

TAX GLASNOST' FOR MILLIONAIRES: PEEKING BEHIND THE VEIL OF IGNORANCE ALONG THE PUBLICITY-PRIVACY CONTINUUM

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[S]o far as taxation is concerned, there ought to be nothing "private" about the amount of any man's income, or the aggregate of all forms of his property, inasmuch as every man has a right to know, that all his neighbors are contributing pro rata with himself to support that Government, which is common to him and them. There is nothing, at least there should be nothing, "private" in connection with Government; that is the one absolutely "public" thing of the world; least of all should there be anything private in the matter of public taxes, since in bearing up the burdens of Government all the citizens are alike copartners, and . . . for this purpose each has a right to demand a look into the books of all the others.¹

INTRODUCTION

Congressional debate over a surtax on millionaires, spurred in part by popular reaction to the unparalleled surge of millionaires and their income during the 1980s,² has revived public discussion of the economic and moral underpinnings of progressive income tax, which was submerged in the self-congratulatory atmosphere surrounding the compression of marginal tax rates during the Reagan administration.³ This Article seeks to contribute to that

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1. A. PERRY, *PRINCIPLES OF POLITICAL ECONOMY* 552 (1890). Perry (1830-1905), was a leading political economist in the United States during the second half of the nineteenth century. President Cleveland wanted to appoint Perry Secretary of the Treasury. See J. DORFMAN, *THE ECONOMIC MIND IN AMERICAN CIVILIZATION: 1865-1918*, at 56 (1949).

2. See, e.g., Fisher, *A Brewing Revolt Against the Rich*, *FORTUNE*, Dec. 17, 1990, at 89.

3. See, e.g., J. BIRNBAUM & A. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM 282-85* (1987).

discussion by examining whether current law frustrates formulation of public policy by blocking access to information needed to explore the ability of the rich to pay higher taxes⁴ without rendering society's poorest members even poorer.⁵

First, this Article presents the available aggregate data concerning the recent proliferation of income-millionaires. Next, it sets forth the remarkable, yet little-known, history of the alternating openness and secrecy of individual income tax returns. The Article then scrutinizes the reasons commonly advanced to vindicate privacy interests. And, finally, the Article offers a concrete proposal favoring publicity of millionaires' tax returns combined with an explanation of how the specific information disclosed will inform a comprehensive debate about income distribution and redistribution.

I.

THE NEW MILLIONAIRES AND THE NEW POLARIZATION

The liberal has partly accepted the view of the well-to-do that it is a trifle uncouth to urge a policy of soaking the rich. Yet on the whole, the rich man remains the natural antagonist of the poor. Economic legislation, above all tax policy, continues to be a contest between the interests of the two. . . . The test of the good liberal is still that he is never fooled and that he never yields on issues favoring the wealthy. . . . Behind him, always challenging him, is the cynical Marxian whisper hinting that whatever he does may not be enough. Despite his efforts, capitalist concentration will keep on, and the wealthy will become wealthier and more powerful. They lose battles but win wars.⁶

[W]e have heard once again the ugly sound of economic McCarthyism. It bellows forth from the fever swamps of the left. It is the savage cry of class warfare.

To ordinary, middle-class Americans, that sound must be one of the most terrifying in the world. It is the sound of the liberals with their hands once again on the tax rates.⁷

The number of self-reported income-millionaires⁸ has experienced un-

4. See W. BLUM & H. KALVEN, JR., *THE UNEASY CASE FOR PROGRESSIVE TAXATION* 64-68 (1978 [1953]); L. EISENSTEIN, *THE IDEOLOGIES OF TAXATION* 16-56 (1961).

5. Thus implicating the "difference principle," which underlies so much of J. RAWLS, *A THEORY OF JUSTICE* (1971).

6. J. GALBRAITH, *THE AFFLUENT SOCIETY* 72 (1958).

7. 136 CONG. REC. H10,284 (daily ed. Oct. 16, 1990) (statement of Rep. Michel).

8. The number of persons or families with annual incomes in excess of \$1,000,000 is, of course, much smaller than that with net worth in excess of that sum. In 1983, almost two percent of families (1,310,000) showed such a net worth; 320,000 households had net financial assets in excess of \$1,000,000. Avery & Elliehausen, *Financial Characteristics of High-Income Families*, 72 FED. RESERVE BULL. 163, 164-65 (1986) [hereinafter *High-Income Characteris-*

precedented growth during the last decade. From 1978 to 1988,⁹ this group expanded nearly thirty-two-fold — from 2,041 to 65,303.¹⁰ Even after correcting for inflation, the number of millionaires rose more than eight-fold, from only 8,622 in 1978 to 65,303 in 1988.¹¹ With Congress contemplating a 10% surtax on taxable income in excess of \$1,000,000,¹² the economic underpinnings of the restoration of a progressive tax for millionaires merits scrutiny.

The increasing importance of millionaires in the income and tax systems is underscored in Table 1,¹³ which shows their absolute numbers, percentage share of total returns filed, reported adjusted gross income (AGI),¹⁴ and share of federal income taxes paid. Though still only a minuscule proportion of all taxpayers, the proportion of income-millionaires increased thirty-fold between

tics]; see also F. LEVY, *DOLLARS AND DREAMS: THE CHANGING AMERICAN INCOME DISTRIBUTION 19-20* (1987).

9. Both of these years fell in expansion periods of the business cycle. See Survey of Current Business, Aug. 1990, at C-7. 1988 is the last year for which the Internal Revenue Service (IRS) has published final data.

10. Calculated according to data in Scheuren & McCubbin, *Individual Income Tax Shares and Average Tax Rates, Tax Years 1916-1950*, SOI BULL., Winter 1988-89, at 1, table 1, at 45 [hereinafter *Tax Shares and Rates 1916-1950*]; McCubbin & Scheuren, *Individual Income Tax Shares and Average Tax Rates, Tax Years 1951-1986*, SOI BULL., Spring 1989, at 39, table 1, at 50 [hereinafter *Tax Shares and Rates 1951-1986*]; SOI BULL., Spring 1990, at 156, table 3, at 157.

11. Given a rise in consumer prices of 81.4% during this period (as measured by the Consumer Price Index [CPI]), \$1,000,000 in 1988 had the same purchasing power as about \$550,000 in 1978. See U.S. BUREAU OF THE CENSUS, *CURRENT POPULATION REPORT: MONEY INCOME AND POVERTY STATUS IN THE UNITED STATES: 1989* (1990) Ser. P-60, No. 166 [hereinafter *1989 INCOME AND POVERTY*]. Use of an alternative means of computing the price deflator yields a slightly lower 75.3% inflationary increase. See *id.*

12. The House version of the Omnibus Budget Reconciliation Act of 1990 [hereinafter OBRA], H.R. 5835, 101st Cong., 2d Sess., 136 CONG. REC. H10,128, H10,265, H10,296 (1990), would have imposed this surtax. It was passed in the House by a vote of 238 to 192.

13. Tables 1 and 2 are based on the data published annually by the IRS in Statistics of Income. They do not take inflation into account and do not include the part of capital gains that was excluded from adjusted gross income before 1987. Consequently, the growth of million-dollar incomes is less marked than indicated in the tables, but the trend remains prominent and is by no means merely a product of inflationary or definitional changes. A series of alternative data reflecting the effect of inflation and capital gains is set out *infra* notes 15-16, 18, 26-33. The methodology underlying the construction of the alternative set of data is explained in the Appendix, *infra* notes 219-225 and accompanying text. Hinds, *Reading Lips of the Rich: Spending, Not Taxes, Is the Problem*, N.Y. TIMES, Oct. 20, 1990, at 8, col. 2, discusses the increase in income-millionaires, but fails to mention these factors.

14. Unless otherwise stated, all references to "income" are to adjusted gross income (AGI), which is not identical with personal income as used in the National Income and Product Accounts of the Bureau of Economic Analysis of the Department of Commerce. See Park & Reeb, *Personal Income and Adjusted Gross Income, 1984-1986*, SOI BULL., Winter 1988-89, at 71; Park, *Relationship Between Personal Income and Adjusted Gross Income, 1987-88*, SURVEY OF CURRENT BUSINESS, Aug. 1990, at 24. AGI, which is familiar from Form 1040, excludes, *inter alia*, interest on state and local government bonds, insurance proceeds, gifts and inheritances, and workers' compensation payments as well as certain business expenses and losses (and, before 1987, 50% or 60% of capital gains). See IRS, *STATISTICS OF INCOME — 1987, INDIVIDUAL INCOME TAX RETURNS 91-92* (1990) [hereinafter *1987 STATISTICS OF INCOME*].

1978 and 1988.¹⁵ Millionaires, six ten-thousandths of all 1988 taxpayers, received more than one-eighteenth of all AGI, almost nineteen times their 1978 share. They paid over one-tenth of all 1988 federal income taxes, a ten-fold increase over 1978.¹⁶ If attention is focused on a fixed share of income recipients, rather than on a fixed amount of income, a similar discontinuity emerges. Whereas the richest 1% of taxpayers had accounted for 7.8% to 9.8% of total pre-tax income between 1948 and 1981, by 1986, this share "skyrocketed to 14.7 percent."¹⁷

15. If inflation and the full inclusion of capital gains are considered, the share increased seven and one-half times.

16. These two figures are at their highest levels since the Great Depression, when working-class incomes were largely exempt from the federal income tax. For convenient historical tables, see Blacksin & Plowden, *Statistics of Income for Individuals: A Historical Perspective*, 1 IRS, STATISTICAL USES OF ADMINISTRATIVE RECORDS: RECENT RESEARCH AND PRESENT PROSPECTS 91, tables 2 and 3, at 102-05 (B. Kilss & W. Alvey eds. 1984). If the combined effect of inflation and full inclusion of capital gains in all years is taken into account, the increases are a seven-fold increase in millionaires' AGI share and a seven-and-one-half-fold increase in total tax.

17. Pechman, *The Future of the Income Tax*, AM. ECON. REV., Mar. 1990, at 1, 2 (data include 100% of realized capital gains). By 1988, 0.67% of income recipients, those with more than \$200,000 of AGI, accounted for 13.5% of the nation's AGI. The previous year, the same income group, which represented 0.63% of income recipients, had accounted for only 9.3% of AGI. Calculated according to data in: Strudler & Ring, *Individual Income Tax Returns, Preliminary Data*, 1988, 1988 SOI Bull., Spring 1990, at 5, table 1, at 15; 1987 STATISTICS OF INCOME, *supra* note 14, table 1.1, at 22.

TABLE 1:
NUMBER OF MILLIONAIRES
AND THEIR SHARE OF RETURNS, AGI, AND TAXES,
1948-1988¹⁸

Year	Number of Millionaires	% Share of All Returns	% Share of Total Adjusted Gross Income	% Share of Total Taxes
1948	149	0.0003	0.2	1.0
1965	646	0.001	0.3	1.2
1978	2,041	0.002	0.3	1.1
1979	3,601	0.004	0.5	1.9
1980	4,414	0.005	0.6	1.8
1981	5,286	0.006	0.6	1.7
1982	8,408	0.009	1.0	2.7
1983	10,800	0.01	1.2	3.5
1984	14,834	0.01	1.6	4.7
1985	17,312	0.01	1.7	4.8
1986	31,859	0.03	2.9	7.9
1987	34,944	0.03	3.1	6.6
1988	65,303	0.06	5.6	10.5

18. Calculated according to data in *Tax Shares and Rates 1916-1950*, *supra* note 10, at 1, Table 1, at 45-46; *Tax Shares and Rates 1951-1986*, *supra* note 10, at 39, table 1, at 49-51; STRUDLER & RING, *supra* note 17, table 3, at 157. While this Article was in press, the IRS published final data for 1988 and preliminary data for 1989, which suggest that the number of income-millionaires may have levelled off. In 1988, 62,065 millionaires accounted for 5.5% of aggregate AGI and 7.7% of all taxes paid; the corresponding data for 1989 were 61,987, 4.8%, and 9.0%. Calculated according to data in IRS, STATISTICS OF INCOME: 1988 INDIVIDUAL INCOME TAX RETURNS table 1.4 at 26, 37 (1991); E. Ring, *Individual Income Tax Returns, Preliminary Data, 1989*, SOI BULL., Spring 1991, at 7, table 1, at 16, 20.

If inflation and full capital gains were taken into account, the upper limit on the number of millionaires (and with index numbers [1978 = 100]) would very roughly be as follows:

1948	4,284	(56)	1983	20,809	(272)
1965	6,804	(89)	1984	25,644	(335)
1978	7,646	(100)	1985	34,198	(447)
1979	10,091	(132)	1986	54,568	(714)
1980	9,738	(127)	1987	40,972	(536)
1981	10,540	(138)	1988	65,303	(854)
1982	15,934	(208)			

For the methodology used in arriving at these estimates, see Appendix, *infra* notes 219-225 and accompanying text. The estimate for 1982 is even rougher than those for the other years because in that year the IRS lumped the two highest income groups together in reporting net capital gains; here, the separately reported data for the excess of net long-term capital gains over net short-term capital loss are used. See IRS, STATISTICS OF INCOME — 1982, INDIVIDUAL INCOME TAX RETURNS, table 1.4, at 46-48 (1985). 1948 and 1965, which were also business cycle expansion years, are added for historical perspective. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83, table 911, at 542 (103d ed. 1982).

This recent pronounced advance in the concentration of income in the very richest households¹⁹ accords with the data from the Current Population Survey (CPS) conducted annually by the Bureau of the Census. The CPS reveals that the highest 5% of households increased their share of total income from 16.5% in 1980 to 18.9% in 1989.²⁰ Speaking more broadly, the richest 20% of individual taxpayers' share of total income rose from 44.1% to 46.8% over the same period. Similarly, the share of aggregate income accounted for by households with more than \$100,000 of total (inflation-adjusted) money income doubled from 1.9% to 3.9%.²¹ Also during the same period, the income share of the poorest quintile has shown the greatest decline.²² This group's real mean income has stagnated since the 1970s, as have median family income and earnings of year-round full-time workers, while only that of the wealthiest 20% and 5% have risen significantly.²³ This particular pattern of inequality is therefore characterized by increasing polarization.²⁴ The composition of the millionaires' income has also developed aberrantly.

The CPI rose 276% between 1965 and 1988, and by 391% between 1948 and 1988. See 1989 *Income and Poverty*, *supra* note 11, table A-1, at 86.

19. See also Danziger, Gottschalk & Smolensky, *How the Rich Have Fared, 1973-87*, AM. ECON. REV., May 1989, at 310.

20. 1989 *Income and Poverty*, *supra* note 11, table 6, at 30.

21. *Id.*, table 2, at 21.

22. For an analysis of the causes of the increase in poverty in the 1980s, see STAFF OF HOUSE COMM. ON WAYS AND MEANS, 101ST CONG., 1ST SESS., BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMM. ON WAYS AND MEANS 970-1050 (Comm. Print 1989).

23. See 1989 *Income and Poverty*, *supra* note 11, table 6, at 30; U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORT: MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1987 (1990) Ser. P-60, No. 162, table A and fig. 1 at 2, figs. 3 and 4 at 6.

24. See N. MAXWELL, INCOME INEQUALITY IN THE UNITED STATES, 1947-1985, at 1 (1990).

TABLE 2:
SOURCES OF MILLIONAIRES' INCOME, 1978 AND 1988²⁵

Source of Income	Amount in \$000,000		% Share of Millionaires' Total AGI		% Share of All Income from this Source	
	1978	1988	1978	1988	1978	1988
Salaries	663	46,196	16	27	0.06	2
Interest	238	11,306	6	7	0.3	6
Dividends	1,302	12,475	32	7	4	16
Capital Gains	1,077	59,686	26	35	4	37
S Corporation/ Partnership	492	32,080	12	19	2	34
Business/ Professional	366	3,759	9	2	0.6	3

Between 1978 and 1988, while aggregate AGI for millionaires increased by a factor of forty-three, AGI for all returns rose a mere 138%.²⁶ The fastest growing component of millionaires' income was wages and salaries, which increased sixty-six times.²⁷ From 1978 to 1988, the proportion of millionaires reporting wages and salaries increased from 79% to 83%. The average wage and salary income of these millionaires more than doubled — from \$410,000²⁸ to \$849,000.²⁹ As a share of millionaires' total AGI, wage and salary income rose during these years from 16% to 27%.³⁰

25. Calculated according to data in IRS, STATISTICS OF INCOME — 1978, INDIVIDUAL INCOME TAX RETURNS, table 1.4, at 16-21 (1981) [hereinafter 1978 STATISTICS OF INCOME]; Strudler & Ring, *supra* note 17, at 5, table 1, at 15-19. The data for capital gains, partnerships and small business corporations, and business and professional income refer to the net income of those returns showing net income in those rubrics. In particular, huge and growing partnership losses have, in recent years, functioned as tax shelters. See Nelson, *Taxes Paid by High-Income Taxpayers and the Growth of Partnerships*, SOI BULL., Fall 1985, at 55. For this reason and because other components of and deductions from AGI have been omitted, the percentages of millionaires' total AGI do not add up to 100%. The amounts are in 1988 dollars.

26. The figures, when inflation and full capital gains are taken into account, are an eight-fold increase in millionaires' AGI versus a 27% increase in all taxpayers' AGI.

27. Adjusted for inflation and capital gains, the figure amounts to thirteen-fold.

28. Adjusted for inflation, the figure becomes \$522,000.

29. In 1965 and 1948, only 65% and 72% respectively of all millionaires reported wage and salary income, which amounted to \$83,000 and \$65,000 per capita respectively (unadjusted for inflation or capital gains).

30. The wage and salary share of expanded AGI (including full capital gains) for taxpayers reporting more than \$500,000 in AGI during 1978 was 17%. The percentage share remained roughly the same until it rose sharply in 1987. By way of comparison, in 1948, millionaires' wages and salaries accounted for only 3% of their (unexpanded) AGI; even among those with more than \$200,000 AGI (the equivalent of 1988 millionaires), wage and salary income ac-

In 1978, total dividend-based income was twice as large as total wages and salaries and total capital gains exceeded the latter by 62%.³¹ Ten years later, wages and salaries were twice as large as interest and dividends combined, while the excess of capital gains over wages and salaries declined to 29%. During this same period, dividends declined from 32%³² to 7% of millionaires' AGI while partnership/S-corporation income made considerable advances. This shift can also be gauged by comparing the sources of millionaires' incomes to those of aggregate AGI. In 1978, millionaires accounted for only 2% of aggregate partnership/S-corporation income and 4% of all capital gains;³³ ten years later they accounted for more than one-third of the income in each category.

The structure of current millionaires' income deviates significantly from that of current-dollar millionaires before World War II.³⁴ During that period, dividends and capital gains accounted for more than 80% of their income, while the share of salaries was negligible.³⁵ Today's new millionaires are no longer purely speculators or investors.³⁶ Instead, they may have received salary (or — in the case of lawyers, accountants, and investment bankers — partnership) incomes large enough to enable them to profit immensely from the rising stock market of the 1980s in the form of stock options, dividends,

counted for only 10% of AGI. In 1965, the wages and salaries of current-year millionaires constituted only 2% of their total income. Data for the income-class equivalent to 1988 millionaires (roughly \$250,000) were not published for 1965; wages and salaries accounted for 4% of AGI of those with more than \$500,000 current-year AGI and 17% of those with more than \$100,000 AGI. Calculated according to data in 1978 STATISTICS OF INCOME, *supra* note 25, table 1.4, at 16 (1981); IRS, STATISTICS OF INCOME — 1965, INDIVIDUAL INCOME TAX RETURNS, table 4, at 12 (1967) [hereinafter 1965 STATISTICS OF INCOME]; IRS, STATISTICS OF INCOME FOR 1948, PART I, table 1, at 66, table 2, at 68-69 (1953) [hereinafter 1948 STATISTICS OF INCOME].

31. Adjusted for inflation and capital gains, the figures are 26% and 147% respectively.

32. Which would be just over 20% if inflation and capital gains were considered.

33. These figures are 4% and 7% respectively if inflation and capital gains are taken into account.

34. Since a million dollars during that period has the purchasing power of six to ten times as much today, it is possible that if the IRS released detailed information for income groups with incomes in excess of \$10,000,000, the structure of their income would more closely resemble that of earlier millionaires.

35. See STAFF OF THE JOINT COMM. ON INTERNAL REVENUE TAXATION, 75TH CONG., MILLION-DOLLAR INCOMES 4 (Comm. Print 1938) [hereinafter MILLION-DOLLAR INCOMES].

36. The Joint Committee on Internal Revenue Taxation, with access to actual tax returns, found that only two persons reported net income in excess of \$1,000,000 every year from 1917 to 1935. Using 1924 as a base year, it determined that of the 75 persons who reported more than \$1 million in 1924, 38 filed a return every year between 1917 and 1935. The Committee divided this group into several subgroups two of which are of interest here: the first, investors, reported at least \$100,000 in each year (1917-1935) and received 65% of their aggregate income from dividends with only 17% from capital gains (and 0.16% from salaries); the second group, speculators, reported aggregate net capital gains between 1917 and 1935 comprising nearly half of their entire income, while dividends accounted for a third, and salaries only 2%. *Id.* at 1-14. On the phenomenon of impermanence among self-reported millionaires, see White, *Income Fluctuation of a Selected Group of Personal Returns*, 18 J. AMER. STAT. A. 67 (1922); Investigation of the Bureau of Internal Revenue, S. REP. NO. 27, 69th Cong., 1st Sess., pt. 2, table 2, at 11 (1926). Both of these studies also had access to actual income tax returns.

and capital gains.³⁷

Who are these new millionaires³⁸ who collect almost a million dollars in salary, almost half a million dollars in interest³⁹ and dividends on average, and more than a million dollars in capital gains?⁴⁰ Why are so many people suddenly receiving such large incomes? Are they concentrated in identifiable occupations, professions, and industries?⁴¹ Are these incomes commensurate in any reasonable way with their contributions to the national welfare?⁴² What

37. If, as the United States Government disclosed in its indictment, Michael Milken received \$550 million in salary and bonuses from Drexel Burnham Lambert in 1987, he single-handedly accounted for 2.5% of the \$21.9 billion in salaries, wages, commissions, bonuses, and fees reported by income-millionaires that year. See 1987 STATISTICS OF INCOME, *supra* note 14, table 1.4, at 28; Wall Street J., Mar. 31, 1989, at A1, col. 4.

38. On the recurrent phenomenon of the nouveau riche in the United States during the last hundred years, see S. LEBERGOTT, *THE AMERICAN ECONOMY: INCOME, WEALTH, AND WANT* 161-78 (1976).

39. 99.8% of all millionaires in 1988 reported receiving taxable interest averaging \$173,000; in addition, 58% also received \$107,000 each in tax-exempt interest (primarily from state and municipal bonds), which is not included in AGI. Several lower income classes (including those with \$50,000 to \$75,000 AGI) reported receiving more aggregate tax-exempt interest than did millionaires. Taxpayers were not required to report such income until 1987.

40. About half of all millionaires in 1988 also reported income from partnerships and/or S corporations averaging \$267,000; another third reported losses. One-fifth also reported business and professional income averaging \$281,000; another tenth claimed losses from such undertakings. Investment bankers and lawyers presumably figure heavily among those reporting partnership income. See K. PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* 170, 172-75 (1990). In 1989-1990, at the 17 law firms with the highest profits per partner, the average for each of 1704 partners exceeded a million dollars. Calculated according to data in AM. LAW., July/August 1990, at 32. Lawyers, physicians, dentists, accountants, and engineers are the chief components of the self-employed professionals; retail and wholesale trade, construction, and service businesses predominate among the unincorporated sole proprietorships. See H. KAHN, *BUSINESS AND PROFESSIONAL INCOME UNDER THE PERSONAL INCOME TAX* 6 (1964).

41. The IRS has begun a study of the self-reported occupations of taxpayers cross-tabulated with the industries of their employers based on W-2 forms for 1979 and 1989, but may not complete or publish it for many years. Telephone interview with Dave Paris, Branch Chief, Individual Statistics, Statistics of Income Division, Office of Assistant Commissioner, Returns Processing, IRS (Oct. 30, 1990). For progress reports, see Crabb, Sailer & Kilss, *Taxpayer Data Used to Study Wage Patterns by Sex and Occupation: 1969, 1974 and 1979*, in IRS, *STATISTICS OF INCOME AND RELATED ADMINISTRATIVE RECORD RESEARCH: 1984*, at 43 (1984); Sailer, Orcutt & Clark, *Coming Soon: Taxpayer Data Classified by Occupation*, in 1 IRS, *STATISTICAL USES OF ADMINISTRATIVE RECORDS: RECENT RESEARCH AND PRESENT PROSPECTS* 149 (B. Kilss & W. Alvey ed. 1984).

A study of a small sample of the wealthiest one-half percent of families in 1982 (not based on income tax returns) unsurprisingly found the greatest concentration of family heads among lawyers and accountants, entrepreneurs, and those in banking, insurance, and real estate. *High-Income Characteristics*, *supra* note 8, at 164. The new salaried millionaires also include chief executive officers of large corporations and many athletes. In 1990 alone, 162 major league baseball players were paid a million dollars or more. *Who Makes What in the Major Leagues*, N.Y. Times, Nov. 21, 1990, at B15, col. 1. By 1991, the figure had risen to 223. Chass, *Opening Day Salaries: Not Peanuts or Cracker Jack*, N.Y. Times, Apr. 10, 1991, at B8, col. 1.

42. The acting chairman of the Council of Economic Advisors in the first Reagan administration has issued the following apologia: "The Reagan administration has had no reason to be defensive about the general effects of its economic policies on the distribution of income." W. NISKANEN, *REAGANOMICS: AN INSIDER'S ACCOUNT OF THE POLICIES AND THE PEOPLE* 267 (1988).

are the new millionaires doing with their income? Are they consuming it in the form of expensive automobiles, houses, and other commodities?⁴³ Or are they investing it in income-generating property, the increasingly lopsided ownership of which⁴⁴ will further exaggerate the upper tail of the income distribution in the future?⁴⁵ If they are investing large parts of their income, are the objects of these investments economically productive or are these merely paper ventures?

The short answer is: "Many economists and statisticians have examined these trends, but nobody has been able to explain them fully."⁴⁶ One reason for this ignorance is the secrecy that surrounds what may be the best single source of information on the subject — individual federal income tax returns.⁴⁷ A principal justification for imposing low tax rates on the rich is that low rates promote work incentives⁴⁸ and enable the taxpayers to invest their income in further wealth-producing ventures, which will ultimately redound

43. The highest income group represented in government surveys of consumer expenditures is only \$50,000. See U.S. BUREAU OF LABOR STATISTICS, CONSUMER EXPENDITURE SURVEY, 1987 BULL. No. 2354, at 13 (1990).

44. For a snapshot of the extraordinarily skewed distribution of income-generating assets in the 1980s, which is even more unequal than that of income, see U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORT: HOUSEHOLD ECONOMIC STUDIES, HOUSEHOLD WEALTH AND ASSET OWNERSHIP: 1984 (1986) Ser. P-70, No. 7; U.S. BUREAU OF THE CENSUS, HOUSEHOLD WEALTH & ASSET STUDIES: 1988 (1990) Ser. P-70, No. 22. In 1983, the top 0.5% of families ranked by income (households with incomes in excess of \$280,000) owned 43% of publicly traded stocks. See *High-Income Characteristics*, *supra* note 8, at 163, table 6, at 171; see also *Survey of Consumer Finances, 1983*, 70 FED. RESERVE BULL. 679, table 13, at 689 (1984). There is some evidence that after declining between 1929 and 1976, the concentration of wealth intensified sharply between 1976 and 1983, the last year for which data are available. Between 1963 and 1983, the wealthiest 0.5% of households increased their share of aggregate net worth from 25% to 34%. In 1983, such families numbered 419,500. See STAFF OF JOINT ECONOMIC COMM., 99TH CONG., 2D SESS., THE CONCENTRATION OF WEALTH IN THE UNITED STATES: TRENDS IN THE DISTRIBUTION OF WEALTH AMONG AMERICAN FAMILIES, table 2, at 24, table 3, at 33, chart VII at 44 (1986). For further analysis of recent trends in the distribution of assets, see A. WINNICK, TOWARD TWO SOCIETIES: THE CHANGING DISTRIBUTIONS OF INCOME AND WEALTH IN THE U.S. SINCE 1960, at 159-200 (1989).

45. On the linkage of income, saving, and wealth, and the significantly greater wealth-income ratio among income-millionaires, see S. LEBERGOTT, THE AMERICAN ECONOMY: *supra* note 38, 149-50, table 11, at 243, table 13, at 245 (1976).

46. Pechman, *supra* note 17, at 3; see Gramlich, Kasten & Sammartino, *Deficit Reduction and Income Redistribution*, AM. ECON. REV., May 1989, at 315.

47. "[T]ax returns are (aside from the decennial census) perhaps the single best and most available source of information about our population in general and individuals in particular." REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. DOC. No. 266, 94th Cong., 2d Sess. 829 (1975) [hereinafter ADMINISTRATIVE PROCEDURES].

48. This position underlies the following statement by Representative Disney that urged repeal of President Roosevelt's executive order limiting salaries to \$25,000 during World War II: "What is it that we have that the Axis does not? High octane gas produced by high salaried research men." 89 CONG. REC. 1881 (1943). Rep. Michel sounded the same theme during the 1990 tax debates: "[Y]ou cannot continually redistribute wealth if those who create it in the first place, with the sweat of their brows, are turned off from doing so because of bad tax policy." 136 CONG. REC. H10,284 (daily ed. Oct. 16, 1990). For a critique of the position, see L. EISENSTEIN, *supra* note 4, at 57-122.

to the welfare of all.⁴⁹ Yet without detailed data on the macroeconomic ramifications of the tax policies of the 1980s, which effected the sharp reductions in income⁵⁰ and estate tax rates⁵¹ on the rich in the 1980s, resulting in the comparatively low rates they enjoy vis-à-vis their counterparts elsewhere in the advanced capitalist world,⁵² the empirical basis for judging the soundness of that justification is lacking.⁵³

II.

PRECEDENTS FOR PUBLICITY

Congress . . . has given the disaffected a handle with which to pump class hatred into the ill-to-do. . . . The idea seems to be that all the people who have committed the crime of owning something . . . should be punished by forced residence in glass houses. Around these brightly illuminated houses march cohorts of Have Nots, stop-

49. "Under an individualistic system, great inequality is necessary to rapidly increasing indirectness in the productive process — necessary to the increasing use of resources in the production of more (and different) resources. The cost of our present stock of productive investments was, in a significant sense, decades and centuries of terrible poverty for the masses." H. SIMON, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY* 22 (1938).

50. The highest marginal rate was more than halved — from 70% to 28%. See 26 I.R.C. § 1 (tax tables for various years). The current rate is the lowest since the Coolidge and Hoover administrations. See S. RATNER, *TAXATION AND DEMOCRACY IN AMERICA*, table C-1, at 577 (1967 [1942]). The 1980s' rate reductions essentially achieved what the movement of the 1940s and 1950s failed to do — namely, the elimination of the principle of progressive taxation through passage of a constitutional amendment limiting the marginal rate to 25%. See *Tax-Wise*, 29 TAXES 515, 540 (1951) (statement by Erwin Griswold). On this "millionaires' amendment," which Rep. Patman called a "Fascist proposal," see 97 CONG. REC. 10,070 (1951). The American Bar Association, inspired by the urgent need to combat the "Marxian principle" of progressive taxation, wholeheartedly supported the Reed-Dirksen Amendment in the 1950s. See *Dresser, The Case for the Income Tax Amendment: A Reply to Dean Griswold*, 39 A.B.A. J. 25 (1953); *Report of the Special Comm. on the Proposed Amendment to the Const. of the U.S. Limiting the Power of Congress to Tax Incomes, Inheritances, and Gifts*, 77 A.B.A. REP. 578, 687 (1952), *Proposed Constitutional Amendment to Limit Income Tax* 78 A.B.A. REP. 445 (1953).

51. The maximum marginal estate tax rate is currently 55% with all estates below \$600,000 in value exempt. 26 I.R.C. § 2001(c)(2)(D) (1988); *id.* § 6018 (1989). Today's rate is the lowest level since the Depression of the 1930s. See S. RATNER, *supra* note 50, table C-5, at 580.

52. The top individual income tax rate for 1990 in 10 other countries ranged between 76% in Japan and 45% in Canada compared with 33% in the U.S. See *WORLD TAX REFORM: A PROGRESS REPORT*, table 2, at 4 (J. Pechman ed. 1988).

53. For a skeptical view of the impact of taxes on the work effort of the rich, see R. BARLOW, H. BRAZER & J. MORGAN, *ECONOMIC BEHAVIOR OF THE AFFLUENT* 129-50 (1968 [1966]); A. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* 96-97 (1975); E. ROLPH & G. BREAK, *PUBLIC FINANCE* 151-57 (1961); Break, *Income Taxes and Incentives to Work: An Empirical Study*, 47 AM. ECON. REV. 529 (1957). For a less skeptical view, see L. KIMMEL, *TAXES AND ECONOMIC INCENTIVES* 66-106 (1950). Economists regard the issue of tax disincentives as empirical because it involves the tradeoff between additional work to sustain a given standard of living and additional leisure once work produces less net income. For a negative view of the linkage between tax reductions, savings, and investment, see B. BOSWORTH, *TAX INCENTIVES AND ECONOMIC GROWTH* (1984).

ping to growl occasionally in the shadows where a thoughtful, genial government has piled up heaps of stones for their convenience and pleasure.⁵⁴

As astounding as it may sound in an era that prides itself on the cultivation of manifold emanations of privacy,⁵⁵ during the 1920s and 1930s, Progressives not only succeeded in keeping the publicity of federal income tax returns on the national political agenda, but also implemented it for a brief period in diluted form.⁵⁶

Publicity of returns actually began much earlier, during the Civil War, when the first federal income tax was enacted. The Act of 1862 required assessors in each collection district to "advertise . . . when and where the lists, valuations, and enumerations . . . may be examined; and said lists shall remain open . . . for fifteen days."⁵⁷ Despite some resistance by officials,⁵⁸ Congress reaffirmed its commitment to publicity.⁵⁹ By the end of the Civil War, publication of incomes and taxes paid became customary in local newspapers.⁶⁰ Publicity was prohibited in 1870,⁶¹ two years before the tax itself was repealed.⁶²

54. *Uncle Sam Favors Paul Pry*, *The Independent*, Nov. 8, 1924, at 353.

55. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1302-1435 (2d ed. 1988). For a broader but scattershot approach, see D. SEIPP, *THE RIGHT TO PRIVACY IN AMERICAN HISTORY* (Harvard U. Prog. on Info. Resources Pol. July 1978).

56. For a sense of contemporaneous public opinion, see *For Income Tax "Snooping"*, *LITERARY DIG.*, Mar. 8, 1924, at 12; *Mrs. Grundy's Taxes*, *NEW REPUBLIC*, Nov. 12, 1924, at 262; *Paul Pry Legislation*, *SATURDAY EVENING POST*, Dec. 20, 1924, at 197 (editorial); *Publicity of Tax Returns*, *NEW REPUBLIC*, May 21, 1924, at 326; *Publicity for Incomes*, *NEW REPUBLIC*, Jan. 22, 1936, at 299; *Stupid Legislation*, *SATURDAY EVENING POST*, Apr. 20, 1935, at 26; *Who Profits by Income Tax Publicity?*, 77 *CURRENT OPINION* 686 (1924).

57. Tax Act of July 1, 1862, ch. 119, § 15, 12 Stat. 432, 437 (1862).

58. See SECRETARY OF THE TREASURY, 38TH CONG., 1ST SESS., *REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE YEAR ENDING JUNE 30, 1863*, at 70 (1863).

59. Tax Act of June 30, 1864, ch. 173, § 19, 13 Stat. 223, 228 (1864).

60. See, e.g., *Income and Taxes*, *N.Y. Tribune*, Jan. 20, 1865, at 5, col. 3 (listing incomes and taxes paid in a congressional district in New York); see also K. KENNAN, *INCOME TAXATION: METHODS AND RESULTS IN VARIOUS COUNTRIES* 251 n.16 (1910); H. SMITH, *THE UNITED STATES FEDERAL INTERNAL TAX HISTORY FROM 1861 TO 1871*, at 66-68 (1914); Hill, *The Civil War Income Tax*, 8 *Q.J. ECON.* 425, 436 (1894).

61. "[N]o collector, deputy collector, assessor, or assistant assessor shall permit to be published in any manner such income returns, or any part thereof, except such general statistics, not specifying the names of individuals or firms, as be [sic] may make public, under such rules and regulations as the commissioner of internal revenue shall prescribe." Tax Act of July 14, 1870, ch. 255, § 11, 16 Stat. 256, 259 (1870).

62. See S. RATNER, *supra* note 50, at 65-135. The Income Tax Act of 1894 also prohibited publicity. Tax Act of Aug. 27, 1894, ch. 349, § 34, 28 Stat. 509, 557 (1894). The Supreme Court, however, held the Act unconstitutional. *Pollock v. Farmers Loan and Trust Co.*, 157 U.S. 429 (1895). See generally S. RATNER, *supra* note 50, at 168-214. A corporate excise tax imposed in 1909 declared the returns public records and open to inspection. Tax Act of Aug. 15, 1909, ch. 6, § 38, Sixth, 36 Stat. 11, 116 (1909). The Act that appropriated funds for processing the returns provided that the returns were open to inspection "only upon the order of the President under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President." Tax Act of June 17, 1910, ch. 297, 36 Stat. 468, 494 (1910).

After the adoption of the sixteenth amendment,⁶³ the first federal income tax enacted in 1913⁶⁴ provided that returns "shall constitute public records and be open to inspection as such: Provided, That any and all such returns shall be open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President."⁶⁵ With some minor changes in language, this principle of the public character of returns remained in effect until the post-Watergate era.⁶⁶ Yet because the President never exercised his authority to open returns to public inspection,⁶⁷ for two decades after 1913, Progressives in Congress used the enactment of every revenue act to debate the issue of publicity of income tax returns.⁶⁸

In 1924 the Progressives finally succeeded in enacting the following compromise:⁶⁹

On the legislative history of this provision, see 45 CONG. REC. 4131-45 (1910). See generally S. RATNER, *supra* note 50, at 265-97.

63. "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." U.S. CONST. amend. XVI.

64. See generally S. RATNER, *supra* note 50, at 298-340; J. BUENKER, *THE INCOME TAX AND THE PROGRESSIVE ERA* (1985).

65. Tax Act of Oct. 3, 1913, ch. 16, § I, 38 Stat. 114, 177 (1913) (forming section II of Underwood Tariff Act).

66. See, e.g., Tax Act of Sept. 8, 1916, ch. 463, § 14(b), 39 Stat. 756, 772 (1916); Tax Act of Feb. 24, 1919, ch. 18, § 257, 40 Stat. 1057, 1086 (1919); I.R.C. § 55(a) (1940); I.R.C. § 6103(a) (1958).

67. ADMINISTRATIVE PROCEDURES, *supra* note 47, at 829. When Congress was debating passage of the income tax in 1913, Representative Tavenner engaged in pre-collection publicity by estimating that John D. Rockefeller would pay \$2 million in tax on his annual income of \$50 million. 50 CONG. REC. 1254 (1913).

68. ADMINISTRATIVE PROCEDURES, *supra* note 47, at 842. On the unsuccessful effort in the Senate in 1916, see 53 CONG. REC. 13, 852-59 (1916). In 1921, Senator Robert M. La Follette introduced an amendment that would have made returns public records. After it was defeated, he introduced another that would have made the amount of income declared by each taxpayer open to public inspection, which failed as well. 61 CONG. REC. 7365-74, 7518-19 (1921). For an historical overview of statutory provisions regarding publicity of income tax information from the Civil War to 1924, see Brief for Defendants in Error at 5-32, *United States v. Dickey*, 268 U.S. 378 (1925) (No. 768).

69. Originally, the House rejected an amendment that would have made returns public records open to inspection "under the same rules and regulations that govern the inspection of other public records." 65 CONG. REC. 2512, 2952-60 (1924). The House then passed an amendment that contained language similar to that enacted authorizing certain congressional committees to inspect returns. *Id.* at 2960-64. The Senate Finance Committee then reported out a provision similar to that of the House, together with another provision making the amounts of income taxes paid and refunds made to taxpayers available for public inspection. S. REP. NO. 398, 68th Cong., 1st Sess. 30 (1924). The Senate then adopted an amendment offered by Senator Norris that resembled the provision the House had rejected earlier, providing that returns "shall be open to examination and inspection as other public records, under the same rules and regulations as may govern the examination of public documents generally." H.R. 6715, 68th Cong., 1st Sess., 68 CONG. REC. 7676, 7692 (1924). In conference, the House bill survived along with the Senate Finance Committee's provision relating to taxes paid. *Id.* at 9244, 9529, 9535. The Progressives regarded this compromise as a defeat, not a vindication, of publicity. See *id.* at 9403-9405 (remarks of Sen. Norris); 69 CONG. REC. 9078 (1928) (remarks of Sen. Reed); *id.* at 9851 (remarks of Sen. Couzens).

The Commissioner shall as soon as practicable in each year cause to be prepared and made available to public inspection in such manner as he may determine, in the office of the collector in each internal-revenue district and in such places as he may determine, lists containing the name and post-office address of each person making an income-tax return in such district, together with the amount of the income tax paid by such person.⁷⁰

Thus, for example, in 1924 and 1925, *The New York Times* and other newspapers devoted entire pages for several days running to identifying the amounts of tax paid by thousands of famous and not-so-famous persons.⁷¹ A four-column headline on page one proclaimed: "Income Tax Returns Made Public; J.D. Rockefeller Jr. Paid \$7,435,169; Ford Family and Company Pay \$19,000,000."⁷²

Under the prodding of Andrew Mellon,⁷³ whose own million-dollar tax payment was prominently published,⁷⁴ and that of big business representatives,⁷⁵ Congress repealed the publicity provision two years later by deleting the phrase "together with the amount of the income tax paid by such person."⁷⁶ Then during the New Deal,⁷⁷ a new publicity campaign, led by Senator Robert M. La Follette, Jr., in 1934, secured adoption of a much broader provision:

Every person required to file an income return shall file with his return, upon a form prescribed by the Commissioner, a correct statement of the following items shown upon the return: (1) name and address; (2) total gross income; (3) total deductions; (4) net income;

70. Tax Act of June 2, 1924, ch. 234, § 257(b), 43 Stat. 253, 293.

71. See, e.g., *id.* Sept. 4, 1925, at A1, col. 2; *id.* Sept. 3, 1925, at A1, col. 6; N.Y. Times, Sept. 2, 1925, at A1, col. 5.

72. N.Y. Times, Oct. 24, 1924, at A1, col. 5; see also *1924 Income Tax Payments Decrease; Rockefeller Jr. Leads with \$6,277,699; Ford Payments Total \$21,260,023*, N.Y. Times, Sept. 2, 1925, at A1, col. 5.

73. Secretary of the Treasury under Presidents Harding, Coolidge, and Hoover. With an overlay of hyperbole, Mellon testified before Congress that: "To make publicity complete would expose every trade secret to the taxpayer's competitor." *Revenue Revision, 1925: Hearings Before the House Comm. on Ways and Means*, 69th Cong., 1st Sess. 9 (1925) [hereinafter *Revenue Revision, 1925*]. For the view of Coolidge and Mellon, see *Cost of Publicity Scored in Treasury*, N.Y. Times, Sept. 3, 1925, at 1, col. 7.

74. See, e.g., *Andrew W. Mellon Paid \$1,173,987 Tax*, N.Y. Times, Oct. 25, 1924, at A2, col. 8.

75. See *Revenue Revision, 1925*, 65-66, *supra* note 73 (testimony of James Emery, representing the National Association of Manufacturers); *id.* at 278-79 (testimony of L. Gottlieb, representing the National Industrial Conference Board); *id.* at 280-83 (testimony of Raymond Berry, representing the American Bankers' Association).

76. Tax Act of Feb. 26, 1926, ch. 27, § 257(e), 44 Stat. 9, 52. The IRS was required to maintain for public inspection lists of the names and addresses of all persons filing tax returns until 1966, when it was instead authorized to inform inquirers whether a person had filed a return. See *ADMINISTRATIVE PROCEDURES*, *supra* note 47, at 1039 n.52.

77. In 1928, the Senate had passed an amendment making tax returns public records open to examination, which it voted to rescind before conference with the House. See 69 CONG. REC. 9059-64, 9073-82, 9843-54 (1928).

(5) total credits against net income for purposes of normal tax; and (6) tax payable. In case of any failure to file with the return the statement required by this subsection, the collector shall prepare it from the return. . . . Such statements or copies thereof shall as soon as practicable be made available to public examination and inspection in such manner as the Commissioner, with the approval of the Secretary, may determine, in the office of the collector with which they are filed, for a period of not less than three years from the date they are required to be filed.⁷⁸

Before it could be implemented, however, the Sentinels of the Republic⁷⁹ intensively lobbied Congress, claiming that after such disclosure: "The Dillingers, the Carpis, and the 'Baby Face' Nelsons and their ilk will eagerly scan each list in his own community for a clue as to possible profitable victims."⁸⁰ Supporters of publicity identified several groups as the chief movers behind repeal. Representative Sabath suggested a very specific anti-New Deal animus:

[T]here are thousands of business men, manufacturers, and others whose return will show substantial profits in 1934, who in 1930, 1931, and 1932, under the Republican administration, suffered tremendous [losses]. It is these gentlemen who have been the beneficiaries of the new-deal legislation, who, under this provision, will be compelled to make true returns showing that conditions have improved under the present administration. . . .⁸¹

Representative Truax, who favored "pitiless publicity . . . thrown upon the incomes of the rich, the superrich, and the idle rich,"⁸² singled out the "burglars of wealth, idle holders of idle capital, lounge lizards of the blue-blooded, and pink-toed aristocracy of wealth."⁸³ Congress, at the urging of "the pink slip rebellion,"⁸⁴ repealed this provision in 1935, permanently putting an end to the type of citizen-oriented income tax publicity advocated by the Progressives.⁸⁵

78. Tax Act of May 10, 1934, ch. 277, § 55(b), 48 Stat. 680, 698 (1934).

79. See, e.g., Pitcairn, *The Pink-Slip Strike*, SATURDAY EVENING POST, June 8, 1935, at 23.

80. 74 CONG. REC. 2690 (1935) (statement of Rep. Bacon); see also H. REP. NO. 313, 74th Cong., 1st Sess. 2 (1935). Representative Bacon, moments after using this theme to protect the rich, turned about and urged secrecy to prevent the public humiliation of those who had suffered losses during the Depression. 74 CONG. REC. 2307, 2691 (1935).

81. 74 CONG. REC. 3391 (1935).

82. 74 CONG. REC. 3392 (1935).

83. 74 CONG. REC. 3393 (1935).

84. 74 CONG. REC. 3378, 3379 (1935) (statement of Rep. Claiborne). The publicity form, returnable with the return, was pink.

85. Tax Act of April 19, 1935, ch. 74, 49 Stat. 158; Revenue Act of 1936, ch. 690, § 55, 49 Stat. 1648, 1671. Benedict & Lupert, *Federal Income Tax Returns — The Tension Between Government Access and Confidentiality*, 64 CORNELL L. REV. 940, 948 (1979), fail to mention the two publicity episodes in writing their historical account of anti-disclosure provisions of the

But this congressional action was not synonymous with either the restoration or vindication of the principle of confidentiality. Since about 1920, the federal government had regarded all returns as "a generalized government asset" to be shared with numerous federal and state agencies.⁸⁶ Indeed, in 1924, Congress authorized the House Committee on Ways and Means and the Senate Committee on Finance to inspect any and all returns and to submit the information thus obtained to the full House and/or Senate⁸⁷ — an authorization that they have retained to the present.⁸⁸ Even while the public was being denied access to returns, all manner of government officials gained broader access for investigative and statistical purposes.⁸⁹ This trend continued unabated until, in the aftermath of Watergate and revelations of presidential party-political deployment of the IRS,⁹⁰ Congress reversed the long-standing pattern by establishing the "[g]eneral rule [that] [r]eturns and return information shall be confidential" except as otherwise authorized.⁹¹ Ironically, the exceptions remain quite extensive, especially the massive use of individually identifiable returns by the Bureau of the Census.⁹² Although the Tax Reform Act of 1976 may not have reversed the trend toward intensive intragovernmental use of returns, it did codify the prohibition of disclosure to the general public.⁹³

federal income tax laws. *Who's Snooping Into Your Tax Returns Now?*, U.S. NEWS & WORLD REP., Aug. 11, 1975, at 61, also overlooks them in its account of congressional action on tax privacy. Two brief, Nixon-era journalistic accounts did report the facts: Rogovin, *Privacy and Income Tax Returns*, Wash. Post, Oct. 13, 1974, at C4, col. 1. (Rogovin was the former chief counsel of IRS.); Janssen, *Income Tax Snooping Through History*, Wall St. J., May 6, 1970, at 18, col. 4.

86. ADMINISTRATIVE PROCEDURES, *supra* note 47, at 845.

87. Tax Act of June 2, 1924, ch. 234, § 257(a), 43 Stat. 253, 293 (1924). Although two years later Congress limited the authority to those committees "sitting in executive session," they were still permitted to submit information to the full bodies. Tax Act of Feb. 26, 1926, ch. 27, § 257(b), 44 Stat. 9, 51 (1926).

88. See I.R.C. § 6103(f) (Supp. 1990). Although the Secretary of the Treasury may furnish the two committees — together with the Joint Committee on Taxation — returns that might directly or indirectly identify a particular taxpayer only in executive session, bizarrely, the committees may still submit the information obtained to the full House and/or Senate. I.R.C. § 6103(f)(1) and (4)(A) (Supp. 1990). Presumably, then, these tax committees already have the authority to secure the returns of all millionaires and to issue reports on their findings to the House and Senate. By the same token, the Internal Revenue Code also expressly directs the Secretary of the Treasury to ensure that its published statistics not permit identification of taxpayers. I.R.C. § 6108(c) (1989).

89. For comprehensive treatment, see ADMINISTRATIVE PROCEDURES, *supra* note 47, at 823-1135.

90. See, e.g., *Confidentiality of Tax Return Information: Hearings Before the House Comm. on Ways and Means*, 94th Cong., 2d Sess. (1976); *IRS Procedures: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 94th Cong., 1st Sess. 1 (1975); *Freedom of Information: IRS: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 93rd Cong., 2d Sess. 1 (1974).

91. Tax Reform Act of 1976, Pub. L. No. 94-445, § 1202(a), 90 Stat. 1525, 1667 (1976) (codified at I.R.C. § 6103(a) (Supp. 1990)).

92. See I.R.C. § 6103(j) (Supp. 1990); 26 C.F.R. § 301.6103(j)(1)-1 (1990).

93. The Tax Reform Act of 1976 left open a tantalizing loophole in the form of the so-called Haskell Amendment, which exempted from the rule of blanket confidentiality data from

Public disclosure of certain taxes and large salaries,⁹⁴ however, has endured. A Wisconsin statute, the progenitor of which dates back to the La Follette era,⁹⁵ provides that the Department of Revenue "shall make available . . . information setting forth the net Wisconsin income tax, . . . franchise tax or . . . gift tax reported as paid or payable in the returns filed by any individual or corporations . . . upon request."⁹⁶ The statute expressly "does not prohibit publication by any newspaper of information lawfully derived from such returns for purposes of argument or prohibit any speaker from referring to such information in any address."⁹⁷

Likewise, the Securities and Exchange Commission requires corporations whose securities are subject to regulation to disclose the cash compensation (where it exceeds \$60,000) paid to each of their five most highly compensated executive officers.⁹⁸ Indeed, even a recently enacted provision of the Code mandates disclosure by section 501(c)(3) tax-exempt entities of the names and addresses of the five highest paid employees where those salaries exceed \$30,000. As a result, the names and compensation of highly paid faculty members at the most prestigious private universities have been prominently disseminated.⁹⁹ Similar compulsory publicity exists on the state level. For example, since 1939, Iowa has statutorily mandated the annual printing of the salaries of state employees.¹⁰⁰ Newspapers in Iowa customarily devote several

"return information" "in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." 90 Stat. 1660 (1976) (codified at I.R.C. § 6103(b)(2) (Supp. 1990)). But the Supreme Court unanimously rejected an expansive interpretation that would have authorized access, under the Freedom of Information Act, by the general public to any return information from which the IRS could delete identifying details. Instead, the Court ruled that the phrase "in a form" meant that the IRS had to have reformulated the return information into a statistical study or other product. *Church of Scientology of California v. Internal Revenue Service*, 484 U.S. 9, 10 (1987).

94. M. LEFF, *THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION, 1933-1939*, at 76-80 (1984) (discussing mandatory disclosure of the salaries of corporate executives in the 1930s and 1940s and the political debate over these disclosures).

95. 1919 Wis. Laws 638. *But see* 1923 Wis. Laws 39 (repealing, in 1923, the secrecy clause of the state income tax law, which the legislature had enacted four years earlier).

96. WIS. STAT. ANN. § 71.78(2) (West 1989). The person making the request must be a resident of the state, prove her identity, and set forth the reason for the request. The Department of Revenue, however, does not deny any request based on the nature of the reason stated. Telephone interview with Dept. of Revenue (Nov. 30, 1990).

97. WIS. STAT. ANN. § 71.78(1) (West 1989). These provisions have been on the books continuously since 1933. *See* WIS. STAT. § 71.20 (1935).

98. 17 C.F.R. § 229.402(a)(1)(i) (1990). On the inadequacies of these disclosures, see Crystal, *The Wacky, Wacky World of CEO Pay*, *FORTUNE*, June 6, 1988, at 68, 76, 78; *see also* 17 C.F.R. § 229.402(a)(1)(ii) (1990) (corporations must also report the cash compensation of all executive officers as a group, stating amounts without names).

99. I.R.C. § 6104(3) and § 6033 (1989); Treas. Reg. § 1.6033-2(g) (1990); Nicklin, *Presidents at Private Research Universities Earn from \$105,000 to \$300,000, Tax Forms Reveal*, *CHRONICLE OF HIGHER EDUCATION*, Feb. 20, 1991, at 1, col. 4.

100. 1939 Iowa Acts ch. 48, § 1 (codified as amended at IOWA CODE ANN. § 18.75(8) (West 1989)) (excepting "personnel who receive an annual salary of less than one thousand dollars"); *see, e.g.*, SUPERINTENDENT OF PRINTING, *LIST OF EMPLOYEES OF THE STATE OF IOWA* (July 1, 1938, to June 1939) (n.d.); STATE OF IOWA, *SALARY BOOK: LIST OF EMPLOYEES OF THE STATE OF IOWA, JULY 1, 1988 TO JUNE 30, 1989* (n.d.). Printing by the state was

pages to listing the salaries of the higher-paid public employees.¹⁰¹

Finally, some European practices strongly suggest that income-tax secrecy in the United States does not represent "[t]he general feeling of the civilized world on this subject,"¹⁰² but merely one cultural variation. In Sweden, for example, free access to public documents is statutorily anchored in order to promote "free interchange of opinion and general enlightenment."¹⁰³

[T]he details of tax declarations must be kept secret, . . . [but] the official assessment lists, showing the amounts of assessable income as determined by the assessment boards, are public documents. Thus income figures are published in the newspapers, and a volume, the *Taxeringskalender*, published by a private firm and listing the assessed incomes of individuals and firms over a certain minimum, is an annual best-seller. A similar volume published only at intervals, *Förmögenhetskalendar*, gives the wealth of wealthier individuals as determined by the publisher from lists reporting the amounts of net wealth tax assessed against taxpayers.¹⁰⁴

Norway has a similar system.¹⁰⁵

III.

IS THERE A COUNTERVAILING PRIVACY INTEREST?

[T]he cult of privacy seems specifically designed as a defence mechanism for the protection of anti-social behaviour.¹⁰⁶

It is a nice question whether our society suffers more from the pathology of privacy or from threats to privacy.¹⁰⁷

Given the current prejudice in favor of income tax secrecy,¹⁰⁸ advocates

suspended and resumed during the 1980s. See 1981 Iowa Acts ch. 10, § 9; 1988 Iowa Acts ch. 1275, § 28. Since the information is available through the state Open Records Act, however, newspapers continued to publish the salaries during the hiatus. See IOWA CODE §§ 22.1 and 22.2 (1989). Presumably, the salaries of state employees are available in many states through their open records statutes.

101. See, e.g., Hartmann, *Doctors Take Top Salary Spots at UI*, Iowa City Press-Citizen, Nov. 14, 1990, at 1A, col. 1; Heth, *94 UI Profs, Officials Top \$100,000*, Iowa City Press-Citizen, June 13, 1986, at 1A, col. 1.

102. *The Internal Revenue Law — Telling Other People's Secrets*, N.Y. Times, Dec. 29, 1864, § 1, at 4, col. 3.

103. HARVARD LAW SCHOOL INT'L PROGRAM IN TAXATION, WORLD TAX SERIES: TAXATION IN SWEDEN 50 (1959) (quoting Swedish Freedom of the Press Act).

104. *Id.* at 51. This institution of publicity continues to flourish in Sweden without significant objection. Telephone interview with Mr. Holmquist, Finance Section of the Swedish Embassy in Washington, D.C. (Dec. 3, 1990).

105. See A. ARNTZEN, J. BUGGE & U. UNDERLAND, COMPANY, TRADE AND TAX LAW IN NORWAY 442 (1979). The modern Norwegian system resembles the one in place in the United States during the Civil War.

106. Arndt, *The Cult of Privacy*, AUSTRALIAN Q., Sept. 1949, at 68, 69.

107. B. MOORE, JR., PRIVACY: STUDIES IN SOCIAL AND CULTURAL HISTORY 275 (1984).

108. Benedict & Lupert, *supra* note 85, at 943-44 ("If given a choice, most individuals

of change bear the practical burden of persuasion. That burden can be carried in two principal ways. The first, and more radical, approach is to demonstrate that no legitimate privacy interest¹⁰⁹ exists that would require accommodation. A second option is to acknowledge some privacy interest and to accommodate the invasion of that interest. Here the former proves adequate to the task.

One historian has explained the tax-publicity movement in the 1920s and 1930s by reference to "an age less solicitous of civil liberties."¹¹⁰ Yet Louis Brandeis, who played a key part in animating a jurisprudence of privacy¹¹¹ and who argued that "the right to life has come to mean . . . the right to be let alone,"¹¹² acknowledged that "[t]he right to privacy does not prohibit any publication of matter which is of public or general interest."¹¹³ Thus the crucial question in determining whether "a fact about ourselves is someone's business"¹¹⁴ is whether "there is a specific social relationship between us which entitles them to know" that particular fact.¹¹⁵ Framing the issue in this manner virtually invites the response that this notion of privacy is not an enlargement of civil liberties, but rather "an individualist conception of society"¹¹⁶ in which "mind[ing] one's own business"¹¹⁷ as "a legitimate instrument of business warfare"¹¹⁸ is applied against the state as another business antagonist.

Analysis of state intercession on behalf of the secrecy of personal income must start from the recognition that:

Legal protection for the right of privacy has progressed at two levels. At one level is the body of law dealing with interference by government with the right to privacy. This law is largely based on constitutional provisions that restrict governmental conduct. . . . At another level the law of privacy is directed not against government interference . . . but against invasion of privacy by private individuals and groups. This body of law is common law or statute. It includes much of our property and tort law.¹¹⁹

Income tax publicity represents an amalgam of state and individual ac-

would almost certainly prefer that the information contained in their tax returns not be made available to the public. . . ."); see also PERSONAL PRIVACY IN AN INFORMATION SOCIETY: THE REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION 100 (1977).

109. For a wide-ranging scholarly legal study of the development of privacy in the United States, see D. O'BRIEN, *PRIVACY, LAW, AND PUBLIC POLICY* (1979); see also R. HIXSON, *PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT* (1987).

110. M. LEFF, *supra* note 94, at 67.

111. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 829-30 (3d ed. 1964).

112. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

113. *Id.* at 214.

114. Rachels, *Why Privacy is Important*, 4 PHIL. & PUB. AFF. 323, 331 (1975).

115. *Id.*

116. Arndt, *supra* note 106, at 70-71.

117. *Id.* at 70.

118. *Id.*

119. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 547 (1970).

tion: the state compels taxpayers to report certain financial information, which the state then processes and makes available to individuals or groups to analyze with a view toward shaping public opinion and policy formation. Such revelation would constitute a tortious invasion of privacy if it fell within one of the recognized protected privacy interests: (1) intrusion on a person's physical solitude or seclusion; (2) public disclosure of private facts; (3) publicity placing a person in a false light in the public eye; and (4) appropriation of a person's name or likeness.¹²⁰ The only one of these torts arguably relevant here is public disclosure of private facts, which is — not coincidentally — also the only one which "require[s] the invasion of something secret, secluded or private pertaining to the plaintiff" and also "depend[s] on publicity."¹²¹

The tortious character of the disclosure would then turn on whether the facts in question are public or private. Because the creation and distribution of income are macrosocial processes par excellence, it would be very difficult to assimilate the publication of individual income data to that of a diary or love letters, which form part of relationships expressly designed to separate off the involved individuals qua individuals from the larger society.¹²² Prosser finesses the problematic public-private distinction by making the test whether the information is "a matter of public record, and open to public inspection."¹²³ Here, that answer is circular, since the issue is precisely whether tax returns should be made open to public inspection by statute. Less formal and more useful is a further limitation that Prosser formulates — the information "must be [such as] would be offensive and objectionable to a reasonable man of ordinary sensibilities. The law is not for the protection of the hypersensitive, and all of us must, to some reasonable extent, lead lives exposed to the public gaze."¹²⁴

The question then reduces to the reasonableness of the demand for and resistance to disclosure. As to the latter, Richard Posner has speculated that "people conceal facts about themselves in order to mislead others."¹²⁵ For example, "people conceal an unexpectedly *low* income mainly because being thought to have a high income has value in credit markets . . . , and they conceal an unexpectedly *high* income to avoid the attention of tax collectors, kidnappers, and thieves; fend off solicitations from charities and family mem-

120. W. PROSSER, *supra* note 111, at 832-39; *see also* Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

121. W. PROSSER, *supra* note 111, at 843.

122. *But see* Benedict & Lupert, *supra* note 85, at 943 (taxpayer has legitimate interest in protecting confidentiality of his assets and liabilities, marital status, alimony, political contributions, dental expenses, casualty losses, union membership, and identity of business associates, dependents, and charities).

123. W. PROSSER, *supra* note 111, at 836.

124. *Id.* at 836-37. Prosser's formulation is much more restrictive than that of Pound, which characterizes privacy as a demand by a person that his "private personal affairs shall not be laid bare to the world and be discussed by strangers." Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 362 (1915).

125. R. POSNER, *THE ECONOMICS OF JUSTICE* 234-35 (1983).

bers."¹²⁶ Horace Greeley anticipated such an approach. Upon hearing that Congress was contemplating a prohibition on the publication of Civil War-era income tax returns, he succinctly opined: "why should any honest man seek to pass for more (or less) than he is worth?"¹²⁷ Although one response might merely be to deny relief to those who want the state to underwrite their efforts to fool other private economic actors, a more fruitful response would focus on the permissible protectable level of sensitivity to social valuation of "worth."¹²⁸

It can scarcely be gainsaid that in the United States a person's income level plays a crucial part in determining "worth," that is, others' estimation of her economic, social, and moral value as a human being, and in turn shapes her self-worth and self-image.¹²⁹ Apart from the fact that this Article challenges the underlying reality and desirability of this set of interlocking assumptions, the publicity proposals cannot be vulnerable to attack on the grounds that they might tend to hold poorer taxpayers up to ridicule because they do not call for publication of their returns.¹³⁰ Little or no plausibility attaches to the claim that the 99.94% of taxpayers whose returns would not be published would be embarrassed for lack of inclusion.¹³¹ If, on the other hand, an embarrassment of riches afflicted some millionaires, that self-consciousness might parallel the skepticism aroused in the public over the disparity it perceived between absolute and relative levels of reward and contribution. This is precisely the structure of social communication envisioned by this proposal.

126. *Id.* (emphasis in original).

127. N.Y. Daily Tribune, May 24, 1866, § 1 at 4, col. 3 (editorial).

128. K. SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 11-12 (1988). Scheppele indirectly opens up this issue by distinguishing between strategic secrets, which are designed to influence others, and private secrets, which, as anchors of a sense of identity, are simply no one else's business.

129. Advocating higher salaries for judges, "one of the nation's leading experts on legal ethics" has drawn upon this same conception of "worth":

Money counts in this country's culture . . . It is a symbol of status and a means of sustaining respectability. Status and respectability are essential ingredients of authority, and authority is what judging is all about. . . Money cannot buy respect. But it can buy things that engender respect: badges of status such as a proper home and car . . .

Hazard, *A Crumbling Judicial Base Hurts the Bar*, Nat'l L.J., Nov. 19, 1990, at 13. Such endorsement of the claim that the intellectual, moral, and political integrity of a judicial opinion is a function of whether the judge owns a Mercedes confers a new dimension on the adage that the law is a seamless web.

130. Perhaps a different world would result from a requirement — not urged here — that everyone's annual income be painted in large numbers on her house. Such an innovation is, however, largely superfluous because of the rough correlation between income and the house itself.

131. At the time of the Civil War income tax publicity, however, *The New York Times* did editorialize that in New York City, "a place in which wealth is every day becoming more and more the measure of position and respect," many people with small incomes made no tax return in order to avoid "sneers." *The Internal Revenue Law — Telling Other People's Secrets*, N.Y. Times, Dec. 29, 1864, § 1, at 4, col. 3.

Anecdotal evidence of how this process might operate on employer-employee relations comes from the interlude of publicity in the 1920s. In the course of reporting that among bankers and corporation heads "Anger at Exposure of Their Own Return Followed by Curiosity as to Others [sic]," *The New York Times* recounted one businessman's story of the consequences of tax publicity:

[L]ast year my business was only fair and I told the boys working for me to be reasonable; not to ask for too many pay raises all in a bunch. I told them I'd have to close down the works if they bothered me too much, for the margin of profit was small. Well, I got through the year with a quarter million profit — and was lucky. In other enterprises I made four times that amount, and naturally put the whole thing into my income tax return. The figure was published yesterday morning on the first page of *The Times*.

Now my men aren't going to stop and figure that part of my income came from other enterprises. They're going to say, 'Well, here we are sweating in this boiler factory while our boss is living off the gravy.' I'm going to have a fine time explaining. What's more, I'll probably have a strike or two on my hands.¹³²

The point of this story was ostensibly that partial disclosure of tax payments could not generate accurate estimates of income.¹³³ As a technical matter, this problem could be drastically reduced by full disclosure of returns including multiple Schedule C forms.¹³⁴ But the account still does not sustain the point; the fact that the employer-taxpayer reported all the profits of his enterprises as his own personal income corroborated the gravamen of his employees' complaint — that he was a rich tightwad. In this case, publicity served the end of promoting fair dealing in a labor market through forthright disclosure.¹³⁵

Justice Douglas's discovery in 1965 of constitutional penumbral emanations that created "zones of privacy"¹³⁶ shielding "the sacred precincts of marital bedrooms"¹³⁷ prompted an intensive legal-philosophical discussion of privacy. An important strand of this thinking has focused on the central do-

132. *Income Revelation Stirs Wall Street*, N.Y. Times, Oct. 25, 1924, § 1, at 1, col. 6.

133. See *Income Tax Publicity*, N.Y. Times, Sept. 2, 1925, § 1, at 22, col. 1; see also A. ATWOOD, *THE MIND OF THE MILLIONAIRE* 254-56 (1926); F. LUNDBERG, *AMERICA'S 60 FAMILIES* 23-31 (1937) (undertaking the most ambitious — albeit mechanical — effort to reconstruct income and wealth statistics from the published tax payments); R. PAUL, *TAXATION IN THE UNITED STATES* 136 (1954) (stating without authority that the publication of tax lists "became an important source of economic data").

134. Schedule C (Form 1040) provides information on "Profit or (Loss) From Business or Profession (Sole Proprietorship)."

135. If, by the same token, the employer were subsidizing an unprofitable business with profits from his other enterprises, then it would have been in his interest to tell his employees about the precarious situation by opening the books.

136. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

137. *Id.* at 486.

main of privacy as grounding the autonomy of the individual within society.¹³⁸ This aspect of privacy as the indispensable constituent of individuality has, in Alan Westin's influential analysis, been analogized to a "core self" surrounded by concentric zones:

The inner circle shelters the individual's "ultimate secrets" — those hopes, fears, and prayers that are beyond sharing with anyone unless the individual comes under such stress that he must pour out these ultimate secrets to secure emotional relief. Under normal circumstances no one is admitted to this sanctuary of the personality. The next circle outward contains "intimate secrets," those that can be willingly shared with close relatives, confessors, or strangers who pass by and cannot injure. The next circle is open to members of the individual's friendship group. The series continues until it reaches the outer circles of casual conversation and physical expression that are open to all observers.¹³⁹

According to this view, "[t]he most serious threat to the individual's autonomy is the possibility that someone might penetrate the inner zone and learn his ultimate secrets," which "would leave him naked to ridicule and shame." Because everyone "lives behind a mask" which hides "the gap between what he wants to be and what he actually is, between what the world sees of him and what he knows to be his much more complex reality," if one person's mask were ripped off while others' were intact, that person could "be seared by the hot light of selective, forced exposure."¹⁴⁰ Moreover, development of the independence required for meaningful participation in a democratic society "requires time for sheltered experimentation and testing of ideas . . . without fear of ridicule or penalty, and for the opportunity to alter opinions before making them public."¹⁴¹

Justice Brandeis had earlier emphasized that the drafters of the Constitution had conferred "the right to be let alone — the most comprehensive of rights and the right most valued by civilized men" — precisely because "[t]hey recognized the significance of man's spiritual nature, of his feelings and of his intellect" as opposed to "material things."¹⁴² If the ethical, cognitive, and moral developmental underpinnings of personhood are made the focus of a right to privacy,¹⁴³ then it becomes very difficult to apply a protective shield to

138. See, e.g., Beane, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROB. 253, 254 (1966); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977) ("autonomy or control over the intimacies of personal identity"); Hirschleifer, *Privacy: Its Origin, Function, and Future*, 9 J. LEG. STUD. 649 (1980).

139. A. WESTIN, *PRIVACY AND FREEDOM* 33 (1967).

140. *Id.*; see also C. SCHNEIDER, *SHAME, EXPOSURE, AND PRIVACY* 40-43 (1977).

141. A. WESTIN, *supra* note 139, at 34.

142. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

143. See, e.g., *PRIVACY: A VANISHING VALUE?* (W. Bier ed. 1980); Gerstein, *Intimacy and Privacy*, 89 ETHICS 76 (1978); McCloskey, *The Political Ideal of Privacy*, 21 PHIL. Q. 303, 313 (1971) (approach inspired by political utilitarianism); Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 39 (1976).

such mundane material matters as income. As one state supreme court noted in denying that a newspaper's publication of statutorily confidential tax reports violated the plaintiff's privacy: "[A] right of privacy . . . is designed primarily to protect the feelings and sensibilities of human beings, rather than to safeguard property, business or other pecuniary interests."¹⁴⁴ Even Thomas Emerson, who successfully argued *Griswold v. Connecticut* before the United States Supreme Court, concedes that the

right to be left alone does not include any general right not to be talked about. The law [a]t most can protect only the most inner core of the personality, involving the kind of intimate details of personal life that were the Court's concern in *Griswold v. Connecticut*. In the main the right of privacy depends upon guaranteeing an individual freedom from intrusion and freedom to think and believe, not freedom from discussion of his opinions, actions or affairs.¹⁴⁵

The incongruity inherent in assimilating the annual results of the most successful individual encounters with mammon¹⁴⁶ with the more ethereal aspects of personhood qua sanctuary¹⁴⁷ is underscored by Charles Fried's view that privacy provides the "moral capital" essential to the relationships of love, friendship, and trust. Yet Fried concedes that far from being "strict derivations from general principles," the empirical forms that privacy assumes in any given society may be conventional over a wide range. But so long as the fair representation of "the interests of all" characterizes the political process that codifies these conventions, which in turn guarantee the maintenance of the requisite quality of moral capital, the outcome is just.¹⁴⁸ It is difficult to discern any basis on which publicity of millionaires' income might violate these conditions. Significantly, litigation brought in the 1920s to enjoin publication of tax returns failed to show an unconstitutional invasion of taxpayers' rights or privileges or even enjoined damage.¹⁴⁹

In view of massive federal and state economic-protective intervention in

144. *Maysville Transit Co. v. Ort*, 296 Ky. 524, 526-27, 177 S.W.2d 369, 370 (1944) (dictum).

145. T. EMERSON, *supra* note 119, at 556.

146. The representative of the Tax Committee of the National Association of Manufacturers characterized tax returns as the "sacred domain of personal immunity," which was "to be guarded equally against malicious private or prurient political curiosity." *Revenue Revision, 1925, supra* note 73, at 65-66 (testimony of James Emery).

147. *But see Federal Tax Return Privacy: Hearings on S. 361 Before the Subcomm. on Admin. of the Internal Revenue Code of the Senate Fin. Comm. on Finance, 94th Cong., 1st Sess.* 235 (1975) (The tax-return system "is a confessional, and in that respect maybe we ought to treat it as a confessional.") (testimony of Sheldon Cohen, former IRS Commissioner).

148. Fried, *Privacy*, 77 YALE L.J. 475, 483-87 (1968). Fried singles out "the excretory functions" as among the conventionally privatized areas to which some societies have given "symbolic importance." *Id.* at 487. If the psychoanalytically inspired excremental vision of filthy lucre were brought to bear here, perhaps a privacy interest could be construed for income. See NORMAN BROWN, *LIFE AGAINST DEATH* (1959).

149. See *United States v. Dickey*, 268 U.S. 377, 386 (1925); *Hubbard v. Mellon*, 5 F.2d 764 (D.C. Cir. 1925); Trotman, *Publicity of Income Tax Returns*, 2 NAT'L INCOME TAX MAG. 263,

the form of infrastructure, government contracts, regulation, licensing, and insurance, there is scarcely a source of income with respect to which taxpayers can construct a plausible claim to governmental non-involvement. Bank deposit insurance,¹⁵⁰ securities regulation, and the monopoly state cartelization of lawyers and physicians, to name but a few, undermine the credibility of the claim that interest,¹⁵¹ dividends,¹⁵² or professional income merit a state-sponsored shield of privacy and secrecy.¹⁵³

IV.

A MODEST AND AN IMMODEST PROPOSAL

If we have not returned enough, let complaint be duly made and correction enforced. And how can this be if the lists are to be shrouded in secrecy? If there be men (or women) who wish to pass for rich when they are not, or to live in state on the plunder of their creditors and tradesmen, why not expose them? And if there be men living at the rate of five to ten thousand a year who swear their incomes down to \$1,000 or \$1,500, why not let the world see and scorn their unpatriotic knavery?¹⁵⁴

The tax publicity proposal would create a kind of Securities Act for the rich, which would require them to disclose certain basic minimal information so that the public can intelligently decide whether it wants to "buy" tax and redistribution policies and market-generated incomes. In other words, if in-

266 (1924). Earlier, the Supreme Court had ruled similarly regarding publicity of corporate income tax returns. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 175-77 (1910).

150. In order to inform public debate over whether the state should make whole depositors with deposits in excess of \$100,000 at fourteen failed banks, the private insurer of which had failed, the governor of Rhode Island released their names. The data showed that 972 such people accounted for about 15% of all deposits held in 300,000 accounts. *Rhode Island Governor Discloses Major Depositors in Closed Banks*, N.Y. Times, Feb. 1, 1991, at A9, col. 1.

151. Banks and taxpayers are already required to report interest payments to the IRS. I.R.C. § 6049 (1989). Since this information would enable the IRS to calculate taxpayers' principal, no privacy interest inheres in the latter. The Bank Secrecy Act, 12 U.S.C. § 1829(b) (1989), requires banks to keep and to retain detailed records of accounts and transactions. Only in dissent does Justice Douglas appear to have gone so far as to assert: "In a sense a person is defined by the checks he writes. By examining them the agents get to know his doctors, lawyers, creditors, political allies, social connections, religious affiliation, educational interests, the papers and magazines he reads" *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 85 (1974).

152. The SEC requires corporations to report the names of the beneficial owners of more than 5% of any class of the corporation's voting securities and the number of shares owned. 17 C.F.R. § 229.403(a) (1990). Directors' holdings must also be divulged. Additionally, officers' holdings are lumped together with all directors' as an unnamed mass. 17 C.F.R. § 229.403(b) (1990). Since this information must be reported, no principle of privacy can conceal the total sum of dividends paid, which could be calculated in any case.

153. On the debate over the degree of overlap between privacy and secrecy, see S. BOK, *SECRECY: ON THE ETHICS OF CONCEALMENT AND REVELATION* 10-14 (1982). K. SCHEPPELE, *supra* note 128, at 12 n.16, distinguishes secrecy as property of information from privacy as a property of individuals.

154. *Publishing Incomes*, N.Y. Daily Tribune, Jan. 21, 1865, at 4, col. 3 (editorial).

creased redistribution of wealth away from the rich were to be constituted as a social norm, then significantly expanded information about millionaires would qualify as part of the system of "public reasons" that would require general acknowledgment as the evaluative basis for that policy.¹⁵⁵

Publishing the income tax returns of millionaires would serve several purposes.¹⁵⁶ First, it would vindicate the principle that in a highly interdependent economy and a democratic state "there should be no secrecy in the transactions between any citizen and his Government."¹⁵⁷ If, in other words, civil litigation between two "private" parties bearing little, if at all, on other citizens' affairs—except recourse to the legal system—becomes a matter of public record, why should not the monetary contributions each makes to support that system and other public institutions be disclosed as well?¹⁵⁸ Former President Benjamin Harrison clearly articulated this communitarian position in 1898:

We have too much treated the matter of a man's tax return as a personal matter. We have put his transactions with the state on much the same level with his transactions with his banker, but that is not the true basis. Each citizen has a personal interest, a pecuniary interest, in the tax return of his neighbor. We are members of a great partnership, and it is the right of each to know what every other member is contributing to the partnership and what he is taking from it. It is not a private affair; it is a public concern of the first importance.¹⁵⁹

The non-instrumental character of this principle emerged a decade later in connection with the controversy surrounding the new federal corporate excise tax. When Secretary of the Treasury MacVeagh told President Taft in 1910 that the publicity of small corporations' returns was generating discontent, Taft replied that "it was the publicity feature which appealed to him more than any other part of the law" because "many small corporations had a good deal that should be made known."¹⁶⁰ MacVeagh then challenged Taft: "Even you would not like all your business matters to become public property: what income you had and from what source it was derived." "I would not

155. See J. RAWLS, *supra* note 5, at 133; Freeman, *Reason and Agreement in Social Contract Views*, 19 PHIL. & PUB. AFF. 122, 127 n.9, 131, 140 (1990).

156. Paul's charge that liberals fail to see the connection is disputable; however, he is right that "privacy and forced egalitarianism are incompatible ideals." See Paul, *Introduction, Institute for the Preservation of Wealth, Inc., The Closing Door: The End of Financial Privacy in America and How to Protect Yourself* 2 (1988).

157. 67 CONG. REC. 892 (1925) (statement of Rep. Griffin).

158. "Why would it not be just as reasonable to say we will close the doors of the courthouses and have all litigation in private so that the public may not pry into a man's business?" 65 CONG. REC. 9405 (1924) (statement of Sen. Caraway).

159. Speech by Benjamin Harrison before Union League Club, Chicago, *The Obligations of Wealth* (Feb. 22, 1898), reprinted in VIEWS OF AN EX-PRESIDENT 331, 355-56 (1901).

160. Archie Butt, letter of Jan. 20, 1910, in 1 TAFT AND ROOSEVELT: THE INTIMATE LETTERS OF ARCHIE BUTT, MILITARY AIDE 262-63 (1930).

mind in the least,' said the President, 'would you?'¹⁶¹ When MacVeagh informed Taft that he " 'certainly would,' " Taft replied: " 'To me the publicity feature of the law is the only thing which makes the law of any special value, for it is not going to be a great revenue-producing measure.' "¹⁶²

Progressives sounded the instrumentalist version of this theme in their efforts to overcome what had hardened into a prejudice in favor of secrecy;¹⁶³ publicity discourages the rich from dodging taxes by subjecting them to additional scrutiny by the public.¹⁶⁴ Here the Progressives echoed the sentiment that *The New York Times* had voiced regarding the Civil War income tax:

Show every taxpayer's *sworn* return of income to his nearest neighbors, his most intimate friends, to himself, in public journals, and you have a security that no laws, and no scrutiny, has or can furnish. In no other way can the income tax be so efficiently and so searchingly executed and enforced as by the regularity and certainty of the publication of income assessment lists.¹⁶⁵

Second, full disclosure of millionaires' tax returns will serve to raise the issue and to question the legitimacy — indeed, even the market rationality¹⁶⁶ — of the enormous and widening differentials between high- and low-paid occupations. Extraordinarily high incomes and their effect on the aggregate distribution of incomes and, in particular, on the lowest incomes have not recently been on the mainstream American political agenda.¹⁶⁷ The debate about redistribution, however, has not always been so quiescent.¹⁶⁸ During the 1920s and 1930s, public interest was sufficiently aroused about income

161. *Id.*

162. *Id.*

163. Even a leading reformer and progressive said that the income tax itself (without publicity) was "an insufferable intrusion into the affairs of the individual which are in a sense sacred." F. HOWE, *TAXATION AND TAXES IN THE UNITED STATES UNDER THE INTERNAL REVENUE SYSTEM 1791-1896*, at 95-96 (1896).

164. See, e.g., 67 CONG. REC. 3486 (1926) (statement of Sen. Norris). The United States grudgingly conceded this point in litigation concerning the prosecution of a newspaper for publishing income tax information. See Brief for the United States, at 15-16, *United States v. Dickey*, 268 U.S. 378 (1925) (no. 678). For the modern European view, see G. MATTERN, *DAS STEUERGEHEIMNIS* 58 (1952). But see *Ass'n of Am. Railroads v. United States*, 371 F. Supp. 114, 116 (D.D.C. 1974) (confidentiality promotes full disclosure by taxpayer because he is "assured that his neighbor or competitor will not be apprised of the intimate details of his financial life"); accord *King v. I.R.S.*, 688 F.2d 488, 494 (7th Cir. 1982).

165. *The Publication of Incomes*, N.Y. Times, July 9, 1866, at 4, col. 5. To be sure, the paper later found publicity unnecessary. See, e.g., *The Lights and the Shadows of the Income Tax*, N.Y. Times, Aug. 7, 1869, at 4, col. 2; N.Y. Times, July 26, 1869, at 4, col. 3.

166. *Crystal*, *supra* note 98, at 68 (indicating that, after bracketing the issue of the general level of CEO compensation, only 39% of income differentials among corporations can be explained by "rational" factors).

167. In 1976, Congress did require the publication of data on individuals with high incomes, but the purpose focused on discovering why such persons might have no income tax liability. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2123, 90 Stat. 1525, 1915 (1976) (codified at I.R.C. § 55(n) (1988)). For an example of the annual publication of such data, see 1987 STATISTICS OF INCOME, *supra* note 14, at 67-90. This Article does not address that issue.

168. See GALBRAITH, *supra* note 6, at 69-83 (historical examples of such debate).

distribution to motivate Congress to inform the debate about tax policy by publishing considerable detail about millionaires' incomes.¹⁶⁹ Indeed, even after Congress repealed the publicity provision in 1935, a national poll revealed that 50% of the population opposed and 38% favored public disclosure of individuals' income tax reports. But when publication was limited to the reports of "rich men," the proportions were nearly inverted, with 49% in favor and 40% opposed.¹⁷⁰

During World War II,¹⁷¹ "[i]n order to correct gross inequities and to provide for greater equality in contributing to the war effort,"¹⁷² President Roosevelt issued an executive order limiting salaries to \$25,000 after taxes.¹⁷³ When, in 1943, it became clear that Congress would not acquiesce in such a measure, Roosevelt proposed "a special war supertax" to limit a married couple's income from all sources to \$50,000.¹⁷⁴ But a majority in Congress rescinded the measure before it went into effect.¹⁷⁵ Roosevelt nevertheless pointed to a crucial issue when he stressed that permitting a few thousand persons to retain their very large salaries was not so much an economic or fiscal matter as one injuring the nation's "morale."¹⁷⁶ Although his concern was "the effective prosecution of the war,"¹⁷⁷ collective morale must remain a constraint on the development of any society characterized by conspicuous cleavages in its wealth and income.¹⁷⁸

Recently, even the business press has sounded an alarm. *Business Week* reported that, from 1980 to 1988, the gap between the compensation of chief

169. In a report that did everything but name names, the Joint Committee on Internal Revenue Taxation made this connection express. *MILLION-DOLLAR INCOMES*, *supra* note 35, at 1.

170. *PUBLIC OPINION 1935-1946*, at 316 (H. Cantril ed. 1951) (poll conducted in 1938). The percentage of those strongly opposed dropped from 35 to 15.

171. For a skeptical discussion of such efforts in the 1930s, see M. LEFF, *supra* note 94, at 74-76, 80-89.

172. Exec. Order No. 9250, § 7, 3 C.F.R. 1213-14 (1944) (issued Oct. 3, 1942). The language Roosevelt used was derived in part from the Act to Amend the Emergency Price Control Act of 1942, ch. 578, § 1, 56 Stat. 765, 765 (codified at 50 U.S.C. app. 961 (1988)) (expired 1947).

173. *Id.*

174. 12 *THE PUBLIC PAPERS OF FRANKLIN ROOSEVELT* 67-68, 90-93 (S. Rosenman comp. 1943) [hereinafter *ROOSEVELT PAPERS*]. This new proposal addressed criticisms that a tax on all sources was more equitable and more efficient than a flat limit on salaries, although the work incentive/disincentive effects appear to be equal unless creative (*i.e.*, deferred) compensation packages could have been negotiated. For an example of the criticism, see 88 CONG. REC. 4148 (1942) (remarks of Rep. Plumley) (citing editorial in *The Washington Post*).

175. Tax Act of Apr. 11, 1943, ch. 52, § 4, 57 Stat. at 63, 63.

176. *ROOSEVELT PAPERS*, *supra* note 174, at 259.

177. Emergency Price Control Act of 1942, ch. 578, 56 Stat. at 765, 765.

178. Not coincidentally, numerous representatives accused Roosevelt of urging a socialist, communist, or Marxist program. See, e.g., 88 CONG. REC. 4148 (1942) (remarks of Rep. Plumley); 89 CONG. REC. 95 (1943) (remarks of Rep. Wolcott); *id.* at 1871 (remarks of Rep. Jenkins); *id.* at 1877 (remarks of Rep. Disney); *id.* at 1886 (remarks of Rep. Cole). Public opinion polls conducted in 1939 and 1976 show a dramatic decline in support for governmental limits on individual income. See J. HOCHSCHILD, *WHAT'S FAIR? AMERICAN BELIEFS ABOUT DISTRIBUTIVE JUSTICE* 16-19 (1981).

executive officers (CEOs) at 354 corporations and the wages of the average factory worker more than doubled — from 42 times to 93 times.¹⁷⁹ During this period, total compensation for the average CEO rose from \$624,996 to \$2,025,485.¹⁸⁰ As *Business Week* laconically editorialized: "Executive compensation has mushroomed to a level that is difficult to justify."¹⁸¹ After all, as Chicago economist Henry Simons noted:

Our captains of industry (enterprisers) are mainly engaged not in making a living but in playing a great game; and it *need* make little difference whether the evidence of having played well be diamonds and sable on one's wife or a prominent place in the list of contributors under the income tax.¹⁸²

Moreover, if, as orthodox economics teaches, the consumer ultimately foots all bills, why should consumers not be entitled to disclosure of the incomes they finance? If they decide that high executive or managerial incomes are inappropriate, they may choose not to patronize enterprises in which such self-dealing prevails.¹⁸³

A program that might at first appear only remotely relevant may shed some light on how publicity could serve to question the distribution of income. For a quarter-century, the Renegotiation Act of 1951 operated to promote "the elimination of excessive profits" from military defense contracts.¹⁸⁴ To

179. Byrne, *Is the Boss Getting Paid Too Much?*, BUS. WK., May 1, 1989, at 46, 52. Since the highest marginal tax rate was reduced from 70% to 28% during this period, the after-tax differential was even more prominent. *The Greed and the Glory of Being Boss*, ECONOMIST, June 17, 1989, at 79, 80 (relating the results of another survey showing a widening of the differential from 29 times to 36 times from 1978 to 1988).

180. Byrne, *supra* note 179, at 52.

181. *Bring CEO Pay Back Down to Earth*, BUS. WK., May 1, 1989, at 146.

182. H. SIMONS, PERSONAL INCOME TAXATION 20 (1938) (emphasis in original). F. BLOCK, POSTINDUSTRIAL POSSIBILITIES: A CRITIQUE OF ECONOMIC DISCOURSE 177 (1990), arguing that "yuppies" are engaged in a form of conspicuous consumption at work, concludes that "if interesting work becomes a kind of consumer good, then it is hard to see the rationale for paying people who do interesting work at much higher rates than those who do boring work." Whether this alleged blurring of productive consumption and consumptive production represents another form of alienated labor, Block does not discuss.

183. "The economic justification of corporate luxury has never been seriously examined. . . . [T]he more tenable hypothesis is that such expenses represent a polite way of having one's hand in the till to benefit by the custody of other people's money." W. MOORE, THE CONDUCT OF THE CORPORATION 102 (1962). Large institutional stockholders such as the California Public Employees Retirement System have begun to vote against high executive compensation. See Stevenson, *California Battle Over State Fund*, N.Y. TIMES, June 18, 1991, at D1, col. 6; Lublin, *Highly Paid Chief Executives Earn Criticism, Too*, WALL ST. J., June 4, 1991, at B1, col. 3. Bills have been introduced in Congress to facilitate such intervention by shareholders. See, e.g., S. 1198, 102d Cong., 1st Sess., 137 CONG. REC. S6997 (1991). The proposed Income Disparities Act of 1991, H.R. 3056, 102d Cong., 1st Sess. § 2 (1991), would amend 26 I.R.C. § 162 to deny an employer a business expense deduction for "excessive compensation," defined as the amount by which compensation for any of its employees' services exceeds "an amount equal to 25 times the lowest compensation paid . . . by the employer for the personal services of any other employee."

184. 50 U.S.C. app. § 1211 (1951). The Renegotiation Board was terminated in 1979,

this end, the statute required the Bureau of Internal Revenue¹⁸⁵ to make government contractors' tax returns available to the Renegotiation Board for inspection.¹⁸⁶ In determining whether a contractor had received "excessive profits," the Renegotiation Board was directed to consider the following factors, which it could in part track through the disclosure of tax returns: (1) "Reasonableness of costs and profits;" (2) "[N]et worth;" (3) "Extent of risk assumed, including the risk incident to reasonable pricing policies;" (4) "Nature and extent of contribution to the defense effort, including inventive and developmental contribution;" (5) "Character of business;" and (6) "Such other factors the consideration of which the public interest and fair and equitable dealing may require."¹⁸⁷ With a small measure of creative adaptation, such factors going to efficiency and fairness could be used to explore the societal acceptability of high incomes.

Third, publicity of millionaires' returns will create a set of data that will contribute to public understanding of the recent trends in the creation and distribution of income.¹⁸⁸ Form 1040¹⁸⁹ itself, as correlated with Form W-2,¹⁹⁰ could finally identify the occupational, industrial, and professional centers of high incomes. Tracked over many years of returns from Schedule A (Itemized Deductions), information on home mortgage interest may indirectly shed light on the value of millionaires' houses.¹⁹¹ If such reconstructions proved inadequate, it might become advisable to condition the continued granting of the privilege of mortgage interest deduction to millionaires on disclosure of more direct information on the cost and value of their houses.¹⁹² The recently-enacted excise taxes on luxury items¹⁹³ provide an excellent opportunity to document the "overconsumptionism"¹⁹⁴ that the public associ-

having become inapplicable to receipts and accruals under contracts performed after September 30, 1976. 50 U.S.C., app. § 1211 (West Supp. 1990).

185. 50 U.S.C. app. § 1215(e)(2) (1951).

186. 50 U.S.C. app. § 1215(e) (1951).

187. 50 U.S.C. § 1213(e) (1951).

188. Of the unique usefulness of IRS data for social-economic research there is no doubt. Even the Privacy Protection Study Commission recommended continuing disclosure to the Bureau of the Census of individually identifiable data because "important societal interests are served." *FEDERAL TAX RETURN CONFIDENTIALITY: REPORT OF THE PRIVACY PROTECTION STUDY COMMISSION* 48 (1976). For an overview of the extensive uses to which the Bureau of the Census puts the data, see *ADMINISTRATIVE PROCEDURES*, *supra* note 47, at 875-88.

189. The forms and schedules discussed here are reproduced in *IRS, Your Federal Income Tax* 192-203 (Pub. 17, 1989).

190. And Form K-1 from partnerships and S corporations.

191. Form 2119 (Sale of Your Home) already provides direct information.

192. Precedent for such an approach is the requirement to disclose the amount of tax-exempt interest income on line 8b of Form 1040. The personal interest deduction, which will be phased out by 1991, would offer a similar opportunity for disclosure of the underlying transactions in credit card and installment contract finance charges.

193. The Omnibus Budget Reconciliation Act (OBRA), 101st Cong., 2d Sess. § 11,221 (1990) (to be codified at 26 U.S.C. §§ 4001-4012), imposes a first retail sale 10% tax on the price in excess of \$30,000 for passenger vehicles, \$100,000 for boats, \$250,000 for aircraft, \$10,000 for jewelry, and \$10,000 for furs.

194. M. DAVIS, *PRISONERS OF THE AMERICAN DREAM: POLITICS AND ECONOMY IN THE*

ates with the "scandal" of the coexistence of "[i]ndecent low-living and indecent high-living."¹⁹⁵ Administratively, the retailer could be required to submit to the IRS a form identifying the tax, item purchased, price, and purchaser by social security number.¹⁹⁶ The interest and dividend information (identifying the payors) from Schedule B in combination with the capital gains information from Schedule D¹⁹⁷ and the expenses and profit data for sole proprietors on Schedule C will, when analyzed over a number of years, permit partial reconstruction of millionaires' patterns of saving¹⁹⁸ and investment.¹⁹⁹

Publicity of millionaires'²⁰⁰ returns could be implemented anonymously or by identifying the taxpayers.²⁰¹ Although identification of taxpayers may be unnecessary where it "has no bearing or effect on the general public," naming names becomes permissible where such revelation is relevant "to the public's understanding of the Government's operation."²⁰² Here, identification of individual millionaires turns out to be indispensable. One of the principal purposes of disclosure is to trace through long time series the impact of the tax system on individual millionaires and its macroeconomic consequences. Such incentive effects cannot be studied in the aggregate precisely because the

HISTORY OF THE U.S. WORKING CLASS 206-21 (1987), identifies the emergence of "overconsumptionism" already in the 1970s. If the new salary-millionaires represent a wave of nouveaux riches who did not inherit a base of material wealth such as houses, they may devote a considerably greater share of their income to current consumption than passive income-millionaires, who have inherited wealth. The inability to defer gratification appears to be particularly prominent among millionaire-athletes and entertainers. See Franks & Zweig, *The Fault Is Not in Our Stars*, FORBES, Sept. 21, 1987, at 120.

195. B. DE JOUVENEL, *THE ETHICS OF REDISTRIBUTION* 21 (1952) (emphasis removed).

196. An alternative model of self-reporting was inserted into OBRA for taxpayers contemplating business use of an aircraft; they are required to demonstrate on their next two tax returns that at least 80% of the aircraft's use was for business. I.R.C. § 4003(c) (1991).

197. And Form 1099-B (Statement for Recipients of Proceeds from Broker).

198. Much more accurate information on saving could be generated by a general progressive consumption tax, requiring taxpayers to calculate consumption by explicitly stating annual savings and subtracting it from income to determine their tax burden. Compare J. PECHMAN, *TAX REFORM, THE RICH AND THE POOR* 111-16 (2d ed. 1989).

199. "A close reading of Schedule B in conjunction with proper financial publications may reveal an entire investment portfolio — not just its general content, but the taxpayer's precise holdings." ADMINISTRATIVE PROCEDURES, *supra* note 47, at 829.

200. Drawing a line at \$1 million — rather than \$200,000 or \$10 million — is, to be sure, arbitrary, but as a cultural icon of a potential standard of living, millionaires retain a certain political significance. Although the cumulative process of inflation does not appear to have eroded this iconic importance, it would be worth considering substituting a fixed index such as income that exceeds the median family income by at least one order of magnitude; currently that figure would amount to about \$350,000. See 1989 INCOME AND POVERTY, *supra* note 11, table D, at 14.

201. Of a third possibility, permitting private inspection at the IRS but prohibiting publication — which may be constitutionally infirm — Horace Greeley editorialized:

The poke-nose permission to peep privately into the returns nullifies every excuse for interdicting their publication. If a thing is fit to be known at all, it should be accurately known, not to those only who may take special pains to become acquainted with it, but to each and all.

N.Y. Daily Tribune, May 24, 1866, at 4, col. 3.

202. *Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 766 n.18 (1989) (quoting H.R. REP. NO. 1497, 89th Cong., 2d Sess. 8 (1966)) (dictum).

rolls of millionaires change from year to year.²⁰³ Therefore, in order to study the microeconomic genesis and development of millionaires, it would also be necessary to publish all their prior and future returns. In other words, once a taxpayer reported a million dollars in income, she would be subject to publicity retroactively and for life.²⁰⁴

Even if millionaires were not named,²⁰⁵ identification might be an inevitable, albeit inadvertent, by-product of the publicity process. Since one of the prime goals of disclosure is securing information on the firms that pay out millionaires' salaries, and since relatively few millionaires are presumably employed at any one firm, researchers could probably identify such millionaires by patching together information from various public sources. Moreover, the embarrassment effect should not impede the disclosure. On the contrary, part of the point of publicity is precisely to draw attention to and to inspire debate about the legitimacy of the distribution of income.

Careful scrutiny of a long and centralized²⁰⁶ time-series of millionaires' returns will help test contrary claims that there are not enough rich people to finance the abolition of poverty,²⁰⁷ even assuming total confiscation, or that less income inequality is explained by inequality among, rather than within, occupations.²⁰⁸ Even now, measures much less radical than "confiscation and

203. See *MILLION-DOLLAR INCOMES*, *supra* note 35, at 1-14.

204. Through the Office of Tax Policy Research at the University of Michigan, the IRS has made public tapes with data (derived from *Statistics of Income*) on 9,000 to 46,000 individual taxpayers for the years 1979-1986. The tapes make it possible to trace information on Form 1040 (excluding occupation) and selected information from the schedules on constant, but unnamed individuals. Because very high income taxpayers are underrepresented — for 1979, only three and, for 1980, only eight individuals with AGI of \$500,000 or more — the sample cannot generate reliable statistics on this group. See G. Clowery, *Characteristics of the Individual Tax Model File and Longitudinal Panel of Individual Returns* 7-13 (Arthur Young Tax Research Grant Rep., Working Paper No. 84A-31, 1985). The IRS also makes available a much larger data base covering the period 1971 to 1987. But these data are not organized to allow year-to-year comparisons of specific (even unnamed) individuals' tax information. Neither data series includes Form W-2 information, thus making it impossible to develop data on the occupations of high-income taxpayers.

205. Identification by social security number might suffice. Since geographic concentration may also be a relevant variable, the city should be disclosed although the street address may not be necessary.

206. Non-standardized data of varying quality and reliability are scattered in the various industry tabloids (e.g., *American Lawyer*, *Variety*, *Sporting News*), probate files, and proxy statements.

207. This is a recurring theme in S. LEBERGOTT, *supra* note 38. In the congressional income tax debate in 1990, Rep. Vander Jagt asserted that: "Oh, you put a 10-percent surtax on millionaires that picks up about \$1 billion a year. That is just petty cash for the big spenders over there." 136 CONG. REC. H10,295 (daily ed. Oct. 16, 1990). In point of fact, a 10% surtax in 1988 (the last year for which the IRS has published data) would have generated more than \$9 billion. In that year, millionaires reported \$156 billion in taxable income (AGI minus deductions). If \$1 million per millionaire is subtracted from this amount, a surtax base of more than \$90 billion remains. The surtax would have raised millionaires' total effective tax rate from 28.1% to 34.0%. Calculated according to data in Strudler & Ring, *supra* note 17, table 1, at 15-25.

208. See C. JENCKS, *INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY & SCHOOLING IN AMERICAN INEQUALITY* 225-26 (1972).

redistribution of all the wealth and income of the very rich"²⁰⁹ would suffice to eliminate official poverty. In the late 1980s, the aggregate deficit — the amount of money required to raise all poor families and unrelated persons to their respective poverty thresholds — hovered at about \$50 billion.²¹⁰ In 1988, income-millionaires' AGI amounted to \$173 billion, of which they paid approximately one-quarter, or \$44 billion, in federal income tax.²¹¹ If a poverty surtax of \$50 billion had been imposed, millionaires would, on average, have remained millionaires after taxes,²¹² and the group's effective tax rate would have been almost exactly what it was in the Eisenhower administration (54.4%).²¹³

Whether their names were released or not, the number of millionaires who would be subject to publicity would be vastly smaller than the universe of affected persons in the 1920s and 1930s, when only a small proportion of the population was subject to the federal income tax.²¹⁴ The public disclosure advocated here is confined not only to a minuscule class of taxpayers, but also to exclusively non-voyeuristic²¹⁵ ends — those of socioeconomic research and policy analysis and formulation. Society may then more accurately evaluate the premises and consequences of the Reaganomic policy of *enrichissez-vous*.²¹⁶ In particular, it will make possible the explanation of the causal con-

209. Dick, *How to Justify a Distribution of Earnings*, 4 PHIL & PUB. AFF. 248, 250 (1975). In 1971, when the total AGI of those with \$50,000 or more in AGI amounted to 6.5% of total income, Dick asserted that total confiscation "would not much alter the shape of the distribution." In 1988, when the inflation-adjusted equivalent of 1971's \$50,000 was \$150,000, those with \$200,000 or more in AGI accounted for 13.5% of total income. Calculated according to data in STRUDLER & RING, *supra* note 17, at 15.

210. See Litmann, *Poverty in the 1980's: Are the Poor Getting Poorer?*, MONTHLY LAB. REV., June 1989, at 13, table 1, at 14; U.S. Bureau of the Census, *Money Income and Poverty Status in the United States 1988*, table F-8 and F-9, at 146 (CURRENT POPULATION REP., SER. P-60 No. 166, Oct. 1989). An alternative calculation taking into account non-cash, in-kind transfers such as food stamps, school lunches, and housing programs would produce an aggregate poverty deficit of approximately \$40 billion. See HOUSE COMM. ON WAYS AND MEANS, BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMM. ON WAYS AND MEANS, 101st Cong., 1st Sess., table 16, at 962-63 (Comm. Print 1989).

211. Calculated according to data in Strudler & Ring, *supra* note 17, table 1, at 15-25.

212. Distributed among 65,303 millionaires, \$79 billion would amount to approximately \$1.2 million per person.

213. Income-millionaires paid 54.7% of their AGI in federal income tax in 1954. Calculated according to data in *Tax Shares and Rates, 1951-1986*, *supra* note 10, table 1, at 49-50. This figure declined in the course of the Eisenhower administration from 62% in 1953 to 44% in 1959. *Id.*

214. See J. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX, fig. 6.2 at 126 (1985).

215. In a letter to the editor about the publication of the pictures of the 10 highest paid employees of the University of Iowa as a masthead banner in the local newspaper, one reader complained of "voyeurism" "since salaries under \$30,000 are not listed." Iowa City Press-Citizen, Nov. 28, 1990, at 7A, col. 3-4.

216. Preliminary accounts include THE LEGACY OF REAGANOMICS: PROSPECTS FOR LONG-TERM GROWTH (C. Hulten & I. Sawhill ed. 1984); THE REAGAN EXPERIMENT: AN EXAMINATION OF ECONOMIC AND SOCIAL POLICIES UNDER THE REAGAN ADMINISTRATION (J. Palmer & I. Sawhill ed. 1982); J. BUCHANAN, ET AL., REAGANOMICS AND AFTER (1989); CONGRESSIONAL BUDGET OFFICE, THE CHANGING DISTRIBUTION OF FEDERAL TAXES: 1975-

nections between the enrichment of the rich and the impoverishment of the very poor.²¹⁷ If the many care to know how the few were able to acquire so much so quickly in the 1980s, so that they may gauge the impact of the resulting redistribution on social well-being²¹⁸ as a whole, peeking behind the veil of secrecy will be indispensable.

STATISTICAL-METHODOLOGICAL APPENDIX

The nominal, current-dollar data on millionaires in Tables 1 and 2 are subject to a number of caveats. First, although the impact of inflation on the numerical increase in millionaires between 1978 and 1988 has already been mentioned, that effect is not reflected in Table 1 or 2 because the inflexible and broad high-income groupings (e.g., \$500,000-\$1,000,000) for which the IRS publishes data make it impossible to determine reliably what percentage of a group's members were inflation-adjusted millionaires. The following incomes (rounded off to nearest \$5,000) were the equivalent of \$1,000,000 in 1988: 1948 — \$205,000; 1965 — \$265,000; 1978 — \$550,000; 1979 — \$615,000; 1980 — \$695,000; 1981 — \$770,000; 1982 — \$815,000; 1983 — \$840,000; 1984 — \$880,000; 1985 — \$910,000; 1986 — \$925,000; 1987 — \$960,000. If incomes were distributed evenly between \$500,000 and \$1,000,000, determining the number of real income-millionaires in any year would be simple. However, the distribution is known to be weighted disproportionately toward the lower end.²¹⁹ Using the hypothesis of proportionality as an upper limit would generate the following number of additional inflation-adjusted millionaires: 1948 — 3,258; 1965 — 6,158; 1978 — 5,605; 1979 — 6,490; 1980 — 5,297; 1981 — 3,465; 1982 — 4,057; 1983 — 4,579; 1984 — 3,986; 1985 — 3,965; 1986 — 3,376; 1987 — 6,028.²²⁰

1990 (Oct. 1987); CONGRESSIONAL BUDGET OFFICE, *THE CHANGING DISTRIBUTION OF FEDERAL TAXES: A CLOSER LOOK AT 1980* (July 1988); T. EDSALL, *THE NEW POLITICS OF INEQUALITY* 202-30 (1984); B. HARRISON & B. BLUESTONE, *THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZING OF AMERICA* (1988); W. NISKANEN, *REAGANOMICS: AN INSIDER'S ACCOUNT OF THE POLICIES AND THE PEOPLE* (1988); K. PHILLIPS, *supra* note 40; P. ROBERTS, *THE SUPPLY-SIDE REVOLUTION: AN INSIDER'S ACCOUNT OF POLICYMAKING IN WASHINGTON* (1984); S. ROUSSEAS, *THE POLITICAL ECONOMY OF REAGANOMICS: A CRITIQUE* (1982); Okner & Bawden, *Recent Changes in Federal Income Redistribution Policy*, 36 NAT'L TAX J. 347 (1983).

217. On the evidence for the latter, see Littman, *supra* note 210, at 13, table 5, at 16.

218. On the notion of social well-being, see L. RAINWATER, *WHAT MONEY BUYS: INEQUALITY AND THE SOCIAL MEANINGS OF INCOME* 17-21 (1974); Brown, *Consumption Norms, Work Roles, and Economic Growth, 1918-80*, in *GENDER IN THE WORKPLACE* 13 (C. Brown & J. Pechman ed. 1987).

219. This configuration follows from the fact that the mean income for the group (ca. \$653,000-\$675,000) is considerably below the midpoint-value of the group (\$750,000). See *infra* text following note 221; see also 1948 STATISTICS OF INCOME, *supra* note 30, Pt. I, table 1, at 65.

220. Calculated according to data in *Tax Shares and Rates 1951-1986*, *supra* note 10, table 1, at 49; 1948 STATISTICS OF INCOME, *supra* note 30, Pt. I, table 2, at 68-69; 1987 STATISTICS OF INCOME, *supra* note 14, table 1.4, at 28. Because McCubbin and Scheuren offer a further breakdown of income groups — \$500,000-\$750,000 and \$750,000-\$1,000,000 — the dividing line for millionaires can be drawn with somewhat greater precision than the annual *Statistics of Income* publications permit.

Second, a break in the tables' data series occurs between 1986 and 1987 when 100% of capital gains were included in AGI and became fully taxable, whereas from 1978 to 1986 only 40% were (and before 1978, 50% were taxed).²²¹ Although it is possible to include the full capital gains for nominal millionaires in each year before 1987, a problem arises concerning the next lowest income group. The mean AGI of the \$500,000-\$1,000,000 group has ranged between \$653,000 and \$675,000 for the years 1978 to 1988, while the net capital gains included in AGI has ranged from \$180,000 to \$243,000. If 100% of capital gains were added, the mean expanded AGI would range from \$940,000 to \$1,018,000. In other words, approximately half the taxpayers in this group were millionaires even before inflation is taken into account. Thus, as long as any year's equivalent of a million dollars is lower than the mean AGI of the \$500,000-\$1,000,000 group, including full capital gains does not increase the number of real millionaires. This situation obtained through 1980. From 1981 forward, the capital gains adjustment operated to incorporate more millionaires than did the inflation adjustment. Thus for the years 1981 to 1987, the number of additional millionaires can be very roughly estimated at one-half of the those reporting AGI between \$500,000 and \$1,000,000 who also reported capital gains.²²²

This mathematical relationship can be illustrated for 1978. If 100% of capital gains are included, the number of millionaires does not increase (at least not appreciably or determinately) because: (1) as the result of the inflation adjustment, 85% of the taxpayers in the \$500,000-\$1,000,000 have already been qualified as millionaires; and (2) the combined effect of inflation and full inclusion of capital gains does not, on average, push the members of the next lowest income group (\$200,000-\$500,000) into the class of millionaires. This result can be explained numerically. In 1978, \$550,000 was the equivalent of \$1,000,000 in 1988. The average AGI of the \$200,000-\$500,000 group was \$279,000 including \$57,000 in capital gains; 60% of the group also reported an additional \$86,000 in capital gains not included in AGI. If this subgroup's average capital gains are added to the whole group's average AGI (since the subgroup's AGI is not published), the expanded average AGI amounts to \$365,000 — far below the inflation-adjustment threshold. But aberrational taxpayers would have been catapulted into millionaire status by the combined effect of inflation and full inclusion of capital gains. A taxpayer with \$220,000 in AGI, all of which was capital gains, for example, would actually have had the \$550,000 in AGI required to qualify as a millionaire.

In 1948 and 1965, the inclusion of full capital gains (rather than the statutory inclusion of 50%) does not appear to expand the class of real millionaires significantly beyond the adjustment for inflation. The mean AGI of the

221. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 301, 100 Stat. 2085, 2216 (1986); 26 U.S.C. § 1202(a) (1982); 26 U.S.C. § 1202 (1976).

222. The alternative estimate of millionaires is therefore based on the inflation adjustment through 1980, and on the capital gains adjustment from 1981 to 1987. See *supra* note 18 and accompanying table.

income group directly below the inflation-adjusted millionaire group (i.e., \$150,000-\$200,000), was \$171,000 in 1948; within this group, 1,754 taxpayers showed an average of \$33,000 in capital gains. If the excluded 50% of capital gains is added to mean AGI, the resulting \$204,000 exactly equals the cutoff for inflation-adjusted millionaires. Hence, one-half of the group, or 877 taxpayers, can be added to the millionaires for 1948.²²³ For 1965, when the inflation-adjusted cutoff for millionaires was \$265,000, the estimate is harder to come by because the IRS grouped all taxpayers with AGI between \$100,000 and \$500,000. The mean AGI for the \$100,000-\$250,000 group was \$122,000, while the mean capital gains for the \$100,000-\$500,000 group was \$52,000.²²⁴ Even the overstated average capital gains figure, when doubled, would still leave the average group member almost \$100,000 short of the cutoff. It may, therefore, be assumed that inclusion of full capital gains does not expand the group of millionaires.

The change in the law not only created a statistical discontinuity, but also caused a massive sell-off of capital assets in 1986 in contemplation of the impending subjection to increasing capital gains taxes, which resulted in exaggerated values for 1986. A few figures will illustrate this blip. Aggregate net capital gains rose 88% for all taxpayers and 163% for millionaires between 1985 and 1986. In 1986, 100% of realized capital gains represented 77% of millionaires' AGI (including all capital gains) compared with 35% in 1988. If 100% of capital gains are included in AGI, the average AGI of the income group with \$500,000-\$1,000,000 slightly exceeded \$1,000,000. If half of this income group is counted among the millionaires, 55,000 of them accounted for 5.9% of aggregate (expanded) AGI — marginally higher than the figure for 1988.²²⁵

223. Calculated according to data in 1948 *STATISTICS OF INCOME*, *supra* note 30, at 65-66, 70-71, 90-91.

224. Calculated according to data in 1965 *STATISTICS OF INCOME*, *supra* note 30, table 4, at 12; *Tax Shares and Rates 1951-1986*, *supra* note 10, table 1, at 49.

225. Unless otherwise indicated, the sources for the data calculated in this Appendix are: 1978 *STATISTICS OF INCOME*, *supra* note 25, table 1.4, at 16-21; IRS *STATISTICS OF INCOME—1986 INDIVIDUAL TAX RETURNS*, table 1.4, at 26-27 (1989); Studler & Ring, *supra* note 17, at 5; *Tax Shares and Rates, 1951-1986*, *supra* note 10, table 1, at 49-50.