

THE SIREN SONG OF DEFERRAL THROUGH THE INCOME TAX WITHHOLDING FORMS

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This Article points out the legal and ethical exposure American workers' and retirees' preparation of tax withholding forms presents when they seek to take advantage of a tax payment deferral technique the forms so readily offer. It details three withholding settings and how each presents potential legal risk for the worker or retiree. Two of the settings exploit a frequently touted safe harbor that allows withholding to occur very late in the year to eliminate penalties that normally apply for not having paid the taxes earlier in the year. This safe harbor presents a multi-billion-dollar time-value-of-money loss to the government. Besides legal risk for Americans who inaccurately complete the forms, this Article argues that the tax ethics and nascent tax-related Environmental, Social, and Governance ("ESG") literature has not yet judged the behavior of those who delay a tax payment (even when done in full legal compliance), as opposed to those who engage in tax avoidance or evasion. It also argues that the government's approach to withholding and its inconsistent and confusing forms are tantamount to the government becoming complicit in Americans' deficient submissions. In some cases, the government is laying a perjury trap, especially for Americans in financial straits looking to their withholding form as a lifeline. The 2022 increase in the information that retirees must provide on their forms, now matching the details employees have always provided, expands prosecutorial reach to retirees. This Article offers numerous recommendations to improve the withholding process and forms to reduce the temptation to engage in the criticized behavior.

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INTRODUCTION

A popular and powerful general class of tax planning tools actually has nothing to do with reducing a person's income taxes. Instead, it relates to optimizing the time value of money, which in the tax planning context includes deferring as long as possible the payment of income taxes due on a given year's income.¹ This Article sheds light on three deferral settings in which individuals engage in one or both of two possible abuses when submitting tax withholding forms to their employers or retirement plan custodians. First, they might exploit a safe harbor in Section 6654(g) of the Internal Revenue Code.² Second, they may be tempted to provide false information on the withholding forms, even if only temporarily.³ The time-value-of-money benefit of deferral is coveted not only by those fortunate enough to be able to invest the deferred funds,⁴ but also by those with immediate cash flow difficulties, especially if unable to stay current on their consumer debt, which is often laden with high interest rates and late fees.⁵

In the first two settings, Americans exploit Section 6654(g), which in effect sanctions the deferral of income tax payments until much later in the year than when they are economically accruing. For those receiving salary or retirement pay, Section 6654(g)'s penalty safe harbor in the tax withholding rules leads the Internal Revenue Service ("IRS") to assume withholding any time during the year—even if all paid in December—was paid evenly throughout the year.⁶ They thus avoid time-based penalties otherwise due for paying such taxes after they would normally be due.⁷ In the first setting, an individual fails to make sufficient quarterly estimated income tax payments (1040-ES payments) on other income and directs her employer or retirement plan to perform increased withholding late in the year.⁸ In the second setting, she excessively reduces earlier-in-the-year withholding and then performs catch-up withholding late in the year.⁹

The third setting does not engage Section 6654(g)'s safe harbor. She instead reduces withholding for the *entire* year because she seeks to delay paying all her current year taxes. She waits to pay her tax until she files her tax return or perhaps

¹ See *infra* notes 66-68 and accompanying text.

² I.R.C. § 6654(g). See *infra* Sections I.C, II.A, and II.B.

³ See *infra* Part II.

⁴ See, e.g., Amanda Parsons & Salome Viljoen, *Valuing Social Data*, 124 COLUM. L. REV. 993, 1060 (2024). See also *infra* notes 66-68 and accompanying text.

⁵ See, e.g., Katherine Hamilton, *Where are this Year's Tax Refunds Going? Right into a Debt Hole. With Credit-Card Debt at Record Levels, Refunds are Helping People Make Ends Meet*, WALL ST. J. (Mar. 28, 2024, 9:00 AM), https://www.wsj.com/personal-finance/taxes/tax-refunds-credit-card-debt-repayment-fea9afa6?st=NHuRVS&reflink=desktopwebshare_permalink (noting that in 2023, households held \$17.5 trillion in debt, including record credit card and vehicle debt); Stephen Gandel, *US Credit Card Defaults Jump to Highest Level Since 2010*, FIN. TIMES (Dec. 29, 2024), <https://www.ft.com/content/c755a34d-eb97-40d1-b780-ae2e2f0e7ad9> (describing how a rising number of low-income consumers are struggling to pay their credit card debt). See *infra* notes 73-75 and accompanying text.

⁶ See *infra* Section I.C.

⁷ See *infra* Section I.C.

⁸ See *infra* Section II.A.

⁹ See *infra* Section II.B.

never pays the tax, as in numerous reported criminal cases involving faulty withholding.¹⁰

At some point in their lives, nearly every American must complete a tax withholding form, first as a worker and then as a retiree. According to the latest data, of Americans' 158 million tax returns for 2021, the vast majority reported wages and/or retirement pay of over \$10 trillion and related income tax withholding of nearly \$1.5 trillion.¹¹ Despite the "fundamental importance" of paying taxes, the "pain of paying has received scant attention in the legal literature on tax law and policy."¹² Tax withholding especially "has received little attention in legal literature[, y]et withholding touches upon fundamental questions about how the tax system should be administered."¹³ This Article adds to this limited literature on such a widely applicable American experience. It details nuanced differences between the three settings and explains how the government is empowered to penalize these cases, both civilly and criminally.

This Article also details how the vagueness in the statutes and lack of past prosecution lead to Americans being more vulnerable to prosecutorial heavy-handedness, including for felonies.¹⁴ Some of this vagueness relates to the fact that withholding forms are filed not with the government, but with the employer, which operates in effect as an agent for the IRS.¹⁵ Also, the expansion in 2022 of information that retirees provide on their withholding forms—matching the detailed questions employees have been answering for decades on their forms—expands prosecutorial reach to retirees, who have been the very rare subject of withholding-related enforcement.¹⁶

This Article also adds to a robust literature on tax-related ethics and morality—but which has a dearth of discussion on tax payment deferral as opposed to tax avoidance or evasion—and adds to the nascent literature on tax-related ESG.¹⁷ It addresses not only behavior of the individual taxpayer but also that of the government, as it is providing undue inducement—especially to those in financial straits—to be morally subverted at best, and to break the law at worst through a

¹⁰ See *infra* Section II.C.

¹¹ These sums include taxable wages of \$9.022 trillion (126 million tax returns), taxable IRA distributions of \$408 billion (15 million returns), and taxable pension/annuity payments of \$858 billion (29 million returns), and wage withholding of \$1.275 trillion and form 1099 withholding of \$173 billion. See IRS STATISTICS OF INCOME, INDIVIDUAL INCOME TAX RETURNS COMPLETE REPORT 2022 (PUBLICATION 1304) 6, 11, <https://www.irs.gov/pub/irs-pdf/p1304.pdf> [<https://perma.cc/ZHC5-7Q5T>]. Some wage earners might also have IRA and pension/annuity income; thus, between 126 million and 158 million tax returns had at least one of these types of income.

¹² Gary M. Lucas, Jr., *The Pain of Paying Taxes*, 56 U. RICH. L. REV. 545, 547 (2022).

¹³ Kathleen DeLaney Thomas, *The Modern Case for Withholding*, 53 U.C. DAVIS L. REV. 81, 84 (2019).

¹⁴ See *infra* Section III.C.

¹⁵ See *infra* Section I.A.

¹⁶ See *infra* note 159 and accompanying text.

¹⁷ See *infra* Section IV.C. This Article does not seek to distinguish tax-related ethics from tax-related morality and shall like other work use the terms interchangeably. See, e.g., Zoe Prebble & John Prebble, *The Morality of Tax Avoidance*, 43 CREIGHTON L. REV. 693, 701 (2010).

form of perjury trap.¹⁸ It also shows how the withholding rules and prosecutorial patterns to date related to faulty withholding violate principles of vertical and horizontal equity.¹⁹

Part I sets forth the tax withholding rules and contrasts them with 1040-ES payments made directly to the IRS, describes Section 6654(a)'s penalty for insufficient current payments, and explains Section 6654(g)'s safe harbor. Part II details time-value-of-money techniques Americans pursue in each setting, as they exploit Section 6654(g) and/or are tempted to counterfactually answer withholding forms. Part III analyzes civil and criminal exposure for engaging in these behaviors. Part IV criticizes the government's approach and tempted Americans' responses through several prisms. Part V offers suggestions on how to improve the authoritative guidance and withholding forms. While these recommendations do not offer a cure-all for the many challenges any pay-as-you-earn system here or abroad faces,²⁰ their implementation would go a long way toward reducing legal risk for Americans and helping the government obtain a fairer timing of cash inflows.

I. PAYING INCOME TAXES ON A CURRENT BASIS

Congress enacted estimated tax payment ("1040-ES payments") and withholding requirements in the Current Tax Payment Act of 1943.²¹ Since 1943, individuals pay their income taxes primarily on a current basis by having tax withheld at source or by making 1040-ES payments during the year the income is earned. For some individuals, both methods apply, such as employees or retirees with income not subject to withholding (e.g., capital gains), as wages and retirement pay are. The IRS credits withholding and 1040-ES payments to the individual's account, to be offset against their ultimately determined tax upon submitting their annual tax return, which is generally due by April 15 of the year after the income is earned.²²

A. Withholding

Employees and retirees generally cannot avoid making current tax payments because the Internal Revenue Code (the "Code") requires payers to withhold tax from wage and retirement pay.²³ There is exposure for employers and

¹⁸ See *infra* Section IV.D. See also *infra* Part II for articles publishing withholding approaches while not providing enough warning about legal exposure.

¹⁹ See *infra* Section IV.B.

²⁰ See, e.g., TAXPAYER ADVOCATE SERVICE, I.R.S., A CONCEPTUAL ANALYSIS OF PAY-AS-YOU-EARN (PAYE) WITHHOLDING SYSTEMS AS A MECHANISM FOR SIMPLIFYING AND IMPROVING U.S. TAX ADMINISTRATION 15-18 (2018), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/11/ARC18_Volume2_01_PAYE.pdf [<https://perma.cc/9RPU-UASS>].

²¹ See Current Tax Payment Act of 1943, Pub. L. No. 78-68, § 1622(a), 57 Stat. 126, 128.

²² I.R.C. § 6072(a). Not relevant to this Article are penalties for not filing or paying tax due by the return's filing deadlines.

²³ See I.R.C. §§ 3402(a), 3405(a)-(c).

retirement plan custodians for failing to properly withhold and remit to the IRS, under what the Supreme Court has noted is a form of secondary liability.²⁴

For employees, Section 3402 requires employers to withhold income tax from wages.²⁵ Employers calculate how much to withhold from salary based on employees completing Form W-4.²⁶ Employees provide information on W-4 that is used to calculate the appropriate tax withholding rate, consistent with W-4's optimistically stated purpose at its top: "Complete Form W-4 so that your employer can withhold the correct federal income tax from your pay."²⁷ The W-4 questions include filing status (e.g., head-of-household), expected tax deductions, credits, other income, and—key to this Article's first two settings—requests for extra withholding.²⁸

An employee may claim exemption from withholding if she both incurred no income tax for the prior year and expects none for the current year, in which case she writes "Exempt" in the designated spot and answers nothing else other than identifying information and filing status.²⁹ (Readers should not confuse "exemption from withholding" with family size "exemptions" that W-4s before 2018 included before the Tax Cut & Jobs Act froze exemption deductions.)³⁰ Alternatively, she can in effect drive down withholding to zero if she inputs enough credits or deductions on her W-4. The form ends with a signature line above "Under penalties of perjury, I declare that this certificate, to the best of my knowledge and belief, is true, correct, and complete."³¹

For retirees, Section 3405 generally requires plan custodians to withhold tax, by cross-referencing Section 3402's rules above related to wage withholding.³² Form W-4P is used for periodic payments (e.g., monthly annuity payments) and W-4R for non-periodic payments (e.g., on-demand distributions from a taxable IRA or 401(k) plan, eligible rollovers upon leaving an employer).³³ Starting with the 2022

²⁴ See *Cent. Ill. Pub. Serv. Co. v. United States*, 435 U.S. 21, 31 (1978). See also I.R.C. §§ 3403, 3405(d)(1), 6672(a).

²⁵ I.R.C. § 3402(a); Treas. Reg. § 31.3402(a)-1(a) to (b). An employer is also required to withhold social security tax. I.R.C. §§ 3101, 3102(a). Employees cannot change flat rate social security withholding, so that is not relevant to this Article, although it can add financial strain and thus temptation to engage in income tax withholding abuse.

²⁶ Substitute forms and electronic filings are allowed. Treas. Reg. § 31.3402(f)(5)-1(a). For the 2025 version of the annually updated W-4, see I.R.S., FORM W-4 (2025), <https://www.irs.gov/pub/irs-pdf/fw4.pdf> [<https://perma.cc/9MEY-NPZ5>] [hereinafter 2025 W-4]. Recent prior iterations were titled "Employee's Withholding Allowance Certificate." See, e.g., I.R.S., FORM W-4 (2017), <https://www.irs.gov/pub/irs-prior/fw4--2017.pdf> [<https://perma.cc/8ZQ4-R6HQ>] [hereinafter 2017 W-4].

²⁷ 2025 W-4, *supra* note 26.

²⁸ See I.R.C. § 3402(m). See also 2025 W-4, *supra* note 26, at steps 1c (status), 4b (deductions), 3 (credits), 4a (other income), and 4c (extra withholding).

²⁹ See I.R.C. § 3402(n); 2025 W-4, *supra* note 26, at 2.

³⁰ See I.R.C. § 151(d)(5). See, e.g., 2017 W-4, *supra* note 26, at 1.

³¹ 2025 W-4, *supra* note 26, at 1 (step 5).

³² I.R.C. § 3405(a)-(b), (f).

³³ I.R.S., FORM W-4P (2025), <https://www.irs.gov/pub/irs-pdf/fw4p.pdf> [<https://perma.cc/8GKD-XWSX>] [hereinafter 2025 W-4P]; I.R.S., FORM W-4R (2025),

form, W-4P requests the same information as W-4 (i.e., expected deductions and credits), which is sensible because periodic retirement pay's withholding is figured similarly to wage withholding, such as using progressive tax rates.³⁴ First released in 2023,³⁵ W-4R requires far less information than W-4P. This is because Section 3405 requires flat (not progressive) tax rate withholding on non-periodic retirement pay unless the recipient elects a flat rate other than the default rate of 10% (20% for eligible rollovers), including voluntary withholding in excess of these amounts.³⁶ Before 2022, W-4P was as devoid of information to provide, like the W-4R.³⁷ There is no perjury or other statement below W-4P's or W-4R's signature line.³⁸

For periodic payments, the recipient—without meeting any conditions—may eliminate withholding on W-4P by writing “No Withholding” in the designated spot and providing nothing else other than identifying information and filing status.³⁹ For non-periodic payments, the recipient—also without meeting any conditions—may eliminate withholding on W-4R, by inputting zero if she does not want the default rate of 10% (for eligible rollovers, the rate may not be reduced below 20%).⁴⁰

Congress is of the view that it is “vital to the integrity of the tax system that the amount withheld from wages closely matches the taxpayer's ultimate tax liability.”⁴¹ Consistent with this view, the regulations state that an employee's withholding allowance may not exceed the amount that they're entitled to as determined based on their reasonable expectations, the Code, and IRS instructions as to deductions and credits allowable to the employee on their tax return for the

<https://www.irs.gov/pub/irs-pdf/fw4r.pdf> [<https://perma.cc/MEL7-TWS3>] [hereinafter 2025 W-4R].

³⁴ See I.R.C. § 3405(a)(1); 2025 W-4P, *supra* note 33; I.R.S., PUBLICATION 505, TAX WITHHOLDING AND ESTIMATED TAX 3, <https://www.irs.gov/pub/irs-pdf/p505.pdf> [<https://perma.cc/MED5-Z7QR>] [hereinafter PUBLICATION 505].

³⁵ Jeffrey M. Holdvogt & Diane M. Morgenthaler, *New IRS Tax Forms for Retirement Plan Payment Withholding, Effective Jan. 1, 2023*, BENEFITSPRO (2022), <https://www.benefitspro.com/2022/12/22/reminder-new-irs-tax-forms-for-retirement-plan-payment-withholding-effective-jan-1-2023/> [<https://perma.cc/VL9Z-XL8K>].

³⁶ I.R.C. § 3405(b); 2025 W-4R, *supra* note 33, at l. 2. Eligible rollovers typically occur upon leaving employment. If the worker does not roll the plan directly to the new employer's plan or an IRA, it will trigger taxation and 20% withholding. I.R.C. § 3405(c).

³⁷ Notice how information on the 2021 W-4P was sparse, much like the newly created W-4R in 2023, and then in 2022 the requested information on W-4P became far more detailed, like the W-4. Compare I.R.S., FORM W-4P (2021), <https://www.irs.gov/pub/irs-prior/fw4p--2021.pdf> [<https://perma.cc/JF4S-CPDV>] [hereinafter 2021 W-4P] with I.R.S., FORM W-4P (2022), <https://www.irs.gov/pub/irs-prior/fw4p--2022.pdf> [<https://perma.cc/Z2A6-ZRPL>] [hereinafter 2022 W-4P].

³⁸ See 2025 W-4P, *supra* note 33, at l. 1 (step 5); 2025 W-4R, *supra* note 33, at l. 2.

³⁹ See 2025 W-4P, *supra* note 33, at 2; I.R.C. § 3405(a)(2).

⁴⁰ See 2025 W-4R, *supra* note 33, at l. 2; 2025 W-4P, *supra* note 33, at 2 (step 4(c)); I.R.C. § 3405(b)(2)(A), (C).

⁴¹ S. REP. NO. 99-313, at 215 (1986).

estimation year.⁴² The Code contemplates errors but demands a corrected W-4 within ten days.⁴³

Salary and retirement pay are taxed as ordinary income, with marginal tax rates as high as 37%.⁴⁴ Because Americans' income tax rates are progressive and dependent on filing status, a payer cannot merely withhold at a flat rate on base salary or monthly annuities. For example, if two employees input the same deductions and credits, a single employee with a \$200,000 annual salary will have withholding far more than double that of a single employee earning \$100,000, and a single employee with a \$100,000 annual salary has far more withholding than a head-of-household employee earning \$100,000.

B. 1040-ES Payments

As with tax withholding, it was only in 1943 that Congress began requiring Americans to make direct 1040-ES payments on income that is not practical to withhold from.⁴⁵ The 1040-ES payments cover income tax, along with social security tax for self-employed taxpayers.⁴⁶ The four due dates are generally April 15, June 15, September 15, and—after the year ends—January 15.⁴⁷ If a due date falls on a weekend or holiday, it moves to the next business day.⁴⁸ (For simplicity, this Article refers to these payments as “quarterly” even though all are not exactly reflective of three-month periods.)

From 1943 to 1982, the Code also required individuals to submit annual estimated tax “declarations” if they might owe taxes other than primarily through withholding, but Congress removed this declaration requirement effective in 1983.⁴⁹ Removing the declaration, however, did not remove Section 6654(a)’s

⁴² Treas. Reg. § 31.3402(f)(2)-1(a)(2), (m)-1(e)(1); *see also* IRM 5.19.11.1.2(3) (Dec. 14, 2018) (“Note: Regulations Permit taxpayers to claim only the withholding rate to which they are entitled. Withholding tax cannot be construed as a hardship.”).

⁴³ I.R.C. § 3402(f)(2)(B); *see also* Treas. Reg. § 31.3402(f)(2)-1(b)(1) (reiterating the Code’s ten-day requirement).

⁴⁴ I.R.C. §§ 61(a)(1), (11), 1(j). Unless an exception applies (*e.g.*, medical expenses), retirement pay taken before age 59.5 generally incurs an additional 10% penalty. I.R.C. § 72(t).

⁴⁵ *See* Current Tax Payment Act of 1943; Edward Allen, *Treasury Tax Policies in 1942*, 34 AM. ECON. REV. 707, 708, 732 (1944); H.R. REP. NO. 78-401, at 11-12 (1943).

⁴⁶ *See* I.R.C. § 1401; Treas. Reg. § 1.6654-1(c); *Form 1040-ES: Estimated Tax for Individuals*, I.R.S. 2 (2025), <https://www.irs.gov/pub/irs-pdf/f1040es.pdf> [<https://perma.cc/FGP7-GFR5>] [hereinafter 2025 1040-ES]. Pages 10 and 11 of 2025 1040-ES, *supra*, contain the quarterly vouchers for taxpayers to mail payments.

⁴⁷ I.R.C. § 6654(c)(2).

⁴⁸ I.R.C. § 7503.

⁴⁹ H.R. 4961, Pub. L. No. 97-248, reprinted in JOINT COMM. ON TAXATION, 97TH CONG., SUMMARY OF THE REVENUE PROVISIONS OF THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, at 226 (1982) (“[T]he requirement for filing a declaration of estimated tax for individuals is terminated after 1982. Other provisions of law, however, will continue to function as if such declaration of law were filed.”). However, the deletion of the entire Section 6073 did not occur until the Competition in Contracting Act of 1984, Pub. L. No. 98-369, §§ 412(a), 414(a), 98 Stat. 494, 792-93 (effective after 1984); *see also* Black v. Comm’r, 19 T.C.M. (CCH) 623 (1960) (noting that the declaration requirement “has been in the law since 1943 and [its] requirement . . . is a matter of common knowledge.”).

monetary penalty aspect if timely and sufficient 1040-ES payments and withholding were not made during the year, which is discussed next.

C. Section 6654(a) Penalty and Section 6654(g) Safe Harbor

Section 6654(a) generally subjects individuals who fail to make timely, sufficient 1040-ES payments to a time-based penalty on quarterly shortfalls, computed on Form 2210.⁵⁰ However, this penalty applies not just to the failure to pay timely, sufficient 1040-ES payments, but also to lack of sufficient withholding, or both.⁵¹ Although the 1040-ES payment vouchers are titled “*Estimated Tax Payment Voucher*” and Form 2210 is titled “*Underpayment of Estimated Tax Penalty*,” this Article will use the term “Section 6654(a) penalty” instead of “penalty for underpayment of estimated tax” to avoid confusion, as the Section 6654(a) penalty also applies if there is insufficient withholding.⁵²

Current tax payments that should have been made by April 15 will attract a penalty if paid after that date.⁵³ The same goes for the other three installments, except the fourth quarter penalty is forgiven if the annual tax return is filed by January 31 along with payment of remaining tax due on that filing.⁵⁴ The IRS pegs its Section 6654(a) penalty rate to the federal funds rate, which in the last seven years has ranged from a low of 3% to a recent high of 8% for 2024.⁵⁵ Furthermore, unlike some forms of interest expense, Section 6654(a)’s penalty is not deductible in calculating taxable income, so taxpayers are keen to avoid the penalty.⁵⁶

Section 6654(g) is key to this Article’s first two settings. It states that for purposes of Section 6654(a)’s penalty, wage withholding “*shall be deemed a payment of estimated tax*,” and “*an equal part of such amount shall be deemed paid on each due date*” for such year, unless the taxpayer establishes the dates on which all amounts were actually withheld.⁵⁷ In other words, Section 6654(g)’s “*shall be deemed a payment of estimated tax*” phrase treats income tax withholding on wages as the equivalent of a 1040-ES payment. And it provides a default safe harbor for late taxpayers by deeming a pro rata equal part of the year’s withholding as paid on each 1040-ES payment due date. Furthermore, as noted earlier, Section 3405 treats

⁵⁰ I.R.C. § 6654(a), (c). *See also* I.R.S., FORM 2210 (2024), <https://www.irs.gov/pub/irs-pdf/f2210.pdf> [<https://perma.cc/HR4H-FWKU>] [hereinafter 2024 Form 2210].

⁵¹ I.R.C. § 6654(a), (g).

⁵² *See* 2025 1040-ES, *supra* note 46 (emphasis added); 2024 Form 2210, *supra* note 50 (emphasis added).

⁵³ I.R.C. § 6654(a), (c).

⁵⁴ I.R.C. § 6654(a), (c), (h).

⁵⁵ *See* Erica Sandberg, *Beating the IRS: How to Dodge the Surge Penalty*, U.S. NEWS & WORLD REP. (Sept. 18, 2024), <https://money.usnews.com/money/personal-finance/taxes/articles/beating-the-irs-how-to-dodge-the-surge-penalty> [<https://perma.cc/A4G4-WR4D>]; *Quarterly Interest Rates*, I.R.S., <https://www.irs.gov/payments/quarterly-interest-rates> [<https://perma.cc/29F9-SNGQ>]; I.R.C. §§ 6654(a)(1), 6621(a)(2).

⁵⁶ *See* I.R.C. § 162(f); Treas. Reg. § 1.162-21(c)(2); Rev. Rul. 78-196, 1978-1 C.B. 45 (1978) (holding that a corporation is unable to deduct its § 6654(a)-type penalty).

⁵⁷ I.R.C. § 6654(g) (emphasis added).

retirement pay withholding as if it was wage withholding.⁵⁸ Thus, Section 6654(g)'s safe harbor applies to withholding from both wages and retirement pay.⁵⁹

D. Other Settings

States that impose income tax have their own rules and forms for withholding, 1040-ES payments, and Section 6654(a) penalties.⁶⁰ Many states also have provisions similar to Section 6654(g)'s withholding safe harbor,⁶¹ including several that use nearly identical language to Section 6654(g).⁶²

Farmers, fishermen, and nonresident aliens have less burdensome 1040-ES payment requirements, even if they have income subject to the standard withholding rules.⁶³ There is also "backup withholding" for other kinds of income.⁶⁴ A common example is a bank's requirement to withhold tax on interest payments if the recipient fails to provide identifying information.⁶⁵

While this Article does not further discuss these other settings, the same shortcomings this Article shines a light on and offers recommendations for could apply in such cases.

II. EXPLOITATION OF THE WITHHOLDING RULES: THE THREE SETTINGS

This Article's focus relates to a popular, powerful tax planning technique: delaying as long as possible the payment of income taxes due on a given year's taxable income. Money has a time value: in the context of tax planning, the "next

⁵⁸ I.R.C. § 3405(a), (f). This is important to note because Section 6654(g) refers to Section 31, which is only about wage withholding, not retirement pay. *See* I.R.C. § 31.

⁵⁹ Dozens of judicial decisions have confirmed that withholding is deemed made evenly during the year. All but one relate to wage withholding and one expressly applies the deeming to retirement pay withholding. *See* *Ndirika v. Comm'r*, 88 T.C.M. (CCH) 407 (2004).

⁶⁰ *See, e.g.*, DEP'T OF REVENUE SERV., STATE OF CONN., FORM CT-W4 (2024), https://portal.ct.gov/-/media/drs/forms/2024/wth/ct-w4_1223.pdf [<https://perma.cc/GX75-AAUM>]; DEP'T OF REVENUE SERV., STATE OF CONN., FORM CT-W4P, https://portal.ct.gov/-/media/drs/forms/2022/wth/ct-w4p_1222.pdf [<https://perma.cc/UNN9-YQV6>]; DEP'T OF REVENUE SERV., STATE OF CONN., FORM CT-1040ES, <https://portal.ct.gov/-/media/drs/forms/2023/income/ct1040es-flat0124.pdf> [<https://perma.cc/TXK3-K877>]; DEP'T OF REVENUE SERV., STATE OF CONN., FORM CT-2210 (2023), https://portal.ct.gov/-/media/drs/forms/2023/income/ct-2210_1223.pdf [<https://perma.cc/V48U-5TTZ>].

⁶¹ *See, e.g.*, Tim Steffen, *Planning Tax Payments to Avoid Penalties*, BAIRD (May 2018), <https://content.rwbaird.com/RWB/Content/PDF/Insights/Whitepapers/Planning-Tax-Payments-to-Avoid-Penalties.pdf> [<https://perma.cc/E2EX-FDD2>] (noting that states "often follow" this approach).

⁶² *See, e.g.*, CONN. GEN. STAT. § 12-722(k); COLO. REV. STAT. § 39-22-605-8(a); 32 V.S.A. § 5852(c); D.C. CODE § 47-4203(d)(3).

⁶³ Farmers and fishermen have only one installment payment, due by January 15. I.R.C. § 6654(i). Nonresident aliens are not required to make an April 15 installment but do have the other three. I.R.C. § 6654(j).

⁶⁴ *See* I.R.C. § 3406 (providing backup withholding requirements).

⁶⁵ *Id.* *See also* Inst. of Mgmt. & Admin., *Backup Withholding: It's All About TINs and Timing*, 7 PAYROLL MANAGER'S REP. 13, 13-15 (2011) (describing situations that trigger the backup withholding requirement).

best thing to not paying tax is putting it off.”⁶⁶ By delaying tax payments to later than their economic accrual, the taxpayer can invest those funds and gain a rate of return.⁶⁷ A leading textbook for tax planning—whose original co-author is Nobel Laureate Myron Scholes—states that it is “desirable to defer paying taxes as long as interest is not being charged on the tax liability.”⁶⁸

With interest rates at historical lows over much of the last two decades, many Americans had a low time value of money.⁶⁹ However, the Federal Reserve’s near zero interest rate environment stopped in March 2022, later peaking at over 5% in July 2023, and only in September 2024 was the rate first cut.⁷⁰ Accordingly, the time value of money has recovered its importance.

Cost-free deferral of tax payments is not solely a benefit for those with the ability to invest the delayed payments. For those not in a position to invest, deferring tax payments allows them to use those funds to accelerate consumption or to service consumer debt. For example, in Settings 1 and 2 below, Americans exploit Section 6654(g)’s safe harbor to achieve for their tax payments a feat analogous to a borrower making no payments on consumer debt during the first eleven months of the year and instead paying all twelve months in December free of any cost or penalty. In Setting 3, they delay paying even beyond December.

Normally, borrowers not paying their bills on a monthly basis incur interest charges, which can range up to annual rates of over 20% on credit cards, along with late fees and damage to their credit reports.⁷¹ Pushing off tax payments until as late as possible with no consequence can also help stave off default or even avoid entering bankruptcy.⁷² American household debt is nearly \$18 trillion⁷³ and

⁶⁶ Stephen B. Land, *Defeating Deferral: A Proposal for Retrospective Taxation*, 52 TAX L. REV. 45, 46 (1996).

⁶⁷ See, e.g., Parsons & Viljoen, *supra* note 4 (describing how investing deferred taxes “is an essential driver of tax planning”).

⁶⁸ MYRON SCHOLES ET AL., TAXES AND BUSINESS STRATEGY 23 (4th ed. 2009); see also Ben C. Ayers et al., *Why Do People Give Interest-Free Loans to the Government? An Experimental Study of Interim Tax Payments*, 21 J. AM. TAX’N ASS’N 55, 55-56 (1999) (arguing that the concept of time value of money dictates the objective of paying as little as possible on an interim basis).

⁶⁹ See, e.g., Yair Listokin, *How to Think About and Teach Income Tax When Interest Rates are Zero*, 151 TAX NOTES 959, 959 (2016) (noting that “when interest rates are high, a dollar saved in taxes today and repaid in the future earns a lot of interest [while] a zero interest rate means that money has no time value”).

⁷⁰ See Taylor Tepper, *Federal Funds Rate History 1990 to 2024*, FORBES (Sept. 18, 2024), <https://www.forbes.com/advisor/investing/fed-funds-rate-history/> [<https://perma.cc/3Q42-F4C5>].

⁷¹ The CFPB’s capping of late fees at \$8 (down from \$30) was recently frozen in court. See Chamber of Com. of U.S. v. Consumer Fin. Prot. Bureau, 733 F. Supp. 3d 558, 559-60 (N.D. Tex. 2024). Missing a monthly payment or utilizing too high a percentage of available credit can harm a borrower’s FICO credit scores. See Jim Akin, *What Affects Your Credit Scores*, EXPERIAN (July 30, 2025), <https://www.experian.com/blogs/ask-experian/credit-education/score-basics/what-affects-your-credit-scores/> [<https://perma.cc/F3YK-3NJ9>].

⁷² See, e.g., Suzanne Blake, *Bankruptcies Spike as Americans Grapple with Debt and Inflation*, NEWSWEEK (Feb. 2, 2024, 12:14 PM), <https://www.newsweek.com/bankruptcy-filings-increase-2023-inflation-debt-1866459> [<https://perma.cc/N3SX-25YG>] (describing how higher credit card interest rates and minimum payments are factors in 2023’s 435,000 personal bankruptcies, up from 374,000 in 2022).

⁷³ See, e.g., Hamilton, *supra* note 5.

delinquencies are rising, especially for credit cards, student loans, medical debt, and car and mortgage loans.⁷⁴ The predatory loan market—including the annual \$40 billion payday loan market—has soared in recent years, targeting consumers struggling to make ends meet until their next paycheck.⁷⁵

Here is our “Base Example,” which will be used for later variations in the three settings. Assume in 2023 a single sixty-year-old’s only income is \$120,000 of interest, she has no credits or deductions other than her standard deduction, and she has no state income tax obligations. Her income tax is \$18,876,⁷⁶ on which a maximum Section 6654(a) penalty would apply if none of 90%⁷⁷ (i.e., \$16,988) was timely paid before January 15, 2024. One-fourth of the \$16,988 annual requirement (i.e., \$4,247) is due on each of April 15, June 15, and September 15 of 2023, and January 15 of 2024. Because these payments were not made until sometime after January, the IRS assesses a Section 6654(a) penalty of \$875.⁷⁸

⁷⁴ See Joe Pinsker, et al., *The State of America’s Wallet; How the Cards, Cash, Debts and Assets We Carry Stack Up*, WALL ST. J. (Sept. 7, 2024, 9:00 PM), https://www.wsj.com/personal-finance/the-state-of-americas-wallet-00fc81ed?st=cGeaYj&reflink=desktopwebshare_permalink (reporting that 590 million active U.S. cards collectively owe \$1.14 trillion and that more than half carry month-to-month balances, averaging \$6,218); Angel Au-Yeung, *Credit-Card Spending, Delinquencies Rise*, WALL ST. J. (Jan. 25, 2024, 5:30 AM), https://www.wsj.com/finance/banking/credit-card-debt-is-upand-its-taking-longer-to-pay-down-237cc4a3?st=m92g3g&reflink=desktopwebshare_permalink (observing a steady rise in delinquency rates since 2021); Gabriel Rubin, *Student Borrowers Tap a New Path to Loan Forgiveness: Bankruptcy; the Number Seeking Relief in Court Increased in the Past Year After a Policy Change, but Remains Extremely Low for Now*, WALL ST. J. (Nov. 16, 2023, 2:35 PM), https://www.wsj.com/us-news/education/student-borrowers-tap-a-new-path-to-loan-forgiveness-bankruptcy-05a0854b?st=NdEAMd&reflink=desktopwebshare_permalink (noting that 40 million borrowers owe \$1.6 trillion in student debt); Noam Levey, *Sick and Struggling to Pay, 100 Million People in the U.S. Live with Medical Debt*, OPB (June 16, 2022 9:31 AM), <https://www.opb.org/article/2022/06/16/sick-and-struggling-to-pay-100-million-people-in-the-u-s-live-with-medical-debt/> [<https://perma.cc/33F9-BUUN>]; Megan Leonhardt, *Overdue Bills Mount for Americans as Household Debt Piles Up*, BARRON’S (Feb. 6, 2024, 12:03 PM), https://www.barrons.com/articles/overdue-bills-credit-card-debt-5dcdf63a?reflink=desktopwebshare_permalink (reporting that of the \$12.3 trillion home mortgage debt in 2023, 3% is over thirty days late and that of the \$1.6 trillion of auto loans, nearly 8% is over thirty days late).

⁷⁵ See Luz M. Molina et al., *Vulnerabilities of Low-Wage Workers and Some Thoughts on Improving Workplace Protections: The Experience of the Workplace Justice Project*, 17 LOY. J. PUB. INT. L. 215, 227 (2016); Mehrsa Baradaran, *Credit, Morality, and the Small-Dollar Loan*, 55 HARV. C.R.-C.L. L. REV. 63, 89 (2020).

⁷⁶ Calculated as follows: \$120,000 less \$13,850 standard deduction equals \$106,150 taxable income. Tax rates and standard deduction are listed in Form 1040-ES’s payment instructions. See I.R.S., FORM 1040-ES (2023), <https://www.irs.gov/pub/irs-prior/f1040es--2023.pdf> [<https://perma.cc/72KU-QZ45>].

⁷⁷ There are several penalty exceptions, such as paying in 90% of the current year tax. I.R.C. § 6654(d)(1)(B).

⁷⁸ Calculations by H&R Block tax software. The per annum penalty rate was 7% from April 16 to September 30, 2023, when it increased to 8%. See I.R.S., INSTRUCTIONS FOR FORM 2210: UNDERPAYMENT OF ESTIMATED TAX BY INDIVIDUALS, ESTATES, AND TRUSTS, at 7 (Jan. 19, 2024), <https://www.irs.gov/pub/irs-prior/i2210--2023.pdf> [<https://perma.cc/GC4G-8UVM>].

This Article now turns to detailing the three settings and how they exploit the tax withholding rules and forms.

A. Setting 1: No 1040-ES Payments and Section 6654(g)'s Catch-up Withholding

Is there a way to avoid Base Example's \$875 Section 6654(a) penalty for someone with the same amount of income? The answer is yes for Setting 1, which amends Base Example by now including wages or retirement pay from which withholding could occur.

Setting 1 Example instead has only \$50,000 of interest, but also \$70,000 of salary and/or retirement pay. Assume the latter's related withholding was accurate for the first part of the year. Again, she eschews making 1040-ES payments on her interest. To exploit Section 6654(g), she directs her payer to withhold extra amounts from her last months' payments so as to eliminate the \$875 penalty and maximize her time-value-of-money benefit.

This Article is not the first to publicize exploiting Section 6654(g)'s safe harbor. In October 2024, the *Wall Street Journal* advised:

So it's important to evaluate paycheck withholding or quarterly payments for this year If you need to pay more, try to raise withholding rather than make a direct payment to the IRS. Withholding can reduce underpayment penalties on income earned earlier in the year, while a quarterly payment usually won't. Employees can raise withholding through their paychecks, while retirees often opt to raise it on taxable IRA payouts But remember: . . . it's too late to avoid underpayment penalties for 2024's first three quarters, except through higher withholding.⁷⁹

Articles offering this advice to workers date back decades. In 1987, the *New York Times* advised that workers who had paid insufficient 1040-ES payments "may be able to avoid underpayment penalties by asking their employer to increase their wage withholding through the end of the year. Employees can have withheld as much as the rest of their salary for the year by filling out a new W-4."⁸⁰

Over the next nearly four decades, the *New York Times* continued to offer this advice to employees, including relating an anecdote of TurboTax's CEO's use of Section 6654(g).⁸¹ Some *Wall Street Journal* articles repeat this advice early in

⁷⁹ Laura Saunders, *Cut Your 2024 Taxes Before It's Too Late*, WALL ST. J. (Oct. 25, 2024, 5:30 AM) https://www.wsj.com/personal-finance/taxes/2024-taxes-ira-rules-fbd713ee?st=EFB4sK&reflink=desktopwebshare_permalink.

⁸⁰ Gary Klott, *Taxpayers Can Benefit by Checking Deduction Rules to Avoid Penalties*, J. REC. (Okla. City), Dec. 25, 1987.

⁸¹ Jan M. Rosen, *A Tax Wrinkle for the Year-End*, N.Y. TIMES, Nov. 9, 1991, at 40, <https://www.nytimes.com/1991/11/09/business/your-money-a-tax-wrinkle-for-the-year-end.html> (describing how because of profitable stock sale in June, CEO would be hit with the Section 6654(a) penalty, so he gave his company a new W-4 to increase withholding in November and December).

the year—before the first 1040-ES payment is due⁸²—and some in late fall to provide employees sufficient time to perform catch-up withholding.⁸³ Magazines of financial or general consumer interest also recommend upwardly adjusting wage withholding late in the year.⁸⁴ Articles in outlets catering to tax advisors,⁸⁵ tax students,⁸⁶ and even the occasional law review⁸⁷ also recommend bringing Section 6654(g)’s safe harbor to clients’ attention.

Just as with the many articles above recommending employees take advantage of the Section 6654(g) safe harbor, there are many suggesting it for retirees. A *Wall Street Journal* article is especially on point:

The benefit is that taxpayers don’t have to file quarterly estimated tax payments if they can adjust their withholding on other income enough. . . . For example, say an investor has a capital gain of \$20,000 in the first quarter. He might owe an underpayment penalty if he doesn’t pay estimated taxes due on it in that quarter. . . . But if this investor raises the withholding on [an] IRA payout enough to

See also Tara Siegel Bernard, *Last Call to Update Your W-4 and Avoid a Tax Bite*, N.Y. TIMES, Dec. 7, 2019, at B1.

⁸² See, e.g., Laura Saunders, *Your Questions on Paying Estimated Taxes, Answered; Knowing When to Pay Estimated Taxes and for What Kinds of Income is Often Confusing* (Feb. 12, 2024, 12:39 PM), https://www.wsj.com/personal-finance/taxes/a-tax-question-why-did-i-get-a-refund-and-an-underpayment-penalty-01f77b4f?st=YqWTF6&reflink=desktopwebshare_permalink [<https://perma.cc/US6G-QDLZ>] (“[S]ay an investor . . . might owe an underpayment penalty if he doesn’t pay estimated taxes due [in first] quarter. But if this investor raises the withholding on a paycheck . . . enough to cover the tax—even in December—there is no . . . penalty.”); Deborah Lohse, *How to Gauge Withholding to Meet Tax Liability*, WALL ST. J., Apr. 15, 1994, at C1 (reporting that Price Waterhouse partner in charge of personal financial services says many of her clients withhold heavily from their year-end bonuses to cover tax shortfalls).

⁸³ See, e.g., Saunders, *supra* note 79; Laura Saunders, *Don’t Miss Out on Your 2023 Tax Breaks* (Nov. 10, 2023), <https://www.wsj.com/personal-finance/taxes/2023-tax-breaks-ira-qcd-ev-878b50a3> [<https://perma.cc/QVV9-VFFP>] (“Under little-known tax rules, these moves can wipe out or reduce underpayment penalties, even if the catch-up payment is made late in the year.”).

⁸⁴ See, e.g., Sandra Block, *Taxes Due Quarterly on Some Extra Income*, USA TODAY, Jan. 9, 2001, at 3B; Bill Bischoff, *Do You Owe Estimated Taxes?* MARKETWATCH (Feb. 12, 2014, 8:00 AM), <https://www.marketwatch.com/story/do-you-owe-estimated-taxes-2014-02-12> [<https://perma.cc/8VJD-RWQD>] (“[J]ack up your withholding between now and year’s end [and] your estimated tax obligations vaporize.”); *Year-End Tax Strategies*, CONSUMER REP., Dec. 1998, at 62-63 (“[H]ave your entire pay withheld . . . [, permitting] you to avoid the tax penalty . . .”).

⁸⁵ See, e.g., Albert B. Ellentuck, *Strategies for Minimizing Estimated Tax Payments*, 49 TAX ADVISER 184, 187 (2018) (§ 6654(g) “creates an opportunity for taxpayers who either find themselves underpaid or wish to defer the payment of tax to avoid the underpayment penalty by increasing withholding at year end (for example, 100% withholding on a year-end bonus).”).

⁸⁶ See, e.g., JAMES H. BOYD ET AL., *SOUTH-WESTERN FEDERAL TAXATION: INDIVIDUAL INCOME TAXES 2025*, at 13-34 (Young et al. eds., 48th ed. 2025) (detailing a taxpayer “can play catch-up to a certain extent” by modifying her W-4).

⁸⁷ See, e.g., Shu-Yi Oei & Diane M. Ring, *Tax Law’s Workplace Shift*, 100 B.U. L. REV. 651, 686 n.159 (2020) (“A worker with a full-time-employee job may have healthcare and retirement benefits through that job and may be able to increase tax withholding on wages from that job to cover any required quarterly filing and payment obligations on income earned from secondary independent contractor positions.”).

cover the tax—even in December—there is no estimated-tax penalty.⁸⁸

Articles in other renowned outlets such as *U.S. News & World Report*, *Forbes*, and *Kiplinger* also recommend increasing withholding on December retirement payouts.⁸⁹ They are joined by many articles in journals catering to retirees and their tax and financial advisors.⁹⁰ Some articles note that the approach is especially useful for taxpayers over a certain age, who are penalized if they do not take out required minimum distributions.⁹¹ Some articles offer the ultimate approach of withholding tax equal to the entire December distribution.⁹²

⁸⁸ Saunders, *supra* note 82. For similar *Wall Street Journal* articles, see, e.g., Saunders, *supra* note 79; Ashlea Ebeling, *The Surprise Bill Coming to Those Who Underpay Their Taxes*, WALL ST. J. (Dec. 2, 2023, 9:00 PM), https://www.wsj.com/personal-finance/taxes/federal-tax-withholding-estimates-penalty-2023-e6c3736f?st=RiLNtY&reflink=desktopwebshare_permalink.

⁸⁹ See, e.g., Kimberly Lankford, *Should You Be Making Quarterly Tax Payments?*, U.S. NEWS & WORLD REP. (June 23, 2025, 11:03 AM), <https://money.usnews.com/money/personal-finance/taxes/articles/should-you-be-making-quarterly-tax-payments> [<https://perma.cc/ZJY8-N7J3>] (“[P]eople who are both self-employed and making IRA withdrawals could try to pay all of their taxes using tax withholding from retirement distributions . . .”); Ashlea Ebeling, *IRS Warns Retirees: Act Now to Avoid Surprise Tax Bill Next April*, FORBES (Sept. 7, 2018, 5:02 PM), <https://www.forbes.com/sites/ashleaebeling/2018/09/07/irs-warns-retirees-act-now-to-avoid-surprise-tax-bill-next-april/> [<https://perma.cc/U9AP-B6U2>]; Kevin McCormally, *10 Things Boomers Must Know About RMDs from IRAs*, KIPLINGER (Dec. 14, 2017), <https://www.kiplinger.com/slideshow/retirement/t045-s001-8-things-boomers-must-know-about-rmds-from-iras/index.html> [<https://perma.cc/V89X-AXAP>] (“Some IRA owners, in fact, use large withholdings from late-in-the-year [distributions] to cover their tax bill on both the IRA payout and investment earnings.”).

⁹⁰ See, e.g., Amy Shepard, *Estimated Taxes vs. Withholding: What Retirees Need to Know*, THE STREET (July 23, 2024), <https://perma.cc/D297-UPJB> (“[I]f someone . . . in December decides to take an IRA withdrawal and have enough tax withheld to meet the safe harbor rule, that works!”); Ellentuck, *supra* note 85; Jeffrey Levine, *How To Reduce Estimated Tax Penalties With IRA Distributions*, FINANCIAL PLANNING (Nov. 19, 2020, 2:29 PM), <https://www.financial-planning.com/news/how-to-reduce-estimated-tax-penalties-with-ira-distributions> [<https://perma.cc/M4HJ-QJUA>] (“[Section 6654(g)] swings the time-value-of-money benefit over to the taxpayer, essentially providing an interest-free loan from Uncle Sam equal to the estimates that would otherwise have been paid.”); Steffen, *supra* note 61; Cathalene Bowler & Dennis Schmidt, *Estimated Tax Rules and Strategies for Individuals*, 129 J. TAX’N 30, 37 (2018).

⁹¹ See Rocky Mengle, *5 Year-End Moves to Trim Your Tax Bill*, KIPLINGER (Nov. 17, 2021), <https://www.kiplinger.com/taxes/603773/5-year-end-moves-to-help-retirees-trim-their-tax-bill> [<https://perma.cc/2264-9CXD>]; John G. Kilgour, *Required Minimum Distributions*, 52 COMPENSATION & BENEFITS REV. 127 (2020). See also I.R.C. § 401(a)(9).

⁹² See, e.g., Kimberly Lankford, *Surprise: There’s Another Tax Deadline on April 15*, U.S. NEWS & WORLD REP. (Apr. 7, 2025, 9:16 AM), <https://money.usnews.com/money/personal-finance/taxes/articles/surprise-theres-another-tax-deadline-in-april> [<https://perma.cc/9EP8-33X2>]; Ellentuck, *supra* note 85; Bowler & Schmidt, *supra* note 90 (suggesting to take a distribution that is eligible for a tax-free rollover, have as much withholding tax as needed to catch up, and then transfer funds to another plan within the 60-day rollover period to avoid ultimate taxation on rolled over amounts).

B. Setting 2: Section 6654(g)'s Catch-up Withholding After Reduced/No Withholding

Setting 2 is similar to Setting 1, except there is *reduced or no* withholding in the first part of the year. As in Base Example and Setting 1, she makes no 1040-ES payments, and, to defer payments as long as possible, she completes her withholding form so as to lower earlier-in-the-year withholding, perhaps even to zero. Exploiting Section 6654(g), late in 2023 she updates her form to withhold as much as possible as late in the year as possible, so as to eliminate the \$875 penalty and maximize her time-value-of-money benefit.

This Article has not identified published sources recommending an employee engage in this strategy by counterfactually driving down withholding early in the year. This is because Part III will show that doing so creates clear legal exposure. Yes, there are articles—*a la* the articles cited in Section II.A to help those who do not make sufficient 1040-ES payments—recommending that a person who happens to find themselves under-withheld early in the year take advantage of Section 6654(g)'s safe harbor.⁹³ And there are the articles recommending retirement pay recipients elect no or reduced withholding when allowed to.⁹⁴ However, these articles stop short of recommending inputting information on the form that leads to less earlier-in-the-year withholding when the underlying facts do not support it. A tax textbook warns that “One way employees might hope to avoid withholding would be to *falsify* the [W-4] information provided to the employer. . . .”⁹⁵

An article in a leading periodical that attributes some deliberately questionable behavior to an early-in-the-year under-withholding worker is in the *Wall Street Journal*. It notes that some workers “change their withholding to get more money in their paycheck to cover expenses or splurges, but that can backfire when the bill comes due. . . .”⁹⁶ Because splurges are of a personal nature—and thus not deductible or creditable for tax purposes—this suggests the anecdotes represent workers who falsified their W-4 to drive down withholding. A *New York Times* article is vaguer in attributing deliberateness, noting the “tactic” of extra December withholding “will work for taxpayers who have not had enough withheld *for any reason*.”⁹⁷ Another *New York Times* article is fraught with legal risk in

⁹³ See, e.g., Anonymous, *Get Your Clients Ready for Tax Season*, 224 J. ACCT. (2021) (“If it looks as if a client’s income tax withholdings will not be enough come Jan. 15, have the client file a new Form W-4 . . . to increase the withholdings through the end of the year . . . even if they are bunched near the end of the year.”).

⁹⁴ See, e.g., Levine, *supra* note 90. Part III explains how even legally permissible changes in withholding can lead to legal exposure if the recipient uses the wrong lines on the withholding form.

⁹⁵ JAMES H. BOYD ET AL., *SOUTH-WESTERN FEDERAL TAXATION: CORPORATIONS, PARTNERSHIPS, ESTATES & TRUSTS* 2025, at 17-20 (Annette Nellen et al. eds., 48th ed. 2025) (emphasis added).

⁹⁶ Ebeling, *supra* note 88.

⁹⁷ Jan M. Rosen, *Want to Reduce Those Tax Bills for 1993? Only 27 Days Left; Smart Strategies in a Year Marked by Higher Rates*, N.Y. TIMES at 34 (Dec. 4, 1993), <https://www.nytimes.com/1993/12/04/news/want-reduce-those-tax-bills-for-1993-only-27-days-left-smart-strategies-year.html> (emphasis added).

guiding one to *increase* withholding: “You can always claim fewer withholding allowances than you are entitled to but not more.”⁹⁸

Posts on the internet offer nearly any sort of advice, including on breaking the law in cases such as Setting 2. On the *Stack Exchange* aggregator, a poster asked: “I’m wondering if it’s possible to defer pay period withholdings to say year end. One intent of this would be to maximize potential investment income on the extra gross income, like a no interest/penalty loan of sorts from the IRS.”⁹⁹ One response is careful to warn of the criminal exposure but then suggested it would likely not be caught: “You can . . . in theory [be] prosecuted, for falsifying W-4 to reduce withholding, but if you do make it up in time I doubt they would bother.”¹⁰⁰ Another response is more aggressive: “you might be able to set your W-4 to ‘10 deductions’ (so you pay no tax), and then make a (appropriately calculated) catch-up payment in Mid-December . . . , so you should be good. However if you miss that, or miscalculate, you’d be in trouble.”¹⁰¹ Another alludes only to risk of civil penalty: “If you achieved the earlier under-withholding by falsifying W-4, there is a separate \$500 penalty. . . but only if they go to the effort (cost) of investigating you, which they probably won’t.”¹⁰²

Another *Stack Exchange* thread appears under the heading “Can you be penalized for setting an arbitrarily high number of allowances on your W-4?”¹⁰³ One answer includes a confession: “You are not allowed to just claim as many allowances as you want. You might get away with it, as I did for many years, but that doesn’t make it legal. You are likely to get away with it”¹⁰⁴

⁹⁸ Editorial, *Guidance for Workers in Filling Out New W-4*, N.Y. TIMES, Nov. 19, 1986, at D5. The author should have directed a person seeking extra withholding to input the amount on the extra withholding line, not to counterfactually decrease deductions/credits, as discussed *infra* Part III.

⁹⁹ Garren, Comment to *Can You Defer Withholding Taxes Until Year End Without Drawing Ire of the IRS?*, STACK EXCHANGE: PERSONAL FINANCE & MONEY (June 13, 2017, 5:21 PM), <https://money.stackexchange.com/questions/80762/can-you-defer-withholding-taxes-until-year-end-without-drawing-ire-of-the-irs> [<https://perma.cc/WD48-HHQS>].

¹⁰⁰ dave_thompson_085, Comment to *Can You Defer Withholding Taxes Until Year End Without Drawing Ire of the IRS?*, STACK EXCHANGE: PERSONAL FINANCE & MONEY (June 14, 2017, 10:04 AM), <https://money.stackexchange.com/questions/80762/can-you-defer-withholding-taxes-until-year-end-without-drawing-ire-of-the-irs> [<https://perma.cc/WD48-HHQS>].

¹⁰¹ Aganju, Comment to *Can You Defer Withholding Taxes Until Year End Without Drawing Ire of the IRS?*, STACK EXCHANGE: PERSONAL FINANCE & MONEY (June 13, 2017, 9:22 PM), <https://money.stackexchange.com/questions/80762/can-you-defer-withholding-taxes-until-year-end-without-drawing-ire-of-the-irs> [<https://perma.cc/WD48-HHQS>].

¹⁰² dave_thompson_085, Comment to *Can You Defer Withholding Taxes Until Year End Without Drawing Ire of the IRS?*, STACK EXCHANGE: PERSONAL FINANCE & MONEY (Sep. 20, 2019, 6:21 AM), <https://money.stackexchange.com/questions/80762/can-you-defer-withholding-taxes-until-year-end-without-drawing-ire-of-the-irs> [<https://perma.cc/WD48-HHQS>]. See *infra* Section III.A regarding this \$500 penalty.

¹⁰³ partyphysics, Comment to *Can You Be Penalized for Setting an Arbitrarily High Number of Allowances on Your W-4?*, STACK EXCHANGE: PERSONAL FINANCE & MONEY (Nov. 4, 2017, 10:25 PM), <https://money.stackexchange.com/questions/86902/can-you-be-penalized-for-setting-an-arbitrarily-high-number-of-allowances-on-you> [<https://perma.cc/7X6P-D8WU>].

¹⁰⁴ stannius, Comment to *Can You Be Penalized for Setting an Arbitrarily High Number of Allowances on Your W-4?*, STACK EXCHANGE: PERSONAL FINANCE & MONEY (Nov. 7, 2017, 7:01

A 2021 survey finds results consistent with many taxpayers deliberately under-withholding early in the year, and perhaps even for the entire year.¹⁰⁵ Only 44% said it was their goal to “pay as close to the exact [withholding] amount as possible” and 56% said they are purposely paying an inaccurate amount of taxes throughout the year; of these, 29% “prefer to underpay and don’t mind a bill.”¹⁰⁶

C. Setting 3: Reduced/No Withholding All Year

Setting 3 does not engage Section 6654(g)’s safe harbor, because Setting 3 seeks to reduce or eliminate withholding for the *entire* year. Setting 3 Example is similar to the prior Examples except she has dramatically reduced or totally turned off her withholding for *all of* 2023. Her goal is to minimize tax payment until she files her 2023 tax return in 2024 or to never pay at all (the latter version of Setting 3 hereafter referred to as “Setting 3 Evasion Case”).

Of the many criminal prosecutions involving facts such as Setting 3 Evasion Case and Section 7205—the misdemeanor penalty for faulty withholding forms detailed in Section III.B—one stands out. As part of their religious opposition to the income tax’s use in making war, Quakers claimed three *billion* dependents on their W-4 in a symbolic move to turn off withholding.¹⁰⁷ In less ostensibly noble Setting 3 Evasion Case reported decisions, individuals claim either exemption from tax or indicate enough dependents, deductions, or credits to turn off their withholding: they either never file a tax return¹⁰⁸ or file a return with understated taxable income to avoid or reduce tax.¹⁰⁹

A very recent criminal case presents the rare example of withholding abuse in the public eye, as shown in the indictment of President Biden’s son:

Defendant withdrew and transferred funds from Owasco, PC’s corporate accounts for his personal benefit. He transferred these funds outside of Owasco, PC’s established payroll system, which meant that taxes were not withheld from these transfers. When [Associate] discovered that the Defendant was subverting the established payroll and tax withholding process, [Associate] advised the Defendant that he was not withholding enough . . . taxes and that he would have a large tax liability due at the end of the year unless he allocated sufficient withholdings.¹¹⁰

PM), <https://money.stackexchange.com/questions/86902/can-you-be-penalized-for-setting-an-arbitrarily-high-number-of-allowances-on-you> [<https://perma.cc/7X6P-D8WU>].

¹⁰⁵ *AICPA Survey: Taxpayer Problems Involving W-4*, 37 TOL. BUS. J. 14 (2021).

¹⁰⁶ *Id.*

¹⁰⁷ *United States v. Snider*, 502 F.2d 645, 661 (4th Cir. 1974).

¹⁰⁸ *See, e.g., United States v. Foster*, 789 F.2d 457, 458 (7th Cir. 1986).

¹⁰⁹ *See, e.g., United States v. Manos*, No. 81-3125, 1982 U.S. App. LEXIS 11871, at *7 (6th Cir. July 14, 1982) (upholding employee’s conviction under Sections 7206(1) and 7205 for “making and subscribing false federal income tax returns” and “supplying his employer with false and fraudulent employee withholding allowance certificates,” respectively).

¹¹⁰ Indictment at 21, *United States v. Biden*, No. 23-CR-00599 MCS (C.D. Cal. Dec. 7, 2023).

There is no mention of W-4 in the public Biden court filings or decisions, as it seems the government did not pursue a Section 7205 W-4 charge and instead focused on other tax crimes, such as Section 7203 failure to pay.¹¹¹ Biden pled guilty to several counts, including one in which he “subverted” the withholding process of his own company by withdrawing millions outside the withholding process and included false business deductions on his tax return to reduce the “very substantial tax liability he faced.”¹¹²

III. LEGAL EXPOSURE FROM FAULTY WITHHOLDING FORMS

Part III identifies possible civil and misdemeanor (and technically applicable felony) charges the government could charge for individuals engaging in behavior described in the three settings. It is not intended to be an exhaustive review of the many statutory provisions, related jurisprudence, and government guidance to its prosecutors. Instead, it is intended to provide enough background to explain how the poorly designed withholding form process tempts so many Americans to engage in not only morally questionable behavior (see Part IV), but also clear misdemeanors in a form of perjury trap. Furthermore, they are susceptible to possible felony prosecutions seizing on literally applicable statutory language, especially if there was selective enforcement.

Before diving into directly applicable potential civil and criminal penalties for faulty W-4 and W-4P submissions, let us identify topics we will not pursue further.¹¹³ First, this Article focuses on conscious abuses of the withholding rules. The IRS has long been clear that Section 6682’s civil penalty discussed in Section III.A “or even a criminal penalty [e.g., the Section 7205 misdemeanor discussed in Section III.B] applies when taxpayers *deliberately and knowingly* falsify a Form W-4 . . . in an attempt to reduce or eliminate the proper withholding of taxes from their wages. A simple error—an honest mistake—will not result in a penalty.”¹¹⁴

Second, Part III will not spill much ink addressing the separate Section 7201¹¹⁵ (tax evasion) and Section 7203¹¹⁶ (failure to pay or file annual tax return)

¹¹¹ Press Release, U.S. Dep’t of Just., Grand Jury Returns Indictment Charging Robert Hunter Biden with Three Felony Tax Offenses and Six Misdemeanor Tax Offenses (Dec. 7, 2023), <https://www.justice.gov/archives/sco-weiss/pr/grand-jury-returns-indictment-charging-robert-hunter-biden-three-felony-tax-offenses> [<https://perma.cc/G2JU-NX8X>].

¹¹² Press Release, U.S. Dep’t of Just., Robert Hunter Biden Convicted on Three Felony Tax Offenses and Six Misdemeanor Tax Offenses (Sept. 5, 2024), <https://www.justice.gov/archives/sco-weiss/pr/robert-hunter-biden-convicted-three-felony-tax-offenses-and-six-misdemeanor-tax-offenses> [<https://perma.cc/FZ9W-8MNK>].

¹¹³ We also will not address Section 7212(a)’s punishment for impeding the administration of tax laws. A recent Section 7212(a) W-4-related conviction in *Adams* was vacated after the Supreme Court in *Marinello* held that § 7212(a) requires nexus to a particular administrative proceeding. *See* *United States v. Adams*, No. 15-44 (JEB), 2019 WL 1746387 (D.D.C. Apr. 18, 2019); *Marinello v. United States*, 584 U.S. 1, 13 (2018).

¹¹⁴ I.R.S., Announcement 87-69, 1987-33 I.R.B. 35 (Aug. 17, 1987) [hereinafter Announcement 87-69] (emphasis added); *see also* PUBLICATION 505, *supra* note 34.

¹¹⁵ “Any person who willfully attempts in any manner to evade or defeat any tax . . . shall, in addition to other penalties provided by law, be guilty of a felony . . .” I.R.C. § 7201.

¹¹⁶ *See infra* Section III.C for details on the “estimated tax” aspect of Section 7203.

prosecutions of Setting 3 Evasion Case where the faulty W-4 is used as “evidence of either evasion of assessment of tax or evasion of payment of tax or both.”¹¹⁷ Setting 3 Evasion Case is by far the type most seen in the criminal jurisprudence involving faulty W-4s. The Office of Chief Counsel states the clearest case: “An employee falsely claims exemption from withholding[, which] when coupled with failure to file a tax return . . . may give rise to . . . *Spies* evasion” under Section 7201.¹¹⁸ *Spies* held that the element of willfulness necessary for felony conviction requires an affirmative commission of an evasive act, not merely a willful omission.¹¹⁹ Courts use *Spies* to couple a felony case for failure to file a return (i.e., an omission) under Section 7201 with the affirmative commission of a faulty W-4, even if Section 7205 is not charged.¹²⁰ There have also been convictions under both Section 7203’s failure to file a return and Section 7205 when the employee submitted W-4s falsely claiming they were exempt.¹²¹

Finally, Part III will not address W-4R because W-4R does not ask the recipient for any information other than identifying information and the rate of tax to use.¹²² Thus, there is no false W-4R information a taxpayer could provide in the settings.¹²³

Two Code sections are dedicated to faulty withholding forms, addressed in Sections III.A and B. Section III.C highlights exposure under Code Sections 7206(1) and 7203 and 18 U.S.C. Sections 1001 and 1621, including felony provisions that literally apply but for which the government has not yet pursued prosecution in published decisions.

A. Civil Penalties, Particularly Under Section 6682

Section 6682 imposes a \$500 civil penalty for “mak[ing] a statement” under Section 3402—the withholding rules at the heart of this Article—that results in a decrease in the amounts withheld if “as of the time such statement was made, there

¹¹⁷ *United States v. Waldeck*, 909 F.2d 555, 560 (1st Cir. 1990). *See also* *United States v. Mal*, 942 F.2d 682, 688 (9th Cir. 1991) (holding the same).

¹¹⁸ OFF. OF CHIEF COUNS., CRIM. TAX DIV., TAX CRIMES HANDBOOK ¶ 1-4.02[b]1, https://www.irs.gov/pub/irs-counsel/tax_crimes_handbook.pdf [<https://perma.cc/Y44M-QKQG>]. Congress intended that §§ 7201 and 7205 be separate offenses. *See United States v. Foster*, 789 F.2d 457, 461 (7th Cir. 1986).

¹¹⁹ *See Spies v. United States*, 317 U.S. 492, 497-98 (1943).

¹²⁰ *See, e.g., United States v. Gross*, 626 F.3d 289, 297 (6th Cir. 2010) (“[F]alse W-4 forms [fall] comfortably within the broad parameters established in *Spies*.”); *United States v. DiPetto*, 936 F.2d 96, 97 (2d Cir. 1991).

¹²¹ *See infra* note 152.

¹²² *See supra* note 36. This Article assumes recipients do not lie about their social security number, as is a frequent issue with illegal workers. *See, e.g., Kansas v. Garcia*, 589 U.S. 191 (2020) (immigration case, but referring frequently to § 7205).

¹²³ Recall a recipient can change withholding with the one exception of eligible rollovers, for which reduction below the default 20% is not allowed, assuming not rolled over into another plan. *See supra* note 40 and accompanying text. As a practical point, however, plan administrators would likely block recipients from stepping into trouble by indicating on a W-4R withholding below 20%.

was no reasonable basis for such statement. . . .”¹²⁴ Section 6682 is clear that the civil penalty is in “addition to any criminal penalty provided by law.”¹²⁵

For Setting 1, the individual would not be subject to the Section 6682 penalty because the questioned withholding actually *increases*, not decreases, as a result of the questioned W-4 or W-4P that is submitted late in the year. Section 6682 is clear that it applies only for decreased withholding.

On the other hand, W-4 and W-4P in Settings 2 and 3 violate Section 6682 for the parts of the year for which withholding was counterfactually reduced. For example, assume a single person instead checks the box for the lower taxed “married-joint” status or lists deductions or credits beyond what she reasonably knows is the case. Here she will have made a “statement” with no reasonable basis that reduces withholding. As for W-4P, however, there is no vulnerability to Section 6682 if the recipient sought to *eliminate* withholding by writing “No Withholding.”¹²⁶ Surprisingly, this results in a retiree vulnerable to Section 6682 if she reduces her withholding a bit more than she should have, compared to had she eliminated withholding by writing “No Withholding.”

Also, a counterfactual obtaining of reduced withholding can provide evidence of intent in a Section 6663 civil fraud case, which imposes a 75% increase in any tax underpayment attributable to fraud.¹²⁷ Several cases find W-4 falsely claiming exemption from withholding¹²⁸ or excessive deductions¹²⁹ provides evidence of such intent. Indeed, the IRS lists a false W-4 as a possible indicator or “badge” of fraud.¹³⁰ However, only the Setting 3 Evasion Case has the goal of never paying the tax (i.e., a tax underpayment). So it appears that Section 6663 would apply only to Setting 3 Evasion Case.

B. Section 7205 Misdemeanor

Section 7205 provides for a withholding form misdemeanor for “Any individual required to supply information to his employer under Section 3402 who willfully supplies false or fraudulent information”¹³¹

¹²⁴ I.R.C. § 6682(a). *See also* Announcement 87-69, *supra* note 114 (“[I.R.S.] will not apply the penalty to a taxpayer who has tried to figure the number of withholding allowances correctly, even if he or she makes a mistake”).

¹²⁵ I.R.C. § 6682(a).

¹²⁶ *See supra* note 39 and accompanying text.

¹²⁷ I.R.C. § 6663(a). Another civil penalty could be the § 6662 20% accuracy penalty, where the faulty W-4 is part of a larger tax underpayment case. *See, e.g.,* *Lowe v. Comm’r*, 2021 U.S. Tax LEXIS 2 (2021) (upholding an I.R.S. determination of the 20% accuracy penalty for a taxpayer who claimed 99 exemptions on his W-4).

¹²⁸ *See, e.g.,* *Thibault v. Comm’r*, 68 T.C.M. (CCH) 881 (1994); *Raley v. Comm’r*, 676 F.2d 980 (3d Cir. 1982).

¹²⁹ *See, e.g.,* *Brobst v. Comm’r*, 56 T.C.M. (CCH) 279 (1988); *Forbush v. Comm’r*, 38 T.C.M. (CCH) 871 (1979).

¹³⁰ IRM 25.1.2.3 (Nov. 3, 2023).

¹³¹ I.R.C. § 7205(a) (imposing a maximum sentence and fine of a maximum of one year in jail and \$1,000, respectively).

The cross-referenced Section 3402's use of the word "employer" nonetheless also applies to retirees' W-4Ps. As noted earlier, the Code treats retirement pay as if it were wages for withholding purposes, including for the provisions in the range of Sections 6001 through 7874 (i.e., civil and criminal penalties).¹³² This view is buttressed by the fact that Section 7205 is the only section in the 6001 through 7874 sequence specifically exempted from deemed treatment as wages in the backup withholding rules.¹³³ The lack of published W-4P Section 7205 criminal prosecutions is very likely due to the fact that W-4P did not request information on deductions or credits until 2022, when it was overhauled to look more like the W-4, before which W-4P looked like newly created W-4R with its lack of any such questions.¹³⁴

As noted in oft-cited *Malinowski*, Section 7205 protects "integrity of the tax withholding system. . . . If the withholding system is to work and the . . . Code is not to be reduced to a shambles, [withholding] certificates must represent the truth. . . ." ¹³⁵ The Ninth Circuit adds that Congress enacted misdemeanors—such as Section 7205—"with the knowledge that for certain types of forbidden behavior . . . a mild deterrent and the certainty of punishment are vital to the system. . . ." ¹³⁶

Section 7205's language is stated in the disjunctive form of "false or fraudulent," and thus it "has been specifically construed to require that the government establish only that the taxpayer willfully supplied false information."¹³⁷ In other words, intent to defraud is not required, for in a "misdemeanor prosecution, the government need not prove fraud, loss of revenue, or reliance by the government."¹³⁸ Other Circuits agree that no intent to defraud is required.¹³⁹ In other words, the offense is sufficiently "made out when a person . . . intentionally uses [W-4] to supply false information."¹⁴⁰

Section 7205 refers to willful behavior, which means the "acts must be voluntary and purposeful and done with the specific intent to fail to do what he knew the law required to be done."¹⁴¹ It does not require the statement be "false in the sense of deceptive" and the "criterion is not whether the employer and the government were, or could have been, deceived."¹⁴² *Malinowski* agrees, adding

¹³² I.R.C. § 3405(f).

¹³³ See I.R.C. § 3406(h)(10). See also *Ndirika*, 88 T.C.M. (CCH) 407 (using I.R.C. § 6654(g) for both retirement pay and wage withholding).

¹³⁴ See *supra* note 37.

¹³⁵ *United States v. Malinowski*, 347 F. Supp. 347, 352 (E.D. Pa. 1972), *aff'd*, 472 F.2d 850 (3d Cir. 1973), *cert. denied*, 411 U.S. 970 (1973).

¹³⁶ *United States v. Smith*, 484 F.2d 329, 330 (9th Cir. 1973), *cert. denied*, 416 U.S. 989 (1974).

¹³⁷ *United States v. Hinderman*, 528 F.2d 100, 102 (8th Cir. 1976) (citation omitted).

¹³⁸ *Smith*, 484 F.2d at 330.

¹³⁹ See, e.g., *United States v. Kelley*, 539 F.2d 1199, 1204 (9th Cir. 1976); *United States v. Best*, 43 A.F.T.R.2d (RIA) 79-636 (2d Cir. 1978); *United States v. Hudler*, 605 F.2d 488, 490 (10th Cir. 1979).

¹⁴⁰ *Smith*, 484 F.2d at 330.

¹⁴¹ *Hinderman*, 528 F.2d at 101.

¹⁴² *Hudler*, 605 F.2d at 491. See also *United States v. Rifen*, 577 F.2d 1111, 1113 (8th Cir. 1978) (holding in an I.R.C. § 7205 case that "[t]he element of willfulness in offenses under the tax code

“Any other knowledge or suspicions of employers or government officials are irrelevant to the purpose because it is only the information on [W-4] which effects tax withholding.”¹⁴³

The Fourth Circuit in *Snider*, however, held that more than falsity is required. It reversed a conviction when W-4 was prepared with an impossible assertion: Quakers claiming three *billion* dependents on W-4.¹⁴⁴ But the Second Circuit rejected *Snider*’s view: “each of the defendants wilfully filed his respective W-4 form with the intent to interfere with the withholding system and prevent the collection of taxes in the manner prescribed by law. Their guilt under . . . § 7205 . . . was fully established.”¹⁴⁵

In all three settings set forth in Part II, mere falsity of information provided on W-4 or W-4P could be sufficient for a Section 7205 violation. No fraud is required, nor reliance by others. Furthermore, in cases other than Setting 3 Evasion Case, a defendant could not benefit from a claim that the government did not ultimately suffer any tax loss, as the taxpayer paid any remaining tax with the annual tax return. This is because Section 7205 does not require loss of tax revenue.¹⁴⁶ The sentencing guidelines for Section 7205 contemplate this view: if the “defendant was attempting to evade—rather than merely *delay*—payment of taxes, an upward departure [in sentencing] may be warranted.”¹⁴⁷

In Settings 1 and 2, W-4 or W-4P submitted with *increased* withholding would not violate Section 7205 if box 4c—extra withholding—was used. This is because there is no falsity, merely the expressed desire of the taxpayer for more withholding. On the other hand, if the individual skipped box 4c and instead forced increased withholding by counterfactually reducing deductions and credits (or changing a filing status to a more expensive one, such as from true married-joint to false single in box 1), she has violated Section 7205.

In Settings 2 and 3, Section 7205 could apply for a W-4 or W-4P submitted with *reduced* withholding if she indicated counterfactual filing status, deductions, or credits¹⁴⁸ or if she counterfactually wrote “Exempt” on W-4.¹⁴⁹ For a W-4P intended to have the legally permissible zero withholding, she has violated Section 7205 if she neglected to write “No Withholding” and instead forced reduced withholding by counterfactually increasing the deductions or credits (or using a less expensive filing status).

does not require proof of any motive other than an intentional violation of a known legal duty”) (citation omitted).

¹⁴³ United States v. Malinowski, 347 F. Supp. 347, 353 (E.D. Pa. 1972).

¹⁴⁴ United States v. Snider, 502 F.2d 645, 662 (4th Cir. 1974).

¹⁴⁵ Hinderman, 528 F.2d at 102.

¹⁴⁶ See, e.g., United States v. Smith, 484 F.2d 329, 330 (9th Cir. 1973); Snider, 502 F.2d at 662 (citing Smith, 484 F.2d at 330); United States v. Wellendorf, 574 F.2d 1289, 1291 (5th Cir. 1978).

¹⁴⁷ U.S. SENT’G GUIDELINES MANUAL § 2T1.8 (U.S. SENT’G COMM’N 2024) (emphasis added).

¹⁴⁸ See, e.g., Malinowski, 347 F. Supp. at 350 (claiming 15 exemptions); Snider, 502 F.2d at 646 (claiming 3 billion dependents); Smith, 484 F.2d at 330 (claiming 17 dependents).

¹⁴⁹ See, e.g., United States v. Foster, 789 F.2d 457, 458 (7th Cir. 1986); United States v. Shivers, 788 F.2d 1046, 1048 (5th Cir. 1986) (filing inaccurate W-4 claiming exemption from withholding four days after filing W-4 with contrary information).

The Department of Justice manual states that Section 7205 is “used only rarely,” noting that false W-4 “generally will be charged as an affirmative act in a § 7201 tax evasion felony prosecution rather than . . . Section 7205[, which] may be used only in those cases in which the government cannot prove tax evasion or” in cooperation cases.¹⁵⁰ In other words, the last quoted phrase calls for deploying Section 7205 in all three settings, except for Setting 3 Evasion Case, where the direction is to charge Section 7205 only if Section 7201 tax evasion elements are difficult to prove.

The DOJ’s reference to “rarely” is inconsistent with the number of reported cases cited in this Section III.B, in which Section 7205 is the sole basis for conviction¹⁵¹ or is an additional charge,¹⁵² and these cases do not appear to be cases that had mere tax payment deferral, as in our settings other than Setting 3 Evasion Case. But there is a drop off, with the latest reported decision for solely Section 7205 in 1995, where the Ninth Circuit affirmed a conviction where an employee wrongly claimed nine exemptions to prevent withholding.¹⁵³ The latest aggregate data for 1994 to 2022 reveals only eight Section 7205 prosecutions, with the last one in 2006, whereas there have been over 13,000 cases under Sections 7201, 7203, and the tax perjury statute 7206(1) discussed in Section III.C.¹⁵⁴

The lack of Section 7205 prosecutions after 2006 is likely due to the fact that starting in 2005, employers were no longer required to send copies of questionable W-4s to the IRS (e.g., over 10 withholding allowances or complete exemption if earning more than a nominal amount per week).¹⁵⁵ Instead, the IRS created its “Withholding Compliance Program,” analyzing information on annual W-2 wage statements to ensure that employees have enough withheld from their paychecks and sending “lock-in” letters to employers to correct withholding amounts, along with either requests to employers to send the questionable W-4 to the IRS or to make it available for inspection.¹⁵⁶ Apparently it is a rare event when

¹⁵⁰ DEP’T OF JUST., CRIMINAL TAX MANUAL § 11.02, <https://perma.cc/2NKKW-XB6C>.

¹⁵¹ See, e.g., *Malinowski*, 347 F. Supp. at 351; *Smith*, 484 F.2d at 330; *Snider*, 502 F.2d at 646; *Hinderman*, 528 F.2d at 101; *United States v. Kelley*, 539 F.2d 1199, 1201 (9th Cir. 1976); *United States v. Best*, 43 A.F.T.R.2d (RIA) 79-636 (2d Cir. 1978); *Wellendorf*, 574 F.2d at 1290; *United States v. Herzog*, 632 F.2d 469, 470 (5th Cir. 1980); *United States v. Bass*, 784 F.2d 1282, 1283 (5th Cir. 1986).

¹⁵² As noted earlier, there are numerous convictions under both Sections 7205 and 7203’s failure to file a return where false W-4s claimed exemption. See, e.g., *Foster*, 789 F.2d at 458 (upholding evasion convictions under both Sections 7201 and 7205); *United States v. Copeland*, 786 F.2d 768, 769 (7th Cir. 1985); *United States v. Schaffner*, 780 F.2d 1024, at *1 (6th Cir. 1985); *United States v. Lawson*, 670 F.2d 923, 925 (10th Cir. 1982); *United States v. Rifen*, 577 F.2d 1111, 1112 (8th Cir. 1978).

¹⁵³ See *United States v. Cree*, No. 94-10574, 1995 WL 465792, at *2-3 (9th Cir. Aug. 7, 1995).

¹⁵⁴ Federal Criminal Case Processing Statistics Data Tool, BUREAU OF JUST., <https://fccps.bjs.ojp.gov/home.html>.

¹⁵⁵ See IRM, *supra* note 42, § 5.19.11.1.2(4); I.R.S., News Release 2005-45 (Apr. 13, 2005); Mark Battersby, *Employers are Mostly Off the Hook as Tax Cops*, INVEST. NEWS (May 16, 2005).

¹⁵⁶ See IRM, *supra* note 42, § 5.19.11.2.1(1); I.R.S., Topic No. 753, Form W-4, Employees Withholding Certificate; I.R.S., News Release 2005-45, *supra* note 155; Treas. Reg. § 31.3402(f)(2)-1(g)(i); Battersby, *supra* note 155.

the employer refuses to comply with the lock-in letter.¹⁵⁷ Notice this approach is *ex post* and thus cannot identify Settings 1 and 2, as the W-2 wage statement's annual reported withholding would not offer any clues to within-year abuses.¹⁵⁸ As for why there are no reported Section 7205 prosecutions of faulty W-4Ps, this is very likely due to the fact that only starting in 2022 did the W-4P begin to ask substantive questions like the W-4 always has.¹⁵⁹

Note that the language of Section 7205—along with Section 6682—has no requirement that the falsehood be material, and no court has imposed it. This is unlike several of the technically applicable statutory provisions we address next in Section III.C.

C. Technical Violations Under Sections 7206(1), 1001, 1621, and 7203

The Supreme Court “has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants,”¹⁶⁰ even if another statute imposes a lesser penalty.¹⁶¹ Accordingly, let us now turn to criminal statutes other than the on-point Section 7205 misdemeanor. While the four criminal statutes discussed below should apply to faulty withholding forms, there are no published decisions involving prosecutions applying such statutes to the faulty withholding form itself. Instead of a deep dive discussing how the statute defines relevant elements such as materiality¹⁶² and willfulness, the below provides highlights and surmises as to why cases have not been brought. Nonetheless, these four statutes appear available in a prosecutor's arsenal.

1. Section 7206(1) Felony Applicability to Faulty W-4

Section 7206(1) provides for a felony for a person who

[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that

¹⁵⁷ Jennifer Carr, *Complicity and Collection: Religious Freedom and Tax*, 11 UNIV. ST. THOMAS L.J. 183, 211 (2014).

¹⁵⁸ Interestingly, the IRS Manual before 2024 indirectly confirmed the goal of ensuring the *full year* withholding was sufficient, not necessarily any given pay period's withholding. “The goal [of WCP and lock-in letters] is to correct withholding to ensure that taxpayers have enough income tax withheld to meet their tax obligations.” *Davis v. Comm’r*, 96 T.C.M. (CCH) 269, at *4 (U.S. Tax. Ct. 2008) (quoting IRM 5.19.11.1(1) (May 1, 2006), the current version of which no longer states this goal and instead is vaguer).

¹⁵⁹ See *supra* text accompanying note 34.

¹⁶⁰ *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979).

¹⁶¹ See, e.g., *United States v. Parsons*, 967 F.2d 452, 456 (10th Cir. 1992) (“Prosecutors are not required to prosecute under another statute perhaps covering the same wrongful act merely because the other statute imposes a lesser penalty.”).

¹⁶² As for materiality in all settings other than Setting 3 Evasion Case, a prosecutor might argue materiality is satisfied if the amount of tax payment deferred is large enough and the time-value-of-money benefit is more than nominal, a hypothetical example of which is offered *infra* Section IV.A.

it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter¹⁶³

Based on the statute's plain language, it can apply to all settings with a faulty W-4, as Form W-4 has a "penalty of perjury" statement and is a "document," if not a "statement."

Read literally, Section 7206(1) is available even in non-tax settings¹⁶⁴ and regardless of to whom the item is submitted, as no such limitations are in its language. The IRS Manual, however, does not read it to apply except for items filed with the IRS.¹⁶⁵ Note that the manual appears to be focusing on *when*—not *whether*—the infraction occurred, as in cases such as the Supreme Court's *Habig* decision, holding the statute of limitations starts *when* the offending item is filed with the IRS.¹⁶⁶ Recall that W-4 is filed only with the employer unless the IRS requests the W-4 under the Withholding Compliance Program discussed in Section III.B. If the government decides to pursue charges under Section 7206(1) for faulty W-4s and the defendant cites *Habig* to insist the W-4 must be filed with the IRS, the government could try to argue that the employer is an agent for the government in the withholding process, but this seems like a stretch unless the W-4 was delivered to the IRS under the WCP.

As with Sections 7201 and 7203 noted above as used for the tax return aspect of a withholding abuse, it is also possible for the government to separately charge Section 7206(1) for violating the perjury statement on the tax returns and Section 7205 for the W-4.¹⁶⁷

2. 18 U.S.C. § 1001 Felony Applicability to Faulty W-4 and W-4P

We can also look to a statute outside of the Code, 18 U.S.C. § 1001. This felony statute punishes

whoever, in any matter within the jurisdiction of the executive . . . branch . . . knowingly and willfully—(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document

¹⁶³ I.R.C. § 7206(1).

¹⁶⁴ Notice there is no reference whatsoever to tax matters in Section 7206(1), unlike Section 7206(2)'s aiding-and-abetting tax perjury statute: ". . . or in connection with any matter *arising under, the internal revenue laws*. . . ." I.R.C. § 7206(2) (emphasis added).

¹⁶⁵ IRM 9.1.3.3.7.1(5) (Jan. 30, 2023) ("[P]rosecutions under this section should involve only false returns or statements presented to or filed with the IRS."). For the same reason, a Section 7207 charge for faulty statements would not apply as its language explicitly requires the statement be delivered to the IRS. *See* I.R.C. § 7207.

¹⁶⁶ *See* *United States v. Habig*, 390 U.S. 222, 225 (1968).

¹⁶⁷ *See, e.g., United States v. Manos*, No. 81-3125, 1982 U.S. App. LEXIS 11871, at *4-7.

knowing the same to contain any materially false, fictitious, or fraudulent statement or entry¹⁶⁸

The Ninth Circuit points out that Section 1001 does not limit its prohibition against falsification to matters that another statute covers, as its purpose is to be a “catchall that reaches fraud not prohibited by other statutes”¹⁶⁹ and its broad false statement provisions “have their place as a ‘fitting complement’ to other statutes dealing with false statements in a particular field.”¹⁷⁰

The DOJ Criminal Resource Manual (“DOJ Manual”) identifies three ways statements could warrant Section 1001 prosecution, two of which could apply to withholding forms: made “to a private person or institution which implements federal programs” or made “in business records that may be subject to Federal government inspection.”¹⁷¹ The manual points out that these “acts have one common feature: they may affect either the operation or integrity of the government. All that is necessary for jurisdiction is that the false statement touch on a Federal interest, i.e., it affect or influence that interest.”¹⁷² Withholding forms are literally part of a “federal program” (i.e., the Withholding Compliance Program¹⁷³) and touch on that interest, and/or they are arguably part of business the IRS could inspect upon audit or as part of the WCP.

While one author states that “statements on W-4 forms would clearly be subject” to Section 1001 in addition to tax code provisions,¹⁷⁴ there are no reported decisions with Section 1001 actions for faulty withholding forms. Perhaps this is consistent with the DOJ’s preference for tax cases to be brought under Title 26 (i.e., the Code)¹⁷⁵ or merely of a piece with DOJ’s lack of Section 7205 prosecutions in recent decades.¹⁷⁶

However, there have been other tax-related wrongs prosecuted under Section 1001, including one that confirms the statement need not be filed with the IRS, as apparently is the government’s view for Section 7206(1).¹⁷⁷ For example, in *Gilbert* the government prosecuted an accountant who wrongly endorsed client

¹⁶⁸ 18 U.S.C. § 1001(a).

¹⁶⁹ *United States v. De Rosa*, 783 F.2d 1401, 1407 (9th Cir. 1986).

¹⁷⁰ *Cohen v. United States*, 201 F.2d 386, 388 (9th Cir. 1953) (quoting *United States v. Gilliland*, 312 U.S. 86, 95 (1941)).

¹⁷¹ U.S. DEP’T OF JUST., CRIMINAL RESOURCE MANUAL § 907, STATEMENTS WARRANTING PROSECUTION.

¹⁷² *Id.*

¹⁷³ See *supra* text accompanying note 156.

¹⁷⁴ Robert D. Probasco, *Prosecuting Conduit Campaign Contributions - Hard Time for Soft Money*, 42 S. TEX. L. REV. 841, 873 (2001).

¹⁷⁵ U.S. DEP’T OF JUST., CRIMINAL TAX MANUAL, *supra* note 150, § 12.02 (suggesting prosecutors bring charges under Section 1001 if technical defenses to a given Code provision, such as Section 7206(1), are likely to be raised).

¹⁷⁶ See *supra* text accompanying note 154.

¹⁷⁷ The DOJ Manual cites numerous cases in which Section 1001 is used to convict for statements not made to the federal government but to other parties in the context of a matter within the purview of government jurisdiction. U.S. DEP’T OF JUST., CRIMINAL TAX MANUAL, *supra* note 150, § 24.05.

tax refund checks for deposit into his own account.¹⁷⁸ The Ninth Circuit shot down the defendant's argument that the statement was made to a bank rather than directly to the IRS.¹⁷⁹ It stated that Section 1001 "contains no language that even suggests a false representation must be so directed; in plain terms, it provides that such a representation must be made in any matter within the jurisdiction of any department or agency of the" U.S.¹⁸⁰ A withholding form filed with the payer is yet another example of an indirect submission to the IRS, analogous to the many non-IRS examples provided in the DOJ Manual.¹⁸¹

Unlike Section 7206(1), there is no requirement under Section 1001 that the offending form be signed under penalty of perjury. Accordingly, W-4P may join W-4 as a potential subject of Section 1001 prosecutions.

3. 18 U.S.C. § 1621 Felony Applicability to Faulty W-4

Faulty W-4s in all three settings present risk under another non-tax criminal statute, 18 U.S.C. § 1621. It provides felony perjury punishment for "[w]hoever . . . in any declaration, certificate, verification, or statement under penalty of perjury as permitted under [28 U.S.C. § 1746] willfully subscribes as true any material matter which he does not believe to be true"¹⁸² The cross-referenced Section 1746 provides that the perjury statement language needs to appear in "substantially the following form: . . . 'I declare (or certify, verify, or state) under penalty of perjury under the laws of [the U.S.] that the foregoing is true and correct. Executed on (date).'"¹⁸³ While several words differ from the perjury statement at the bottom of W-4, it is substantially similar, and thus Section 1621 would appear to apply to a faulty W-4 (but not a W-4P, which has no perjury statement).

Just as prosecutors are permitted to proceed under tax criminal statutes or non-tax criminal statutes,¹⁸⁴ the DOJ Manual makes clear—with ample citation—that prosecutors are also permitted to proceed under either of Sections 1001 or 1621.¹⁸⁵ The manual quotes the Second Circuit: "The government is not barred from a prosecution under [Section 1001] merely because it might also prosecute under [Section 1621. A] single act or transaction may violate more than one criminal statute."¹⁸⁶

¹⁷⁸ *Gilbert v. United States*, 359 F.2d 285, 286 (9th Cir. 1966).

¹⁷⁹ *Id.* at 287 (rejecting the defendant's argument because he "certainly was aware that the endorsement of the checks was the first crucial step in their journey to the Treasury Department where they would be ultimately presented for payment").

¹⁸⁰ *Id.* (internal quotation marks omitted).

¹⁸¹ U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL § 906, JURISDICTIONAL REQUIREMENTS SATISFIED.

¹⁸² 18 U.S.C. § 1621(2).

¹⁸³ 28 U.S.C. § 1746(1). For declarations made outside the U.S., the language is "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. . . ." 28 U.S.C. § 1746(2) (internal quotation marks omitted).

¹⁸⁴ See *supra* note 160 and accompanying text.

¹⁸⁵ U.S. DEP'T OF JUST., CRIMINAL TAX MANUAL, *supra* note 150, § 24.08[2].

¹⁸⁶ *United States v. Greenberg*, 268 F.2d 120, 122 (2d Cir. 1959).

4. Section 7203 Misdemeanor Applicability to W-4 and W-4P

Like Section 7206(1) above, Section 7203's misdemeanor language is another example of clearly applicable language in a statute that the government has not pursued in published prosecutions. Besides Section 7203—as noted above—being a frequent charging statute in W-4 cases to convict for failure to pay the final tax due on a tax return or that would have been due had the taxpayer filed a truthful tax return, there is another part of Section 7203 that literally applies in all settings. (Indeed, it even literally applies in cases involving only insufficient 1040-ES payments).

Note the following emphasized language in Section 7203:

Any person required under [the income tax] title to pay any *estimated tax* or tax, . . . who willfully fails to pay such *estimated tax* or tax . . . at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor. . . . *In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no [Section 6654(a) penalty for failure to pay sufficient 1040-ES payments and withholding] with respect to such failure.*¹⁸⁷

Based on the plain language, even a small amount of Section 6654(a) penalty in any setting could subject taxpayers to Section 7203. This would be because they failed to have sufficient 1040-ES payments or—because of Section 6654(g)'s “withholding *shall be deemed a payment of estimated tax*” language—sufficient withholding.

The DOJ Manual does not dismiss the possibility of using Section 7203 for not paying estimated tax, as it reminds readers that there is no failure to pay estimated tax for purposes of Section 7203 if there is no Section 6654(a) penalty.¹⁸⁸ But the manual discusses it no further. Courts—in dicta—have stated that willful failure to pay estimated tax can be prosecuted under Section 7203.¹⁸⁹ Furthermore, the Joint Committee on Taxation included the following in its report on various penalty provisions: “In addition to the civil penalties for failure to pay estimated tax, section 7203 provides that any person who willfully fails to pay estimated tax

¹⁸⁷ I.R.C. § 7203 (emphasis added).

¹⁸⁸ U.S. DEP'T OF JUST., CRIMINAL TAX MANUAL, *supra* note 150, § 10.03. In a court transcript, a government attorney stated, “I envisioned a plea to [Section] 7203, which makes it a crime to fail to pay an estimated tax.” Transcript of Change of Plea Hearing at 10, *United States v. Marchelletta* (N.D. Ga., 2007) (No. 1:07-CR-107-TCB).

¹⁸⁹ *See, e.g., United States v. Araujo*, 43 F. App'x 21, 25 (9th Cir. 2002) (“No case has held that the intentional non-payment of estimated tax is a crime under 26 U.S.C. § 7201. . . . § 7203 is the section that specifically covers willful failure to pay estimated tax or tax.”); *United States v. Palermo*, 259 F.2d 872, 875 n.7 (3d Cir. 1958) (“The question of failure to pay estimated tax, made a misdemeanor under [Section 7203], was not raised in the instant case.”).

shall be guilty of a misdemeanor.”¹⁹⁰ Also, several law review articles have stated the same.¹⁹¹ These articles are all dated after 1983’s repeal of the requirement to file declarations of estimated tax,¹⁹² so an argument that Section 7203 merely neglected to have a conforming deletion of “estimated tax” seems weak. Furthermore, in a case not related to estimated tax the Supreme Court confirmed that “the intent to report the income and pay the tax sometime in the future does not vitiate the willfulness required by” Section 7203.¹⁹³

IV. CRITICISMS

Part IV criticizes the withholding process and its related Forms W-4 and W-4P, especially their luring of Americans to so easily engage in less than ethical behavior (at best) or illegality (at worst). These criticisms will lead us into Part V’s recommendations. Section IV.A shows that policymakers and prosecutors fail to appreciate that the time-value-of-money benefits the withholding forms so readily offered in the settings can be significant, in some cases even more so than outright nonpayment of taxes, as in the Setting 3 Evasion Case. Section IV.B shows how the withholding process arguably violates principles of vertical and horizontal equity. Section IV.C argues that even for legally sanctioned behavior such as Setting 1, extension of the tax ethics and morality and nascent tax-related ESG literature shows that Americans who engage in such behavior nonetheless are morally deficient. Section IV.D argues that the withholding process reveals the government as complicit, in essence luring Americans into less-than-ethical behavior and perjury traps, which is especially risky when the laws are so rarely enforced, presenting risk of selective enforcement.

A. Economic Significance of Tax Payment Deferral

The lack of focus of the government and academia on the behavior in settings other than the Setting 3 Evasion Case reveals lack of appreciation for the time value of money. Deferral of tax payments for no more than a year is of such short duration that it perhaps flies under the radar of policymakers and prosecutors watching for tax-related abuses, and its subtleness likely avoids the discerning eye of moralists, academic or otherwise. However, a violation of the law or unethical behavior—even if in small amounts—can aggregate to large amounts when

¹⁹⁰ STAFF OF JOINT COMM. ON TAX’N, 106TH CONG., STUDY OF PRESENT-LAW PENALTY AND INTEREST PROVISIONS AS REQUIRED BY SECTION 3801 OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998 (INCLUDING PROVISIONS RELATING TO CORPORATE TAX SHELTERS) 117 (Comm. Print July 22, 1999), available at <https://www.congress.gov/106/cprt/JPRT57655/CPRT-106JPRT57655.pdf> [<https://perma.cc/TX8S-UN6V>].

¹⁹¹ See, e.g., William B. Barker, *The Ideology of Tax Avoidance*, 40 LOY. U. CHI. L.J. 229, 241 (2009); Edward D. Urquhart & Susan Schwyn Martinez, *Handling Investigations Involving Civil and Criminal Tax Cases*, 45 S. TEX. L. REV. 193, 195 (2003). See also 1 FEDERAL TAX PRACTICE AND PROCEDURE § 3.07 (2024) (“Individuals who willfully fail to pay an estimated tax commit a misdemeanor.”).

¹⁹² See *supra* note 49 and accompanying text.

¹⁹³ *Sansone v. United States*, 380 U.S. 343, 354 (1965).

engaged in by many. If we generalize the results of the AICPA withholding survey for participants who answered that they “prefer to underpay and don’t mind a bill”¹⁹⁴ to the millions of Americans and their trillions of dollars of annual wages and retirement pay subject to withholding,¹⁹⁵ the delay of the U.S. government’s cash inflows presented by deferral-related withholding exploits is of enormous consequence, especially with the government running deficits and needing to issue debt to fund its programs.

As for the cost and risk to any one individual, many are vulnerable to being subjected to the civil penalties and misdemeanor charges detailed in Part III (both of which have no materiality thresholds for falsity) or even felony charges if a zealous prosecutor decides to use statutory armament not yet used, as highlighted in Section III.C. Whether an actor’s behavior is illegal—or unethical, as addressed in Section IV.C—does not depend on the amount. For example, President Clinton saw his law license suspended for what one scholar calls a “little white lie”¹⁹⁶ and wealthy celebrity Martha Stewart was imprisoned in connection with a relatively meager \$45,000 insider trading gain.¹⁹⁷

Readers who are sticklers for economic significance—and prosecutors needing to meet materiality¹⁹⁸ thresholds for felony convictions if they use the statutes not yet used for faulty withholding forms—should recognize that well-paid CEOs and other wealthy Americans can exploit the settings for very large time-value-of-money benefits. These outstrip the benefits of the typical American, even those who fail to pay their owed taxes, as in the Setting 3 Evasion Case. To demonstrate, assume a variation of Setting 2: a CEO with \$1.2 million of investment income and a \$1.2 million salary. Her income tax liability is just under \$889,000, on which Section 6654(a)’s penalty would apply if none of the 90% (i.e., just under \$800,000 annually or \$200,000 per quarter) was timely paid before January 15, 2024.¹⁹⁹ Assume she eschews making 1040-ES payments on her investment income and counterfactually reduces salary withholding on her W-4 to a tax rate of only 20%, or \$240,000.

Because sufficient current payments were not made, the IRS assesses Section 6654(a)’s penalty of just under \$29,000.²⁰⁰ To avoid the penalty, she

¹⁹⁴ See *supra* note 106 and accompanying text.

¹⁹⁵ See *supra* note 11 and accompanying text.

¹⁹⁶ Alan Heinrich, *Clinton’s Little White Lies: The Materiality Requirement for Perjury in Civil Discovery*, 32 LOY. L.A. L. REV. 1303 (1999); see also *Opinion, Bill Cops a Plea*, WALL ST. J. (Jan. 22, 2001).

¹⁹⁷ J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 GEO. MASON L. REV. 45, 79 (2007).

¹⁹⁸ The word “materiality” in the prosecution context is not necessarily synonymous with “significance,” the word Section IV.A prefers to use for its purposes.

¹⁹⁹ \$889,000 is calculated as follows: \$2,400,000 less \$13,850 standard deduction equals \$2,386,150 taxable income. See *supra* notes 76-77 for the tax rate and 90% requirement. At these income levels the tax includes 3.8% net investment income tax. See I.R.C. § 1411. Assume the investment income does not include long-term capital gains and qualified dividends, which face a favorable marginal tax rate of slightly over half the ordinary rate. See I.R.C. § 1(h)(1)(D).

²⁰⁰ Calculations by H&R Block tax software. See *supra* note 78.

exercises stock options with gains of approximately \$1.3 million²⁰¹ and directs her firm to withhold the entire \$1.3 million for tax, thereby wiping out the penalty. If she is even more aggressive, she completes her W-4 to counterfactually reduce her earlier-in-the-year withholding to zero. In this case, she has a penalty of just over \$41,000, which she just as easily sidesteps by exercising even more options. This example could also work with her year-end bonus or 401(k) or IRA savings.

Contrast this CEO with her firm's janitor, whose only income is an annual salary of \$29,000. Although his income tax is only \$1,600, assume he is struggling to make ends meet and feels compelled to counterfactually reduce withholding to zero and—when annual filing time arrives—he is unable to pay the \$1,600, thereby becoming a Setting 3 Evasion Case. Clearly the CEO's time-value-of-money benefit of \$29,000 (or as much as \$41,000) is far more than the janitor's \$1,600 benefit, yet the lack of faulty-withholding-form prosecutions of any but Setting 3 Evasion Cases implies that the government sees the CEO's \$29,000 benefit as less significant than the janitor's \$1,600 benefit.

In other criminal tax prosecution settings, however, the law contemplates tax deferral abuses. First, as noted earlier, Section 7205's sentencing guidelines suggest a lower penalty for mere delay of payment than for outright tax evasion.²⁰² Second, in a Section 7206(2) aiding-and-abetting conviction, the Court in *Stadtmauer* confronted how to sentence a tax preparer when there was no actual reduction in the tax reported for the year at issue, but instead mere deferral of his client's taxable income—and thus tax—to a year later than appropriate.²⁰³ The applicable sentencing guidelines are based on “tax loss;” to determine the amount of loss, the guidelines presume a loss equal to 28% of false deductions unless this does not “fit the circumstances of the particular case,” in which case the “court should use any method of determining the tax loss that appears appropriate to reasonably calculate the loss”²⁰⁴ *Stadtmauer*'s relevant wrong was depreciation expense deducted sooner than appropriate, thereby deferring tax to a future year when the depreciation tax shield would be reduced to make up for overstating depreciation in the earlier challenged year.²⁰⁵ The Court used a time-value-of-money approach:

[T]he purpose of taking the deductions in full in the year incurred was to receive the time value of money benefit from paying less taxes now rather than spread over time. . . . The question, then, is what is a reasonable way to estimate this loss. [To] accept the presumptive 28% rate . . . would be unfair and drastically overstate

²⁰¹ This represents the \$560,000 shortfall (\$800,000 – \$240,000) in current tax payments, grossed up by her marginal rate of approximately 40% (37% plus Medicare tax of 2.35%), plus tax due on the added option gain. Medicare tax of 2.35% represents the 1.45% general Medicare tax due from employees on all wages and the Medicare surcharge of 0.9%. See I.R.C. § 3101(b).

²⁰² U.S. SENT'G GUIDELINES MANUAL § 2T1.8 (U.S. SENT'G COMM'N 2024).

²⁰³ *United States v. Stadtmauer*, No. 05-249, 2009 WL 361113, at *15 (D.N.J. Feb. 9, 2009), *aff'd*, 620 F.3d 238 (3d Cir. 2010).

²⁰⁴ U.S. SENT'G GUIDELINES MANUAL § 2T1.1(a)(2) (U.S. SENT'G COMM'N 2024); *id.* application n.1.

²⁰⁵ *Stadtmauer*, 2009 WL 361113, at *15.

the tax loss. The Court finds that the most reasonable way to account for this loss is by using the Government's own method for compensating itself for the time value of money related to underpayments of tax [via the Section 6654(a) penalty].²⁰⁶

The settings do not present the issue of what year to report taxable income; instead, the issue is when to pay the tax due on a particular year's taxable income. Nonetheless, the Section 7205 sentencing guidelines and *Stadtmauer* show that courts can appreciate the time-value-of-money benefit of deferring tax to a later time.

B. Vertical and Horizontal Equity

Turning back to the CEO hypothetical above, notice how the janitor is far more likely to be prosecuted than the CEO, whose time-value-of-money benefit through withholding exploits is over eighteen times greater than the janitor's. Indeed, many of the reported faulty withholding decisions—either as the sole Section 7205 charge (as in *Snider's* Quaker school teacher) or coupled with another tax charge (as in *Foster's* policeman)—apply to lower-paid workers.²⁰⁷

Let us now assume the CEO does not reduce salary withholding but does continue to eschew 1040-ES payments on her investment income, opting to pay that tax shortfall in her increased December withholding on options gains, taking advantage of Section 6654(g). In other words, she is not breaking the law, as she uses the correct box 4c to add voluntary withholding in December on her revised W-4. Notice how the wealthy CEO has legal advantages the janitor does not if the janitor is unable to eliminate his withholding to zero due to a Withholding Compliance Program lock-in letter the IRS sends after it compares his W-2 to his withheld income.²⁰⁸ Or if the WCP fails to detect the janitor's elimination of withholding, then he is at risk of being prosecuted, while the CEO is not.

In effect, comparing the CEO and janitor reveals Section 6654(g)'s violation of vertical equity, which is a policy objective of having those who earn more income pay a higher share of their income in taxes, as reflected in the U.S.'s progressive tax rate structure.²⁰⁹ Here, we find the wealthy having the benefits of deferral with no criminal sanction by using Section 6654(g), a technique the janitor is unable to replicate. In effect, Section 6654(g)'s safe harbor is *regressive*, as it affords the wealthy a greater tax benefit than it affords the poor.

And what of horizontal equity? That policy objective requires that those similarly situated be treated equally and is a general principle of tax design, such that those who have similar economic means bear the same burden.²¹⁰ Notice how a janitor cannot benefit from deferral the way a person with non-withholdable

²⁰⁶ *Id.* at *16.

²⁰⁷ See *Snider*, *supra* note 144; *Foster*, *supra* note 108.

²⁰⁸ See *supra* note 156 and accompanying text.

²⁰⁹ See Henry Ordover, *Horizontal and Vertical Equity in Taxation as Constitutional Principles: Germany and the United States Contrasted*, 7 FLA. TAX REV. 259, 271 (2006).

²¹⁰ See *id.*

income can. Consider someone with \$29,000 of self-employment income²¹¹ or investment income. While she can opt to incur Section 6654(a)'s penalty if she does not pay her tax until she files her annual tax return, that option is not available to the janitor. He must have the correct withholding currently, and if he seeks to defer tax until filing his annual return, he is also at risk of a Section 6682 penalty of \$500 and of perpetrating a misdemeanor (or possibly a felony).

Also in effect violating horizontal equity is the requiring of employees to sign perjury statements on W-4 but not requiring the same for retirees on W-4P or W-4R.

C. Withholding Form Exploiters as ESG Violators and Ethically Deficient Actors

While there are countless articles in recent years addressing environmental, social, and governance ("ESG") issues, it is only recently that academics have started to focus on the behavior of taxpayers as actors. Scholars Chaim and Parchomovsky argue that corporate tax-related behavior should be another aspect of ESG:

[T]axes are most relevant to the social pillar of ESG. It is wrong to think of taxes simply as an obligation that we must avoid complying with if we can. Tax payments are the means by which the government finances its programs and labors toward a better future. Without taxes, we . . . would have to rely on the beneficence of corporations and the private sector. We believe that our society is not ready for this yet; in fact, we are doubtful that it ever will be.²¹²

They also note that "exploitation of legal loopholes and other grey areas . . . deprive[s] governments of the funding needed for the provision of public goods and

²¹¹ Delaney Thomas, *supra* note 13, proposes that withholding be expanded to reach self-employed individuals, although not couching it in terms of horizontal equity and also not mentioning Section 6654(g). She argues that employees, because they have mandatory withholding upon income, require "virtually no effort," while the self-employed have "burdensome compliance costs" (e.g., needing to make 1040-ES payments or avoiding risk of Section 6654(a) penalties). *Id.* at 143. See also Jay A. Soled & James Alm, *Passive Income Tax Withholding, \$200 Billion in Revenue Without Raising Taxes*, 187 TAX NOTES FED. 1163 (2025) (proposing tax withholding on investment income).

²¹² Danielle A. Chaim & Gideon Parchomovsky, *The Missing "T" in ESG*, 77 VAND. L. REV. 789, 825 (2024); see also Mark J. Cowan & Joshua Cutler, *ESG and the Demand for State Tax Incentives*, 27 FLA. TAX REV. 78, 83 (2023) ("[A] growing number of ESG reports discuss taxes in the 'S' section as part of a company's support for the community."). But see Lisa Chen, *More T in ESG: Tax as a Crucial Component of ESG*, 75 U.C. L.J. 1245, 1263 (2024) (noting that "traditionally [tax paid is] seen as a governance issue," but could also be a part of the "S" prong). In addition to citing posts and articles by practitioners, Chen cites CSR and tax avoidance literature, highlighted *infra* note 214.

the promotion of important societal policies[,] outcomes that are starkly at odds with ESG principles.”²¹³

To date, the nascent tax-related ESG literature has focused only on corporations. (There is also recent literature on tax-related corporate social responsibility, which overlaps somewhat with ESG).²¹⁴ While this Article’s focus is on individuals’ behavior related to their own taxes, it is clear that if ESG norms require corporations to behave properly in their tax affairs, then individuals likewise should in their personal tax affairs. Because firms act through human agents, criticizing a firm for poor ESG is in effect criticizing its responsible human agents.

We should consider the tax behavior of individuals with the same judgmental eye that is applied more formally to firms’ ESG scores. A term with growing use on the web—but not yet in academic circles—is “personal ESG score.”²¹⁵ The same ESG goals that apply to firms should apply to individuals. For example, the use of private jets hurts a firm’s ESG score.²¹⁶ Similarly, it should hurt one’s personal ESG score, as evidenced by many articles citing the hypocrisy of climate activists who use private jets.²¹⁷ While jet use relates to the environmental pillar of ESG, let us turn to tax behavior, which Chaim and Parchomovsky argue above to be part of ESG’s social pillar. If corporations have a social responsibility to engage in proper tax behavior to help the government fund its programs, so should individuals, especially because individuals in aggregate pay far more U.S. federal income tax. For example, in 2024 corporations paid \$535 billion in U.S.

²¹³ Chaim & Parchomovsky, *supra* note 212, at 789; *see also* Pinky Shodhan & Don Reiris, *Marrying ESG Initiatives to Business Tax Planning*, TAX ADVISER, February 2023, at 8 (“[A] growing number of businesses are acknowledging that proper ESG tax planning provides a mechanism for companies to contribute to their communities and build public trust as a responsible corporate actor.”).

²¹⁴ *See, e.g.*, Kimberly S. Krieg & John Li, *A Review of Corporate Social Responsibility and Reputational Costs in the Tax Avoidance Literature*, 20 ACCT. PERSP. 477 (2021). *See also* Cowan & Cutler, *supra* note 212, at 121 (“[W]e view CSR as included in the ‘S’ part of ESG.”). In yet another prism, some speak of tax avoidance as a sustainability issue. *See, e.g.*, Robert Bird & Karie Davis-Nozemack, *Tax Avoidance as a Sustainability Problem*, 151 J. BUS. ETHICS 1009 (2010).

²¹⁵ *See, e.g.*, *What is Your Personal ESG Score and Why Should You Care?*, ESG | THE REPORT, <https://esgthereport.com/what-is-your-personal-esg-score-and-why-should-you-care/>, [https://perma.cc/C3SV-5S2T]. *See also* Jeff Thompson, *Are You a Good Global Citizen? Your “ESG Score” Will Say It All*, NEWSTEX BLOGS ACTIVIST POST (Feb. 22, 2022), <https://www.theorganicprepper.com/esg-score/>, [https://perma.cc/KUQ6-48RK]. The lack of academic literature on personal ESG scores likely reflects the fact that the prevalence of published ESG ratings data for investors to study has kept academics’ focus on publicly traded corporations’ ESG behavior.

²¹⁶ *See, e.g.*, Opinion, *Carbon Counter: ESG Activism will Give Mile-High Snub to Executive Jets*, FIN. TIMES (June 19, 2021), <https://www.ft.com/content/10fe8280-b76b-4d08-9da9-48009081c90d>.

²¹⁷ *See, e.g.*, Tibor Fischer, *How Come Only the Left Enjoys the Privilege of Double Standards?*, DAILY TEL. (Mar. 6, 2019), <https://www.telegraph.co.uk/news/2019/03/05/left-wingers-can-enjoy-privilege-double-standards/>.

federal income tax, while individuals' income tax withholding was over \$2.4 trillion.²¹⁸

Turning from the tax-related ESG literature, we can look to the decades of vast tax ethics literature.²¹⁹ This literature, however, has focused on tax evasion (illegal) and tax avoidance (legal), each as related to the imposition of tax,²²⁰ not necessarily when it is *paid*. As with the tax-related ESG literature, taxpayer ethics and morality literature does not explicitly or directly address tax *payment* deferral, in an apparent failure to fully appreciate time value of money. As shown in the CEO setting example,²²¹ deferring tax payments for a handful of months saves some Americans multiples of how much it saves most others, even those engaging in outright, permanent tax evasion, as in Setting 3 Evasion Case.

Can mere deferral of tax payment violate norms of tax-related behavior? One law review article provides the example of deferral of taxable *income* to future years, which leads to delay of the related tax, but not deferral of tax *payments* on a given year's taxable income. It points out that "some kinds of avoidance—such as putting money in a tax-deferred retirement savings account—are morally cleared because they are intended by government."²²² However, it is unclear whether the author means that the "avoidance" is the deferral's time-value-of-money benefit, the ability to subject deferred income to a lower tax rate in retirement years, or both. The distinction is important, as even if tax rates are the same in the year the income was deferred and the year it was paid out, the individual gains due to the time-value-of-money benefit on the tax deferred.²²³

The extensive empirical finance and accounting literature addressing tax avoidance as proxied by Generally Accepted Accounting Principles' effective tax rates ("ETR") of publicly traded firms in effect also ignores the time-value-of-money benefit of deferral.²²⁴ As noted in a leading literature review, a tax strategy that defers taxes to a future year (e.g., accelerated depreciation for tax purposes) will not alter GAAP ETR.²²⁵ This is because GAAP requires total income taxes—whether paid now or in future years on deferred taxable income—to be included in

²¹⁸ See FINANCIAL STATEMENTS OF THE UNITED STATES GOVERNMENT FOR THE FISCAL YEARS ENDED SEPTEMBER 30, 2024, AND 2023, at 61, <https://perma.cc/4U6Q-K959>.

²¹⁹ See, e.g., Alfred G. Buehler, *Ethics and Taxes*, 45 PROC. ANN. CONF. ON TAX'N UNDER AUSPICES NAT'L TAX ASS'N 276 (1952); Prebble & Prebble, *supra* note 17; Heather M. Field, *Aggressive Tax Planning & the Ethical Tax Lawyer*, 36 VA. TAX REV. 261 (2017).

²²⁰ See, e.g., Prebble & Prebble, *supra* note 17, at 702, 705-06 (adding the term "tax mitigation" as tax avoidance deliberately encouraged by the tax law); Daniel T. Ostas, *Endogenous Tax Law: Regulatory Capture and the Ethics of Political Obligation*, 85 LAW & CONTEMP. PROBS. 49 (2023).

²²¹ See *supra* Section IV.A.

²²² Allison Christians, *Avoidance, Evasion, and Taxpayer Morality*, 44 WASH. U. J. L. & POL'Y 39, 48 (2014).

²²³ See, e.g., SCHOLES ET AL., *supra* note 68; Stanley Veliotis, *Do Tax-Motivated Wash Gain Sales Pass Economic Muster?*, 71 TAX LAW. 391, 399-400 (2018).

²²⁴ See, e.g., Richard C. Sansing, *Accounting for Income Taxes: Primer, Extant Research, and Future Directions*, 89 ACCT. REV. 1565, 1566 (2014) (describing how GAAP ETR treats current and "deferred tax payments as the same, ignoring time-value-of-money considerations that drive many tax planning strategies").

²²⁵ See, e.g., Michelle Hanlon & Shane Heitzman, *A Review of Tax Research*, 50 J. ACCT. & ECON. 127, 139 (2010).

ETR's numerator, to be divided by pre-tax GAAP income.²²⁶ Even "cash ETR" (i.e., with only current-year tax payments included in the numerator)—an alternate proxy for tax avoidance in the literature²²⁷—would not suitably capture the deferral of taxes this Article focuses on, as corporations do not pay tax through withholding; instead, they pay through their own version of 1040-ES payments, with their fourth quarter payment due two weeks *before* year-end, not two weeks after year-end as for individuals.²²⁸

Does the ubiquitous use of ETR proxies in the tax avoidance literature that ignore deferral of the tax payment on a given year's taxable income mean that deferral accomplished in our three settings (other than the Setting 3 Evasion Case) does not merit criticism? Of course not; it is merely a matter of degree. The longer a deferral of tax (e.g., a young person's IRA contribution or a corporation's immediate expensing of a long-lived asset), the larger the benefit. But as demonstrated in the CEO-janitor hypothetical, the CEO's deferral benefit for eight to as many as twelve months can be larger than most others' multi-year deferral benefit. Just because something is paid before the year is over or shortly thereafter does not mean the delay is not both a benefit to the taxpayer and a detriment to the government. After all, why do lenders charge late fees on a monthly basis? It is because they too value being paid sooner rather than later. A lender will charge the CEO more in late fees and interest on a several-hundred-thousand-dollar credit card statement that is not paid for eight months than it will charge the janitor who takes twenty years to pay his \$1,600 credit card bill. In sum, an individual who delays paying a bill—tax or otherwise—has engaged in behavior that benefits themselves at the expense of another: the government and by extension her fellow taxpayers and beneficiaries of government programs.

D. Government's Complicity

It is disappointing that the government provides a withholding process that is not only extremely complicated but also tempts many to engage in morally suspect behavior that can also possibly result in civil, misdemeanor, and even felony charges.

While encouragement and entrapment are normally legal defenses in cases such as setting up a perpetrator to engage in dealing narcotics, bribery, and crimes of that ilk, the ease with which individuals can exploit their withholding forms opens the door to a possible entrapment defense. This is especially so when the IRS forms are so complicated in their approach, and the Section 6654(g) safe harbor beckons them to shift earlier-in-the-year withholding to late in the year. In today's age of easy electronic updating of withholding forms,²²⁹ making changes to one's withholding form is so easy, especially with larger employers and behemoth plan

²²⁶ *Id.*

²²⁷ *Id.*; see also Krieg & Li, *supra* note 214; Chaim & Parchomovsky, *supra* note 212.

²²⁸ I.R.C. § 6655(c)(2).

²²⁹ See *supra* note 26.

administrators.²³⁰ It is very unlikely that the IRS will detect mere shifts of withholding from earlier to later in the year, especially after the IRS stopped requiring employers to send in suspect W-4s.²³¹

It is not only conscious users of Section 6654(g)'s safe harbor that the government's deficient withholding process may ensnare. What about those who simply have trouble completing the forms? The W-4 has long been "an incredibly complex document."²³² In a recent AICPA survey of 2,000 respondents, only 11% answered accurately all six very basic true-false questions about W-4.²³³ For many, the forms call for a prediction of the year's financial and familial transactions, along with their tax implications. Indeed, addressing a constitutional challenge to a W-4 in a Section 6654(a) penalty case, the Sixth Circuit quoted the defendant's argument that "enumerated powers of the Congress do not include any power to compel a citizen to prophesy. . . ."²³⁴ This inability to fully forecast the future and to expertly know relevant tax law typically leads to imperfect withholding form submissions, as opposed to a final tax return, which is prepared after the year is over and all the facts are in, and for which most taxpayers employ tax professionals or software.²³⁵ What can be simple error or guesstimating on a withholding form, including forcing numbers onto lines so as to arrive at what the individual's intuition believes is correct,²³⁶ may allow the government to penalize under Sections 6682 and 7205, which require solely a falsity to punish.

Yes, it is unlikely a criminal defendant would prevail with an entrapment argument blaming the withholding forms for being so attractive to exploit. However, an ethical argument exists that the government is setting a form of perjury trap. While not having the reputation for selective government action like Russia, China, and Ukraine, the U.S. has faced its own accusations of perceived selective

²³⁰ See, e.g., *The Hows and Whys of Going with an Electronic W-4 System in 2008*, IOMA'S PAYROLL MANAGER'S REP., Feb. 2008, at 3, 5; Proposed Collection; Comment Request for Electronic Filing of Form W-4, 89 Fed. Reg. 17897 (Mar. 12, 2024).

²³¹ See *supra* notes 155-156 and accompanying text.

²³² Rose Gutfeld, *Many May Find New Withholding Hard to Swallow*, WALL ST. J. (Jan. 30, 1992).

²³³ *45% of American Taxpayers Have No Idea When They Last Updated Their Withholding: AICPA W-4 Survey*, CPA PRACTICE ADVISOR (Dec. 8, 2020), <https://www.cpapracticeadvisor.com/2020/12/08/45-of-taxpayers-dont-remember-when-they-last-updated-their-withholding/41614/> [<https://perma.cc/6ENN-2X2E>].

²³⁴ *Acker v. Comm'r*, 258 F.2d 568, 571 (6th Cir. 1958).

²³⁵ Alice Gilman, *Stop Identity Refund Fraud: Teach Employees About Proper Withholding* (Dec. 13, 2016) ("Let's face it, employees know very little about their W-4s because they don't do their own taxes."). See also Marielle Segarra, *Why so Few People Do Taxes on Their Own* (Apr. 10, 2019), <https://www.marketplace.org/story/2019/04/10/why-so-few-people-truly-diy-their-taxes> (noting that over 90% of U.S. taxpayers use a paid preparer or tax software).

²³⁶ Scott R. Schmedel, *IRS's Income-Tax Withholding Game Has Rules That Can Guarantee Defeat*, WALL ST. J., May 23, 1997, at C1 ("Half-facetiously, [an interviewee] proposes an 'ingenious' shortcut for folks frustrated by the W-4: Claim enough allowances to eliminate all taxes, then enter the desired dollar amount on Line 6, 'Additional amount, if any, you want withheld from each paycheck.'").

enforcement, as in the case of 2012's Tea Party investigations.²³⁷ Many argue there were selective prosecutions of the Clinton, Trump, and Biden families' personal matters.²³⁸ Outside politics, many see examples in the U.S. of selective government action in cases such as auditing taxpayers based on race.²³⁹

Of "central concern is the possibility that the [government agent's] encouragement might induce a person who otherwise would be law-abiding to engage in criminal conduct."²⁴⁰ This concern is consistent with the long-established Supreme Court view of entrapment, starting with *Sorrells*:

[T]he fact that . . . Government merely afford[s] opportunities or facilities for the commission of the offense does not defeat the prosecution. . . . A different question is presented when the criminal design originates with . . . Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.²⁴¹

Again, it is unlikely a criminal defendant would win in arguing that the government's withholding form entrapped her, as a court would likely see the forms as at most "merely affording" opportunities to commit the crime, to use language in *Sorrells*. So let us now turn to the moral responsibility of the *government* here.

The literature is clear that it is not ethical to tempt someone into crime or immoral behavior. In the coercion literature, philosophers debate the propriety of an actor's behavior, such as when a villain informs the actor that the villain will kill hostages unless the actor kills the villain's enemy.²⁴² This example is called "moral coercion," to be distinguished from "non-moral coercion."²⁴³ The difference between the two is that moral coercion forces the actor to decide between two results affecting third parties, while non-moral coercion forces the actor to decide between two results affecting the actor herself.²⁴⁴ The coercion literature may be a bit far from our settings, as there is no physical harm the government is coercing the actor to cause, but one could argue that Americans in Settings 2 and 3 having

²³⁷ See, e.g., Cynthia Barmore, *Authoritarian Pretext and the Fourth Amendment*, 51 HARV. C.R.-C.L. L. REV. 273, 284 (2016); Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99 CORNELL L. REV. ONLINE 41, 42 (2013).

²³⁸ See, e.g., Heinrich, *supra* note 196; Joe Miller et al., *Trump Set to Face Criminal Charges in New York Court; Hush-Money Allegations Ex-President Rails over "Witch Hunt" Re-Election Uncertainty*, FIN. TIMES, Apr. 1, 2023, at 1; Susan Milligan, *Hunter Biden's Questionable Case of "Special Treatment"*, U.S. NEWS & WORLD REP. (June 21, 2023, 6:46 PM), <https://www.usnews.com/news/politics/articles/2023-06-21/hunter-bidens-questionable-case-of-special-treatment> [<https://perma.cc/QL2T-LKHP>].

²³⁹ See, e.g., Martha Waggoner, *IRS Chief: Racial Disparities in Audits will be Addressed Within a Year*, J. ACCT. (May 16, 2023), <https://www.journalofaccountancy.com/news/2023/may/irs-chief-racial-disparities-in-audits-addressed-within-year/> [<https://perma.cc/9Z73-29GR>].

²⁴⁰ Wayne R. LaFare, CRIMINAL LAW 661 (6th ed. 2017).

²⁴¹ *Sorrells v. United States*, 287 U.S. 435, 441-42 (1932).

²⁴² See, e.g., Saba Bazargan, *Moral Coercion*, PHILOSOPHERS' IMPRINT, May 2014, at 1, 2.

²⁴³ *Id.* at 5-6.

²⁴⁴ *Id.* at 6.

trouble putting food on the table might view themselves as coerced into withholding abuses.

One scholar argues that one reason entrapment is wrong is because it “subverts the moral capacities of entrapped persons,” thereby interfering with their practical reasoning in ways that increase the likelihood they will culpably choose to act wrongly.²⁴⁵ He adds that this subversion “is incompatible with respect” for such parties in that it fails to provide support “for the successful operation of [their] moral capacities.”²⁴⁶

In other contexts, such as payments to lab experiment subjects, there is the concept of “undue inducements,” which are large monetary incentives “which appear irresistible, and hence coercive.”²⁴⁷ This creates a concern that the subject will “do something about which they may have serious misgivings; in effect, that the large offer may seduce them into acting ‘against their better judgment.’”²⁴⁸ One can appreciate how a financially struggling American might feel so tempted to exploit their withholding forms that it amounts to a form of coercion.

One last way to view the government’s flawed withholding process is to view it as an aider-and-abettor of a taxpayer’s withholding abuses. In essence, the government is complicit in the crime or unethical behavior. However, the government is actually the victim of the abuses, so pursuing any discussion of the government as complicit would evoke concepts of victim complicity, which is an outdated justification for pardoning others’ behavior.²⁴⁹

In essence the IRS withholding process provides one or both of two types of entrapment scenarios that police use. The first is the “Honey Pot” Operation, where police open a garbage business in the hopes of becoming targets for extortion.²⁵⁰ The second is the “Manna from Heaven” Operation, where police leave unattended luggage at the bus depot and arrest those who attempt to take it.²⁵¹ Both are arguably analogous to when the IRS offers a withholding form and related processes and then waits for employees and retirees to take the bait.

V. RECOMMENDATIONS

In an ideal world, tax withholding would be simple and yield a final tax collection, removing the need to file annual tax returns for the millions of Americans whose income consists solely of wages. For example, the U.K. sets the

²⁴⁵ Jeffrey W. Howard, *Moral Subversion and Structural Entrapment*, 24 J. POL. PHIL. 24, 25 (2016).

²⁴⁶ *Id.*

²⁴⁷ Ruth W. Grant, *Ethics and Incentives: A Political Approach*, 100 AM. POL. SCI. REV. 29, 38 (Feb. 2006).

²⁴⁸ *Id.*

²⁴⁹ See, e.g., Shawn Marie Boyne, *Uncertainty and the Search for Truth at Trial: Defining Prosecutorial “Objectivity” in German Sexual Assault Cases*, 67 WASH. & LEE L. REV. 1287, 1297 n.53 (2010) (quoting SUSAN ESTRICH, *REAL RAPE* 19 (1988)) (noting that common deterrents faced by assault victims include “juries’ knee-jerk suspicions of victim complicity”).

²⁵⁰ Gerald Dworkin, *The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime*, 4 L. & PHIL. 17, 20 (Apr. 1985).

²⁵¹ *Id.* at 19.

withholding tax rate based on the taxpayer's previous year's earnings, often eliminating the need to file an annual tax return, especially for those whose only income is wages.²⁵² In its 2018 report to Congress, the IRS's Taxpayer Advocate Service prepared a detailed report on other countries' methods as it suggested possible overhauls to the U.S. withholding system.²⁵³ The IRS Advisory Council recently released its lengthy Public Report on myriad tax matters, including some recommendations to improve Form W-4 to make it easier for employees (though it does not address the matters at issue in this Article).²⁵⁴ This Article does not weigh in on the TAS, IRSAC, or other recommended withholding changes, instead choosing to propose the following incremental improvements that can go a long way toward reducing confusion and temptation, thereby reducing legal and ethical risk for Americans, and creating fairer timing of cash flow for the government.

A. For Americans and Those Advising Them

The first recommendation is a broadside to all journalists and practitioners who suggest to Americans that they take advantage of Section 6654(g)'s safe harbor without careful guidance as to how to accurately and truthfully complete their withholding forms. It also applies to all the do-it-yourself-ers as they complete their own withholding forms.

For Settings 1 and 2, for the latter part of the year when taxpayers increase their withholding on W-4 or W-4P, journalists and practitioners should be crystal clear that taxpayers include the proper dollar amount in box 4c, the box for extra withholding. They should warn not to accomplish a similar result via counterfactually reducing credits or deductions or changing their filing status to a more expensive one. If taxpayers do so, they violate both Sections 6682 and 7205, which apply regardless of intent or materiality.

For Setting 2, those who counterfactually reduce their earlier-in-the-year withholding need to be better informed that they have clearly violated both Sections 6682 and 7205. The same applies for those in Setting 3 for the entire year, although Setting 3 Evasion Case perpetrators have larger concerns under Sections 7201 or 7203.

For those who deliberately over-withhold as a forced method of savings²⁵⁵ or out of concern of owing money when they file their annual tax return or to "catch up" because of an innocent mistake leading to under-withholding earlier in the year, they also technically have violated Sections 6682 and 7205 if they do not use box

²⁵² See TAXPAYER ADVOCATE SERVICE, I.R.S., *supra* note 20, at 15-17.

²⁵³ See *id.*

²⁵⁴ See I.R.S. ADVISORY COUNCIL, PUB. NO. 5316, PUBLIC REPORT (Nov. 2024).

²⁵⁵ The literature is replete with evidence of this financially irrational behavior, leading one economist to write, "Why the great majority of taxpayers allow themselves to get into refund status, granting the government an interest-free loan during the tax year, is itself a fascinating question." Joel Slemrod et al., *April 15 Syndrome*, 35 ECON. INQUIRY 695, 698 (1997). But see Susannah Kroeber, *The Case for Over-Withholding Federal Income Tax: Benefits to Low-Income Taxpayers*, 12 COLUM. J. TAX L. 172, 183-88 (2021) (recommending over-withholding to reduce the risk of surprise tax liabilities becoming due).

4c for extra withholding. The same is true for those who use their withholding at any time of the year to replace 1040-ES payments they would otherwise have to make on their income other than through withholding on retirement pay and salary.

B. For Congress and the IRS

1. *Eliminate Section 6654(g) Withholding Loophole*

Congress should eliminate the portion of Section 6654(g) that states that withholding shall be deemed to have been paid evenly throughout the year. The legislative history of Section 6654(g)'s enactment in 1954 was part of an attempt to reduce administrative burden, along with other amendments of the estimated tax penalty provisions.²⁵⁶ The section's legislative history demonstrates its broader intent:

Another complicated and troublesome feature of the present law is the declaration of estimated tax [required] from over a million taxpayers who have no tax liability in excess of that discharged by withholding, and several hundred thousand where the tax to be paid with the declaration is very small. These requirements involve unnecessary administrative expenses as well as compliance burdens. Moreover, present law contains a very complex system of penalties for failure to comply with the estimated tax provisions. . . . The bill provides a new set of requirements for the filing of declarations of estimated tax which will relieve a substantial number of individuals of the burden in preparing these returns.²⁵⁷

The quoted language suggests Section 6654(g) was enacted as part of an overarching goal of simplification and fairness. It is easy to imagine how the lack of readily available, inexpensive electronic computing power in 1954 would make calculating Section 6654(a)'s penalty difficult for individuals and even their tax preparers, especially if calculating based on exact dates of paycheck withholding. After all, it was only in the 1970s that simple hand-held calculators entered the market, but even they sold for up to \$400 (over \$2,000 in today's dollars), while such devices now sell for under \$10 and exist on portable phones.²⁵⁸ Congress should embrace the technological age and scrap the deemed-evenly-paid withholding approach of Section 6654(g) and put employees and retirees on equal

²⁵⁶ See 100 CONG. REC. S8996 (daily ed. June 28, 1954) (statement of Sen. Eugene Millikin). The 1954 Code enacted the provision as Section 6654(e) but in 1984 it was re-designated as Section 6654(g). See Tax Reform Act of 1984, 26 U.S.C. § 6654(g); *Wallmeyer v. Comm'r*, 59 T.C.M. (CCH) 271, n.7 (1990).

²⁵⁷ 100 CONG. REC. S8996, *supra* note 256. As noted *supra* Section I.B., Congress abolished the estimated tax declaration requirement effective after 1982.

²⁵⁸ See, e.g., James R. Hagerty, *Jerry Merryman Helped Design First Hand-Held Calculator in Mid-1960s; Trio of Texas Instruments Scientists Used a New Tool, Microchips, to Create a Device that Took the Drudgery Out of Simple Math* (Mar. 7, 2019), <https://perma.cc/5DML-HB5W>.

footing with taxpayers who are only able to avoid Section 6654(a) penalties by making sufficient 1040-ES payments.

If this change is made, then how would the IRS calculate Section 6654(a)'s penalty for insufficient withholding? Ideally, employers and their payroll processing vendors would include with quarterly Form 941 IRS filings²⁵⁹ data on the quarter's withholding and salary per employee. The IRS could store that data in the same fashion it keeps data on 1040-ES payment dates and amounts to calculate their Section 6654(a) penalties. Retirement plan administrators do not submit quarterly withholding summaries; instead, they submit Form 945²⁶⁰ once a year. They could likewise provide the needed data along with Form 945 submissions. Furthermore, these payers could include such data in their W-2 and 1099 annual transmissions to taxpayers and the IRS, informing how much was earned and withheld by quarter. Another benefit of this quarterly data is it would more readily help the IRS identify payees for lock-in letters under the Withholding Compliance Program, described in Section III.B. Because the WCP compares annual W-2s with annual tax returns, alone this step fails to ever identify Settings 1 and 2, and it identifies Setting 3 only after the year is over. (If Section 6654(g) is not amended as suggested above, the IRS should nonetheless consider the Form 941/945 suggestion above if only to improve the WCP).

While the Form 941/945 suggestion above may seem ambitious, it is possible. For example, the UK has real-time reporting, which includes integrated payroll systems that simultaneously process payroll and provide information reporting to tax authorities.²⁶¹

If the Form 941/945 suggestion is not used, Congress should enact a limited safe harbor to the effect that no more than a certain percentage of variation from Section 6654(g)'s deeming may occur. In this way, the parties avoid the burden of identifying paycheck dates and amounts and the resulting calculations (versus the relatively less burdensome four-times-a-year calculation for insufficient 1040-ES payments). For example, if a worker was required to have withholding of \$10,000 per quarter to avoid a Section 6654(a) penalty, any amount above, say, \$9,000 would be deemed free of penalty. Anything less than \$9,000 would require detailed calculation. Furthermore, the IRS should be permitted to raise on audit of an individual's tax return a revised Section 6654(a) penalty for withholding distortions it identifies during the audit.

2. *Enact Maximum Withholding Rate*

Ideally Congress should not allow individuals to withhold at a rate greater than their own specific marginal tax rate on the specific amount of marginal

²⁵⁹ This form informs the IRS of total wages and withholding for a quarter. *See, e.g.*, I.R.S., FORM 941 (2025), <https://www.irs.gov/pub/irs-pdf/f941.pdf> [<https://perma.cc/QG83-DFNH>].

²⁶⁰ This form informs the IRS of total Form 1099 (*e.g.*, retirement pay) and withholding for the year. *See, e.g.*, I.R.S., FORM 945 (2024), <https://www.irs.gov/pub/irs-pdf/f945.pdf> [<https://perma.cc/2NTU-5JLT>].

²⁶¹ TAXPAYER ADVOCATE SERVICE, I.R.S., *supra* note 20, at 7.

income.²⁶² However, with multiple tax rate brackets, dual working couples, workers with multiple jobs, and complicated rules as to how to determine taxable income, it may be difficult to determine the precise withholding rate. However, we all know the highest marginal rate that could apply to even the highest income earner. Accordingly, if Section 6654(g)'s safe harbor will not be removed as suggested above, Congress should forbid withholding at any rate higher than the highest marginal rate that applies in such year to wages or retirement pay. This would include workers choosing to withhold more than the elected minimum flat 22% on supplemental income (37% if over \$1 million), such as bonuses.²⁶³ For example, in 2024, workers and retirees should not have been allowed to withhold more than the 37% marginal ordinary income tax on their W-4, W-4P, and W-4R.

Accordingly, Congress should add such a limiting provision to Section 3405(e)(8), which currently states that the withholding cannot exceed the gross retirement payment, implying it may go as high as 100%, as box 4c of W-4P and box 2 of W-4R can effect.²⁶⁴ As for withholding on wages, there is no equivalent of Section 3405(e)(8) in Section 3402, which appears to delegate enough authority to the IRS to allow it to offer withholding to be as high as the entire amount of a wage payment, as box 4c of W-4 can effect.²⁶⁵ Accordingly, Congress should add a new clause to Section 3402 similar to the suggestion offered immediately above for Section 3405(e)(8).

Once enacted, the IRS can amend the forms' instructions to limit withholding to the applicable rate, such as 37% for 2024. Employers and plan custodians can also design their systems to block withholding above that rate.

3. *Limit In-Year Withholding Changes and Require Annual Renewal*

Congress should consider legislating or directing the IRS to institute a rule that no changes to withholding forms are permitted except for a once-a-year renewal. This approach could be made part of the annual benefits enrollment process at employers, where in the fall employees are asked to re-enroll in benefits plans effective for the coming calendar year, such as for health insurance, life

²⁶² For example, on their 2020 tax return President and Mrs. Biden reported they had withheld federal income tax of \$116,751 on \$212,681 of wages. This rate of nearly 55% is dramatically higher than the maximum marginal rate in 2020 of 37%. See *U.S. Individual Income Tax Return (Form 1040): Joseph R. Biden, Jr. & Jill T. Biden* (2020), <https://perma.cc/CS42-5NQB>. Those resisting this change to capping withholding rates may argue that the IRS may prefer to receive amounts above the proposed maximum rate now versus a risk of not receiving it later. This does not appear to be optimal, especially as the IRS receives a Section 6654(a) penalty rate that is 300 basis points above the Federal Funds rate. See *supra* Section I.C.

²⁶³ See I.R.S. Notice 2018-14, 2018-7 I.R.B. 353 (Feb. 12, 2018); I.R.S., PUBLICATION 15, (CIRCULAR E) EMPLOYER'S TAX GUIDE 22 (2024). The IRS forbids social security recipients from withholding tax at higher than 22%. See, e.g., I.R.S., FORM W-4V (2018), <https://www.irs.gov/pub/irs-pdf/fw4v.pdf> [<https://perma.cc/TD97-8TDM>].

²⁶⁴ See *supra* note 33.

²⁶⁵ See Form W-4, *supra* note 28.

insurance, and flexible health/dependent care accounts.²⁶⁶ Those elections are generally locked in but exceptions apply for health plans when there is a “qualifying life event,” such as a new child or divorce, events that would generally also affect tax withholding.²⁶⁷ Such life events would likewise be a permitted opportunity to update the withholding forms. Retirement plans could also send out similar requests to retirees in the Fall.

As put by one journalist, “Let’s face it, employees . . . filed [W-4] when they started work (savvy employees may have refiled when they married or had children) and then they forgot about them.”²⁶⁸ The once-a-year renewal approach helps to avoid staleness. Otherwise, employees and retirees run the risk of falsifying a once truthful W-4 or W-4P at initial submission, and thereby violating Section 3402, which requires amending within ten days.²⁶⁹ In other words, an omission—as opposed to a commission—may result in an individual reporting outdated family status, deductions, or credits on their withholding form. Also, for those who asked for extra withholding in box 4c, the annual renewal would avoid unintended large tax overpayment in future years. New hires who start before open enrollment may continue to take advantage of part-year withholding rules for the year of hire designed to reflect more likely marginal tax rates for someone not earning such a salary for a full year:²⁷⁰ but they would be required to update or re-validate the W-4 or W-4P during open enrollment.

Inability to change withholding forms until the next year will raise the stakes on accuracy. This is because any over-withholding would have to wait for reimbursement as a refund without interest and any under-withholding could subject the taxpayer to Section 6654(a) penalties. If the withholding forms were counterfactually completed, the payee is subject to the legal risks detailed in Part III.

To encourage the employee to comply with the annual renewal, the withholding rate will be set to the highest marginal rate that could apply based on salary information the employer has and the family data it has per the information available for its benefits plans. This is somewhat like the current approach for new hires who do not complete a W-4, where the employer will assume single status, which ramps up to higher marginal tax rates before married-filing-joint and head-of-household.²⁷¹ As for retirees, the plan administrator may not have as much information, so it should default to 37% for retirees who will not comply with the

²⁶⁶ See, e.g., *Benefits Enrollment: A Guide for Employers*, ADP, <https://www.adp.com/resources/articles-and-insights/articles/b/benefits-enrollment.aspx> [https://perma.cc/A6SV-FFSM].

²⁶⁷ See, e.g., *How Qualifying Life Events Can Impact Your Health Insurance Coverage*, ANTHEM, <https://www.anthem.com/individual-and-family/insurance-basics/health-insurance/qualifying-life-event> [https://perma.cc/58UH-S4AX].

²⁶⁸ Gilman, *supra* note 235.

²⁶⁹ See *Treas. Reg. § 31.3402(f)(2)-1(b)(1)*; see also text accompanying note 43.

²⁷⁰ I.R.S. Publication 505, *supra* note 34.

²⁷¹ See *Treas. Reg. § 31.3402(f)(2)-1(a)(4)*; *Federal Income Tax Rates and Brackets*, I.R.S. (2024), <https://www.irs.gov/filing/federal-income-tax-rates-and-brackets> [https://perma.cc/JS4D-BWLU].

annual renewal. Under the current approach, the payer defaults to a single person's tax rate if the retiree does not provide an initial W-4P.²⁷²

4. *Make Minimum and Zero Withholding Consistent for Employees and Retirees*

As detailed earlier, employees may reduce their withholding to zero for the current year if they had no tax in the prior year and expect no tax in the current year (and write "Exempt" on their W-4), whereas retirees may reduce to as low as zero on their W-4P (by writing "No Withholding").²⁷³ It is unclear why Congress would deliberately require employees receiving, say, monthly wages to have a much more stringent set of conditions to eliminate withholding as compared to retirees receiving monthly annuity payments. This also would appear to violate horizontal equity for retirees and workers with the same income. Congress should consider making the minimum or zero withholding rules consistent for employees and retirees.

Furthermore, W-4R recipients (i.e., for non-periodic payments) have default withholding rates of 10% (or 20% for eligible rollover payments), and the 10% rate may be zeroed out at the recipient's election. It is unclear why this differs from the minimum rates that apply to non-periodic wages (e.g., bonuses) for employees electing to not have the W-4 rates that apply to periodic income apply: those rates are a flat 22%, or 37% if over \$1 million.²⁷⁴ (If these changes are made, another benefit would be that W-4 and W-4P could be combined into one form, as they are very similar at present, although their respective instructions vary due to differences as described above and in Section I.A.)

5. *Consider Box 4c Negative Amounts*

Earlier, this Article walked through Forms W-4 and W-4P, explaining how the more credits and deductions in boxes 4a and 4b, the less the withholding is, and vice versa.²⁷⁵ And the forms have box 4c for extra withholding.²⁷⁶ The instructions, however, are silent on whether box 4c may be a negative amount (i.e., reduced withholding), although the context appears to not allow it. Congress and the IRS may wish to afford recipients the option to put negative amounts in box 4c for the occasions in which there was *over*-withholding in the early part of the year. In this way, the recipient is not forced to provide counterfactual information in boxes 4a and 4b to accomplish the same result.

²⁷² See Form W-4P, *supra* note 33, at 3.

²⁷³ See *supra* notes 29, 39 and accompanying text.

²⁷⁴ See Form W-4R, *supra* note 33; Notice 2018-14, *supra* note 263, at 8; Treas. Reg. § 31.3402(g)-1(a)(iv)(2); Publication 15, *supra* note 263.

²⁷⁵ See *supra* notes 26, 28, 34 and accompanying text.

²⁷⁶ See *supra* notes 28, 36 and accompanying text.

6. *Change Section 6654(a) Penalty Rate Method*

Congress should consider changing Section 6621, which sets forth how to calculate the Section 6654(a) penalty rate. As indicated in Section I.C, it adds 300 basis points to the Federal Funds (FF) interest rate. When the FF rate was near zero in many years, including as low as under 0.25% at the start of the COVID pandemic, the Section 6654(a) penalty rate of 3% was as low as it could go.²⁷⁷ This is an excessive rate as it is twelve times greater than 0.25% (it is also an infinite multiple of zero, although mathematicians might insist that there are no “multiples” of zero). A fairer approach would be to charge a rate that is a percentage (not a number of basis points) higher, such as double the FF rate, with minimums of, say, 1% and a maximum of 300 basis points above the FF rate. Perversely high relative Section 6654(a) rates in effect in eras of near-zero FF rates increase temptation to exploit Section 6654(g)’s safe harbor when an American is facing a penalty rate that is so many multiples of the FF rate.

7. *Change Section 6682 Dollar Penalty*

A flat \$500 penalty is unfairly high for many lower-paid taxpayers and too trivial for wealthy Americans. For example, in the janitor example in Section IV.A, a \$500 penalty is nearly a third of his \$1,600 deferred tax payment, while \$500 for the CEO who reduced withholding by hundreds of thousands of dollars is too low. A percentage approach should instead be used, coupled with perhaps a minimum dollar amount of, say, \$100.

C. For Congress

1. *Add Materiality Threshold to Sections 6682 and 7205*

As detailed in Section III.A, Section 6682 imposes a \$500 civil penalty as long as the taxpayer had no reasonable basis to believe the falsely inputted item. Thus, if a payee prepared her withholding form with \$15,000 of solar tax credit when she knew it would actually be only \$14,499 (or if she forgets to remove the credit for the future years),²⁷⁸ the penalty applies. The same risk applies if she had prior included a dependent who has since stopped being a dependent.²⁷⁹ Or what if an individual threw up her hands in surrender to a complicated withholding form and guesstimated amounts?²⁸⁰ These issues are also present with Section 7205. With the exception of *Snider*’s Quakers listing three billion dependents on their W-4, courts have not required more than a falsity to convict.²⁸¹ Accordingly, Congress

²⁷⁷ See Sandberg, *supra* note 55 and accompanying text.

²⁷⁸ See Treas. Reg. § 31.3402(f)(2)-1(b)(2)(v).

²⁷⁹ See Treas. Reg. § 31.3402(f)(2)-1(b)(2)(iv); see also text accompanying note 144.

²⁸⁰ See Schmedel, *supra* note 236 and accompanying text.

²⁸¹ See *United States v. Snider*, 502 F.2d 645, 661 (4th Cir. 1974); see also *supra* text accompanying note 43.

should add a materiality threshold to Sections 6682 and 7205, as is required for Sections 7206(1), 1001, and 1621.²⁸²

The amendments should make clear that materiality includes deferral of withholding tax from earlier in the year until later in the year and that time-value-of-money concepts be considered. (Ideally, materiality of this type should also be included in Section 7206(1)).

2. Clarify Jurisdiction of Section 7206(1)

Section III.C.1 points out that Section 7206(1) literally applies to any matter—even if not tax-related, and even if not submitted to the IRS. This is because the provision states: “[w]illfully 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. . . .”²⁸³

If Congress agrees that Section 7206(1) should only apply to submissions to the IRS, it should clarify, so that the withholding forms—which are submitted to payers, not the IRS (unless requested or inspected as part of the Withholding Compliance Program)—are not included in Section 7206(1)’s jurisdiction. For example, Congress could borrow language from the aiding-and-abetting Section 7206(2)²⁸⁴ to amend Section 7206(1). It could instead state: “[w]illfully makes and subscribes any return, statement, or other document *submitted to the government in connection with any matter arising under the internal revenue laws*, which contains or is verified by a written declaration . . .”

3. Remove Deadwood in Section 7203

Congress should remove the deadwood reference to “estimated tax” in Section 7203.²⁸⁵ Those two words may have had a purpose when there was also a requirement to file declarations of estimated tax in addition to paying 1040-ES payments.²⁸⁶ When Congress repealed estimated tax declarations as of 1983,²⁸⁷ it should also have removed the two words “estimated tax” before the phrase “or tax” and deleted the “or” in “or tax.” A Section 7203 penalty for not paying “estimated tax” has no place in the Code. There are underpayment penalties in Section 6654(a) that we have discussed to punish late payers,²⁸⁸ and the phrase “or tax” immediately following the phrase “estimated tax” will capture those who fail to pay sufficient tax with their annual tax return (or fail to file a tax return), whether or not they make

²⁸² See discussion *supra* Section III.C.

²⁸³ I.R.C. § 7206(1) (emphasis added).

²⁸⁴ See Form W-4P, *supra* note 33 and accompanying text. See also *supra* note 164 (quoting relevant part of Section 7206(2)).

²⁸⁵ See Summary of the Revenue Provisions of H.R. 4961, *supra* note 49 and accompanying text.

²⁸⁶ See discussion of P.L. 98-369, *supra* note 49.

²⁸⁷ *Id.*

²⁸⁸ See *supra* notes 50-56 and accompanying text.

sufficient 1040-ES payments (or insufficient withholding, if a prosecutor argues that withholding is also “estimated tax” under Section 6654(g)).

4. *Rename Section 7205*

Section 7205 is titled “Fraudulent withholding exemption certificate or failure to supply information.”²⁸⁹ The word “false” is missing from the title. Section III.B showed that even a false—even if not fraudulent—W-4 violates Section 7205 based on its express terms and the jurisprudence. Accordingly, Congress should correct the title by adding the phrase “or false” after the word “Fraudulent.”

D. For the IRS

1. *Consistency of Presence of Perjury Statements on Withholding Forms*

Section 6065 requires all tax forms “be verified by a written declaration that it is made under the penalties of perjury” unless “otherwise provided by the” IRS.²⁹⁰ As noted earlier, there are no perjury statements on W-4P or W-4R, while there is one on W-4.²⁹¹ When W-4P was overhauled in 2022 to mirror the extensive information requested on W-4 (unlike before, when W-4P asked only for what tax rate to use, as the W-4R does), the IRS did not see fit to include a perjury statement on the new W-4P.²⁹² To put employees and retirees on the same footing, the perjury statement on W-4 should be removed or the W-4P should now include it.

If W-4P adds a perjury statement, then consideration should be made to include one on W-4R also. While W-4R has far less information, it does ask for certain identifying information that one might wish to lie about.

2. *Add Form W-4P to Withholding Compliance Program*

The Withholding Compliance Program addresses W-4, not W-4P.²⁹³ Now that W-4P is requiring payees to include the same detailed information as on W-4, the WCP should also include W-4P submissions. For example, if a retiree receiving \$10,000 per month of taxable annuity income counterfactually indicates excessive credits or deductions on W-4P, leading to insufficient withholding, the IRS could identify that when the annual tax return is filed and have its chance to send the retirement plan custodian a lock-in letter. At present, the WCP calls for lock-in letters only to employers.

²⁸⁹ I.R.C. § 7205.

²⁹⁰ See I.R.C. § 6065; see also Treas. Reg. § 1.6065-1.

²⁹¹ See *supra* notes 31, 38 and accompanying text.

²⁹² See *supra* notes 35-38 and accompanying text.

²⁹³ See Topic no. 753, Form W-4, Employees Withholding Certificate, *supra* note 156 and accompanying text.

3. *Add Regulations for Section 7205*

There are no regulations accompanying Section 7205. The IRS could provide some information there, even if only a simple copy-and-paste from publications it already offers on its website. For example, Publication 505 has extensive details that could be easily drawn from to include in a regulation.²⁹⁴

4. *Remove Deadwood in 1.6073 Regulations*

The IRS has neglected to remove the deadwood of Treas. Reg. § 1.6073-1. It is entitled “Time and place for filing declarations of estimated income tax by individuals.” As noted before, Congress repealed declarations as of 1983.²⁹⁵

E. Include Time-Value-of-Money Lost in Section 6654(g) as Tax Expenditures

If Congress will not make the suggested relevant changes above, it should at least require disclosure of the value of deferral as a “tax expenditure.” The term “tax expenditure” refers to the loss to government due to U.S. tax laws “intended not as necessary structural parts of a normative tax, but rather as tax incentives or hardship relief provisions[; these] provisions are thus really spending measures.”²⁹⁶ Section 6654(g) appears to be a hardship relief provision.²⁹⁷

Of the billions of dollars of annual tax expenditures listed in separate reports maintained by Treasury²⁹⁸ and the Joint Committee on Taxation,²⁹⁹ taxpayers’ Section 6654(g) benefits are not among them. The two reports do include deferrals of *taxable income* as a tax expenditure (e.g., accelerated depreciation and deferral of gains on like-kind exchanges of real estate).³⁰⁰ While this Article is concerned with deferral of tax *payments* on a given year’s taxable income, the time-value-of-money lost to the government should constitute yet another tax expenditure.

The amounts are not trivial. Across individual tax returns in 2021, there were \$1.8 billion of Section 6654(a) penalties,³⁰¹ \$1.2 trillion of wage

²⁹⁴ Publication 505, *supra* note 34.

²⁹⁵ See Summary of the Revenue Provisions of H.R. 4961, *supra* note 49 and accompanying text.

²⁹⁶ Stanley Surrey & Paul McDaniel, *The Tax Expenditure Concept and the Legislative Process*, THE ECONOMICS OF TAXATION 123-24 (Henry Aaron & Michael Boskin ed., 1980).

²⁹⁷ See *supra* notes 256-57 and accompanying text.

²⁹⁸ See, e.g., OFF. TAX ANALYSIS, U.S. DEP’T TREAS., TAX EXPENDITURES (Mar. 6, 2023).

²⁹⁹ See, e.g., JOINT COMM. ON TAX’N, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2024-2028.

³⁰⁰ See *supra* notes 298-99.

³⁰¹ I.R.S., PUBLICATION 4801, INDIVIDUAL INCOME TAX RETURNS, LINE ITEM ESTIMATES, 2021, at 21 l.36.

withholding,³⁰² up to \$161 billion of withholding from retirement pay,³⁰³ and \$499 billion of 1040-ES payments.³⁰⁴ Using these amounts, if we assume a 3% time-value cost of eight-and-a-half months of deferral and that 5% of wage withholding and 25% of retirement withholding is being used for Setting 1, the annual time-value-of-money loss to the government is \$3 billion. This would place it in the top third of tax expenditures.³⁰⁵ Many have argued that one way to address the precarious annual government deficits is to reduce tax expenditures.³⁰⁶ While \$3 billion would not put a large dent in annual deficits of over \$1 trillion, it could be a start.

CONCLUSION

At some point in their lives, nearly every American must complete a tax withholding form, first as a worker and then as a retiree. It is nearly certain that the reader of this Article has gone through this experience, probably more than once, and likely continues to have income subject to withholding.

In its first two settings, this Article exposes how Americans accomplish for their income tax payments a result analogous to a borrower making no payments on up to eleven months of credit card and mortgage bills and instead paying all twelve months in December free of penalties, interest, or damage to their credit reports. In the third setting, they push the envelope even further, delaying their tax payments another nearly four months, although likely incurring a Section 6654(a) monetary penalty.

The tax withholding rules and the Section 6654(g) safe harbor this Article details are so tempting to exploit that they amount to a siren song, not unlike Greek mythology's tale of an island of Sirens "whose sweet songs lure men to their deaths."³⁰⁷ Many Americans either cannot resist the temptation to exploit the tax withholding process for investment opportunities or to use it to temporarily extricate themselves from financial straits. Every tax colleague and taxpayer I speak to on the topic of withholding forms has seen the forms completed less than accurately to facilitate their completion, much as when running late to a meeting we might drive a mile-per-hour or two above the speed limit. And the more sophisticated ones speak of exploiting the Section 6654(g) safe harbor.

³⁰² *Id.* at 21 1.25(a). W-2 is the annual wage reporting document that also includes details of how much was withheld.

³⁰³ *Id.* at 21 1.25(b). Form 1099-R, Retirement, is one of the series of Forms 1099. It is the one that is most likely to have withholding, far more than the separate Forms 1099 for interest, dividends, and capital gains.

³⁰⁴ *Id.* at 21 1.26; *see also id.* at 16 1.26.

³⁰⁵ *See, e.g.,* OFF. TAX ANALYSIS, *supra* note 298, at tbl.3.

³⁰⁶ *See, e.g.,* Jeb Hensarling, *GOP Takes Control, Headed for a Fiscal Cliff*, WALL ST. J. (Dec. 17, 2024), <https://www.wsj.com/opinion/gop-takes-control-headed-for-a-fiscal-cliff-policy-economy-550653a5>.

³⁰⁷ Rebeca Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 337 (2006); *see also* Craig K. Agule, *Resisting Tracing's Siren Song*, 10 J. ETHICS & SOC. PHIL. 10, 10-11 (2016).

This Article seeks to alert those Americans—and those many advising and writing for them—who believe that they can, with ease, unilaterally change their “borrowing terms” with the government by exploiting their withholding forms: they do so at their legal peril. While the DOJ has not been known to criminally prosecute earlier-in-the-year withholding shortfalls (or even full-year shortfalls satisfied with the annual tax return filing), Americans are nonetheless at risk of misdemeanor jail time, dollar penalties, and—due to technically applicable statutory language—felony charges. Even for otherwise legally-sanctioned Setting 1, if the taxpayer uses the wrong line on the form, they are also at risk. The 2022 change to retirees’ withholding forms of adding the extensive taxpayer information that has always been required on employees’ forms now adds retirees to the pool of potential targets of enforcement.

This Article also points out that even if the law allows any behavior in the three settings, taxpayers are nonetheless exploiting the rules for their own financial benefit and thus engaging in ethically questionable behavior, likely depriving the government annually of several billion dollars of time-value-of-money benefit in the current interest rate environment. And the government itself is complicit by providing such an easily exploited situation, rendering Americans vulnerable to a perjury trap and becoming ethically unsound taxpayers.

No withholding process is perfect. But if the recommendations in this Article are implemented, there will be a muting of the siren song of deferral through the withholding forms.