

A JEWISH ETHICAL PERSPECTIVE TO AMERICAN TAXATION

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I. INTRODUCTION:

Several recent newspaper headlines and official press releases have reported instances of tax fraud or tax evasion involving rabbis and others who nominally or purportedly identify as religious Jews.¹ There is an obvious disconnect between such reported misdeeds and Jewish ethical principles as enunciated in the Halacha (Jewish law). Any system of taxation is replete with ethical issues, and the American system is no exception.

This article will address the ethical issues and dynamics in the American system of taxation,² and critique them from a Jewish law perspective.³ First, a discussion on the legitimacy

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¹ See, e.g., Alan Feuer, *Hasidic Rabbi and Assistant Are Arrested in Tax Scheme*, N.Y. Times, December 20, 2007, p. B-7, *guilty pleas and plea agreements announced*, U.S. Attorney's Office, C.D. Cal., Press Release # 08-091 (June 27, 2008), available on the Internet at <<http://www.usdoj.gov/usao/cac/pressroom/pr2008/091.html>> (accessed October 12, 2008); Press Release # 08-099 (July 18, 2008), available on the Internet at <<http://www.usdoj.gov/usao/cac/pressroom/pr2008/099.html>> (accessed October 12, 2008); *Hasidic Scams Net Jail Terms, Judge Says Crimes Showed 'Chutzpah'*, HOUSTON CHRON., June 15, 2003, p. A-13, *convictions upheld but remanded on sentencing issues*, United States v. Samet, 200 Fed. Appx. 15 (2d Cir. 2006); Arnold H. Lubasch, *Three Found Guilty in Scheme to Create False Tax Write-Offs*, N.Y. TIMES, December 5, 1987, § 1, p. 32, col. 6, *defendant's conviction upheld*, United States v. Gurary, 860 F.2d 521 (1988), *cert. denied sub nom.* Gurary v. United States, 490 U.S. 1035 (1989); Tony Van Alphen, *Rabbi Fined \$32,000 in Tax-Evasion Scheme*, TORONTO STAR, May 31, 2001, *guilt finding entered*, *Regina v. Ederly*, [2001] O.J. No. 1437 (Ontario Ct. Just., 2001).

² The statutory basis for American federal taxation is the federal Internal Revenue Code, and the tax codes of the various states, almost all of which parallel the Internal Revenue Code to one extent or another.

The Internal Revenue Code is codified at Title 26 of the United States Code. The widely used and accepted convention among tax practitioners and courts to cite the Internal Revenue Code as "I.R.C."

of taxation schemes will be presented.⁴ This article will then discuss the taxpayer's obligations,⁵ followed by a discourse on the ethics of tax administration.⁶ Tax practitioners such as attorneys, accountants and enrolled agents play a key role in the American taxation system, accordingly, there will be a discussion on taxation ethics as they relate to such practitioners.⁷ Because tax-exempt organizations are so closely intertwined with Jewish communal life in America, ethical issues relating to the donors and management of tax-exempt organizations will also be covered.⁸ This Article will conclude that the ethics required by Jewish law are most compatible with American taxation ethics.⁹

II. TAXATION SCHEMES:

A. Fair and Just Taxation Schemes:

"Taxes are the lifeblood of government."¹⁰ The debate over the appropriate taxation scheme is intense and perennial. Controversy and conflict persist regarding what is an appropriate or fair system of taxation.¹¹ Thus, the ethics of the very taxation scheme itself are

instead of "26 U.S.C." will be utilized in this article. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, P.5, at 16, and R.12.8.1, at 85 (Columbia L. Rev. Assn., et al., eds., 17th ed., 2000); ASSOCIATION OF LEGAL WRITING DIRECTORS & DARBY DICKERSON, ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION, pt. 3, 14.2(b)(3), at 103 (Aspen Law & Business, N.Y., 2000);

³ Taxation under Jewish law is quite different from taxation under American law, though there are many similarities and analogs between the two. See, e.g. Adam S. Chodorow, *Maaser Kesafim and the Development of Tax Law*, 8 FLA. TAX REV. 153 (2007).

⁴ See notes 9 through 27 *infra* and accompanying text.

⁵ See notes 28 through 65 *infra* and accompanying text.

⁶ See notes 66 through 116 *infra* and accompanying text.

⁷ See notes 117 through 149 *infra* and accompanying text.

⁸ See notes 150 through 196 *infra* and accompanying text.

⁹ See notes 197 through 209 *infra* and accompanying text.

¹⁰ *Bull v. United States*, 295 U.S. 247, 259 (1935). Cf. MARCUS TULLIUS CICERO, PRO LEGE MANILIA, ch. 7, in CICERO: THE SPEECHES 28 (H. Grose Hodge, trans, Wm. Heinemann Ltd / G. P. Putnam's Sons, 1927) ("[V]jectigalia nervos esse rei publicae" (revenues are the sinews of the commonwealth)).

¹¹ See, e.g. Leo P. Martinez, *The Trouble with Taxes: Fairness, Tax Policy, and the Constitution*, 31 HASTINGS CONST. L.Q. 413 (2004); John K. McNulty, *Flat Tax, Consumption Tax, Consumption-Type Income Tax Proposals in the United States: A Tax Policy Discussion of Fundamental Tax Reform*, 88

continually the subject of debate. Even the Rabbis of the Talmud were undecided on the issue, as evidenced by the differing recounted versions of the discussion between Rabbi Eleazar and Rabbi Yochanan on the question of who shall bear the cost of building the wall to protect the city:

"R. Eleazar inquired of R. Yochanan: Is the impost [for the wall] levied as a poll tax or according to means? He replied: It is levied according to means; and do you, Eleazar my son, fix this ruling firmly in your mind. According to another version, R. Eleazar asked R. Yochanan whether the impost was levied in proportion to the proximity of the resident's house to the wall or to his means. He replied: In proportion to the proximity of his house to the wall; and do you, Eleazar my son, fix this ruling firmly in your mind."¹²

Jewish law recognizes the need to finance governmental functions, and recognizes that the secular governments underwrite the creation of various systems and infrastructures which benefit the populace as a whole, including the Jewish community.¹³ And while the Rabbis of the Talmud were no more successful than the scholars and solons of today in propounding an ideal taxation scheme, implicit in the Rabbis' discourse was the notion that whatever taxation scheme may be decreed requires some articulable basis of fairness. Moreover, Maimonides definitively posited that whichever taxation scheme might be chosen must be objective, known, and not subject to the whim of the tax collector:

"When does the statement that a customs collector is considered to be a highwayman apply? When the customs collector is a gentile [star worshiper], is self-appointed, or was appointed by the king but is given unlimited jurisdiction and takes whatever he wants and leaves whatever he wants. If, however, the customs collector was appointed by the king to take a third, a fourth or any fixed amount ... such person is not considered to be a robber. The law [established] by

Calif. L. Rev. 2095 (2000); *see also* 153 CONG. REC. H13452 (daily ed., November 9, 2007) (remarks of Rep. Pascrell):

Why should the richest of all Americans pay only 15 percent in taxes when a doctor or lawyer pays 35 percent? Why should the kings of Wall Street only pay 15 percent on their contingency fees when most teachers and police officers pay 25 and 30 percent? I have heard repeatedly in this debate that private equity managers are involved in a risky business so they should be rewarded with the lowest tax rates around. But the risk they carry is on other peoples' money, not their own. When you want to talk about risk, how about the firefighter that rushes into a burning building?

Id.

¹² *Talmud, Baba Batra* 7b.

¹³ *Talmud, Baba Kama* 113b.

the king is [binding] law. Indeed, anyone who does not pay this tax transgresses, for he is taking what is due the king." ¹⁴

Maimonides's expoundment was thus most consistent with Adam Smith's view that "[t]he tax which each individual is bound to pay ought to be certain and not arbitrary. The time of payment, the manner of payment, the quantity to be paid, ought to be clear and plain to the contributor, and to every other person." ¹⁵

Jewish law, then, recognizes the need for a fair, just and objective scheme for imposing taxes, and, under such a governmental taxation scheme, requires compliance with it. ¹⁶ Indeed, the famous Talmudic dictum "dina d'malchutha dina" ("the law of the ruling government is the law") is specifically set forth in the context of the payment of customs duties imposed by the secular governments. ¹⁷

B. Overview of the American Taxation System:

Of the \$2,792,607 million collected by the United States Treasury in Fiscal Year 2008, \$2,294,326 million (or 82%) was from personal income, Social Security, and Medicare taxes. ¹⁸ \$354,063 million (approximately 13%) was from corporate income taxes. ¹⁹ Just \$66,293, or approximately 3%, was from excise taxes. ²⁰ The Federal Estate and Gift Tax collections were \$29,824, just a bit more than one percent of total Treasury collections. ²¹ These percentages tend to be relatively stable in comparison to one another over prior years. ²²

¹⁴ MAIMONIDES, MISHNEH TORAH, *Gezelah v'Avedah*, ch. 5, ¶ 11, at 280 (Rabbi Eliyahu Touger trans., Moznaim Publ. Co. 1993).

¹⁵ ADAM SMITH, THE WEALTH OF NATIONS (Edwin Cannan, ed., Modern Amer. Library, NY, 1937) (1789), Book V, Chapt. II, Pt. II at 778 (Maxim II.).

¹⁶ MAIMONIDES, MISHNEH TORAH, *Gezelah v'Avedah*, ch. 5, ¶ 11; MEIR TAMARI, AL CHET: SINS OF THE MARKETPLACE 101 - 102, 157 - 158 (Jason Aronson, Inc., 1996); Herschel Schachter, "*Dina De'malchusa Dina*": *Secular Law As a Religious Obligation*, 1 J. HALACHA & CONTEMP. SOC'Y 103 - 15.

¹⁷ *Talmud, Baba Kama* 113a.

¹⁸ See U.S. TREASURY DEPT., FISCAL YEAR 2008 PERFORMANCE AND ACCOUNTABILITY REPORT 146, available at http://www.treas.gov/offices/management/dcfo/accountability-reports/2008-par/Full_Version.pdf.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

Unlike the taxation systems best known through most of history, the American taxation system is principally based upon taxation of income,²³ as distinguished from customs duties and excise taxes spoken of in the Talmud,²⁴ and by Maimonides and others.²⁵ The American system is one of voluntary compliance, which "means that taxpayers are expected to comply with the law without being compelled to do so by action of a federal agent; it does not mean that the taxpayer is free to decide whether or not to comply with the law."²⁶ The Internal Revenue Service is the primary Federal administrative agency that collects the tax and deals with the taxpayer.²⁷ State and local governments have their own taxation authorities, many patterned after the IRS in structure, function, and taxes administered.

III. ETHICAL STANDARDS FOR THE TAXPAYER:

A. Basic Tax Compliance:

"The United States is a unique country in the context of tax administration because of the extent to which people willingly pay the taxes they owe to federal, state and local governments."²⁸ The American income taxation process is initiated by the self-assessment in the initial filing of the return and calculation of the tax by the taxpayer.²⁹ It can only work if there are "strict filing standards," including negative consequences for not honoring a definitive filing

²² *Id.*; see also INTERNAL REVENUE SERVICE, DATA BOOK 2008, T.6 at 15, available at <http://www.irs.gov/pub/irs-soi/08datbk.pdf>.

²³ Though sales taxes and other excise imposts are also a familiar part and parcel of the American system.

²⁴ *E.g.* TALMUD, BABA KAMA 113a.

²⁵ See note 14 *supra* and accompanying text.

Maimonides also seems to implicitly make passing mention of a tax on land, see MAIMONIDES, MISHNEH TORAH: SH'CHENIN, ch. 11, ¶ 9 at 532 (Rabbi Eliyahu Touger trans., Moznaim Publ. Co. 1993) ("when he sold a property to pay [his] taxes to the king ...").

²⁶ See, e.g. INTERNAL REVENUE SERVICE, PUB. 1273, GUIDE TO THE INTERNAL REVENUE SERVICE FOR CONGRESSIONAL STAFF at 4 (January 1996) (SuDoc No. T22.44/2: 1273/996).

²⁷ Certain duties and excise taxes are collected by other Federal agencies.

²⁸ *United States v. Kloda*, 133 F. Supp. 2d 345, 347 (S.D.N.Y. 2001).

²⁹ I.R.C. § 6501(a)(1); *Moroney v. United States*, 352 F.3d 902, 906 (4th Cir. 2003).

There are, of course, provisions for the IRS to assess taxes where the taxpayer fails to comply with his or her duty to file. I.R.C. § 6020.

deadline.³⁰ It is imperative that the taxpayer be candid and truthful in entering information on the tax return.³¹ The American system "depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability."³²

Nevertheless, "[a]ny one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes."³³ "One is not required to arrange his or her affairs so that the government will receive more tax than it is rightfully owed. Nor is it fraudulent to construe an ambiguous law in a manner that is adverse to the government."³⁴ It even is legal to hold and express disdainful views of the taxation authority.³⁵

The American taxpayer thus has the legal and ethical obligation to truthfully report all taxes due, timely file the required tax returns with all of the required information, and timely pay the taxes. If one engages the services of a professional tax return preparer, then the tax preparer must be apprised of all relevant facts and circumstances; failure of the taxpayer to do so is a "badge of fraud" from which fraudulent intent may be inferred.³⁶ Failure to timely file one's tax returns or filing fraudulent returns can make one ineligible to obtain or continue to hold a license to practice in the professions,³⁷ and can be the basis for denial of a security clearance, even if there has been no criminal prosecution or civil penalty imposed under the Internal Revenue Code.³⁸

Under the American system, then, "[a] taxpayer is expected to police his own records, to report promptly and in full his taxable income, and to pay the assessments which he himself has

³⁰ *United States v. Boyle*, 469 U.S. 241, 249 (1985).

³¹ *U.S. v. Taylor*, 574 F.2d 232, 234 (5th Cir. 1978), *reh'g denied* 576 F.2d 931 (5th Cir. 1978), *cert. denied* 439 U.S. 893 (1978).

³² *United States v. Bisceglia*, 420 U.S. 141, 145 (1975).

³³ *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd* 293 U.S. 465 (1935).

³⁴ *Estate of Trompeter v. Commissioner*, T.C. Memo. 1998-35, *vacated and remanded on other grounds*, 279 F.3d 767 (9th Cir. 2002).

³⁵ *Belli v. Commissioner*, T.C. Memo 1989-403, 57 TCM (CCH) 1172, 1181 ("Expressing one's feelings about the IRS ... is not an element of tax fraud; if it were, our Federal prisons undoubtedly would be brimming with such 'tax convicts.' We fail to discern any requirement that taxpayers must enjoy or look forward to paying their taxes.").

³⁶ *Bacon v. Commissioner*, T.C. Memo 2000-257, *aff'd* 2001 U.S. App. LEXIS 21882 (3d Cir. 2001).

³⁷ *E.g.*, *In re Levine*, 7 A.D.3d 4, 776 N.Y.S.2d 299, (2d Dep't 2004); *Margoles v. State Bd. of Medical Examiners*, 47 Wis. 2d 499, 177 N.W.2d 353 (1970).

³⁸ *See, e.g.*, *Matter of Anonymous*, Defense Office of Hearings & Appeals, ISCR Case No. 97-0606 (30 January 1998), *aff'd* (DOHA Appeals Bd., 20 April 1998).

initially determined to be owing."³⁹ This implicates a need for proactive ethical behavior on the part of every taxpayer.

Jewish law similarly requires the payment of taxes to legitimate taxation regimes, and implicitly views legitimately assessed taxes as the property of the government.⁴⁰ Failure to pay legitimately imposed taxes, and/or smuggling in order to evade customs duties, are tantamount to theft.⁴¹ Renown rabbis have taken a dim view of tax evasion among those in their communities.⁴² American courts have recognized that those who do not pay their tax obligations shift additional tax burdens onto the tax-complying public,⁴³ just as the Rabbis of the Talmud similarly recognized more than a millennium previously.⁴⁴

B. Audit Roulette:

"The fact that so few tax returns are audited causes many taxpayers to consider playing what is known in tax parlance as the audit roulette game."⁴⁵ "Audit roulette" refers to underreporting income and/or overstating deductions on one's tax return, under the assumption

³⁹ *Stoltzfus v. United States*, 264 F. Supp. 824, 828 (E.D.Pa. 1967), *aff'd* 398 F.2d 1002 (3d Cir. 1968), *cert. denied* 393 U.S. 1020 (1969).

⁴⁰ MAIMONIDES, MISHNEH TORAH, *Gezelah v'Avedah*, ch. 5, ¶ 11; SAMSON RAFAEL HIRSCH, HOREB, § 337 at 228 (I. Grunfeld, trans., Soncino Press, 6th ed. 1997) (1837).

⁴¹ Hirsch, prior note.

⁴² See, e.g. Eliyahu Meir Klugman, *The Ish HaEmes: The Man of Unimpeachable Integrity*, Rabbi Shimon Schwab, in *The Ethical IMPERATIVE* 547, at 554 and 562 (Rabbi Nissin Wolpin, ed., Mesorah Publications, 2000) (reporting the Rabbi Shimon Schwab, leader of the large Washington Heights (New York) Jewish community, detested the practice of allowing people known to have cheated the government to lead the congregation in prayer, and was most scrupulous in his personal financial and tax affairs); Shlomo Lorincz, *Nothing But the Truth*, JEWISH OBSERVER, September 2007, p. 37, at 43 - 44 (recounting opposition by Rabbi Yitzchok Ze'ev Halevi Soleveitchik, Rabbi of Brisk, of the practice by butchers of evading the Brisk municipality's tax on animal slaughter); see also note 101 *infra* and accompanying text.

⁴³ *United States v. Thiel*, 619 F.2d 778, 782 (8th Cir. 1980).

⁴⁴ Talmud, Sukkah, 29b (referring to tax evaders as "those who remove the yoke from off their necks and place it on their fellows.").

⁴⁵ Jay A. Soled, *A Proposal To Lengthen the Tax Accounting Period*, 14 AM. J. TAX POLICY 35, n. 65 at 51 (1997); see also David Cay Johnston, *Rate of All I.R.S. Audits Falls; Poor Face Particular Scrutiny*, N.Y. TIMES, 16 February 2001, § A, p. 1, col. 3; Mark L. Silow, *IRS Stands to Get Aid in Tax Shelter Battle*, LEGAL INTELLIGENCER, 18 February 2003, p. 5.

that the amount of tax thus underpaid justifies the odds against the chance of detection and punishment.⁴⁶

The Internal Revenue Code provides for several additions to the tax, commonly known as "penalties," that can be imposed upon a taxpayer who fails to comply with the tax laws. These include, but are not limited to, the penalties for failing to timely file or pay one's taxes,⁴⁷ making payment with a dishonored check,⁴⁸ and penalties for inaccuracies beyond certain thresholds.⁴⁹

There are further ethical ramifications, discussed below, when a tax practitioner is complicit in the audit roulette game.⁵⁰

The Torah twice commands Jews to return lost property to its rightful owner.⁵¹ This being the case, and given that the taxes owed to the government constitute property of the sovereign,⁵² playing the "audit roulette" game is surely contrary to Jewish law.

C. Trust Fund Taxes:

Employers are required to withhold certain taxes from the paychecks of their employees, and to remit such monies to the IRS and to the applicable state and/or local taxation authority. Such funds are considered to be held in "a special fund in trust for the United States,"⁵³ though there is no requirement that the withheld taxes actually be segregated into their own dedicated account.⁵⁴ Regardless of whether the employer actually remits the withheld taxes over to the government, the withheld taxes are credited to the tax accounts of the employee from whose

⁴⁶ The practice is also referred to as "audit lottery," *see, e.g.* McClanahan v. Commissioner, 95 T.C. 98, 103 - 104 (1990).

⁴⁷ I.R.C. § 6651.

⁴⁸ I.R.C. § 6656.

⁴⁹ I.R.C. §§ 6662 - 6665.

⁵⁰ *See* notes 132 through 135 *infra* and accompanying text.

⁵¹ EXODUS 23:4; DEUTERONOMY 22: 1 - 3.

⁵² *See* notes 40 through 42 *supra* and accompanying text.

⁵³ I.R.C. § 7501(a) (2003).

⁵⁴ *Newsome v. United States*, 431 F.2d 742, 745 - 746 (5th Cir. 1970).

Though I.R.C. § 6672 does not specifically prohibit commingling of trust fund taxes pending payment to the government, the IRS does have the authority to require a delinquent employer to specifically segregate such funds. *See* I.R.C. § 7512.

wages the taxes were withheld, and the employee has no further liability with respect to such withheld taxes.⁵⁵

Those persons responsible for withholding and/or paying over the "trust fund" taxes can be personally liable in the event that the taxes are not properly withheld or remitted.⁵⁶ States have similar personal liability statutes.⁵⁷

"If the statute is followed, the amount retained as taxes never leaves the employer's possession" until it is remitted to the government.⁵⁸ But the statute is not always followed, and many an employer facing cash flow problems has succumbed to the tempting trap of using trust funds to pay other debts, hoping to somehow come up with the funds when they are due to the IRS.⁵⁹ And though the employee from whose wages the taxes were withheld is off the hook, the list of those who *can* be personally liable for trust fund taxes is very broadly inclusive.⁶⁰ Each responsible person may be liable for the entire amount of the trust funds, regardless of relative degree of responsibility,⁶¹ and the IRS has broad discretion to pursue some or all of the responsible parties, without regard to relative degree of responsibility.⁶²

⁵⁵ I.R.C. § 31(a); *Slodov v. United States*, 436 U.S. 238, 243 (1978); *United States v. Pepperman*, 976 F.2d 123, 126 (3d Cir. 1992).

⁵⁶ I.R.C. § 6672, *Slodov v. United States*, 436 U.S. 238 (1978); Kenneth H. Ryesky, *Favoring Other Creditors over the Taxation Authorities*, N.Y.L.J., 7/2/2009, at 4.

⁵⁷ *E.g.*, ARIZ. RRV. STAT. § 42-5028; CONN. GEN. STAT. § 12-736; NY TAX LAW § 685(g); OHIO REV. CODE § 5739.33. Some local municipalities, including New York City, have their own trust fund statutes, *see, e.g.* CITY OF CINCINNATI MUNICIPAL CODE § 311-35; N.Y.C. ADMIN. CODE §§ 11-1775, 11-1913 & § 11-2016; CITY OF PHILA., INCOME TAX REG. § 407. The state and local statutes can apply to taxes other than payroll taxes, *see, e.g.* *Rock v. Department of Taxes*, 742 A.2d 1211 (Vt. 1999) (imposing Vermont trust fund liability for withholding taxes, rooms and meals taxes, and sales and use taxes).

⁵⁸ *United States v. Porth*, 426 F.2d 519, 522 (10th Cir. 1970).

⁵⁹ *Slodov v. United States*, 436 U.S. 238, 243 (1978); *United States v. Pepperman*, 976 F.2d 123, 126 (3d Cir. 1992).

⁶⁰ *See, e.g.*, Mary A. Bedikian, *The Pernicious Reach of 26 U.S.C. § 6672*, 13 VA. TAX REV. 225 (1993).

⁶¹ *See, e.g.*, *Thosteson v. United States*, 304 F.3d 1312, 1318, 1320 (11th Cir. 2002), *aff'g* 182 F. Supp. 2d 1189 (M.D. Ala. 2001).

⁶² *United States v. Pomponio*, 635 F.2d 293, 298 (4th Cir. 1980); *Hornsby v. United States*, 588 F.2d 952, 954 (5th Cir. 1979); *Kelly v. Lethert*, 362 F.2d 629, 635 (8th Cir. 1966).

Those from whom the IRS successfully collects the trust fund taxes subsequently have causes of action for contribution against other responsible parties. I.R.C. 6672(d); Kenneth H. Ryesky, *In Employers We Trust: The Federal Right of Contribution under Internal Revenue Code § 6672*, 9 FORDHAM J. OF CORP. AND FINANCIAL L. 191 (2003).

Tax funds withheld on behalf of the government often prove to be very tempting sources of funds, especially in situations of deficient cash flow, where the initial intent is to eventually make good on the trust funds.⁶³ But Jewish law forbids stealing someone's property, even temporarily with the intent to later return the stolen property.⁶⁴ One may not borrow the property of another without the owner's consent, and one who does so is responsible for the borrowed property, even if the borrowed property is destroyed by forces beyond the borrower's control.⁶⁵ Accordingly, Jewish law is most consistent with, and indeed, goes beyond, the requirements imposed by the Internal Revenue Code and the state taxation statutes regarding trust fund taxes.

IV. TAX ADMINISTRATION ETHICS:

Once a taxation scheme has been determined, there remains the even more formidable task of administering it. The taxation bureaucracies must provide for and confront the ethical issues implicated in the various aspects of tax administration. "Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences."⁶⁶

A. Accountability of the Taxation Authority Employee:

The American system has long held its tax agents to objective standards in the conduct of their official duties.⁶⁷ The IRS, for example, has been sanctioned to pay attorney fees of a taxpayer when the IRS agent who had worked on the case had altered a document,⁶⁸ and when the

⁶³ See, e.g., *Slodov v. United States*, 436 U.S. 238, 243 (1978) (noting "the funds can be a tempting source of ready cash to a failing corporation beleaguered by creditors"); *Buffalow v. United States*, 109 F.3d 570, 572 (9th Cir. 1997) (noting how companies facing financial difficulties often use money held in trust for the government); P. Prestin Weidner, *The Misappropriation of Trust Fund Taxes Under the Guise of Reasonable Cause*, 57 VAND. L. REV. 287, 288 - 291 (2004).

⁶⁴ MAIMONIDES, MISHNEH TORAH: *Geneivah* ch. 1, ¶ 2; SHLOMO GANZFRIED, *KITZUR SHULCHON ORUCH* 182:3 at 700 (Rabbi Eliyahu Touger trans., Moznaim Publ. Co. 1991) (1864).

⁶⁵ MAIMONIDES, MISHNEH TORAH, *Gezelah v'Avedah*, ch. 3, ¶¶ 11 and 15.

⁶⁶ *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204, 212 (1930).

⁶⁷ See, e.g. *Schmitt v. Trowbridge*, 21 F. Cas. 710, 711 (D.C.E.D. Mich. 1878) (No. 12,468) (Brown, J., charging the jury).

⁶⁸ *Straight v. Commissioner.*, T.C. Memo 1997-569.

cognizant IRS agent made a bare credibility assessment between two versions of the facts without objectively verifying one version or the other.⁶⁹

One Illinois case demonstrates the lengths to which a taxation authority employee must go to avoid even the appearance of partiality. Warren Holliday, a Revenue Collection Officer for the Illinois Department of Revenue, was tasked with collecting delinquent taxes from the Louise Shop, Inc. Holliday's supervisors apparently knew that the Louise Shop was owned by none other than Holliday's wife. Holliday failed to recuse himself from the assignment, as provided under the relevant procedures. While unimpressed with the conduct of Holliday's supervisors, the court upheld Holliday's termination.⁷⁰

Additionally, IRS agents and their state counterparts are usually held to a higher standard in their personal tax compliance,⁷¹ and, of course, are forbidden to accept bribes⁷² and are accountable for all government funds they handle in their capacity as agents for the government.⁷³ This is quite consistent with the scrutiny imposed upon those who handled the tax receipts in the Temple in Jerusalem.⁷⁴

B. Courtesy and Civility to the Taxpayer:

Paying one's taxes is not, and never has been, an enjoyable experience,⁷⁵ and the experience of being audited by the taxation authority can be all the more disconcerting for the

⁶⁹ Owens v. Commissioner, 2003 U.S. App. LEXIS 12481 (5th Cir. 2003).

⁷⁰ Holliday v. Civil Service Comm., 121 Ill. App. 3d 763, 460 N.E.2d 358 (Ill.App. 1984).

⁷¹ See Kenneth H. Ryesky, *Of Taxes and Duties: Taxing the System with Public Employees' Tax Obligations*, 31 Akron L. Rev. 349 (1998), and cases cited therein.

⁷² I.R.C. § 7214(a)(2).

As with any other criminal offense, the criminal's family often suffers when IRS agents are punished for bribery and other misdeeds. See, e.g. Weiss v. Commissioner, T.C. Memo 1995-70 (holding wife of former IRS agent liable for taxes on husband's bribery income which was unreported on the couple's joint income tax return).

⁷³ I.R.C. § 7804(c).

⁷⁴ MAIMONIDES, MISHNEH TORAH: HILCHOT SHEKALIM, ch. 2, ¶ 10 at 95 (Rabbi Eliyahu Touger trans., Moznaim Publ. Co. 1993) (“And they would talk to him [continuously] from the time he entered until the time he departed, so that he could not place [a coin] in his mouth.”).

⁷⁵ See, e.g. Belli v. Commissioner, T.C. Memo 1989-403 (“Expressing one's feelings about the IRS ... is not an element of tax fraud; if it were, our Federal prisons undoubtedly would be brimming with such 'tax

taxpayer.⁷⁶ In a taxation system such as the American one, which is based upon voluntary compliance in the first instance, civil and courteous treatment of the cooperating taxpayer is vital to maintaining public confidence in and respect for the system. A salient ethical issue in any taxation bureaucracy is striking the appropriate balance between the need to collect taxes and the ethical imperative to treat the compliant taxpayer with courtesy and respect.⁷⁷

In 1911, the New York State Civil Service Commission contended, successfully on appeal, that the job qualifications for a stock transfer tax examiner included "qualities of mature judgment, courtesy, temperate habits, self-control and integrity far beyond those which might be expected of the ordinary employee."⁷⁸ If the specialized nature of a stock transfer tax examiner requires courtesy to the taxpayer, the need for courtesy is all the greater with respect to the auditing and examination of less specialized taxes, such as the income tax, which is imposed upon common elements of the population at large. Indeed, Congress's Fiscal Year 2006 appropriation for the Treasury specifically required the IRS to "maintain a training program to ensure that Internal Revenue Service employees are trained in taxpayers' rights, in dealing courteously with the taxpayers, and in cross-cultural relations."⁷⁹

Unfortunately, the taxation bureaucracies are not always as courteous to the taxpayer as they might be.

'While this court cannot speak for the IRS, it may be some comfort to Weiner that she has convinced us that while she is entitled to no legal remedy, fair dealing and simple courtesy should have impelled the IRS to have corrected its error more expeditiously, to have apologized for having erred in the first place, and to have provided her with sufficient documentation of its error to enable her to undo some of the harm done to her."⁸⁰

convicts.' We fail to discern any requirement that taxpayers must enjoy or look forward to paying their taxes.

⁷⁶ See, e.g. *Moran v. Commissioner*, 88 T.C. 738, 741 (1987) ("[T]he mere experience of an income tax examination can provoke trauma."); cf. *Cleveland v. United States*, 2000 U.S. Dist. LEXIS 18908 at *4 - *5 (N.D. Ill. 2000), *aff'd* 297 F.3d 569 (7th Cir. 2002) (Reporting claims, albeit not legally cognizable ones, "that defendant's malpractice precipitated the IRS decision to audit, which, in turn, caused Cleveland severe financial and psychological harm and, ultimately, led to his suicide.").

⁷⁷ Robert A. LeBaube and Charles L. Vehorn, *Assisting Taxpayers in Meeting Their Obligations under the Law*, in *IMPROVING TAX ADMINISTRATION IN DEVELOPING COUNTRIES* 310, 322 (Richard M. Bird and Milka Casanegra de Jantscher, eds., International Monetary Fund, 1992).

⁷⁸ *Merritt v. Kraft*, 71 Misc. 492, 501, 129 N.Y.S. 636 (Sup. Ct. Albany Co. 1911), *rev'd on other grounds* 145 A.D. 662, 130 N.Y.S. 363 (3d Dept. 1911), *aff'd* 204 N.Y. 626, 97 N.E. 1103 (1912).

⁷⁹ Pub. L. No. 109-115, § 202, 119 Stat. 2396, 2438 (2005); see also I.R.M. § 1.4.1.13 (07-01-2003) ("Managers must set the tone and instill the need for courteous, firm, and professional attitudes and behavior.").

⁸⁰ *Weiner v. IRS*, 986 F.2d 12, 13 (3d Cir. 1993).

Discourtesy towards taxpayers and unnecessary prolongation of tax audits have been grounds for the suspension or removal of insolent tax bureaucrats.⁸¹ And IRS employees have been known to improperly assert the threat of a tax audit against those with whom they had some personally gripe or altercation.⁸²

Fortunately, there have been some positive paragons of courtesy and professionalism among the ranks of the tax bureaucracies:

"Finally, some commending words are in order concerning the professional conduct and consideration of the auditor, Fred J. Havenbrook, in the face of a recalcitrant taxpayer. Mr. Havenbrook in his initial review of petitioner's tax returns for the three years at issue observed the very high medical expenses claimed by petitioner. But before he proceeded with his initial request for substantiation of these medical expenses, he compared petitioner's past returns because he did not want to issue a letter to petitioner which might 'cause undue trauma to a taxpayer if [he] actually did have a medical concern.' However, when the auditor reviewed petitioner's past filings, he observed that the taxpayer was consistently claiming high amounts of medical expenses, which 'set off alarms and that is why I issued the letter [seeking substantiation of medical expenses] for all years that were still within the statute of limitations.'" ⁸³

Emerson noted that "[o]f all debts, men are least willing to pay the taxes,"⁸⁴ an observation that has proven to be the overriding norm under circumstances which otherwise defy

⁸¹ *E.g.*, *Watkins v. Department of the Treasury*, 1992 U.S. App. LEXIS 13478 (Fed. Cir. 1992); *McStravick v. Department of Revenue*, 470 So. 2d 518, 519 (La.App. 1985), *cert. denied* 475 So. 2d 1095 (La. 1985); *Department of Finance v. Zindel*, New York City Office of Admin. Trials & Hrgs. Index No.OATH 168/06 & 223/06 (October 3, 2006), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD07-63-SA (June 12, 2007); *Department of Finance v. Anderson*, New York City Office of Admin. Trials & Hrgs. Index No.OATH 1485/08 (May 6, 2008).

At least one applicant for an IRS Tax Examiner position has been found unqualified based upon a record of prior significant discourteous behaviors in another government position. *Patch v. OPM*, 30 M.S.P.R. 87 (1986).

⁸² *See, e.g.* *James v. Tablerion*, 363 F.3d 1352 (Fed. Cir. 2004), *reh'g denied*, 2004 U.S. App. LEXIS 14558 (Fed. Cir. 2004); *United States v. Temple*, 447 F.3d 130 (2d Cir. 2006), *cert. denied* 549 U.S. 997 (2006); *Cirella v. Department of the Treasury*, 2008 MSPB 79 (2008).

⁸³ *Matter of Paul Tam*, N.Y.S. Div. of Tax Appeals, Determination DTA Nos. 819366 & 819367 [Transcript citations omitted] (27 May 2004).

⁸⁴ Ralph Waldo Emerson, *Ralph Waldo Emerson: Essays, Politics* (1844), reprinted in *Ralph Waldo Emerson: Essays and Lectures* 567 (Joel Porte ed., The Library of America, N.Y. 1983); *also in 5 The Harvard Classics: Essays and English Traits* at 247 (Chas. W. Eliot ed., Collier & Son, N.Y. 1909).

logic and reason.⁸⁵ The excuses tendered by unenthusiastic taxpayers are remarkably similar from nation to nation,⁸⁶ as are the dubious and frivolous claims that the relevant tax violates the respective nations' constitutions.⁸⁷

Resistance to taxation, then, is always a factor for the taxation bureaucracy to confront, and there comes the point where the taxation authority must use some degree of compulsion to collect the taxes.⁸⁸ Even in societies where the government enjoys wide public support, the tax

⁸⁵ See HAROLD C. WILKENFELD, *TAXES AND PEOPLE IN ISRAEL* 3 (Harvard Univ. Press, 1973).

"It is paradoxical that tax evasion could have reached such alarming proportions so soon after the State of Israel came into being. Establishment of the State in 1948 was the culmination of many years of concerted devotion by those who became its first citizens. There was hardly any sacrifice which the Jewish population was unwilling to make in order to achieve this end — for which they and their ancestors had prayed for almost 2000 years. Yet the same people whose patriotic fervor at times reached the highest pitch of willingness to sacrifice themselves and their wealth for the common good, at other times seemed to have no compunction about engaging in tax evasion on a large scale."

Id.

⁸⁶ *Cf.*, e.g. *O'Toole v. Commissioner*, T.C. Memo. 2002-265 (rejecting petitioner's claim that the IRS assessment was invalid because it omitted the apostrophe in his name) *with* *Commissioner of Inland Revenue v. Boyton*, 2001 NZDCR LEXIS 170, [2001], D.C. REG. 1126 (Dist. Ct. Upper Hutt, 2001) (rejecting defendant's argument that the New Zealand Inland Revenue assessment was invalid because it spelled his name "Craig Gordon Boyton" instead of "Craig-Gordon: Boyton" (with hyphen and colon as indicated)); *cf.*, e.g. *Marsh v. Commissioner*, T.C. Memo. 2000-11, *aff'd* 2002 U.S. App. LEXIS 1354 (9th Cir. 2002) (rejecting tax protester argument that native Hawaiians are not obligated to pay taxes); *Avery-Carter v. Commissioner*, T.C. Memo 1993-598 (same, African-American); *Hill v. Commissioner*, T.C. Memo 1995-301 (same, Native American) *with* *Kaihau v. New Zealand Inland Rev. Dept.* [1990] 3 NZLR 344 (Highcourt, Auckland, 1990) (rejecting tax protester's argument that he is exempt from New Zealand taxation because he is a Maori).

⁸⁷ *See*, e.g. *Deputy Commissioner of Taxation v. Levick*, [1999] FCA 1580 (Fed. Ct. Australia 1999); *Regina v. Sydel*, 2005 BCPC 413 (Brit. Col. Prov. Ct. 2005); *Regina v. Dove*, [2004] O.J. No. 4015 (Ontario Sup. Ct. Just. 2004); *B v. Comptroller of Inland Revenue*, [1974] 2 MLJ 110 (Malaysia Fed. Ct. Civ. App., 1974); *Tan v. Del Rosario*, Philippines Sup. Ct., G.R. No. 109289 (October 3, 1994); *Youngstrom v. Kosrae*, [1991] FMSC 12 (Kosrae, Micronesia, 1991); *Metcash Trading Ltd. v. Commissioner*, 2001 (1) BCLR 1 (CC) (S. Afr. Const. Ct., 2000).

⁸⁸ *See* 1 EDWARD GIBBON, *HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE*, ch. XVII at 493 (J. B. Bury, ed., Heritage Press 1946) (1788):

"The secret wealth of commerce, and the precarious profits of art or labour, are susceptible only of a discretionary valuation, which is seldom disadvantageous to the interest of the treasury; and as the person of the trader supplies the want of a visible and permanent security, the payment of the imposition, which, in the case of a land-tax, may be obtained by the seizure of property, can rarely be extorted by any other means than those of corporal punishments."

compliance rate amongst the populace depends, in no small measure, upon the perceived willingness and ability of the taxation authority to impose sanctions upon the noncompliant.⁸⁹

Very instructive is Maimonides's description of the collection procedures for the half-shekel tax imposed while the Temple stood:

"On the first of Adar the court would announce [the collection of the [half] shekalim, so that every single individual would prepare his half-shekel and be ready to give. On the fifteenth [of Adar], the money-changers sit in every city and would gently prod [the people to give]. If people gave them, they would accept it. If someone did not give, they would not compel him to give. On the twenty-fifth [of Adar], they would sit in the Temple and collect [the half-shekalim]. From this time onward, everyone who had not given [a half-shekel] as yet would be compelled to give. When a person did not give [voluntarily], his property would be taken by force as a pledge. Even his clothing was taken from him."⁹⁰

Jewish law, then, recognizes the obligation of the tax collector to be polite and courteous in the first instance, but also recognizes that force occasionally must be resorted to in order to preserve the integrity of the taxation system. Now, as then, the tax collectors need ethical guidance in the use of the force at their disposal.

C. The *Mesirah* Issue:

"*Mesirah*" refers to one Jew informing upon another Jew to non-Jewish authorities. The complex Jewish laws relating to *mesirah* are beyond the ambit of this article, but give due regard to whether and to what extent the governing regime has harsh or benign tendencies towards the Jewish people.⁹¹ Suffice it to say that more often than not throughout history, Jews have lived

Rita Zeidner, *From Grizzly to Cuddly*, GOV'T EXECUTIVE MAGAZINE, Oct 1992, 12, 17 (quoting Natwar Gandhi, Associate Director for Tax Policy, U.S. General Accounting Office: "Kind words can do a lot, but kind words and a gun can go a lot further.").

⁸⁹ See, e.g. Carlos A. Silvani, *Improving Tax Compliance*, in IMPROVING TAX ADMINISTRATION IN DEVELOPING COUNTRIES at 274 (Richard M. Bird and Milka Casanegra de Jantscher, eds., International Monetary Fund, 1992).

⁹⁰ MAIMONIDES, MISHNEH TORAH: HILCHOT SHEKALIM, ch. 1, ¶ 9 at 18 (Rabbi Eliyahu Touger trans., Moznaim Publ. Co. 1993).

⁹¹ See Michael J. Broyde, *Informing on Others for Violating American Law: A Jewish Law View*, 43 J. HALACHA & CONTEMP. SOC'Y 5 (2002).

Mesirah can also involve giving testimony in court against a fellow Jew. See *United States v. Schlesinger*, 438 F. Supp. 2d 76, 99 (E.D.N.Y. 2006), *new trial denied* 439 F. Supp. 2d 255 (E.D.N.Y. 2006), *aff'd* 514 F.3d 277 (2d. Cir. 2008),), *cert. denied sub nom Schlesinger v. United States*, ___ U.S.

under regimes which, at best were unable or unwilling to control violence against the Jewish community, and which at worst were actually complicit in such violence.⁹² Accordingly, various rabbinical enactments prohibited the practice of one Jew informing the authorities of the transgressions of another Jew, for such was tantamount to informing robbers of someone else's possession of wealth, and thus exposing such persons to loss of liberty and worse.⁹³

On account of the harsh lessons of collective Jewish experience no less than the rabbinical prohibitions, there developed a very strong taboo in Jewish society against informing upon fellow Jews to the secular authorities. This aversion to involving the secular authorities manifests itself in many ways,⁹⁴ and indeed, the complicity of an informant in the prosecution of one prominent case of rabbinical tax evasion⁹⁵ significantly stoked tempers within the Jewish community.⁹⁶

The question then becomes whether a Jew may, under Jewish law, become a tax enforcement officer or functionary for a secular government. As mentioned earlier, Maimonides ruled that a tax regime based upon objective standards is a legitimate one whose imposts must be paid.⁹⁷ Maimonides mentions, with approval, Jewish customs collectors in the service of non-Jewish sovereigns.⁹⁸ Several authoritative American rabbis have likewise permitted Jews to engage in such occupations. Rabbi Moshe Feinstein, considered by many to be the foremost rabbinical authority of his day,⁹⁹ wrote a responsum which, notwithstanding its strong reassertion of the rule against informing others to secular authorities, allowed a Jew in America to be an IRS agent, even where the audit assignments might uncover criminal tax evasion by Jews and lead to

_____, 129 S. Ct. 174, 172 L. Ed. 2d 44 (2008); *United States v. Lieber*, 473 F. Supp. 884, 887 (E.D.N.Y. 1979).

⁹² See Broyde, prior note.

⁹³ *Id.*

⁹⁴ See, e.g. *Rakoszynski v. Rakoszynski*, 174 Misc. 2d 509, 514 - 515, 663 N.Y.S.2d 957, 961 (Sup. Ct. Rockland Co., 1997) (declining to uphold a rabbinical arbitration award prohibiting the parties from "informing on the other party to the authorities, in any way whatsoever.").

⁹⁵ See Feuer, note 1 *supra*; see also *United States v. Weisz*, First Superceding Indictment, C.D.Cal., CR 06-775, ¶ 16 at 4 ("R.K. was a member of the conspiracy from 1996 through October 2004. Beginning in or about October 2004, R.K. became a cooperating witness for the government.").

⁹⁶ See *Case of Informant Reverberates Through L.A.'s Orthodox Community*, FORWARD, January 25, 2008, p. A-1; Alan Nadler, *Righteous Indignation; How are We to Understand the Alleged Spinka Scandal?*, FORWARD, January 25, 2008, p. B-1.

⁹⁷ See note 40 *supra* and accompanying text.

⁹⁸ MAIMONIDES, MISHNEH TORAH, *Gezelah v'Avedah*, ch. 5, ¶ 11.

⁹⁹ See Joseph Berger, *Thousands Mourn Talmudic Scholar*, N.Y. Times, March 25, 1986. p. B-6.

prosecution and imprisonment of the Jewish tax evaders.¹⁰⁰ And Rabbi Yaakov Kamenetzky reportedly permitted and indeed, proactively encouraged, Jewish U.S. Customs Service agents to relentlessly pursue a ring of nominally religious Jewish smugglers who were evading the customs duties by secreting precious stones and other valuables inside Jewish religious articles.¹⁰¹

The mesirah issue is complex with respect to taxation.¹⁰² The better view is that Jewish law permits Jewish people to serve as tax enforcement officers of the taxation system in America,¹⁰³ a system which by and large operates by objective and ascertainable (albeit sometimes complex and confusing) standards.¹⁰⁴ But, as we have seen, service in the cadres of the taxation authority imposes significant ethical responsibilities from the standpoint of both American and Jewish law.

D. Taxpayer Privacy and Confidentiality:

The personal income tax as imposed in America is replete with personal privacy concerns. The IRS, which shares information with the taxation authorities, is privy to much personal data regarding the taxpayer, including the taxpayer's address, identity of household members, and

¹⁰⁰ RABBI MOSHE FEINSTEIN, IGROT MOSHE, *Chosen Mishpat* 1:92 (6 Tammuz 5722 [8 July 1962]); see also Michael J. Broyde, *Informing on Others to a Just Government*, 43 J. HALACHA AND CONTEMPORARY SOC'Y 5, 35 - 37 (2002).

¹⁰¹ Rabbi Mordechai Kamenetsky, *Parsha Parables: Booking a Judge*, YATED NE'EMAN, September 5, 2008, p. 60. Rabbi Mordechai Kamenetsky is the grandson of Rabbi Yaakov Kamenetzky.

¹⁰² Michael J. Broyde, *Informing on Others to a Just Government*, 43 J. HALACHA AND CONTEMPORARY SOC'Y 5 (2002).

¹⁰³ See Broyde, prior note.

Several persons of the Jewish faith have served as Commissioner of Internal Revenue. See INTERNAL REVENUE SERVICE, PREVIOUS IRS COMMISSIONERS, available on the Internet at <<http://www.irs.gov/irs/article/0,,id=184235,00.html>> (accessed October 12, 2008). The author of this article served as an attorney in the employ of the Internal Revenue Service.

¹⁰⁴ See, e.g., Judge Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947):

[T]he words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time.

Id.

taxpayer's employer and occupation. Additional personal data is ascertainable or inferable to the tax collector when the taxpayer is audited. In addition to medical expense deductions from which the auditor might deduce the taxpayer's personal health and medical situation, there are the charitable contributions deductions, from which one can determine or infer the religious, political and social attitudes of the taxpayer. The compatibility or incompatibility of such personal attributes to those of the taxation functionary assigned the case leaves the system and the taxpayer potentially susceptible to much abuse from the tax auditor who allows his or her personal views to drive the course of the tax audit.

Moreover, the American system of voluntary compliance cannot work unless the taxpayer has meaningful assurances that the personal information disclosed to the tax collector in the course of filing the return and paying the tax shall not be made public.¹⁰⁵ This is especially so on account of the rapid rise of identity theft which has accompanied modern information technologies.¹⁰⁶

Congress, aware of the potential for abuse, has enacted several provisions to ensure that the taxpayers' privacy rights are honored, and that the information disclosed by the taxpayer in the tax compliance process remain confidential. These include extensive rules regarding when taxpayer and tax return information may or may not be disclosed by the IRS,¹⁰⁷ and criminal and civil penalties for IRS employees who willfully access the IRS database for information not related to a duly assigned case.¹⁰⁸

Privacy is also a concern for the individuals in the employ of the taxation authority. The Internal Revenue Service Restructuring and Reform Act of 1998 limits the use of pseudonyms by IRS employees, requiring a showing of adequate justification, and a review of each individual request by a superior-ranked employee.¹⁰⁹ The IRS's internal procedures provide for keeping track of the pseudonym or unique employee identification number within the IRS bureaucracy in order to prevent abuses and to hold the taxation authority employee accountable notwithstanding the use

¹⁰⁵ See, e.g. *Boske v Comingore*, 177 U.S. 459, 469 - 470 (1900); *United States v. Tucker*, 316 F. Supp. 822, 825 (Dist. Conn. 1970); *FSLIC v. Krueger*, 55 F.R.D. 512, 514 (N.D. Ill. 1972); *Webb v. Standard Oil Co. of California*, 49 Cal. 2d 509, 513, 319 P.2d 621, 624 (1957); *New York State Dept. of Taxation & Finance v. New York State Dept. of Law*, 44 N.Y.2d 575, 378 N.E.2d 110, 406 N.Y.S.2d 747 (N.Y. 1978).

¹⁰⁶ President's Identity Theft Task Force, *Combating Identity Theft, Volume II* at 51 - 52 (April 2007), available on the Internet at <<http://www.idtheft.gov/reports/VolumeII.pdf>> (accessed October 12, 2008).

¹⁰⁷ I.R.C. § 6103.

¹⁰⁸ Taxpayer Browsing Protection Act of 1997, P.L. 105-35 (Aug. 5, 1997) 110 Stat. 1104, codified at I.R.C. §§ 7213(a)(2), 7213A and 7431.

¹⁰⁹ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3706, 112 Stat. 685, 778 (1998).

of the pseudonym.¹¹⁰ Balancing the public interest against the individual IRS employees' personal privacy concerns, at least one court has upheld IRS's nondisclosure of its employees' pseudonyms used when in contact with taxpayers.¹¹¹

Personal privacy rights, so ubiquitous in American law, have long been recognized by the Torah,¹¹² and under Jewish law.¹¹³ Moreover, the Torah prohibition against gossip¹¹⁴ includes publicizing facts about a person which, though true, might be negative, or even construed in a negative manner.¹¹⁵ Truth, that oft asserted absolute defense to defamation,¹¹⁶ does not suffice under Jewish law. The statutes that protect a taxpayer's privacy rights certainly facilitate compliance with Jewish law as well.

V. ETHICS IMPLICATIONS FOR TAX PRACTITIONERS:

A. The Role of the Tax Practitioner:

Given the complexity of American taxation, many taxpayers engage the services of a tax professional at various stages of the taxation process. Accountants, attorneys and enrolled agents are very vital to the taxation process, from the preparation of the tax return, to representation of the taxpayer before the IRS. A tax practitioner's integrity is recognized as a very critical factor to the proper operation of the system,¹¹⁷ and a competent practitioner will command the respect of IRS and taxpayer alike.

¹¹⁰ I.R.M. § 1.2.4 (09-28-2000).

¹¹¹ Long v. Office of Personnel Management, N.Y.L.J., 10/5/2007, p. 34, col. 1, at 36, col. 1, 2007 U.S. Dist. LEXIS 72887 at *59 - *61 (N.D.N.Y., 2007).

¹¹² See DEUTERONOMY 24:10-11 ("When thou dost lend thy neighbour any manner of loan, thou shalt not go into his house to fetch his pledge. Thou shalt stand without, and the man to whom thou dost lend shall bring forth the pledge without unto thee").

¹¹³ See Alfred S. Cohen, *Privacy: A Jewish Perspective*, 1 J. HALACHA AND CONTEMPORARY SOC'Y 53 (1981).

¹¹⁴ LEVITICUS 19:16.

¹¹⁵ SHLOMO GANZFRIED, KITZUR SHULCHON ORUCH 30: 1 - 5 at 136 - 138 (Rabbi Eliyahu Touger trans., Moznaim Publ. Co. 1991) (1864); see also ZELIG PLISKIN, *GUARD YOUR TONGUE* (1975).

¹¹⁶ See, e.g. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Fendler v. Phoenix Newspapers, Inc.*, 636 P.2d 1257, 1261 (Ariz. 1981).

¹¹⁷ See, e.g. *IRS Confirms Call to Accounting Firms to Discuss Qualified Intermediary Program*, 2008 TNT 133-9 (10 July 2008) (Quoting IRS spokesman: "The accounting community is an important part of our efforts in this area and we will continue to work cooperatively in our future efforts."); ABA Tax Section Meeting: IRS Office Of Professional Responsibility Director Outlines Changes, 2004 TNT 90-8

Tax practitioners must strike a delicate balance between zealously advocating the interest of their client, the taxpayer, and complying with the tax laws, a role which is complicated by the peculiarities and ambiguities of the tax system.¹¹⁸ The complexity of the Internal Revenue Code and its consequent regulations has given rise to many specific ethical issues for those professionals engaged in taxation practice.¹¹⁹

Along with the tax practitioner's honored professional status comes enhanced responsibilities. Imprimis, tax practitioners are held to a higher standard with respect to their own tax affairs.¹²⁰ For Federal criminal offenses involving taxation, the fact that a defendant was a tax return preparer warrants a two-level sentence enhancement under the United States Federal Sentencing Guidelines.¹²¹

With respect to the individual returns they prepare, tax return preparers may be subject to monetary penalties for the willful, reckless or meritless understating their client's tax liability on the tax return.¹²² Even such seemingly routine mundane clerky matters such as signing the client's tax return,¹²³ providing a copy of the return to the client,¹²⁴ or retaining a copy of the client's return in the return preparer's file¹²⁵ are cause for penalizing the tax preparer.

(10 May 2004) (quoting IRS OPR Director Cono Namorato: "Even the honest and scrupulous [practitioners] suffered from the erosion of ethics," Namorato said. "In effect, we view [practitioners] as our partners in this tax administration business; [practitioners] are the front line.").

¹¹⁸ See, e.g., Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 Kan. L. Rev. 847 (1999).

¹¹⁹ See, e.g. Bernard Wolfman & James P. Holden, *Ethical Problems in Federal Tax Practice*, Preface at p. ix (Michie Bobbs-Merrill, 1981).

¹²⁰ *Dodge v. Commissioner*, 1999 U.S. App. LEXIS 20319 at *10-*11, 99-2 U.S. Tax Cas. (CCH) ¶¶50,809 at 89,657 (6th Cir., 1999) ("[A]ttorneys who specialize in taxation are rightfully held to a higher standard of care with respect to their preparation of tax returns."); *McCarron v. Commissioner*, T.C. Summary Op. 2004-13 ("Petitioners failed to offer any evidence that their failure to timely file their 1993 and 1994 tax returns was due to reasonable cause and not willful neglect. In fact, petitioners offered no explanation at all. This is particularly troubling given that petitioner is a tax return preparer."); see also John J. Tigue, Jr. and Jeremy H. Temkin, *New IRS Focus is on the Conduct of Taxpayers' Representatives*, N.Y.L.J., January 15, 2009, p. 3, col. 1.

¹²¹ USSG § 2T1.4(b)(1)(B); *United States v. Robledo*, 2004 U.S. App. LEXIS 266 (5th Cir. 2004).

¹²² I.R.C. § 6694.

¹²³ I.R.C. § 6695(b).

¹²⁴ I.R.C. § 6695(a).

¹²⁵ I.R.C. § 6695(c).

More broadly, there is an Office of Professional Responsibility which regulates practice before the IRS, enforces detailed rules regarding the conduct of those authorized to practice, and which disciplines those practitioners who deviate from the rules.¹²⁶ Tax practitioners are similarly regulated at the state level with respect to state taxation authorities.¹²⁷ And, of course, the tax professional (and anyone else) is subject to fines and imprisonment for willfully aiding or abetting in the preparation of a false tax return or other tax-related document.¹²⁸

Negligence on the part of a tax practitioner can cause an audit of the taxpayer's tax return,¹²⁹ and the IRS obviously does specifically target tax returns prepared by tax professionals known to be careless or unscrupulous.¹³⁰ Practitioners who fail to file returns or otherwise make errors in their returns must be honest and open in informing the client of such errors.¹³¹

B. Situational Ethical Issues for the Tax Practitioner:

¹²⁶ 31 C.F.R. Part 10. The Treasury Department has issued Circular 230, which sets forth 31 C.F.R. Part 10 and its updates.

¹²⁷ *See, e.g.*, ORS § 673.605 et seq. (regulating tax consultants and tax return preparers in the State of Oregon).

¹²⁸ I.R.C. § 7206(2). It is not necessary for the prosecution to prove that the false tax return was actually filed. *United States v. Black*, 469 F. Supp. 2d 513, 546 -547 (N.D. Ill. 2006), *aff'd* 530 F.3d 596 (7th Cir. 2008).

¹²⁹ *See, e.g.* *Radabaugh v. Commissioner*, T.C. Memo 1992-572.

¹³⁰ *See, e.g.* *McDonald v. Commissioner*, T.C. Memo 1996-87; *see also* [Matter of Anonymous, Defense Office of Hearings & Appeals, ISCR Case No. 07-05336 (August 26, 2008) (reciting that all tax returns prepared by applicant's tax preparer were audited by the IRS.)

Cf. *Lewis v. Commissioner*, T.C. Summary Op. 2006-140; *Harrell v. Commissioner*, T.C. Summary Op. 2006-141; *Warren v. Commissioner*, T.C. Summary Op. 2006-142; *Anthony Muhammad v. Commissioner*, T.C. Summary Op. 2006-144; *Warfield v. Commissioner*, T.C. Summary Op. 2006-145 (respectively disallowing claimed charitable contribution deductions in 5 Tax Court decisions, each filed September 13, 2006, each tax return in question prepared by one Chester Muhammad); *see also* *Curtis Muhammad v. Commissioner*, T.C. Summary Op. 2006-174 (disallowing claimed charitable contribution deductions claimed on tax return prepared by daughter of Chester Muhammad, and disallowing claimed business deductions in connection with business allegedly established with aid of Chester Muhammad.).

The author of this article, while employed by the IRS, was involved in cases where the decision of whether or not to audit was influenced not only by the identity and reputation of the tax return preparer, but also by the identity and reputation of other professionals such as property appraisers. The criminal sanctions of I.R.C. § 7213(a)(1) bar the author from divulging the particulars here.

¹³¹ *Board of Professional Ethics & Conduct v. Reedy*, 586 N.W.2d 701 (Iowa 1998); *People v. Schmeiser*, 35 P.3d 560 (Colo. 2001); *Matter of Robertson*, 612 A.2d 1236 (D.C. App. 1992).

Certain aspects and issues of the American taxation system tie into and implicate ethical issues for the tax practitioner. Some of these will presently be discussed.

1. Audit Roulette:

The evils of "audit roulette" by individual taxpayers, discussed above,¹³² are compounded when tax practitioners are complicit. The IRS's Circular 230, which governs the conduct of tax practitioners, specifically prohibits the practitioner from weighing the possibility of audit or challenge when evaluating the reasonableness of the tax advice given.¹³³ The IRS has been known to specifically audit tax returns prepared by particular tax preparers,¹³⁴ and has done so in cooperation with the state taxation authorities.¹³⁵ Tax preparers who engage in unscrupulous practices and/or adhere to lax standards of practice thus place all of their clients in peril of a tax audit. Moreover, where tax practitioners who play the "audit roulette game" proliferate, pressure to compromise standards is brought to bear upon the scrupulous practitioners, who see their client bases erode as taxpayers flock to the unscrupulous preparers who promise (and sometimes deliver) greater tax refunds based upon questionable deductions, or upon lax omissions from income.

2. Privacy and Confidentiality:

The imperative for taxpayer confidentiality and privacy, discussed previously,¹³⁶ also implicates tax practitioners. In non-criminal matters, tax advice discussions and correspondence between tax practitioner and taxpayer are privileged communications which the tax practitioner is generally prohibited from divulging without client consent.¹³⁷ Moreover, disclosure by a tax return

¹³² See notes 45 through 52 *supra* an accompanying text.

¹³³ 31 C.F.R. § 10.34(d)(1); *see also* Estate of Trompeter v. Commissioner, 111 T.C. 57, 69 (1998) (Swift, J., concurring), *vacated & remanded on other grounds* 279 F.3d 767 (9th Cir. 2002), *on remand* T.C. Memo 2004-27, *aff'd in part & rev'd in part on other grounds*, 170 Fed. Appx. 484, (9th Cir. 2006) (noting that " tax return preparers may no longer consider the audit lottery when evaluating the 'reasonableness' of tax return positions.

¹³⁴ *See, e.g.* United States v. Bruno, 2000 U.S. App. LEXIS 29313 at *6 (2d Cir. 2000); United States v. Brown, 548 F.2d 1194 (5th Cir. 1977).

¹³⁵ Stone v. Commissioner, T.C. Memo 1998-314.

¹³⁶ See notes 105 through 116 *supra* and accompanying text.

¹³⁷ I.R.C. § 7525.

preparer of confidential information received in connection with preparation of a tax return is subject to civil and criminal penalties.¹³⁸

3. Electronic Filing of Tax Returns:

In 1998, Congress tasked the Treasury Department with developing a "return-free tax system" to utilize modern information technologies in the taxation process.¹³⁹ Electronic filing of tax returns, having undergone various stages of experimentation and pilot programs, was thus given imprimatur to become the norm, and the IRS's Electronic Filing Program thus went into full throttle mode.

For the ordinary individual taxpayer, E-filing currently requires an intermediary; and with that need for an intermediary comes the need for the IRS to regulate those involved in providing electronic filing services to the public. "[I]mplicit trust must be placed on electronic filers to possess a high degree of integrity as well as to be in compliance with the revenue laws."¹⁴⁰

Accordingly, the IRS has set forth certain qualifications for E-file entrepreneurs, requiring, among other things, that they be in compliance with their personal tax obligations and otherwise behave in a reputable and competent manner,¹⁴¹ and indeed, the IRS has excluded from its Electronic Filing Program several entrepreneurs who have failed to fulfill their own tax obligations and/or who have otherwise acted disreputably.¹⁴² Deprivation of E-file participation privileges has been recognized as a very harsh sanction, but one necessary to protect the revenue and ensure the integrity of the program.¹⁴³

Tax practitioners who facilitate electronic filing of tax returns are thus held to an especially stringent standard by the IRS.

¹³⁸ I.R.C. §§ 6713 and 7216.

¹³⁹ Pub. L. 105-206, §§ 2001 et seq. (signed by President 22 July 1998).

The term "return-free tax system" is a misnomer, inasmuch as taxpayers will continue to be required to provide the Government a report of computations for the taxes owed. A more accurate terminology for the Congressional ideal would be "paper-free tax return system."

¹⁴⁰ *Brenner Income Tax Centers, Inc. v. Director of Practice*, 87 F. Supp. 2d 252, 254 (S.D.N.Y., 2000).

¹⁴¹ *Rev. Proc. 96-61*, 1996-2 C.B. 401; *Ramos v. IRS*, 351 F. Supp. 2d 5, 12 - 14 (N.D.N.Y. 2005).

¹⁴² *E.g.*, *Brenner Income Tax Centers, Inc. v. Director of Practice*, 87 F. Supp. 2d 252 (S.D.N.Y., 2000); *Forehand v. IRS*, 877 F. Supp. 592 (M.D.Ala.1995); *Ekanem v. IRS*, 98-1 USTC (CCH) ¶ 50,257, 1998 U.S. Dist. LEXIS 2866 (D.Md.1998); *Sabat v. IRS*, 2000 U.S. Dist. LEXIS 3974; 200-1 USTC (CCH) ¶ 50,328 (W.D. Pa. 2000)

¹⁴³ *Brenner Income Tax Centers, Inc. v. Director of Practice*, 87 F. Supp. 2d 252, 256 (S.D.N.Y., 2000).

C. Jewish Ethical Norms:

In addition to obvious contravention of the basic Torah injunctions to be honest and truthful,¹⁴⁴ irregularities and lapses by tax practitioners can, *inter alia*, steal money which is rightfully the property of the government, facilitate the entanglement of the taxpayer in illegal behavior, and enhance the client's risk of an audit if the taxation authorities become wise to the practitioner's modus operandi. Moreover, if indeed a tax practitioner is or becomes suspected of the improprieties, the mere signature of the practitioner's name on the tax return can, by subjecting the taxpayer to an audit, effectively serve to inform upon the client to the taxation authorities.¹⁴⁵

American law places tremendous responsibility upon tax practitioners. Under Jewish law, agents who act for others likewise must carry significant responsibilities to the principals on whose behalf they act.¹⁴⁶ The Torah prohibitions against misleading and/or placing a stumbling block in the path of a blind person¹⁴⁷ have long been understood in a far, far broader sense to forbid the facilitation of another's transgressions or straying into danger.¹⁴⁸ These prohibitions include the giving of bad advice, and in such a spirit have been specifically recognized to apply in today's modern financial world to "advice given by the financial and advisory services of banks, and by accountants, lawyers, and financial analysts."¹⁴⁹

VI. ETHICS IMPLICATIONS FOR TAX-EXEMPT ORGANIZATIONS:

¹⁴⁴ EXODUS 23:7; LEVITICUS 19:11; *see also* SAMSON RAFAEL HIRSCH, HOREB, § 368 - 376 at 248 - 253 (I. Grunfeld, trans., Soncino Press, 6th ed. 1997) (1837).

¹⁴⁵ Or absence of such signature. Preparers of tax returns are subject to penalty for failing to sign the returns they prepare for clients, I.R.C. § 6695(b). The absence of such a signature may well flag the tax return for audit.

¹⁴⁶ SAMSON RAFAEL HIRSCH, HOREB, § 356 at 239 - 240 (I. Grunfeld, trans., Soncino Press, 6th ed. 1997) (1837).

¹⁴⁷ LEVITICUS 19:14; DEUTRONOMY 27:18.

¹⁴⁸ SAMSON RAFAEL HIRSCH, HOREB, § 381 - 384 at 258 - 260 (I. Grunfeld, trans., Soncino Press, 6th ed. 1997) (1837); Michael Broyde & David Hertzberg, *Enabling a Jew to Sin: The Parameters*, 19 J. HALACHA & CONTEMP. SOC'Y 7 (1990).

¹⁴⁹ MEIR TAMARI, AL CHET: SINS OF THE MARKETPLACE 149 (Jason Aronson, Inc., 1996).

A. Historical Background:

It has long been the policy of the state and Federal governments to foster and encourage eleemosynary organizations.¹⁵⁰ Abuses for personal gain of the tax-exempt status of charitable, educational and religious organizations¹⁵¹ were, for a long time, largely tolerated by the authorities and the public, in light of the overall benefits to society afforded by the tax exempts.

In recent years, however, as abuses of the system have garnered public notoriety, the regulations affecting charitable organizations have multiplied.

The initial concerns regarding abuses by tax exempt organizations had little to do with private inurement of individuals connected with such organizations, but rather, focused upon unfair competition of tax exempts with businesses that were required to carry the burdens of taxation.¹⁵² The case of the C. F. Mueller Co., a pasta manufacturer that existed to benefit the New York University Law School, brought the issue to a head.¹⁵³ In response to the *Mueller* decision, Congress enacted what is now I.R.C. §§ 502 and 511-515, to impose taxes upon charitable organizations with respect to business income unrelated to their charitable works.¹⁵⁴

During the 1960s, Texas Congressman Wright Patman, the Chairman of the House Small Business Committee, instigated Congressional hearings and inquiries on tax-exempt entities. Patman's focus ranged from the unfair competitive advantage of tax-exempts over taxpaying

¹⁵⁰ Matter of Kimberly, 27 A.D. 470, 473 (N.Y. App.Div., 4th Dept. 1898).

¹⁵¹ For the sake of clarity and brevity, the discussion in this article will use the terms "charitable" and "tax exempt" interchangeably, and the legal distinctions between charitable, religious, educational and other tax-exempt purposes will be largely ignored, unless specifically indicated otherwise. *See, e.g.* Taxation with Representation v. Regan, 676 F.2d 715, 719 (D.C. Cir. 1982), *rev'd on other grounds sub nom* Regan v. Taxation With Representation, 461 U.S. 540 (1983) ("Section 501(c)(3) organizations-sometimes simply called 'charitable' organizations ...").

See I.R.C. § 501 for classifications of various types of tax-exempt entities, *see also* *Taxation With Representation* at 718 - 721.

¹⁵² H. Rep. No. 2319, 81st Cong., 2d Sess. (1950), at 36-37, *reprinted at* 1950-2 C.B. 380, 409; S. Rep. No. 2375, 81st Cong., 2d Sess. (1950), *reprinted at* 1950 U.S.C.C.A.N. 3053, 3081, 1950-2 C.B. 483, 504-05.

¹⁵³ C. F. Mueller Co. v. Commissioner, 190 F.2d 120 (3d Cir. 1951), *aff'g* 14 T.C. 922 (1950).

The then tax-exempt entity was organized with just \$1,000 capital and \$3.55 million in debt, *see* C. F. Mueller Co. v. Commissioner, 479 F.2d 678, n. 2 at 679 (3d. Cir. 1972). *Cf.* HOK Sport, Inc. v. FC Des Moines, L.C., 495 F.3d 927 (8th Cir. 2007) (piercing corporate veil of nonprofit organization founded with no capital, which undertook a construction project estimated to cost in excess of \$14 million.).

¹⁵⁴ Revenue Act of 1950, § 301, 64 Stat. 947 et seq.

businesses,¹⁵⁵ to adverse effects upon the general economy,¹⁵⁶ to private inurement through compensation and other transfers.¹⁵⁷

Concerns have been raised over the misuse of public funds by tax-exempt organizations and their principals and employees in insurance fraud schemes (including Medicaid fraud),¹⁵⁸ as has suspicion of similar complicity by tax-exempts in inflating charitable donation dollar values.¹⁵⁹

By 1993, the scope of governmental oversight had expanded beyond the tax-exempt organizations themselves, to the individuals receiving inappropriate private benefits. Taxpayers' abuses involving unreported quid pro quo goods or services in return for charitable contributions led to the requirement of a written receipt from the charity for contributions of \$250 or more, and not just a canceled bank check or other money trail.¹⁶⁰ Though the requirement falls upon the donor and there is no penalty per se upon the donee organization for failing to provide a proper receipt to the donor, the organization should logically be concerned over the prospect of angry *former* donors who were not given proper receipt documentation.¹⁶¹ Knowingly supplying a

¹⁵⁵ See, e.g. *Patman Studies Tax-Free Funds*, N.Y. TIMES, August 20, 1961, p. 54.

¹⁵⁶ *Study of Foundations' Stock Dealings Is Widened*, N.Y. TIMES, November 4, 1962, p. 42.

¹⁵⁷ *Panel Questions Foundations' Pay*, N.Y. TIMES, August 11, 1964, p. 6.

¹⁵⁸ See, e.g. *United States v. Hendricks*, 2003 U.S. App. LEXIS 12938 (4th Cir. 2003); *Easton v. Public Citizens, Inc.*, 1991 U.S. Dist. LEXIS 18690 (E.D.N.Y. 1991); *Congregation B'nai Jonah v. Kuriansky*, 172 A.D.2d 35, 576 N.Y.S.2d 934 (3d Dept. 1991), *app. dismissed* 79 N.Y.2d 895, 590 N.E.2d 244, 581 N.Y.S.2d 659 (1992); *Matter of Fuhrer*, 100 Misc. 2d 315, 419 N.Y.S.2d 426 (Sup. Ct. Richmond Co. 1979), *enforced*, 72 A.D.2d 813, 421 N.Y.S.2d 906 (2d Dept. 1979).

¹⁵⁹ See, e.g. *St. German of Alaska Eastern Orthodox Catholic Church v. United States*, 840 F.2d 1087 (2d Cir. 1988).

¹⁶⁰ Omnibus Budget Reconciliation Act of 1993, P.L.103-66, § 13172(a), 107 Stat. 312, 455-456, codified at I.R.C. § 170(f)(8).

¹⁶¹ See IRS, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TEXT, FY 2000, ch. T, Fundraising Issues (31 August 1999), *reprinted in* 1999 TNT 169-31.

"The penalty for failure to obtain the substantiation statement required by IRC 170(f)(8) falls, in the first instance, on the contributor. Although charities are involved in issuing the statement, Congress does not impose on charities a penalty for failure to furnish an IRC 170(f)(8) statement. The belief was that where donors of \$250 or more could not take a deduction because they were not given properly completed substantiation statements, the donors would punish the charity by not giving to them in the future. Charities on the other hand would see substantiation as an element in good donor relations."

Id.

false receipt would, of course subject the donee organization and/or its cognizant personnel to various criminal and/or civil penalties.¹⁶²

B. The Tax-Related Obligations of Tax-Exempt Organizations:

It is hardly the purpose of this article to exhaustively detail, or even to overview, the entire panoply of legal obligations imposed upon tax-exempt organizations.¹⁶³ Suffice it to say that with tax-exempt status comes various requirements and limitations.

Among other things, tax-exempt organizations (other than certain small organizations and individual houses of religious worship) are required to file detailed Form 990 information returns,¹⁶⁴ the information in which is a matter of public record.¹⁶⁵ They are limited in their legislative lobbying efforts,¹⁶⁶ and are subject to sanctions for engaging in political activities,¹⁶⁷ and for making expenditures which are not for the purposes of the organization's tax-exempt status.¹⁶⁸ Income from activities unrelated to the organization's tax-exempt purpose is subject to taxation.¹⁶⁹

Moreover, individuals connected with tax-exempt organizations have their own obligations and restrictions in their dealings for or with their organizations. Those who receive benefit from or authorize self-dealing transactions with the tax-exempt organization organizations are subject to taxes on the transaction.¹⁷⁰ More punitive by far are the so-called

¹⁶² See, e.g., I.R.C. § 6701; I.R.C. § 7206(2); *United States v. Adu*, 770 F.2d 1511 (9th Cir. 1985), *cert. denied* 475 U.S. 1030 (1986).

¹⁶³ See, e.g., Carolyn W. Schott, *Tax Exempt! Not So Fast ... A Primer for the Non-Tax Lawyer about Taxes on Nonprofits and Tax-Exempt Organizations*, 43 TENN. B.J. 28 (2007); BRUCE R. HOPKINS, *IRS AUDITS OF TAX-EXEMPT ORGANIZATIONS: POLICIES, PRACTICES, AND PROCEDURES* (Wiley, 2008).

¹⁶⁴ I.R.C. § 6033, Treas. Reg. § 1.6033-2. Repeated failure to file the required information return is cause for revocation of the organization's tax-exempt status, I.R.C. § 6033(j).

¹⁶⁵ I.R.C. § 6104; Treas. Reg. § 601.702 (d)(3). Many Forms 990 are posted on the Internet at the <<http://www.guidestar.org>> website (accessed October 12, 2008), by Philanthropic Research, Inc., itself a tax-exempt organization, in cooperation with the IRS.

¹⁶⁶ I.R.C. § 501(h).

¹⁶⁷ I.R.C. §§ 4911, 4912 and 4955.

¹⁶⁸ I.R.C. §§ 4952(a)(1) and 4952(b)(1).

¹⁶⁹ I.R.C. §§ 502 and 511-515.

¹⁷⁰ I.R.C. § 4941.

"intermediate sanctions" taxes imposed upon individuals who receive and/or authorize excessive compensation or benefits in connection with their control over tax-exempt organizations.¹⁷¹ And illegal lobbying expenditures by private foundations can result in punitive taxes upon both the tax-exempt organization itself and its manager(s) personally.¹⁷²

And, of course, a tax-exempt organization is required, as any other employer, to withhold the applicable payroll taxes from the paychecks of its employees and remit the same to the IRS.¹⁷³ Failure of the organization to do so may result in personal liability for the organization's officers or employees or other individuals responsible for the failure.¹⁷⁴

Thus, there is significant interplay of ethical requirements and issues between a tax-exempt organization and its principal individuals and employees.

C. Enhanced IRS Scrutiny over Improper and/or Excessive Expenditures by Tax-Exempt Organizations:

Several ill advised acts by charitable organizations and their principals drew the attention of Congress and the public. The poster boy for illegally diverting charitable funds for personal benefit was William Aramony, the CEO of the United Way of America, who was convicted on criminal charges stemming from, inter alia, his use of United Way monies for his personal chauffeur, and to finance his personal intimate relationship and his paramour.¹⁷⁵ Other high profile incidents involving alleged mismanagement or worse by nonprofit entities have included Adelphi University's lavish salary and perquisites for its president at a time when the University

¹⁷¹ I.R.C. § 4958.

Prior to the "intermediate sanctions" provision, the IRS's only recourse was to revoke the organization's tax-exemption, *see* H.R. Rep. No. 104-506, at 54 (1996), an extreme measure which the IRS was reluctant to impose, thus effectively allowing such abuses.

¹⁷² I.R.C. § 4945.

¹⁷³ I.R.C. §§ 3102 and 3403.

¹⁷⁴ I.R.C. § 6672; *Verret v. United States*, 542 F. Supp. 2d 526 (E.D. Tex. 2008), *aff'd* 312 Fed. Appx. 615, 2009 U.S. App. LEXIS 3966 (5th Cir. 2009); *Jefferson v. United States*, 459 F. Supp. 2d 685 (N.D. Ill. 2006), *aff'd* 546 F.3d 477 (7th Cir. 2008); *Cooper v. United States*, 539 F. Supp. 117 (E.D. Va. 1982), *aff'd* 705 F.2d 442 (4th Cir. 1983).

¹⁷⁵ *Unites States v. Aramony* ("Aramony I"), 88 F.3d 1369 (4th Cir. 1996), *cert. denied* 520 U.S. 1239 (1997).

Aramony was also sued civilly by the New York Attorney General to recover the misappropriated funds. *Vacco v. Aramony*, N.Y.L.J., 7 August 1998, p. 21 (Sup. Ct. N.Y. Co. 1998).

was cutting back on programs,¹⁷⁶ the compensation and perquisites paid to the trustees of the Bishop Estate in Hawaii,¹⁷⁷ and the compensation package of former New York Stock Exchange Chairman Richard Grasso.¹⁷⁸ Such incidents by charitable and tax-exempt organizations attracted the attention of the IRS and other regulatory authorities.

In the spring of 2004, the IRS signaled its intention to ratchet up its scrutiny over the affairs of tax-exempt organizations. On 1 April 2004, the IRS issued Notice 2004-30¹⁷⁹ regarding certain types of transactions. According to an accompanying press release, Notice 2004-30 was "the first time the IRS has exercised its authority under the tax shelter regulations to specifically designate a tax-exempt party as a 'participant' in a tax avoidance transaction."¹⁸⁰

On 7 April 2004, IRS Commissioner Mark W. Everson testified before a Senate subcommittee that the IRS "will discourage and deter non-compliance within tax exempt and government entities, and the misuse of such entities by third parties for tax avoidance or other unintended purposes."¹⁸¹

¹⁷⁶ See Bruce Lambert, *New York Regents Oust 18 Trustees from Adelphi U.*, N.Y. TIMES, 11 February 1997, § A, p. 1, col. 3, see also *Vacco v. Diamandopoulos*, 185 Misc. 2d 724, 715 N.Y.S.2d 269 (Sup. Ct. N.Y. Co., 1998).

¹⁷⁷ See Todd S. Purdum, *For \$6 Billion Hawaii Legacy, a New Day*, N.Y. TIMES, 15 May 1999, § A, p. 1, col. 4; *IRS is Threatening to Revoke Status of Hawaii Estate if Trustees Don't Quit*, WALL ST. J., 30 April 1999, § A, p. 16, col. 1.

¹⁷⁸ See New York State Attorney General's Office, Press Release, "Former NYSE Chief Sued over Excessive Pay Package" (24 May 2004), available on the Internet at <http://www.oag.state.ny.us/media_center/2004/may/may24a_04.html> (accessed September 29, 2008). The New York Attorney General's claims against Grasso were ultimately dismissed. *People v. Grasso*, 11 N.Y.3d 64, 893 N.E.2d 105, 862 N.Y.S.2d 828 (2008).

¹⁷⁹ Notice 2004-30, though actually issued on 1 April 2004, was published in the Internal Revenue Bulletin nearly four weeks later, 2004-17 I.R.B. 828 (26 April 2004). The delay was no doubt attributable, at least in part, to the hectic activity at IRS Headquarters in connection with the well-known personal income tax filing deadline of April 15th.

¹⁸⁰ *Treasury and IRS Issue Guidance on S Corporation, Tax Exempt Entity Transaction*, IR-2004-44 (April 1, 2004), available on the Internet at <<http://www.irs.gov/newsroom/article/0,,id=122440,00.html>> (accessed October 12, 2008).

¹⁸¹ Written Statement of Commissioner Of Internal Revenue Mark W. Everson before the Senate Committee on Appropriations Subcommittee on Transportation, Treasury and General Government Hearing on Internal Revenue FY 2005 Budget Request (7 April 2004), hearing transcript at 10 and 16, available on the Internet at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_sapp_tra_4&docid=f:39104127.pdf> (accessed October 12, 2008).

Three weeks later, IRS Exempt Organizations Division Director Steven T. Miller indicated that the IRS planned to give increased scrutiny to tax-exempt organizations when he spoke at a Georgetown University Law Center conference on 29 April 2004,¹⁸² a conference at which Senate Finance Committee staff members also indicated growing Congressional interest in controlling abuses in connection with the tax-exempt organizations.¹⁸³ Miller made similar remarks at a Washington College of Law conference on 20 May 2004.¹⁸⁴ Less than one week later, the IRS announced that Miller would be elevated to Commissioner of its Tax Exempt and Government Entities Division, effective 1 June 2004.¹⁸⁵ On 22 June 2004, Commissioner Everson declared to the Senate Finance Committee that

"[d]isclosure is an important way for the IRS to identify participants in abusive transactions. However, our disclosure scheme, which originally was developed to address the taxable sector, does not yet fit all tax-exempt participants because the method of reporting does not fit all tax-exempt entities well. For example, an organization must attach Form 8886 to its annual tax return for each year that the organization participates in a listed transaction. For this purpose, "tax return" includes information returns, so tax-exempt entities that file information returns are covered by the regulations. However, entities that are not required to file any return are not covered. This excepted category includes churches, small exempt organizations, state and local governments, state and local government retirement plans, and Indian tribal governments. Thus, these entities are not covered by the section 6011 disclosure net."¹⁸⁶

¹⁸² *Miller Announces Initiative on EO Compensation, Other Compliance Projects*, 2004 TNT 84-6 (29 April 2004).

Public and special audience speeches by high-ranking IRS or Treasury officials are entitled to some weight by tax practitioners and the public in ascertaining the IRS's policy. See *Vinson & Elkins v. Commissioner*, 99 T.C. 9, 58 - 59 (1992), *aff'd* 7 F.3d 1235 (5th Cir. 1993). The IRS accordingly uses such remarks as one means to signal its enforcement intentions.

¹⁸³ *Senate Finance Staffers Describe Lawmakers' EO Abuse Concerns*, 2004 TNT 84-7 (29 April 2004).

¹⁸⁴ Fred Stokeld, *IRS's Miller Briefs Church Reps on Service's Policies On Churches, Religious Orgs*, 2004 TNT 99-6 (21 May 2004).

¹⁸⁵ *Miller, Morgante Named to Leadership Posts*, IRS Press Release IR-2004-71 (25 May 2004), available on the Internet at <<http://www.irs.gov/newsroom/article/0,,id=123466,00.html>> (accessed October 12, 2008).

¹⁸⁶ See, IRS News Release IR-2004-81, WRITTEN STATEMENT OF MARK W. EVERSON, COMMISSIONER OF INTERNAL REVENUE, BEFORE THE COMMITTEE ON FINANCE, U.S. SENATE: HEARING ON CHARITABLE GIVING PROBLEMS AND BEST PRACTICES, at 11 (June 22, 2004), available on the Internet at <<http://finance.senate.gov/hearings/testimony/2004test/062204metest.pdf>> (accessed October 12, 2008); see also IRS News Release IR-2004-81, available on the Internet at <<http://www.irs.gov/pub/irs-news/ir-04-081.pdf>> (accessed October 12, 2008).

Everson's discourse was an unabashed invitation to Congress to expand the sweep of disclosure requirements to include more tax-exempt organizations.

This series of events within a three-month period proved to be the start of heightened scrutiny by the IRS over tax-exempt organizations. As this article was written, the IRS's special attention towards tax-exempt organizations continued apace, with Congressional backing.¹⁸⁷

D. Tax-Exempt Organizations and the Jewish Practices of Charitable Giving:

The Hebrew word "tzedakah" has a far deeper and broader meaning than its common English translation "charity." The Hebrew root of "tzedakah" is "tzedek," which means justice, for Jewish law and practice equate giving to the less fortunate of society as a component of if not synonymous with justice.¹⁸⁸ The practice of giving money and other aid to those less fortunate has always been deeply rooted in Jewish tradition and law,¹⁸⁹ and, is practiced very extensively amongst almost all segments of the American Jewish population, even those who have strayed far from the Jewish religious ritual practices.¹⁹⁰

Though the individual synagogues have long performed, and continue to perform, various charitable works,¹⁹¹ organizations to augment the synagogue have appeared in America and

¹⁸⁷ See, e.g., Ben Gose, *Congress Continues to Scrutinize Spending by Wealthy Groups*, CHRON PHILANTHROPY, July 24, 2008, p. 14; SEN. CHUCK GRASSLEY, NEWS RELEASE, IRS QUESTIONNAIRE OF COLLEGES, UNIVERSITIES (October 1, 2008), available on the Internet at <http://finance.senate.gov/press/Gpress/2008/prg100108.pdf> (accessed October 12, 2008).

¹⁸⁸ See, e.g., Eliezer Cohen, *Tzedakah: A Matter of Justice*, in *THE ETHICAL IMPERATIVE* 481 (Rabbi Nissin Wolpin, ed., Mesorah Publications, 2000); see also Avrohom Chaim Feuer, *The Tzedakah Treasury* (Mesorah Publications, 2000), *passim*; GEORGE HOROWITZ, *THE SPIRIT OF JEWISH LAW* § 84 at 142 (2nd Reprint 1973) (1953).

¹⁸⁹ MAIMONIDES, *MISHNEH TORAH: Matinot Aniyim*; SHLOMO GANZFRIED, *KITZUR SHULCHON ORUCH* ch. 34 at 152 - 157 (Rabbi Eliyahu Touger trans., Moznaim Publ. Co. 1991) (1864).

¹⁹⁰ MILTON GOLDIN, *WHY THEY GIVE: AMERICAN JEWS AND THEIR PHILANTHROPIES* (Macmillan, N.Y., 1976); *CONTEMPORARY JEWISH PHILANTHROPY IN AMERICA* (Barry A. Kosmin and Paul Ritterband, eds., Rowman & Littlefield, 1991); Joseph Isaac Lifshitz, *Welfare, Property, and Charity in Jewish Thought*, 44(2) *Society* 71 (January/February 2007).

¹⁹¹ See, e.g. BORIS D. BOGEN, *JEWISH PHILANTHROPY* 363 - 374 (Reprint, Montclair, NJ, Patterson Smith, 1969) (Macmillan, 1917); BARBARA MILLER SOLOMON, *PIONEERS IN SERVICE: THE HISTORY OF THE ASSOCIATED JEWISH PHILANTHROPIES OF BOSTON* 4 - 5 (Associated Jewish Philanthropies, Boston, 1956).

elsewhere.¹⁹² By one count, in 1909 there were in America seven national organizations; 809 relief societies; 148 hospitals, orphanages, convalescent homes and similar institutions; and 227 schools and other educational institutions specifically supported by the American Jewish population.¹⁹³ The number of Jewish *tzedakah* organizations in America has multiplied since then.¹⁹⁴

For the most part, these organizations (and any new ones which might appear in contemporary times) took and continue to take advantage of the American tax laws by qualifying as tax-exempt organizations.¹⁹⁵ Indeed, one of the highest forms of *tzedakah*, bested only by giving the charitable donee a job or a position as a coventurer in a business enterprise, is anonymous aid where the identity of the donor and of the donee are unknown to one another.¹⁹⁶ A tax-exempt organization is a natural and logical vehicle for effecting such *tzedakah*. Accordingly, the religious and secular ethical issues which are part and parcel of American taxation pertain not only to the individual, but at the organizational level as well.

VII. CONCLUSION:

In the very first verse of Pirkei Avot, the rabbis enjoin the Jewish people to erect a fence around the Torah,¹⁹⁷ meaning to take stringencies in order to ensure adherence to the Torah's commandments.¹⁹⁸ This has obvious implications to taxation ethics, if only in the avoidance of involvement in schemes whose legality is ambiguous.

In the context of taxation systems based upon objective standards, such as those found in the United States and most Western countries, Halacha requires that everyone comply with the

¹⁹² *Bogen*, prior note, at 364; *Miller*, prior note, at 6; see also J. Sanford Rikoon, *The Jewish Agriculturalists' Aid Society of America: Philanthropy, Ethnicity, and Agriculture in the Heartland*, 72(1) AGRICULTURAL HISTORY 1 (Winter 1998).

¹⁹³ *Bogen*, prior note, at 7 - 8.

¹⁹⁴ See, e.g. HARRY L. LURIE, *A HERITAGE AFFIRMED* (Jewish Publication Society of America, 1961).

¹⁹⁵ The IRS proactively encourages such organizations to obtain and maintain tax-exempt status. See IRS, *TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS* (Pub. 1828, June 2008); IRS, *COMPLIANCE GUIDE FOR 501(c)(3) PUBLIC CHARITIES* (Pub. 4221-PC, June 2007).

¹⁹⁶ MAIMONIDES, *MISHNEH TORAH: Matinot Aniyim*, ¶ 10.8; SHLOMO GANZFRIED, *KITZUR SHULCHON ORUCH* ch. 34 at 152 - 157 (Rabbi Eliyahu Touger trans., Moznaim Publ. Co. 1991) (1864).

¹⁹⁷ Talmud, Pirkei Avot 1:1.

¹⁹⁸ See, e.g. Michael J. Broyde, *A Jewish Law Analysis of Being a Prosecutor or Defense Attorney*, 66 *FORDHAM L. REV.* 1141, n. 34 at 1149 (1998).

tax law in an honest and straightforward matter; any less is contrary to Jewish law as well as national secular law.

Misbehavior in taxation and other financial matters by a Jewish person is viewed not only as a personal transgression, but as a discredit to the Jewish people; a *chillul HaShem* (profanation of the Name of G-d).¹⁹⁹ The mere suspicion of rabbis, religious Jews and religious Jewish institutions in publicized tax fraud cases²⁰⁰ is therefore something which should give the Jewish community great pause. Even where there is no criminal conviction, or the conviction is overturned on a technicality,²⁰¹ news media reports of religious Jews involved in ethical lapses in tax matters is not in the Jewish community's -- nor society's -- best interests. And disingenuous excuses such as the sentence mitigation argument advanced by a defense attorney in a British courtroom that the cigarette smuggler defendants "were religiously observant young men from a yeshiva"²⁰² only detract from the esteem in which the Jewish community is held, as do lenity supplications citing the convicted tax cheat's service to the religious Jewish community.²⁰³ Individuals who are learned in Torah law should, if anything, know to comport themselves far better.²⁰⁴

Religious leaders in the Jewish community need to make clear that tax fraud is inimical to Jewish laws and values, and is unacceptable in the Jewish community.

There is much that can be done by the Jewish community to instill a sense of taxation ethics in its membership. A parent's tax indiscretions set a poor example for his or her children not only in taxation matters, but also in broader ethical issues. As one Jewish educator observed,

"I shudder every time I remember the words of a young man who had been caught stealing, who was brought to me to be disciplined. When I asked him how he thought his father would react to his misdeed, he laughed scornfully at

¹⁹⁹ See, e.g. Rabbi Shimon Schwab, *Integrity and Faith in the Marketplace*, in THE ETHICAL IMPERATIVE 27 - 28 (Rabbi Nissin Wolpin, ed., Mesorah Publications, 2000).

²⁰⁰ This Article will presume that any such individuals or institutions are in fact innocent of any wrongdoing unless and until a guilty plea, jury verdict or judicial bench trial determination establishes otherwise.

²⁰¹ See, e.g. *United States v. Rosenblatt*, 554 F.2d 36 (2d Cir. 1977) (overturning conviction of rabbi involved in using his yeshiva in a money laundering scheme to enable others to evade taxes).

The *Rosenblatt* case also involved testimony against the defendant by his alleged co-conspirator, which raises *mesirah* issues, see notes 91 through 104 *supra* and accompanying text.

²⁰² Rachel Fletcher, *Cigarette Gang is Fined*, JEWISH CHRONICLE (London), October 5, 2007, p. 6.

²⁰³ E.g., *United States v. Felzenberg*, 1998 U.S. Dist. LEXIS 4214 at *17 (S.D.N.Y. 1998).

²⁰⁴ See, e.g. Rabbi Avrohom Pam, *The Yeshiva Graduate's Obligation*, in THE ETHICAL IMPERATIVE 109 (Rabbi Nissin Wolpin, ed., Mesorah Publications, 2000).

me. 'My father? He brags at the Shabbos table about he tricks the IRS every year so that he doesn't have to pay any taxes. He'll probably be proud of me!'"²⁰⁵

Children should be taught from an early age to respect the property of others,²⁰⁶ which obviously would include the property of the government. Jewish schools need to include taxation honesty as part of their ethics courses.²⁰⁷ In such regard, it is noted that on a procedural motion for trial severance in a criminal tax evasion case, the defendant's argument invoking Jewish law was decisively put to rest by U.S. District Judge Vincent P. Biunno's own analysis:

As is well known, Jewish religious law is founded on Torah, the written law as given by the Lord to Moses and embodied in the first five books of the Old Testament. This written law, which may be likened to a written constitution and statutes, is supplemented by "oral law", or "Torah by Mouth". This oral law consists of both Mishnah, a systematic collection of religious-legal decisions developing the laws of Torah, and Gemara, comprising supplemental material by way of Rabbinical interpretation by various scholars. These three major components, along with Tosephta, Mishradin and Targumin, represent the body of orthodox Rabbinical literature connecting Torah with medieval and modern Judaism.

In any event, it is of interest to examine the written law, Torah. A brief inspection discloses a number of written laws pertinent to the question presented. Thus, the law is written:

. . . "Ye shall not . . . deal falsely, neither lie one to another," Leviticus, xix., 11.

. . . "Thou shalt not defraud thy neighbor", Leviticus, xix., 13.²⁰⁸

If practiced and applied properly, Jewish law has a very salutary effect upon taxation ethics and the welfare of the nation. But if Jewish children do not learn taxation ethics through

²⁰⁵ Yosaif Asher Weiss, *Why are There Still Children at Risk?*, JEWISH OBSERVER, January/February 2006, p. 11, at p. 12.

²⁰⁶ SAMSON RAFAEL HIRSCH, HOREB, § 343 at 231 (I. Grunfeld, trans., Soncino Press, 6th ed. 1997) (1837).

²⁰⁷ See, e.g. Steven H. Resnicoff & Ira Kasdan, *A Proposal for a High School Course in Torah Ethics* in THE ETHICAL IMPERATIVE 88, Appendix at 96 (Rabbi Nissin Wolpin, ed., Mesorah Publications, 2000).

²⁰⁸ United States v. Braunstein, 474 F. Supp. 1, 4 (Biunno, J.) (D.N.J. 1978).

the words and actions of their parents, teachers and rabbis, then they may well hear discourses on Jewish taxation ethics from Gentile judges in secular courtrooms.²⁰⁹

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²⁰⁹ Judge Biunno's former law clerk confirmed to the author that the Judge was of the Catholic faith and often attended Sunday Masses. E-mail from Walter Timpone, Esq. to Kenneth H. Ryesky, Esq., October 12, 2008, on file with author.