INTRODUCTION:

TAX EVASION AS WHITE COLLAR FRAUD

By Geraldine Szott Moohr[*]

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* Alumnae College Professor of Law, University of Houston Law Center. I thank the Symposium participants for their contributions and my colleagues Ira Shepard and Bill Streng for reviewing a draft of the essay. Thanks also to Aaron Ries, who provided valuable research assistance. I am grateful for the continuous support of my research efforts by the University of Houston Law Foundation.

The Houston Business and Tax Law Journal sponsored and developed this symposium, and we are all grateful to them for doing it so well. Kacie Bevers, the Symposium Editor, deserves special mention. Her talent and hard work made the organization of this gathering seem easy, when we all know that managing an event like this is far from easy. Thanks also to Jyotpal Singh, Editor-in-Chief of the Journal, who skillfully guided the project throughout. One of the many contributions of the Journal's staff was to choose the topic of the symposium, the white collar crime of tax fraud.

The topic provides the occasion to bring experts in criminal law and tax law together to compare and consider approaches to preventing tax crimes. This brief introduction, written from the perspective of a specialist in white collar crime rather that of an expert in tax controversies, reviews connections between tax crimes and other white collar frauds. After identifying tax crimes as, at base, frauds, I survey various issues relating to enforcement through brief discussion of well-known criminal cases.

I. TAX CRIME AS A WHITE COLLAR CRIME

The term "white collar crime" has evolved since its genesis in identifying criminal behavior in the upper class mileu.[1] Today, although there is no single definition of the term, it is generally defined as any illegal act "committed by nonphysical means and by concealment or guile, to obtain money or property . . . or to obtain business or personal advantage."[2] Under this definition, willfully cheating on taxes – activities that are grouped here under the term "evasion" – is a white collar offense. Evading taxes does not involve violence or a threat of violence, and its goal involves a transfer of property. The right to taxes that are owed is a property right, even when the government is foreign.[3] Further, tax offenders are motivated by a desire for pecuniary gain, to inflate their wealth by avoiding payment, in one way or another, of taxes owed. While tax evasion inflates the perpetrators' wealth, it also imposes a pecuniary loss on others. The government is directly harmed by losing revenue, and fellow citizens are indirectly harmed as they absorb a higher tax burden to compensate for the evader's unpaid taxes.

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1. Sociologists first formulated the concept by focusing on crimes committed by respectable, high-status individuals in the course of their work. *See* Gilbert Geiss & Colin Goff, *Introduction* to EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION xi-xiii (Yale Univ. Press 1983).

2. HERBERT EDELHERTZ, THE NATURE, IMPACT, AND PROSECUTION OF WHITE-COLLAR CRIME 3 (1970).

3. *See* Pasquantino v. United States, 544 U.S. 349, 355 (2005) ("Canada's right to uncollected excise taxes . . . is 'property' in its hands."). In the words of the Supreme Court, "[t]he right to be paid money has long been thought to be a species of property." *Id.*; *see also* United States v. Griffin, 324 F.3d 330, 353-55 (5th Cir. 2003) (noting that, unlike tax revenue, tax credits serve a regulatory purpose and thus are not property for purposes of mail and wire fraud).

The purpose of punishing criminal tax offenses is similar to that of other white collar crimes, to punish and deter socially undesirable conduct. The theory of criminal law posits two justifications for punishment: to extract retribution for undesirable, immoral, and harmful conduct of a specific offender and to deter future crimes by potential offenders. Like many white collar offenses, the balance in tax crimes tilts toward the goal of deterrence. This is not to suggest that tax fraud is without a moral component,[4] or to forget that all criminal laws serve a public interest, such as protecting physical autonomy or the security of property. Nevertheless, the pursuit of tax crime, which is "calculated to induce prompt and forthright fulfillment of every duty under the income tax law,"[5] safeguards a more specific public interest.[6] The purpose of the criminal tax enforcement program is to protect "the public interest in preserving the integrity of this Nation's self-assessment tax system" by punishing the wrongdoer and thus deterring other potential tax violators.[7]

A similar public interest justification is found in judicial interpretations of non-tax white collar statutes. For example, the Supreme Court has stated that insider trading laws are designed to protect the integrity of the securities market.[8] The specific public policy of encouraging innovation and creative effort justifies the criminal treatment of infringement of intellectual property.[9] In sum, the purpose of and the rationale for punishing willful tax evasion echoes the justification for many white collar offenses, to deter certain conduct in order to achieve or safeguard an important public interest.

II. THE SPECIFIC CRIMINAL TAX LAWS AND THE GENERAL FEDERAL CRIMINAL CODE

The criminal tax provisions form a quite complete criminal code that is independent of the generally applicable white collar offenses found in Title 18 of the United States Code.[10] The tax provisions, codified in Title 26, include substantive felony offenses like tax evasion, phrased so it

4. *See* STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE COLLAR CRIME 246-48 (2006).

5. Spies v. United States, 317 U.S. 492, 497 (1943).

6. The public policy goal suggests harms that are not subject to objective measurement like lost contributions to the public fisc. For instance, successful tax evaders can obtain an unfair advantage over law-abiding citizens and businesses. *See* Pamela H. Bucy, *Criminal Tax Fraud: The Downfall of Murderers, Madams and Thieves*, 29 ARIZ. ST. L.J. 639, 640-41 (1997).

7. TAX DIV., U.S. DEP'T OF JUSTICE, CRIMINAL TAX MANUAL § 1.01[4] (2008), http://www.usdoj.gov/tax/readingroom/2008ctm/CTM%20Chapter%201.htm#TOC2_4.

8. *See* United States v. O'Hagan, 521 U.S. 642, 653 (1997) ("The misappropriation theory is . . . designed to 'protect the integrity of the securities market . . . .'").

9. *See, e.g.*, United States v. Hsu, 155 F.3d 189, 194-96 (3d Cir. 1998) (discussing the Economic Espionage Act, which criminalizes misappropriation of trade secrets).

10. For an overview of the statutory scheme, *see* Bucy, *supra* note 6; *see also* Jarret Jacinto & James Fitzmaurice, *Tax Violations*, 45 AM. CRIM. L. REV. 995 (2008).

includes attempts[11] and misstating information on tax filings, or tax perjury.[12] Lesser offenses, like failure to file a return, are categorized as misdemeanor offenses.[13] In addition, a third-party felony that applies to accountants, tax preparers, and lawyers is established by an aiding and assisting provision.[14] Finally, a separate felony obstruction provision addresses endeavors to obstruct or impede the due administration of tax enforcement.[15] Thus, the criminal tax provisions provide a comprehensive and independent enforcement scheme.

A. *Convergence and Contrast of the Codes*

The text of the criminal tax provisions, phrased as evasion or perjury, does not expressly include the term "fraud." Although this absence can obscure the conduct of deception that is inherent in these offenses, tax crimes are a kind of fraud.[16] And fraud is the quintessential white collar crime. Its core element is a material misrepresentation,[17] and some deception of a victim is a basic element of the federal fraud statutes.[18] As in ordinary frauds, tax evaders engage in deceptive conduct in order to benefit themselves and to impose harm on the victim of the lie. To state the obvious, tax offenders misrepresent material matters by concealing information or by providing false information with the goal of avoiding income taxes.

Nonetheless, tax fraud is not wholly congruent with the generally applicable federal fraud statutes. Although the act of material misrepresentation is similar, the culpability elements of tax fraud and non-tax fraud differ markedly. Tax crimes, both felonies and misdemeanors, require proof of "willful" conduct, and the Supreme Court has defined that term in the criminal tax laws as an "intentional violation of a known legal duty."[19] This standard means that defendants can prevent the government from proving willfulness with evidence of their sincere good faith belief

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11. I.R.C. § 7201 (2007); Spies v. United States, 317 U.S. 492 (1943).

12. I.R.C. § 7206(1).

13. *Id*. § 7203.

14. *Id.* § 7206(2). A separate felony provision applies to employers' obligation to withhold and pay employee taxes. *See id*. § 7202.

15. *Id*. § 7212(a). The mens rea term in this provision, "corruptly," differs from the other criminal tax provisions as it tracks the generally applied crime of obstruction, 18 U.S.C. § 1503. *See* United States v. Reeves, 752 F.2d 995, 1001-02 (5th Cir. 1985) (defining "corruptly" as seeking an advantage inconsistent with the tax laws).

16. *See* I.R.C. § 7201 (2007); *see* United States v. Helmsley, 941 F.2d 71, 99 (2d Cir. 1991) (noting that criminal tax provisions prohibit fraudulent evasion of taxes and specifically list fraudulent methods); *see also* Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 741 (1999) (noting section 7201 is a fraud offense even though the word "fraud" does not appear in the provision).

17. *See* 2 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 76 (2d. ed. 1890); MODEL PENAL CODE § 223.3 (1995) (defining fraud as theft by deception).

18. *See* Neder v. United States, 527 U.S. 1, 20-22 (1999).

19. Cheek v. United States, 498 U.S. 192, 201 (1991) (citations omitted).

they acted within the tax laws.[20] The Court justified the unusually rigorous standard by the complexity of the federal tax laws and a concern for innocent conduct.[21] In contrast, courts have devised far less rigorous interpretations of the term "willful" in non-tax white collar offenses.[22] Moreover, the mens rea elements in the general criminal code are far from uniform,[23] and many white collar offenses do not include a mens rea term or they supply only a weak one.[24]

In spite of the divergent mens rea elements, the conduct of tax fraud often violates or implicates several non-tax federal crimes. Indeed, the overlap between other white collar crimes and tax crimes sometimes verges on outright duplication. For instance, the conduct of tax fraud – misrepresenting one's tax obligation – constitutes the crime of making a false claim that decreases money owed to the United States government.[25] The deception inherent in a tax fraud can also constitute a second white collar federal crime, willfully and knowingly making a false statement to an executive branch agency.[26] Moreover, when more than one person is involved, a conspiracy or agreement to defraud the United States of money or property may be brought under the venerable federal conspiracy

20. In Model Penal Code terms, this is a mistake of law defense. MODEL PENAL CODE § 2.04 (1962). The claim, however, may not be successful. *See Cheek*, 498 U.S. at 209-10 (Blackmun, J., dissenting) (noting it unlikely any jury would accept the claim that wages are not income).

21. This heightened standard is rare in criminal law, although the Court has very occasionally used a similar rationale to interpret mens rea elements. *See e.g.*, Staples v. United States, 511 U.S. 600 (1994) (firearm registration); Liparota v. United States, 471 U.S. 419 (1985) (food stamps).

22. *See* United States v. Kay, 513 F.3d 432, 447 (5th Cir. 2007) (discussing three conceptions of "willful" conduct), *cert. denied*, 129 S. Ct. 42 (2008); United States v. Skilling, 554 F.3d 529, 548-49 (5th Cir. 2009) (discussing willful blindness instruction in securities fraud case).

23. In this respect, the federal criminal code differs markedly from the Model Penal Code, which reduced the many common law culpability terms to four. *See* MODEL PENAL CODE § 2.02 (1962).

24. The mail and wire fraud statutes do not contain a mens rea provision, and the culpability element supplied by the courts has been variously defined. *Compare* United States v. Regent Office Supply Co., 421 F.2d 1174, 1181-82 (2d Cir. 1970) (specific intent to defraud) *with* United States v. Paradies, 98 F.3d 1266, 1285 (11th Cir. 1996) (general intent to deceive). In other white-collar offenses, "corruptly" suffices. *See, e.g.*, 18 U.S.C. § 201 (2007) (bribery). On the other hand, some statutes employ a surfeit of terms, such as "knowingly and willfully" in the false statement provision. *See, e.g.*, 18 U.S.C. § 1001 (fraud and false statements). For further discussion of mens rea terms in the federal criminal code, *see generally* Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 FORDHAM ENVTL. L.J. 861 (1996).

25. 18 U.S.C. § 287 (encompassing false, fictitious or fraudulent claims). The false claims statute covers claims that avoid or decrease payments to the government. *See* JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 293 (3d ed. 2007).

26. 18 U.S.C. § 1001.

statute.[27] When a tax offense involves some use of the mail or a private interstate carrier like FedEx, tax evasion can be charged as mail fraud.[28]

Neither the white collar crimes referenced above nor the tax offenses are predicate offenses under the Racketeering Influenced and Corrupt Organizations Act ("RICO").[29] This means that RICO charges cannot be brought against tax evaders, even when defendants committed multiple tax crimes.[30] One way to circumvent this limitation is to charge tax evasions as mail fraud, a happenstance that merits further discussion.

B. *Tax Fraud as Mail Fraud*

As noted, when a tax offense includes a mailing, the misrepresentation involved in evading taxes – almost by definition – comprises "engaging in a scheme to defraud" that is prohibited by the mail fraud statute.[31] Moreover, because it is a predicate offense, mail fraud charges enable enforcers to add money laundering and RICO charges to the indictment.[32] This strategy increases possible punishment and also subjects offenders to forfeiture actions.[33] In addition, a conspiracy to commit a federal crime, *i.e.*, mail fraud, can be charged.[34]

It is easy to understand why charging mail fraud when the offense is pure tax evasion is controversial.[35] For one thing, in practice, the mens rea of mail fraud is often easier to establish than the willful evasion required in tax fraud.[36] For another, it is more difficult to defend against multiple

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27. *Id.* § 371. *See* United States v. Caldwell, 989 F.2d 1056, 1059 (9th Cir. 1993) (holding that defrauding the United States government under the conspiracy statute requires proof of dishonest or deceitful conduct).

28. 18 U.S.C. § 1341. If the fraud involved a wire transmission, such as a fax or the internet, wire fraud charges can be brought under § 1343. Mail and wire fraud are sister statutes that are interpreted jointly; references to mail fraud in this essay apply equally to wire fraud.

29. *Id.* § 1961(1) (listing predicate offenses of Racketeer Influenced and Corrupt Organizations Act ("RICO")).

30. Tax evasion and tax perjury may lead to money laundering charges, however, under a special provision in the money laundering statute. *See id.* § 1956(a)(1)(A)(ii) (laundering of monetary instruments). Pending legislation that targets offshore accounts would make it easier to apply the money laundering statutes. *See* Fraud Enforcement and Recovery Act of 2009, S. 386, 111th Cong. (2009).

31. 18 U.S.C. §§ 1341, 1346.

32. *See* United States v. Busher, 817 F.2d 1409, 1411-12 (9th Cir. 1987) (upholding RICO conviction based on mail fraud charge for mailing fraudulent tax returns).

33. For an example of the effect of mail fraud, RICO, and forfeiture actions, *see* J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 GEO. MASON L. REV. 45, 64 (2007) (noting RICO charges and consequent forfeiture action against Princeton-Newport Partners were based on mail fraud charges for mailing fraudulent tax reports). The charges led to the failure of the firm and to D.O.J. guidelines restricting use of RICO charges based, ultimately, on tax crimes charged as mail or wire fraud. *Id.* at 65.

34. 18 U.S.C. § 371 (encompassing conspiracy to commit an offense against the United States).

35. *See* Ellen S. Podgor, *Tax Fraud – Mail Fraud: Synonymous, Cumulative, or Diverse?*, 57 U. CIN. L. REV. 903 (1989).

36. *See supra* note 24 (discussing culpability element of mail fraud).

charges,[37] and this increases the probability of plea bargains even when the government could not prove its case. On a policy level, charging mail fraud would render most indictments for the specific crime of tax fraud unnecessary. Perhaps for these reasons, the Tax Division of the Department of Justice ("D.O.J.") has discouraged using those statutes when the essence of the offense is solely a tax fraud. In 2005, however, the D.O.J. adopted a more flexible policy that could result in more mail fraud charges,[38] causing some alarm among commentators and defense attorneys.[39]

Adding or substituting mail fraud charges, while providing strategic enforcement advantages, does not seem to accord with congressional intent in enacting an independent and comprehensive criminal tax code. As noted, the independent criminal tax provisions comprise a mini-criminal code that was designed to avoid recourse to general white collar offenses.[40] The comprehensive nature of the criminal tax code arguably signifies a congressional purpose to confine tax crimes to the criminal tax code they provided.

III. ENFORCEMENT ISSUES

As with the general federal fraud statutes used in white collar prosecutions, the criminal tax provisions apply to a wide and divergent range of offenders, providing a valuable enforcement instrument to the government. This scope and flexibility produce several issues that can be illustrated through well-known tax cases. These cases fall into one of two categories, depending on whether the offender evaded taxes on lawfully-earned income or unlawfully-gained proceeds.

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37. The practice of charging multiple offenses based on the same conduct, as in tax evasion and another federal crime, would only rarely implicate the constitutional ban against double jeopardy under the Supreme Court's interpretation of the Fifth Amendment. U.S. CONST. amend. V; *see* Blockburger v. United States, 284 U.S. 299, 304 (1932) (finding no double jeopardy implication where provisions of one criminal statute require proof of a fact that another statute does not).

38. *Compare* TAX DIV., U.S. DEP'T OF JUSTICE, CRIMINAL TAX MANUAL § 3.00 TAX DIVISION DIRECTIVE NO. 128 (2008) (expanding circumstances in which authorization to file mail and wire fraud charges may be granted when the only mailing or wiring was a tax return or when the conduct was merely incidental to a tax revenue law), http://www.usdoj.gov/tax/readingroom/2008ctm/CTM%20Chapter%203.htm#Directive%20No.%2012 8, *with* TAX DIV., U.S. DEP'T OF JUSTICE, CRIMINAL TAX MANUAL § 3.00 TAX DIVISION DIRECTIVE NO. 99 (2001) (superseded by Directive No 128), http://www.usdoj. gov/tax/readingroom/ 2001ctm/03ctax.htm#99.

39. *See* Kathryn Keneally & Kenneth M. Breen, *Tax Crimes: More Aggressive Government Policies and Practices*, THE CHAMPION, Apr. 2006, at 60.

40. *See* United States v. Henderson, 386 F. Supp. 1048, 1052-53 (S.D.N.Y. 1974) (finding that treating tax evasion as mail fraud went beyond the intent of Congress). *But see, e.g.*, United States v. Regan, 713 F. Supp. 629, 634-35 (S.D.N.Y. 1989); Podgor, *supra* note 16, at 761 n.224 (noting judicial exceptions to *Henderson*).

A. *Unlawfully-Gained Proceeds*

In the category of unlawfully-gained proceeds, three applications of criminal tax crimes illustrate enforcement strategies. One strategy is to charge tax evasion as a substitute for other crimes, as the familiar case against Al Capone shows. Capone, a prohibition-era gangster, was convicted of tax offenses when prosecutors could not successfully prove more serious crimes like racketeering and even murder. He served thirteen years on the tax charges before his death in prison. This type of tax prosecution is a pretext for the substantive offenses that prosecutors may not be able to prove at trial.[41]

Many white collar crimes, most notably the "cover-up" offenses of perjury, obstruction, and false statements are used in the same way. That is, when the substantive offense cannot be proved or evidence of them is weak and when the suspect has lied or otherwise interfered in an investigation, prosecutors may charge obstruction of justice. I. Lewis "Scooter" Libby, chief of staff to Vice-President Cheney, was charged with obstruction for lying to investigators even though substantive charges for disclosing the identity of a C.I.A. operative were not pursued.[42] Unwilling to bring criminal insider trading charges,[43] the government charged Martha Stewart with obstruction, false statements, and conspiracy to commit perjury.[44]

A second enforcement strategy is to add tax crimes based on unlawful gains to indictments of other charges. The former mayor of Atlanta, Bill Campell, was indicted for racketeering and soliciting bribes and, in addition, tax fraud charges for failing to declare unlawfully-gained proceeds from those schemes. The jury acquitted him of the non-tax charges that led to indictment, but convicted him of the three tax counts, and he served two and a half years in prison.[45] Here, the additional tax charges enabled prosecutors to secure a conviction even in the face of

41. *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 583-84 (2005).

42. *See* Indictment, United States v. Libby, 2003 WL 25589962 (D.D.C. 2003) (No. 05-394); Neil A. Lewis, *Libby Given 30 Months for Lying in C.I.A. Leak Case*, N.Y.TIMES, June 6, 2007, at A1.

43. The Securities and Exchange Commission brought a civil enforcement action against Stewart, which she settled. *See* Landon Thomas, Jr., *Stewart Deal Resolves Stock Case*, N.Y. TIMES, Aug. 8, 2006, at C1. For differing views on the absence of insider trading charges, see Strader, *supra* note 33, at 65-80 and Geraldine Szott Moohr, *What the Martha Stewart Case Tells Us About White Collar Criminal Law*, 43 HOUS. L. REV. 591, 598-602 (2006).

44. *See* Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN. ST. L. REV. 1107, 1114 (2005).

45. Associated Press, *Georgia: Former Mayor is Released*, N.Y. TIMES, Oct. 25, 2008, at A15; United States v. Campbell, 491 F.3d 1306, 1317-18 (11th Cir. 2007) (affirming sentence for violating 26 U.S.C. § 7206(1) on basis of tax loss to the government and enhancements). The racketeering charges were predicated on mail fraud; although Campbell was found guilty of mail fraud, he had not been charged separately with that offense. *Id.* at 1310 n.1.

acquittal on the substantive charges. In other cases, the threat of increased penalties can lead defendants to agree to plea bargains.

Third, enforcers can use tax crimes on unlawfully-gained proceeds for unique tactical purposes. White collar crime specialists will recall the case of Lea Fastow, the wife of former Enron chief financial officer, Andrew Fastow. She was indicted for failing to declare as income on their joint return the proceeds her husband had derived from Enron frauds.[46] Lea Fastow pleaded guilty to tax perjury and served a year in prison. Her indictment led Andrew Fastow to plead guilty and – most usefully – to cooperate with prosecutors by incriminating Ken Lay and Jeffrey Skilling.[47] The charges against Lea Fastow were a means to an end, as prosecutors sought leverage to secure Andrew Fastow's cooperation.

Although the cases involving illegal proceeds present disturbing issues about prosecutorial tactics, perhaps their most problematic aspect is that they are unlikely to deter those who evade taxes on lawful income. The deterrence message sent by the former is neither clear nor meaningful to the latter class of offenders. The behavior of organized crime members, corrupt politicians, and spouses of indicted executives may not seem relevant to otherwise law-abiding citizens, even as they arrange to place assets in off-shore accounts. This is due, in part, to the human tendency to regard oneself as an ethical being, a habit that can keep law-abiding citizens from perceiving their conduct as criminal.[48] Law-abiding individuals are unlikely to perceive any similarity to their own conduct, so the example of the conviction does not register with them. Thus, although punishment in cases of unlawfully gained proceeds may achieve some marginal deterrence of the underlying offense, it is unlikely to deter the evader of lawfully-earned income.

B. *Lawfully-Earned Income*

The second broad category of criminal tax cases concern those who seek to avoid taxes on income that was lawfully earned. Leona Helmsley, the billionaire hotelier who reportedly said, "Only the little people pay taxes," serves as the poster person for this category.[49] She was convicted

46. *See* United States v. Fastow, 300 F. Supp. 2d 479 (S.D. Tex. 2004); John A. Townsend, *Analysis of the Fastow Plea Agreements*, TAX NOTES TODAY, Mar. 5, 2004.

47. *See* Michelle S. Jacobs, *Loyalty's Reward – A Felony Conviction: Recent Prosecutions of High-Status Female Offenders*, 33 FORDHAM URB. L.J. 843, 855-60 (2006) (reporting that the sentencing judge balked at Lea Fastow's initial plea agreement, which was eventually adjusted to include more prison time); Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 184 n.78 (2004).

48. *See* John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL'Y 189, 200 (2005).

49. *See* Associated Press, *Maid Testifies Helmsley Denied Paying Taxes*, N.Y. TIMES, July 12, 1989, at B2.

of twenty-two tax offenses that arose because she and her husband charged personal expenses to their real estate business, a tactic that lowered the amount of tax owed.[50] She was ultimately sentenced to four years in prison. The tax crimes were charged in the absence of other criminal conduct or unique enforcement strategies, in a "pure," unmixed sense.

The recent case against Wesley Snipes, Hollywood star of the *Blade* vampire movies, is another variation of evading taxes on lawfully-earned income. He and other tax protestors make unfounded or frivolous claims, for instance, that the income tax is unconstitutional or was improperly signed into law. In this case, the court rejected Snipes' claim that the federal government had no lawful authority to tax citizens. Although a jury acquitted Snipes of the more serious felony tax charge of evasion, it nevertheless convicted him of three misdemeanor tax counts, and he received a three year prison sentence.[51] The Internal Revenue Service ("I.R.S.") takes tax protestors increasingly seriously because the movement, if it gained momentum, would threaten the tradition of voluntary compliance with the tax laws. Perhaps for this reason, the I.R.S. now prefers the term "tax defier," a person who "seeks to deny and defy the fundamental validity of the tax laws."[52]

Finally, just as businesses can commit other white collar frauds, they can violate tax laws. For example, recall the criminal case against the KPMG accounting firm for marketing unlawful tax shelters that ended with the firm's deferred prosecution agreement. In the aftermath, a district court renounced a D.O.J. enforcement policy and dismissed charges against most of the individual defendants.[53] Notwithstanding how the case against KPMG ended, the principle that firms may be liable for tax crimes is clear, and several banks are now under investigation for their roles in enabling wealthy Americans to avoid federal income taxes. In an ongoing story, UBS, a large Swiss private bank, agreed to pay $780 million for defrauding the I.R.S. of tax revenue by enabling 19,000 American clients to hide $20

50. United States v. Helmsley, 941 F.2d 71, 75-76 (2d Cir. 1991). In addition, the mailing of fraudulent state tax returns supported convictions for federal mail fraud, and Helmsley was also convicted of conspiracy to defraud the United States in violation of 18 U.S.C. § 371. *Id.* at 71, 78.

51. *See* New York Times Regional Newspapers, *Wesley Snipes Gets 3 Years For Not Filing Tax Returns*, N.Y. TIMES, Apr. 25, 2008, at C3; *see also* David Cay Johnston, *Wesley Snipes Cleared of Serious Tax Charges*, N.Y. TIMES, Feb. 2, 2008, at C1. Snipes has appealed and has not yet begun to serve his sentence. See *Actor Snipes Appeals Tax Conviction*, WALL STREET J., May 3, 2008, at A7.

52. *See* Lynnley Browning, *U.S. Says It Will Increase Efforts Against 'Tax Defiers'*, N.Y. TIMES, April 9, 2008, at C3; TAX DIV., U.S. DEP'T OF JUSTICE, CRIMINAL TAX MANUAL § 40.00 n.1 (2008) (noting the I.R.S. Restructuring Act of 1998, § 3707, precludes the I.R.S. from labeling a taxpayer as an "illegal tax protester"), http://www.usdoj.gov/tax/readingroom/2008ctm/CTM%20Chapter%2040.pdf.

53. *See* United States v. Stein, 541 F.3d 130, 144-46 (2d Cir. 2008) (upholding dismissal of criminal tax fraud charges as necessary to cure government violation of defendants' Sixth Amendment right to counsel).

billion in secret offshore accounts.[54] A member of the bank's executive board has been indicted for conspiracy, a former employee and a former client have pleaded guilty, and the D.O.J. continues to press UBS to disclose the identities and records of 52,000 American clients.[55] Other banks, Deutsche Bank, Credit Suisse, and HBSC, are under similar scrutiny.[56] Although the KPMG and UBS cases also involve individual taxpayers[57] and tantalizing ancillary issues,[58] the point here is that the tax laws apply to business entities and the tax professionals who work for them as well as the primary tax evader. Similarly, general white collar criminal statutes apply to firms directly,[59] under conspiracy law,[60] and through respondeat superior principles.[61]

In sum, the offense of tax fraud is a white collar crime, both in doctrine and in enforcement strategies. The congruence between tax fraud and non-tax fraud law, their respective statutory schemes, enforcement strategies, and case law can serve each legal regime as a reciprocal point of reference for the other. An examination of tax fraud enforcement can provide lessons about enforcing non-tax frauds, and vice versa. For instance, the example from the general fraud statutes should send a cautionary signal against redundant charges that simply add counts to a criminal indictment. Conversely, the specificity of the criminal tax provisions and their rigorous mens rea element provides a model for reform of the general fraud statutes as they are used in non-tax cases. The

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54. *See* Lynnley Browning, *A 2nd Inquiry Hits UBS, Pressed for 52,000 Names*, N.Y. TIMES, Feb. 20, 2009, at B1 (reporting evasion of $300 million a year in federal taxes).

55. *See id.*; Evan Perez & Carrick Mollenkamp, *Top Banker Cited in Tax Dodge Case*, WALL ST. J., Nov. 13, 2008, at A1. One of the former executives is reportedly cooperating with prosecutors and the other has just been declared a fugitive. Lynnley Browning, *Executive at UBS Is Deemed a Fugitive*, N.Y. TIMES, Jan. 14, 2009, at B3.

56. *See* Lynnley Browning, *Indictment Links Deutsche Bank to Tax-Shelter Inquiry*, N.Y. TIMES, Nov. 17, 2008, at B3; Lynnley Browning, *I.R.S. Debates How to Deal with Foreign Tax Shelters*, N.Y. TIMES, Dec. 3, 2008, at B2.

57. The government is investigating American clients of the foreign firms. *See* Lynnley Browning, *Indictments Are Said to Be Possible in Investigation of UBS and Offshore Accounts*, N.Y. TIMES, Nov. 11, 2008, at B3.

58. The controversy about prosecutorial tactics in the KPMG case overshadowed the D.O.J. enforcement policy against firms. *See* Carrie Johnson, *U.S. Disputes KPMG Ruling*, WASH. POST, June 26, 2007, at D02. Similarly, the case against UBS is newsworthy in part because it impinges on the Swiss banking confidentiality laws. *See* Lynnley Browning, *Swiss Said to Be Sharing Client Data in Tax Case*, N.Y. TIMES, Oct. 1, 2008, at C3.

59. *See, e.g.*, United States v. Purdue Frederick Co., 495 F. Supp. 2d 569 (W.D. Va. 2007) (accepting company's guilty plea for misbranding drugs); United States v. Bank of New England, N.A., 821 F.2d 844 (1st Cir. 1987) (holding collective knowledge of employees satisfied mens rea element of money laundering).

60. *See, e.g.*, United States v. Arch Trading Co., 987 F.2d 1087 (4th Cir. 1993) (holding agreement to violate a congressionally authorized executive order violates 18 U.S.C. § 371).

61. *See, e.g.*, Arthur Andersen, L.L.P. v. United States, 544 U.S. 696 (2005). In addition, the aiding and abetting theory may also apply to firms that assist their agents in criminal activity. *See generally* Geraldine Szott Moohr, *Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation*, 44 AM. CRIM. L. REV. 1343 (2007).

Symposium contributors, experts in criminal law and in tax controversies, offer commentary that facilitates this type of discussion.

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The authors consider the crime of tax evasion, explain the criminal enforcement process, and analyze new enforcement initiatives. Stuart Green, Professor of Law and Justice Nathan L. Jacobs Scholar at Rutgers School of Law - Newark, considers what is wrong with the crime of tax evasion.[62] After noting the low level of compliance with tax law, Professor Green argues that the social norm condemning tax evasion is shaky and offers ten factors that contribute to this instability. Revisiting his prior work on whether evading taxes is a form of theft, whether it breaches an overarching moral obligation to obey the law, or whether it is a species of cheating, he concludes that one way to buttress the social norm against evasion is to ensure that the tax laws meet the community's standard for just laws.

Robert E. Davis, a specialist at K&L Gates in tax controversies and white collar crime, considers several aspects of the criminal tax enforcement system and identifies emerging issues.[63] He first notes that the combination of withholding taxes from paychecks, robust civil fines, high interest rates on delinquent taxes, and criminal penalties belies the myth of voluntary compliance. After identifying salient characteristics of the criminal tax system, Mr. Davis identifies problems that emanate from the shared responsibility for criminal enforcement, which includes a division of the I.R.S., United States Attorneys in the field, and the D.O.J.'s Tax Division. A brief summary of criminal tax enforcement since 1982 leads to a discussion of using scarce enforcement resources in cases of illegally-gained proceeds and money laundering.

Jack Townsend, of Townsend & Jones, specializes in tax controversies and represented one of the KPMG defendants whose charges were dismissed.[64] In his article, Mr. Townsend traces the government's increasing use of the tax obstruction provision to expand criminal liability.[65] The government argues that the provision criminalizes any interference with the operation of the I.R.S., as developed in cases considering other conspiracies to defraud the United States. Mr.

62. *See* Stuart P. Green, *What Is Wrong with Tax Evasion?* 9 HOUS. BUS. & TAX L.J. 221 (2009).

63. *See* Robert E. Davis & Danny S. Ashby, *Federal Criminal Tax Enforcement in 2009: The Role of Criminal Tax Enforcement in the Federal "Voluntary" Self-Assessment and Payment Tax System*, 9 HOUS. BUS. & TAX L.J. 237 (2009).

64. *See* United States v. Stein, 541 F.3d 130 (2d Cir. 2008).

65. *See* John A. Townsend, *Tax Obstruction Crimes: Is Making the IRS's Job Harder Enough?*, 9 HOUS. BUS. & TAX L.J. 260 (2009).

Townsend, arguing that this theory is too broad, identifies limitations to the government's argument in the elements of the substantive tax offenses.