

publicly available on such accounts, that individual has no reasonable expectation of privacy with respect to what has been posted.⁹⁸

To reiterate, the primary concern of this Article is not whether the IRS looking at social media violates the taxpayer's right to privacy or whether the IRS has the right to access and use this information for enforcement purposes. I think the better question is whether, as a matter of social policy, it is appropriate and desirable, or even cost-effective, for the IRS to mine social media for civil enforcement purposes. As the prior section explained, other government agencies can and do access social media to investigate various types of benefits fraud. But most tax noncompliance does not constitute "fraud."

1. IRS Use of Data Analytics—Past and Future

The IRS has been using data analytics to address noncompliance since long before Facebook and Instagram. Since the 1960s, the agency has used something called Discriminant Function (DIF) scoring to select returns for audit.⁹⁹ The DIF score is a three-digit score assigned by a series of algorithms and models, the contents of which are not known outside the IRS.¹⁰⁰ According to the IRS, the DIF "score rates the potential for [tax liability] change, based on past IRS experience with similar returns"—with a higher score more likely to be selected for examination.¹⁰¹ The DIF is used as a screening tool, and a return identified by a DIF score is manually classified by an "experienced [IRS] examiner" in order to screen for significant issues "worthy of exam."¹⁰²

The examination selection process has evolved over time through the use of technology and automation, and over time these methods have increased the efficiency of audits by using data to identify returns

⁹⁸ Stacey Vanek Smith, *When the IRS 'Likes' Your Facebook Update*, MARKETPLACE (Apr. 14, 2014) <https://www.marketplace.org/2014/04/14/when-irs-likes-your-facebook-update/> [<https://perma.cc/KJQ9-UT38>]. As tax scholar Edward Zelinsky remarked, "It's hard to believe that anybody who puts anything on Facebook has any legitimate expectation of privacy." *Id.*

⁹⁹ See Carina Federico & Travis Thompson, *Do IRS Computers Dream About Tax Cheats? Artificial Intelligence and Big Data in Tax Enforcement and Compliance*, J. TAX PRAC. & PROC., Feb.–Mar. 2019, at 43, 45; TOM GREENAWAY & ALEXANDRA DESANTIS, *Taking the Mystery Out of Examinations—the Audit Process*, in 1 EFFECTIVELY REPRESENTING YOUR CLIENT BEFORE THE IRS 3-3 (Keith Fogg ed., 7th ed. 2018).

¹⁰⁰ GREENAWAY & DESANTIS, *supra* note 99, at 5; see also IRM 4.1.5.3.3.1(1) (Sept. 21, 2020).

¹⁰¹ I.R.S. Fact Sheet FS-2006-10 (Jan. 2006).

¹⁰² IRM 4.1.5.3.3.1 (Sept. 21, 2020) ("Classifiers must use their skills, technical expertise, local knowledge, and experience to identify hidden, as well as obvious, issues.").

more likely to be noncompliant.¹⁰³ Other examples include the IRS automated underreporter program that matches returns with third-party reporting and the requirement implemented in 1987 to list identification numbers of dependents.¹⁰⁴ The IRS also screens individual income tax returns using databases external to the agency to detect errors and noncompliance. For example, returns claiming the EITC are screened against the Dependent Database, which includes information from external sources.¹⁰⁵ These returns are scored according to certain indicators, with a higher score suggesting a greater probability that a taxpayer may not meet the credit's residency, relationship, or age eligibility requirements.¹⁰⁶

While the public does not know how DIF scores are calculated, or exactly what information is entered into the Dependent Database and from which sources, it stands to reason that the possibilities of social media data mining extend far beyond the traditional tools used for return screening.

In their 2017 article, Kimberly Houser and Debra Sanders detail how the IRS is already engaging in data mining of public and commercial data pools, including social media sites such as Facebook, Instagram, and Twitter, and using that information to run predictive algorithms.¹⁰⁷ In addition to raising procedural and due process concerns about this practice,¹⁰⁸ Houser and Sanders also express a concern that the IRS's use of such algorithms may result in discrimination.¹⁰⁹

¹⁰³ See generally Houser & Sanders, *supra* note 14, at 828–33.

¹⁰⁴ *Id.* at 829; see also James Alm et al., *New Technologies and the Evolution of Tax Compliance*, 39 VA. TAX REV. 287, 312–13.

¹⁰⁵ See NAT'L TAXPAYER ADVOC., THE EARNED INCOME CREDIT, 3 SPECIAL REPORT TO CONGRESS 2020, at 5 n.26. (“The [Dependent Database] is a rule-based system incorporating data within the IRS and information from external sources such as the Department of Health and Human Services and the Social Security Administration.”); see also IRM 4.19.14.1.1 (Dec. 7, 2017) (“Exam receives the majority of its EITC work from the Dependent Database [] and Electronic Fraud Detection System.”).

¹⁰⁶ NAT'L TAXPAYER ADVOC., *supra* note 105, at 27. The Dependent Database is referenced in IRM 4.19.14.8 (Apr. 4, 2019), but most of the details are redacted.

¹⁰⁷ Houser & Sanders, *supra* note 14, at 819–20. Houser and Sanders also detail other types of privacy breaches not discussed in this Article, including how the ACLU has found that the IRS purchased cell phone tracking technology and also discovered in 2013 that the IRS policy permitted the reading of private emails without a warrant (it has since agreed to stop doing so). *Id.* at 822–23.

¹⁰⁸ *Id.* at 843 (identifying ways in which the IRS data collection and analytics practices may violate the Administrative Procedures Act and/or due process protections).

¹⁰⁹ *Id.* at 848–50 (“[Algorithms] may result in targeting certain groups based on the associations created as the algorithm learns [And t]he New York Police Department came under fire for its use of predictive analytics to focus its policing on certain communities.”). But see generally I. Bennett Capers, *Race, Policing, and Technology*,

My greatest concern, which Houser and Sanders do not specifically raise, is that data mining of social media sources will disproportionately impact low-income taxpayers. As I¹¹⁰ and others¹¹¹ have highlighted elsewhere, low-income taxpayers are already disproportionately in the examination spotlight: in fiscal year 2018, the audit rate for all individual taxpayers was 0.59%; when broken down by level of adjusted gross income (AGI), a higher percentage of taxpayers with AGI between \$1 and \$25,000 were audited (0.69%) than those with AGI between \$25,000 and \$499,000.¹¹² As the next section addresses, audits of low-income taxpayers are typically time-consuming, burdensome, and stressful. Taxpayers are asked to provide documentation substantiating fact-intensive questions, such as who lives in their household, what their relationship to those individuals is, and how much support the taxpayer provides to those individuals.¹¹³ For low-income taxpayers, audits can pose an economic hardship for those cases in which the IRS freezes the valuable refundable credit portion of the refund until the audit is resolved.¹¹⁴

95 N.C. L. REV. 1241 (2017) (advocating for the harnessing of surveillance technology to deracialize policing and describing the necessary redistribution of privacy).

¹¹⁰ See MICHELLE LYON DRUMBL, TAX CREDITS FOR THE WORKING POOR (2019).

¹¹¹ Kiel, *supra* note 19 (“[A]udits of the rich continue to plunge while those of the poor hold steady, and the two audit rates are converging [ETC recipients] are audited at a higher rate than all but the richest taxpayers.”).

¹¹² I.R.S., PUB. NO. 55B, DATA BOOK: 2018, at 27 (May 2019). At AGI levels above \$500,000, the audit rate is higher, and the tiny number of the taxpayers at the highest end are subject to a sharply higher rate: the audit rate of taxpayers with AGI between \$500,000 and \$1 million was 1.1%; taxpayers with AGI between \$1 million and \$5 million had an audit rate of 2.21%; taxpayers with AGI between \$5 million and \$10 million faced an audit rate of 4.21%, and 6.66% of taxpayers with AGI above \$10 million were audited. *Id.* Note that taxpayers who reported no AGI were also subject to a higher than average audit rate (2.04%); this includes returns with losses, and a taxpayer with no AGI cannot claim EITC. *Id.*

¹¹³ See I.R.C. §§ 2(b), 7703(b), 24, 32, 151 and accompanying Treasury Regulations (setting forth the eligibility requirements for head of household filing status, marital status, the child tax credit, the EITC, and the dependent exemption). These various eligibility requirements overlap imperfectly and can be particularly complicated to apply to multigenerational households and shared child custody situations. Examiners ask taxpayers to prove residence of individuals through the use of such documents as school records, medical or social service records, and court orders, if applicable. See, e.g., I.R.S. Form 886-H-EIC (Oct. 2019), <https://www.irs.gov/pub/irs-pdf/f886he.pdf> [<https://perma.cc/Y2LN-YAKZ>].

¹¹⁴ See *infra* text accompanying note 120.

2. *Disproportionate Enforcement on Lower-Income Taxpayers, and Implications for Taxpayer Privacy*

The higher audit rate of these low-income taxpayers, relative to the moderate-income taxpayers, is due in part to the fact that the IRS prioritizes audits of returns claiming the EITC. In recent years, more than one in three individual income tax returns selected for examination involved an EITC claim.¹¹⁵ The EITC remains an enforcement priority for the IRS even as other types of examinations have declined and even though the overall number of returns with EITC claims has not increased in recent years.¹¹⁶ The IRS has been subject to criticism for shining the spotlight on the poor rather than the rich, as well as for the demographic consequences of this enforcement strategy.¹¹⁷ A former IRS economist who analyzed exam coverage data and estimated how it breaks down by county and state reported that taxpayers in the rural south are being audited at disproportionately high rates; according to his estimates, the ten most-heavily audited counties in the United States are disproportionately rural, low-income, and nonwhite.¹¹⁸

¹¹⁵ In 2018, 37% of audited returns were selected on the basis of an EITC claim. I.R.S., PUB. NO. 55B, *supra* note 112, at 23–26. Table 9a shows that 150,043,227 individual income tax returns were filed; of this total, 892,187 were selected for audit, representing an overall individual income tax audit rate of 0.59% for FY 2018. *Id.* Of the 892,187 returns selected for audit, footnote 5 specifies that 330,359 (37%) were selected for audit on the basis of an EITC claim. *Id.* at 126 n.5. See also Paul Kiel & Jesse Eisinger, *Who's More Likely to Be Audited: A Person Making \$20,000—or \$400,000?*, PROPUBLICA (Dec. 12, 2018, 5:00 AM), <http://www.propublica.org/article/earned-income-tax-credit-irs-audit-working-poor> [<https://perma.cc/HMP7-DDVR>] (describing how EITC audits have increased as a proportion of audits over a period of time in which IRS resources have been reduced) (“[In FY 2016], the IRS audited 381,000 recipients of the EITC. That was 36 percent of all audits the IRS conducted, up from 33 percent in 2011, when the budget cuts began.”).

¹¹⁶ See, e.g., TREASURY INSPECTOR GEN. FOR TAX ADMIN., NO. 2019-30-063, TRENDS IN COMPLIANCE ACTIVITIES THROUGH FISCAL YEAR 2018, at 15 (Sept. 9, 2019) (“Overall, the number of tax returns claiming the [EITC] have not increased over the past five years. At the same time, the number of examinations conducted by the [Wage & Investment] Division for returns claiming the [EITC] have increased by 17 percent, from 282,665 in FY 2014 to 330,886 in FY 2018.”); see also George testimony, *supra* note 16, at 10 (noting that the IRS added 290 additional tax examiner positions, that tax examiners were the only position the IRS increased in 2018 and that correspondence examinations were the only types of examinations that the IRS increased in 2018. In contrast, the IRS has decreased the number of revenue agent positions; revenue agents conduct more complex examinations in the field).

¹¹⁷ See, e.g., Paul Kiel & Hannah Fresques, *Where in the U.S. Are You Most Likely to Be Audited by the IRS?*, PROPUBLICA (Apr. 1, 2019), <https://projects.propublica.org/graphics/eitc-audit> [<https://perma.cc/JZ7F-EJLL>].

¹¹⁸ Kim M. Bloomquist, *Regional Bias in IRS Audit Selection*, 162 TAX NOTES 987 (Mar. 4, 2019) (discussing regional bias in audits for tax years 2012–2015 and highlighting

The majority of all examinations, and EITC examinations in particular, are correspondence examinations rather than in-person audits.¹¹⁹ Correspondence examinations, as the name suggests, are conducted through the mail. These examinations are highly automated and are not overseen by one specific employee from start to finish. In other words, the IRS uses an inefficient process to audit low-income taxpayers on an issue with fact-intensive and complex eligibility requirements. These audits are time-consuming to resolve, with the result that refunds of thousands of dollars are often delayed for months or longer.¹²⁰ Further, these audits are often burdensome for taxpayers.¹²¹ Yet the IRS has justified this disproportionate focus on EITC claimants, citing resource constraints.¹²² At the same time, the IRS has faced criticism for not doing more to pursue high-income individuals who fail to file a tax return, even though pursuing nonfilers is also cost-efficient because of automation and the use of third-party information reporting.¹²³

that rural Humphreys County, Mississippi, with a median annual household income of just \$26,000, had the highest rate of audit intensity, while also noting that the ten most heavily audited counties are all in the rural south and that in 2017 the population of these ten counties was 79% nonwhite (primarily African-American) according to the U.S. Census Bureau).

¹¹⁹ Seventy-one percent of examinations conducted in FY 2017 were correspondence examinations, which is fairly typical. NAT'L TAXPAYER ADVOC., ANNUAL REPORT TO CONGRESS 126 (2018), <http://www.TaxpayerAdvocate.irs.gov/2018AnnualReport> [<https://perma.cc/PWB6-Z3LM>]. In the same year, approximately 72% of correspondence exams in the Wage & Income Division were EITC exams. *Id.* at 128.

¹²⁰ Most EITC exams occur prior to the issuance of the refund, with the result that the refund is frozen and the taxpayer does not receive the EITC until the audit is concluded in the taxpayer's favor. *Id.* at 130, fig.1.8.3. Depending on household composition and income level, these refunds are often thousands of dollars, making them significant relative to the annual earned income of the household; low-income households rely on these refunds as a critical anti-poverty safety net. *See* CONG. RSCH. SERV., THE EARNED INCOME TAX CREDIT (EITC): HOW IT WORKS AND WHO RECEIVES IT, R43805 (Jan. 12, 2021), <https://fas.org/sgp/crs/misc/R43805.pdf> [<https://perma.cc/33EY-LTPX>].

¹²¹ *Id.* at 133 (citing lower education levels, reliance on tax return preparers, and language barriers as some of the challenges faced by EITC claimants upon audit).

¹²² Describing how the IRS audits approximately 300,000 EITC returns a year, the agency's website states, "EITC correspondence audits are the most efficient use of available IRS examination resources with the average time to complete the audit of 5 hours per return." I.R.S. Update on Audits (Sept. 24, 2020), <https://www.irs.gov/newsroom/irs-update-on-audits> [<https://perma.cc/WL6P-VLB4>].

¹²³ TREASURY INSPECTOR GEN. FOR TAX ADMIN., NO. 2020-30-015, HIGH-INCOME NONFILERS OWING BILLIONS OF DOLLARS ARE NOT BEING WORKED BY THE INTERNAL REVENUE SERVICE (May 29, 2020) [hereinafter TREASURY INSPECTOR REPORT]. As the TIGTA report notes, the intentional failure to file federal income tax returns is a crime. *Id.* at 1. *But see* I.R.S. News Release IR-2020-34 (Feb. 19, 2020) (announcing that revenue officers would increase in-person visits to taxpayers with income of more than \$100,000 who did not file returns in 2018 or previous years). IRS Commissioner Charles Rettig

It should be noted that while EITC claimants are disproportionately in the IRS enforcement spotlight, recipients of this social benefit are in many respects perceived to be treated with more dignity than recipients of traditional welfare.¹²⁴ Tax scholar Hayes Holderness describes the EITC as “far less privacy-invasive than either TANF or SNAP,” as both of those social benefit programs require precertification whereas the EITC does not.¹²⁵ Moreover, as Zelenak describes, it is rare for the IRS to make a criminal referral for an individual EITC claimant; individuals who wrongfully claim the EITC usually face only civil sanctions.¹²⁶

3. Differing Policy Implications for the IRS Examination and Collection Functions

The IRS RFI explicitly mentions the agency’s interest in using social media research tools for “existing compliance cases” and mentions collections as an end goal.¹²⁷ Though it does not explicitly mention the potential use in examinations, it is not implausible that the IRS would consider using such tools to access social media in the context of both examinations and collections.

While social media is a relatively new phenomenon, the IRS has long navigated criticism and limitations on the appropriate balance between taxpayer privacy and tax enforcement, including in examinations. In the early 1990s, the IRS acknowledged it had expanded the use of its “economic reality” investigations; whereas the indirect method technique was previously used only in criminal cases involving unfiled returns, the IRS extended its use of these so-called

emphasized this initiative as a priority in testimony before the Senate Finance Committee in June 2020: “We continue working towards the goal of having a presence in every neighborhood, on each type of tax issue and at every level of income, to ensure fairness for all taxpayers.” *2020 Filing Season and COVID-19 Recovery: Before the S. Fin. Comm.*, 116th Cong. (June 30, 2020) (Testimony of Charles P. Rettig, Commissioner, Internal Revenue Service), <https://www.finance.senate.gov/hearings/2020-filing-season-and-irs-covid-19-recovery> [<https://perma.cc/T6GR-VS8G>].

¹²⁴ See generally SARAH HALPERN-MEEKIN ET AL., *IT’S NOT LIKE I’M POOR* (2015) (recounting interviews with EITC recipients who speak to their perceptions); see also Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515 (2013).

¹²⁵ Hayes Holderness, *Taxing Privacy*, 21 GEO. J. ON POVERTY L. & POL’Y 1, 30 (2013).

¹²⁶ To the extent that the IRS makes criminal referrals in connection with the EITC, it is most commonly in the context of tax return preparer fraud and promoters of fraudulent schemes, rather than individual claimants. Zelenak, *supra* note 56, at 1891–92. One might analogize return preparer fraud to social benefit trafficking.

¹²⁷ IRS RFI, *supra* note 2.

lifestyle audits to civil cases.¹²⁸ Agents were trained to look for economic signs that taxpayers were living beyond their means, signaling possible unreported income.¹²⁹ Tax professionals complained that the audits were arbitrary, blurred the lines between civil examinations and criminal investigations, and involved intrusions into taxpayer privacy.¹³⁰ Congress subsequently enacted § 7602(e), which limited the circumstances under which the IRS could use this technique.¹³¹ While § 7602(e) seemingly gave taxpayers a new defense and even an opportunity to invoke a due process right, the statute provides only that the IRS must show it had a “reasonable indication” of a “likelihood” of unreported income. The relatively thin caselaw on § 7602(e) suggests that the IRS has had little trouble in meeting this standard to justify its use of lifestyle audits when challenged by taxpayers.¹³² In its internal legal advice interpreting § 7602(e), the Office of Chief Counsel advised IRS revenue agents that they may drive by a taxpayer’s house, or may conduct a Lexis search to ascertain if the taxpayer purchased real estate in a year at issue, prior to having a reasonable indication that there is a likelihood of unreported income.¹³³

All this raises the question: If the IRS decides to pursue the use of social media in both examinations and collections, should it develop different policies and guidelines for the use of social media by these distinct functions?

¹²⁸ Albert B. Crenshaw, *Tax Cheats Beware: The IRS Will Now Audit Lifestyles*, WASH. POST (Nov. 6, 1994), <https://www.washingtonpost.com/archive/business/1994/11/06/tax-cheats-beware-the-irs-will-now-audit-lifestyles/1c220596-4ee3-4ec3-80cb-b06a0e443c32/> [<https://perma.cc/T6GR-VS8G>].

¹²⁹ See, e.g., Philip R. Fink & Charles Gibson, *Less Reason to Be Afraid?*, CPA J. (June 1999), <http://archives.cpajournal.com/1999/0699/features/f46699.html> [<https://perma.cc/6NC9-UU2E>].

¹³⁰ *Id.*; Barbara Whitaker, *Spending It; When the I.R.S. Agent Peeks Under the Mattress*, N.Y. TIMES (July 28, 1996), <https://www.nytimes.com/1996/07/28/business/spending-it-when-the-irs-agent-peek-under-the-mattress.html> [<https://perma.cc/J648-GH74>].

¹³¹ I.R.C. § 7602(e) (“The Secretary shall not use financial status or economic reality examination techniques to determine the existence of unreported income of any taxpayer unless the Secretary has a reasonable indication that there is a likelihood of such unreported income.”).

¹³² See, e.g., *Hsu v. United States*, No. 17-cv-06656 NC, 2018 WL 2234439 (N.D. Cal. May 16, 2018); *Mortland v. IRS*, No. A-03-CA-115-SS, 2003 WL 21791249 (W.D. Tex. June 24, 2003); *United States v. Abramson-Schmeiler*, No. 09-cr-00359-REB, 2010 WL 11537887 (D. Colo. Oct. 14, 2010); *Chapin v. IRS Agent*, No. 2:14-cv-538-EJL-REB, 2016 WL 383135 (D. Idaho Jan. 8, 2016).

¹³³ I.R.S. Assoc. Chief Couns. Mem. 200101030 (Oct. 25, 2000) (concluding that these specific practices would not constitute “an intrusion on a taxpayer”).

The IRS examination function and the IRS collection function each play a role in enforcement. As there are slight distinctions in their mission, each function's use of social media mining and big data algorithms might have different implications.¹³⁴ IRS policy states that, in selecting returns for examination,

[t]he primary objective . . . is to promote the highest degree of voluntary compliance on the part of taxpayers. This requires the exercise of professional judgment in selecting sufficient returns of all classes of returns in order to assure all taxpayers of equitable consideration, in utilizing available experience and statistics indicating the probability of substantial error, and in making the most efficient use of examination staffing and other resources.¹³⁵

The IRS has a separately stated set of policy considerations for collections, which also emphasizes that “enforcement is a necessary component of a voluntary assessment system.”¹³⁶ Unlike in the examination context, taxpayers have additional rights and protections in the collections context, some of which are statutory¹³⁷ and some of which are a function of IRS policy.¹³⁸ For example—and of critical importance to low-income individuals—the IRS cannot pursue forced collections through levy if doing so will create an economic hardship for the taxpayer.¹³⁹ In addition to statutory notice and due process requirements, there are additional checks and balances in the collection process. For example, by statute, the IRS cannot seize the taxpayer's principal residence without the approval of a U.S. district court judge or magistrate.¹⁴⁰

¹³⁴ Recall that the RFI references using social media mining tools only with respect to collections and explicitly mentions that it would limit the use to open cases. *See supra* note 2. I include both examination and collections in this discussion in light of Houser and Sanders' concerns about how the IRS is using its big data database. *See Houser & Sanders, supra* note 14, at 870.

¹³⁵ IRM 1.2.1.5.10 (June 1, 1974).

¹³⁶ IRM 1.2.1.6.1 (August 18, 1994).

¹³⁷ *See* I.R.C. §§ 6300–44, which includes notice and demand requirements and collection due process rights related to the imposition of liens and levies.

¹³⁸ *See, e.g.*, IRM 5.11.7.2.1.1(2)(e) (Sept. 23, 2016); I.R.S., Dir. of Collection Inventory Delivery and Selection Mem. SBSE-05-1015-0067 (Oct. 7, 2015) (notifying IRS Field Collection agents of a policy decision to exclude social security disability insurance payments from the automated levy program, even though § 6331(h) provides the IRS the statutory authority to levy those benefits).

¹³⁹ I.R.C. § 6343(a); Treas. Reg. § 301.6343-1(b)(4) (as amended in 2005) (defining economic hardship as a taxpayer being unable to pay reasonable basic living expenses).

¹⁴⁰ I.R.C. § 6334(e). Section 6334(a)(13) additionally provides that any real property used as the taxpayer's residence is exempt if the amount of the levy does not exceed \$5,000. *See also* Treas. Reg. § 301.6334-1(d).

The IRS Policy Statement on “Fairness and Integrity in Enforcement and Collection” states three primary goals: (1) to ensure fairness to the taxpaying public; (2) to ensure an equitable process for all taxpayers; and (3) to ensure fairness to each taxpayer.¹⁴¹ The policy further describes how it aims to ensure an equitable process: “[F]airness and integrity are built into the foundation of our enforcement selection processes. These processes operate under a comprehensive set of checks and balances and safeguards to identify the highest potential noncompliance, using scoring mechanisms, data driven algorithms, third party information, whistleblowers and information provided by the taxpayer.”¹⁴² We should expect the IRS to pursue collection where necessary to promote compliance, but it must take measures to avoid undue hardship to the taxpayer.¹⁴³

As one way of balancing these enforcement goals with taxpayer rights, Section II.C proposes that the IRS clarify its conception of the taxpayer right to privacy to the public. The agency should be transparent to the public about its use (if any) of social media, so that taxpayers are on notice that the IRS is watching. It is hard, if not impossible, to predict what compliance impact would result from taxpayers knowing that the IRS is monitoring their social media.¹⁴⁴ However, putting taxpayers on notice of this intention affords them dignity.¹⁴⁵

¹⁴¹ I.R.S. Policy Statement 1-236 (Oct. 24, 2016).

¹⁴² *Id.*

¹⁴³ *See, e.g.*, IRM 1.2.1.6.5 (July 10, 1959); IRM 1.2.1.6.14 (Nov. 19, 1980).

¹⁴⁴ There is a rich literature on theories of tax compliance. *See, e.g.*, Marjorie E. Kornhauser, *Normative and Cognitive Aspects of Tax Compliance: Literature Review and Recommendations for the IRS Regarding Individual Taxpayers*, in NAT'L TAXPAYER ADVOC., 2 ANN. REP. TO CONG. 138 (2007). One theory of tax compliance is economic deterrence, which is the idea that taxpayers who perceive that the IRS is likely to catch tax cheats will be deterred from cheating. However, studies suggest that deterrence is not the strongest driver of tax compliance: other compliance motivations include social norms, tax morale, trust in government, convenience, and reliance on tax preparers. *Id.*

¹⁴⁵ Arguably, it also affords taxpayers who engage in noncompliance a warning to cultivate their social media in a way that does not publicly tip off the IRS while continuing to engage in such noncompliance. On the other hand, if everyone on social media cultivates their online image with this in mind, with the effect that no one on social media brags about cheating on their taxes, might this boost tax morale? These questions are worthy of research, but beyond the scope of this Article.

4. Differing Policy Implications for Civil Tax Enforcement and Criminal Tax Enforcement

Just as there ought to be different considerations for examination and collections, there should be different considerations in place for civil proceedings and criminal investigations. As a policy matter, it may be more justifiable for the IRS to engage in social media mining (along with other use of artificial intelligence) to determine whether a criminal act has been committed.¹⁴⁶ The IRS Criminal Investigations unit has far fewer employees than the civil enforcement side,¹⁴⁷ and its smaller workforce has a broader scope that includes not just tax fraud but also money laundering and narcotics-related and counterterrorism-related financial crimes.¹⁴⁸ Don Fort, chief of the IRS Criminal Investigations unit, has spoken publicly about how his office is using “advanced data analytics to spot suspicious behavior,” specifically mentioning his office was using data analytics to investigate noncompliance with payroll tax laws.¹⁴⁹ The need for this stems in part from the agency’s decrease in staffing.¹⁵⁰ Fort has also made public remarks about unreported capital gains related to cryptocurrencies as an emerging area of focus and said that there are whistleblower cases they are actively working; he cited cryptocurrencies as an area of concern because of the lack of transparency and visibility in those transactions.¹⁵¹

¹⁴⁶ See generally Alm et al., *supra* note 104 (discussing ways that technology may both improve and subvert tax compliance, including in the criminal tax context).

¹⁴⁷ In fiscal year 2018, examinations and collections had 30,876 full-time equivalent positions. IRS, DATA BOOK 2018 at 67, tbl.30 (2018). In contrast, there were 2,019 special agent positions in the Criminal Investigations unit in fiscal year 2018. IRS, IRS: CRIMINAL INVESTIGATION ANNUAL REPORT 7 (2018), https://www.irs.gov/pub/irs-utl/2018_irs_criminal_investigation_annual_report.pdf [<https://perma.cc/GR3W-K5PA>].

¹⁴⁸ IRS, IRS: CRIMINAL INVESTIGATION ANNUAL REPORT 6 (2018).

¹⁴⁹ Kristin Broughton, *Tax Crime Enforcement Unit Relying More on Analytics to Spot Crime*, WALL ST. J. (June 12, 2019, 5:14 PM), <https://www.wsj.com/articles/tax-crime-enforcement-unit-relying-more-on-analytics-to-spot-crime-11560363826> [<https://perma.cc/JC7V-KHTW>].

¹⁵⁰ *Id.* (noting that the IRS Inspector General reports the IRS has 26% fewer special agents than it did in 2012); see also Michael Cohn, *IRS Criminal Investigation Leveraging More Data Analytics*, ACCT. TODAY (Nov. 14, 2018, 12:29 PM), <https://www.accountingtoday.com/news/irs-criminal-investigation-leveraging-more-data-analytics-to-probe-tax-fraud> [<https://perma.cc/PW5S-B6VU>] (“One reason why the division needed to rely so much on data analytics was to make up for the shortage of special agents, while helping IRS agents identify the cases that would have the most impact.”).

¹⁵¹ Broughton, *supra* note 149. The IRS Criminal Investigation unit is devoting significant resources to cryptocurrency investigations. See Federico & Thompson, *supra* note 99.

Perhaps it is inevitable that the IRS will increasingly utilize artificial intelligence techniques in criminal investigations, and perhaps the public at large will not find the use of such techniques objectionable in this context. If we embrace this as acceptable, where might this ultimately take us? Will the IRS use facial recognition techniques to track where taxpayers are going and to monitor their cash purchases?¹⁵² Where, as a society, do we want this to end? And do we want this technology to be applied to all taxpayers and to all potential tax-related issues, both big and small?¹⁵³

II

PUNISHING THE UNSOPHISTICATED: PONDERING BRAGGADOCIO, WHISTLEBLOWERS, AND THE QUEST TO CLOSE THE TAX GAP

This Article is not meant to deny or undermine the importance of tax compliance or IRS enforcement efforts. The IRS estimates there is a relatively high and steady rate of voluntary tax compliance, most recently estimated at approximately 83.6%.¹⁵⁴ The term “tax gap” refers to the amount of tax *not* paid voluntarily and timely and refers to three distinct types of noncompliance: nonfiling, underreporting, and underpayment.¹⁵⁵ The IRS uses noncompliance estimates and research programs to inform its enforcement strategies. For example, there is a well-established correlation between information reporting and compliance, and there is a well-known compliance gap correlating with the cash economy due to the lack of information reporting. Underlying the goal of reducing the tax gap (as well as underlying the RFI) are

¹⁵² EUBANKS, *supra* note 30, at 7 (citing the example of Maine Governor Paul LePage having his administration mine data and publicly release information about welfare recipients who withdrew cash from ATMs in smoke shops, liquor stores, and out-of-state locations).

¹⁵³ According to TIGTA, “[i]n the past, the Internal Revenue Service (IRS) has focused on the tax compliance of high-income individuals because their noncompliance can have a significant corrosive effect on tax administration.” TREASURY INSPECTOR REPORT, *supra* note 123, at 1. This is not to argue that the IRS should ignore small indiscretions, but given the agency’s high focus on EITC enforcement, it ought to use technology to increase its efforts at reducing high-dollar noncompliance. To see the proposal I set forth for this, see my discussion in Section II.C.5.

¹⁵⁴ IRS, PUBLICATION 1415, FEDERAL TAX COMPLIANCE RESEARCH: TAX GAP ESTIMATES FOR TAX YEARS 2011–2013, at 1 (2019). This figure is the voluntary compliance rate, which is a measurement of the gross tax gap; the net compliance rate, which includes amounts that are eventually paid, including through enforcement and collection measures, is a slightly higher figure (85.8% in latest report).

¹⁵⁵ *Id.* at 4.

questions about how to most efficiently allocate limited resources in maximizing tax compliance.

For some, it may be easy to shrug off a call to protect the privacy of people who voluntarily make public the intimate (and often mundane) details of their private life. Section II.A addresses that temptation and raises examples of when and why it might be unfair, unwise, or inefficient to incorporate social media mining for tax enforcement. A distinction can and should be made between blatant public admissions of fraudulent behavior, on the one hand, and subtleties perceived by possibly discriminatory algorithms that may lead to significant false positives. As to blatant admissions, Section II.B explores the question of whistleblowers and whether the IRS should expressly encourage third parties to report potential fraud based on social media postings.

This part then concludes in Section II.C with several suggested policy proposals for the IRS, including a call for the IRS to clarify its understanding of a taxpayer's "right to privacy" for the public.

A. The Temptation to Disregard Individual Privacy Concerns

One response to this Article can be couched in the words of the fictional character Forrest Gump: "Momma says stupid is as stupid does."¹⁵⁶ In other words, people may intuitively respond to the IRS RFI with a shoulder shrug: if taxpayers are foolish enough to get caught doing something wrong, why is that necessarily bad? And if they are bragging about illegal behavior publicly on the internet, why do they deserve sympathy or leniency?¹⁵⁷

As one unsympathetic example of internet braggadocio, consider John McAfee, the British American businessman who founded the McAfee Associates software company. McAfee, a self-described Libertarian who unsuccessfully ran for President in 2016, is a multimillionaire who has publicly stated that he is a nonfiler.¹⁵⁸ I would be surprised if this fact had been previously unknown to the IRS—presumably at least some of his income is subject to third-party

¹⁵⁶ FORREST GUMP (Paramount Pictures 1994).

¹⁵⁷ Note that this dovetails with one of the major critiques of privacy rights: that "those with nothing to hide have no reason to be concerned for privacy." Hatfield, *supra* note 14, at 591 (evoking arguments made by Judge Richard Posner and Catherine MacKinnon). Several people I have spoken to about this Article had that reaction as well.

¹⁵⁸ Brooker Crothers, *John McAfee Is Running from U.S. Authorities – and Running for President. On a Boat.*, FOX NEWS (Jan. 24, 2019), <https://www.foxnews.com/tech/john-mcafee-is-running-from-u-s-authorities-and-running-for-president-on-a-boat> [<https://perma.cc/WQ7D-LGQZ>].

information reporting,¹⁵⁹ and the IRS would easily determine if no return had been filed in a given year. Of course, it is the height of hubris to brag about this publicly on Twitter, as McAfee did:¹⁶⁰

I have not filed a tax return for 8 years. Why? 1: taxation is illegal.
2: I paid tens of millions already and received Jack Shit in services.
3. I'm done making money. I live off of cash from McAfee Inc. My net income is negative. But i [sic] am a prime target for the IRS. Here I am.

According to McAfee, he has told the IRS, “I am not filing a return, I have no intention of doing so, come and find me.”¹⁶¹ Though the IRS has not publicly confirmed this, McAfee claims that in January 2019 the IRS convened a grand jury to charge him, his wife, and four campaign workers “with unspecified IRS crimes.”¹⁶²

Another unsympathetic example of such public bluster is RASHIA Wilson, the self-declared “First Lady” and “Queen of Tax Fraud.”¹⁶³ Wilson pleaded guilty to one count of wire fraud and one count of aggravated identity theft in connection with charges that she filed false federal income tax returns using fraudulently obtained social security numbers.¹⁶⁴ According to news reports, Wilson “taunted police by posting photos of herself flashing stacks of cash”¹⁶⁵ and posted inflammatory statements online, including: “*I’M RASHIA, THE QUEEN OF IRS TAX FRAUD . . . I’m a millionaire for the record, so if U think indicting me will B easy it won’t, I promise you!*”¹⁶⁶

¹⁵⁹ The Internal Revenue Code imposes an information reporting requirement on certain third-party payors. See I.R.C. § 6031. The list is voluminous and includes payors of rents, royalties, wages, and sales or redemptions of securities. IRS research analysts have consistently found a relationship between third-party information reporting and tax compliance. See IRS, PUBLICATION 1415, *supra* note 154, at 13.

¹⁶⁰ John McAfee (@officialmcafee), TWITTER (Jan. 3, 2019, 2:24 PM), <https://twitter.com/officialmcafee/status/1080953136985133062?s=21>.

¹⁶¹ Crothers, *supra* note 158.

¹⁶² *Id.*

¹⁶³ Press Release, U.S. Att’y’s Off., Middle Dist. of Florida, “Queen of Tax Fraud” Resentenced to 21 Years in Prison (Mar. 6, 2015), <https://www.justice.gov/usao-mdfl/pr/queen-tax-fraud-resentenced-21-years-prison> [<https://perma.cc/E3CL-6RBA>].

¹⁶⁴ Wilson’s federal indictment included fifty-seven counts. See U.S. v. Wilson, 593 F. App’x 942 (11th Cir. 2014), *aff’d in part, remanded in part*, 649 F. App’x 827 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 1064 (2017).

¹⁶⁵ Susan Taylor Martin, *From the ‘Tax Fraud Queen’ to the \$980,000 Refund, Tampa Bay Is a Hotbed of Tax Scammers*, TAMPA BAY TIMES (Feb. 22, 2019), <https://www.tampabay.com/business/from-the-tax-fraud-queen-to-the-980000-refund-tampa-bay-is-a-hotbed-of-tax-scammers-20190222/> [<https://perma.cc/QXM9-RYPD>].

¹⁶⁶ Robert W. Wood, *Queen of Tax Fraud Gets 21 Year Prison Term — for the Second Time*, FORBES (Mar. 6, 2015, 1:26 AM), <https://www.forbes.com/sites/robertwood/2015/03>

Neither McAfee nor Wilson is a low-income taxpayer who engaged in a small amount of cheating or made a small mistake. Wilson was sentenced to twenty-one years in her plea bargain and was ordered to forfeit over \$2,000,000 in stolen proceeds.¹⁶⁷ McAfee was indicted in October 2020 for tax evasion and willful failure to file tax returns.¹⁶⁸

It is understandable that some would take a just deserts approach: the idea that those who (like McAfee and Wilson) post things publicly are inviting scrutiny and deserve what they get. Indeed, Americans seem to enjoy stories of stupid criminals and human folly.¹⁶⁹ These stories proliferate on blogs, in news media, and in books.¹⁷⁰ It stands to reason, therefore, that people may enjoy stories of taxpayers “dumb” enough to tip their tax hand to the IRS on social media.¹⁷¹ In my view, our government agencies should resist the apparently very human urge to laugh at human misjudgment. Our revenue agency ought to direct its resources toward serious and systemic tax evasion and toward reducing the tax gap.

I do not find McAfee or Wilson to be sympathetic examples either; while both cases involve social media bragging, they run much deeper than that. My privacy concerns do not extend to those who choose to use social media to openly taunt the IRS or encourage the shirking of

/06/queen-of-tax-fraud-teasing-i-cant-be-caught-gets-21-years-prison-for-the-second-time/#791bcc0a4d15 [https://perma.cc/PDD5-2ZZY].

¹⁶⁷ Press Release, U.S. Att’y’s Off., *supra* note 163.

¹⁶⁸ Press Release, U.S. Dep’t of Just., John McAfee Indicted for Tax Evasion (Oct. 5, 2020), <https://www.justice.gov/opa/pr/john-mcafee-indicted-tax-evasion> [https://perma.cc/6GWA-AFEB]. McAfee was arrested in Barcelona, Spain, as he was getting ready to board a flight to Istanbul. Following his arrest, McAfee tweeted from prison: “I am charged with tax fraud but my only crime is refusing to file returns - a misdemeanor. Fraud is lying on your tax returns. How could I have lied if I have said nothing?” John McAfee (@officialmcafee), TWITTER (Oct. 10, 2020, 12:00 PM), <https://twitter.com/officialmcafee/status/1315004213638897665>.

¹⁶⁹ See, e.g., DARWIN AWARDS, <http://darwinawards.com/rules/> [https://perma.cc/333W-5QK9]. The Darwin Awards is a “humor” site and a community effort published by Wendy Northcutt, who has compiled the stories into a book series titled “The Darwin Awards” (Dutton Books). *Id.* At the time of this writing, there were four books in the series. The Darwin Awards website states, “One should not be ashamed of laughing over the misfortune of others.” *Id.*

¹⁷⁰ See, e.g., TOM NICK COCOTOS, WEIRD BUT TRUE! STUPID CRIMINALS: 150 BRAINLESS BADDIES BUSTED, PLUS WACKY FACTS (2012); Andy Simmons & Priscilla Torres, *The Fifteen Unluckiest Dumb Criminals Ever*, READER’S DIG. (Sept. 18, 2019), <http://www.rd.com/funny-stuff/dumb-criminals-unlucky/> [https://perma.cc/8BES-ZVDJ].

¹⁷¹ Similarly, the state of Washington made an example of the individual who publicly posted an offer to trade marijuana for EBT cards. WASH. ST. DEP’T OF SOC. & HEALTH SERVS., *supra* note 63. All three of these examples (McAfee, Wilson, and the EBT trader) involve criminal acts rather than civil infractions.

tax obligations. The IRS would ignore this behavior at its own peril, as researchers find a strong link between tax compliance and tax morale.¹⁷² If taxpayers view tax evasion taunts on social media and believe that those individuals are “getting away with it,” that undermines goals of tax compliance.¹⁷³

Moreover, any criminal investigations of these two individuals likely did not emanate from the internet bragging—rather, the bragging (or taunting) seems to have come after the individuals were under scrutiny by the authorities. My concerns are with much more subtle social media users. For example, ordinary photos scanned by an algorithm might prompt an audit; the algorithm might predict that, based on these photos, an individual earns more money than he or she reported, or that a child does not live in the taxpayer’s house for the period required in connection with a particular credit that he or she claimed.

In addition to my concern that the use of social media mining might disproportionately harm low-income taxpayers, I wonder if the agency’s choice to engage in social media mining might impact certain personality types of taxpayers more than others. For example, it seems that social media mining would likely locate individuals who engage in bluster, targeting for scrutiny those who are loud, flashy, or indiscreet, even though those individuals’ tax compliance may be no better or worse than quiet individuals. Another concern is that it might punish those who are cultivating a false image of themselves online.¹⁷⁴ In a survey of 2000 British social media users, more than 75% of people admitted to lying about themselves on Twitter and Facebook.¹⁷⁵ There is a rich body of social science literature examining how and why

¹⁷² See Kornhauser, *supra* note 144, at 139 (“Higher tax morale correlates with higher tax compliance.”). Kornhauser’s article provides an extensive bibliography of tax compliance literature.

¹⁷³ Kornhauser notes that “[n]on-compliance among other taxpayers can decrease an individual’s own tax morale and compliance.” *Id.* at 139–40 (citing Bruno S. Frey & Benno Torgler, *Tax Morale and Conditional Cooperation*, 35 J. COMP. ECON. 136 (2007)).

¹⁷⁴ Houser and Sanders address the problem of potentially false data in their article. See Houser & Sanders, *supra* note 14, at 841–42 (citing Minas Michikyan, Jessica Dennis & Kaveri Subrahmanyam, *Can You Guess Who I Am? Real, Ideal, and False Self-Presentation on Facebook Among Emerging Adults*, 3 EMERGING ADULTHOOD 55, 60 (2015)).

¹⁷⁵ Lisa Vaas, *Over 75% of People Lie on Social Media*, NAKED SECURITY: SOPHOS (Apr. 7, 2016), <https://nakedsecurity.sophos.com/2016/04/07/over-75-of-people-lie-on-social-media/> [<https://perma.cc/QB3T-T8EM>] (finding men more likely to lie on social media than women, with 43% of men polled admitting to fabricating facts about themselves); see also Cortney S. Warren, *How Honest Are People on Social Media?*, PSYCH. TODAY (July 30, 2018), <https://www.psychologytoday.com/us/blog/naked-truth/201807/how-honest-are-people-social-media> [<https://perma.cc/WL8W-KFBC>] (describing the same British survey).

people lie online, as well as perceptions of how often other people lie.¹⁷⁶

This tendency for people to lie or exaggerate surely spans all ages, but there appears to be a generational element to it as well. Social scientists have found that young adults “with a less coherent sense of the self and lower self-esteem reported presenting their false self on Facebook to a greater extent.”¹⁷⁷ Whether young or old, people may have a wide variety of incentives and motivations to cultivate a false online image. They may post pictures of someone else’s expensive car. In some cases, a photo may not tell the full story. For example, a low-income individual may post photos of a vacation at an expensive resort, which might suggest to the IRS that the individual has significant disposable income—but perhaps this individual’s parents paid for the entire trip. Do we want an algorithm to point the IRS in these directions, forcing individual taxpayers to prove that someone else took them someplace expensive and paid their way?

In this regard, it is likely data mining will pick up false hits and minor indiscretions that will direct the IRS down a path that is either negligible (in the case of a low-income taxpayer who has committed a relatively minor tax indiscretion, either intentionally or unintentionally) or useless (in the case of those presenting a false image or those posts that the algorithm misinterprets).¹⁷⁸ Other government agencies that engage in social media investigations have cited this as a downside of using automated tools.¹⁷⁹ Thus, it is foreseeable that the IRS’s use of automated mining may necessitate the resource-intensive manual review of many accounts that turn out to be false hits or not worth pursuing; in that regard, it is possible that automation may not be as cost-saving as one would assume. Kimberly Houser and Debra Sanders raised similar concerns about the accuracy of IRS data mining, noting, “big data results are based on correlation, not causation, and it is inappropriate to judge people based on correlation; just because

¹⁷⁶ See, e.g., Michelle Drouin et al., *Why Do People Lie Online? “Because Everyone Lies on the Internet,”* 64 COMPUTS. HUM. BEHAV. 134 (2016) (examining online deception across four different online venues, including social media).

¹⁷⁷ Michikyan et al., *supra* note 174, at 55.

¹⁷⁸ The IRS RFI mentions this possibility, though does not elaborate on how it would prevent it: “the IRS will also be mindful that frequently information posted on social media and the internet may be wrong or misleading.” IRS RFI, *supra* note 2.

¹⁷⁹ See SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM, *supra* note 58, at 23 (“[O]fficials in one state noted that the automated tools have placed an excessive demand on staff because they had to sift through the many false-positive leads that were generated.”).

people share characteristics or interests does not mean that they will have similar tax compliance behavior.”¹⁸⁰

Returning to the example of Predictim, the now-defunct online service that used artificial intelligence screening to create a predictive profile of potential babysitters, computer-generated scans sometimes produce ambiguous results. “When one babysitter’s scan was flagged for possible bullying behavior, the unnerved mother who requested it said she couldn’t tell whether the software had spotted an old movie quote, song lyric or other phrase as opposed to actual bullying language.”¹⁸¹ Similarly, Facebook has worked to fine-tune its social suicide prediction screening: Mason Marks cites the example of how in its early efforts Facebook picked up false positives from likely benign social media posts such as “Ugh, I have so much homework I just wanna kill myself.”¹⁸²

At the same time, the IRS’s use of social media data mining presumably would spare those who are quiet—those who are sophisticated enough to maintain online privacy, who know what not to post, those who are so down-and-out that they lack access to the internet, or those who lack the instinct to post about their lives on social media. A sophisticated individual will follow the advice of privacy law scholar Joshua Fairfield, who advises that one way for a device user to protect one’s privacy is to “provide false information where possible, to make the algorithms less sure.”¹⁸³

I can imagine instances in which an algorithm might also target those who maintain a social media presence but are silent as to certain aspects of their lives. Imagine a taxpayer who has qualifying children she claims for the EITC and child tax credit. What if she maintains an active Facebook page but never posts pictures of her children? This is not a farfetched scenario: many people choose not to post photos of their children due to privacy concerns or simply because their children ask them not to do so. Based on the absence of photos, would an algorithm suggest that the IRS select this taxpayer’s return for examination and require substantiation for the qualifying child claims, even if the existing databases (e.g., the Dependent Database) had not prompted it?

¹⁸⁰ Houser & Sanders, *supra* note 14, at 871.

¹⁸¹ Harwell, *supra* note 71.

¹⁸² Marks, *supra* note 25, at 109.

¹⁸³ Joshua Fairfield, *7 Things I Teach My Kids About Privacy*, MEDIUM (Sept. 9, 2020), <https://medium.com/@fairfieldj/7-things-i-teach-my-kids-about-privacy-24372552cde0> [<https://perma.cc/5DTP-42T4>] (explaining that, as device users, we lack the ability to protect our data but can take certain steps to protect our privacy).

Another concern is the proliferation of fake social media accounts, including for nefarious purposes.¹⁸⁴ There have been publicized cases of criminals impersonating individuals on Facebook in order to scam unsuspecting individuals.¹⁸⁵ Would this affect the social media mining algorithm, leading to time-consuming false positives?

These are but a few suggestions of how social media algorithms might create red herrings for the IRS in many directions, directing scarce resources to dead ends rather than prioritizing human analytical work toward larger dollar cases. Are there other, more effective ways to use social media as a tax compliance tool? Returning to the extreme examples of internet braggadocio, the IRS Whistleblower Program provides an example that might be instructive to draw upon in this regard.

B. Whistleblowers: Should the IRS Encourage Social Media Snitching, and Under What Circumstances?

Recall the story of the woman in Pennsylvania who brazenly posted an offer on Facebook to trade her SNAP card for cash.¹⁸⁶ Social media was her downfall, but she wasn't caught by an algorithm or even by an agency employee conducting a manual search.¹⁸⁷ Something old-fashioned happened: someone snitched on her.¹⁸⁸ A member of the public saw the post, recognized the illegal nature of it, and contacted the agency to report it.¹⁸⁹ This example underscores something about human nature: if people are morally outraged by something, they will speak up. Thus, it is possible that social media will serve as a tool for

¹⁸⁴ See Arun Vishwanath, *Habitual Facebook Use and Its Impact on Getting Deceived on Social Media*, 20 J. COMPUTER-MEDIATED COMM. 83 (2015) (describing how habitual Facebook use may increase the user's vulnerability to phishing attacks on social media sites).

¹⁸⁵ See, e.g., Jack Nicas, *Facebook Connected Her to a Tattooed Soldier in Iraq. Or So She Thought*, N.Y. TIMES (July 28, 2019), <https://www.nytimes.com/2019/07/28/technology/facebook-military-scam.html> [<https://perma.cc/UR8E-PVWR>] (“[There are] two sides of a fraud that has flourished on Facebook and Instagram, where scammers impersonate real American service members to cheat vulnerable and lonely women out of their money.”).

¹⁸⁶ Following the tip from a member of the public, investigators arrested Tanya Keenan Mac after she traded her EBT card for heroin. Kristina Papa, *Food Stamp Facebook Post Leads to Another Arrest*, WNEP (Apr. 4, 2017, 5:50 PM), <https://www.wnep.com/article/news/local/lycoming-county/food-stamp-facebook-post-leads-to-another-arrest/523-8c2dc-ca-b352-42bb-9e37-4eafa4fd6d9> [<https://perma.cc/Y49Y-972U>].

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

enforcement whether the IRS chooses to mine it or not. Not every instance of internet braggadocio is as outrageous as the examples of John McAfee and Rashia Wilson or even as overt as that of the woman in Pennsylvania. Most social media leads will be subtler and may be useful only in conjunction with other information known to the viewer.

In his 1996 article suggesting ways to improve public perceptions of the tax system, Joshua Rosenberg proposed ways to encourage and even financially incentivize the public to report tax avoidance to the authorities, arguing that fostering communication (rather than polarization) with the IRS may improve attitudes toward tax compliance.¹⁹⁰ Along those lines, perhaps it might be more appropriate to leave social media monitoring to the public and not have the IRS initiate it. In that framework, the IRS is not doing the frontline social media mining, which eliminates the unwelcome “Big Brother” feeling of the government monitoring your posts.

The IRS already has some mechanisms in place for members of the public to report tax noncompliance. Anyone can report a “suspected tax law violation” on IRS Form 3949-A, which can be submitted anonymously.¹⁹¹ The form provides a place to report the name of the alleged wrongdoer, and the informant can tick one or more of twenty boxes to describe the alleged violations. These boxes range from very common types of civil noncompliance (failure to file a return, failure to pay tax, EITC, unreported income) to more serious criminal allegations (narcotics income, kickback, organized crime, corruption).

In addition to this information referral form, which anyone can use to report a variety of suspected misconduct, the IRS has a statutory whistleblower program. Internal Revenue Code § 7623, as originally enacted, was an informant claim program authorizing the Secretary of Treasury to pay financial awards as necessary for “(1) detecting underpayments of tax,” or “(2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or

¹⁹⁰ Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane*, 16 VA. TAX REV. 155 (1996).

¹⁹¹ IRS, FORM 3949-A, INFORMATION REFERRAL (2016). IRS procedures for screening these forms are described in the Internal Revenue Manual, though parts are redacted. IRM 3.28.2 (Aug. 1, 2020).

conniving at the same.”¹⁹² Section 7623(b), added in 2006,¹⁹³ created a formalized whistleblower program, providing that a whistleblower shall “receive as an award at least 15 percent but not more than 30 percent of the proceeds collected as a result of the action . . . or from any settlement in response to such action,” with the amount of the award determined based upon “the extent to which the individual substantially contributed to such action.”¹⁹⁴ The 2006 amendment also mandated the creation of an IRS Whistleblower Office to implement the program.¹⁹⁵

Under the IRS Whistleblower Program, an award applies only in cases in which (1) an individual taxpayer’s gross income exceeds \$200,000 in the year at issue; or (2) the proceeds in dispute exceed \$2,000,000.¹⁹⁶ Thus, Congress designed the program to incentivize tips or reports of significant evasion or of evasion by taxpayers with significant income.

Notably, the award is decreased in cases “based principally on information disclosed in certain public sources”¹⁹⁷ This limitation

¹⁹² I.R.C. § 7623(a). Internal revenue informant laws have been in effect since 1867, but the significant revisions that created the whistleblower program were enacted in 2006. See IRS, *History of the Whistleblower/Informant Program* (June 18, 2020), <https://www.irs.gov/compliance/history-of-the-whistleblower-informant-program> [<https://perma.cc/8HF3-HUY2>].

¹⁹³ Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, div. A, tit. IV, § 406, 120 Stat. 2958.

¹⁹⁴ I.R.C. § 7623(b).

¹⁹⁵ Tax Relief and Health Care Act of 2006 § 406(b).

¹⁹⁶ I.R.C. § 7623(b)(5). The most prominent IRS whistleblower is Bradley Birkenfeld, the UBS banker who divulged information to the IRS about Swiss banking schemes that amounted to criminal tax evasion. David Kocieniewski, *Whistle-Blower Awarded \$104 Million by I.R.S.*, N.Y. TIMES (Sept. 11, 2012), <https://www.nytimes.com/2012/09/12/business/whistle-blower-awarded-104-million-by-irs.html> [<https://perma.cc/Q37C-6GAB>]. Birkenfeld, himself a subject of the criminal investigation and who served two and a half years in prison for his role in the scheme, made use of the IRS Whistleblower Program and received the largest ever award, \$104 million. *Id.* The information he provided to the IRS yielded a lot of fruit: thousands of names of U.S. offshore bank account owners were provided to the IRS, and thousands of other offshore bank account holders voluntarily disclosed their accounts as part of an amnesty program that resulted. *Id.* The IRS estimated that Birkenfeld’s information “helped recover more than \$5 billion in unpaid taxes.” As the article notes, whistleblower awards constitute gross income, so the IRS ultimately receives part of the award back in tax revenue. *Id.*

¹⁹⁷ IRS, PUBLICATION 5241, WHISTLEBLOWER PROGRAM FISCAL YEAR 2018 ANNUAL REPORT TO CONGRESS 4 (2019), <https://www.irs.gov/pub/irs-prior/p5241--2019.pdf> [<https://perma.cc/3HSB-N2AE>]; see also I.R.C. § 7623(b)(2). The award is also decreased when the whistleblower “planned and initiated the actions” that led to the tax law violations. I.R.C. § 7623(b)(3).

is likely to become relevant if a whistleblower's basis for the claim is information he or she saw on a taxpayer's Facebook or Twitter page.

While most tips from social media would be unlikely to meet the criteria of the formalized whistleblower program, the IRS has fixed a general framework for individuals to report noncompliant taxpayers. Instead of pursuing a third-party tool for social media mining, the IRS could simply leave the online snooping to the public, and the agency can follow its existing procedures in pursuing any social media-related tips that are reported on Form 3949-A or whistleblower claims.

*C. Proposals for Setting IRS Policies on Social Media Mining:
Balancing Modern Enforcement Techniques with a Taxpayer
Right to Privacy*

1. The IRS Should Clarify Its Understanding of the Taxpayer "Right to Privacy"

As a starting point, the IRS ought to define more clearly its interpretation of a taxpayer's right to privacy. Michael Hatfield's scholarship provides examples illustrating the breadth of personal information that may be tax relevant.¹⁹⁸ Hatfield warned that technological advances, including the use of big data mining, would undo the privacy protection previously afforded to individuals when the IRS faced a structural inability to review all the information available to it.¹⁹⁹

Notions of privacy are rapidly changing. Perhaps it is not even possible for the IRS to define its conceptualization of taxpayer privacy. That would be a legitimate position—if that is the case, it ought to say so explicitly. In part parroting the statutory language of § 7602(e), the IRS website explanation of the taxpayer right to privacy states the agency “should not seek intrusive and extraneous information about your lifestyle during an audit if there is no reasonable sign that you

¹⁹⁸ Hatfield, *supra* note 14, at 631 (referencing the potential tax relevance of sleeping arrangements, marital discord, therapy sessions, and health and social club memberships, among other things); *see also* Michael Hatfield, *Taxation and Surveillance: An Agenda*, 17 YALE J.L. & TECH. 319, 321 (2015) (describing instances of how the IRS is entitled to collect information about individuals' hobbies, reading preferences, religious affiliation, travel plans, weight and doctor's recommendations about it, abortion, sterilization, or gender identity disorder).

¹⁹⁹ Hatfield, *supra* note 14, at 631–32 (“[G]iven how much personal information will be covered by the coming technology and how much personal information is potentially tax relevant, it is hard to have anything but a dystopian vision of this future . . .”).

have unreported income.”²⁰⁰ However, most of what is posted on social media is extraneous to one’s income situation. If the IRS is routinely surveilling social media at large (even if by algorithm as opposed to manually), rather than making targeted searches after finding signs of unreported income, then it is seemingly violating its own principle.

2. Increase Transparency of Audit Techniques

Relatedly, if the IRS does not believe that taxpayers have a right to privacy in their social media posts, and if it intends to use automated techniques to trawl all forms of social media for possible enforcement leads, it ought to state that intention clearly and explicitly. At least then the public will be on explicit notice that the IRS is watching their social media. Just as posted signs warn motorists of traffic cameras on roads or notify the public of security cameras at tourist sites and stores, taxpayers should be on notice that the IRS is monitoring their social media activity. Further, the IRS ought also to provide specifics as to its methods: whether the mining is manual or automated; whether the agency is searching indiscriminately or only with cause; whether it is doing so in civil cases or only for criminal investigations; and whether it is doing so in connection with examinations, collections, or both.

This information ought to be prominently displayed on the IRS website. The IRS could undertake a public relations campaign to this effect, using social media as its own tool for spreading the word to taxpayers. If it wishes, it might even openly encourage people to report one another when they see incriminating information on other people’s social media. Imagine such a tweet from the IRS: “Do your patriotic duty: retweet suspected tax noncompliance! #TaxGap @IRStaxpros #taxcompliance.” If that is how the IRS wishes to operate, it should make that known to the public so that people can proceed accordingly.

3. Limit Social Media Investigations to Manual Searches Rather than Automated, and Define Limits in the Internal Revenue Manual

If the IRS pursues social media mining as part of its enforcement strategy, it will face decision points in setting the contours. A critical first question is to what extent the mining should be done by humans as opposed to by algorithms. If the mining is done by algorithms, a

²⁰⁰ *Taxpayer Bill of Rights 7: The Right to Privacy*, IRS (Jan. 22, 2021), <https://www.irs.gov/newsroom/taxpayer-bill-of-rights-7-the-right-to-privacy-0> [<https://perma.cc/2CH5-KR7D>].

second question is whether mining should be limited only to current investigations or used more widely to cast the broadest possible net.

Software programs for data mining produce false positives and are potentially discriminatory. Of course, the same risks are inherent in humans performing manual searches on social media. But humans can play a role in procedural protections, especially if trained in how to conduct searches in a way that minimizes false positives. In the context of whether the Social Security Administration should explore greater use of social media in its investigatory work, Social Security Commissioner Michael J. Astrue told members of Congress that, in his view, professionally trained fraud investigators should be the ones evaluating circumstantial evidence of fraud, not administrative law judges or other employees: “Social media sites are not exactly clear and reliable evidence . . . Facebook puts up phony websites under my name all the time.”²⁰¹

Additionally, humans face constraints that computers do not: for one, they have only a limited number of work hours in the week. Humans do not have time to engage in widespread social media mining on a random basis, nor would it be cost efficient for them to do so. Thus, it would be logical to limit employee use of manual searches to the context of existing enforcement cases. This would be most consistent with the limits imposed by § 7602(e), providing that the IRS should not engage in broad fishing expeditions based solely on signs of financial status but can conduct lifestyle audits once the agency finds “a reasonable indication that there is a likelihood of such unreported income.”²⁰²

Authorizing specially trained employees to undertake manual searches of social media in preexisting enforcement cases would be the least harmful alternative. There is a humanity to manuality that is not inherent in automated searches: it opens the door to mercy and

²⁰¹ Robert Pear, *On Disability and on Facebook? Uncle Sam Wants to Watch What You Post*, N.Y. TIMES (Mar. 10, 2019), <https://www.nytimes.com/2019/03/10/us/politics/social-security-disability-trump-facebook.html> [<https://perma.cc/BM7V-FA9D>]. Pear quotes Astrue’s remarks in the 2019 article; the remarks were made in 2012 while Astrue was serving as Social Security Commissioner. In his testimony at the hearing, Astrue articulated the possibility that angry ex-spouses may post false information on Facebook. *The Social Security Administration: Is It Meeting Its Responsibilities to Save Taxpayer Dollars and Serve the Public?: S. Hearing 112-751 Hearing Before the Comm. on Fin.*, 112th Cong. (2012) (statement of Hon. Michael J. Astrue, Commissioner, Social Security Administration). He also expressed a concern that “[i]f you allow broad social media access on government time, I think that becomes an enormous suck on productivity.” *Id.*

²⁰² I.R.C. § 7602(e).

discretion in the taxpayer's favor. There is, however, still the risk of employee bias with manual searches. If the IRS were to adopt this technique, it ought to develop policies on when social media investigations are appropriate and what types of evidence might be probative. The IRS can incorporate these policies into the Internal Revenue Manual. Most importantly, these tools ought not to be used to unduly scrutinize poor people.

For example, with respect to collection enforcement, it may be appropriate for an Offer Specialist to manually search social media while verifying the financial statements that were made by the applicant under penalties of perjury. Perhaps an Offer Specialist's findings should weigh adversely only if a material misrepresentation is found and documented in writing in the file, and after the applicant has had a chance to respond to specific questions about the information viewed online. Imagine a manual social media search that appears to uncover an asset of significant value not reported on the Offer in Compromise financial statement: the Offer Specialist should be allowed to make further inquiries and document the findings and the applicant's response as part of the administrative record. For example, if the Specialist sees a photograph of the taxpayer wearing a very expensive wristwatch that was not reported on the asset section of the financial statement, it is reasonable that the Specialist be permitted to ask the taxpayer about this. On the other hand, the Specialist should not be permitted to make value-laden inquiries as to the applicant's expenses. For example, taxpayers submitting an Offer in Compromise are permitted to use a standard expense dollar amount to account for food, clothing, and certain other household items based on the size of the household; the IRS policy is to permit the standard figure without questioning the amount actually spent, and the taxpayer is not required to substantiate the allowable standard figure.²⁰³ Therefore, if the taxpayer has claimed the standard figure, the Offer Specialist should be barred from asking the taxpayer to increase the offer's dollar amount on the basis that the taxpayer has been spotted on social media smoking cigarettes, eating steak, or wearing designer-brand clothes.

²⁰³ See *Collection Financial Standards*, IRS (Nov. 19, 2020), <https://www.irs.gov/businesses/small-businesses-self-employed/collection-financial-standards> [https://perma.cc/3TGE-JS9B].

4. *If Automated Social Media Mining Is Used, Implement Use of Pre-Examination Soft Letters to Nudge Taxpayers Detected by the Algorithm*

If the IRS proceeds with using social media mining, it should do so as part of an announced compliance campaign. Rather than moving straight to opening examinations based on results, as a first step, the IRS should send selected taxpayers a “soft letter” as a nudge to improve compliance. The idea behind such an initiative is to let taxpayers know that the IRS is undertaking a new enforcement technique or enhancing enforcement of a particular type. The IRS refers to these as “educational letters,” and there is precedent for broad use of these letters in targeted areas of suspected noncompliance. In recent years, the IRS has sent soft letters to cryptocurrency holders,²⁰⁴ offshore account holders,²⁰⁵ and taxpayers known to have engaged in specific types of transactions that the IRS suspects might be abusive.²⁰⁶

The Taxpayer Advocate Service conducted a study in which it sent educational letters to taxpayers whose returns were not selected for examination, but nonetheless appeared to have erroneously claimed the EITC on their 2014 tax return.²⁰⁷ The study found that the letters were effective in improving compliance the following year in some particular contexts, with taxpayers not making the same mistake the next year.²⁰⁸ During her time as National Taxpayer Advocate, Nina

²⁰⁴ See, e.g., I.R.S. News Release IR-2019-132 (July 26, 2019). Taxpayer Advocate Erin Collins recently criticized the scope of these letters, calling it “disturbing” that these letters imposed “unreasonable burdens on [taxpayers] outside the protection of an examination.” NAT’L TAXPAYER ADVOC., OBJECTIVES REPORT TO CONGRESS FISCAL YEAR 2021, at 80 (2020).

²⁰⁵ See, e.g., Kelly Phillips Erb, *IRS to Target S Corporations, Foreign Disclosures in New Campaigns*, FORBES (July 24, 2019, 2:15 PM), <https://www.forbes.com/sites/kellyphillipserb/2019/07/24/irs-to-target-s-corporations-foreign-disclosures-in-new-campaigns/#78f1f4313a38> [https://perma.cc/CE98-9U2H].

²⁰⁶ See, e.g., Jay Adkisson, *IRS Sends Second Wave of Soft Letter Warnings to Certain Captive Owners for Abusive Microcaptive Transactions*, FORBES (Aug. 8, 2020, 9:48 PM), <https://www.forbes.com/sites/jayadkisson/2020/08/08/irs-sends-second-wave-of-soft-letter-warnings-to-certain-captive-owners-for-abusive-microcaptive-transactions/#7b14cd8713ee> [https://perma.cc/6746-857W].

²⁰⁷ See NAT’L TAXPAYER ADVOC., STUDY OF SUBSEQUENT FILING BEHAVIOR OF TAXPAYERS WHO CLAIMED EARNED INCOME TAX CREDITS (EITC) APPARENTLY IN ERROR AND WERE SENT AN EDUCATIONAL LETTER FROM THE NATIONAL TAXPAYER ADVOCATE, 2 ANNUAL REPORT TO CONGRESS 32, 33 (2016).

²⁰⁸ *Id.* The study found the educational letters were particularly effective with respect to educating taxpayers on the relationship requirement of the EITC but less effective with respect to taxpayers who claimed a child that was also claimed by another taxpayer. Extrapolating from the study, some types of noncompliance may be more easily corrected by an educational letter than others. See also NTA Blog, *EITC – How a Simple Educational*

Olson emphasized that, in order to be salient and effective, IRS letters or notices should be specific in content and tailored to the most relevant issues to the taxpayers.²⁰⁹ To be most effective, an educational letter in the social media context should address the specific mistake that is suspected, rather than be framed as a general reminder to comply with taxes.

While I do not wish to see the IRS engage in widescale automated social media mining, sending educational letters to taxpayers based upon suspicious findings is a more reasonable first step than immediately opening an examination. The letter should specifically reference social media. Sending such a letter serves the goal of transparency, as it puts the taxpayer on notice that the IRS is surveilling their online activity and, ideally, will nudge the taxpayer to correct his or her behavior.²¹⁰

5. Sharply Define the Social Media Mining Criteria, Using It to Target Only the Most Egregious Noncompliance

I find social media mining in tax enforcement cringeworthy at any income level, and my first preference is to keep the IRS out of this realm. However, if the IRS proceeds with this initiative, my alternative preference is for the agency to set its sights either on the most egregious types of tax noncompliance (regardless of income level) or on the highest earners, who have been the subject of a declining audit rate in the last decade.²¹¹

Letter Can Help Avert Noncompliance, TAXPAYER ADVOC. SERV. (Feb. 28, 2018), <https://www.taxpayeradvocate.irs.gov/news/ntablog-eitc-how-a-simple-educational-letter-can-help-avert-noncompliance/> [<https://perma.cc/BGA9-KAVM>].

²⁰⁹ NTA Blog, *The IRS Should Redesign Its Notices Using Psychological, Cognitive, and Behavioral Science Insights to Protect Taxpayer Rights, Enhance Taxpayer Understanding, and Reduce Taxpayer Burden*, TAXPAYER ADVOC. SERV. (April 3, 2019), <https://www.taxpayeradvocate.irs.gov/news/ntablog-the-irs-should-redesign-its-notices-using-psychological-cognitive-and-behavioral-science-insights-to-protect-taxpayer-rights-enhance-taxpayer-understanding-and-reduce-taxpayer-burden/> [<https://perma.cc/W97B-UFFF>] (referring to notices in general, not educational letters in particular).

²¹⁰ As governments in many other countries have done, the IRS has borrowed upon behavioral science, psychology, and cognitive science in connection with its tax compliance research; the IRS can use insights gleaned from its studies to design a social media soft letter and determine which taxpayers should receive it. *See* TAXPAYER ADVOC. SERV., LITERATURE REVIEW: IMPROVING NOTICES USING PSYCHOLOGICAL, COGNITIVE, AND BEHAVIORAL SCIENCE INSIGHTS, 2 ANNUAL REPORT TO CONGRESS 194 (2018).

²¹¹ *See, e.g.*, Keith Fogg, *IRS Large Case Examination Rate Collapses*, PROCEDURALLY TAXING (July 13, 2020), <https://procedurallytaxing.com/irs-large-case-examination-rate-collapses/> [<https://perma.cc/VTL2-ECTD>] (citing statistics from IRS 2019 Databook).

For example, could the IRS use social media mining to screen for potential tax protestors? It could set its data mining algorithm to search for social media posts that repeat or promote frivolous tax arguments, such as those compiled by the IRS on its website.²¹²

With respect to pursuing wealthy tax cheats, the IRS might wish to look to the examples of state revenue agencies and foreign revenue agencies using high-tech methods in enforcement. The New York State Department of Taxation is well known for using invasive methods (including social media) to track individuals who have ties to New York but claim to reside in lower-tax states on their tax filings.²¹³ These residency audits are aimed, strategically, at the wealthy as a means of maximizing the state's revenue base.²¹⁴ Greece made headlines when it used police helicopters and satellite images from Google Earth to locate home swimming pools as part of a large-scale crackdown on tax evasion and unreported income.²¹⁵

From a cost-benefit perspective, it makes sense to aim these initiatives at the wealthy if the revenue recouped from the positive results will offset the costs of chasing false leads. To some, these initiatives may create “feel-good” stories with the hope that such stories will boost tax morale (and thus boost individual compliance) among the larger public.²¹⁶ Personally, I do not like the idea of the IRS tracking any class of individuals' movements electronically—normatively, this is more privacy than I wish for the public to sacrifice in the name of revenue collection²¹⁷—so I do not favor this approach

²¹² *The Truth About Frivolous Tax Arguments*, IRS (May 1, 2020), <https://www.irs.gov/privacy-disclosure/the-truth-about-frivolous-tax-arguments-introduction> [<https://perma.cc/958W-MGGX>].

²¹³ See, e.g., Robert Frank, *Tax Collectors Chase Rich New Yorkers Moving to Low-Tax States. Auditors Inspect Cell Records, Even Your Dog's Vet Bills*, CNBC (Mar. 8, 2019, 7:05 AM), <https://www.cnbc.com/2019/03/08/tax-collectors-chase-rich-new-yorkers-moving-to-low-tax-states.html> [<https://perma.cc/2EHE-ECL4>].

²¹⁴ *Id.* (“New York can’t afford to lose many millionaires or billionaires. The top 1 percent of earners pays 46 percent of the state’s income taxes . . .”).

²¹⁵ Daniel Steinvorth, *Finding Swimming Pools with Google Earth: Greek Government Hauls in Billions in Back Taxes*, SPIEGEL INT’L (Aug. 2, 2010, 2:48 PM), <https://www.spiegel.de/international/europe/finding-swimming-pools-with-google-earth-greek-government-hauls-in-billions-in-back-taxes-a-709703.html> [<https://perma.cc/NCA5-V553>] (describing how these tactics revealed that the suburbs of Athens had 16,974 swimming pools, rather than the 324 that had been reported).

²¹⁶ Studies suggest that taxpayer compliance is directly correlated to perceived compliance of others. See, e.g., Alm et al., *supra* note 104, at 297.

²¹⁷ Recall that the IRS states that taxpayers have the right to expect enforcement action will be “no more intrusive than necessary.” In my opinion, using data mining and technological surveillance to track the personal lives of taxpayers without a specific

even if targeted to the wealthy. But to the extent the IRS wishes to adopt these methods, I prefer targeting tax protestors, or the wealthy, to the idea of training an algorithm to tease out whether a poor person earns a little bit of extra cash on the side or whether a person in a \$25 per month installment agreement could afford to pay a slightly higher amount but for the fact that she is smoking a pack of cigarettes a day. Targeting specific groups other than the poor would also serve as a counterweight to the fact that the lowest-income taxpayers are already subject to such a high audit rate. If nothing else, the agency's enforcement efforts would be spread among a larger group of taxpayers (instead of increasing the focus on the poorest).

6. Use Social Media Mining Only at Taxpayer's Request, as a Method of Dispute Resolution

As mentioned in the introduction, the RFI also raises the prospect of using a social media tool to *protect* taxpayers. While I do not favor the IRS searching individual taxpayers' social media in any capacity, I would be curious to see how the IRS might use it to protect taxpayers: trading off taxpayer privacy only for good, rather than for enforcement.²¹⁸ Recall the example of the man in Detroit who was wrongfully arrested and could have invoked social media in his alibi—are there similar analogies to be envisioned for taxpayers?²¹⁹

Imagine if taxpayers could turn social media in their favor, electing at their option to use it as a defense or to substantiate their claims in disputes. For example, IRS underreporter notices are sometimes the first clue to taxpayers that they are victims of identity theft; because the notice lists all tax information reported by third parties, the taxpayer will see if income is wrongly reported by an unknown person who is working under the taxpayer's social security number. In those cases, the taxpayer must contact the IRS and establish that the income listed on the notice does not belong to the taxpayer. Perhaps in some cases a taxpayer could use social media posts to demonstrate to the IRS that they had only one place of employment or that they had no connection

suspicion of tax noncompliance is far more intrusive than tracking wages and financial transactions, the latter of which are justifiable for a revenue agency.

²¹⁸ Relatedly, though not specific to social media, see W. Edward Afield, *Moving Tax Disputes Online Without Leaving Taxpayer Rights Behind*, 74 TAX LAW. 1 (2020) (imagining how the IRS can deploy technology to resolve tax disputes in ways that are pro-taxpayer rights).

²¹⁹ See *supra* note 47 and accompanying text.

to the geographic location where the income was reported under their number.

Perhaps social media could be used (again, I would propose it be allowed only at the taxpayer's election) to substantiate an EITC claim upon examination. The IRS could institute a policy that the agency may consider a taxpayer's social media evidence within its discretion; to protect taxpayers, it could further adopt a policy that no negative inference can be drawn from the social media sources.

Some individuals have turned to technology (and opted to sacrifice a bit of their own privacy) as a method of tax planning: as a response to state residency tax audits, tax-specific compliance tools have become commercially available. Monaeo sells a so-called personal and audit defense system, which consists of an app and web interface that enable users to track and log their days in and out of a state, ensuring that they do not trip into residency status.²²⁰

In discussing compliance burdens and how cultural norms around technology and privacy have changed and will continue to evolve, Michael Hatfield imagines a future in which taxpayers could choose between two systems depending on their privacy preference.²²¹ One option Hatfield sets forth would be to voluntarily sacrifice privacy (by consenting to data surveillance) and in exchange receive certain tax benefits; the other option would be to opt out of surveillance and as a result give up the tax benefit.²²² At least such a regime would put the taxpayer in control.

III

BROADER IMPLICATIONS FOR REPRESENTING LOW-INCOME TAXPAYERS IN THE #TMI ERA

In light of the IRS social media request for information, as well as broader trends signaling the loss of individual privacy, how should tax practitioners advise their clients? As the director of a low-income taxpayer clinic, I am most concerned with this vulnerable population of clients who receive our legal services on a pro bono basis.

²²⁰ Frank, *supra* note 213. The article states that Monaeo said use of its "Personal Edition" app is up fifty-one percent in 2018 over 2017. *See also* MONAEO, <https://monaeo.com/personal> [<https://perma.cc/RL64-9USL>].

²²¹ Hatfield, *supra* note 198.

²²² *Id.* at 352. Hatfield emphasizes the need for research as to taxpayer preferences, and he recognizes that "the tax law of 2040 should be fundamentally different than that of 2015 if revolutionary technologies are to be integrated into its administration." *Id.* at 366.

Increasingly, I see social media usage addressed in a variety of ways as a continuing legal education (CLE) topic. One such seminar advised lawyers how to use the internet as an investigative tool; the promotional flyer included agenda items such as “[f]ind out ‘secret’ ways to ferret out information from social media profiles” and suggested social media site navigation as a method to obtain background information about adverse parties, lawyers, judges, and current and potential clients.²²³ The CLE flyer suggests other uses for lawyers to navigate social media sites, including to (1) “[F]ind information to attack a party or witness’s credibility”; (2) “uncover fraud”; and (3) “seek out the smoking gun.”²²⁴

Other CLE programs include discussion of how the profession’s ethical rules apply to social media. For example, may an attorney representing the defendant in a products liability case check the plaintiff’s social media sites without the plaintiff’s lawyer’s consent?²²⁵ C. Simon Davidson of law firm McGuire Woods posed this hypothetical and concluded yes, so long as there is no “communication” with the party or witness.²²⁶ Davidson cautions, however, that some state professional regulations “would prohibit arguably deceptive conduct designed to gain access” to those social media sites; presumably this would include setting up a fictional account to “friend” the party on Facebook or “follow” the party on Twitter.²²⁷

If lawyers are regularly using social media as a tool for opposition research, what advice are they giving their own clients about how to manage social media without pitfalls? The obvious advice would be for clients to simply go dark: no Facebook, no Twitter, no Instagram. However, that might not be viable advice in the twenty-first century, or clients may not take it seriously. But it does not hurt to remind clients that the government may be mining their social media. I have seen posts by some of my own Facebook friends about how they want to borrow

²²³ Carole A. Levitt & Mark E. Rosch, *Social Media as Investigative Research*, GA. LAWS. CLE, <https://georgialawyersclewebinars.ce21.com/item/social-media-investigative-research-evidence-309411#tabDescription> [<https://perma.cc/78NN-FW37>] (coauthors of *THE CYBERSLEUTH’S GUIDE TO THE INTERNET* (14th ed. 2017)).

²²⁴ *Id.*

²²⁵ C. SIMON DAVIDSON, *THE ETHICS OF EMAIL AND SOCIAL MEDIA: A TOP TEN LIST* 302 (2017), https://www.tba.org/sites/default/files/davidson_hypotheticals_and_analysis.pdf [<https://perma.cc/QB8A-WCF2>] (providing several examples of cases in which a party’s or witness’s postings on social media sites were a useful source of evidence).

²²⁶ *Id.*

²²⁷ *Id.*

someone else's child for their tax return, and I have seen a compilation of tweets along the same line.²²⁸ I presumed at least certain of these were jokes, though sometimes it is hard to be sure. Can a data algorithm perceive a joke?

Criminal defense attorneys advise their clients that social media is fair game for police investigators.²²⁹ In the civil context, divorce lawyers routinely advise clients to be careful about what they post on social media, cautioning that content posted can be used for a variety of purposes.²³⁰ Personal injury lawyers have a different set of best practices regarding social media posts depending on whether their client is the plaintiff or defendant.²³¹ A concern cited by one plaintiffs' attorney firm is the tendency of social media posts to broadcast one's good news and downplay or ignore bad news, with the unintended consequence that "defendants looking to escape liability may point to such photos and posts as evidence that you are not really injured."²³² For this reason, the law firm advises plaintiffs to refrain from social media posts following an injury.²³³ Harkening back to the analogy of

²²⁸ See Drumbl, *supra* note 69.

²²⁹ Tom Petersen, *If You Are a Defendant in a Criminal Case — Be Careful What You Post on Social Media*, PETERSEN CRIM. DEF. L. (Sept. 7, 2018), <https://www.criminaldefensene.com/if-you-are-a-defendant-in-a-criminal-case-be-careful-what-you-post-on-social-media/> [https://perma.cc/XG77-S4CV].

²³⁰ See, e.g., Jaliz Maldonado, *Family Law: Social Media Evidence in Divorce Cases*, THE NAT'L L. REV. (Feb. 14, 2019), <https://www.natlawreview.com/article/family-law-social-media-evidence-divorce-cases> [https://perma.cc/Y2UJ-PFL8]; Larry Upshaw, *Contemplating Divorce? 10 Critical Social Media "Don'ts" You Need to Know*, CONNATSER FAM. L., <https://connatserfamilylaw.com/contemplating-divorce-10-critical-social-media-donts-you-need-to-know/> [https://perma.cc/3YWS-332S] (last visited Jan. 24, 2021).

²³¹ See, e.g., Frances Crockett Carpenter et al., *Social Media Admissions in Personal Injury Cases: Mitigating Risk for Plaintiffs, Securing Admissions from Defendants*, STRAFFORD PUBL'NS (May 10, 2017), <https://www.straffordpub.com/products/social-media-admissions-in-personal-injury-cases-mitigating-risk-for-plaintiffs-securing-admissions-from-defendants-2017-05-10> [https://perma.cc/6WCP-YZ7K] ("This CLE webinar will provide guidance to personal injury litigators for mitigating the risks that social media posts pose for their clients, as well as tips for tracking down admissions by defendants on social media.").

²³² Amalia Lucero, *Social Media Being Used as Evidence in Personal Injury Cases*, CURTIS & CO. ATT'YS, <https://www.curtislawfirm.org/articles/social-media-being-used-as-evidence-in-personal-injury-cases/> [https://perma.cc/U9F3-DNAU].

²³³ *Id.* Similar advice is found on other personal injury firm websites. See, e.g., Adam S. Kutner, *How Social Media Can Impact Your Personal Injury Case*, <https://www.askadamskutner.com/personal-injury/social-media-can-impact-personal-injury-case/> [https://perma.cc/U4VK-DFGZ] ("[I]f you're claiming that you have a broken arm, but you post on social media that you're going bowling, the defense is going to challenge your injuries.").

other agencies that administer social benefits, an attorney representing Social Security disability claimants states that he cautions new clients, “There is a little bitty chance that Social Security may be snooping on your Facebook or your Twitter account You don’t want anything on there that shows you out playing Frisbee.”²³⁴

What about in the tax context? Tax attorneys Carina Federico and Travis Thompson observe, “It is imperative that modern tax practitioners develop a full understanding of a client’s digital footprint,” advising that “[c]lient intake questions should include inquiries about social media usage and online sales through digital marketplaces, at a minimum.”²³⁵ Federico and Thompson further suggest “practitioners should advise clients to be mindful about what they post on social media. For instance, a taxpayer should not tell the IRS that they do not have any money, but then post pictures of himself on Instagram with expensive cars or on an extravagant vacation.”²³⁶ In the litigation context, tax attorney James Creech advises lawyers to conduct due diligence of a client’s social media if the case “relies heavily on the petitioner’s credibility on the witness stand” and warns of the ethical consequences that may arise if a lawyer finds contradictory evidence on social media.²³⁷

Should low-income taxpayer clinics adopt similar routine counseling tactics? Should our clients be counseled differently depending on whether the case involves an examination or a collections issue?

Beyond just the litigation context that Creech discusses, tax attorneys should consider the wide range of their due diligence obligations. Our clients sign financial forms such as a Collection Information Statement or an Offer in Compromise under penalties of perjury. The professional regulations governing practice before the IRS impose upon tax practitioners an affirmative duty to exercise due

²³⁴ Pear, *supra* note 201.

²³⁵ Federico & Thompson, *supra* note 99, at 46.

²³⁶ *Id.*

²³⁷ Creech, *supra* note 22. Referring to Federal Rule of Evidence 803(3), Creech argues that social media posts can be a useful indicator of mindset: “The low threshold for publication and our cultural habit of oversharing and introspection mean that [social media posts] are probably a fairly accurate indicator of the declarant’s mental state.” *Id.* While I agree with Creech’s advice as to due diligence, it is important to remember that social media posts are not always an accurate depiction of one’s life. See Houser & Sanders, *supra* note 14, at 841 (citing Minas Michikyan et al., *Can You Guess Who I Am? Real, Ideal, and False Self-Preservation on Facebook Among Emerging Adults*, 3 EMERGING ADULTHOOD 55, 60 (2015)).

diligence when preparing, assisting with, or approving tax returns and other documents relating to tax matters, as well as due diligence in determining the correctness of oral and written representations made by the practitioner.²³⁸ Before submitting such financial forms and statements to the IRS, it would be prudent to also perform online searches of our clients to look for inconsistencies, the way that we might look for inconsistencies in a bank statement that supports such a form. In the bankruptcy context, there are multiple examples of debtors who failed to disclose assets or income and later ran into trouble because of social media posts.²³⁹

Elaborating on the point made by Federico and Thompson, I can envision a number of similarly problematic tax scenarios, particularly in the collection context. What if social media reveals a side cash business, even one that is relatively low dollar? For our clients, that could have an impact on the “ability to pay” calculation, and it could materially change an Offer in Compromise. Even if the side business is fledgling or operating at a net loss, the failure to disclose it reflects poorly on the taxpayer’s honesty elsewhere on the form. Imagine a client’s Facebook page posting photos of puppies for sale or advertising to mow lawns or babysit. For low-income taxpayers in collections cases, even one or two hundred dollars a month of unreported income can create issues with collections alternatives, making them ineligible for financial hardship status or forcing a higher minimum payment in an installment agreement. This is an important conversation to have with clients and one that can complicate calculation of monthly income due to the unpredictability of an income stream from such sources. It prompts a broader question as well: Should tax professionals surveil their clients’ social media sites looking for any hint of unreported income in connection with preparation of a routine individual income tax return?

Another vulnerable category of taxpayers is those requesting innocent spouse relief. In these cases, a taxpayer who has filed a joint income tax return with his or her spouse in the past is asking for relief from the joint liability, either because the IRS examined the return and

²³⁸ Treasury Circular No. 230, 31 C.F.R. § 10.22 (2021).

²³⁹ See, e.g., Carolyn S. Toto & Kimberly Buffington, *50 Cent Breaks the Golden Rule of Social Media Posting*, PILLSBURY INTERNET & SOC. MEDIA L. BLOG (Feb. 29, 2016), <https://www.internetandtechnologylaw.com/50-cent-breaks-the-golden-rule-of-social-media-posting/> [<https://perma.cc/55XW-HUD4>]; *Debtors Beware: Social Media Knows Where Your Assets Are Buried*, PILLSBURY INTERNET & SOC. MEDIA L. BLOG (Feb. 20, 2018), <https://www.internetandtechnologylaw.com/debtors-social-media-assets-bankruptcy/> [<https://perma.cc/3ADK-4PTA>].

found an understatement of tax or because the return showed a balance due that was not paid.²⁴⁰ These cases are directed to a centralized unit of the IRS, where an individual makes a determination using a number of factors, including the following: whether the requesting spouse had knowledge, or reason to know, of the understatement of tax when the return was filed; whether the requesting spouse received a significant benefit from the understatement or underpayment; and whether under all the facts and circumstances it would be unfair to hold the requesting spouse liable for the tax owed.²⁴¹ When a taxpayer requests innocent spouse relief, the IRS sends a letter and questionnaire to that taxpayer's spouse or ex-spouse (the "nonrequesting spouse") and uses that response to evaluate the requesting spouse's claim.²⁴² If the requesting spouse appeals the determination in Tax Court, the nonrequesting spouse has a right to intervene in the case.²⁴³ Thus, it would be prudent for a requesting spouse to be particularly careful about what he or she posts to social media—both the IRS and the nonrequesting spouse may be looking at those posts. Of course, if the requesting spouse is in the middle of divorce proceedings, his or her divorce lawyer may already have advised him or her to shut down social media sites. But a significant number of innocent spouse claimants are unrepresented by counsel,²⁴⁴ particularly low-income claimants, and therefore they are not privy to such advice.

To reiterate, I am not advising tax attorneys to help their clients engage in tax fraud, evasion, or any kind of noncompliance. My concerns are with broader systemic fairness. For example, will the use of social media mining increase the likelihood that IRS employees will make moral judgments of the poor? As Eubanks referenced in her work, we have seen examples in other contexts in which the behavior

²⁴⁰ I.R.C. § 6015.

²⁴¹ See I.R.C. § 6015; Rev. Proc. 2013-34, 2013-34 I.R.B. 397; I.R.S. Pub. 971 (Oct. 20, 2014).

²⁴² Treas. Reg. § 1.6015-6(a)(1); see also IRM 25.15.3.4 (Dec. 12, 2016) ("The [nonrequesting spouse] must receive notice of, and an opportunity to participate in, any proceeding with respect to an innocent spouse relief request.").

²⁴³ See *King v. Comm'r*, 115 T.C. 118 (2000).

²⁴⁴ See generally Stephanie Hunter McMahon, *An Empirical Study of Innocent Spouse Relief: Do Courts Implement Congress's Legislative Intent?*, 12 FLA. TAX REV. 629, 668 (2012) (highlighting the high number of pro se petitioners appealing the outcome of their innocent spouse determination in court, but also remarking that "representation does not appear to be a critical matter for determining whether a spouse wins"). Because McMahon's study draws upon data from cases litigated in federal courts, her statistics reflect only requesting spouses who appealed the denial of their request in court, as opposed to the broader universe of all requesting spouses who submit a request. *Id.* at 648.

of poor people is scrutinized, with officials publicly shaming the behavior as part of a broader policy conversation.²⁴⁵ I can envision a situation in which politicians question the IRS allowance of a standard household expense figure by citing examples of individuals who were granted financial hardship status appearing on social media smoking a cigarette, drinking a six-pack of beer, or sporting a tattoo. The underlying expense of any of those things could unfortunately yet easily become the subject of moral judgment, such as the judgment that the taxpayer could have allocated that money to rent or food.²⁴⁶

Regardless of whether the IRS chooses to move forward with social media mining, or whether and how it publicly defines a taxpayer's right to privacy, it seems wise to err on the side of assuming that all electronic transactions, actions outside one's home, internet activity, and social media posts may be subject to various levels of scrutiny and observation.²⁴⁷ As lawyers, whether one is a tax lawyer, a criminal defense attorney, or a family law specialist, it is prudent to remind our clients of this twenty-first century technological reality.

CONCLUSION

As I stated at the beginning, this Article is not meant as a defense of those who cheat on their taxes. I certainly do not condone faking financial hardship, fudging eligibility for social benefits, or hiding income from the IRS. Tax compliance is a serious problem, and one that deserves serious solutions. The underfunding of the IRS is likewise a serious problem and compels the agency to be creative in its enforcement solutions.

This conversation is yet another reminder that the IRS is tasked by Congress with too many responsibilities in addition to tax administration and revenue collection. The agency is the administrator of refundable tax credits that operate as social benefits. It plays a significant role in oversight of the tax aspects of retirement plans,

²⁴⁵ See, e.g., EUBANKS, *supra* note 30 (discussing how Eubanks uses the example of the public shaming of TANF recipients who use ATMs in certain locations).

²⁴⁶ See generally Zelenak, *supra* note 56 (discussing how the public views tax cheats versus welfare cheats).

²⁴⁷ See, e.g., Heather Kelly & Rachel Lerman, *America Is Awash in Cameras, a Double-Edged Sword for Protesters and Police*, WASH. POST (June 3, 2020, 4:00 AM), <https://www.washingtonpost.com/technology/2020/06/03/cameras-surveillance-police-protesters/> [<https://perma.cc/53ZG-9YKA>] (describing law enforcement's use of surveillance cameras, body cameras, and face- and object-recognition software, as well as private citizens' use of smart phones, home security cameras, and vehicle cameras, and describing the metadata contained in these videos and photos).

nonprofit organizations, and healthcare-related provisions. It gets called upon to administer financial aid in times of crisis, as in the COVID-19 pandemic when the IRS was unexpectedly tasked with delivering economic impact payments to millions of individuals, including those with no taxable income or filing requirement. It stands to reason that the agency—overtasked and underfunded—is searching for shortcuts in the name of efficiency.

Despite these pressure points, to which I am sympathetic, I sincerely hope that the agency will choose not to go down the road of cheap and easy in relying on big data and social media analytics for collection and examination purposes. The IRS aspires in its mission statement to “enforc[e] the tax law with integrity and fairness to all.”²⁴⁸ In my view, incorporating social media mining as a routine part of examination and collection would undermine the dignity of the taxpayers, as well as the integrity of the agency.

²⁴⁸ I.R.S. Policy Statement 1-236 (Oct. 24, 2016).