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CONFLICT BETWEEN THE INTERNAL REVENUE CODE AND THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The privilege against self-incrimination contained in the fifth amendment to the United States Constitution is invoked with some frequency in the reporting of income to the Internal Revenue Service. Unfortunately, no definite standard for the applicability of this privilege to income reporting has emerged. In this comment, the author reviews decisional law on the applicability of this privilege to income reporting and analyzes under what circumstances this privilege can be invoked.

I. INTRODUCTION

On April fifteenth of each year,¹ a taxpayer who has violated a criminal law during the preceding year is placed in a difficult situation. If the taxpayer reports information required on a federal income tax return,² any incriminating information reported is admissible to prosecute the taxpayer.³ If the taxpayer attempts to avoid self-incrimination by providing false answers on a return, the taxpayer commits perjury.⁴ Finally, if the taxpayer fails to file any return at all, the taxpayer may commit a tax crime.⁵ The taxpayer thus faces a trilemma.⁶

Invoking the fifth amendment's⁷ protection against self-incrimination on a tax return is one possible solution to the trilemma.⁸ Filing an income tax return with fifth amendment claims in place of many of the required disclosures, however, creates a variety of other problems. The Internal Revenue Service (IRS), alleging the fifth amendment return does not satisfy the statutory requirements of a return, often assesses the frivolous return penalty⁹ or criminally prosecutes the claimant for failure to file a return.¹⁰ Further difficulty for fifth amendment claims has been created by the United States Supreme Court's recent decision that the contents of a taxpayer's voluntarily prepared business records are not

1. I.R.C. § 6072(a) (1982). When a taxpayer follows a fiscal year rather than a calendar year, the return generally is due on the fifteenth day of the fourth month following the close of the fiscal year. *Id.* The Secretary, however, may grant a reasonable extension of time for filing any return. I.R.C. § 6081(a) (1982).

2. I.R.C. § 6011(a) (1982).

3. *See, e.g.,* *Garner v. United States*, 424 U.S. 648 (1976).

4. I.R.C. § 7206 (1982); 18 U.S.C. § 1001 (1982).

5. I.R.C. § 7203 (1982).

6. *See* *United States v. Egan*, 459 F.2d 997 (2d Cir. 1972). *See generally* Note, *Internal Revenue Form 1040 and the Fifth Amendment: Self-Reporting or Self-Incrimination, the Taxpayer's Dilemma*, 54 N.D.L. REV. 213 (1977).

7. The fifth amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

8. For other methods of invoking the fifth amendment's protection, see generally *infra* notes 206-314 and accompanying text.

9. I.R.C. § 6702 (1982).

10. I.R.C. § 7203 (1982).

protected by the fifth amendment.¹¹

This comment provides a framework for compliance with the Internal Revenue Code (IRC) that preserves a taxpayer's constitutional privilege against self-incrimination and avoids commission of additional criminal acts. This comment begins by discussing the IRC sections and Supreme Court decisions integral to a resolution of the taxpayer's trilemma. This comment then develops a framework for determining the validity of a taxpayer's fifth amendment claim and reviews the standards used to determine whether a disclosure incriminates a taxpayer of a non-tax crime, tax crime, or state law crime. Various methods of exercising the fifth amendment privilege are then analyzed, and special attention is given to the disclosure of a taxpayer's identity, occupation, exemptions, and amount of income. Finally, the impact of the Supreme Court's recent *United States v. Doe*¹² decision on taxpayers' fifth amendment claims is examined.

II. BACKGROUND

A. Internal Revenue Code and the Fifth Amendment

Under its constitutional taxing power, Congress enacted the IRC. The IRC requires individuals to file an annual income tax return,¹³ disclose information on income tax forms,¹⁴ and keep supporting records available for IRS inspection.¹⁵ Enforcement of these IRC requirements is accomplished through a myriad of provisions that empower the government to assess penalties¹⁶ and bring criminal charges against violators.¹⁷ The most frequently prosecuted tax crimes are: (1) willful attempt to evade tax (tax fraud or tax evasion);¹⁸ (2) willful failure to file a return or pay tax (failure to file);¹⁹ and, (3) willful making of a false

11. *United States v. Doe*, 465 U.S. 605 (1984).

12. 465 U.S. 605 (1984).

13. I.R.C. §§ 6012, 6072 (1982). Individuals with gross income of less than \$1,000 are exempt from the filing requirement. Threshold amounts greater than \$1,000 are applicable to specified individuals. I.R.C. § 6012(1)(A)(i)-(iii), (1)(B) (1982).

14. I.R.C. § 6011(a) (1982).

15. Treas. Reg. § 1.6001-1(a) & (e) (1982).

16. *E.g.*, I.R.C. § 6702 (1982).

17. *See infra* notes 18-20 and accompanying text. *See generally* CRIMINAL SECTION, TAX DIVISION, U.S. DEP'T OF JUSTICE, CRIMINAL TAX MANUAL (1986).

18. Section 7201 provides:

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000, . . . or imprisoned not more than 5 years, or both, together with costs of prosecution.

I.R.C. § 7201 (1982).

19. Section 7203 provides:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such

return, statement, or other document under the penalties of perjury (false statement).²⁰ The Supreme Court has defined the willfulness element of these crimes as "a voluntary, intentional violation of a known legal duty."²¹

The fifth amendment provides that no person "shall be compelled in any criminal case to be a witness against himself."²² Although typically considered to provide protection against testifying at trial, the privilege against self-incrimination also applies to information revealed in the preparation and filing of an income tax return because it is testimonial in nature.²³ Thus, the IRC conflicts with the fifth amendment when a taxpayer is directed to disclose incriminating information on an income tax return.

Although not as broad as the fifth amendment, IRC section 6103 (section 6103) provides limited protection for disclosures made on an income tax return. Federal and state officials²⁴ may disclose federal tax returns or tax return information²⁵ only as provided by section 6103.²⁶ The section permits disclosures to federal employees for use in federal criminal investigations,²⁷ and to federal²⁸ or state²⁹ officials for administering their tax laws. The statute does not, however, permit state officials to use disclosures for nontax criminal investigations.³⁰

records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000, . . . or imprisoned not more than 1 year, or both, together with the costs of prosecution.

I.R.C. § 7203 (1982).

20. Section 7206 provides in part:

Any person who —

(1) Declaration under penalties of perjury. — Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

I.R.C. § 7206 (1982); *see also* 18 U.S.C. § 1001 (1982).

21. *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (quoting *United States v. Bishop*, 412 U.S. 346, 360 (1973)).

22. U.S. CONST. amend. V.

23. *See Garner*, 424 U.S. at 655-56.

24. I.R.C. § 6103(a)(1)-(2) (1982).

25. I.R.C. § 6103(b)(1)-(3) (1982).

26. Act of Oct. 28, 1919, ch. 85, 41 Stat. 305.

27. I.R.C. § 6103(i)(1) (1982). For a discussion of the *ex parte* reasonable cause showing required, see Comment, *Raiding the Confessional — The Use of Income Tax Returns in Nontax Criminal Investigations*, 48 *FORDHAM L. REV.* 1251, 1273-80 (1980). The author's basic premise, that compelled tax information is entitled to the same protection as the private papers in one's home, is subject to considerable question after *Doe*, 465 U.S. 605.

28. I.R.C. § 6103(h) (1982) (no showing required).

29. I.R.C. § 6103(d)(1) (1982).

30. *Id.* Disclosure is permitted only to the extent necessary for administration of the state's tax law. I.R.C. § 6103(d)(2) (1982).

B. Supreme Court Analysis

In 1927, the United States Supreme Court first addressed the issue of self-incrimination in the context of filing a federal income tax return. In *United States v. Sullivan*,³¹ an individual convicted of failure to file a tax return³² argued that requiring a federal income tax return from someone who had violated a federal law conflicts with the fifth amendment.³³ The individual also argued that the IRC is not intended to tax income derived from criminal activity.³⁴ The Court held that income derived from illegal activity is subject to income tax and that the fifth amendment did not protect the taxpayer from the requirement of filing an income tax return.³⁵ The Court reasoned that a taxpayer could claim the fifth amendment on a return if the form required disclosures that the defendant was privileged from making, but could not on that account refuse to make any return at all.³⁶

Because the individual in *Sullivan* did not file a return, the Court did not decide what, if any, information is privileged from disclosure on a federal income tax return.³⁷ In dictum, however, the Court noted that most of the disclosures would not incriminate and that "[i]t would be an extreme if not extravagant application of the fifth amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in a crime."³⁸ The *Sullivan* Court nevertheless suggested that a taxpayer could test the fifth amendment's application to a specific disclosure by claiming the privilege on his return.³⁹ The Court thus implied that a taxpayer cannot claim the fifth amendment without submitting his claim to legal scrutiny.⁴⁰

In 1953, the Court confronted the issue of self-incrimination in the context of registering for, and paying, the federal wagering tax. In *United States v. Kahriger*,⁴¹ an individual who allegedly violated state

31. 274 U.S. 259 (1927).

32. *Id.* at 262.

33. *Id.* at 261.

34. *Id.* at 262.

35. *Id.* at 263.

36. *Id.*; see also *Garner v. United States*, 424 U.S. 648, 650-51 n.3 (1976) ("[N]othing we say here questions the continuing validity of *Sullivan*'s holding that returns must be filed.").

37. *Sullivan*, 274 U.S. at 263. The Court expressly noted that it was "not called on to decide what information, if any, [Sullivan] might have withheld." *Id.* at 263.

38. *Id.* at 263-64. Justice Holmes also noted that "most items warranted no complaint." Less tolerant of the suggestion that illegal expenses, such as bribes, are deductible, Justice Holmes stated that deductibility of illegal expenses does not follow, but the question would be considered "if a taxpayer has the temerity to raise it." *Id.*

39. *Id.* at 264.

40. *Id.* ("He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law."). The Court noted that Sullivan did not make a declaration; rather, he abstained from filing a return. *Id.*

41. 345 U.S. 22 (1953), *rev'd*, 390 U.S. 39 (1968). Two years later, the Court reached

gambling laws failed to register for the federal wagering tax. The Court held that the privilege against self-incrimination does not protect taxpayers engaged in wagering activities.⁴² The *Kahriger* Court questioned whether an individual could claim the fifth amendment privilege after failing to register for the wagering tax and cited *Sullivan* for the proposition that a taxpayer must file a return and claim the privilege thereon.⁴³ The Court, however, did not find that the wagerer lost the fifth amendment privilege because of a failure to claim the privilege in a timely manner, or because of a failure to claim the privilege on a filed return. Instead, the Court held that the fifth amendment privilege applies "only to past acts, not to future acts."⁴⁴ The wagering tax provisions were upheld because registration does not compel the confession of acts already committed, but merely requires the taxpayer to register before engaging in the business of wagering.⁴⁵

In 1968, the Court in *United States v. Marchetti*⁴⁶ reconsidered the fifth amendment's application to a taxpayer who failed to register for, or pay, the federal wagering tax and reversed the *Kahriger* decision. Rejecting the chronological fifth amendment analysis applied in *Kahriger*, the *Marchetti* Court stated that "[t]he question is not whether a taxpayer holds a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence against himself."⁴⁷ The Court stated two reasons for finding the chronological reasoning in *Kahriger* deficient.⁴⁸ First, *Kahriger* overlooked the hazards of self-incrimination as to past or present acts stemming from registration and payment of the occupational tax.⁴⁹ Second, the fifth amendment's application is determined by whether the claimant is confronted with substantial hazards of self-incrimination and not by whether a statute requires confession of a criminal intent before the commission of a criminal act.⁵⁰

Marchetti answered the question left open in *Kahriger*: can an individual claim the fifth amendment privilege after failing to register?⁵¹ Noting that *Marchetti* could not present his claim to the IRS without admitting guilt, the Court held that assertion of the fifth amendment at trial is sufficient to avoid losing this constitutional protection.⁵² The Court reasoned that finding a loss of fifth amendment protection would result in widespread erosion of the privilege through ingeniously drawn

the same result in *Lewis v. United States*, 348 U.S. 419 (1955), *rev'd*, 390 U.S. 39 (1968), where an individual allegedly violated federal gambling laws.

42. *Kahriger*, 345 U.S. at 32-33.

43. *Id.*

44. *Id.*

45. *Id.* But see *infra* notes 48-50 and accompanying text.

46. 390 U.S. 39 (1968).

47. *Id.* at 51.

48. *Id.* at 52.

49. *Id.* at 52-53.

50. *Id.* at 53-54.

51. *Kahriger*, 345 U.S. at 32.

52. *Marchetti*, 390 U.S. at 50.

legislation requiring individuals to cease illegal activities or provide the government with incriminating information.⁵³

The Court rejected *Kahriger's* suggestion that *Sullivan* required the filing of a wagering tax return. The Court noted that *Sullivan* was concerned with an unwarranted extension of the fifth amendment's privilege and with the taxpayer becoming the final arbiter of the merits of fifth amendment claims.⁵⁴ Application of the privilege to the whole registration procedure is neither extreme nor extravagant because, unlike the tax returns in *Sullivan*, every wagering requirement directly and unmistakably incriminates the taxpayer.⁵⁵ The Court found the policy against taxpayers determining the validity of fifth amendment claims unpersuasive because requiring the presentation of a taxpayer's claim to the Treasury Department obliges one "to prove guilt to avoid admitting it."⁵⁶

After establishing the fifth amendment's application to wagering tax returns, the Court analyzed whether Marchetti was confronted with "substantial and 'real', and not merely trifling or imaginary, hazards of incrimination."⁵⁷ The Court concluded that Marchetti was subject to a substantial risk of self-incrimination because registration and payment significantly increased the likelihood of prosecution for future gambling activities.⁵⁸ Compliance also provided evidence that Marchetti intended to violate gambling laws.⁵⁹

The *Marchetti* Court proceeded to consider the applicability of the required records doctrine. The Court explained that the doctrine consists of three principle elements: (1) the preservation of records customarily kept by the regulated person; (2) the public aspects of the records that render them analogous to public documents; and, (3) a governmental inquiry that is essentially regulatory.⁶⁰ When the required records doctrine applies, the taxpayer impliedly waives the fifth amendment because he engaged in a regulated activity.⁶¹ The Court concluded that the required records doctrine did not apply because Marchetti was not required to keep and preserve records of the type he customarily kept, but was required to provide unrelated information similar to providing oral testimony. The information required from Marchetti had no public aspects, but rather was information known to a private individual. The wagering requirements were not imposed in an essentially noncriminal

53. *Id.* at 51-52.

54. *Id.* at 50.

55. *Id.* at 48-49.

56. *Id.* at 50-51 (quoting *Kahriger*, 345 U.S. at 34).

57. *Id.* at 53; see also *Rogers v. United States*, 340 U.S. 367, 374 (1950); *Brown v. Walker*, 161 U.S. 591, 600 (1895).

58. *Marchetti*, 390 U.S. at 54.

59. *Id.* at 52-54.

60. *Id.* at 55-57; see also *Grosso*, 390 U.S. at 67-68.

61. *Id.* at 55-57; see also Note, *Required Information and the Privilege Against Self-Incrimination*, 65 COL. L. REV. 681, 687-90 (1965). For a criticism of the required records doctrine, see McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 214-32.

and regulatory area, but were directed at a group inherently suspect of criminal activities.⁶² The United States suggested the required records doctrine was irrelevant because Marchetti was required to submit reports rather than maintain them.⁶³ The Court, however, rejected the government's distinction, stating that required records "[r]egulations permit records to be retained, rather than filed, largely for the convenience of the persons regulated."⁶⁴

The *Marchetti* Court refused to place a use restriction on the information obtained from a taxpayer who complies with the wagering requirements.⁶⁵ The Court recognized that imposition of a use restriction interfered with the congressional intent to prosecute gamblers.⁶⁶ Judicial application of use immunity would require authorities to show their evidence was not tainted by information obtained from the taxpayer's compliance with the wagering tax requirements.⁶⁷ The Court concluded that Congress should strike the balance between the Treasury Department's need for tax information and the government's desire to enforce gambling prohibitions.⁶⁸ Use immunity thus was not mandated.

In 1971, the Court addressed the issue of self-incrimination when a taxpayer makes incriminating disclosures on a wagering tax return. In *Mackey v. United States*,⁶⁹ the taxpayer relied on *Marchetti* to attack collaterally the admission of the amounts of income disclosed on *wagering* tax returns in his criminal prosecution for *income* tax evasion.⁷⁰ A majority of the Court held that the fifth amendment does not protect against prosecutorial use of disclosures made on gambling tax returns. The plurality held that *Marchetti* had prospective application only, and thus Mackey's argument was rejected⁷¹ because his conviction became final prior to *Marchetti*. A concurring justice, however, noted that *Sullivan* might excuse reporting the amount of income earned where the amount would lead to disclosure of the criminal activities that had produced the income.⁷² Mackey, however, was prosecuted for a tax crime, not a nontax crime, and therefore *Sullivan* did not apply.⁷³

In 1976, the Court addressed the issue of self-incrimination on an income tax return where a taxpayer made disclosures rather than claiming the fifth amendment. In *Garner v. United States*,⁷⁴ a taxpayer listed his occupation as a professional gambler and reported substantial income

62. *Marchetti*, 390 U.S. at 56-57.

63. *Id.* at 56 n.14.

64. *Id.*

65. *Id.* at 58.

66. *Id.* at 59.

67. *Id.*

68. *Id.* at 60.

69. 401 U.S. 667 (1971).

70. *United States v. Mackey*, 401 U.S. 667, 674 (1971).

71. *Id.*

72. *Id.* at 708 (Brennan, J., concurring).

73. *Id.*

74. 424 U.S. 648 (1976).

from gambling.⁷⁵ When prosecuted for conspiracy to fix horse races,⁷⁶ Garner unsuccessfully relied on the fifth amendment to prevent the admission of his tax returns at trial.⁷⁷ The returns were admitted into evidence to establish Garner's familiarity with gambling and to rebut his claim of an innocent relationship with alleged coconspirators.⁷⁸ Although acknowledging that the IRC compels the filing of an income tax return,⁷⁹ the Court noted that instead of claiming the fifth amendment on his tax return, Garner disclosed incriminating information.⁸⁰ The Court therefore reasoned that the government did not *compel* Garner to incriminate himself with regard to the specific disclosures made on the return.⁸¹

Relying primarily on three cases, Garner argued that a taxpayer is under compulsion to make incriminating disclosures and should not lose fifth amendment protection by disclosing information in his income tax return rather than claiming the privilege in the return.⁸² First, Garner cited *Miranda v. Arizona*⁸³ for the proposition that a valid waiver of the fifth amendment's protection must be knowing and intelligent.⁸⁴ In *Miranda*, the Court excluded statements made by an individual in custody because of the psychological pressures of custodial interrogation and the government's knowledge of the incriminating nature of the disclosures sought.⁸⁵ Emphasizing a taxpayer's freedom to complete a return at leisure and with legal assistance, the *Garner* Court rejected Garner's *Miranda* argument by distinguishing statements made by an individual in custodial interrogation from disclosures made on a noncustodial, unpressured, and not necessarily incriminating income tax return.⁸⁶

Second, Garner argued that *Mackey v. United States*⁸⁷ permitted a taxpayer to exclude incriminating information disclosed in a tax return by making an objection at trial.⁸⁸ The Court, however, rejected Garner's argument by distinguishing wagering tax returns from income tax returns.⁸⁹ The Court stated that the great majority of people do not incriminate themselves by filing an income tax return, whereas wagering tax returns are directed at individuals "inherently suspect of criminal

75. *Garner*, 424 U.S. at 649-50.

76. *See* 18 U.S.C. § 224 (1964); 18 U.S.C. § 1084 (1961); 18 U.S.C. § 1952 (1961); 18 U.S.C. § 371 (1948).

77. *Garner*, 424 U.S. at 649.

78. *Id.* at 650.

79. *Id.* at 652.

80. *Id.* at 653.

81. *Id.* at 665.

82. *Id.* at 656.

83. 384 U.S. 436 (1966).

84. *Garner*, 424 U.S. at 657.

85. *Id.* at 657-58 (citing *Miranda*, 384 U.S. at 467, 475-76).

86. *Garner*, 424 U.S. at 658.

87. 401 U.S. 667 (1971).

88. *Garner*, 424 U.S. at 659.

89. *Id.* at 659-60 & n.13 (The *Garner* Court implied that, under *Marchetti*, the fifth amendment's protection may be exercised only by failing to file.).

activities.”⁹⁰

Finally, Garner relied on *Garrity v. New Jersey*,⁹¹ which held that policemen are denied the freedom to remain silent when their fifth amendment claims lead to their dismissal.⁹² Analogizing to *Garrity*, Garner claimed that the possibility of prosecution for failure to file a return, resulting from claiming the fifth amendment on the return, compelled incriminating disclosures on the income tax return.⁹³ Distinguishing these situations, the Court stated that the policemen in *Garrity* were threatened with punishment for a valid exercise of the privilege, whereas a conviction for failure to file a tax return cannot be based on a valid exercise of the privilege.⁹⁴

Although the disclosures in *Garner* were not compelled, and thus not constitutionally protected against admission in subsequent criminal proceedings,⁹⁵ the Court did establish a framework for analyzing the fifth amendment’s application to the preparation and filing of an income tax return.⁹⁶ First, the *Garner* Court limited its decision to self-incrimination under nontax laws.⁹⁷ Second, the Court stated that “the privilege protects against the use of compelled statements as well as guarantees the right to remain silent absent immunity.”⁹⁸ Third, the Court noted that the privilege applies only when “the Government seeks testimony that will subject its giver to criminal liability.”⁹⁹ Fourth, the Court placed the burden of making a timely assertion of the privilege on the witness.¹⁰⁰ Finally, the Court equated information revealed in the preparation and filing of an income tax return with the testimony of a witness.¹⁰¹

In 1984, the Court considered the issue of self-incrimination where a taxpayer prepared incriminating business records. In *United States v. Doe*,¹⁰² a grand jury investigating municipal corruption issued subpoenas demanding a sole proprietor’s business records.¹⁰³ The United States District Court for the District of New Jersey required disclosure only of

90. *Id.* at 660-61. Justice Brennan reasoned that the admission of the amount of income from gambling is not protected because the United States is entitled to demand the amount of a taxpayer’s gross income. *Id.* at 659 n.12.

91. 385 U.S. 493 (1967).

92. *Id.* at 497-98.

93. *Garner*, 424 U.S. at 661.

94. *Id.* at 662. In a concurring opinion, Justice Marshall narrowed the issue to whether the possibility of a criminal prosecution compels a taxpayer to make incriminating disclosures. He would hold that threat of prosecution does not compel incriminating disclosures because a good faith claim of privilege, albeit erroneous, does not expose a taxpayer to criminal liability. *Id.* at 666.

95. *Id.* at 665.

96. *See id.* at 656.

97. *Id.* at 650-51 n.3.

98. *Id.* at 653.

99. *Id.* at 655.

100. *Id.*

101. *Id.* at 656.

102. 465 U.S. 605 (1984).

103. *Id.* at 606-07.

records required by law to be kept or disclosed to a public agency.¹⁰⁴ The Third Circuit affirmed,¹⁰⁵ and the Supreme Court granted certiorari to consider the limited issue of the fifth amendment's application to business records and documents not required by law to be kept or disclosed to a public agency.¹⁰⁶ Reasoning that the fifth amendment protects only against compelled self-incrimination, the Court held that the contents of business records are not privileged because the taxpayer voluntarily prepares the documents and the subpoenas do not compel the taxpayer to restate or affirm the truth of the contents of the documents.¹⁰⁷ The Court, however, upheld the district court's finding that the act of producing the documents involved testimonial self-incrimination.¹⁰⁸ The court reasoned that the act of producing the documents involves testimonial self-incrimination because it compels the taxpayer to admit the records exist, are in his possession, and are authentic.¹⁰⁹ The government therefore cannot compel disclosure without a statutory grant of use immunity.¹¹⁰ As in prior cases, the Court refused to impose use immunity on the taxpayer's business records because Congress gave the prosecution, rather than the judiciary, the right to balance the need for information against the risk that the grant of immunity will frustrate an attempt to prosecute the subject of an investigation.¹¹¹ The Court noted, however, that any "grant of immunity need be only as broad as the privilege against self-incrimination."¹¹² To satisfy the fifth amendment's requirements, a grant of immunity needs only to protect against self-incrimination resulting from the act of producing the documents and not from the documents' contents.¹¹³

III. ANALYSIS

A. *When is a Taxpayer's Fifth Amendment Claim Valid?*

The major issues raised when a taxpayer claims the fifth amendment is whether the claim is valid, and if not, whether the claim was made in good faith. When determining the validity of fifth amendment claims for tax purposes, courts generally apply two standards: (1) the substantial hazards of self-incrimination test (favorable to the taxpayer); and (2) a

104. *In re Matter of the Grand Jury Empannelled March 19, 1980*, 541 F. Supp. 1 (D.N.J. 1981), *aff'd*, 681 F.2d 327 (3d Cir. 1982), *aff'd in part & reversed in part sub nom. United States v. Doe*, 465 U.S. 605 (1984).

105. 681 F.2d 327 (3d Cir. 1982), *aff'd in part & reversed in part sub nom. United States v. Doe*, 465 U.S. 605 (1984).

106. 461 U.S. 913 (1983).

107. 465 U.S. at 611-12.

108. *Id.* at 617 & n.13 (applying the substantial hazards of self-incrimination test).

109. *Id.* at 612-14.

110. *Id.* at 617. Justice O'Connor's concurring opinion states that the fifth amendment does not apply to a taxpayer's personal records. *Id.* at 618.

111. *Id.* at 616.

112. *Id.* at 617 n.17.

113. *Id.*

weighing or balancing test (unfavorable to the taxpayer). Application of these standards to nontax, tax, and state law crimes is discussed. The good faith defense to a criminal tax prosecution follows the discussions of the different methods of claiming the fifth amendment privilege and possible waiver of the privilege.

1. Failure to Disclose Incriminating Information Regarding a Prior Federal Nontax Crime

When determining the validity of a taxpayer's fifth amendment claim for information regarding a nontax crime,¹¹⁴ the Supreme Court applies the substantial hazards of self-incrimination standard.¹¹⁵ Under this test, the Court held that disclosures furnishing a link in a chain of evidence tending to establish guilt create a substantial hazard.¹¹⁶ Similarly, information that provides a "lead" or "clue" also is protected by the fifth amendment.¹¹⁷ Trifling or imaginary hazards, however, are insufficient to merit fifth amendment protection,¹¹⁸ as are claims that are either "extreme" or "extravagant."¹¹⁹

The Supreme Court found substantial hazards of self-incrimination when disclosures required on a wagering tax return were admissible as evidence in an individual's criminal prosecution.¹²⁰ In *Marchetti*, the Court expressly found substantial hazards of self-incrimination because compliance with wagering tax laws, which required taxpayers to report their involvement in accepting wagers, list names and addresses of agents and employees, and maintain records indicating daily amounts of gross wagers, served as decisive evidence of criminal gambling violations.¹²¹ Similarly, in *Doe*, the Court applied the substantial hazards of self-incrimination standard where the taxpayer's act of producing business documents provided evidence of the existence, authenticity, and possession

114. *Garner*, 424 U.S. 648, 662-63. "The [f]ifth [a]mendment itself guarantees the taxpayer's insulation against liability imposed on the basis of a valid and timely claim of privilege . . ." *Id.* at 662-63.

115. *See, e.g., Marchetti*, 390 U.S. at 53 (citing *Rogers v. United States*, 340 U.S. 367, 374 (1950); *Brown v. Walker*, 161 U.S. 591, 600 (1895)).

116. *Marchetti*, 390 U.S. at 48; *see also* *United States v. Neff*, 615 F.2d 1235, 1239 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980) (citing *Hoffman v. United States*, 341 U.S. 479 (1951); *Hashagen v. United States*, 283 F.2d 345, 345 (9th Cir. 1960)).

117. *United States v. Neff*, 615 F.2d 1235, 1239 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980) (citing *Hashagen v. United States*, 283 F.2d 345, 348 (9th Cir. 1960)).

118. *Marchetti*, 390 U.S. at 53.

119. *Sullivan*, 274 U.S. at 263; *see also Marchetti*, 390 U.S. at 50 (citing *Sullivan*, 274 U.S. at 263).

120. Although the fifth amendment's protection does not necessarily vary with changes in the rules of evidence, the Supreme Court stated that "the privilege against self-incrimination may not properly be asserted if other protection is granted which 'is so broad as to have the same extent in scope and effect' as the privilege itself." *Marchetti*, 390 U.S. at 58 (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 585 (1891)).

121. *Id.* at 54.

of the documents.¹²² For wagering tax returns and business records, the Court thus applies the substantial hazards test.

In *Garner*, the Court recognized a standard for review of fifth amendment claims on income tax returns essentially equivalent to the substantial hazards standard. The *Garner* Court equated disclosures on an income tax return with an individual's testimony¹²³ and stated that the right to remain silent applies when the "government seeks testimony that will subject its giver to criminal liability."¹²⁴ In *Garner*, the Court stated that the taxpayer could have claimed the fifth amendment privilege¹²⁵ instead of listing his occupation as a professional gambler and disclosing substantial gambling income.¹²⁶ The government introduced these disclosures in *Garner's* prosecution for fixing gambling contests.¹²⁷

Dictum in *Sullivan* suggests that fifth amendment claims are valid if they are neither extreme nor extravagant,¹²⁸ a standard essentially equivalent to the substantial hazards standard.¹²⁹ The *Sullivan* Court, however, did not discuss whether the admissibility of required disclosures in a criminal trial resulted in fifth amendment protection for the required information.¹³⁰ Although the Supreme Court has not adopted a test for income tax returns expressly, *Garner* and *Sullivan* indicate that the substantial hazards of self-incrimination test also applies to income tax returns.

In applying the substantial hazards of self-incrimination standard, the Supreme Court has recognized valid reasons for claiming fifth amendment protection other than the admissibility of disclosures as direct evidence against an individual in a criminal trial. For example, the prosecution in *Garner* introduced income tax returns to rebut the taxpayer's testimonial claim of an innocent relationship with other conspirators.¹³¹ Similarly, in *Marchetti*, the Court reasoned that registration for the wagering tax significantly enhanced the likelihood of prosecution for

122. *Doe*, 465 U.S. at 614 n.13.

123. *Garner*, 424 U.S. at 656.

124. *Id.* at 655.

125. *Id.* at 653, 665.

126. *Id.* at 649-50. After briefly stating the disclosures *Garner* made, the Court framed the issue by using the term "specific disclosures" instead of listing the disclosures. The Court's use of "specific disclosures" apparently refers to *Garner's* occupation as a professional gambler and the substantial income from gambling. The Court did not explain what were the incriminating aspects of the disclosures. The mere fact that *Garner* was a gambler of any sort would seem to be incriminating. Moreover, *Garner's* description of his gambling occupation as being a "professional" may have had an additional incriminating effect. Likewise, the disclosure of substantial income probably would have incriminating aspects independent of its gambling source.

127. *Id.* at 649.

128. *Sullivan*, 274 U.S. at 263-64.

129. The *Marchetti* court used the terms "extreme or extravagant" and "substantial hazards of self-incrimination" interchangeably. See *Marchetti*, 390 U.S. at 49.

130. *Sullivan*, 274 U.S. at 263-64.

131. *Garner*, 424 U.S. at 650.

future acts.¹³² The *Marchetti* Court apparently determined that the gambling information provided a lead or a clue.¹³³ In reviewing an individual's fifth amendment claim, therefore, courts should look beyond the possible use of a disclosure as direct evidence of a crime and consider the broader incriminatory effects of a disclosure. If an individual apparently has committed criminal acts, a court should uphold a taxpayer's fifth amendment claim when the disclosure would be relevant to an investigation or prosecution of the crime.

2. Failure to Disclose Incriminating Information Regarding a Prior Federal Tax Crime

In *United States v. Carlson*,¹³⁴ an individual claimed ninety-nine withholding exemptions.¹³⁵ Due to the amount of exemptions claimed, Carlson's employer did not withhold federal income tax.¹³⁶ In addition, Carlson failed to make a tax payment with his income tax return. Instead, Carlson claimed the fifth amendment privilege against self-incrimination rather than providing any information from which tax liability could be calculated. Carlson also attached tax protestor material to his return. Although Carlson was vulnerable to prosecution for supplying false withholding information, the government prosecuted Carlson for failure to file an income tax return.¹³⁷

The United States Court of Appeals for the Ninth Circuit acknowledged that Carlson faced substantial hazards of self-incrimination and recognized the issue presented as the one that the *Garner* Court expressly left open — the standard applicable to self-incrimination for a criminal income tax violation.¹³⁸ Noting the collision of governmental and individual interests, the Ninth Circuit *balanced* Carlson's fifth amendment privilege against the government's need for revenue collection through self-reporting.¹³⁹ After finding Carlson's fifth amendment claim part of an overall plan to evade taxes,¹⁴⁰ the court stated that the privilege against self-incrimination did not *compel* protection of Carlson's activities.¹⁴¹ Stating that taxpayers who employ Carlson's scheme severely

132. *Marchetti*, 390 U.S. at 54.

133. See *supra* note 117 and accompanying text. Information that significantly enhances the likelihood of a future prosecution apparently creates substantial hazards of self-incrimination. See *Marchetti*, 390 U.S. at 53-54. In any event, an increased probability of prosecution does not fit into the category of admissible evidence.

134. 617 F.2d 518 (9th Cir.), *cert. denied*, 449 U.S. 1010 (1980).

135. *Id.* at 519; see I.R.C. § 7205(a) (1982).

136. *Carlson*, 617 F.2d at 519.

137. *Id.*

138. *Id.* at 523; see also *Garner*, 424 U.S. at 650-51 n.3. The Court stated that the claims of privilege considered are "only those justified by a fear of self-incrimination other than under the tax laws." *Garner*, 424 U.S. at 650-51 n.3.

139. *Carlson*, 617 F.2d at 521.

140. *Id.*

141. *Id.* at 523. The court also found that the neutrality of questions on an income tax return weighed in favor of requiring the filing of income tax returns. *Id.*

hinder the government's ability to determine tax liability, the court held that "an individual who seeks to frustrate the tax laws by claiming too many withholding exemptions, with an eye to covering that crime and evading the tax return requirement by assertion of the fifth amendment, is not entitled to the amendment's protection."¹⁴² The court thus sustained Carlson's conviction for failure to file an income tax return.¹⁴³ Furthermore, the court found that Carlson did not claim the fifth amendment in good faith, notwithstanding the substantial hazards of self-incrimination he faced.¹⁴⁴

Although the Ninth Circuit adopted a balancing test for analyzing the validity of a taxpayer's fifth amendment claim when invoked to avoid self-incrimination of a tax crime, the decision is not supported by case law,¹⁴⁵ legal commentaries,¹⁴⁶ or reason.¹⁴⁷ The *Carlson* balancing test

142. *Id.* at 522-23. The court also suggested the crime of claiming too many withholding allowances may not be protected by the fifth amendment under any circumstances. *Id.*

143. *Id.* at 523.

144. *Id.* at 523-24.

145. Although *California v. Byers*, 402 U.S. 424 (1971), mentioned balancing the government's need with individual rights, the plurality applied the substantial hazards of self-incrimination standard along with four dissenters. *Id.* at 429, 460, 470. Only one concurring Justice applied a balancing test. *Id.* at 427-34, 454 (Harlan, J., concurring). Moreover, *Byers* did not involve a tax return, but rather a statute that requires the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address. *Id.* at 425.

The *Carlson* court's suggestion that applying the substantial hazards of self-incrimination test undercut the rule in *United States v. Sullivan*, 274 U.S. 259 (1927), requiring an individual to file an income tax return, is difficult to support. In *Sullivan*, the Court required taxpayers to file a tax form even though the fifth amendment remains a valid response to specific inquiries. *Sullivan*, 274 U.S. at 263-64. In a similar manner, Carlson filed a return with fifth amendment responses for specific inquiries. *Carlson*, 617 F.2d at 519. How application of the substantial hazards standard to Carlson undercuts the rule in *Sullivan* is unclear.

146. The *Carlson* court used two quotes from Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, to support propositions completely contrary to those of their author. *Carlson*, 617 F.2d at 521 n.5. The first quotation suggests that the only way to absolutely prevent income tax returns from incriminating is to abandon their information gathering nature or to engage in a fiction that they do not incriminate. *Id.* The author's statement, however, only applied to a hypothetical situation in which individuals with illegal income are exempt from filing a return. Mansfield, *supra*, at 118. In the hypothetical, an individual's failure to file inferred involvement in illegal activity. *Id.* This hypothetical was, however, expressly rejected by the *Sullivan* requirement that one must file a return and claim one's privilege thereon. See *Sullivan*, 274 U.S. at 263-64; *Garner*, 424 U.S. at 650-51 n.3.

Second, Professor Mansfield's use of a balancing test did not apply to a taxpayer providing information on a tax return, as in *Carlson*. Mansfield, *supra*, at 119-20. But see *Carlson*, 617 F.2d at 521 n.5. To the contrary, the professor questioned whether the government could require an individual to file a return when fifth amendment responses are necessary. Mansfield, *supra*, at 119-20. In response to this question, the Mansfield article suggested application of a balancing test. *Id.* at 120. The author supports a balancing test because otherwise taxpayers, rather than officials, determine the validity of fifth amendment claims. *Id.*

In direct opposition to the approach taken by *Carlson*, Professor Mansfield

focuses on the government's need to collect revenue, not on the incriminating aspects of the disclosures for which Carlson had claimed the fifth amendment. The court also failed to explain why the government's need to collect revenue is greater in tax crime situations than in nontax crime situations.¹⁴⁸

To support the adoption of a balancing test, the *Carlson* court emphasized an increased need for revenue collection through self-reporting when a tax crime is involved.¹⁴⁹ The government, however, often possesses more information to compute one's tax liability when an individual claims the fifth amendment for a tax crime rather than a nontax crime.¹⁵⁰ A taxpayer's employer reports each employee's withholding tax and tax-

warned about the dangers of "weighing competing interests [because] the subtle but important values represented by the privilege gradually [would] be lost." *Id.* at 166. Professor Mansfield concluded that the conflict between the individual's privilege against self-incrimination and the government's need for information is reduced by limiting the use of information to the reason for compelling disclosures and precluding its use for criminal prosecutions. *Id.*

147. *Carlson's* balancing test is difficult to apply because of conflicting language in the court's application of the standard. First, the court states the privilege against self-incrimination is limited for "only the most substantial" reasons. *Carlson*, 617 F.2d at 521. This language indicates an application of the fifth amendment favorable to taxpayer's claims. Further in the decision, however, the court concludes that the fifth amendment does not "compel protection of Carlson's actions." *Id.* at 523. This language indicates an application of the fifth amendment extremely unfavorable to taxpayer's claims. The court apparently required Carlson to show a compelling reason for invoking the fifth amendment's protection.

Although *Carlson* may be limited to tax evasion schemes, the court broadly stated the issue to be whether "the privilege against self-incrimination [can] constitute a defense to a section 7203 prosecution when it is asserted to avoid incrimination for a past violation of income tax laws." The court's narrow holding, however, states "that an individual who seeks to frustrate the tax laws by claiming too many withholding exemptions, with an eye to covering that crime and evading the tax return requirement by assertion of the [f]ifth [a]mendment, is not entitled to the amendment's protection." *Id.* Compare the Supreme Court's statement in *Marchetti* that "[t]he constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted." *Marchetti*, 390 U.S. at 51.

148. See *Carlson*, 617 F.2d at 522-23. When two constitutional provisions conflict, a preferred approach might be to: 1) determine the nature of the provisions, e.g., governmental power or individual rights; 2) define the limits of the provisions, e.g., fifth amendment applies only to "compelled" incrimination; 3) attempt to resolve the conflict without reducing a governmental power or individual right; and 4) give individual rights preference over governmental power when resolving a conflict that must reduce one or the other.

149. *Carlson*, 617 F.2d at 522-23.

150. See *United States v. Bank of California*, 652 F.2d 783 (9th Cir. 1980) (upheld trial court's finding that forms 1099 were in IRS possession and the trial court's refusal to enforce a summons for such forms where there was no testimony that a reasonable inquiry had failed to locate the forms or that the IRS filing procedures rendered the documents inaccessible). *But cf. United States v. First Nat'l Bank of New Jersey*, 616 F.2d 668 (3d Cir.) (forms 1099 were not in IRS possession because it was impractical for the IRS to locate such forms), *cert. denied*, 447 U.S. 905 (1980).

Detection of a nontax crime is easier when the fifth amendment is claimed to shield a tax crime. Individuals who claim the fifth amendment for nontax crimes, however, usually are involved with or employed by, other individuals who also are

able income to the IRS.¹⁵¹ A failure to pay any income tax is obvious from the face of a tax return when combined with an employer's report indicating that income tax was not withheld.¹⁵² The government can determine an individual's tax liability from the amount of income reported by the individual's employer.¹⁵³ Employers also are required to disclose the identity of any employee who claims more than fourteen withholding exemptions.¹⁵⁴ When a taxpayer claims the fifth amendment for the amount of income earned in a nontax crime, however, the IRS is unlikely to possess any information from which tax liability can be calculated.¹⁵⁵

Although the Ninth Circuit expressed concern that validating fifth amendment claims in *Carlson*-type situations may affect the tax collection system adversely, the court did not express clearly the reasons for this concern. Even if the court recognized Carlson's fifth amendment claim and thereby reversed his conviction for failure to file, Carlson still faced potential prosecutions for filing a false withholding statement, failure to pay tax, tax fraud, tax evasion, and perhaps a number of other offenses.¹⁵⁶ Recognizing Carlson's claim, therefore, would have precluded his prosecution only for one of the several tax crimes he committed.

The *Carlson* court also failed to distinguish *Marchetti*, where the Supreme Court applied the substantial hazards standard in a case where

involved in illegal activities. In such cases, the IRS is unlikely to receive any information through self-reporting.

The information the IRS was seeking in *Carlson* was the taxpayer's claimed amount of withholding exemptions. See *Carlson*, 617 F.2d at 522-23. This information could have been obtained from the taxpayer's employer. See I.R.C. § 7609 (1982); Treas. Reg. § 31.3402(f)(2)-1(g) (1982). The IRS evidently did obtain the number of withholding exemptions via this route. See *Carlson*, 617 F.2d at 519.

151. See Treas. Reg. § 1.6041-2 (1982).

152. Mere failure to file a return does not necessarily mean that one failed to pay one's tax liability. One's withholding is often greater than one's tax liability. However, when the government knows a taxpayer received sufficient income to require a tax payment, the taxpayer's failure to have any tax withheld, or to submit a payment with his return, usually indicates a failure to pay one's tax liability. See *Carlson*, 617 F.2d 518.

153. The government receives reports from employers and also receives reports regarding partnership, dividend, and interest income. See I.R.C. §§ 6031, 6042, 6049 (1982). With these reports, the government need only fill out one's tax return. See I.R.C. § 6020(b)(1) (1982); see also *Garner*, 424 U.S. at 651.

154. Treas. Reg. § 31.3402(f)(2)-1(g) (1982).

155. See *supra* note 150.

156. The *Carlson* court's decision fails to distinguish between the crimes of tax fraud and failure to file. See I.R.C. §§ 7201, 7203 (1982). Upholding a conviction for failure to file by weighing the government's need to collect revenue is illogical because underpayment of one's tax liability is not an element of a criminal failure to file. Compare I.R.C. § 7201 (1982) with I.R.C. § 7203 (1982). Underpayment of tax is, however, an element of tax fraud. See I.R.C. § 7201 (1982). The court rejected Carlson's claim because it was part of an overall plan to evade payment of income tax. *Carlson*, 627 F.2d at 522. The government should have prosecuted Carlson for tax fraud rather than failure to file an income tax return. Tax fraud is the more serious offense; failure to file would merge into tax fraud; and the fifth amendment issue could have been avoided.

the taxpayer claimed the fifth amendment to avoid self-incrimination of a tax crime.¹⁵⁷ Although *Marchetti* involved a gambling tax, the government's need for revenue collection is the same, irrespective of the type of tax involved.¹⁵⁸ Even if the court had recognized a privilege not to disclose certain information, such a privilege would not excuse payment of one's tax liability.¹⁵⁹

The government can satisfy the need for information through alternatives to self-reporting when incriminating information is necessary to verify an individual's tax liability. The self-reporting system is merely one method by which the government exercises the power to collect taxes.¹⁶⁰ Alternatives to self-reporting prevent a collision of the government's power to collect tax and an individual's fifth amendment right against self-incrimination.¹⁶¹ The government can exercise its power to tax through self-reporting,¹⁶² voluntary and involuntary disclosures by third parties,¹⁶³ a valid search and seizure,¹⁶⁴ or grants of immunity.¹⁶⁵ Although some alternatives to self-reporting may impose a substantial burden on the government, the burden imposed by the grant of statutory immunity is minimal.

In *Garner*, the Supreme Court recognized the IRS's power to compel a taxpayer to make disclosures in exchange for immunity.¹⁶⁶ The *Doe* Court held that the government cannot compel the production of documents without a statutory grant of use immunity.¹⁶⁷ When an individual has a valid fifth amendment claim, the IRS should pursue one of the alternative methods of obtaining information needed to calculate tax liability.¹⁶⁸ In this manner, both the government's and the individual's con-

157. See *Marchetti*, 390 U.S. at 53-54.

158. The government may argue that the tax base for income tax is much broader than for the wagering tax. The government's need for self-reporting is therefore greater.

159. *Marchetti*, 390 U.S. at 60.

160. The sixteenth amendment does not create an absolute power to require self-reporting. See *Marchetti*, 390 U.S. at 58 ("The Constitution of course obliges this Court to give full recognition to the taxing powers and to measures reasonably incidental to their exercise. But we are equally obliged to give full effect to the constitutional restrictions which attend the exercise of those powers."). Cf. *Garner*, 424 U.S. at 661-65 (fifth amendment protection does not extend to disclosures made under threat of criminal prosecution).

161. *But cf. Carlson*, 617 F.2d 518.

162. See I.R.C. § 6012 (1982).

163. See I.R.C. § 7609 (1982).

164. See *Andresen v. Maryland*, 427 U.S. 463 (1976).

165. See 18 U.S.C. §§ 6002-04 (1982). Although empowered to grant immunity, the government does not utilize this method to obtain tax information. See *Garner*, 424 U.S. at 652 n.6; *Doe*, 465 U.S. at 616 (government orally agreed not to use information but refused to follow procedures for granting use immunity).

166. *Garner*, 424 U.S. at 652 n.6.

167. *Doe*, 465 U.S. at 614-17.

168. Although requiring self-reporting is more convenient for the government, one hardly may argue that the government cannot collect revenue except through self-reporting given the government's alternatives. See *Garner*, 424 U.S. at 651 (administratively complete tax return).

stitutional interests are preserved; there is no need to balance the government's power against an individual's rights.¹⁶⁹ Application of the substantial hazards of self-incrimination standard remains necessary, however, to establish the existence of a valid fifth amendment claim.¹⁷⁰

Limiting *Carlson* to tax protestor cases would preserve taxpayers' fifth amendment rights. Applying *Carlson* in this manner, however, would create two standards for analysis of fifth amendment claims.¹⁷¹ A proper analysis should center on an individual's claim rather than his social status or the crime involved. Otherwise, courts are required to determine whether the *Carlson* approach applies when an individual is a tax protestor, claims false withholding exemptions, or claims protection for other tax crimes.¹⁷² Finding that an individual is a tax protestor is irrelevant to the issue of whether information required to be disclosed by the IRS compels the individual to incriminate himself.¹⁷³ If a taxpayer claims false withholding exemptions, requiring certain disclosures is conceded to compel self-incrimination.¹⁷⁴ Use of a balancing test only obfuscates the issue and creates a double standard — substantial hazards for nontax crimes and balancing for judicially selected tax crimes.¹⁷⁵ Establishing a separate standard by distinguishing between a tax protestor or tax crimes and nontax crimes is unfounded.¹⁷⁶

The Court's limitation of *Garner* to nontax criminal prosecutions evidences reluctance to impose a use immunity on disclosures. The federal government must balance the need for tax information against the frustration of future prosecutions.¹⁷⁷ Furthermore, a judicially imposed use immunity places the burden on the government to show evidence

169. The *Carlson* court assumed that whenever two constitutional provisions conflict, one must give way to the other. *Carlson*, 617 F.2d at 521; see *supra* note 148. A taxpayer can avoid self-incrimination by making an undisclosed taxpayer payment, if necessary. See G. Crowley & R. Manning, *Criminal Tax Fraud — Representing the Taxpayer Before Trial* 290-91 (Practicing Law Institute 1976) [hereinafter cited as Crowley & Manning].

170. Establishing the existence of a power or a right is a different issue from whether powers and rights already established conflict.

171. In *United States v. Neff*, 615 F.2d 1235, 1238-40 (9th Cir. 1980), the Ninth Circuit determined that traditional fifth amendment analysis requires inquiries into the substantial hazard of self-incrimination faced by the taxpayer and inquiries into the taxpayer's good faith. *Id.* Surprisingly, the same Justices decided *Carlson*.

172. See *supra* note 147.

173. The *Carlson* court shifts the analysis to the taxpayer's motives rather than the hazards of self-incrimination faced by the taxpayer. *Carlson*, 617 F.2d at 520. The taxpayer's motives, however, should be considered when analyzing the taxpayer's good faith.

174. *Carlson*, 617 F.2d at 522.

175. *But see Carlson*, 617 F.2d 518 (applies two standards to analyze fifth amendment claims — the substantial hazards and balancing tests).

176. *But cf. Garner*, 424 U.S. at 650-51 n.3 (reserved judgment on self-incrimination under the tax laws).

177. *Doe*, 465 U.S. at 614-17; *Marchetti*, 390 U.S. at 58-60. *But cf. Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (state grant of immunity precludes federal prosecution).

used in a criminal tax prosecution was not obtained through a taxpayer's immune disclosures.¹⁷⁸ *Garner* thus does not stand for the proposition that the fifth amendment provides more protection when invoked to avoid incrimination of a tax crime rather than of a nontax crime.

3. Failure to Disclose Incriminating Information and Statutory Immunity

Although a disclosure appears to create substantial hazards of self-incrimination, statutory protection against governmental use of the disclosure may be available. The Supreme Court has held that the federal government may compel an individual to disclose incriminating information if the individual is granted protection "as broad as the privilege against self-incrimination."¹⁷⁹ IRC section 6103 provides rules for the dissemination of tax return information to federal and state officials, and describes the purposes for which these officials may use tax return information. When a taxpayer invokes the fifth amendment on a federal income tax return to avoid incriminating himself, the taxpayer must determine whether section 6103 provides protection as broad as the taxpayer's privilege against self-incrimination.¹⁸⁰ Two initial determinations are necessary: (1) whether the criminal activity violates state law, federal law, or both; and (2) whether the activity violates a tax or nontax law.

When a criminal act violates federal law, section 6103 does not provide protection as broad as the fifth amendment.¹⁸¹ Classifying the violation of federal law as a tax or nontax crime is unnecessary because section 6103 does not provide significant protection for either type of crime.¹⁸² When an individual's act violates only a state *tax* law, section 6103 does not provide any protection because federal income tax returns are available to state officials for administering state tax laws, including criminal state tax laws.¹⁸³ When an individual's act violates only a state *nontax* law, however, section 6103 appears to provide protection against disclosure of return information to state prosecutors.¹⁸⁴ Section 6103 expressly forbids state tax officials from using disclosures on federal income tax returns for nontax criminal investigations.¹⁸⁵ There are, however,

178. Report on Administrative Procedures of the Internal Revenue Service, S. Doc. No. 94-266, 94th Cong., 2d Sess. 821, 925 (1975) [hereinafter cited as Administrative Report].

179. *Marchetti*, 390 U.S. at 58 (citing *Counselman v. Hitchcock*, 142 U.S. 547, 585 (1892)).

180. There is no evidence that Congress intended § 6103 to provide protection as broad as the privilege against self-incrimination.

181. I.R.C. §§ 6103(h) (1982) (disclosure to federal officials for tax purposes), 6103(i) (1982) (disclosure to federal officials for nontax purposes).

182. *Id.*

183. I.R.C. § 6103(d) (1982) (disclosure to state tax officials).

184. I.R.C. § 6103(d) (1982) (for the purpose of, and only to the extent necessary in, the administration of state tax laws).

185. *Id.*

several reasons why section 6103 does not provide protection as broad as the fifth amendment's protection. First, section 6103 does not establish an exclusionary rule to prevent state prosecutors from using illegally disclosed information.¹⁸⁶ Second, disclosures to state officials are permitted in emergency situations.¹⁸⁷ Third, if a state requires an individual to disclose information reflected on a federal return or to attach any portion of a federal return to a state return, section 6103 does not prohibit disclosure of the information by a state tax officer to a state nontax officer if the disclosure is authorized by state law.¹⁸⁸

4. Failure to Disclose Information and Tax Protestors

Disclosures are not privileged if a taxpayer claims the fifth amendment to protest the tax system rather than to prevent self-incrimination.¹⁸⁹ Protest material attached to the tax return, testimony of the taxpayer's witnesses, and the taxpayer's testimony can be evidence of a motive to protest taxes.¹⁹⁰ In addition, courts often review the tax return to determine whether an individual made a fifth amendment claim for the entire tax return or only in response to specific questions.¹⁹¹ In upholding tax protestors' criminal convictions for failure to file because the

186. The issue is different when a taxpayer voluntarily discloses information and then wants the information excluded from evidence. The issue then becomes a question of exclusion after having not remained silent, rather than of the right to remain silent from the outset. The issue is also different than the issue arising when the government obtains information illegally. If a taxpayer is required to provide incriminating information on a tax return, the taxpayer is compelled to be a witness against himself. In contrast, when the government makes an illegal search, the taxpayer is not compelled to be a witness against himself.

187. I.R.C. § 6103(i)(3)(B)(i) (1982).

188. I.R.C. § 6103(p)(8)(B) (1982). A taxpayer faces additional difficulties in a state that requires taxpayers to attach a copy of their federal tax return with their state tax return. If the taxpayer attaches a copy of the federal return, *Garner* indicates that the disclosures are voluntary and beyond the fifth amendment's protection. On the other hand, if the taxpayer refuses to attach his federal return or attaches a federal return with the incriminating information deleted, the state may subpoena the taxpayer's federal return. Following the reasoning in *Doe*, the contents of a withheld federal return are prepared voluntarily, and thus unprivileged. The act of producing the federal return likewise is unprivileged if the existence, the possession, and the authenticity of the return are foregone conclusions. *Doe*, 465 U.S. at 614 n.13. These three requirements are most likely foregone conclusions if a federal tax return, with the incriminating information deleted, is attached to a state tax return.

189. *United States v. Carlson*, 617 F.2d 518, 523 (9th Cir.), *cert. denied*, 449 U.S. 1010 (1980). In response to *Carlson*, one commentator noted that *Quinn v. United States*, 349 U.S. 155 (1955), held that one may assert one's fifth amendment privilege and exercise one's first amendment rights simultaneously. The commentator also noted the court's conclusion that *Carlson* claimed the fifth amendment in bad faith contradicted the court's finding that disclosure created substantial hazards of self-incrimination. Note, *United States v. Neff* and *United States v. Carlson*: Reconciling the Fifth Amendment Privilege Against Self-Incrimination with the Duty to File Tax Returns, 5 G.M.U.L. REV. 247, 257-58 (1982).

190. *United States v. Neff*, 615 F.2d 1235, 1240 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980).

191. *Id.* at 1238.

fifth amendment was claimed in bad faith, courts often bypass fifth amendment analysis and conclude that a tax return on which a wholesale fifth amendment claim is made, and from which tax liability can not be calculated, is not a tax return.¹⁹²

At least one United States Court of Appeals has recognized the deficiency in bypassing fifth amendment analysis when the privilege is claimed in response to specific questions posed on a tax return.¹⁹³ In *United States v. Neff*,¹⁹⁴ the Ninth Circuit required independent fifth amendment analysis of the substantial hazards of self-incrimination faced by a taxpayer who claimed the fifth amendment in response to more than twenty-five questions on an income tax return.¹⁹⁵ Noting that the questions asked on the income tax return were not obviously incriminating, the court required positive disclosure of hidden dangers.¹⁹⁶ Because the taxpayer only desired to protest taxes, the court determined that the taxpayer did not face substantial hazards of self-incrimination and did not claim the fifth amendment in good faith.¹⁹⁷

B. *Methods of Exercising the Fifth Amendment*

1. Introduction

The Supreme Court consistently has recognized the government's power to collect taxes and has recognized the essential role of tax payment and return filing in the federal scheme of taxation.¹⁹⁸ As a result, the Court often has placed the government in a no-lose situation. The *Sullivan* Court refused to recognize a fifth amendment privilege when there was a complete failure to file an income tax return,¹⁹⁹ and the *Garner* Court permitted disclosures made on an income tax return to be admitted in the taxpayer's nontax criminal trial.²⁰⁰ Although *Sullivan* and *Garner* appear to leave the taxpayer with little protection, the Court nevertheless has recognized the taxpayer's right to claim the fifth amend-

192. *Id.*; see *United States v. Irwin*, 561 F.2d 198, 201 (10th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978).

193. *United States v. Neff*, 615 F.2d 1235, 1239 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980).

194. 615 F.2d 1235 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980).

195. *Id.* at 1238-39.

196. *Id.* at 1240-41. A taxpayer apparently does not have to explain why answers to questions are self-incriminating if the circumstances suggest that they are incriminating. Because the questions on a return are neutral on their face and are not directed at those inherently suspect of criminal activity, however, courts are unlikely to uphold one's claim without some indication why the taxpayer would be incriminated. The policy behind requiring some type of showing is to prevent taxpayers from becoming the final arbiters of the validity of their claims. *Id.* at 1239-41.

197. *Id.* at 1240-41 n.6.

198. See, e.g., *Sullivan*, 274 U.S. 259.

199. *Id.*; see also *Garner*, 424 U.S. at 650-51 n.3 ("nothing we say here questions the continuing validity of *Sullivan's* holding that returns must be filed").

200. *Garner*, 424 U.S. 648.

ment in response to incriminating questions under the proper circumstances.²⁰¹

In *Marchetti*, the Court upheld the taxpayer's fifth amendment claim as a defense to a prosecution for failure to file or pay tax.²⁰² The Court reasoned that every requirement of the wagering tax scheme was incriminating.²⁰³ Consistent with recognition of the government's power to collect taxes, however, *Marchetti* held that the fifth amendment does not permit a taxpayer to avoid tax liability.²⁰⁴ Although the taxpayer was not required to incriminate himself by paying the wagering tax, the government maintained the power to collect the wagering tax based on independently gathered information or through granting the taxpayer immunity from the incriminating aspects of paying the wagering tax.²⁰⁵

2. Claiming the Fifth Amendment on an Income Tax Return

That an individual may claim the fifth amendment in response to specific disclosures required on an income tax return is well settled.²⁰⁶ There remains, however, disagreement over the validity of fifth amendment claims for disclosures other than those approved in *Garner* and *Sullivan*.²⁰⁷ *Garner* may have enhanced this uncertainty by noting that some types of information are so neutral that the fifth amendment rarely, if ever, protects against their disclosure.²⁰⁸ One major area of disagreement involves the validity of fifth amendment claims in response to questions concerning the amount of a taxpayer's income.²⁰⁹

201. *Sullivan*, 274 U.S. at 263-64; *Garner*, 424 U.S. at 653.

202. *Marchetti*, 390 U.S. 39; *Grosso*, 390 U.S. 62.

203. *Marchetti*, 390 U.S. at 48-49.

204. *See id.* at 60-61.

205. *Id.* at 59-61.

206. *See Garner*, 424 U.S. at 653; *Sullivan*, 274 U.S. at 263-64.

207. *Compare Sullivan*, 274 U.S. at 263-64 (claiming one's privilege instead of disclosing the amount of one's income is an extreme and extravagant application of the fifth amendment) with *United States v. Barnes*, 604 F.2d 121, 148 (2d Cir. 1979) (the right to make a valid claim of privilege is available even as to the amount of a taxpayer's income), *cert. denied*, 446 U.S. 907 (1980). Some courts simply reject the fifth amendment's application to certain types of disclosures. Although the fifth amendment may not protect against certain disclosures, this conclusion should result from a finding that the disclosure does not create substantial hazards of self-incrimination. Separating disclosures into types in this comment serves to identify the hazards of self-incrimination that may result from certain types of disclosures. There is no implication that certain types of disclosures are more incriminating than others. This author takes the position that all types of disclosures are incriminating under certain circumstances.

208. *Garner*, 424 U.S. at 650-51 n.3 (citing *California v. Byers*, 402 U.S. 424 (1971)). *Garner* does not refer to the substantial hazards of self-incrimination standard. The *Garner* Court, however, fully recognized the fifth amendment's applicability to disclosures on income tax returns. *Id.* at 649-54.

209. *See United States v. Perkins*, 746 F.2d 705, 710 (11th Cir. 1984) (tax protestor — § 7203 prosecution — fifth amendment does not protect the amount of one's income from disclosure); *United States v. Turk*, 722 F.2d 1439, 1440-41 (9th Cir. 1983) (apparent tax protestor — § 7203 prosecution — fifth amendment not applicable to income, citing *Sullivan*), *cert. denied*, 105 S. Ct. 86 (1984); *United States v. Schiff*,

a. *Occupation*

The instructions for filing form 1040 are silent regarding the disclosure of a taxpayer's occupation.²¹⁰ There is, however, little doubt that a taxpayer may claim the fifth amendment instead of disclosing an incriminating occupation.²¹¹ *Sullivan* suggests that a taxpayer's occupation is privileged, and *Garner* reinforces the fifth amendment's application to a taxpayer's occupation.²¹²

When a taxpayer has both a legal and illegal occupation, there is uncertainty whether disclosure of only the legal occupation satisfies the reporting requirement.²¹³ Because form 1040 requires disclosure of occupation in the singular,²¹⁴ disclosure of a taxpayer's primary occupation should satisfy the reporting requirement. If the taxpayer's primary occupation is illegal, the taxpayer must disclose that occupation or proffer a fifth amendment response.²¹⁵ A taxpayer should not be required to dis-

612 F.2d 73, 83 (2d Cir. 1979) (tax protestor — a taxpayer can comply with the tax laws and exercise the fifth amendment by listing the amount, not the source, of income from illegal sources); *United States v. Brown*, 600 F.2d 248 (10th Cir.) (tax protestor — § 7203 prosecution — amount not protected), *cert. denied*, 444 U.S. 917 (1979); *United States v. Johnson*, 577 F.2d 1304, 1310 n.3, 1311 (5th Cir. 1978) (tax protestor — § 7203 prosecution — amount not protected — the jury instruction stated income from criminal activities is protected); *United States v. Oliver*, 505 F.2d 301, 303 (7th Cir. 1974) (narcotics violation — § 7201 prosecution — amount not protected — taxpayer cites *Marchetti*); *United States v. Mirelez*, 496 F.2d 915 (5th Cir.) (omission of gross income from sale of heroin — § 7206 prosecution — rejected fifth amendment claim quoting *Sullivan*), *cert. denied*, 419 U.S. 1069 (1974); *Bershesky v. Commissioner*, 46 TCM 906, 909-10 (1983) (professional gambler — § 7203 prosecution — source protected — amount unprotected). *But see* *United States v. Green*, 757 F.2d 116, 122 (7th Cir. 1985) (tax protestor — § 7203 prosecution — amount of income protected if disclosure may lead to criminal prosecution — compare with *Oliver* above); *United States v. Conforte*, 692 F.2d 587 (9th Cir. 1982) (not tax protestor — § 6211(a) — not as strict when taxpayer makes legitimate claim); *United States v. Barnes*, 604 F.2d 121, 148 (5th Cir. 1979) (not tax protestor — narcotics prosecution — right to make claim of privilege as to amount of taxpayer's income, citing *Sullivan*), *cert. denied*, 446 U.S. 907 (1980); *United States v. Paepke*, 550 F.2d 385 (7th Cir. 1977) (narcotics sales — § 7206 prosecution — source and amount of income protected if disclosure tends to incriminate, citing *Garner*).

210. Dept. of Treas., I.R.S., Package X, Informational Copies of Federal Tax Forms at 24-25 (1984) [hereinafter cited as Package X].

211. *Sullivan*, 274 U.S. at 263-64.

212. *Garner*, 424 U.S. at 650.

213. For example, a fisherman may make a living primarily from fishing but also may receive compensation for smuggling activities.

214. Package X, *supra* note 210, at 19. The instructions require disclosure of "your occupation(s) in the spaces in the upper right corner." *Id.* at 25. The use of the plural option for occupation, however, seems to apply when married individuals file a joint return, and each spouse must disclose an occupation. The form provides one space for your occupation and one space for your spouse's occupation.

215. *See* I.R.C. § 6011 (1982); Package X, *supra* note 210, at 19 ("Your Occupation"). Determination of one's primary occupation creates substantial problems. If a fisherman only engages in smuggling activity several times in one year, then based on the time spent on each occupation, one could reasonably conclude that fishing was the taxpayer's primary occupation. However, if one analyzes the gross receipts from

close or proffer a fifth amendment response for either a legal or an illegal secondary occupation. Reporting a secondary legal occupation, however, instead of a primary illegal occupation, may expose the taxpayer to prosecution for filing a false statement.²¹⁶ Two considerations make the success of such a prosecution unlikely. First, form 1040 requires disclosure of a taxpayer's occupation, not occupations. Second, determination of a taxpayer's primary occupation may vary depending upon which factors are controlling in that determination.²¹⁷ Both considerations make it difficult for the government to prove beyond a reasonable doubt that the taxpayer intentionally violated a known legal duty.²¹⁸

b. Exemptions

Whether the fifth amendment protects against disclosure of the amount of an individual's exemptions is unclear.²¹⁹ Perhaps the only legitimate reason for claiming the fifth amendment, instead of disclosing the amount of one's exemptions, is that the taxpayer already has claimed too many withholding exemptions fraudulently.²²⁰ In that circumstance, if the individual discloses the proper amount of exemptions and pays the tax due, a criminal prosecution is unlikely. If the individual claims the fifth amendment and refuses to give the IRS any information from which tax liability can be calculated, however, the individual faces a variety of criminal charges in addition to failing to file a return, even if the court finds the fifth amendment claim is valid.²²¹

When an individual claims the fifth amendment instead of disclosing the correct amount of exemptions or providing any information from which tax liability can be calculated, a court should apply the substantial hazards test and recognize the validity of the claim. Recognition of the fifth amendment privilege merely prevents a prosecution for failure to file a return.²²² Once an individual's fraudulent scheme is discovered, the government can prosecute for the false withholding statement, tax fraud,

each activity, the illegal activity may appear to be the taxpayer's primary occupation. Moreover, one's illegal activities may not even constitute an occupation.

216. I.R.C. § 7206 (1982).

217. *See supra* note 215.

218. *See United States v. Pomponio*, 429 U.S. 10, 12 (1976).

219. *See Carlson*, 617 F.2d 518. In *Carlson*, the Ninth Circuit held that the fifth amendment is not available when claimed as part of a scheme to evade paying one's tax liability. *Carlson*, 617 F.2d at 523. The *Carlson* decision, however, may apply only to a very narrow set of circumstances. *See supra* notes 134-78 and accompanying text for the standard of self-incrimination that may apply to prior tax crimes.

220. If one claims the fifth amendment in the box provided on form 1040 instead of the number of one's exemptions, there are very few underlying crimes that would support such a claim. The most obvious crime is overstating one's exemptions. *See Carlson*, 617 F.2d 518; I.R.C. § 7205 (1982).

221. *See, e.g.*, I.R.C. § 7205 (1982). Although *Carlson* claimed ninety-nine withholding exemptions, fewer exemptions also would have resulted in no tax being withheld. Therefore, all the IRS would know when looking at one's return is that one claimed an amount of exemptions large enough to preclude withholding.

222. *Carlson* was prosecuted for failure to file rather than tax fraud or filing a false with-

and a variety of other crimes.²²³ There can be little objection to preclusion of prosecution for failure to file when the taxpayer has filed a return and has claimed the fifth amendment instead of disclosing information that presented substantial hazards of self-incrimination.²²⁴ Any deterrent effect criminal prosecutions may have is maintained by prosecution for providing false withholding exemptions or other tax crimes. By recognizing a taxpayer's fifth amendment claim, courts avoid the fiction that a taxpayer failed to file a return. In addition, courts avoid the inconsistency of applying a balancing test for tax crimes and the substantial hazards of self-incrimination test for other crimes.

c. Income — amount, nature, and source

Proper disclosure of income requires a taxpayer to reveal the nature,²²⁵ the amount,²²⁶ and often the source²²⁷ of his income. One method of determining whether a disclosure creates substantial hazards of self-incrimination is to determine whether the disclosure would be admissible against the taxpayer in a criminal trial. Federal Rule of Evidence 401 requires that evidence proffered tend to make the existence of any fact that is of consequence to the determination of an action more probable than without the evidence.²²⁸ A disclosure that an individual derived income in an undisclosed amount and from an undisclosed source makes it probable that the individual is involved in an illegal business. Disclosure of substantial income without a legitimate source also makes involvement in an illegal activity more probable than without the disclosure. A taxpayer therefore must analyze the incriminating aspects of disclosing the nature, amount, and source of his income.

There are a variety of circumstances in which disclosure of the nature of an individual's income is incriminating. Disclosure of member-

holding statement. See *Carlson*, 617 F.2d at 520 n.3 (the government conceded *Carlson* could be prosecuted under I.R.C. § 7205).

223. See, e.g., I.R.C. § 7206 (1982).

224. See *Neff*, 615 F.2d at 1238-39 (reliance upon the definition of a tax return is inappropriate because it lacks independent fifth amendment analysis). But cf. *Carlson*, 617 F.2d at 523 n.6 (the fifth amendment may never protect against claiming too many withholding allowances because of the character and urgency of the tax laws). Interestingly, the same three-judge panel decided *Carlson* and *Neff*.

225. The nature and type of a taxpayer's income is disclosed when an individual places a number or fifth amendment response on form 1040 in response to one of the income categories. The nature of a taxpayer's income also is disclosed by attaching schedules that are required for certain types of income such as dividend, interest, or partnership income. See Package X, *supra* note 210, at 73-74, 79.

226. Disclosure of the amount of an individual's income is accomplished by placing a number on the line for total income. See *Id.* at 19, lines 7-22.

227. The source of a taxpayer's income is disclosed by informing the government from whom income is derived. For example, Schedule E (Form 1040) requires disclosure of the name and employer identification number of a partnership from which income is derived. See *Id.* at 80, Part II, column (a). Many of the incriminating aspects of disclosing the nature and source of one's income are analogous to the incriminating aspects of disclosing one's occupation.

228. FED. R. EVID. 401.

ship in a partnership sometimes suggests conspiratorial involvement.²²⁹ If an individual involved in an illegal business discloses that income is derived from a sole proprietorship, partnership, or corporation, the disclosure is admissible to substantiate a prosecutor's claim that the individual was involved in an illegal business.²³⁰

Different schedules are required for certain types of income. If a taxpayer believes that disclosing the nature of his income is privileged, attaching income schedules claiming the fifth amendment likewise would incriminate the taxpayer. The hazards of self-incrimination created by filing supplementary schedules are similar to those of filling in a specific income line on form 1040 because the mere claiming of the fifth amendment privilege on a schedule or income line discloses the nature of a taxpayer's income.

A taxpayer may try to disclose the nature of illegal income in a manner that avoids raising suspicion.²³¹ For example, an individual deriving income from an illegal activity may describe the income's nature as miscellaneous or sales.²³² Although this approach avoids the attention given to a tax return that claims the fifth amendment, such a disclosure exposes an individual to a false statement prosecution.²³³ Moreover, such a voluntary disclosure creates substantial hazards of self-incrimination because it allows a prosecutor in a future criminal trial to challenge the taxpayer to bring forth witnesses that will rebut the prosecution's theory that the miscellaneous income was derived from illegal activity.²³⁴ If the nature of a taxpayer's income is incriminating, a taxpayer should invoke the fifth amendment either by claiming the fifth amendment, or by disclosing the amount of the taxpayer's income from illegal activity, on the line for total income. Before disclosing the amount of an individual's income, however, the incriminating aspects of disclosing that amount require analysis.

Perhaps the most common reason for claiming the fifth amendment, rather than disclosing the amount of a taxpayer's income, is to prevent

229. *Cf. Garner*, 424 U.S. at 650-51 (conspiratorial involvement).

230. *United States v. Barnes*, 604 F.2d 121, 148 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980). A different result would occur if *only* a defendant has evidence to contradict the prosecutor's claim. *Id.* Given the reasoning in *Barnes*, however, a court is unlikely to find that only a defendant possesses information to contradict the government's theory.

231. *See* Package X, *supra* note 210, at 73-75, 77, 79, 81.

232. *See Barnes*, 604 F.2d at 146-47.

233. *See United States v. DiVarco*, 343 F.Supp. 101 (N.D. Ill. 1972) (income reported as commissions paid by corporation, when no commission was ever paid); *aff'd*, 484 F.2d 670 (7th Cir. 1973). Most likely, a description that is not false will result only in a voluntary disclosure of the description. *See Barnes*, 604 F.2d 121 (2d Cir. 1979).

234. *See Barnes*, 604 F.2d at 146-47. A constitutional challenge will prevail "if either the defendant alone has the information to contradict the government evidence referred to or the jury 'naturally and necessarily' would interpret the summation as a comment on the failure of the accused to testify." *United States v. Bubar*, 567 F.2d 192, 199 (2d Cir.), *cert. denied*, 434 U.S. 872 (1977).

disclosure of income derived from illegal activity.²³⁵ In criminal trials, courts admit evidence concerning the sudden acquisition of large amounts of income because it is probative of involvement in illegal activity in which pecuniary gain is the usual motive.²³⁶ After the *Sullivan* dictum, refusing to disclose one's income became an extreme, if not extravagant, application of the fifth amendment.²³⁷ *Garner*, however, indicates that the fifth amendment protects against disclosure of a substantial amount of income earned from gambling.²³⁸ The Court found that the taxpayer's professional occupation and substantial income were introduced to establish that *Garner* did not have an innocent relationship with other conspirators.²³⁹ The Court then turned to the issue of whether *Garner* waived his privilege with regard to the specific disclosures made when he could have claimed the fifth amendment.²⁴⁰

The *Garner* Court identified two disclosures and then stated that the taxpayer was privileged to claim the fifth amendment for the "specific disclosures made."²⁴¹ The Court apparently assumed both of *Garner*'s disclosures were protected by the fifth amendment. The Court noted that the case did not present an occasion for deciding what types of information were rarely, if ever, protected.²⁴² If the taxpayer's disclosures were not protected, the Court would not have framed the issue as whether the government compelled the taxpayer "to incriminate himself with regard to specific disclosures made on his return when he could have claimed the Fifth Amendment privilege instead."²⁴³ Finally, if the Court intended to avoid the issue of the fifth amendment's application to the taxpayer's income, the Court would have reserved its opinion expressly.

Courts have cited *Garner* to support opposing positions on the fifth amendment's applicability when the fifth amendment is invoked to protect against disclosing the amount of one's income.²⁴⁴ When deciding tax protestors' fifth amendment claims for the amount of their income, few courts even acknowledge that the fifth amendment applies to the amount of a taxpayer's income.²⁴⁵ Instead of analyzing the hazards of self-incrimination faced by tax protestors, courts bypass fifth amendment anal-

235. The cases indicate that income from illegal activity, *see, e.g., Garner*, 424 U.S. 648, and past tax crimes, *see, e.g., Carlson*, 617 F.2d 518, are the main reasons for claiming the fifth amendment on an income tax return.

236. *Barnes*, 604 F.2d at 146-47.

237. *Sullivan*, 274 U.S. at 263-64.

238. *Garner*, 424 U.S. at 649-50.

239. *Id.* at 650.

240. *Id.* at 652-53.

241. *Id.*

242. *Id.* at 650-51 n.3.

243. *Id.* at 653.

244. *See supra* note 209.

245. *Id.*

ysis by finding the amount of a taxpayer's income unprivileged.²⁴⁶ In cases not involving tax protestors, however, courts acknowledge that the fifth amendment applies to a taxpayer's claim for the amount of his income.²⁴⁷ The conflicting decisions on the fifth amendment's application to the amount of one's income are reconcilable because taxpayers claiming the fifth amendment solely to protest taxes generally do not face substantial hazards of self-incrimination in regard to the amount of their income.²⁴⁸

Disclosing the source of a taxpayer's income may incriminate the taxpayer. For instance, identifying individuals who are associated with the taxpayer's income producing activities may inform the government of the taxpayer's coconspirators.²⁴⁹ If an individual discloses that he received dividends from a specific corporation, the IRS can subpoena the corporation's records to determine the amount of stock owned by the taxpayer.²⁵⁰ The stock may have been acquired with unreported income or with income indicating other illegal conduct.²⁵¹ Disclosing the sale of assets likewise may reveal that an individual's net worth is unsupported by the amount of income declared in prior years.

d. Identity: Name, Address, and Social Security Number

Personal identification may raise hazards of self-incrimination whether a taxpayer's name, address, or social security number is disclosed.²⁵² In *Baird v. Koerner*,²⁵³ the IRS brought an action to compel an attorney to disclose the identity of a client who employed the attorney to make an undisclosed taxpayer payment. The Ninth Circuit held that a client's identity is privileged under the attorney-client privilege when the substance of an incriminating communication is known and the client is unknown.²⁵⁴ The court reasoned that identification of the client would convey information ordinarily within the privilege.²⁵⁵ The only method of preserving the privilege is to protect the client's identity.²⁵⁶

Likewise, the IRS can ascertain whether a taxpayer has filed an in-

246. See, e.g., *United States v. Wade*, 585 F.2d 573, 574 (5th Cir. 1978), cert. denied, 440 U.S. 928 (1979).

247. See, e.g., *Barnes*, 604 F.2d at 147-48.

248. See *Neff*, 615 F.2d at 1238-41.

249. See *Garner*, 424 U.S. at 650-51 (conspiratorial involvement).

250. See I.R.C. § 7609 (1982).

251. The net worth method could be used to determine the amount of income earned by the taxpayer. See generally *Holland v. United States*, 348 U.S. 121 (1955).

252. This author analyzes one's name, address, and social security number together because all identify the taxpayer.

253. 279 F.2d 623 (9th Cir. 1960).

254. *Id.* at 631-32. The four exceptions to the general rule are: 1) the client voluntarily subjects himself to the jurisdiction of the court; 2) an identification relating to an employment by some third person, not the client or his agent; 3) employment of an attorney with respect to future criminal or fraudulent transactions; and 4) the attorney himself being a defendant in a criminal matter.

255. *Id.* at 632.

256. *Id.* at 633.

come tax return. If one files a late return, the IRS knows that the taxpayer did not file when required.²⁵⁷ Revealing one's name on the late return allows the IRS to identify the taxpayer who failed to file a timely return. Sending the IRS a delinquent tax return that identifies a taxpayer thus creates substantial hazards of self-incrimination for failing to file a timely income tax return. In such a situation, the IRS is not under an obligation to refrain from prosecution.²⁵⁸

If a delinquent tax return discloses a tax deficiency, a taxpayer may have incriminated himself for tax fraud.²⁵⁹ A taxpayer should analyze each disclosure carefully even though the taxpayer takes the position that his name is privileged.²⁶⁰ For example, a court may find the taxpayer's identity is not privileged and the voluntary disclosures are admissible, along with the taxpayer's name, as evidence of a failure to file or of tax fraud. The government also may provide immunity from a failure to file prosecution to obtain the taxpayer's name, and then use the taxpayer's voluntary disclosure of a tax deficiency to prosecute for tax fraud.²⁶¹ On the other hand, if the taxpayer decides to make a "voluntary disclosure," then the taxpayer should disclose as much information as possible. The purpose behind full disclosure is to negate the government's proof of willfulness, which is needed to establish an intentional failure to file.²⁶²

3. Failing to File a Return

Sullivan and *Garner* established the general rule that an individual must file income tax returns.²⁶³ *Marchetti*, however, held that the fifth amendment protects an individual from prosecution for failure to file a wagering tax return.²⁶⁴ Income tax returns have been distinguished from

257. The situation may be different when a taxpayer fails to file a return at all for prior years and then timely files one for the current year. The IRS is not notified necessarily thereby that the taxpayer did not file for the previous years. The sophistication of IRS computers, however, may make notification of the past failures automatic eventually. Depending on the disclosures for the current year, it may be fairly obvious that returns were required in the prior years. Moreover, a taxpayer may face substantial hazards of self-incrimination by merely filing after years in which the taxpayer filed to file.

258. R. FINK, *TAX FRAUD* § 14.03 (Matthew Bender & Co. 1980).

259. See I.R.C. § 7201 (1982).

260. The importance of analyzing each disclosure should not be overlooked. One cannot stop analyzing the disclosures when it appears that they will not be incriminating by themselves. A later finding that some claims are invalid could change the incriminating aspects of disclosures made on the assumption of the privileged character of other disclosures.

261. See *Doe*, 465 U.S. at 617 n.17 (to satisfy the requirements of the fifth amendment, a grant of immunity need only be as broad as the privilege against self-incrimination). If the government grants immunity from prosecution for failure to file a return, the government may then try to prosecute the taxpayer for other crimes the taxpayer voluntarily revealed evidence of on the return, such as gambling, narcotics, or other crimes for which pecuniary gain is the motive.

262. I.R.C. § 7203 (1982).

263. *Sullivan*, 274 U.S. at 263-64; *Garner*, 424 U.S. at 650-51 n.3.

264. *Marchetti*, 390 U.S. at 60-61.

wagering tax returns on the ground that federal income tax returns are not directed at a group inherently suspect of criminal activity.²⁶⁵ Most courts therefore conclude that the fifth amendment cannot protect a taxpayer against filing an income tax return because the return is not directed at those inherently suspect of criminal activities.²⁶⁶ Unfortunately, this conclusion avoids analysis of the hazards of self-incrimination faced by taxpayers involved in criminal activity. The *Marchetti* Court found gamblers to be a group inherently suspect of criminal activities because every requirement of the wagering tax return required self-incrimination.²⁶⁷ Similarly, if every aspect of filing an income tax return is incriminating, a taxpayer should be privileged from filing an income tax return.²⁶⁸ A taxpayer's failure to satisfy the "inherently suspect of criminal activity" standard in the same manner as a gambler should not preclude the fifth amendment's protection.

To determine whether every aspect of filing a return incriminates a taxpayer, the incriminating effect of disclosing one's occupation,²⁶⁹ income,²⁷⁰ and identity must be determined.²⁷¹ Because an income tax return requires disclosures regarding income, many individuals will be incriminated of a crime motivated by economic gain.²⁷² In such cases, the taxpayer's occupation and income usually are privileged. The major issue thus is whether disclosure of the taxpayer's identity creates substantial hazards of self-incrimination.²⁷³ If the courts refuse to find fifth amendment protection for a taxpayer's identity, a taxpayer must file a return that discloses his identity and informs the government of involvement in an illegal occupation motivated by economic gain.

The hazards of self-incrimination created by filing a fifth amendment return that discloses a claimant's identity depend upon the limits placed on the government's use of the taxpayer's identity.²⁷⁴ Section

265. See, e.g., *Garner*, 424 U.S. at 658-61.

266. *Id.* at 659-61.

267. *Marchetti*, 390 U.S. at 48-49.

268. Wagering being an occupation inherently suspect of criminal activity, every aspect of the wagering tax requirements is incriminating. Although *Marchetti* does not discuss whether the government would accept a return that did not identify the taxpayer, nonidentification is also incriminating.

269. See *supra* notes 210-18 and accompanying text.

270. See *supra* notes 225-51 and accompanying text.

271. See generally *supra* notes 252-62 and accompanying text.

272. Income tax returns generally do not elicit information regarding crimes such as murder or rape. Income tax returns elicit economic information and, therefore, crimes in which taxpayers intend to make a profit are the crimes about which income tax returns require disclosures.

273. Other disclosures such as a taxpayer's exemptions, see *supra* notes 210-24 and accompanying text, are not considered at this point. Although such disclosures may not create substantial hazards of self-incrimination, disclosing such incidental items does not prevent a taxpayer from making an undisclosed taxpayer fifth amendment claim.

274. The government must provide protection as broad as the fifth amendment's protection before a taxpayer is required to disclose incriminating information. See *Marchetti*, 390 U.S. at 58.

6103 does not preclude use of tax information for federal criminal investigations.²⁷⁵ The IRS volunteers the identity of taxpayers suspected of criminal activity by sending a taxpayer's name to the Department of Justice noting that the IRS may have incriminating information regarding the taxpayer.²⁷⁶ The Department of Justice may request the taxpayer's return and make him the target of a strike force.²⁷⁷ From the return, the Department of Justice is provided the identity of a potentially unknown criminal and learns that the taxpayer may be involved in a crime motivated by economic gain. A return disclosing a taxpayer's identity but claiming the fifth amendment for the taxpayer's occupation and income therefore falls within the definition of what constitutes a substantial hazard of self-incrimination²⁷⁸ because a taxpayer may become the target of a strike force due to filing a fifth amendment return.²⁷⁹

In this situation, the incriminating information provided on an income tax return is similar to the incriminating information provided by a gambling tax return.²⁸⁰ The only difference is that filing a gambling tax return reduces the categories of crimes a taxpayer may have committed to gambling related offenses.²⁸¹ This difference, however, should not produce a result different than the one in *Marchetti*. As in *Marchetti*, taxpayers reasonably can expect that filing a fifth amendment income tax return will "significantly enhance the likelihood of their prosecution for future acts."²⁸²

Failing to file income tax returns allows taxpayers to determine the validity of their own fifth amendment claims. Consequently, courts strain to invalidate fifth amendment claims that are made in lieu of filing a return.²⁸³ The *Sullivan* Court rejected the fifth amendment's application to the filing of an income tax return and stated that the taxpayer "could not on [the account of a return requiring incriminating answers]

275. I.R.C. § 6103(i)(1) (1982).

276. See Administrative Report, *supra* note 178, at 913-15. The author states that the combined intelligence system, in which tax returns became inextricably entangled, comprises the most essential feature of the strike force operation. *Id.* at 903.

277. *Id.* at 913.

278. See *Marchetti*, 390 U.S. at 48.

279. For a discussion of the historical background of strike forces see Administrative Report, *supra* note 178, at 900-13.

280. Although income tax returns are not directed at taxpayers inherently suspect of criminal activity, once a taxpayer claims the fifth amendment on an income tax return he is equally suspect of criminal activity as an individual who filed a gambling tax return.

281. When a taxpayer files a gambling tax return, the crimes the taxpayer is incriminated of necessarily relate to gambling. When a taxpayer files a fifth amendment tax return, however, the list of crimes the taxpayer may have committed is expanded to other economic crimes such as prostitution and drug trafficking.

282. *Marchetti*, 390 U.S. at 54. Whether filing a fifth amendment tax return readily provides evidence that will facilitate a taxpayer's conviction is not settled. See *id.* Cf. *Griffin v. California*, 380 U.S. 609 (1965) (impermissible to comment on a criminal defendant's failure to testify).

283. See, e.g., *Carlson*, 617 F.2d at 520-23 (fifth amendment inapplicable although taxpayer faced real and appreciable hazard of self-incrimination).

refuse to make any return at all."²⁸⁴ This holding is based on the policy that a taxpayer can invoke the fifth amendment for specific privileged answers that incriminate the taxpayer.²⁸⁵ The Court assumed, however, that certain disclosures were not privileged.²⁸⁶ The Court therefore had no reason to consider what a taxpayer should do when every disclosure incriminated the taxpayer.²⁸⁷ The assumption that certain disclosures are not privileged made the requirement of filing a return logical.

The Supreme Court's recent analyses of fifth amendment claims are more sophisticated than in *Sullivan*. In *Sullivan*, the Court noted that application of the fifth amendment to the amount of a taxpayer's income is extreme and extravagant.²⁸⁸ In *Garner*, however, the Court assumed a taxpayer's income was privileged.²⁸⁹ *Marchetti* found filing a gambling tax return privileged. Analogous to the act of filing a return, the *Doe* Court found the act of producing documents privileged under the fifth amendment.²⁹⁰ One commentator recognizes that the government's current use of income tax returns makes the filing of such returns potentially incriminating for today's taxpayer, although there were no substantial hazards of self-incrimination in *Sullivan*.²⁹¹ The government's power to collect tax and the need to determine the validity of fifth amendment claims, however, leads the same commentator to suggest that *Sullivan* would be affirmed today.²⁹²

The payment of tax and the filing of a return are not causally connected. A taxpayer may pay tax without filing a return and vice versa. The filing of a return and disclosure of tax information thereon function to permit the government to review the basis of an individual's tax payments. A taxpayer must prepare a return, or make a similar calculation, to determine the exact amount of his annual liability. The filing of the return with the final tax payment is, of course, unnecessary for the IRS to receive the tax payment. The government's power to collect tax, therefore, does not require the filing of an income tax return from individuals who are incriminated by filing.

If a taxpayer does not file a return, but instead invokes the fifth amendment, there is justified concern over the taxpayer's determination that his fifth amendment claim is valid. If masses of taxpayers were to refuse to file returns, the IRS would face serious difficulty in determining

284. *Sullivan*, 274 U.S. at 263.

285. *Id.*

286. *Id.* at 263-64 (applying fifth amendment to the amount of a taxpayer's income would be extreme or extravagant).

287. *See Marchetti*, 390 U.S. at 48-49 (distinguishing *Sullivan*).

288. *Sullivan*, 274 U.S. at 263-64.

289. *Garner*, 424 U.S. at 649-50, 653.

290. *Doe*, 465 U.S. at 612-14.

291. *See* Administrative Report, *supra* note 182, at 919.

292. *See* Note, *Raiding the Confessional — The Use of Income Tax Returns in Nontax Criminal Investigations*, 48 *FORDHAM L. REV.* 1251 (1980); Mansfield, *supra* note 146, at 103, 119-20. *But see* Administrative Report, *supra* note 178, at 928.

which taxpayers had substantial claims for failing to file.²⁹³ The number of taxpayers with substantial claims is presumably a small percentage of the total population, and many of these taxpayers are not filing returns or paying income taxes. The real problem with recognizing a privilege for those who are incriminated by filing a return is that many unprivileged taxpayers also may refuse to file.

An *undisclosed taxpayer fifth amendment claim* recognizes the government's right to determine the validity of fifth amendment claims without requiring a taxpayer to file a return.²⁹⁴ A taxpayer's attorney could advise the IRS that an undisclosed taxpayer asserts the fifth amendment's privilege instead of filing a return or the attorney could file a return for the taxpayer with fifth amendment claims in response to specific incriminating questions. If the IRS challenges the taxpayer, a federal district court could determine the claim's validity in an action similar to one in which the IRS challenges the fifth amendment's application to a specific disclosure on a return.²⁹⁵ In this way, taxpayers with invalid claims would not be encouraged to claim the fifth amendment because the claimant would have to pay the tax liability, and invalid claims would not pass judicial scrutiny.²⁹⁶ Meanwhile, taxpayers with valid claims would be protected against self-incrimination. Moreover, an undisclosed taxpayer's fifth amendment claim facilitates the policy in favor of resolving fifth amendment claims by judicial determinations.

When a taxpayer fails to file because disclosure of his income and occupation are self-incriminating, a subsequent effort to comply with the IRC is difficult. The taxpayer's identity is privileged because disclosure provides the government information sufficient to prosecute the taxpayer for failure to file.²⁹⁷ The majority of the remaining information required by the return is also privileged.²⁹⁸ If analysis of the remaining information reveals all the remaining disclosures are privileged, the taxpayer should make an undisclosed taxpayer payment.²⁹⁹ The taxpayer should be able to limit his criminal exposure, if any, to failure to file a return.³⁰⁰

The privilege against filing a return only provides limited protection when the initial failure to file was invalid. If the IRS discovers the taxpayer has failed to file a return, the privilege arising from the previous

293. *Cf. Carlson*, 617 F.2d at 520.

294. Although the Constitution does not require "a preliminary-ruling procedure for testing the validity of an asserted privilege, . . . such a procedure [may] serve the best interests of the Government as well as the taxpayer." *Garner*, 424 U.S. at 664 (citing *Emspak v. United States*, 349 U.S. 190, 213-14 (1955) (Harlan, J., dissenting)).

295. *See Garner*, 424 U.S. at 651-52.

296. *Marchetti*, 390 U.S. at 54 (the Court will consider insubstantial claims when a taxpayer has the temerity to raise them).

297. *Baird*, 279 F.2d at 631-32.

298. *See supra* notes 210-62 and accompanying text.

299. *Baird*, 279 F.2d at 631-32; *see also* Crowley & Manning, *supra* note 168.

300. An undisclosed taxpayer payment helps to negate both the willfulness and tax deficiency elements necessary to establish tax fraud. *See* I.R.C. § 7201 (1982).

failure to file does not preclude prosecution for the original failure to file. If the taxpayer made a timely undisclosed taxpayer fifth amendment claim instead of filing, of course, a prosecution for failure to file should not succeed.³⁰¹ A subsequent untimely filing, however, may lead to a prosecution for failure to file, at the IRS's discretion.³⁰² A timely undisclosed taxpayer payment, however, should preclude a conviction for tax fraud.³⁰³

Although a taxpayer may not be privileged from filing a return, the IRS may engulf the filing requirement within the fifth amendment's protection.³⁰⁴ If a taxpayer is privileged from disclosing incriminating information and the IRS refuses to accept a return without the incriminating information, *Marchetti* indicates that the taxpayer is privileged from filing the entire return.³⁰⁵ There is essentially no difference between the IRS requiring incriminating information before accepting a return and the situation in *Marchetti*. In *Marchetti*, the Court found that gamblers were privileged from paying tax because the government refused to accept payment without a return, and filing a wagering tax return incriminated the taxpayer.³⁰⁶ The theory in *Marchetti* is relatively simple — the government cannot require self-incrimination as a condition of complying with nonincriminating requirements without equally subjecting both the nonincriminating and the incriminating disclosures to the fifth amendment's protection.

4. Failing to Pay the Tax Due

Few situations arise that permit exercising the fifth amendment's privilege when failing to pay the tax due. Earning money from illegal activities does not make payment of federal income tax privileged.³⁰⁷ Similarly, a legal obligation to make restitution or another form of repayment of illegal receipts does not prevent liability for income tax.³⁰⁸

In *Marchetti*, the Court relied on two factors to hold that a taxpayer properly exercised the fifth amendment by failing to pay the wagering tax. First, *Marchetti* was privileged from filing a return because every

301. A taxpayer who makes an undisclosed taxpayer claim instead of filing rarely acts in bad faith. The government is, therefore, unable to establish the willfulness element required for conviction of a tax crime.

302. See *Plunkett v. Commissioner*, 465 F.2d 299 (7th Cir. 1972) (prosecution followed a voluntary disclosure).

303. See *supra* notes 300-01.

304. The IRS determines what taxpayer information will be accepted and what will be rejected for failure to satisfy the statutory requirements. See Note, *Internal Revenue Form 1040 and the Fifth Amendment: Self-Reporting or Self-Incrimination, the Taxpayer's Dilemma*, 54 N.D.L. REV. 213, 220 n.75 (1977).

305. *Marchetti*, 390 U.S. at 60-61; *Grosso*, 390 U.S. at 65 & n.2.

306. *Id.*

307. *Sullivan*, 274 U.S. at 263.

308. *James v. United States*, 366 U.S. 213, 219-20 (1961). See generally Bittker, *Taxing Income From Unlawful Activities*, 25 CASE W. RES. 130 (1974).

disclosure on the entire return required self-incrimination.³⁰⁹ Second, the government rejected tax payments made without an accompanying wagering tax return.³¹⁰ Even if a taxpayer is privileged from filing an income tax return,³¹¹ an attorney may make an "undisclosed taxpayer" payment against an individual's tax liability.³¹² The argument used by *Marchetti* thus is not available for a failure to pay income tax. If the IRS refuses to accept an undisclosed taxpayer payment, however, the taxpayer should be privileged from the act of making payment.³¹³ The taxpayer's liability does not change; only the act of making payment becomes privileged.

A major question remaining is whether the undisclosed taxpayer system is sufficiently accessible to a taxpayer privileged from making most, if not all, of the specific disclosures required on a return so as to preclude a valid fifth amendment claim for failing to file a return or make a tax payment. A taxpayer who fails to file a return for fear of self-incrimination, also may fail to pay tax because he is unaware of a method to do so without incriminating himself. In any event, the government must obtain independent knowledge of a taxpayer's liability before the taxpayer needs to assert the privilege for failure to pay tax.³¹⁴ The government, therefore, would possess at least some of the incriminating information.

B. Waiver or Loss of the Fifth Amendment Privilege

A taxpayer's right to claim the fifth amendment at trial or in response to an IRS summons often depends on whether the taxpayer properly claimed the privilege at a prior time. When a taxpayer validly claims the privilege on his return³¹⁵ or claims the privilege by failing to file, the taxpayer may raise the fifth amendment's protection in response to an IRS summons or at trial.³¹⁶ If a taxpayer's claim is not privileged but was made in good faith, the taxpayer may claim the fifth amendment until provided a judicial ruling.³¹⁷ When a taxpayer fails to make a timely assertion of the privilege, the status of the privilege depends on the disclosure made. If incriminating information is disclosed, the privilege is lost unless the government compelled the disclosure.³¹⁸ If incriminating information is not disclosed, there is no reason to lose the fifth

309. *Marchetti*, 390 U.S. at 48-49; see also *Grosso*, 390 U.S. at 65.

310. *Marchetti*, 390 U.S. at 41 n.1., 42-43; see also *Grosso*, 390 U.S. at 65 n.2.

311. See *supra* notes 263-306 and accompanying text.

312. Crowley & Manning, *supra* note 168, at 290-91.

313. See *Grosso*, 390 U.S. at 65 & n.2; *Doe*, 465 U.S. at 612-14 (act of producing business records privileged).

314. If the IRS does not know a taxpayer owes taxes, it will not be able to bring an action against the taxpayer.

315. See *Garner*, 424 U.S. 648.

316. See *Marchetti*, 390 U.S. at 50-51.

317. See *Garner*, 424 U.S. at 662-63 (protection based on § 7203 standard of willfulness).

318. See *id.* at 653.

amendment's protection. Several cases, however, indicate that the privilege is lost when not claimed timely.³¹⁹ In these cases, however, the taxpayer usually disclosed the incriminating information.³²⁰

When a taxpayer avoids disclosure of the information by failing to file and the failure was not privileged, the fifth amendment should apply to specific disclosures irrespective of the unprivileged failure to file. If the taxpayer failed to file invalidly but in good faith, the fifth amendment should protect against disclosure of any incriminating information. A failure to file is a criminal violation for which the taxpayer may claim the fifth amendment.³²¹ If the IRS claims that the fifth amendment's protection is lost for the specific disclosures, the taxpayer may claim the privilege for the failure to file. In any event, the government is unlikely to succeed if it claims the fifth amendment's protection is lost when a taxpayer does not disclose incriminating information.

Even when a taxpayer discloses incriminating information, the fifth amendment may preclude the government's use of the information. The fifth amendment not only permits a taxpayer to remain silent, but also protects against the use of compelled information.³²² Although disclosures on a return are not compelled, the filing of an income tax return is compelled.³²³ If a taxpayer is privileged from filing an income tax return, the taxpayer's act of filing the return should be protected. Some courts, however, may determine that filing an income tax return is not compelled because the taxpayer could have made an undisclosed taxpayer fifth amendment claim or because there is policy in favor of resolving fifth amendment claims by judicial determination rather than taxpayer determination.

Claiming the fifth amendment in the appropriate manner is always the taxpayer's best alternative. Although the burden is on the taxpayer to make the initial claim,³²⁴ the burden to argue for disclosure is apparently on the government once a claim is made.³²⁵ When the incriminating nature of requested information is apparent, a judge will not require disclosure.³²⁶ When the incriminating nature of requested information is not apparent, the taxpayer is given the opportunity to explain why the information is incriminating.³²⁷ The judge, however, should not require the taxpayer to admit guilt to avoid incriminating himself.³²⁸

319. See, e.g., *United States v. Murdock*, 284 U.S. 141, 148 (1931).

320. See, e.g., *Garner*, 424 U.S. at 649-50.

321. See I.R.C. § 7203 (1982).

322. *Garner*, 424 U.S. at 653.

323. *Id.* at 652.

324. *Id.* at 655.

325. See *id.* at 655-56 (taxpayer's burden is limited to a timely invoking of the privilege).

326. *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

327. *Id.*; *Garner*, 424 U.S. at 658-59 n.11.

328. *Marchetti*, 390 U.S. at 50 (quoting *United States v. Kahriger*, 345 U.S. 22, 34 (1953) (Jackson, J., concurring)).

C. Good Faith

The good faith defense allows an individual to invoke the fifth amendment in an unclear situation without facing criminal liability. In a footnote, the *Garner* Court indicated that an individual who erroneously invokes the fifth amendment on a tax return may defend a criminal prosecution for failure to file, based on the taxpayer's good faith intent to exercise a constitutional privilege.³²⁹ The constitutional source of the good faith defense, however, is contradicted by the same Court's textual reasoning — the fifth amendment protects a taxpayer with a valid claim and section 7203's willfulness requirement broadens the constitutional protection.³³⁰ The Court, however, previously had established good faith as a statutory defense to a section 7203 prosecution.³³¹ Whether the fifth amendment protects an erroneous but good faith claim remains an open question.³³²

The source of the good faith defense may be insignificant because of the breadth of the statutory good faith defense. To establish that a taxpayer lacked statutory good faith, the government must show "a voluntary, intentional violation of a known legal duty."³³³ There is, however, some limitation on the taxpayer's use of the good faith defense. For example, a good faith claim does not transmute an invalid fifth amendment claim into a valid one.³³⁴ A taxpayer who makes an invalid fifth amendment claim in good faith must eventually make a disclosure.

There are three steps a taxpayer should take to prevent the government from establishing bad faith. First, a claimant should present a fifth amendment claim to the government. The claim may be for specific disclosures on a return or in the form of an undisclosed taxpayer fifth amendment claim. The government is then hard pressed to prove that the taxpayer intended to violate a legal duty because the taxpayer's motive is to preserve the privilege until his legal duty is judicially determined. Second, a taxpayer should seek legal advice. When a taxpayer is

329. *Garner*, 424 U.S. at 663 n.18 (citing *United States v. Murdock*, 290 U.S. 389, 397 (1933)).

330. *Id.* at 662-63.

331. *See United States v. Bishop*, 412 U.S. 346, 360 (1973).

332. *See Note, supra* note 304, at 225-29.

333. *United States v. Pomponio*, 429 U.S. 10, 12 (1976). The taxpayer's good faith negates the willfulness element and precludes a conviction. *Garner*, 424 U.S. at 663 n.18.

334. *See United States v. Neff*, 615 F.2d 1235 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980). Neff argued that a sincere belief was sufficient to validate the assertion of one's privilege. *Id.* at 1241. Policy against taxpayers' being the final arbiters of their claims of privilege dictates that Neff's argument cannot prevail. *But cf. Marchetti*, 390 U.S. 39 (taxpayer could exercise fifth amendment by failing to file and failing to pay the wagering tax). Whether one's objective good faith is sufficient to establish a valid claim is unclear. The Court stated that "[Marchetti] was required . . . to provide information which he might reasonably suppose would be available to prosecuting authorities." *Id.* at 48. The Court found that Marchetti's claim was valid. *Id.* at 54.

advised by an attorney to claim the privilege, it will be difficult for the government to prove that the taxpayer knew there was a legal duty to perform the proscribed act rather than invoke the fifth amendment. Third, a taxpayer should make an undisclosed taxpayer payment when necessary. A payment of tax negates the substantial tax deficiency element of tax fraud. Payment also affirmatively establishes the taxpayer's honest effort to comply with his legal duty.

Because the fifth amendment is lost when not properly claimed, a taxpayer is forced to claim the privilege when its application is uncertain. If constitutional rights are so fragile that an improper move destroys the right, courts should rarely find that taxpayers acted in bad faith when claiming the fifth amendment. The government should carry the burden of establishing that the taxpayer claimed the privilege for a reason other than the preservation of a constitutional right. As long as a taxpayer makes an undisclosed taxpayer payment, the government should not be able to assert that the taxpayer invoked the privilege to avoid payment of federal income taxes.

IV. REQUIRED RECORDS

Although *United States v. Doe*³³⁵ expressly applies to business records rather than records required by law,³³⁶ many of the Court's examples of business records were also income tax records.³³⁷ The Court's express exclusion of required records³³⁸ from the scope of its opinion does not imply that the fifth amendment provides broader protection for income tax records than for business records. If the *Doe* Court's fifth amendment analysis of business records applies to tax records, however, the payment of tax by individuals involved in illegal activity becomes almost impossible unless those taxpayers relinquish a substantial portion of their fifth amendment protection by voluntarily creating incriminating tax records.

The fifth amendment permits an individual to remain silent and protects against governmental use of compelled statements. When a taxpayer discloses incriminating information on an *income tax return*, however, the fifth amendment privilege is lost because the taxpayer has the free choice to remain silent. Incriminating disclosures on income tax returns are deemed to be voluntary rather than compelled disclosures. In *Doe*, the Court determined that taxpayers voluntarily prepare *business records*. The *Doe* Court thus implied that taxpayers have the choice to claim the fifth amendment instead of preparing business records. If *Doe* applies to tax records, a taxpayer likewise would be entitled to claim the fifth amendment in lieu of preparing incriminating tax records.

335. 465 U.S. 605 (1984).

336. *Id.* at 607 n.3.

337. *Id.* at 607 n.1.

338. *Id.* at 607 & n.3.

There are significant problems that result from a taxpayer's failure to prepare tax records that do not occur when a taxpayer claims the fifth amendment instead of making specific disclosures on an income tax return. A taxpayer who claims the fifth amendment on a return can calculate the tax liability incurred during the year. The government also can ascertain the taxpayer's liability by granting use immunity.³³⁹ On the other hand, a taxpayer who claims the fifth amendment by failing to create tax records cannot determine the tax liability incurred during the year. Even if the government grants the taxpayer immunity, it cannot ascertain the taxpayer's liability because there are no tax records from which the taxpayer's liability can be calculated.

One solution is for the Court to apply fifth amendment analysis in the following manner, and thereby distinguish business records, income tax returns, and tax records. The government does not require taxpayers to prepare business records, and, therefore, business records are properly viewed as voluntarily prepared.³⁴⁰ The government does require taxpayers to file income tax returns,³⁴¹ but specific questions on an income tax form generally do not create substantial hazards of self-incrimination because a taxpayer can avoid self-incrimination by claiming the fifth amendment for specific disclosures instead of making incriminating disclosures.³⁴² As for tax records, however, the government requires taxpayers to prepare tax records³⁴³ and a taxpayer can avoid substantial hazards of self-incrimination only by failing to prepare incriminating tax records. The significant difference between tax returns and tax records is a taxpayer's inability to create tax records without losing the fifth amendment's protection for the contents of the incriminating disclosures.³⁴⁴

Once the unique nature of income tax records is recognized, the remaining issue is whether a taxpayer facing substantial hazards of self-incrimination can invoke the fifth amendment validly instead of preparing incriminating tax records. As already noted, a taxpayer's failure to prepare tax records significantly impairs the functioning of the tax system. Whenever possible, the Constitution should be interpreted to uphold the government's taxing power. The Court could provide protection for tax records by either considering them as compelled documents or by placing a use restriction upon them. The Court, however, has exercised extreme restraint when requested to impose use immunity judicially.³⁴⁵ If a taxpayer prepares incriminating tax records and loses the fifth amendment's protection for the contents of the records, the tax-

339. Although the IRS is authorized to compel disclosures in exchange for immunity, the IRS does not do so in practice. See *Garner*, 424 U.S. at 652 n.6.

340. *Doe*, 465 U.S. at 610-12.

341. *Garner*, 424 U.S. at 652.

342. *Id.* at 653, 665.

343. I.R.C. § 6001 (1982).

344. See *Doe*, 465 U.S. at 610-12 (contents of business records voluntarily prepared, and thus, unprivileged).

345. *Doe*, 465 U.S. at 614-17; *Marchetti*, 390 U.S. at 58-61.

payer still could invoke the fifth amendment for the incriminatory effects of producing the tax records to the government.³⁴⁶

V. CONCLUSION

A taxpayer must analyze each disclosure on a return to determine whether disclosure creates substantial hazards of self-incrimination. The taxpayer should not disclose information that incriminates the taxpayer of a tax or nontax crime unless granted immunity as broad as the fifth amendment privilege against self-incrimination. Each disclosure is analyzed as if all the other required information is disclosed on the return. In all circumstances, a taxpayer should make a complete tax payment unless the government conditions acceptance of the payment on the disclosure of incriminating information. No matter what information is deemed privileged, the taxpayer's claim always is made to the government. When the amount of income is privileged, an undisclosed taxpayer payment is made through the taxpayer's attorney. If the filing requirement is privileged, the taxpayer makes an undisclosed taxpayer payment and an undisclosed taxpayer fifth amendment claim.

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346. See *Doe*, 465 U.S. at 610-12.