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Freakonomics and the Tax Gap: An Applied Perspective

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FREAKONOMICS AND THE TAX GAP: AN APPLIED PERSPECTIVE

LESLIE BOOK*

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INTRODUCTION

Over the course of approximately nine years, I had the opportunity to talk with Janet Spragens at length about many topics. One topic that took up a lot of our time was the earned income tax credit (the “EITC”) and, in particular, the Internal Revenue Service’s (the “IRS”) efforts to reduce the error rate associated with the EITC. Janet was deeply concerned about low-income taxpayers, and she felt to her core that IRS compliance efforts, if not designed or implemented with the characteristics of the low-income taxpayer in mind, were likely to be unduly burdensome and lead to erroneous determinations. In testimony before the Oversight Board,¹ in

* Professor of Law and Director, Federal Tax Clinic, *Villanova University School of Law*. I am grateful for the research assistance of John Guinan and Jane Coogan, and the *Villanova University School of Law* for its financial support of my research. Helpful comments on an earlier draft were provided by Will do next round

1. Janet Spragens’s testimony before the Oversight Board is essential reading for those interested in issues affecting low-income taxpayers. See, e.g., Janet Spragens, Professor of Law, Fed. Tax Clinic, Am. Univ., Wash. Coll. of Law, Statement Before the IRS Oversight Board (Feb. 1, 2005), available at http://www.treas.gov/irsob/meetings/2-01-05/statement_spragens.pdf (discussing how Low-Income Taxpayer Clinics provide a critical service to the IRS by both educating taxpayers about their tax obligations and by protecting the rights of low-income taxpayers).

comments to the IRS,² and in articles,³ Janet strove to give voice to the low-income taxpayer, and she cautioned administrators and legislators to consider policies from the taxpayer's perspective. At times, Janet was critical of efforts that she felt placed taxpayers at greater risk, and she suggested a measured approach to proposals like requiring the testing, registration, and certification of income tax return preparers. Yet, Janet was not one just for the status quo, and with that in mind, the inquiry about what to do with the problem of non-compliance among low-income taxpayers, and the EITC in particular, is a topic that I feel is especially appropriate to consider.

I. SUMO, BAGELS AND TAX CHEATING

The EITC error rate is high relative to other transfer programs, though not as large in relative terms as other systemic areas of non-compliance within the tax system.⁴ Views differ on just how important the EITC compliance problem is and the means to reduce this error rate.⁵ This Article argues that applying insights from the entertaining book *Freakonomics*⁶ can assist policymakers grappling with the thorny issues of EITC non-compliance. In *Freakonomics*, using Steven D. Levitt's insights as a curious economist, the authors sift through data to address broader issues of greater import. One key question they tackle is just how corrupt people are in different settings, looking at, for example, the role incentives play for school teachers who feed answers to students on tests,⁷ and parents

2. See, e.g., Janet Spragens, Nancy Abramowitz & Leslie Book, *Professors Comment on EITC Precertification*, 100 TAX NOTES 847, 848 (2003) (raising concerns over the IRS's proposed pre-certification program, which could increase compliance burdens for low-income taxpayers and in turn deter a significant number from claiming the EITC that Congress intended for them).

3. See, e.g., Janet Spragens & Nancy Abramowitz, *Low-Income Taxpayers and the Modernized IRS: A View From the Trenches*, 107 TAX NOTES 1407, 1407 (2005) (asserting that although the IRS Restructuring and Reform Act of 1998 generates significant efficiency gains for the agency, those gains often compromise fair process for low-income taxpayers); Janet Spragens & Nancy Abramowitz, *IRS Modernization and Low-Income Taxpayers*, 53 ADMIN. L. REV. 701, 701 (2001) (explaining that the IRS reorganization has the potential to greatly benefit low-income taxpayers, but special attention is required to ensure that the unique needs of this group are addressed); Janet Spragens & Nina Olson, *Tax Clinics: The New Face of Legal Services*, 88 TAX NOTES 1525, 1529 (2000) (arguing that the professional tax community needs to recognize the compliance problems that face low-income taxpayers and affirmatively support a moratorium on annual tax changes).

4. Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1882-84 (2005).

5. See, e.g., Nina Olson & Janet Spragens, *Point & Counterpoint: Certification and Precertification for the Earned Income Tax Credit*, A.B.A. SECTION OF TAXATION NEWS QUARTERLY, Summer 2005, at 10, 10-13, 20 (capturing different views on the merits of the IRS's proposal to require certain EITC claimants to pre-certify eligibility).

6. STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* (rev. and expanded ed. 2006) (2005).

7. See *id.* at 22 (noting that high-stakes testing has radically changed the incentives for

of children at day care centers who fail to pick their children up on time.⁸ In these scenarios, the authors examine how structural incentives create great temptations and lead teachers and parents to attempt to game the system by feeding students answers to tests,⁹ or failing to discourage parents to pick their children up on time.¹⁰

Two of Levitt and Stephen J. Dubner's examples stand out as illustrations of why there may be a non-compliance problem among EITC-claiming taxpayers. The first story considers sumo wrestlers. In sumo wrestling, wrestlers compete in fifteen matches to stay in the top leagues, and those who finish with a winning record qualify for larger pay and other benefits.¹¹ The authors study the outcomes of matches between those who are 7-7 and those who are 8-6, and note that in these matches, which do not mean anything for the 8-6 wrestlers, but do mean a great deal in terms of cash for the wrestlers with the poorer record, the 7-7 wrestler actually wins around 80% of the time.¹² According to the authors, the 7-7 wrestler should win less than 50% of the time,¹³ and in matches where the outcome is not crucial, the wrestlers with 7-7 records win only about 40% of the time.¹⁴ To the authors, this suggests collusion among the wrestlers, with the structure of sumo greatly contributing to the propensity for the wrestlers to game the system.¹⁵

Levitt and Dubner also examine Paul Feldman, a former economist turned small businessman in the Washington, D.C. area, whose business is remarkably efficient and profitable.¹⁶ His business is simple: early in the morning, he delivers bagels and a plywood box with an opening for coins and bills to a company's snack room.¹⁷ Later, he returns and collects the cash box and any leftovers.¹⁸ The business provided Feldman (and Levitt

teachers to cheat, since schools are now increasingly being held accountable for poor test results).

8. *See id.* at 19 (explaining that when a three dollar late fee was imposed on parents arriving to the day care center more than ten minutes late, the number of late pickups actually increased because the amount of the fine was too small).

9. *See id.* at 22-23 (listing the various incentives that persuade teachers to cheat, including the fact that "teacher cheating is rarely looked for, hardly ever detected, and just about never punished").

10. *See id.* at 19 (arguing that a three dollar late fee does not deter late pickups because, among other things, it substitutes an economic incentive for a moral one).

11. *See id.* at 36 (maintaining that a sumo wrestler's ranking affects every facet of his life, including how much money he makes and how large of an entourage he carries).

12. *Id.* at 37.

13. *Id.* at 38.

14. *Id.* at 39.

15. *See id.* (concluding that quid pro quo agreements among the wrestlers is the most logical explanation for why 7-7 wrestlers win such an unnaturally high percentage of matches against 8-6 opponents).

16. *Id.* at 41-47.

17. *Id.* at 42.

18. *Id.*

and Dubner) with an interesting window into customers' honesty. After tweaking the cash collection mechanism to limit the temptation to steal (initially Feldman relied on an open basket and coffee can with a plastic lid), he noted that the overall payment rate for bagels was about 89%.¹⁹

Attempting to draw conclusions from the data, bagel whiz Feldman recounted Plato's tale of "The Ring of Gyges," from *The Republic*.²⁰ In the tale, a student of Socrates named Glaucon tells of a shepherd named Gyges who comes upon a secret cavern with a corpse inside that wore a golden ring.²¹ Taking the ring, Gyges discovered that turning the ring permitted Gyges to become visible or invisible.²² Able to escape detection, Gyges went on to commit horrible acts, such as seducing the Queen, murdering the King, and seizing the throne.²³ Glaucon's telling of the tale was cautionary; is it so, as Glaucon stated, that invisibility defeats virtue, leading to evil deeds?:

Suppose now that there were two such magic rings, and the just put on one of them and the unjust the other; no man can be imagined to be of such an iron nature that he would stand fast in justice. No man would keep his hands off what was not his own when he could safely take what he liked out of the market, or go into houses and lie with any one at his pleasure, or kill or release from prison whom he would, and in all respects be like a God among men. Then the actions of the just would be as the actions of the unjust; they would both come at last to the same point. And this we may truly affirm to be a great proof that a man is just, not willingly or because he thinks that justice is any good to him individually, but of necessity, for wherever any one thinks that he can safely be unjust, there he is unjust.²⁴

Like Gyges, those scarfing down Feldman's bagels for free or less than full price have the benefit of invisibility. Surely, installing video cameras or paying an employee to serve as a bagel cashier would reduce the possibility of invisibility, and hence increase the payment rate. Those solutions, however, create other problems, including adding technology and labor costs, thus cutting profits, especially if the technology or labor costs exceed the underpayment costs. Feldman considered companies with payment rates above 90% as honest, and when rates were between 80% and

19. *See id.* at 44-45 (discussing that subsequent to 9/11, overall payment rate inched up 2%, which, according to Feldman, reflected either patriotism or an increase in a general sense of empathy).

20. *Id.* at 46.

21. PLATO, *THE REPUBLIC* 56 (Benjamin Jowett trans., The World Publishing Company 1946).

22. *Id.*

23. *Id.*

24. *Id.*

90% he found them “annoying but tolerable.”²⁵ Levitt and Dubner, harkening Adam Smith, who described humankind’s innate honesty, look to the nearly 90% of those paying for bagels as evidence that people are not universally corrupt.²⁶

Levitt and Dubner’s insights suggest that policymakers concerned with cheating should pay closer attention to structural incentives and the relative ease in which individuals’ non-compliance falls outside the light of day. Like Feldman’s bagel business, the tax system provides a window on the propensity to cheat. Many academics and economists have noted that incentives alone do not describe why people choose to comply or not comply with the tax law,²⁷ where the overall compliance rate is probably somewhere between 80% and 85%.²⁸ Yet, the possibility of detection and visibility are significant factors in tax compliance. Not surprisingly, when there is extensive information reporting to the IRS, as in wage income, people report their income properly, with a compliance rate of 96%.²⁹ Where there is little information reported, people fail to report their income, such as income attributable to sole proprietorships, where the compliance rate is about 40%.³⁰ Taxpayer use of offshore credit cards and complex trusts is like the turning of Gyges’s ring, cloaking the taxpayer from the often distracted and overwrought eyes of the IRS.

A number of recent tax compliance changes and proposals reflect the strong desire in tax administration to limit opportunities for taxpayers to evade detection. These changes and proposals include: disclosure rules pertaining to corporate tax shelters,³¹ proposals to require financial institutions to track and report the basis of securities,³² and third-party

25. LEVITT & DUBNER, *supra* note 6, at 43.

26. *See id.* at 46 (“[A] lot of people steal from [Feldman], but the vast majority, even though no one is watching over them, do not.”).

27. *See, e.g.,* Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 U. KAN. L. REV. 971, 973-74 (2003) (discussing the reasons why enforcement alone does not explain the overall rate of tax compliance and noting how scholars have looked to factors such as taxpayer morale, trust in government, and the use of tax compliance as a signal to explain compliance rates that exceed what would be expected if taxpayers were responsive only to audit rates and penalties).

28. *See id.* at 973 (reporting that the overall voluntary compliance rate is generally estimated at 83%).

29. NAT’L TAXPAYER ADVOCATE, 2005 ANNUAL REPORT TO CONGRESS 395 (2006), available at http://www.irs.gov/pub/irs-utl/section_2.pdf.

30. *See, e.g.,* *The Tax Gap: Written Testimony Before the S. Comm. on Fin. Subcomm. on Taxation and IRS Oversight on the Tax Gap*, 109th Cong. (2006) (statement of Mark J. Mazur, Director of Research, Analysis, and Statistics, Internal Revenue Service), available at <http://www.sentate.gov/~finance/hearings/testimony/2005test/07260.pdf> (stating that individual income tax underreporting accounted for 57% of the overall tax gap in 2001, totaling \$197 billion).

31. I.R.C. § 6111(d) (2000) (amended 2004) (requiring registration of confidential corporate tax shelters).

32. *See, e.g.,* Joseph Dodge & Jay Soled, *Reporting Tax Basis: Dawn of a New Era*, 110 TAX NOTES 784, 784 (2006) (arguing that brokers should be required to report the tax

information reporting of miscellaneous payments to corporations with fewer than fifty shareholders.³³ Given that budget deficits often coincide with a renewed emphasis on reducing the tax gap,³⁴ former Commissioner Everson's priority for renewed IRS enforcement,³⁵ and a limited congressional appetite for increasing IRS spending on enforcement,³⁶ it is no surprise that calibrating efforts to best reduce the tax gap has become an increasingly important issue. Over the past few years, the IRS, in words and action, has paid increasing attention to larger ticket tax issues, such as tax abuses related to the corporate use of tax shelters.³⁷ Yet, despite an increased emphasis on wealthier and corporate taxpayers, it is also not surprising that among areas of the tax gap, the IRS disproportionately directs scarce compliance resources on those with less voice in the system: namely, the working poor who claim the EITC.³⁸ Some of the IRS's efforts

basis of their investments in addition to their existing obligation to report the amount realized upon the sale or disposition of an investment).

33. See NAT'L TAXPAYER ADVOCATE, *supra* note 29, at 394-96 (explaining that when third-parties have to report information to the IRS, taxpayers report 96% of their income).

34. For example, Congress is looking at the tax gap as a means of addressing the current budget deficit. See Heidi Glenn & Meg Shreve, *Lawmakers Begin Hunt for Revenue to Solve Long-Term Fiscal Gap*, 114 TAX NOTES 496, 496 (2007) ("When Senate Budget Committee Chairman Kent Conrad, D-N.D., pressed a panel of witnesses last week to address ways to change the tax code in light of the nation's looming revenue challenges, he said he was pointing to a key step toward solving the nation's fiscal problems."). For historical precedent, see James W. Wetzler, Commentary, Alan Plumley & C. Eugene Steuerle, *Ultimate Objectives for the IRS: Balancing Revenue and Service*, THE CRISIS IN TAX ADMINISTRATION 311, 343 (Henry J. Aaron & Joel Slemrod eds., 2004), available at http://www.urban.org/uploadedpdf/1000636_IRS_objectives.pdf.

The Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") initiated a period in which policymakers became willing to impose greater burdens on taxpayers in order to harvest the revenues from improved tax compliance. Faced with the need to restore fiscal stability after what they perceived as the excessive 1981 tax cuts, . . . drafters of TEFRA reviewed numerous potential ways to raise revenue and concluded that improved tax compliance was a relatively attractive option.

35. IRS enforcement statistics have increased in the most recent fiscal year. U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE SEC'Y OF THE TREASURY, GAO-07-136, FINANCIAL AUDIT: IRS'S FISCAL YEARS 2006 AND 2005 FINANCIAL STATEMENTS 35 (2006), available at <http://www.gao.gov/new.items/d07136.pdf>; see Robert Guy Matthews, *In-House Critic Holds IRS Feet to the Fire*, WALL ST. J., Mar. 21, 2006, at A4 (noting how IRS Commissioner Everson has emphasized enforcement and has "something of a tough-guy reputation").

36. See Martin A. Sullivan, *Closing the Tax Gap: One Step Forward, Two Back*, 110 TAX NOTES 691, 692 (2006) (deeming restrictions on IRS spending "ludicrous," as increased IRS spending could actually reduce a fiscal deficit).

37. U.S. GEN. ACCOUNTING OFFICE, *supra* note 35, at 35 ("The IRS has and will continue to enforce the law across all sectors, but is focusing on corrosive activities of corporations, high income taxpayers, and other major violators of the tax code.").

38. See Zelenak, *supra* note 4, at 1884-87 (discussing how the IRS moderately over-weights enforcement of the EITC relative to other parts of the tax gap). In effect, the IRS's increasing use of math error procedures, and its reliance on external and internal databases to detect likely noncompliant taxpayers for audit selection reflects this desire to detect likely intentional noncompliant taxpayers with fewer agency resources allocated to the task. Increased agency mining of external data is also a development in other benefits programs.

have been particularly harsh, including freezing, without providing notice, nearly 1.6 million low-income taxpayers' refunds over a four-year period under the IRS's "Questionable Refund Program."³⁹

Given that the IRS's compliance efforts are at times overbroad and may deter or discourage eligible taxpayers,⁴⁰ policymakers should consider administrative or legislative changes that, on an ex ante basis, decrease the incentives or opportunities for potentially noncompliant EITC claimants. It is not a terrific stretch to make the analogy between delivering an EITC-generated refund through a self-identifying tax return and delivering bagels in a snack room with an unattended cash box.⁴¹ Unlike other benefits programs with extensive and almost universal pre-eligibility screening tests,⁴² to receive the EITC, taxpayers complete and file a tax return, and unless the taxpayer is one of the roughly 2% audited, the low-wage worker receives a benefit of up to \$4,536 without consideration of eligibility.⁴³ In other programs, like food stamps,⁴⁴ error rates are tolerable, with overpayments hovering at or below 5%.⁴⁵ The most recent comprehensive study indicates that following IRS compliance efforts, approximately 27% to 32% of the EITC dollars still were claimed erroneously.⁴⁶ The EITC's

See Amy Mulzer, Note, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 COLUM. HUM. RTS. L. REV. 663, 709 (2005) (discussing the use of computer matching as primary verification in the Medicaid program).

39. David Cay Johnston, *IRS Move Said to Hurt the Poor*, N.Y. TIMES, Jan. 11, 2006, at C1.

40. See Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351, 391 (2002) (describing these eligible taxpayers' sense of defeat, despite the option of challenging the IRS's denial of their eligibility in court).

41. See LEVITT & DUBNER, *supra* note 6, at 45-48 (detailing the design of this bagel business and its rate of success).

42. See Mulzer, *supra* note 38, at 663-65 (discussing the role of eligibility restrictions, benefit levels, and application procedures for means-tested social welfare programs).

43. See INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUBLICATION 596: EARNED INCOME CREDIT (EIC) (2006), <http://www.irs.gov/pub/irs-pdf/p596.pdf> [hereinafter IRS 596] (providing guidance for taxpayers on how to apply for Earned Income Credit tax benefits); INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, EITC THRESHOLDS AND TAX LAW UPDATES, <http://www.irs.gov/individuals/article/0,,id=150513,00.html> (last visited Mar. 24, 2007) [hereinafter IRS THRESHOLDS] (listing maximum benefits for taxpayers in tax years 2005, 2006, and 2007).

44. For a discussion of changes to the administration of the food stamp program, including efforts to target incorrect claimants, see David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1377 (2004) (discussing that in some states a third or more of food stamp applicants and recipients are investigated for fraud, even if the state does not have probable cause to believe that an applicant or recipient participated in any wrongdoing). More traditional benefits programs have intrusive and detailed verification procedures, including home visits and the direct contacting of third-party witnesses. *Id.* at 1376-77.

45. See Dorothy Rosenbaum, *Food Stamp Error Rates Hold at Record Low Levels in 2005*, CENTER ON BUDGET & POL'Y PRIORITIES, July 11, 2006, <http://www.cbpp.org/6-30-04fa.htm> (detailing overall trends in food stamp error rates and their implications and possible causes).

46. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, EITC REFORM INITIATIVE

error rate, especially in comparison to other benefits programs, has contributed to legislative and executive branch scrutiny.⁴⁷ The EITC error rate raises questions about the viability of continued broad support, and has contributed to a variety of conventional and unorthodox approaches to bring the error rate down.⁴⁸

The difference in error rates between traditional benefits programs and the EITC relates to the tax system's reliance on self-declared eligibility, which results in significantly lower administrative costs but is much more susceptible to program error.⁴⁹ In a recent Article, I looked at the non-compliance problem among low-income taxpayers,⁵⁰ and argued that a component of the government's efforts to reduce those error rates should be a strengthening of third-party due diligence requirements, including a possible tiered level of gathering and reporting information to the IRS that would vary based upon the experience of the return preparer and the number of tax returns prepared.⁵¹ Underlying my suggestions was both an awareness that tax return preparers play an important role in the EITC and a desire to increase compliance by addressing ways to shine light on preparers and taxpayers, without materially increasing either direct or indirect taxpayer costs. In this Article, I make two claims. First, the current structure of the EITC presents structural incentives to certain classes of taxpayers willing to mis-state eligibility for the EITC or facilitate others' misstatements. These classes include taxpayers with more than two

(2003), <http://www.irs.gov/newsroom/article/0,,id=110296,00.html>. In Fiscal Year 2006, taxpayers claimed approximately \$41 billion in EITC, with approximately \$36 billion of that refunded; recent IRS estimates are that between 23% and 28% of the \$36 billion in refunded EITC was improper. U.S. GEN. ACCOUNTING OFFICE, *supra* note 35, at 134-35.

47. See Improper Payments Information Act of 2002, Pub. L. No. 107-300, 116 Stat. 2350 (2002) (requiring federal agencies, including the IRS, to review programs that are susceptible to improper payments). Professor Zelenak is critical of how the Office of Management and Budget ("OMB") has only requested from the IRS improper payment information relating to the EITC: "Despite the rather obvious application of the Act to improper refunds, the only program administered by the IRS for which the OMB has requested improper payment information is the EITC." Zelenak, *supra* note 4, at 1897. For a highly critical appraisal of congressional and administrative attention to lower-income non-compliance rather than non-compliance associated with higher-income taxpayers, see Dorothy Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L.J. 755, 785-86 (2005).

48. Cf. Dennis J. Ventry, Jr., *Welfare By Any Other Name: How We Can Save the EIC*, 114 TAX NOTES 955 (2007) (suggesting that the EITC is on much firmer ground than in prior periods and that some advocates' suggestions that its compliance problems could lead to its repeal are overstated).

49. See Zelenak, *supra* note 4, at 1881 (noting the apparent inverse relationship between congressional tolerance for program error and the ratio of administrative costs to program benefits).

50. See Leslie Book, *Preventing the Hybrid from Backfiring: Delivery of Benefits to the Working Poor Through the Tax System*, 2006 WIS. L. REV. 1103, 1113 (2006) (lamenting the lack of data for comparing rates of intentional non-compliance with unintentional error leading to EITC non-compliance).

51. *Id.* at 1146-48.

children and non-custodial fathers who maintain some connection to their children, but who fail to meet the Internal Revenue Code's (the "Code") residency requirement for EITC eligibility. Second, the relative invisibility of the tax return filing process, and, in particular, the identification of children that the taxpayer claims as qualifying children, emboldens taxpayers to erroneously claim children who do not meet the Code's detailed eligibility requirements, and the residency requirement in particular. After considering these two claims, I suggest prescriptive policies that Congress and the IRS should consider to: (1) minimize the structural incentives to cheat, and (2) increase the likelihood of exposure, which provides a powerful ex ante deterrent effect on misstating eligibility.

II. THE THEORETICAL CONTEXT

Before considering the EITC, it is helpful to place the discussion of EITC compliance in the context of the considerable research regarding tax compliance in general. Over the past thirty years, a significant amount of research from a variety of social science disciplines has considered tax compliance.⁵² Economists, psychologists, and sociologists have contributed to the discussion, offering research and, at times, conflicting explanations regarding the dependent variable of whether a person is likely to comply with his obligation to file an accurate tax return.⁵³ In the jargon of social science research, the unifying theme among this research is a search for explanatory reasons, referred to as independent variables, which are the factors that lead to non-compliance. The disciplines' approaches to research reflect differing views of how and why the variables might be related and the various disciplines' choices of which variables to focus on indicate, in part, their assumptions about what motivates human behavior.

In broad terms, the economic models of tax compliance assume rational behavior, and that people will coldly consider compliance from the perspective as to whether the expected utility of non-compliance exceeds the utility of complying. To that end, researchers relying on the economic model have looked to a variety of independent variables likely to affect the calculus, including penalty rates, the likelihood of an audit, and

52. Lin Mei Tan and Adrian Sawyer, A Synopsis of Taxpayer Compliance Studies: Overseas vis-a-vis New Zealand, 9 *New Zealand Journal of Taxation Law and Policy* 431, 433-37 (2003) (providing an overview of research into factors affecting tax compliance)

53. I am indebted to the excellent theoretical overview of the respective social science approach to tax compliance research in Neil Brooks, *Challenge of Tax Compliance*, TAX ADMINISTRATION: FACING THE CHALLENGE OF THE FUTURE 7, 19 (Chris Evans & Abe Greenbaum eds., 1998). For a good survey of the tax compliance literature, see Pauline Niemirowski, Steve Baldwin & Alex Wearing, *Thirty Years of Tax Compliance Research: Of What Value Is It to the ATO?*, TAX ADMINISTRATION IN THE 21ST CENTURY 199, 211-12 (Michael Walpole & Chris Evans eds., 2001).

complexity. This research has become quite sophisticated. There are numerous studies testing the variables that economists believe contribute to taxpayers' decisions to comply with the tax laws. Psychologists and sociologists have rightly pointed out that the economic model is insufficient as an explanatory tool. Sociologists and psychologists alike argue that framing a taxpayer as an amoral utility maximizer fails to capture the complexities of human behavior and relationships, and fails to explain why compliance rates exceed what would otherwise be expected if people were solely evaluating compliance in terms of dollars and cents.⁵⁴ Accordingly, psychologists have emphasized factors influencing the decision not to comply as related to individuals' moral aversion or acceptance of tax evasion, with sociologists examining factors like attitudes toward government generally, distributional and procedural fairness of the tax system, and demographical variances among taxpayers.⁵⁵ The challenge among policymakers mining the social science research is that the research is at times inconsistent and incomplete.

As Professor Brooks aptly summarizes, in a perfect or even merely orderly world the research would lead to:

[A] theory about why people comply with the tax law from which an interested tax administration department could deduce a comprehensive compliance strategy. Naturally, no such theory has emerged from the research. Like much empirical research, we end up learning how much we do not know. In some of the research, it is difficult to be sure which way causation runs[,] . . . in more controlled experiments conducted to test for causation there are problems generalizing the results . . . and theories based on some research have become so complex that they explain everything, by tautology.⁵⁶

A survey of the quantitative tax compliance literature is a sobering exercise.⁵⁷ The tax compliance literature is often lacking the sweep of context, a true understanding of patterns of human behavior. To date, the quantitative approach to tax compliance has failed to offer satisfactory predictive generalizations. One perceptive commentator, Margaret McKerchar, in addressing the shortfalls in the compliance literature, noted

54. See, e.g., Robert Cooter & Melvin A. Eisenberg, *Symposium Norms & Corporate Law: Fairness, Character, and Efficiency in Firms*, 149 U. PA. L. REV. 1717, 1725 (2001) (pointing to lawyers who become judges and high rates of tax compliance as examples of human behavior beyond mere self-interest).

55. Brooks, *supra* note 53, at 20

56. *Id.* at 21-22.

57. See Niemiowski et al., *supra* note 53, at 211-12 (identifying sixty-four variables for non-compliance, and bemoaning the contradictory and inconclusive research). "Beliefs, personality traits, demographic variables and tax rates, opportunity, propensity to evade, and various 'external variables' have also contributed to understanding compliance behaviour. Yet despite the extensive research, there is still a paucity of consistent reliable predictors or explanations of causality." *Id.* at 211.

that research has:

[B]een driven by the need to find one model that fitted [sic] (rather than explained) all possible types of compliance behaviour and allowed predictions to be made about the taxpaying population in general. In doing so, assumptions . . . were often unrealistic and therefore reduced the usefulness of the model to policymakers and administrators. For example, it is unlikely that taxpayers are all utility maximisers, risk averse or rational decisionmakers. . . . [P]eople exist in a dynamic environment where there are a great deal of influences, of which some are inconstant and others may have not yet been identified or studied by researchers.⁵⁸

Facing the inadequacy and shortfalls of the existing compliance literature, Professor McKerchar noted that researchers and policymakers would be better served by abandoning the search for a “single model of taxpayer compliance and consider[ing] the use of different models to explain differing types of compliance behaviour.”⁵⁹ McKerchar continued by noting the importance of identifying the various typologies of non-compliance,⁶⁰ and urged that additional studies relate to actual observed taxpayer behavior and focus group study.⁶¹

Faced with the at times inconsistent findings, Professor Brooks suggested that more research is needed, but in the meantime, policymakers should focus on the rather straightforward strategy of reducing

58. Margaret McKerchar, *Why Do Taxpayers Comply? Past Lessons and Future Directions in Developing a Model of Compliance Behaviour*, TAX ADMINISTRATION IN THE 21ST CENTURY 225, 242 (Michael Walpole & Chris Evans eds., 2001).

59. *Id.*

60. *See id.* at 243 (emphasizing the need for further research on tax compliance). I began this project of applying the useful Kidder/McEwen typology to low-income taxpayers in *The Poor and Tax Compliance: One Size Does Not Fit All*, 51 KAN. L. REV. 1145 (2003) [hereinafter Book, *One Size Does Not Fit All*], and continued it with a focus on commercial tax return preparers in my article *Preventing the Hybrid from Backfiring: Delivery of Benefits to the Working Poor Through the Tax System*, *supra* note 50. This Article continues that project; in future research, I hope to apply more qualitative research models to help better explain how commercial tax return preparers affect tax compliance among lower-income taxpayers.

61. McKerchar, *supra* note 58, at 243. An excellent example of a study that considers taxpayer behavior is Joseph Bankman & Stewart Karlinsky, *Developing a Theory of Cash Businesses' Tax Evasion Behaviour and the Role of Their Tax Preparers*, 5TH INTERNATIONAL CONFERENCE ON TAX ADMINISTRATION: CURRENT ISSUES AND FUTURE DEVELOPMENTS 136, 167 (Michael Walpole & Rodney Fisher eds., 2002). Bankman and Karlinsky interviewed hundreds of independent contractors, business owners and tax preparers, all of whom spoke to the authors on conditions of confidentiality. *Id.* at 136. Bankman and Karlinsky concluded that cash business owners primarily rely on their own to under-report income though they concluded that some cash business taxpayers looked to their return preparer to facilitate the non-compliance. *Id.* At 161-62. The qualitative approach that Bankman and Karlinsky deployed, rather than a pure quantitative approach that focuses on causal relationships between variables, is a valuable means of learning the dynamics of non-compliance, and I believe offers the potential for generating significant insights for researchers and policymakers.

opportunities for evasion.⁶² This is consistent with Levitt and Dubner's approach of examining structural incentives and visibility, two key factors that can contribute to the temptation to cheat. What follows in the next two Sections is a consideration of how the current EITC creates opportunities for individuals to affirmatively misstate eligibility. Lest advocates think this paints an unfair picture of low-income taxpayers as cheaters, I am intimately aware of some of the limitations of this Article's approach. First, this Article considers only a slice of the EITC compliance problem. As I have indicated elsewhere, in considering the EITC compliance challenge there are separate and often distinct compliance problems.⁶³ Some of the non-compliance relating to the EITC is facilitated and caused by the supply part of the equation; that is, commercial preparers and other return preparers who play a key role in the tax system generally and an even larger role for low-income taxpayers. Likewise, preparers' own incentives to sell low-income taxpayers services and products that are monetized by the very refunds that taxpayers claim on tax returns creates a strong temptation for preparers to facilitate errors.⁶⁴ In addition, a significant number of errors on the EITC relates to inadvertent errors that taxpayers (or their preparers) themselves make. This Article largely focuses on the taxpayer willing to intentionally misstate facts on a tax return to ensure eligibility or enhance the amount of the EITC claimed. A challenge for researchers is that there is little hard data on the various motivations and reasons underlying the EITC errors, and there is not an adequate understanding of the role that commercial preparers themselves play.⁶⁵ I do not wish to suggest that low-income taxpayers are less

62. Brooks, *supra* note 53, at 22.

63. See Book, *One Size Does Not Fit All*, *supra* note 60, at 1165-77 (listing eight categories of non-compliance, including reasons related to the complexities of the EITC rules and procedure, people's varying attitudes toward the tax system, and advice from tax professionals).

64. The role that preparers can play in brokering or facilitating noncompliance is illustrated by the actions of certain Jackson Hewitt tax preparation franchises, in which the government alleged were pervasively engaged in fraudulent schemes to erroneously claim the EITC and generally misstate tax liabilities. See <http://www.usdoj.gov/tax/txdv07215.htm> (the government filed civil injunction suits alleging that the franchise operations filed thousands of false tax returns resulting in \$70 million in losses to the Treasury). I intend to explore the complex role that preparers play in tax compliance in future research. For more on some of the challenges to compliance associated with commercial return preparers, see Regulation of Federal Tax Return Preparers: *Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 109th Cong. 1-2 (2005) (written statement of Nina E. Olson, Nat'l Taxpayer Advocate), available at http://www.irs.gov/pub/irs-utl/testimony_wm_oversight_returnpreparers.pdf (correlating the increase in electronic filing and availability of EITC funds with an increase in taxes being prepared by "unenrolled" preparers and those for whom tax preparation is not the primary business).

65. See Janet Holtzblatt & Janet McCubbin, *Issues Affecting Low-Income Filers*, THE CRISIS IN TAX ADMINISTRATION, 148, 170 (Henry J. Aaron & Joel Slemrod eds., 2004) (arguing that the use of a variety of paid preparers makes it difficult to generalize their impact, as a group, on tax compliance). Holtzblatt and McCubbin identify EITC error rates

trustworthy as a class than other people, nor even that a majority of the errors relating to the EITC stem from claimants' intentional willingness to misstate facts that enhance eligibility or create the conditions for eligibility. Policymakers would benefit from a more nuanced understanding of the root causes of the problem. More research and a clearer understanding of the underlying reasons for errors will assist in crafting administrative and legislative responses. It is true that the varied nature of the problem suggests that the government must rely on a multi-faceted approach to compliance, which includes a healthy dose of quality taxpayer service. This Article is not a blanket condemnation of the EITC errors as all intentional and driven by claimant conduct. Yet, a realistic discussion of the issue must take into account that in the tax system generally, and with the EITC in particular, there is ample opportunity to misstate eligibility. Professor Brooks and Levitt and Dubner suggested that intentional non-compliance follows opportunity, and this insight is as relevant for the EITC claimants as it was for corporate taxpayers who participated in complex corporate tax shelters in the late 1990's and first part of this century.⁶⁶

III. STRUCTURAL INCENTIVES WITHIN THE EITC CREATE THE MOTIVATION FOR INTENTIONAL SYMBOLIC NON-COMPLIANCE

On the demand side of the equation, I suspect that individuals respond to perceived inequities in the current EITC, and act to redress those inequities by claiming an EITC to which they are not eligible. Working in a legal clinic representing low-income taxpayers for the past nine years has provided me with numerous instances of claimants feeling that the current system does not adequately reward low wage workers who may be connected in some way to children who fall short of the technical requirements of the qualifying child definition.⁶⁷ This frustration with the EITC eligibility rules thus contributes to symbolic non-compliance in effect, intentional non-compliance that taxpayers commit to address perceived injustices in the system.⁶⁸ Two common instances relate to: (1) taxpayers with more than two qualifying children, and (2) non-custodial

among different classes of commercial preparers, though there appears to be no meaningful data on the reasons why the error rates differ. *Id.* at 170-71. Explanations for the varied error rates include differing levels of respect for the tax laws, technical knowledge of the law, and taxpayer characteristics among the differing classes of preparers. *Id.*

66. See generally JOHN BRAITHWAITE, *MARKETS IN VICE, MARKETS IN VIRTUE* 197-211 (2005) (discussing the rise of corporate tax shelters in the United States and Australia).

67. A qualifying child is: (1) a son or daughter, or sibling, or is a stepchild or eligible foster child of the taxpayer; and (2) has the same principal place of abode as the taxpayer for more than half of the tax year; and (3) does not exceed certain age requirements. I.R.C. § 32(c)(3)(A) (2000) (referring to § 152(c)). Lineal descendants of children, stepchildren and siblings are also eligible to be considered qualifying children. *Id.*

68. Book, *One Size Does Not Fit All*, *supra* note 60, at 1174.

parents (mostly fathers) who are connected to the minor children but who fail the EITC's technical residency requirements.⁶⁹

The current EITC is based upon the existence of earned income and the residence of up to two qualifying children.⁷⁰ The presence of more than two qualifying children does not affect the amount of EITC that can be received.⁷¹ Consider that the poverty rate for children in families with three or more children is 26%, compared to 12% for families with only one or two children.⁷² Poverty is more prevalent among larger families, and the EITC's effectiveness is "poorly designed to address this pattern of child poverty."⁷³ To address this inequity, low wage workers with more than two children are tempted to "share" the benefits with related parties who may have earned income, but fewer than two qualifying children of their own.⁷⁴

Likewise, many non-custodial⁷⁵ parents are still connected in some material way to their biological children, but because the non-custodial parent fails the EITC's residency requirement, he or she is unable to claim the children as a qualifying child for purposes of the EITC. One of our clients in the Villanova Federal Tax Clinic, for example, recently had his EITC properly denied after audit when the IRS properly determined that he was not the custodial parent. While not the custodial parent, he did spend approximately three days per week with his children, who lived the balance of the week with their mother, and he was the childrens' principal provider

69. Other situations also lend themselves to symbolic non-compliance. For example, nontraditional family arrangements also present a real challenge, as there are many unrelated wage earners who live with the child and the child's parent, but who may not be married to the parent due to laws preventing gay marriage or other state benefits' policies that penalize adults for marrying. For a discussion of some of the challenges that alternative families face in the tax system, and with the EITC in particular, see Patricia A. Cain, *Dependency, Taxes, and Alternative Families*, 5 J. GENDER RACE & JUST. 267, 282-84 (2002). I have previously discussed the unfairness of the 2000 legislative change that eliminated the ability for adults to treat children as qualifying children unless the children are placed with the adult by an authorized placement agency. Book, *One Size Does Not Fit All*, *supra* note 60, at 1184-86.

70. See IRS 596, *supra* note 43, at 1 (providing a summary of EIC requirements for taxpayers to use as a reference).

71. See IRS THRESHOLDS, *supra* note 43 (listing maximum credit amounts for only three scenarios: where the taxpayer has zero, one, or at least two qualifying children).

72. JASON FURMAN, CTR. ON BUDGET & POLICY PRIORITIES, TAX REFORM AND POVERTY 4 (2006), <http://www.cbpp.org/4-10-06tax.pdf>.

73. *Id.*

74. The other child-related provisions in the tax code, the dependency exemption and child tax credit, are based on a per-child basis, though the value of the dependency exemption is limited by its deductible rather than refundable nature, and the child-tax credit is refundable only in a limited manner for lower-wage families with three or more children. *Id.* at 4-5. Increasing the refundable nature of the child tax credit for lower-income individuals would likewise have a significant effect on reducing the tax system's incentives for sharing children. See Brown, *supra* note 47, at 789 (2005) (noting the unfairness of the CTC's limited refundability for lower-income individuals).

75. By non-custodial, I mean parents who spend significant time with children through shared or partial physical custody, but who do not spend more than half the year with the child.

of material support. Our client, a full-time low wage worker, claimed the children as dependents, and the custodial mother signed a waiver permitting the father to do so.⁷⁶ This is by no means a unique situation.

It is possible, at some cost, to minimize the structural incentives to cheat in the above situations. Providing some additional EITC benefit for more than two children will reduce the systemic temptations to cheat, and a number of observers have suggested this solution on grounds other than its effect on compliance incentives.⁷⁷ To address the situation with non-custodial parents, the National Taxpayer Advocate has suggested creating a separate credit for non-custodial parents who pay all required child support in a given year.⁷⁸ This would likewise lessen the temptation for cooperative unmarried or divorced parents to cheat when the custodial parent has no or limited benefit from the EITC; in situations, for example, where she has little or no earned income. The above proposed solutions are within the framework of the existing EITC. In addition to the virtues of the proposals within the framework of accepted policy objectives of the EITC, including reducing the effects of childhood poverty and perhaps providing proper labor incentives,⁷⁹ they lessen the existing structural incentive for individuals to borrow or lend children to enhance their EITC eligibility.

There has been increasing attention to the possibility of a radical overhaul and consolidation of the Code's existing child benefits into one unified refundable credit.⁸⁰ While these proposals have other merits beyond an effect on compliance,⁸¹ including considerations of efficiency and fairness, an important consideration to such proposals is the possibility

76. I.R.C. § 152 allows for non-custodial parents to claim the children as dependents, even if the non-custodial parent does not satisfy the residency requirement under the dependency exemption. See Internal Revenue Service, Form 8332, <http://www.irs.gov/pub/irs-pdf/f8332.pdf> (last visited March 24, 2007) (allowing for the non-custodial parent in effect to transfer the child to the custodial parent for purposes of the dependency exemption and child tax credit).

77. It may also address some of the negative effects that the EITC may have on groups that have a higher incidence of larger families. See Brown, *supra* note 47, at 820 (noting that blacks are more likely than whites to have larger families and thus are penalized for the EITC's failure to increase benefits for families with more than two qualifying children).

78. NAT'L TAXPAYER ADVOCATE, *supra* note 29, at 398.

79. See CTR. ON BUDGET & POLICY PRIORITIES, *supra* note 72 (discussing the EITC's impact on poverty and labor participation).

80. These ideas appear to be gaining more traction. For recent proposals, see JONATHAN BARRY FORMAN, MAKING AMERICA WORK (2006) (noting government influence on work behavior and suggesting alternative policies to create incentives for citizens to work); President's Advisory Panel on Federal Tax Reform, *Simple, Fair, and Pro-Growth: Proposals to Fix America's Tax System* (Nov. 1, 2005), <http://www.taxreformpanel.gov/final-report> (suggesting ways to cut down on the complexity of the tax code, including combining different tax provisions into one). For a spirited defense of the use of refundable credits in the tax system, see Lily T. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Credits* 59 STAN. L. REV. 23 (2006).

81. See generally Batchelder, Goldberg, Jr. & Orszag, *supra* note 80.

that a revised and combined credit provision might also limit the opportunity or lessen the motive for individuals to game the system. This consideration is apparent in some recent proposals, including the 2005 National Taxpayer Advocate Report that recommends combining the dependency exemption, child tax credit, and aspects of the EITC into a unified and refundable Family Credit available to all taxpayers, regardless of income.⁸² In her recommendation, the National Taxpayer Advocate states that such a structure will minimize the temptation for individuals to lend or borrow children.⁸³ One measure to evaluate such proposals and their potential for creating the conditions for structural incentives is how likely they are to provide benefits to individuals who have economic or familial attachments to children, and whether the tax transfer mechanism contributes to claimants acting like Japanese sumo wrestlers looking to share prize money.

IV. VISIBILITY AND THE CLAIMING OF QUALIFYING CHILDREN

The importance of visibility and information reporting on compliance is both intuitive and somewhat irrational. Individuals overstate the likelihood of audit, and when they know that the IRS has information pertaining to the treatment of an item on a tax return, they are much less inclined to report something that is inconsistent with information the IRS has already obtained. According to Levitt and Dubner, visibility is a key factor in tax compliance, and the wide divergence in income reporting among those self-employed and those who earn wages from an employer is attributable to the fact that those who are self-employed have much more incentive to cheat because they know that barring an audit, the IRS has no chance of knowing the self-employed individual's true income.⁸⁴ Given the low audit rate, even with individuals generally overstating the chances of audit, it is no wonder that many taxpayers feel confident enough to underreport income. Given the political challenges associated with giving the IRS additional resources to reach more taxpayers⁸⁵ (Levitt and Dubner remind us of the popularity of Michael Dukakis' 1988 campaign promises to support a more

82. NAT'L TAXPAYER ADVOCATE, *supra* note 29, at 371.

83. *Id.* at 405.

84. Stephen J. Dubner & Steven D. Levitt, *Filling in the Tax Gap*, N.Y. TIMES, Apr. 2, 2006, at 26.

85. For a discussion of some of the political challenges associated with giving the IRS additional resources to clamp down on tax cheating, see Ryan J. Donmoyer, *Democrats' Revenue Plans Might Mean Turning Taxman Into 'Beast'*, BLOOMBERG.COM, Mar. 5, 2007, <http://www.bloomberg.com/apps/news?pid=washingtonstory&sid=aU8SELY0OrWM> (quoting former Assistant Secretary for Tax Policy at the U.S. Department of the Treasury, Pamela Olson, as saying that suggestions that the IRS should collect a significant portion of the tax gap risk turning "the IRS into the enforcer Congress ordered it not to be less than a decade ago").

vigorous IRS),⁸⁶ some taxpayers feel confident enough that they can file incorrect tax returns and get away with underpaying what they owe, at significant cost to those who pay their fair share.⁸⁷

In addition to the importance of visibility to the proper reporting of income, it also is crucial for other aspects of tax compliance.⁸⁸ In a brief discussion of tax compliance, Levitt and Dubner describe how the requirement for individuals to list the actual social security number of any person claimed as a dependent resulted in a substantial decrease in the number of claimed dependents.⁸⁹ They recount the efforts of IRS employee John Szilagyi,⁹⁰ who had the idea of requiring individuals to list their claimed dependents' social security numbers on their tax returns, resulting in a significant decrease in the number of fictitious children claimed. The authors estimate that there was an increase of tax revenue by about \$3 billion per year.⁹¹ This approach was a low-cost way of limiting the opportunity for taxpayers to twist the ring or throw an invisibility cloak around claimed tax benefits.⁹²

Many observers have noted that the tax system's relative impersonal approach to claiming benefits, especially in comparison to the detailed and often in-person pre-benefits eligibility process of other benefits programs, contributes to the higher error rates relative to these other programs.⁹³

86. Dubner & Levitt, *supra* note 84, at [OH: Insert pinpoint].

87. Recent estimates peg the costs to those who are compliant at approximately \$2680 per household. WRITTEN STATEMENT OF NINA E. OLSON, NATIONAL TAXPAYER ADVOCATE, BEFORE THE COMMITTEE ON THE BUDGET, U.S. HOUSE OF REPRESENTATIVES, THE IRS AND THE TAX GAP 1 (Feb. 16, 2007), <http://budget.house.gov/hearings/2007/08Olson testimony.pdf>.

88. For a discussion of the policy implications of requiring additional information reporting in the tax system, as well as practical suggestions for situations that warrant additional reporting, see *id.* at 4-6.

89. See LEVITT & DUBNER, *supra* note 6, at 21 (noting that as a result of the IRS requiring social security numbers for dependents, seven million less children were claimed on tax returns).

90. The story of Szilagyi is also told in *Filling in the Tax Gap*, Dubner & Levitt, *supra* note 84.

91. LEVITT & DUBNER, *supra* note 6, at 239; cf. Ariel Rubinstein, *Freak-Freakonomics*, 3 *The Economists' Voice* Issue 9, Article 7, <http://www.bepress.com/ev/vol3/iss9/art7> (critiquing the magnitude of the effect of requiring taxpayers to list claimed dependents' social security numbers).

92. The concept of visibility's effect on tax compliance has been previously explored. See Robert A. Kagan, *On the Visibility of Income Tax Law Violations*, 2 *TAXPAYER COMPLIANCE* 76 (Jeffrey A. Roth & John T. Scholz eds., 1989) (concluding that the "visibility" of income reporting violations by citizens determines the extent to which citizens comply with the laws); see also Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 *OHIO ST. L.J.* 1453, 1500 (2003) (noting that the high compliance among those whose income is reported and identifying lack of opportunity as a key factor in the high compliance rate).

93. See, e.g., Zelenak, *supra* note 4, at 1876-79 (comparing the EITC program, which operates on the basis of self-declared eligibility, to food stamp programs or Temporary Assistance to Needy Families, where claimants must complete a government required process to establish eligibility).

While EITC claimants (like other taxpayers) have the possibility of income misreporting (though EITC-claiming taxpayers may have an incentive to overstate or create earned income), the residence of qualifying children is the most common EITC error,⁹⁴ and within that category, the residency requirement is the most common error.⁹⁵ Unlike wage income, there is no third-party information reporting requirement that would identify children and addresses of record.⁹⁶ Other agencies responsible for administering benefits programs where eligibility is dependent upon residency requirements have relied on fairly intrusive measures to establish eligibility, including pre-eligibility third-party contacts and visits to homes.⁹⁷ In some ways, the IRS's pilot pre-certification program,⁹⁸ which required certain taxpayers to provide documentation establishing a claimed qualifying child's residence at or before the filing of a tax return, was an effort to bring children outside of the shadows and impose on claimants, rather than third parties directly, the obligation of reporting relevant information to the IRS.⁹⁹

At present, the IRS does not plan to implement certification on a wide scale, though the IRS is continuing to evaluate certification's effect on participation and the level of erroneous payments.¹⁰⁰ Under current practice, how visible are the qualifying children that EITC-claimants list?

94. Holtzblatt & McCubbin, *supra* note 65.

95. *Id.* at 164-66.

96. While there are no information reporting obligations relating to residency, the IRS does have access to data collected by the Department of Health and Human Services ("HHS") that relates to child support payments, and its computer system, known as the Dependent Database, incorporates data acquired from HHS into the processing of individual tax returns. This process helps guide the selection of returns for examination. *See, e.g.*, TREASURY INSPECTOR GEN. FOR TAX ADMIN., THE SELECTION OF EARNED INCOME TAX CREDIT RETURNS FOR EXAMINATION CAN BE IMPROVED TO FURTHER PREVENT ERRONEOUS PAYMENTS (2003), <http://www.ustreas.gov/tigta/auditreports/2004reports/200440004fr.html> (reviewing the IRS's process of selecting EITC cases for examination using a cost-benefit analysis and making recommendations to provide for a more productive combination of returns for examination). Other benefits programs have increasingly relied on data mining to assist in verification and compliance activities. *See* Mulzer, *supra* note 38, at 709 (discussing the use of data mining in the Medicaid program).

97. In the food stamp context, see David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1377 (2004) (arguing that individuals will be less apt to take advantage of food stamp benefit programs if doing so would increase their risk of fraud charges).

98. For a discussion of the IRS EITC certification tests, see Internal Revenue Service, Earned Income Certification Test, <http://www.irs.gov/individuals/article/0,,id=118200,00.html> (last visited Mar. 23, 2007).

99. Preliminary results from the IRS's testing indicated that it likely deterred non-compliant taxpayers from claiming the EITC; however, unlike merely listing a social security number on a return, it did also increase the costs for those who were eligible and also likely deterred some eligible taxpayers from actually claiming the credit. DEPARTMENT OF THE TREASURY & INTERNAL REVENUE SERVICE, IRS EARNED INCOME TAX CREDIT (EITC) INITIATIVE: FINAL REPORT TO CONGRESS (2005), http://www.irs.gov/pub/irs-utl/irs_earned_income_tax_credit_initiative_final_report_to_congress_october_2005.pdf.

100. U.S. GEN. ACCOUNTING OFFICE, *supra* note 35.

It is worth recalling that approximately 70% of taxpayers claiming the EITC use paid preparers.¹⁰¹ The claiming of the EITC is a rather impersonal and invisible process, especially given that many taxpayers who are willing to misstate information on a return have the benefit of blaming another party (the return preparer) if the IRS does catch up with them. Given that there are often cultural and language barriers between the preparer and the taxpayer,¹⁰² even assuming good faith and competence, there may be legitimate reasons why a return claiming the EITC lists a child who did not in fact live with the taxpayer for more than six months.¹⁰³

Paid preparers do have a due diligence obligation that requires them to complete and retain a due diligence worksheet detailing the preparer's efforts at obtaining appropriate information.¹⁰⁴ Current rules do not require the preparer to furnish the worksheet with the return, though for all taxpayers claiming an EITC (except those claiming the relatively small childless EITC), the return must also include a Schedule EIC.¹⁰⁵ Schedule EIC is a one-page sheet requiring certain information about the qualifying child to appear on the schedule, including the child's name, social security number, year of birth, relationship to the taxpayer, and the number of months that the child lived with the taxpayer in the year in question. The taxpayer is not required to separately sign Schedule EIC, though the taxpayer is required to sign the appropriate 1040, which contains a statement to the effect that under penalties of perjury the taxpayer attests to the truth, correctness, and accuracy of the return and accompanying schedules and statements.¹⁰⁶

Within the norms of the tax system, where can more be done to shine more light on taxpayers claiming the EITC, without infringing too far on legitimate privacy rights¹⁰⁷ or imposing too great a cost on taxpayers or

101. ALAN BERUBE, THE BROOKINGS INST., *THE NEW SAFETY NET: HOW THE TAX CODE HELPED LOW-INCOME WORKING FAMILIES DURING THE EARLY 2000S* 9 (2006), http://www.brook.edu/metro/pubs/eitc/20060209_newsafety.pdf.

102. See Michael I. O'Connor, *Tax Preparation Services for Lower-Income Filers: A Glass Half Full, or Half Empty?*, 90 TAX NOTES 231, 232-37 (2001) (discussing some of the cultural and language barriers between preparers and low-income taxpayers).

103. The residency requirement is relatively straightforward, though temporary absences can be disregarded for purposes of determining eligibility, and shared custody arrangements between parents can be complicating factors.

104. A preparer must complete Form 8867, Paid Preparer's Earned Income Credit Checklist, or an equivalent form. The completion of the checklist must be based on information provided by the taxpayer or reasonably obtained by the preparer. Treas. Reg. § 1.6695-2(b)(1) (2000).

105. Internal Revenue Service, Schedule EIC, <http://www.irs.gov/pub/irs-pdf/f1040sei.pdf> (last visited Mar. 23, 2007).

106. For e-filed returns, the IRS has promulgated Form 8879, which the taxpayer signs and the preparer retains for the later of three years from the filing of the return or the return's due date. Internal Revenue Service, Form 8879, <http://www.irs.gov/pub/irs-pdf/f8879.pdf> (last visited Mar. 24, 2007).

107. For a consideration of privacy rights in the context of tax compliance, see Stephen

third parties? I have previously argued that every paid preparer should be required to sign the EITC due diligence worksheet and submit a copy of that sheet to the IRS.¹⁰⁸ To increase the visibility of the process, preparers should also be required to furnish a statement to individuals who claim the EITC with a summary of the EITC claimed. The statement should read something to the effect of:

Based upon information you told me about [name[s]] age and relationship to you, and that [name[s]] lived with you for more than six months (or was temporarily absent from you), you claimed [name[s]] as qualifying children for the earned income credit. As required by law, I have furnished to the IRS a due diligence worksheet pertaining to the EITC and am submitting to you this statement in accordance with requirements under law.

I suspect that individuals who know that preparers will separately report information about claimed qualifying children will be less inclined to misstate information on their tax return. It will be much more difficult (though not impossible) for individuals to hide behind preparer error when given a separate clearly marked disclosure statement listing information relating to the EITC. While it is true that the IRS could only detect errors relating to residence by examining the tax return, I believe it would reduce the temptation to cheat, akin to bagel whiz Feldman's tinkering with the box where money was collected and forcing claimants to take one more affirmative step (receiving a clearly-delineated statement) before the receipt of an EITC-generated refund.

Imposing additional reporting obligations on third parties will not, however, have an effect on individuals who self-prepare their tax returns. For those individuals, the IRS might require more self-disclosure and vary the disclosure based upon certain variables, including the type of relationship between the taxpayer and the claimed child and whether the taxpayer has previously claimed the qualifying child. For example, I suspect that married taxpayers who file a joint return and claim their biological children as qualifying children are much less likely to claim an improper child than a single parent filing as a head of household or an uncle or aunt claiming a niece or nephew. Likewise, the first claiming of a qualifying child seems an opportune moment to require more information

W. Mazza, *Taxpayer Privacy and Tax Compliance*, 51 KAN. L. REV. 1065 (2003) (conceding that while preserving the confidentiality of taxpayer information usually promotes compliance, some exceptions to this policy may be beneficial); see also Cynthia Blum, *The Flat Tax: A Panacea For Privacy Concerns?*, 54 AM. U. L. REV. 1241, 1257 (2005) (noting that while IRS reporting requirements may warrant privacy concerns, a constitutional issue regarding these requirements would only come about in the absence of security precautions or unwarranted disclosure of private data).

108. See *generally* Book, note 50, at 1103 (discussing the EITC and the problems in determining the reasons for taxpayer non-compliance).

from a taxpayer, especially given that the non-compliance can become habitual.¹⁰⁹ To address the former situation, the IRS could promulgate a different Schedule EIC that would require more information to be disclosed (such as checking a box that would list common circumstances why the child resided with the taxpayer in the year in question), and perhaps even have a separate signature requirement directly on the Schedule EIC itself. To deal with first time claimants, the form should directly ask the taxpayer to disclose if this is the first time that the taxpayer is claiming the individual as a qualifying child, and, if so, explain why.¹¹⁰

CONCLUSION

There is much we do not know about tax compliance generally and compliance problems of low-income taxpayers. While research in tax compliance is flourishing, there are many unanswered questions relating to what contributes to the misreporting of income and overstatement of deductions and credits. Structural incentives and visibility are two factors that appear to have an effect on individuals' willingness to misstate items on a tax return. In this Article, I argue that policymakers should consider structural incentives and visibility in fashioning responses to the EITC error rate. Perceived unfairness with the current EITC, combined with the ease in which related parties can share the claiming of children, is likely a factor in the EITC overclaim rate. The opportunity for collusion, as Levitt and Dubner illustrate with their discussion of sumo results, creates temptation and contributes to EITC overclaims. Likewise, the relative invisibility of the residence of qualifying children also creates opportunities for individuals to misstate eligibility. Generating additional disclosure requirements for commercial return preparers and taxpayers themselves will temper the temptation to cheat. While not a panacea for the multiple reasons why individuals may misstate eligibility for the EITC, reducing the

109. See Robert Kidder & Craig McEwen, *Taxpaying Behavior in Social Context: A Tentative Typology of Tax Compliance and Non-Compliance*, in 2 TAXPAYER COMPLIANCE 47, 62 (Jeffrey A. Roth & John T. Scholz eds., 1989) (explaining that habitual non-compliance develops over time as the taxpayer learns what one can "get away with" based on previous filings).

110. For example, the form could identify common situations when a taxpayer should claim a child, including the birth of a child, a formal custody arrangement, the first presence of sufficient earned income, etc. Increasing disclosure obligations on taxpayers themselves has the risk of adding complexity, deterring eligible individuals from claiming the EITC, or encouraging even greater use of commercial preparers. To judge this proposal's effectiveness, the IRS may wish to test its costs and benefits in a manner similar to what the IRS did in evaluating the EITC pilot certification program. See IRS EARNED INCOME TAX CREDIT (EITC) INITIATIVE: FINAL REPORT TO CONGRESS, *supra* note 99, at 10-11 (explaining that in evaluating the certification program, administrative data regarding tax return information was collected and surveys shedding light on the burden imposed by the certification were conducted to assess the process on compliance and participation).

possibilities of collusion, as well as increasing the exposure associated with claiming the EITC, will serve the modest but important objective of reducing the perceived and actual opportunities to misstate eligibility.