsuperscript{172} By forgiving penalties for tax evasion, amnesty may

\begin{itemize}
\item \textsuperscript{168} See J. Andenaes, supra note 134, at 8; Report on Civil Tax Penalties, supra note 68, at 2; H. Packer, supra note 160, at 39.
\item \textsuperscript{168} See Report on Civil Tax Penalties, supra note 67, at 2.
\item \textsuperscript{169} See J. Andenaes, supra note 134, at 8; H. Packer, supra note 160, at 42-44; Report on Civil Tax Penalties, supra note 67, at 1.
\item \textsuperscript{170} See Report on Civil Tax Penalties, supra note 67, at 1.
\item \textsuperscript{171} See Guttmann, supra note 54.
\end{itemize}
decrease the social respect for compliance. The impression created is that tax evasion is not really morally reprehensible, at least not to the extent that it absolutely requires punishment. Amnesty's effect could be especially damaging, because of the already borderline status of the tax laws. Simply put, people generally have less respect for the tax laws than for other laws. Reducing or extinguishing moral inhibitions against tax evasion in this way, as an amnesty likely would do, will result in increased noncompliance with tax laws.

Deterrence, like retribution, raises ethical questions. Perhaps most problematic is the morality (or immorality) of using individual offenders as instruments of society. Because the criminal's culpability is irrelevant to determining the appropriate punishment, the possibility of unjust punishment looms. Moreover, the uniqueness of tax controversies center about resolution of legal and factual disputes. If clear standards of conduct are set down, and proportionate penalties for deviation are announced, the ethical problem can be avoided.

However, once the rules are established, they should not be changed in midcourse. Amnesty by making such a change is, in this sense, unethical and thus fundamentally unfair.

Amnesty is also plagued by related structural problems. Conventional wisdom suggests that a federal tax amnesty be a one-time occurrence, never to be repeated. There are, however, several flaws with this proposition. First, while the sincerity of the statement that amnesty would not be repeated need not be questioned, it is not certain that this is actually the case. Indeed the greater

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174 See J. Andenaes, supra note 134, at 77. Andenaes admits that where a particular crime is increasing dramatically, there exists a very real possibility that the courts may choose to make an example of the defendant. He then raises the interesting question whether the punishment should depend upon the publicity it will receive. Would it be ethical to sentence Donald Trump to ten years for tax evasion, and give John Doe 100 hours of community service for the same crime? Andenaes's answer is that this is acceptable only within very narrow limits. Id. at 77. He concludes that an ethical theory of deterrence: (1) may impose only proportionate penalties; and (2) must not violate the principle of equality before the law. Id. at 147.
175 Readings on Income Tax Administration, supra note 95, at 536; Pepper, supra note 53, at 546.
176 Amnesty critics are quick to point out that even with extensive publicity surrounding the one-time nature of an amnesty, there are those who would adhere to the belief that they would have a chance at a second amnesty and thus not participate in the first. Miscellane-
an amnesty program's initial success, the greater the chance that lawmakers would be tempted to repeat it.\textsuperscript{177} Supporting this proposition is the fact that one state and several foreign countries have held more than one amnesty program.\textsuperscript{178} Second, even if a federal tax amnesty did turn out to be a one-time affair, many people, cynically inured to politicians' promises, would probably persist in the belief that amnesty would in fact be repeated.\textsuperscript{179}

Finally, the merest hint of any amnesty would go far to discourage compliance until the amnesty is put into effect.\textsuperscript{180} In sum, the existence of any one of these flaws will doom a federal tax amnesty.

2. \textit{Deterrent Effect of Tax Penalties}

The success of the threat of punishment as a deterrent depends in large part on what type of crime is involved.\textsuperscript{181} On the one hand, some crimes are so serious (murder, rape, etc.), that moral and social inhibitions alone, even absent the threat of punishment, pro-

\begin{itemize}
\item \textsuperscript{177} Id. Of course, if an initial program were successful, this could be taken as a suggestion that the perception or possibility of a repeat performance is an insignificant factor. One British commentator has suggested that an amnesty be followed by a continued voluntary disclosure policy. Pepper, supra note 53, at 549. Such a course of action likely would undermine any amnesty by providing little incentive for initial participation. In fact, most believe that an amnesty should be followed by increased and more vigorous enforcement measures. See supra note 23.
\item \textsuperscript{178} See Jones, In Argentina, Tax Evasion is a National Sport, 38 Tax Notes 636 (Feb. 8, 1988); Ross, supra note 5, at 166 n.66; Mikesell, supra note 5, at 509.
\item \textsuperscript{179} "'I just throw my tax assessment away every year,' boasts one [Argentinian] businessman, 'It's a lot cheaper that way.'" (Argentina has offered six amnesties in the last 40 years). Jones, supra note 178.
\item \textsuperscript{180} One economic model of tax amnesty shows that as the probability of an amnesty increases, taxpayers report less of their income to the tax authorities. See A. Malik & R. Schwab, supra note 12, at 11. That is to say, voluntary compliance decreases.
\item \textsuperscript{181} The results suggested by this economic model appear to contradict the experience of states such as Massachusetts. However, the long term effect on taxpayer behavior of the states' tax amnesties is still unknown and, unfortunately, many states did not allocate resources to analyze the results of their amnesties. See Ross, supra note 5, at 152.
\item \textsuperscript{181} See J. Andenaes, supra note 136, at 10; A. von Hirsch, supra note 129, at 42; see Posner, supra note 169. The success of deterrence also depends on the actor's motivations; threat of punishment will likely do little to deter crimes of passion, whereas it may be quite effective where the actor calculates rationally and cold-bloodedly. See H. Packer, supra note 161, at 40-41.
\end{itemize}
vide a strongly deterrent effect.\textsuperscript{183} Tax offenses, however, are different. Where economic regulations conflict with private interests, moral and social inhibitions alone will not prevent the commission of offenses.\textsuperscript{183} In many cases, the economic incentives to evade prove tempting enough that a potential offender can easily rationalize away moral and social inhibitions.\textsuperscript{184} Where moral and social inhibitions are insufficient to deter tax evasion, penalties may accomplish this goal.

\subsection*{a. Taxpayers Motivated by Economics}

Many citizens engage in a sophisticated cost-benefit analysis and conclude that the monetary rewards of avoiding tax obligations outweigh the potential cost of detection.\textsuperscript{185} That taxpayers engage in this type of analysis is illustrated by the causal connection between the rate of taxation and the rate of compliance.\textsuperscript{186} A rise in

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\begin{enumerate}
\item See J. Andenaes, supra note 134, at 19. This is not to say that punishment as a deterrent is unnecessary with regard to these crimes. To the contrary, exactly because they are so offensive to society, every step must be taken to make sure that they are prevented.
\item Id. at 11.
\item Id. at 14-15.
\item See Miscellaneous Tax Bills, supra note 5, at 71. Individuals will generally choose an optimal level of tax avoidance by weighing the likelihood of detection versus the potential penalties faced. See Spicer, Civilization at a Discount: The Problem of Tax Evasion, 39 Nat'l. Tax J. 13, 14 (1986). Noncompliance with the revenue laws increases when the information regarding a taxpayer's obligation either is not available to the IRS or does not have a source independent of the taxpayer. See A. Weiner & M. Ernst, Proposals to Deter and Detect the Underground Cash Economy, Income Tax Compliance 293, 295 (1983). Income taxes are the most difficult to administer. See L. Yudkin, supra note 145, at 2. This is based on the fact that other taxes are tied in some concrete way to the thing taxed. Property taxes are one such example. Other taxes, like most sales taxes, require the cooperation of other parties for successful evasion thus making non-compliance more difficult. More visible income on the other hand, such as information reported by third parties including banks, is more likely to be reported. See Internal Revenue Service, Taxpayer Compliance Volume I: An Agenda for Research 71, reprinted in Tax Notes Doc. No. 89-3136 (May 1, 1989). It is apparent that as the likelihood of successful concealment of taxpayers' obligations increases, so too noncompliance increases. See H. Aaron \& H. Galper, supra note 7, at 42; Readings on Income Tax Administration, supra note 95, at 535.
\item See H. Aaron \& H. Galper, supra note 7, at 42; Readings on Income Tax Administration, supra note 95, at 535.
\item Economists have traditionally used economic models to analyze the tax evasion problem. See Spicer, supra note 186, at 14. Recently two economists have expanded the traditional economic model of tax evasion to analyze the economic implications of tax amnesties on the tax evasion decision. See A. Malik \& R. Schwab, supra note 12, at 11. The Malik \& Schwab model suggests that if the taxpayers take advantage of the amnesty, they will declare enough additional income during the amnesty so that in total they declare the same amount they would have declared initially had they known that their utility function was that of a
\end{enumerate}
\end{footnotesize}
tax rates is usually followed by a decrease in compliance, while a tax rate reduction foretells an increase in compliance.\textsuperscript{187} For these cost-benefit analyzers to participate in an amnesty, there would have to be some clear financial incentive.\textsuperscript{188} Thus, assuming a favorable risk-economic reward ratio, amnesty would seemingly appeal to taxpayers motivated by economics.\textsuperscript{189}

Making noncompliance less cost effective by increasing penalties has been the government's response to the problem of noncompliance.\textsuperscript{190} Although these efforts have met with some success, the trend in the United States has been toward decreasing rates of tax compliance.\textsuperscript{191} This is not surprising considering the wide range of risk-averse, honest individual. Thus, if the amount reported initially falls by one dollar, then the amount reported during an amnesty must rise by one dollar. Their results as to the effect of amnesty on total revenue collected are inconclusive.

The result suggested by the economic model may be attributed to the possibility that potential participants may gamble on continued undetection or procrastinate for possible participation in a later amnesty. See Pepper, supra note 53, at 549; Jackson, supra note 12, at 322; Lerman, supra note 13, at 326.

\textsuperscript{187} See S. Crane & F. Nourzad, supra note 77, at 145 (citing empirical data supporting proposition that evasion rises with rate increase); Parkinson, supra note 18, at 123 (tax avoidance and tax evasion are functions of the cost of avoidance and the amount of the tax).

\textsuperscript{188} Professor Hall notes that after the conviction of Al Capone for income tax evasion, the next day and for several weeks afterwards, many underworld figures offered to pay their previously evaded taxes so as to avoid Capone's fate. J. Hall, supra note 3, at 303 (citing Irey and Slocum, The Tax Dodgers 35 (1948)). That taxpayers engage in this type of analysis is illustrated by the causal connection between the rate of taxation and the rate of compliance. See H. Aaron & H. Galper, supra note 7, at 42; Readings on Income Tax Administration, supra note 95, at 535.

\textsuperscript{189} The author recognizes that implicit in this idea is that taxpayers feel little or no moral guilt in evading taxes. As suggested above, the morality of tax evasion is difficult to discern. See supra note 184.

\textsuperscript{190} See Hoeftlich, supra note 72, at 45. Little has been done to eliminate the psychic rewards associated with tax evasion. Such attitude has enjoyed historical longevity and only the unlikely prospect of fundamental social change stigmatizing tax evasion will change this fact of life. In re Chira, 231 Cal. Rptr. 560 (1986) (tax evasion is not crime meriting disbarment); Tax Gap Down, Compliance Up, Says New IRS Study, 38 Tax Notes 1298 (Mar. 21, 1988).

\textsuperscript{191} Estimates of the so called "tax gap" vary widely and focus almost exclusively on income taxes. See Tax Gap Down, Compliance Up, Says New IRS Study, supra note 190. In 1985, the amount evaded by taxpayers was estimated to be more than $100 billion. See Jackson, supra note 12. According to the Internal Revenue Service the rate of compliance decreased by over 12% from 1965 to 1985. See Ross, supra note 7. Commissioner Egger estimated that in 1986, taxpayers would pay voluntarily 81.6% of their total income tax liability. See Tax Reform Proposals: Hearings before the Senate Committee on Finance, supra note 84, at 8 (testimony of Commissioner Egger). A recent Internal Revenue Service study suggests that while compliance rates for corporations have been declining, compliance rates for individuals have been increasing slightly as of late. See Tax Gap Down, Compli-
other motivations for tax evasion.\textsuperscript{192} Though it is relatively easy to analyze amnesty’s attractiveness to cost-benefit analyzers, amnesty’s effects are unclear upon those who evade obligations for non-economic reasons. Though some tax evaders choose not to comply for purely economic reasons, some are motivated by other, not always rational, concerns.

\textit{b. Taxpayers Motivated by Non-Economic Reasons}

The assumption underlying the penalty system is that taxpayers are motivated by economics.\textsuperscript{193} The reality is that tax evasion is rife with non-economic motivations. Most rationalize away any moral inhibition against economic crimes: “Rich people don’t pay their fair share, so why should I file an honest return?”\textsuperscript{194} This encourages cold-blooded calculation on the part of potential lawbreakers. For some, evasion is a conscious act to avoid detection of illegal activities such as drug sales or money laundering; for others, trying to beat the tax collector is a challenging, as well as profitable, game.\textsuperscript{195} Still others choose evasion or noncompliance as a purely visceral response to an inherently distasteful act - the non-payment of taxes represents an uncomplicated emotional protest by taxpayers.\textsuperscript{196}

Many citizens feel that if taxes are beyond their comprehension, the system of taxation must be cheating them in some way.\textsuperscript{197} Instead of trying to understand taxes, they decide to simply avoid all the bother, including payment of taxes, associated with compliance.\textsuperscript{198} The increasing complexity of the tax laws only exacerbates

\textsuperscript{192} See infra notes 194-204 and accompanying text.
\textsuperscript{194} J. Andenaes, supra note 134, at 13.
\textsuperscript{195} See Hoefflich, supra note 71.
\textsuperscript{196} Readings on Income Tax Administration 535 (P.L. Kelley & O. Oldman eds. 1973). Some evade taxes simply because they lack the money to satisfy the liability. Id. Tax evaders comprise a wide range of ethnic and socioeconomic groups although it appears clear that noncompliance is not “largely the province of busboys, cabbies, field hands, and street vendors. In fact [the] image of tax cheaters should be decidedly more ‘white middle class’.” Henry, Noncompliance with U.S. Tax Law - Evidence on Size, Growth, and Composition, 15, 64 in Income Tax Compliance (ABA 1983).
\textsuperscript{197} H. Aaron & H. Galper, supra note 7.
\textsuperscript{198} Id., at 42.
this problem.199

Widespread disapproval regarding the uses to which tax dollars are applied also breeds noncompliance.200 It is likely that the purchases of $500 hammers, endemic corruption in the letting of government contracts and even moral and ideological disagreement over specific government programs likely go a long way to convincing taxpayers that their hard earned dollars ought to remain in their pockets rather than be turned over to the federal government.201 The result is that the natural reluctance to pay one’s tax obligations is strengthened by lack of faith in the government.202

Finally, increased economic sanctions have perhaps estranged some taxpayers from a tax system they view as overly harsh in both its penalties and administration.203 Many taxpayers feel that the tax system does not respect the individual because of the different rules for taxpayers than for the Service itself.204 They re-


201 According to Richard Wassenaar, IRS Associate Commissioner (Criminal Investigations), the reasons for protesting tax obligations range from a belief that currency is worthless to religious convictions. L. Sheppard, The IRS and Civil Disobedience, 26 Tax Notes 851, 852 (Mar. 4, 1985). A 1984 examination revealed that of the 28,324 protestor returns, approximately 16,700 made “constitutional” arguments that the Constitution recognizes only the gold standard, that currency is worthless, or that the income tax is unconstitutional; others objected to their tax dollars being spent on defense, though these military tax protestors have reportedly declined since the Vietnam war. Id.

The IRS acknowledges that more research is necessary on taxpayer motivations. It recently released a report asserting that, to date, research reveals that the primary motivations for compliance or noncompliance with the tax laws are as follows: considerations of self interest, including financial incentives and social sanctions, legal sanctions, moral commitment and various demographic and socioeconomic factors. Internal Revenue Service, Taxpayer Compliance, Volume I: An Agenda for Research 71 (to be published June 1989), reprinted in Tax Notes Doc. No. 89-3136 (May 1, 1989).


204 Research in various fields has shown that people who feel they have been treated fairly by a government agency are more likely to comply with its decisions even if it conflicts with the individuals self interest. See Internal Revenue Service, Taxpayer Compliance, Volume I: An Agenda For Research 129, reprinted in Tax Notes Doc. No. 89-3136 (May 1, 1989). Although the relationship between compliance and attitudes towards the IRS remains virtu-
spond by losing respect for the tax system. Taxpayer sentiments of "us against them" are only aggravated by recent revelations of IRS agents' enforcement improprieties.

The combination of psychological and economic rewards provides a strong incentive to cheat. If taxpayers enjoy the "game" of noncompliance and eschew economics, a tax amnesty holds little allure. Even marginal specific deterrence would come at the expense of any general deterrent effect. While amnesty might specifically deter individuals from continuing evasion, a federal tax amnesty would do its greatest harm by its failure to express society's disapproval of tax evasion. Amnesty would create the impression that crime does pay if one is fortunate enough to continue to evade taxes until that happy time when the government declares that part if not all is forgiven.

A tax amnesty in itself is not a deterrent to undesired behavior. Its aim, to the contrary, is to encourage desirable behavior in taxpayers—the payment of what the tax laws oblige. To the extent, however, that an amnesty would detract from existing deterrent mechanisms as embodied by the penalty system, it is an ill advised course to follow.

By excusing punishment, amnesty will compromise the deterrent effect of future threats. By reducing the apparent risk of punishment, amnesty increases tax evasion's attraction and it is therefore contrary to the classic utilitarian model of deterrence. In essence, an amnesty would send a message to the general public to the effect that, when it comes to taxes, crime may pay.

V. Conclusion

The federal government enjoys a high rate of tax compliance in

ally untested, a 1984 Roper study found that the ratio of favorable to unfavorable responses was lower for the IRS than any other federal agency. Even if attitudes towards the IRS do not affect compliance directly, they indirectly affect compliance because they influence attitudes towards tax laws. Id.


205 Oliver Wendell Holmes expressed this idea succinctly: "The law threatens certain pains if you do certain things, intending thereby to give you a new motive for not doing them. If you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed." O. Holmes, The Common Law 46 (1881).
comparison to the states and in comparison to other countries.\textsuperscript{207} Moreover, the federal government has among the lowest rates of dollars spent to dollars collected among western nations.\textsuperscript{208} Thus the system appears, by objective measure, to be relatively efficient and effective. If so, a tax amnesty would threaten the effectiveness of the system by undercutting penalties for tax evasion and obviating the mechanism for deterrence.

The popular perception that the tax system is unfair provides an especially potent and convenient counterweight to moral and social inhibitions against tax evasion.\textsuperscript{209} Once the potential tax-offender has decided that evasion is socially acceptable, he is likely to rationally and carefully calculate the potential risks and rewards.\textsuperscript{210} Only if the risk of punishment for non-compliance seems unacceptably high will he voluntarily comply. This suggests that any change in the tax penalty structure may have a significant impact on the voluntary compliance rate.

The societal benefits of amnesty are principally economic.\textsuperscript{211} Because an amnesty theoretically raises revenue otherwise lost, an amnesty is economically tempting if it raises more revenue than it costs.\textsuperscript{212} It is expected, based on the states' experiences, that a federal tax amnesty will heal an ailing fisc.\textsuperscript{213} As set forth above, this dubious possibility is offset to a large extent by the economic risks attendant to amnesty.\textsuperscript{214} The costs of amnesty are many and are not necessarily limited to diversion of Internal Revenue Service resources away from traditional enforcement programs.\textsuperscript{215} A federal

\textsuperscript{207} Miscellaneous Tax Bills, supra note 5, at 158 (testimony of Dennis Ross, Deputy Tax Legislative Counsel, Dep't of the Treas.). According to a recent IRS estimate, the voluntary compliance rate was 83.6\% in 1988. Internal Revenue Service, Trend Analyses and Related Statistics, 1988 Update 27 (1988), \textit{reprinted in} Tax Notes Doc. No. 88-5794 (July 4, 1988).

\textsuperscript{208} Executive Task Force, supra note 124, at 1. The United States has a cost of collection on the order of 50 cents for each 100 dollars collected. Mikesell, supra note 5, at 34-35. Other Western countries spend two to three times as much on collection. Id. at 37.

\textsuperscript{209} See supra notes 194-204 and accompanying text.

\textsuperscript{210} Executive Task Force, supra note 124, at 1-2; J. Andenas, supra note 134, at 14-15 (1974); see also H. Packer, The Limits of the Criminal Sanction 41 (1968).

\textsuperscript{211} See supra note 81 and accompanying text.

\textsuperscript{212} It is theoretically possible that an amnesty could lose money and still be economically efficient if it is assumed that more taxpayers would be drawn into the taxpaying fold as a result of an amnesty. See supra text accompanying notes 98-107.

\textsuperscript{213} See supra notes 4-5 and accompanying text.

\textsuperscript{214} See supra text accompanying notes 66-206.

\textsuperscript{215} Id.
tax amnesty may well increase costs of tax administration and at the same time decrease the rates of compliance. Thus, even the modest goal of immediate cost effectiveness may be unattainable.

The evidence suggests, however, that in addition to being ineffective, a federal tax amnesty is unfair. A federal tax amnesty is a logical solution to the nation's budget woes only if it raises revenue in such a way that it maintains fairness in the system.

The fairness of the tax system may be measured by the justifications for the current penalty system. If the penalty system is fair, amnesty, by forgiving justified punishment, is unfair. A federal tax amnesty is contrary to the conventional views on punishment. It ignores the basic tenets of a retributive theory of punishment and it is largely inconsistent with a deterrent model of punishment.

Amnesty defeats retributive goals if tax evaders are allowed to retain their ill-gotten gains and escape punishment. Retribution serves a legitimate public purpose. As Holmes suggested, retribution channels vengeance and it strengthens the rule of law. Even when utilitarian criticism of retribution is taken into account the potential costs of excusing punishment remain unacceptably high.

Tax penalties for violating the established standard of behavior effectively validate a desirable societal norm, reminding citizens of their duty to pay taxes.\textsuperscript{316} Amnesty defeats this validating function, and undermines the basic idea that the tax laws describe a desirable societal norm.\textsuperscript{317} By forgiving penalties for tax evasion, amnesty will decrease the social respect for compliance. This reduction in public confidence inevitably must lead to lower tax compliance rates.

The desirability of a federal tax amnesty must be measured by its economic and social goals. A federal tax amnesty is cost ineffective, may decrease compliance, and defeats the purposes of punishment. Judging from the infrequent historical use of amnesty

\textsuperscript{316} J. Andenaes, supra note 8. The retributivist corollary is that the "pardoning power is part of a system of justice: that requires punishment and pardon to be administered justly; some logical reason, other than benevolence, must be attached to its use and that it must instead be considered an act of justice." K. Moore, supra note 147, at 213; but see United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833) (amnesty traditionally considered an act of mercy or grace).

\textsuperscript{317} Executive Task Force, supra note 124, at 2.
and the very limited contexts in which it has been applied, the popular proposals for a federal tax amnesty should be discarded.