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Complicity and Collection: Religious Freedom and Tax

Jennifer Carr

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ARTICLE

COMPLICITY AND COLLECTION:
RELIGIOUS FREEDOM AND TAX

JENNIFER CARR*

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* Jennifer Carr, Assistant Professor-in-Residence and Director of the Academic Success Program at UNLV-William S. Boyd School of Law, J.D., UNLV-William S. Boyd School of Law; B.A., University of Nevada, Reno. Thank you to Kyle Hoyt, my research assistant. I am grateful for the guidance and feedback of Marjorie Kornhauser, Thomas Berg, Francine Lipman, and George Mader. I appreciate the willingness of Ruth Benn, of the National War Tax Resistance Coordinating Committee and Dr. Lonnie Valentine of the Earlham School of Religion, to review the theological and historical aspects of this paper for accuracy.

INTRODUCTION

In 1985, the Internal Revenue Service (the “IRS”) seized Miriam Redstone and David Dillman’s 1969 Dodge, a car the couple had affectionately named Dolly.¹ The IRS seized and auctioned the car to offset Redstone and Dillman’s federal income tax liability.² Redstone and Dillman’s pacifist religious and moral beliefs required them to abstain from acts of war or acts that supported war. They believed the federal government’s use of tax money to support military spending violated those beliefs.³ Calling themselves war tax resisters, they refused to pay federal income taxes because they believed that to pay their taxes would have been a sin.

The National War Tax Resistance Coordinating Committee⁴ estimates the IRS spent \$345 to auction Dolly, which sold to a friend of Redstone and Dillman’s for \$105. The friend promptly returned the car to Redstone and Dillman, with a loss to the United States government of \$240.⁵

War tax resisters like Redstone and Dillman face a difficult conundrum; they can either disobey the dictates of conscience or suffer the consequences of non-payment of tax—everything from seizure of property, to garnishment of wages, to arrest, to jail time.

Pacifist war tax resisters have claimed collection of tax for payment of war violates their religious freedom under the First Amendment and, later, under the Religious Freedom Restoration Act.⁶ Nevertheless, courts have routinely held the Free Exercise Clause does not grant the right to be free from taxation.⁷ Forcing pacifists to pay tax, when they believe it to be sinful, belies the importance the nation places on its adherence to the ideal of Free Exercise.

Currently, because of the Affordable Care Act (ACA), attention to the tension between religious freedom and government regulations compelling certain payments is high. But balancing the needs of religious pacifists (and of war tax resisters in particular) against the economic requirements of the country is a challenge that has faced legislators on American soil since before the creation of the United States. Legislation resolving this issue would solve the current conflict between pacifists’ rights to freely practice their religion and the need of the country for revenue just as the exceptions to the mandates of the ACA have solved the conflict between persons of

1. *History of War Tax Resistance: The 1980’s*, NAT’L WAR TAX RESISTANCE COORDINATING COMMITTEE, <http://www.nwtrcc.org/history/history1980.php> (last visited Sept. 22, 2014).

2. *Id.*

3. *Id.*

4. While there is no centralized war tax resistance information storehouse, two groups have served as a resource for war tax resisters: The National War Tax Resistance Coordinating Committee and the War Resisters League.

5. *History of War Tax Resistance: The 1980’s*, *supra* note 1.

6. *See, e.g.*, *Adams v. Comm’r*, 170 F.3d 173, 175–76 (3d Cir. 1999).

7. *See, e.g., id.* at 178–80.

religious faiths which prohibit the use of birth control and the need for the American people to have health insurance.

The IRS is charged with somehow collecting funds from individuals who feel facilitating that collection—even in the slightest—is a sin. Because war tax resisters believe that paying tax is a sin, they resist paying taxes in novel and challenging ways, going to extremes to avoid compliance. This is despite the fact that most war tax resisters would pay tax if they felt they could do so without sinning.⁸ As the Redstone/Dillman case demonstrates, it is likely that most of the IRS' efforts to collect tax owed by war tax resisters cost the government more than the government gains.⁹ Meanwhile, the country suffers a lack of revenue to which it is entitled. Those who avoid payment of tax “deprive the country of resources it needs to ensure its continued existence.”¹⁰

In response to these problems, several members of Congress have introduced various versions of a “Peace Tax Fund” bill. The bill would allow war tax resisters who qualify as pacifists to direct their tax money to a separate fund not to be used for military spending. Despite some version of this bill having been introduced in every congressional session since 1972, the House Ways and Means committee has only held three hearings and the bill has gained no traction.¹¹

Now, however, the timing is right. The concessions made to concerns of religious freedom by the ACA suggest the current administration is open to the idea of carving out small, non-burdensome exceptions to laws of universal applicability when necessary to protect genuine expressions of religious faith.¹²

8. Telephone Interview with Bob Runyan (Sept. 23, 2013).

9. It is difficult to establish what collection from war tax resisters costs the United States government. Because war resisters object to tax and resist collection of tax with religious fervor, they are more difficult to collect from than other types of tax resisters. While other resisters and/or tax evaders may cave under the weight of government collection, many war resisters refuse to comply with taxation at all, even under threat of jail. Anecdotal evidence suggests collecting from resisters is costly—Redstone and Dillman's case is one such example, and see the story of the Kehlens later on. Additionally, the Joint Committee on Taxation has found altering the current tax structure to avoid the collection/complicity problem by accommodating resisters would increase revenue, which suggests, at a minimum, current structures are not effective. While resisters are subject to penalties and fines which should offset the cost to the government of collection, resisters often engage in absolute noncompliance, refusing to pay anything at all, and necessitating further coercive collection practices, which are costly. It should be noted some resisters simply put money aside and wait for the IRS to collect the money; for them, sin is avoided if the tax is paid involuntarily. Even this less strenuous resistance costs the government time and energy to find and collect the funds; however, funds resisters would pay if they could do so without violating their religious beliefs.

10. Colleen M. Garrity, *The Religious Freedom Peace Tax Fund Act: Becoming Conscious of the Need to Accommodate Conscience*, 64 OHIO ST. L.J. 1229, 1231 (2003).

11. *Id.* at 1245 n.88.

12. See generally 45 C.F.R. § 147.131 (2014) (exempting religious employers from the requirement to cover certain forms of birth control).

This Article focuses on how the bill might be improved so that members of Congress enact it. First, the bill needs to clearly define who qualifies as a pacifist for tax purposes. By paralleling the already-existing conscientious objector status used by the military, the revised bill could effectively limit who might qualify as a war tax resister. Congress already allows conscientious objectors to military service to serve their countries in an alternate, non-military form. Second, the bill must also direct the funds after collection so as to avoid the charge that citizens might be legislating through their tax returns. This bill would simply allow those who are conscientious objectors to taxation to fund the country via an alternate, non-military fund, which Congress could use for any non-military purpose.

This Article—and the bill for which it provides revisions—deals exclusively with war tax resisters motivated by religious conscience, and does not address tax evaders or those politically opposed to tax collection, who would not qualify for protection under a religious freedom argument. Additionally, the bill this Article proposes does not deal with war tax resisters who choose to earn below the taxable income level—the only legal way, currently, for a war tax resister (or any taxpayer) to avoid a federal income tax liability—nor those war tax resisters who resist by filing a tax form, paying in full, and including a statement that they are doing so under duress. Rather, this Article deals only with war tax resisters who file their tax returns and withhold all or part of the funds owed on the basis that paying the tax would amount to an act of sin.

Section I defines the term “war tax resister” and explains the difficulties of conscience faced by war tax resisters. Section II suggests the U.S. military’s definitions of conscientious objector (both current and past) could be used to determine conscientious objector status under the revised bill. Section III traces the history of war tax resistance, which puts the purpose of the bill in perspective by explaining the difficulty the IRS has faced in collecting tax from war tax resisters and the difficulties war tax resisters have faced in avoiding complicity with war, which they see as sin. Section IV discusses the relevant case law and why, thus far, war tax resisters claiming constitutional protection against tax collection have been unsuccessful, making passage of the Religious Freedom Peace Tax Fund Bill (as it is currently called) necessary. Section V explains the history of the Religious Freedom Peace Tax Fund Bill, and Section VI suggests changes that might ensure passage of the revised Bill.

I. WHAT DOES IT MEAN FOR A WAR TAX RESISTER TO BE COMPLICIT WITH SIN?

The U.S. military recognizes an exception to draft requirements for pacifists, granting persons able to establish the sincerity of their beliefs the title of conscientious objector and permitting them to perform “alternate

service.”¹³ Since the draft has ended, it would seem there is no need for the conscientious objector status; with an all-volunteer army, Congress cannot currently be compelling citizens to participate in war against their religious consciences.

War tax resisters disagree, feeling that being compelled to provide monetary support is participation in war and is against their religious beliefs.¹⁴ In this way, the war tax resisters argument mirrors that of the Little Sisters of the Poor, who claim being required by the ACA to pay for birth control violates their religious beliefs.¹⁵

The decision to become a war tax resister is long and complex, especially in light of the consequences of noncompliance with the tax code. Henry David Thoreau, in his essay “Civil Disobedience,” expresses the tension a war tax resister feels when torn between his conscience and his government and accurately outlines the modern revenue issues that arise from war tax resistance. Describing the tension between law and conscience, Thoreau urges those opposed to war and slavery, which he calls “twin injustices,” to refrain from paying tax,¹⁶ telling them to be “men first[] and subjects afterward.”¹⁷ The mere fact that one may vote against a law that violates one’s conscience does not absolve the voter if he later complies with the law.¹⁸ He urges his audience to join him in resisting unjust laws by telling them, “Cast your whole vote, not a strip of paper merely, but your whole influence.”¹⁹ Thoreau says he wants only to avoid the violation of his own conscience which would occur were he compelled to support injustice.²⁰ Thoreau concludes that men are required to face complicity with evil once a year, saying:

I meet this American government . . . once a year . . . in the person of its tax-gatherer; this is the only mode in which a man situated as I am necessarily meets it; and it then says distinctly, Recognize me; and the simplest, the most effectual, and, in the present posture of affairs, the indispensablest mode of treating with it on this head, of expressing your little satisfaction with and love for it, is to deny it then.²¹

13. See 50 U.S.C. app. § 456(j) (2014) (exempting pacifists from the draft).

14. See, e.g., *Statement of Purpose*, NAT’L WAR TAX RESISTANCE COORDINATING COMMITTEE, <http://www.nwtrcc.org/sop.php> (last visited Mar. 9, 2014) (“We oppose militarism and war and refuse to complicitly participate in the tax system which supports such violence. NWTRCC sees poverty, racism, sexism, homophobia, economic exploitation, environmental destruction and militarization of law enforcement as integrally linked with the militarism which we abhor.”).

15. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 2013 U.S. Dist. LEXIS 180867, *7–*13 (D. Colo. Dec. 27, 2013).

16. HENRY DAVID THOREAU, *CIVIL DISOBEDIENCE* (1848), reprinted in *WALDEN AND CIVIL DISOBEDIENCE* 224, 224 (Owen Thomas ed., 1966).

17. *Id.* at 225.

18. *Id.* at 228–29.

19. *Id.* at 233.

20. See generally *id.*

21. *Id.* at 232.

Thoreau did refuse to pay his taxes and the state imprisoned him for his beliefs. Modern war tax resisters are similarly steadfast; even jail time does not dissuade war tax resisters from what they see as the dictates of conscience.

The refusal to become complicit with sin results in more than tension between the taxpayer's conscience and the government; it also results in lower revenue for the government. This loss of revenue occurs despite the fact war tax resisters, unlike other tax evaders, "seek no personal gain" from their nonpayment of tax. In fact, many relinquish control of their tax money by putting it in a bank account and waiting for the IRS to seize it or donate it to charitable causes.²² The willingness of war tax resisters to part with their money suggests the IRS could easily collect this money if the money was spent in ways that did not violate the conscience of the resisters and further highlights the challenge war tax resisters present.

Thoreau advised those in his audience unwilling to risk jail to live simply, saying:

But, if I deny the authority of the State when it presents its tax bill, it will soon take and waste all my property, and so harass me and my children without end. This is hard. This makes it impossible for a man to live honestly, and at the same time comfortably, in outward respects. It will not be worth the while to accumulate property; that would be sure to go again. You must hire or squat somewhere, and raise but a small crop, and eat that soon. You must live within yourself²³

To avoid complicity with sin, some modern war tax resisters follow Thoreau's advice, deciding to live below income levels which would generate a federal income tax. Many combine this with the public expression of this decision as deliberate, and an attempt to comply with both the law and the dictates of conscience.²⁴ If a war tax resister chooses to take credits such as the Earned Income Tax Credit, a married couple with two children engaging in this form of income tax resistance could make up to \$45,776 to avoid liability.²⁵ If such a family chooses not to take the credits, avoiding

22. Marjorie E. Kornhauser, *For God and Country: Taxing Conscience*, WIS. L. REV. 939, 943–44 (1999). Interestingly, donating to a charitable cause may result in reduced tax liability because charitable donations are generally deductible and may provide a tax benefit.

23. THOREAU, *supra* note 16, at 235.

24. See, e.g., *How to Resist War Taxes*, WAR RESISTERS LEAGUE, <https://www.warresisters.org/content/how-resist-war-taxes> (last visited Sept. 23, 2014). See, for example, the case of Patricia Washburn, who withheld \$4,000 of her tax liability, which, after penalties for late payment, became a debt of \$24,000. Unable to satisfy the debt, the IRS seized Washburn's car and home. Following this occurrence, she decided to live below the poverty line to avoid income tax liability. The IRS uses penalties as a stick to get the taxpayer's attention; penalties are a necessary collection tool but are often ineffective when applied to those who resist taxation for religious reasons. Garrity, *supra* note 10, at 1243–44.

25. *Relationship Between Tax Entry Thresholds and Poverty, 1980-2021*, TAX POL'Y CENTER (Aug. 5, 2011), <http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=471>.

tax liability would require an income of less than \$26,400.²⁶ On its face, this form of tax resistance may not appear problematic for the government; if the couple is complying with the applicable tax code, what difference does it make, practically, if they are doing so out of religious obligation? The problem is this: these resisters have the capacity to earn more (and thus to pay more income tax, generating more revenue for the government). The refusal of the tax code to accommodate their religious beliefs deprives the government of revenue.

Other resisters know attaching such a statement will likely draw attention to their returns and do not self-identify as war tax resisters. Take, for example, T.W.²⁷ T.W. calculates the total amount owed then deducts a percentage proportional to the percentage of government funds used for military purposes and pays that reduced amount. T.W.'s decision to become a war tax resister was difficult; he describes himself as a child of government employees and has enlisted family members.²⁸ His process to war tax resistance began when he read that income taxes used to fund wars were meant to be temporary.²⁹ He says, "These never-ending conflicts . . . ," his voice trailing off. "It rose up in me; I needed to stand outside of this." Though T.W. is aware of the government's ability to prosecute him, the consequences of his decision did not deter him from engaging in resistance. He and his wife were married in a religious ceremony but are not legally married because she is not a war tax resister and he worries his decision may cause her liability.³⁰ "It breaks my heart to say we aren't married. No, I can't say that. We got married; we have a certificate. If push comes to shove, I have to be able to show I did this all on my own. I have to protect her."³¹ He has saved enough money to pay his back taxes and penalties when he is audited but says, "I admire people who are self-identified [as war tax resisters]. I don't self-identify. I wouldn't want to go to jail but I'm only thinking that way because we're trying to conceive a child. If it were just me, I would do prison time."³²

Another tactic some war tax resisters take is to create a fictional deduction to effectively reduce one's taxable income down to zero and enclose a statement explaining the reason the taxpayer created the deduction, explaining that failure-to-pay is intentional and is a result of religious be-

26. *Id.*

27. T.W. agreed to be interviewed but asked I not identify him by name.

28. Interview with T.W., in Phila., Pa. (June 30, 2014).

29. *Id.*

30. *Id.*

31. *Id.* The "certificate" to which T.W. refers is likely a Quaker wedding certificate. Quaker marriages were frequently not recognized by the state because Quakers eschew officiants, believing the couple marries themselves. The rest of their meeting (church members) signs the certificate in recognition of the marriage. *Id.*

32. *Id.*

lief.³³ These approaches result in significant additions to one's tax liability through application of penalties.³⁴ The IRS has classified these deductions as "frivolous" and fined war tax resisters up to an additional \$5,000 over and above the other failure-to-pay penalties and interest.³⁵ The National War Tax Resistance Coordinating Committee reports, however, the IRS has assessed the fee even against taxpayers who filed a correct income tax return, paid the total amount owed, and merely enclosed a letter stating they were paying their income tax under duress.³⁶ A recent formal opinion issued by the IRS states that such a position is incorrect; that the frivolous filing fee should only be assessed against those who either file an erroneous tax return (those who claim a war tax deduction, for example) or against those who state their purpose is to impede federal income tax collection.³⁷ The fee should not be assessed against those who merely explain they are filing under duress.³⁸

Some resisters refuse to file at all, even if they might be allowed a refund or a credit. Says T.W., "I haven't had a refund since I started doing this. Even if we have kids and we would qualify for the Earned Income Tax Credit, I wouldn't cash their checks. I don't want any part of that money."³⁹ But others feel differently. Says Bob Runyan,

We do everything normally on our taxes except we refuse to pay the [proportion of tax equivalent to military spending]. We have collected the Earned Income Credit in the past. We have also had the [refund] that we would have received due to the Earned Income Credit taken by the IRS. I don't see a connection between the Earned Income Credit, which I believe is meant as an anti-poverty measure, and whether or not one pays war taxes. Again, if there were a way to pay federal taxes without the money going to war, then we would gladly comply.⁴⁰

33. See *How to Refuse to Pay for War*, NAT'L WAR TAX RESISTANCE COORDINATING COMMITTEE, http://www.nwtrcc.org/how_to_resist.php (last visited Sept. 23, 2014).

34. See I.R.S. Tech. Adv. Mem. 20133303F (Aug. 16, 2013), available at <http://www.irs.gov/pub/irs-lafa/20133303f.pdf>.

35. See 26 U.S.C. § 6702 (2014). Section 6702(a) imposes a \$5,000 penalty on a person when: 1) the taxpayer files what purports to be a tax return that (A) does not contain information as to whether the tax assessment is correct or which (B) contains information that on its face indicates the return is incorrect; and 2) the information or lack of information the taxpayer includes on or with the return is based (A) on a position which the IRS has identified as frivolous or (B) a position that reflects a desire to delay or impede the administration of Federal tax laws. *Id.*

36. See *What To Do If You Receive a "Frivolous" Letter from the IRS*, NAT'L WAR TAX RESISTANCE COORDINATING COMMITTEE, <http://www.nwtrcc.org/frivolous.php> (last visited Sept. 23, 2014).

37. See I.R.S., *supra* note 34.

38. See *id.*

39. Interview with T.W., *supra* note 28.

40. Runyan, *supra* note 8.

War tax resisters may be subject to criminal liability under 26 U.S.C. § 7203,⁴¹ but the IRS only rarely pursues criminal charges against war tax resisters.⁴² This is probably because, first, when it comes to income tax evaders, war tax resisters are not unsympathetic characters,⁴³ and second, it is difficult for the IRS to demonstrate the mental state requirement of “willfully” failing to file.⁴⁴ In *Cheek*, the United States Supreme Court held the “willful” requirement meant a good-faith belief that one did not have to file did not violate Section 7203, even if that belief was irrational or unreasonable.⁴⁵ Thus, the IRS must establish war tax resisters are knowingly and intentionally breaking the law, which may be too high a bar, given that many war tax resisters have an arguably good faith belief they are protected by the First Amendment, even if that belief is irrational or unreasonable.⁴⁶ Peter Goldberger⁴⁷ testified in 1992 that the “Justice Department has gener-

41. 26 U.S.C. § 7203 (2014) (providing for civil and criminal penalties for those who “willfully” fail to file income tax returns or pay income taxes).

42. See, e.g., *Miscellaneous Tax Bills and the Peace Tax Fund: Hearing on H.R. 65, 1733, and 1870 Before the H. Committee on Ways and Means*, 102d Cong. 191 (1992) (statement of Peter Goldberger, Attorney-Adviser, National Campaign for a Peace Tax Fund).

43. See, for example, a discussion of Priscilla Adams, a Quaker in Philadelphia, who had never voluntarily paid tax. Though the IRS pursued civil penalties against Adams, it did not seek criminal penalties. “Michael Livingston, a tax law professor at Rutgers University’s Camden campus, said image might have something to do with Adams’ ability to escape criminal prosecution by the IRS. ‘The question of how to respond to these things is a very tricky one for the IRS,’ he said. ‘It certainly doesn’t look very good for the IRS to go after these people [Quakers].’” The IRS denied it treated Adams any differently than it would have treated any other taxpayer. Lauren Mayk, *Citing Beliefs, A Quaker Takes On IRS Priscilla Adams of Willingboro Refuses To Pay Federal Income Tax Because She Doesn’t Want Her Money Helping The Military*, PHILLY.COM (Feb. 28, 2000), http://articles.philly.com/2000-02-28/news/25576687_1_tax-money-religious-society-federal-agency.

44. T.W. may be an example of a willful failure to file, in that he acknowledges he owes the income tax, recognizes the court does not recognize a faith-based exception to tax, has not self-identified, and resists by adjusting his deductions to give him a tax liability of the amount proportionate to non-military spending. It is a difficult balance for resisters. T.W.’s tactic makes it less likely he will be caught—as the IRS would need to audit him to determine he is resisting, unlike self-identifiers who alert the IRS to their resistance—but may increase his penalties (as he is perhaps “willful” in his failure to file, rather than merely “negligent”). But this tactic also allows him to continue his resistance; if he is not caught, the IRS cannot force him to violate his conscience by seizing his funds.

45. *Cheek v. United States*, 498 U.S. 192, 203 (1991).

46. See, e.g., Mayk, *supra* note 43. Ted Marasciulo, a tax attorney who has represented other war tax resisters, said about Adams:

To prosecute Adams criminally, the IRS would have to prove that she had a ‘guilty mind’ and was intentionally and knowingly breaking the law. . . . ‘A good-faith belief can keep [the defendant] from being prosecuted’. . . . The ability to prove this criminal intent, public relations concerns, and the financial cost of a criminal trial may discourage the IRS from bringing criminal charges against Adams

Id. It is likely his comments would accurately describe any prosecution of similarly situated war tax resisters.

47. Mr. Goldberger is an appellate tax and criminal law attorney based in Philadelphia. He has represented a number of war tax resisters and was testifying in his capacity as an expert in this area.

ally shown [a] commendable restraint and sound discretion in not bringing criminal prosecutions [against war resisters].”⁴⁸

It is important to distinguish the war tax resister from an ordinary tax evader motivated by greed. War tax resisters do not hide their income or assets from the government and the vast majority file income tax returns; they simply refuse to pay for what they see as sinful.⁴⁹ They are different from people who protest tax for non-religious reasons. Unlike those who believe the government has no power to tax, war tax resisters believe the state can and should tax its citizens.⁵⁰ And unlike those who object to the payment of taxes because they believe the government ought not to tax (anarchists, for example), war tax resisters do not find the collection of tax to be a wrongful use of government resources.⁵¹ Their objection is simply this: they believe war, in all its forms and for all reasons, is sinful.⁵² They resist, to the utmost, any attempt to force them to participate in war. And they see war tax resistance as the only way to avoid complicity in the sin of war.⁵³ Congress and the courts, however, treat war tax resisters and those who resist taxes for other reasons, as well as garden-variety tax evaders, as the same—all three are subjected to the same fines and penalties.⁵⁴

II. HISTORY OF CONSCIENTIOUS OBJECTION

Preserving religious freedom by permitting pacifists to avoid military service has been a time-honored priority of the United States. In the colony of Pennsylvania, although pacifists were not exempt from conscription, the state legislature allowed pacifists to hire a substitute in the case of conscrip-

48. *Misc. Tax Bills and the Peace Tax Fund: Hearing Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways and Means*, 102d Cong. 191 (1992) (statement of Peter Goldberg, Attorney).

49. The War Tax Resisters League website includes a letter entitled “An Appeal to Conscience” with this quote:

Refusal to pay taxes used to finance unjust wars, along with refusal by soldiers to fight in them, is a direct and potentially effective form of citizen noncooperation, and one that governments cannot ignore. War tax refusal has a long and honorable tradition among religious and secular opponents of war. Refusal to pay all or a portion of one’s federal taxes as a form of conscientious objection to war may involve personal risks.

An Appeal to Conscience, WAR RESISTERS LEAGUE, <https://www.warresisters.org/node/326> (last visited Sept. 23, 2014). And the National War Tax Resistance Coordinating Committee puts it succinctly: “War tax resisters are not out to enrich themselves by evading taxes.” *What is War Tax Resistance?*, NAT’L WAR TAX RESISTANCE COORDINATING COMMITTEE, http://www.nwtrcc.org/what_is_wtr.php (last visited Sept. 23, 2014).

50. Telephone interview with Alonzo Valentine, Professor of Peace and Justice Studies at Earlham School of Religion (Sept. 22, 2013).

51. *Id.*

52. Runyan, *supra* note 8.

53. “For most of us who resist, the dire consequences of voluntarily paying for war are far worse [than] what the IRS and government can do to us.” NAT’L WAR TAX RESISTANCE COORDINATING COMMITTEE, *supra* note 49.

54. See, for example, 26 U.S.C. § 6702 (2006) which provides for a \$5,000 “frivolous” filing penalty. This penalty is applied to those who take facially invalid deductions for any reason—whether that reason is religiously motivated or not. *Id.*

tion.⁵⁵ In 1755, John Woolman addressed the Philadelphia Yearly Meeting,⁵⁶ urging Quakers⁵⁷ to refuse to pay taxes for war.⁵⁸ Woolman and other similar-minded Quakers later sent a letter to other Quaker groups, saying, “[W]e . . . think that as we cannot be concerned in wars and fightings, so neither ought we to contribute thereto by paying the tax directed by the said Act, though suffering be the consequence of our refusal, which we hope to be enabled to bear with patience.”⁵⁹

The Continental Congress of 1775 adopted a resolution exempting religiously motivated conscientious objectors from service in state militias.⁶⁰ In lieu of military service, the resolution encouraged pacifists to “‘contribute liberally in this time of national calamity’ and to offer whatever services they were able to perform, consistent with their religious principles,”⁶¹ an early form of “alternative service.” This resolution demonstrates that, from the earliest days of the nation, the refusal to conscript pacifists while still permitting them to contribute to the life of the nation was important. Similarly, providing a taxation alternative could provide pacifists an opportunity to perform alternate service.

And Congress discussed conscientious objectors and those whose religious beliefs required opposition to paying for war at the drafting of the United States Constitution. Mr. Jackson proposed a conscientious objector exemption to military service, offering this addition to the current Second Amendment, “no person religiously scrupulous of bearing arms shall be compelled to render military service in person.”⁶² It was suggested this right should be conditioned upon “paying an equivalent,”⁶³ but Mr. Roger Sherman of Connecticut said, “It is well known that those who are religiously scrupulous of bearing arms are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other.”⁶⁴ To war resisters, paying tax which Congress uses to fund the military is the functional equivalent of hiring a substitute to kill for

55. See PETER BROCK, *PACIFISM IN THE UNITED STATES: FROM THE COLONIAL ERA TO THE FIRST WORLD WAR* 21, 22 (1968).

56. A Yearly Meeting is an annual gathering of Quakers where issues of doctrine, faith, and practice are decided by consensus.

57. The proper term for Quakers is “Friend” as the Quaker church is properly termed “The Religious Society of Friends of the Truth.” However, while Quaker was initially a pejorative term, many Friends have embraced the name and use it, especially with non-Quakers as “Quaker” is more widely known than “Friend.” Thus, I use Quaker throughout this paper.

58. Letter from Abraham Farrington et al. (Dec. 16, 1755), in *We Won’t Pay: A Tax Resistance Reader* 23, 24 (David Gross ed. 2008).

59. *Id.*

60. William D. Palmer, *Time to Exorcise Another Ghost from the Vietnam War: Restructuring the In-Service Conscientious Objector Program*, 140 *MIL. L. REV.* 179, 182 (1993).

61. *Id.*

62. 1 *Annals of Cong.* 434 (1789) (Joseph Gales ed., 1834).

63. Meaning paying a substitute to serve in one’s place.

64. 1 *Annals of Cong.* 779 (1789) (Joseph Gales ed., 1834).

them⁶⁵—the very thing Mr. Sherman noted the religiously scrupulous would rather die than do.

During the Civil War, the Union passed the Conscription Act of March 3, 1863.⁶⁶ The Act permitted a draftee to find a substitute to fight for him or pay the government \$300 to hire a substitute.⁶⁷ Many pacifists refused to participate or to hire a substitute.⁶⁸ The government subjected those whom it conscripted and who then refused to hire a substitute (or who were unable to do so) to punishment—including death.⁶⁹ Cyrus Pringle, who chose to go to prison rather than comply with conscription, explained, “We cannot purchase life at the cost of peace of soul.”⁷⁰ Perhaps recognizing that the Conscription Act was unworkable, Congress amended it one year later to provide conscientious objectors with alternative service: objectors could either serve in the hospitals or care for freedmen or pay another to do so (in contrast to paying for another to serve as a soldier).⁷¹ Establishing conscientious objector status required the claimant to prove “by satisfactory evidence that his deportment has been uniformly consistent with [a claim of conscientious objection].”⁷²

In World War I, the military began granting conscientious objector status. Modern conscientious objector status means permitting a conscripted conscientious objector to perform alternate service in lieu of military service—echoing the resolution of the Continental Congress.⁷³ After being conscripted, conscientious objectors during World War I formally claimed conscientious objector status.⁷⁴ Congress required the men to establish the veracity of their conscientious objection claims to psychologists and other

65. Runyan, *supra* note 8.

66. While the Confederacy also had programs to exempt conscientious objectors, these programs became more limited as wartime losses for the Confederacy accumulated and the need for Confederate soldiers became greater. LILLIAN SCHLISSSEL, *CONSCIENCE IN AMERICA* 90 (Lillian Schlissel ed., 1968). It is possible the Union remained comparatively sympathetic to the plight of conscientious objectors because many of the anti-slavery Republicans supporting President Lincoln were also pacifists. See John Whiteclay Chambers II, *Conscientious Objectors and the American State from Colonial Times to the Present*, in *The New Conscientious Objection: From Sacred to Secular Resistance* 45 (Charles C. Moskos & John Whiteclay Chambers II eds., 1993).

67. Act of Mar. 3, 1863, ch. 75, § 13, 12 Stat. 731, 733 (1863).

68. See BROCK, *supra* note 55, at 22.

69. Superior officers often threatened conscientious objectors with severe punishments, including imprisonment and death. See Cyrus Pringle, *Diary*, in *CONSCIENCE IN AMERICA* 102, 107 (Lillian Schlissel ed., 1968).

70. *Id.* at 105.

71. See Act of Feb. 24, 1864, ch.13, § 17, 13 Stat. 6, 9 (1864).

72. *Id.*

73. Chambers II, *supra* note 66, at 33–35.

74. Section 4 of the Selective Service Act of 1917 restricted conscientious objector status to members of “any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form” Pub. L. No. 65-12, 40 Stat. 76, 78 (1917). In other words, conscientious objectors had to show membership in a historic peace church—traditionally including the Anabaptists, Quakers, and Brethren.

officials (including army officers). It is estimated some 4,000 men claimed conscientious objector status and 95 percent of the men claiming conscientious objector status did so because of sincerely held beliefs—meaning they were not malingerers or shirkers but were religiously motivated conscientious objectors to war.⁷⁵

Most of the men remained under the control of the military in non-combatant positions.⁷⁶ (Non-combatant positions are positions of service to the military that do not require objectors to carry weapons. For example, a non-combatant might serve as a medic or as a radio operator but would wear a military uniform.) The military found 1,300 men qualified to do non-combatant service within the military.⁷⁷ Another 1,200 received “farm-furloughs,” being sent to do farm work in the place of men at war.⁷⁸ Ninety-nine went to Europe to assist in rebuilding under the guidance of the American Friends Service Committee (a Quaker service organization). Nine-hundred and forty men remained in Army camps.⁷⁹ This willingness to give objectors another way to fulfill their duties to the republic—an alternative service that did not violate their religious beliefs—demonstrates Congress’ continued commitment to providing alternate service.

However, just as there are levels of war tax resistance—ranging from the legal (reducing income to levels below the income tax thresholds) to the dubious (filing tax returns with a statement the paying of tax is done under protest) to the illegal (refusing to pay)—there are levels of conscientious objection.⁸⁰

Some 400 men absolutely refused participation, rejecting any form of non-combatant service, resulting in their imprisonment.⁸¹ Imprisonment was typically at an army camp.⁸² One conscientious objector wrote of his experience at such an army camp in this way:

75. Chambers II, *supra* note 66, at 34.

76. *Id.* at 33.

77. *Id.* at 34.

78. See Anne M. Yoder, *World War I Conscientious Objectors* (May 2002), <http://www.swarthmore.edu/library/peace/conscientiousobjection/WWI.CO.coverpage.htm>.

79. *Id.*

80. Kornhauser lists the following as “negative” methods of war tax resistance:

- 1) supporting war tax resistance of others by contributing to a tax resisters’ penalty fund;
- 2) refusing to pay federal phone taxes;
- 3) paying federal income taxes but writing “paid under protest” on the form;
- 4) paying the tax due but with a check made out to the Department of Health and Human Services;
- 5) filing an income tax return correctly but refusing to pay a symbolic amount of the tax and sending an attached letter explaining;
- 6) filing income tax return correctly but paying only the nonmilitary portion of the taxes;
- 7) sending any unpaid tax to a community justice or peace organization; and
- 8) not filing and/or not paying any income tax.

Kornhauser, *supra* note 22, at 957–58.

81. *History of the Campaign for a Peace Tax Fund*, NAT’L CAMPAIGN FOR A PEACE TAX FUND, <http://www.peacetaxfund.org/aboutus/history.htm> (last revised July 25, 2013).

82. See MELVIN GINGERICH, *SERVICE FOR PEACE: A HISTORY OF MENNONITE CIVILIAN PUBLIC SERVICE*, 10 (Mennonite Central Committee, 1949).

We were cursed, beaten, kicked, and compelled to go through exercises to the extent that a few were unconscious for some minutes. They kept it up for the greater part of the afternoon, and then those who could possibly stand on their feet were compelled to take cold shower baths. One of the boys was scrubbed with a scrubbing brush using lye on him. They drew blood in several places.⁸³

Religious scruples create a zealous refusal to comply with laws violating those principles. This noncompliance may seem nonsensical (or at least irrational) to those not similarly motivated. A poignant description of that seemingly nonsensical resistance to any participation in war is that of four Hutterite (Christian pacifist) men who absolutely refused service of any kind; they refused to even wear uniforms.⁸⁴ They would not apply for conscientious objector status because to do so required they fill out a document called "Statement of Soldier."⁸⁵ The Hutterites could not claim to be soldiers to object to being soldiers without becoming complicit with sin.⁸⁶ They were held in solitary confinement, beaten, and starved. Two of these men, Joseph and Michael Hofer, died at Fort Leavenworth.⁸⁷ The military returned their bodies to their pacifist families in the military uniforms they refused to wear while alive.⁸⁸

Little Sisters of the Poor Home for the Aged make similar claims regarding filling out forms. To obtain the ACA exemption, religious nonprofits must complete a two page form which certifies the organization as a nonprofit with a sincerely held objection and directs a third party to provide the objected-to medical care.⁸⁹ The Little Sisters plaintiffs claim merely filling out the forms violates their religious beliefs because the form requires them to direct another party to commit a sinful act, thus making them complicit in the sinful act.⁹⁰ On its face, this objection seems to mirror the Hutterites' claims that filling out the request for accommodation would violate their beliefs. But the Hutterites refused to sign because the language at

83. *Id.*, (quoting JONAS SMUCKER HARTZLER, *MENNONITES IN THE WAR, OR NONRESISTANCE UNDER TEST* (Mennonite Publishing Committee 1922)). It is not clear why the military engaged in these harsh methods. The motivation might have been to encourage conscientious objectors to renounce their pacifism or to punish them for noncompliance.

84. Duane C.S. Stoltzfus, *Standing in Chains at Alcatraz: When Hutterites Were Called to War*, *THE MENNONITE* (Aug. 1, 2012), http://www.themennonite.org/issues/15-8/articles/Standing_in_chains_at_Alcatraz.

85. *See id.*

86. *See id.*

87. *See id.*

88. *See id.*

89. EBSA FORM 700 (2014), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/01/EBSA-Form-700.pdf>.

90. *See* Brief for Petitioner at 10-11, *Little Sisters of the Poor Home for the Aged v. Sebelius*, 134 S.Ct. 1022 (No. 13A691), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/01/13A691-application1.pdf>.

the top of the form identified them as soldiers; this identification was what they saw as the sin.⁹¹

In contrast, Little Sisters argues completing the ACA exemption form would violate their beliefs because the second part of the form would direct another to do what they, because of their religious beliefs, cannot do. (The first part of the form, certifying themselves as a qualifying religious non-profit, does not seem to be a source of contention.) The Little Sisters bear more similarity to war tax resisters, who refuse to file tax returns because to do so would pay another to fight for them, something which, because of their religious beliefs, they cannot do.

The Little Sisters conflates these acts in their brief, saying,

Indeed, the crux of the Tenth Circuit's decision was that Applicants could avoid all penalties . . . if they would simply fill out the forms the government mandates. Such reasoning would, of course, resolve all religious liberty cases: Quaker conscientious objectors would suffer no penalties if they would just join the military⁹²

But Quaker conscientious objectors *do* fill out forms to avoid military service. It is not the certification process to which most objectors object. It is the requirement to comply with the act that is objectionable. And what conscientious objectors to tax will not do is pay another to do what they will not, which is the relief both groups seek.

War tax resisters, as fellow pacifists, share this refusal to participate in war, despite great pressure to comply. While the IRS is not compelling war tax resisters to take cold showers and is not drawing their blood, many war tax resisters remain firm in their refusal to comply in the face of both civil and criminal penalties.⁹³

The Selective Training and Service Act of 1940 provided a man could qualify for conscientious objector status if he could establish a long-standing religious belief in the immorality of killing another human being.⁹⁴ The objection could not be for moral or political reasons, but had to be based on religious belief. Selective objection did not establish conscientious objection within the meaning of the Selective Training and Service Act; thus, the conscientious objector who allowed there might be such a thing as a "just war" could not qualify.⁹⁵ Thirty-four million men registered for the draft,

91. It is also possible language barriers caused the refusal. See Stoltzfus, *supra* note 84.

92. See Brief for Petitioner, *supra* note 90, at 26.

93. The IRS' motivation is clear: Taxpayers can believe what they like, but must pay their taxes. And the IRS aims to apply pressure until compliance is achieved.

94. Selective Training and Service Act of 1940, Pub. L. No. 76-783, § 5(g), 54 Stat. 885, 889 (1940) available at <http://www.legisworks.org/congress/76/publaw-783.pdf>.

95. *Id.*

72,354 of these applied for conscientious objector status.⁹⁶ Of these, approximately 25,000 accepted non-combatant positions within the military.⁹⁷ Approximately 27,000 of the conscientious objectors were deemed ineligible for the draft due to their physical condition.⁹⁸ Another 12,000 men, who refused to serve in the military, even in a non-weapons carrying (non-combatant) capacity, entered into Civilian Public Service.⁹⁹

Congress created Civilian Public Service as a form of alternative service, building on the work of the Civilian Conservation Corps Congress had created during the Great Depression.¹⁰⁰ The men lived in camps and did work that served the greater community—building bridges, preserving national parks, monitoring soil, and so on.¹⁰¹

During the Korean War, the Selective Service System further formalized the application process for conscientious objectors seeking to perform alternative service by creating the I-W application for conscientious objectors and allowing institutions to apply to receive I-W qualified workers. Between 1952 and 1955, over 10,000 men applied for, and received, I-W status.¹⁰² Selective Service approved over 1,200 such institutions.¹⁰³

The Vietnam era ushered in a very unpopular military conflict and the number of conscientious objectors rose. Almost a half million men applied for conscientious objector status.¹⁰⁴ Among them, in 1965, was Daniel Seeger (and his co-appellants).¹⁰⁵ While not a member of a historic peace

96. Anne M. Yoder, *Brief History of Conscientious Objection*, <http://www.swarthmore.edu/library/peace/conscientiousobjection/co%20website/pages/HistoryNew.htm> (last visited Sept. 7, 2013).

97. *Id.*

98. *Id.*

99. *Id.* Over 6,000 men simply refused to comply with the Selective Service requirements in any way. *Id.* They were sentenced to prison; failure to register for the draft remains a federal crime. *Id.* At present, there is no way to register for the draft as a conscientious objector, so some young men refuse to register out of concern they will be drafted. In addition to risking jail time, these young men are ineligible for federal financial aid for college as well as other federal benefits. *See, e.g.*, Selective Service System, *Fast Facts, Benefits and Programs Linked to Registration*, <http://www.sss.gov/FSbenefits.htm> (last visited Sept. 7, 2013). Interestingly, during World War II, many conscientious objectors performing alternate service served unpaid, unlike soldiers who were paid. The peace churches supported their members and their members' families. Now, if a young man fails to register for the Selective Service and becomes ineligible for federal financial aid, the historic peace churches provide scholarships. *See, e.g.*, Center on Conscience & War, *The Fund for Education and Training*, <http://centeronconscience.org/event-schedule/fund-for-education-and-training.html> (last visited Sept. 7, 2013). Similarly, many war tax resisters contribute to a communal fund designed to be used if the IRS compels a resister to pay tax. This solidarity (and stubbornness in the face of sometimes severe consequences) is part of what makes collecting from war tax resisters so difficult.

100. *See generally* 16 U.S.C. ch. 3A, §§ 584–90 (repealed 1966).

101. *See generally id.*

102. *See* Yoder, *supra* note 96.

103. *Id.*

104. *Id.*

105. *United States v. Seeger*, 380 U.S. 163, 167 (1965).

church,¹⁰⁶ and indeed, not necessarily religious, Seeger objected to war, claiming conscientious objector status.¹⁰⁷ The Supreme Court held the military must allow men whose belief system did not encompass a Supreme Being, but which forbade participation in war, conscientious objector status.¹⁰⁸ The Court based its holding on the Establishment Clause, holding conscientious objection could not be limited to members of historic peace churches (a previous military standard to establish conscientious objection) or even to those motivated by a particular faith. The Court did not hold that the Free Exercise Clause required a conscientious objector status but did hold that once Congress created such a status, it had to be granted without favoritism.

In 1967, Congress adopted today's definition of a conscientious objector, which could be analogized to war tax resisters. The Military Selective Service Act provides "any person . . . who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."¹⁰⁹ Then, in 1971, the Supreme Court expanded conscientious objector status to include anyone with a "deeply felt" belief in the moral and ethical impermissibility of every war.¹¹⁰ *Gillette* held that requiring conscientious objectors to be opposed to all war was not a violation of the Establishment Clause. Thus, while a particular religious faith could not be required, objection to war must be required. The Court further held that allowing conscientious objectors to perform alternate service had two secular purposes.¹¹¹ Conscientious objectors make poor soldiers (just as war tax resisters make poor taxpayers) and attempting to turn objectors into soldiers is a waste of resources,¹¹² (just as attempting to make war tax resisters pay taxes is a waste of resources). The Court specifically addressed the notion of the drafted conscientious objector and the difficulty he would face when forced to choose between obedience to the law and obedience to his God, saying, "in the forum of conscience, duty to a moral power higher than the State has always been maintained."¹¹³ This is the same quandary war tax resisters face.

106. A historic peace church is one whose creed requires a pacifistic stance.

107. *Seeger*, 380 U.S. at 167–68.

108. *Id.* at 175–76.

109. The Military Selective Service Act of 1967, 50 U.S.C.A. § 456(j) (West, Westlaw through P.L. 113-145 (excluding P.L. 113-121, 113-128, and 113-143)).

110. *Gillette v. United States*, 401 U.S. 437, 454 (1971) (explaining that "The relevant individual belief is simply objection to all war, not adherence to any extraneous theological viewpoint.").

111. *Id.* at 452–53.

112. *Id.*

113. *Id.* (quoting *United States v. Macintosh*, 283 U.S. 605, 633 (1931) (Hughes, C.J., dissenting)).

The end of the draft in 1973 largely ended the large-scale application for conscientious objector status;¹¹⁴ few are the pacifist soldiers in a volunteer army. Nevertheless, there are soldiers who occasionally recognize their objection to war after enlisting, so there continues to be some limited use of the conscientious objector status by enlisted soldiers who claim to have become conscientious objectors.¹¹⁵ Similar methods could be adopted to determine whether a taxpayer ought to qualify for alternate taxation.

Establishing the sincerity of one's objection to war is a thorough process that weeds out false applicants. While the directive does not permit the evaluating officer to consider the veracity of the applicant's religious beliefs (the officer cannot engage the applicant in a back-and-forth debate about whether his or her beliefs are objectively "correct"), the directive does require the applicant prove, by clear and convincing evidence, that the objector's beliefs are honest, sincere, and deeply held.¹¹⁶

The first step to applying for conscientious status within the military is to submit an application based off the I-W form.¹¹⁷ This written application must explain how the conscientious objector's belief in pacifism came to be.¹¹⁸ The application must also demonstrate the conscientious objector does not seek to avoid military service.¹¹⁹ After all, a sudden conversion to pacifism upon being drafted suggests an aversion to military service rather than a commitment to pacifism.¹²⁰

Questions traditionally included on the I-W form (or the more modern SSS 150) have been:

1. Describe the nature of your belief.
2. How, when and from what source have you received training or acquired this belief?
3. Who is the individual you rely on most for religious guidance?

114. Yoder, *supra* note 78 ("Secretary of Defense Melvin Laird announced on January 27, 1973 that the draft was to end, as of that date, in favor of voluntary enlistment.").

115. See, for example, the case of Kimberly Rivera, *US Soldier Who Refused to Go Back to Iraq Arrested on Return from Canada*, NBC NEWS, Sept. 21, 2012, http://worldnews.nbcnews.com/_news/2012/09/21/14008027-us-soldier-who-refused-to-go-back-to-iraq-arrested-on-return-from-canada?lite, and the case of Mark Wilkerson, John W. Gonzalez, *Soldier Who Deserted Before Iraq Gets 7 Months*, HOUSTON CHRONICLE, Feb. 23, 2007, <http://www.chron.com/news/houston-texas/article/Soldier-who-deserted-before-Iraq-gets-7-months-1796959.php>.

116. U.S. DEP'T OF DEF., INSTRUCTION 1300.06, CONSCIENTIOUS OBJECTORS ¶ 5.3 (May 31, 2007), available at <http://www.dtic.mil/whs/directives/corres/pdf/130006p.pdf> [hereinafter DoDI 1300.06].

117. *Id.* ¶¶ 7.1, E2.

118. *Id.* ¶ E2.2.2.

119. *Id.* ¶ 5.2.2.

120. As the Selective Service puts it, "[T]he man's lifestyle prior to making his claim must reflect his current claims." *Conscientious Objection and Alternative Service*, SELECTIVE SERV. SYS., www.sss.gov/FSconsobj.htm (last modified Apr. 30, 2002). See also *Basic Draft and Registration Information*, CTR. ON CONSCIENCE & WAR I (last modified Sept. 2005), <http://centeronconscience.org/images/stories/pdf/basic.pdf> (directing young men to compile documentation of their conscientious objector status prior to turning eighteen).

4. When, if ever, do you believe in the use of force?
5. Describe any of your actions or behavior that show the depth and consistency of your belief.
6. Describe any public expression of your belief.
7. Have you ever been a member of the military?
8. Are you a member of any religious sect?
9. Describe the creed of that sect as it relates to war.
10. Describe your relationships or activities with non-military and non-religious organizations.¹²¹

Persons who come to conscientious objection after enlisting may apply for conscientious objector status using the procedures outlined in the Department of Defense Instruction 1300.06 as applied by the various branches. Each branch has developed questionnaires similar to the SSS 150 form. For example, the Air Force asks the applicant to supply information about how and when the applicant came to be a conscientious objector, when, if ever, the use of force might be appropriate, and so on.¹²²

The only way to evaluate an applicant's internal beliefs is by evaluating the behaviors that are the external manifestation of those beliefs.¹²³ Factors the evaluating officer may consider when determining a conscientious objector's sincerity include:

training in the home and religious organization; general demeanor and pattern of conduct [of the applicant]; participation in religious activities; whether ethical or moral convictions were gained through training, study, contemplation, or other activity comparable in rigor and dedication to the processes by which traditional religious convictions are formulated; credibility of the applicant; and credibility of persons supporting the claim.¹²⁴

In the written application, the conscientious objector is asked to describe how he came to his pacifistic beliefs.¹²⁵ Although membership in a historic peace church is not sufficient by itself to establish one's own belief in pacifism, the objector may present such membership to support a claim of pacifism.¹²⁶ Pacifists may demonstrate their long-standing objection to war by establishing active participation (in addition to mere membership) in a historic peace church and other activities that demonstrate a long-standing commitment to peace, such as attendance at marches and protests against

121. *See, e.g.*, *Clark v. United States*, 236 F.2d 13, 15 n.3 (9th Cir. 1956).

122. *See* U.S. AIR FORCE, INSTRUCTION 36-3204: PROCEDURES FOR APPLYING AS A CONSCIENTIOUS OBJECTOR ¶ A2.2 (July 15, 1994), available at http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-3204/afi36-3204.pdf. *See also* U.S. COAST GUARD, COMMANDANT INSTRUCTION 1900.8: CONSCIENTIOUS OBJECTORS AND THE REQUIREMENT TO BEAR ARMS ¶ 7(a)(2) (Nov. 30, 1990), available at http://www.uscg.mil/directives/ci/1000-1999/CI_1900_8.pdf.

123. DoDI 1300.06, *supra* note 116 ¶ 5.2.2.1.

124. *Id.* ¶ 5.2.2.2.

125. *Id.* ¶ E2.2.

126. *Id.* ¶ 5.2.3.2.

war.¹²⁷ Peace churches advise conscientious objectors to keep a record of those activities in which they have participated and which show a genuine, deeply held belief in pacifism.¹²⁸ The conscientious objector might also file letters of reference from acquaintances, members of the clergy, family, and friends who can attest to the long-standing nature of the religious belief.¹²⁹ Conscientious objectors may also explain how they became conscientious objectors—was that process one of training, of contemplation, or both?¹³⁰

To test the “credibility” of the belief, the military currently requires an interview with a military chaplain and a psychiatrist.¹³¹ The chaplain evaluates the nature of the applicant’s religious beliefs based on the applicant’s religious training whereas the psychiatrist ensures there are no mental health issues that might preclude military service.¹³²

Considering the vigorous processes historically and currently in place to prove conscientious objector status—as well as the few findings of malingering or false claims—it becomes apparent conscientious objector status is neither easily sought nor easily obtained, but is available for those who can establish a deeply held, genuine, and sincere belief that war is sinful. This same vigorous process could be easily adopted and used to prevent false claims of conscientious objection in the field of taxation.

III. HISTORY OF WAR TAX RESISTANCE

War tax resistance has likely existed as long as war has existed. Tracing the history of war tax resistance gives insight into why a revised Religious Freedom Tax Bill might resolve the problem of trying to collect tax money from persons who believe submitting to collection is equivalent to complicity with sin. Certainly, war tax resistance is older than the United States itself. In the late 1600s Quakers in the Pennsylvania Assembly refused to pay two tax assessments—one in support of the Anglo-Dutch war

127. See *id.* ¶ 5.2.3.4

(Where an applicant is or has been a member of a religious organization or tradition, and where the applicant’s claim of conscientious objection is related to such membership, inquiry may properly be made as to the fact of membership, and the teaching of the religious organization or tradition, as well as the applicant’s religious activity.).

128. See this advice from the Ithaca Monthly Meeting (Quaker community) to its members: In anticipation of a draft, you should prepare a file of evidence of your beliefs. At minimum, include in this file photocopies of your registration card and other attempts to get on record, a comprehensive statement of your beliefs, documentation of activities in your life that help to support your claim, and letters of support. This evidence can be provided to the local board who will hear your claim for CO classification if you are drafted.

Conscientious Objection Information, ITHACA MONTHLY MEETING, <http://ithacamonthlymeeting.org/resources/conscientious-objection-information/> (last visited Sept. 25, 2014); see also *CTR. ON CONSCIENCE & WAR*, *supra* note 120.

129. SELECTIVE SERV. SYS., *supra* note 120 (“He may provide written documentation or include personal appearances by people he knows who can attest to his claims.”).

130. DoDI 1300.06, *supra* note 116 ¶ 5.2.2.2.

131. *Id.* ¶ 7.3.

132. *Id.*

and another in support of King William's War.¹³³ When the Quaker assembly refused to pay a tax of 4,000 pounds for an expedition to Canada, the assembly explained "it was contrary to their religious principles to hire men to kill one another."¹³⁴ And, of course, there was the refusal of pacifists to pay for substitutes during the Revolutionary and Civil Wars, which many war tax resisters analogize to paying tax used for military spending.¹³⁵

However, it was not until World War II that the income tax evolved into a mass tax¹³⁶ and large numbers of people found themselves paying for war—among them, pacifists.¹³⁷ During World War I, the top income tax rates increased from 7% to 77%.¹³⁸ The percentage of those paying income taxes increased from roughly 2% to nearly 17%, and the income tax revenue went from less than 10% of total federal revenues in 1914 to nearly 83% by the end of the war.¹³⁹ After World War I, income tax revenue dropped dramatically.¹⁴⁰ But in 1942, Congress re-introduced the employee withholding tax, in part to fund World War II.¹⁴¹ This reintroduction transformed the income tax from a "class-based income tax to mass-based income tax system,"¹⁴² meaning pacifists not previously required to consider whether payment of tax would violate their religious beliefs now faced this conundrum. Some became war tax resisters.

War tax resisters proved as stubborn as their conscientious-objector-to-military-service counterparts. In 1942, the first known war tax resister of the modern era, Ernest Bromley, emerged. Bromley refused to pay for the

133. See *History of War Tax Resistance: 400 B.C. to 1699 A.D.*, NAT'L WAR TAX RESISTANCE COORDINATING COMMITTEE, <http://www.nwtrcc.org/history/history1.php> (last visited Sept. 25, 2014). See also *History of War Tax Resistance*, WAR RESISTERS LEAGUE, <https://www.warresisters.org/node/328> (last visited Sept. 25, 2014).

134. See DONALD D. KAUFMAN, *THE TAX DILEMMA: PRAYING FOR PEACE, PAYING FOR WAR* 30 (1978).

135. Runyan, *supra* note 8. "I won't go to war and I don't want to pay for someone else to kill for me." *Id.*

136. See Ajay K. Mehrotra, *Lawyers, Guns & Public Monies: The U.S. Treasury, World War One, and the Administration of the Modern Fiscal State*, 28 *LAW & HIST. REV.* 173, 173–74 (2010) ("[I]t was during the war that the federal government ended its traditional reliance on regressive import duties and excise taxes as principal sources of revenue and began a modern era of fiscal governance, one based primarily on the direct and progressive taxation of personal and corporate income.").

137. Many of the citations in the following section come from the National War Tax Resistance Coordinating Committee or the War Resisters League, arguably biased sources; however, there does not appear to be an opposing source's recitation of the history of war tax resistance. *History of War Tax Resistance*, *supra* note 133.

138. Mehrotra, *Lawyers, Guns & Public Monies*, *supra* note 136, at 182 tbl.1.

139. *Id.* at 180–82, tbl. 1.

140. Ajay K. Mehrotra, *The Price of Conflict: War, Taxes, and The Politics of Fiscal Citizenship*, 108 *MICH. L. REV.* 1053, 1064 (2009).

141. *Id.* at 1069 ("The Revenue Act of 1942, in fact, marked the start of a new era of fiscal policy, as the dramatic increase in rates, the decrease in exemption levels, and the reintroduction of tax withholding, transformed the early class-based income tax into a mass-based income tax system.").

142. *Id.*

“defense tax stamp” levied against all cars and used to fund World War II.¹⁴³ Withholding the \$7.09 “defense tax stamp” liability resulted in Bromley serving 60 days in jail.¹⁴⁴

Not all resisters served jail time for their war tax resistance; some simply chose to live in poverty. Ammon Hennacy refused to register for the draft during World War I.¹⁴⁵ For his refusal to register, the court sentenced Ammon to two years imprisonment.¹⁴⁶ After being released from prison, he continued his conscientious objection by refusing to pay tax,¹⁴⁷ choosing instead to live in voluntary poverty, thereby effectively reducing his federal income tax liability.¹⁴⁸ However, he must have incurred some tax liability because in 1950, the local newspaper called him “one of the city’s most persistent lone wolf pickets” and reported the IRS had seized Hennacy’s “Income Taxes Pay for Bombs” sign as partial payment of his tax liability.¹⁴⁹

Congress recognized the existence of religious objectors to war funding and made provision for them during World War II, creating “civilian bonds” as the pacifist alternative to the ubiquitous war bond. While the reinvigorated income tax was the primary basis of funding for World War II,¹⁵⁰ Congress issued war bonds to contribute to war funding. Civilian bonds were an alternative form of service for those who could not conscientiously buy a bond meant to support the war.¹⁵¹ Thus, the bonds were not labeled “defense bonds” but rather “civilian bonds.”¹⁵² Congress outsourced the issuance of these bonds to the National Service Board for Religious Objectors, a group of pacifists who helped to regulate and sell the civilian bonds.¹⁵³

143. WAR RESISTERS LEAGUE, *supra* note 133.

144. *Id.*

145. *History of War Tax Resistance: 1900 to 1959*, NAT’L WAR TAX RESISTANCE COORDINATING COMMITTEE, <http://www.nwtrcc.org/history/history1900.php> (last visited Sept. 25, 2014).

146. *Id.*

147. *Id.*

148. *Id.*

149. Ruth Benn, *Summer Travel: Destination Wisconsin*, WAR TAX TALK (July 2, 2014), <http://nwtrcc.org/blog/?p=406> (detailing the author’s review of war tax resistance materials held at the Dorothy Day Catholic Worker Collection at Marquette University. Day was a war tax resister as well).

150. Mehrotra, *supra* note 136, at 183 (“During [World War II], taxes constituted a significantly larger percentage of financing [than World War I].”).

151. *See History of War Tax Resistance: 1900 to 1959, supra* note 145; *see also* Yoder, *supra* note 78, (showing a picture of the AFSC (American Friends Service Committee) version, complete with the slogan “Civilian Public Service. ‘To Substitute Order for Chaos and Creation for Destruction.’”).

152. MELVIN GINGERICH, *Service for Peace: A History of Mennonite Civilian Public Service*, 355–58 (Mennonite Central Committee, 1949).

153. The National Interreligious Service Board for Religious Objectors was an organization comprised of the three historic peace churches: the Brethren, the Mennonites, and the Quakers. First called “The National Council for Religious Conscientious Objectors,” the group later merged with the Civilian Service Board and became known as the National Interreligious Service Board

After World War II, war tax resistance gained traction and in 1947, 250 people attended a conference in Chicago entitled “More Disciplined and Revolutionary Pacifist Activity.”¹⁵⁴ Out of this conference came an organization of about 40 people calling themselves “The Peacemakers,”¹⁵⁵ and refusing to pay all or part of their income tax.¹⁵⁶ They published a newsletter, *Peacemaker*, advocating the refusal of income tax payment.¹⁵⁷

Then, as now, war tax resisters faced legal consequences for their failure to comply with the Internal Revenue Code. Abraham Muste was an example of one of these early income tax resisters brought to court for his nonpayment of tax liability. Muste was a Presbyterian minister and a Quaker.¹⁵⁸ In 1948, he became convinced¹⁵⁹ he could no longer pay his income tax.¹⁶⁰ Every year he sent a letter, along with a completed tax return, to the IRS, explaining why he was refusing to pay his tax.¹⁶¹ One such letter so clearly expressed what it meant to him, as a war tax resister, to be complicit with the sin of war in an era of taxation that the tax court quoted the letter in its decision against him.

The two decisive powers of government, especially with respect to war, are the power to conscript and the power to tax.

Pacifists recognize that to be consistent they must refuse to be conscripted for military service or training. I have come as the result of long reflection and prayer to the conviction that I at least am in conscience bound, in the present period, under the condi-

for Religious Objectors. It is now called the Center on Conscience and War. See *Center Profile: Center on Conscience & War (NISBCO) (2014)*, THE PLURALISM PROJECT AT HARVARD UNIV., <http://www.pluralism.org/profiles/view/73564> (last visited Sept. 25, 2014).

154. William Louis Tabac, *War Tax Refusal: Some Code Problems*, 20 CLEV. ST. L. REV. 215, 216 (1971) (stating there were 250 attendees). But see WAR RESISTERS LEAGUE, *supra* note 133 (stating that there were 300 attendees).

155. WAR RESISTERS LEAGUE, *supra* note 133.

156. *Id.*

157. *Id.*

158. *Muste v. Comm’r*, 35 T.C. 913, 915 (1961).

159. *Id.* It is difficult to fully capture what is meant by the Quaker term “convincement,” but the term encompasses a measure of conversion to a doctrinal truth as well as a feeling of being led by God to a particular conclusion. The Lancaster, Pennsylvania Monthly Meeting described “convincement” this way: “This is not so much an intellectual assent to some doctrine, but a deep conviction, based in experience, that God is present in our lives, and moves us to certain actions and to a way of life congruent with God’s purposes.” Lancaster, Pa. Quakers, *FAQs*, LANCASTER FRIENDS MEETING, <http://lancasterpaquakers.org/faqs.html#9> (last visited Sept. 23, 2014). For Muste to use this term, along with his explanation of a period of prayer and reflection, demonstrates the sort of training and contemplation the Selective Service Act contemplates when discussing conscientious objection.

160. A few organizations have agreed not to withhold income tax at the request of income tax resisters. Muste’s employer was one such organization. It is beyond the scope of this article but the possibility of corporate income tax resistance may be influenced by the outcome of *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (the claim that a secular, private corporation’s religious beliefs (or, the beliefs of the corporation’s founders) can alleviate the corporation’s duty to comply with a law of uniform applicability).

161. *Muste*, 35 T.C. at 915.

tions above set forth, to challenge the right of the government to tax me for waging war

I recognize that as a citizen it is my duty to strive by “democratic” means to change laws and policies with which I disagree and that ordinarily, where no serious issue of conscience is involved, one obeys laws until they are changed. The fact that a conscription law has been enacted does not, however, lead the pacifist to the conclusion that he must conform to it until it is repealed.¹⁶²

A consistent pacifist would unquestionably also be opposed in principle to paying taxes which went directly and solely to war purposes. The same reasoning that would prevent him from firing a gun at an enemy and would prevent him from thinking that he was exonerated from guilt if he handed the gun and ammunition to another soldier to use, would also keep him from paying the money to make the guns and ammunition.¹⁶³

Despite the petitioner’s eloquence, the court held the First Amendment does not prohibit the collection of income tax from pacifists and that the petitioner was willfully negligent in filing his income tax.¹⁶⁴ Nevertheless, the court held he was not fraudulent in his failure to file.¹⁶⁵

In 1949, James Otsuka, an American of Japanese descent and a Quaker, refused to pay a tax assessment of \$4.50.¹⁶⁶ During World War II, Otsuka was subject to the draft.¹⁶⁷ He applied for conscientious objector status and the military classified him as an objector able to serve in non-combatant service.¹⁶⁸ Otsuka refused to perform noncombatant service within the military, believing he should properly have been classified as 4E, a conscientious objector required to perform alternate service in an ap-

162. *Muste* is echoing Thoreau here.

Unjust laws exist: shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once? Men, generally, under such a government as this, think that they ought to wait until they have persuaded the majority to alter them. They think that, if they should resist, the remedy would be worse than the evil. . . . If the injustice is part of the necessary friction of the machine of government, let it go, let it go: perchance it will wear smooth—certainly the machine will wear out. If the injustice has a spring, or a pulley, or a rope, or a crank, exclusively for itself, then perhaps you may consider whether the remedy will not be worse than the evil; but if it is of such a nature that it requires you to be the agent of injustice to another, then I say, break the law. Let your life be a counter-friction to stop the machine. What I have to do is to see, at any rate, that I do not lend myself to the wrong which I condemn.

THOREAU, *supra* note 16, at 7.

163. *Muste*, 35 T.C. at 915.

164. *Id.*

165. *Id.*

166. *History of War Tax Resistance 1900–1959*, *supra* note 145.

167. *Otsuka v. Hite*, 64 Cal. 2d 596, 599 (Cal. 1966) (discussing Otsuka’s later claim he ought to be able to vote, despite his felony record, but the court traces the source of his felony conviction and so I use it here to describe the fervency of the war tax resisters refusal to comply with “sinful” taxation).

168. *Id.*

proved institution.¹⁶⁹ He served three years in the penitentiary for his refusal to comply with conscription to a noncombatant position within the military.¹⁷⁰ After his release, the same stubborn refusal to support the military in any way drove him to refuse to pay 29% of his income tax, for a total liability of \$4.50.¹⁷¹ He also refused to comply with court orders to produce his records to the IRS.¹⁷² The court sentenced him to a four-month jail term for tax refusal, increased because of his contempt of court in refusing to turn over his tax records.¹⁷³

Describing his decisions to resist laws he saw as compelling him to violate his conscience, Otsuka said:

As a general rule I obey the law. I feel that it is my duty to violate the law when it involves my conscience, such as a law requiring racial segregation, or commanding me to enter the armed forces and kill human beings. When I refuse to obey the law, I do not do so lightly or casually. It takes all of my faith and courage.¹⁷⁴

Although the IRS actively pursued war tax resisters throughout the 1950s and 1960s,¹⁷⁵ war tax resistance did not gain nationwide publicity until 1964, when Joan Baez refused to pay her 1963 income tax.¹⁷⁶ Capitalizing on this new notoriety, The Peacemakers created a “No Tax for War in Vietnam” committee, which in turn created a pledge stating “I am not going to pay taxes on 1964 income.”¹⁷⁷ The pledge eventually received 500 signatures.¹⁷⁸ In 1967, *The Washington Post* ran an ad signed by a number of notables (Joan Baez, Dorothy Day, Noam Chomsky, Nobel Prize winner Albert Szent-Gyorgyi, and publisher Lyle Stuart, among others) who refused to pay income tax.¹⁷⁹

When Congress later introduced a 10 percent telephone tax to fund the military, a mass movement formed around resisting the telephone tax, creat-

169. *Id.*

170. *Id.*

171. *History of War Tax Resistance 1900–1959*, *supra* note 145.

172. *Id.*

173. *IRS Seizure and Court Actions Against War Tax Resisters*, WAR RESISTERS LEAGUE, www.warresisters.org/convicted_wtr.htm (last visited Sept. 24, 2014).

174. *Otsuka*, 64 Cal. 2d at 612 n.16.

175. For example, in 1951, Walter Gormley was the first person to have the IRS seize and auction his car to pay off taxes unpaid due to war tax resistance; in 1957, Jean and Raymond Olds had their truck and house seized and auctioned; and a number of others engaged in “complete noncompliance” with the IRS and the courts, earning themselves contempt of court sentences of up to a year. *History of War Tax Resistance: The 1900s*, NAT’L WAR TAX RESISTANCE COORDINATING COMMITTEE, <http://www.nwtrcc.org/history/history1900.php> (last visited Sept. 24, 2014).

176. WAR RESISTERS LEAGUE, *supra* note 133.

177. *Id.*

178. *Id.*

179. *Id.* An interesting side note is that A.J. Muste, whose letter is quoted above, formed and led this committee. See *Muste v. Tax Comm’r*, 35 T.C. 913 (1961).

ing the “War Resisters League.”¹⁸⁰ A corollary to the War Resisters League, the Writers and Editors War Tax protest coalesced in 1967.¹⁸¹ The 528 members (who included Gloria Steinem) agreed to refuse to pay the 10 percent tax.¹⁸² By the early 1970s, the War Resisters League estimates there were approximately 20,000 income tax resisters in the United States and 20,000 who refused to pay the telephone excise tax.¹⁸³

Interestingly, much of the war tax resistance at this time is not attributed to the historic peace churches, but was secular in nature.¹⁸⁴ This increase was likely due to widespread disapproval of the Vietnam War.¹⁸⁵ And at the end of the Vietnam War, the number of war tax resisters dropped.¹⁸⁶ But in 1981, Roman Catholic Archbishop Raymond Hunthausen of Seattle urged citizens to refuse to pay 50 percent of their income taxes to protest spending on nuclear weapons.¹⁸⁷ Hunthausen’s urging led to a renewed interest in religious war tax resistance.¹⁸⁸

As indicated by the participation of Archbishop Hunthausen, “[w]ar tax resistance no longer derives its support mainly from the historic peace sects . . . a wide range of religious denominations actively support it.”¹⁸⁹ This mirrors the expansion of conscientious objector status beyond the historic peace churches to anyone with a sincerely held religious belief in the immorality of war.¹⁹⁰

War tax protesters began “altering” their income tax forms, deducting some portion of their income taxes as a “war tax deduction” or “war tax

180. *History of War Tax Resistance, 1960s*, NAT’L WAR TAX RESISTANCE COORDINATING COMMITTEE, <http://www.nwtrcc.org/history/history1960.php> (last visited Sept. 24, 2014).

181. *Id.*

182. WAR RESISTERS LEAGUE, *supra* note 133.

183. Kornhauser, *supra* note 22, at 954 n.57 (quoting Tabac, *supra* note 154, and acknowledging that the estimates are imprecise at best); *see also* WAR RESISTERS LEAGUE, *supra* note 133.

184. WAR RESISTERS LEAGUE, *supra* note 133.

185. Note such “secular” resisters would not qualify under a revised Religious Freedom Tax Bill.

186. WAR RESISTERS LEAGUE, *supra* note 133.

187. *Id.*

188. *Id.*

189. Kornhauser, *supra* note 22, at 955. Today, the Peace Tax Fund lists a number of organizational endorsements, some from historic peace churches, such as the Brethren in Christ of North America, the Mennonite Central Committee, and the American Friends Service Committee, but many are from other religious organizations, such as Pax Christi (Catholic), the National Council of Churches, the Buddhist Peace Fellowship, the American Muslim Foundation, the Christian Legal Society, and the Jewish Peace Fellowship. Nonreligious organizations also endorse the Peace Tax Fund, even though alternate taxation would only apply to those who satisfied the conscientious objector requirement. Such nonreligious organizations include Veterans for Peace, the Women’s International League for Peace and Freedom, the National Lawyers Guild, the Green Party, and three Gray Panthers chapters. For a complete list, see *Endorsing Organizations*, NAT’L CAMPAIGN FOR A PEACE TAX FUND (May 13, 2014), www.peacetaxfund.org/endorsements/index.htm.

190. Borrowing the definition of a conscientious objector from the military and applying it to the war tax resisters means people holding these beliefs would qualify as war tax resisters under the Religious Freedom Tax Fund Bill.

credit.”¹⁹¹ In 1982, the IRS responded by instituting a new civil penalty, aimed at war tax resisters.¹⁹² The penalty was called the “frivolous” filing fee and provided for a fine of \$500 against anyone who altered Form 1040 (e.g., by claiming a war tax deduction).¹⁹³ The legislative history states:

[T]he penalty could be imposed against any individual filing a ‘return’ showing an incorrect tax due or a reduced tax due, because of the individual’s claim of a clearly unallowable deduction, such as . . . a ‘war tax’ deduction under which the taxpayer reduces his taxable income or shows a reduced tax due by that individual’s estimate of the amount of his taxes going to the Defense Department budget, etc.¹⁹⁴

The IRS continued to bring criminal charges during this time in an effort to collect funds and to dissuade others from resisting, but such collection attempts were often ineffective. The National War Tax Resistance Coordinating Committee reports ten criminal prosecutions of war tax resisters since 1980, in addition to a number of contempt charges.¹⁹⁵ However, the War Resisters League reports only three criminal prosecutions.¹⁹⁶ The IRS charged resisters with failure to file or filing frivolous or fraudulent returns. Courts held some war tax resisters in contempt of court for failure to turn over documents to the IRS.¹⁹⁷ Many war tax resisters continued to adopt a stance of absolute noncompliance and thus refused to even turn over documents, not unlike the Hutterite men who refused to fill out the “Statement of a Soldier.”

In 1984 and 1985, after years of very few seizures by the IRS, the IRS resumed seizure of property to pay for back taxes owed by resisters.¹⁹⁸ About a half dozen automobiles and a similar number of houses were seized from war tax resisters.¹⁹⁹ The number of seizures when compared to the

191. WAR RESISTERS LEAGUE, *supra* note 133.

192. *Id.*

193. *See Kahn v. United States*, 753 F.2d 1208 (3d Cir. 1985). Kahn wrote a letter, which she attached to her return, explaining her objection to taxes used to fund war and claiming to be a conscientious objector. She lined through a valid credit line (19b, the Earned Income Credit), and wrote “46% WAR TAX REFUSED, SEE ATTACHED LETTER.” The IRS “summarily” assessed against her the \$500 frivolous filing fee, which the court upheld. *Id.*; *see also* 26 U.S.C. § 6702 (2012) (discussed earlier in this article).

194. STAFF OF THE JOINT COMM. ON TAX. 97TH CONG., 2ND SESS., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982 277-288 (Comm. Print 1982).

195. *IRS Seizure and Court Actions Against War Tax Resisters*, *supra* note 173.

196. For the most part, the National War Tax Resistance Coordinating Committee and the War Resister’s League agree in their recitation of the history of war tax resistance and this minor discrepancy is likely due to the difficulty of tracking and reporting criminal sentences, which would largely depend on the war resisters reporting of the outcome of a particular case to the larger group, and the difficulty lay people may face distinguishing between a criminal sentence and a contempt of court sentence. WAR RESISTERS LEAGUE, *supra* note 133.

197. *Id.*

198. *Id.*

199. *Id.*

total number of tax resisters remains small.²⁰⁰ This is likely because the amount the IRS is able to get for the seized property when compared to the effort required to seize the property amounts to a net loss for the government.

The process of discovering war tax resisters, auditing their returns, calculating the taxes owed, and enforcing the judgments against them is a labor-intensive one for the IRS, made more so by the absolute refusal of many resisters to comply.²⁰¹ The process of collection of taxes begins with an audit, which may be triggered by a resister claiming an inflated number of dependents on a W-4 form (one resister claimed 3 billion dependents—the population of the earth—in 1972).²⁰² Alternately, some resisters properly compute their tax liability, then deduct some portion of their tax liability (generally the amount spent by the federal government on “war efforts”) and pay the reduced amount.²⁰³ Often, a letter explaining the deduction is included.²⁰⁴ This too can trigger an audit.²⁰⁵ Some tax resisters simply choose not to file a tax return; when the IRS locates non-filers, the IRS will attempt to compel a filing, and if taxpayers are not responsive, prepare the tax return for the non-filer.²⁰⁶ The debt, at this point, includes civil penalty fees for unpaid taxes as well as compound interest for the years of unpaid tax to present.²⁰⁷ Additionally, fraud allegations are possible for those who inflate their dependents.²⁰⁸ Those who take a “frivolous” deduction can be subjected to a frivolous filing penalty of up to \$5,000.²⁰⁹ After calculating the total amount owed by the taxpayer, the IRS will send the resisters notices of taxes owed; after a final demand notice, the IRS will begin the seizure process, which involves looking for property (usually starting with bank accounts and progressing to tangible property) to seize and, in the case of tangible property, auctioning that property with the proceeds being used to offset the taxpayer’s debt.²¹⁰

200. *Id.*

201. Some resisters have engaged in a level of civil disobedience requiring they be carried into tax court. *Id.*

202. *History of War Tax Resistance: The 1970s*, NAT’L WAR TAX RESISTANCE COORDINATING COMMITTEE, <http://www.nwtrcc.org/history/history1970.php> (last visited Sept. 24, 2014).

203. *How to Resist*, NAT’L WAR TAX RESISTANCE COORDINATING COMMITTEE, http://www.nwtrcc.org/how_to_resist.php (last visited Sept. 24, 2014).

204. *Id.*

205. *Consequences of War Tax Resistance*, NAT’L WAR TAX RESISTANCE COORDINATING COMMITTEE, <http://www.nwtrcc.org/consequences.php> (last visited Sept. 24, 2014).

206. See 26 U.S.C. § 7203 (2012) (making non-filing a crime); 26 U.S.C. § 6020(b) (2012) (allowing the IRS to prepare the return for any taxpayers who fail to file their tax returns).

207. See *Topic 653—IRS Notices and Bills, Penalties and Interest Charges*, INTERNAL REVENUE SERVICE (Dec. 12, 2013), www.irs.gov/taxtopics/tc653.html.

208. See 26 U.S.C. § 7206 (2012) (making a fraud finding possible upon the showing a tax return contains a “false statement”).

209. 26 U.S.C. § 6702(a) (2012).

210. *The IRS Collection Process Publication 594*, IRS.GOV, at 4, available at www.irs.gov/pub/irs-pdf/p594.pdf. (Last visited September 23, 2014).

Another method of collecting money from war tax resisters is to compel the resister's employer to adjust the number of dependents claimed on the W-4 form.²¹¹ Rarely, employers refuse to adjust. When the IRS' attempts to compel war tax resister Priscilla Adams to pay taxes were unsuccessful, the IRS sued her employer, the Philadelphia Yearly Meeting. For a period, the Philadelphia Yearly Meeting refused to comply with the government's directive to garnish Adams's wages.²¹² (The Meeting also refused to withhold on Adams's behalf from 1986–1996.) While Philadelphia Yearly Meeting eventually complied, the landscape for compelling cooperation from religious organizations (as opposed to individual people) is changing. Like Little Sisters, Philadelphia Yearly Meeting is a small religiously motivated organization whose primary purpose is to serve the community. The forthcoming decision in *Little Sisters* may set a precedent useful to war tax resisters, especially if the Religious Freedom Peace Tax Bill were to pass.

And in another, similar case, a small intentional community of pacifists called The Restored Israel of YAHWEH operated a construction business which employed both members of the community and non-members.²¹³ The company, run by members of the community, refused to withhold for members of the community who objected, for religious reasons, to paying tax.²¹⁴ Eventually, both the owner of the business and the bookkeeper served time for their refusal, notwithstanding their arguments that their refusal to withhold was an expression of religious freedom.²¹⁵ This is parallel to *Hobby Lobby*, which held a closely-held for-profit publicly traded corporation could claim an exemption to a law of universal applicability based on the religious belief of the corporation's holders.²¹⁶

Collecting back taxes from war tax resisters is more difficult than collecting from the typical tax evader. The typical tax evader, when faced with jail time unless he pays his back-due taxes, is likely to pay, if he has the money. Not so the war tax resister, who would rather go to jail than become complicit with sin. The commitment of these men and women to noncompliance with taxation is staggering. For example, consider Randy Kehler, who, with his wife, regularly reported his income tax liability in full, but refused to pay the amount owed.²¹⁷ This continued for 12 years,²¹⁸ but in

211. See, e.g., *Employee's Withholding Allowance Certificate*, IRS.GOV, <http://www.irs.gov/taxtopics/tc753.html> (last updated July 16, 2014) (discussing "lock-in letters," directing employers to withhold more taxes than the employee is claiming).

212. The Associated Press, *I.R.S. Sues Quaker Group*, N.Y. Times, July 27, 2003, <http://www.nytimes.com/2003/07/27/national/27QUAK.html>.

213. *Three Face Jail for Refusing to Pay for War*, NAT'L WAR TAX RESISTANCE COORDINATING COMMITTEE (Feb. 2005), <http://www.nwtrcc.org/mtap05/mtap0205.html>.

214. *Id.*

215. *Id.*

216. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

217. Kornhauser, *supra* note 22, at 943–44.

218. See *Randy Kehler Papers, 1978–1997*, UMASS AMHERST LIBRARIES ARCHIVES (Sept. 2005), available at <http://www.library.umass.edu/spcoll/umarmot/kehler-randy/>.

1989, the IRS moved to seize the home Randy Kehler shared with his wife.²¹⁹ After seizure, the IRS attempted to auction the home, but, unable to secure a buyer for it at auction, the IRS bought the home.²²⁰ A year later, federal agents arrested Kehler and his wife for trespassing on federal land when they were found in the home.²²¹ After their release, federal agents again found the couple in the home.²²² Kehler served six months for contempt of court for his refusal to leave the house.²²³ The IRS finally found a buyer for the house in 1992, but a group of Kehler's friends occupied the home for two months until the group could be removed and the buyers of the home moved in.²²⁴ For eighteen months thereafter, a coalition of anti-war groups held vigil outside the house.²²⁵ After the new owners vacated the home, Kehler and his wife did not return to it, choosing instead to continue living with her sister, saying the dispute was never about the house, but instead, was about Kehler (and his wife)'s refusal to be complicit with paying for war.²²⁶ This sort of tenacity is not atypical of those motivated by conscience and is part of what makes collecting from war tax resisters so time and resource intensive.

IV. WAR, TAX, RELIGION, AND THE COURTS

Whether conscientious objectors would be entitled to a conscientious objector status absent the Selective Service Act—in other words, whether there is a First Amendment right under the Freedom of Religious Expression Clause to avoid the draft—has not yet been decided. *Seeger*, *Gillette*, and *Welch* dealt with the interaction between the Selective Service Act and the First Amendment (whether Congress' definition of conscientious objector satisfied the First Amendment), rather than between a claim of conscientious objection and the First Amendment directly. Thus, we know the limits set by the Selective Service Act are now sufficient in that the limits do not unfairly favor one belief system, but it is not clear that the Selective Service Act itself is constitutionally required.

Because there is not yet a Selective Service corollary to the tax code, the case law on war tax resistance addresses the question of whether the First Amendment itself requires some alternative form of taxation for those who object to tax for religious reasons—and courts have consistently held it does not.²²⁷

219. Kornhauser, *supra* note 22, at 941.

220. *Randy Kehler Papers*, *supra* note 218.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. See *Randy Kehler Papers, 1978–1997*, UMASS AMHERST LIBRARIES ARCHIVES (Sept. 2005), available at <http://www.library.umass.edu/spcoll/umarmot/kehler-randy/>.

227. Kornhauser, *supra* note 22, at 962.

In a very few select cases, the Court has held a particular tax statute is unconstitutional under the First Amendment. For example, in *Murdock v. Pennsylvania*, the Court held an ordinance, which required door-to-door salespeople to purchase a license, violated the First Amendment. Murdock, a Jehovah's Witness, engaged in what the court called "an age-old form of missionary evangelism"²²⁸: that of distributing pamphlets door-to-door. He asked for a contribution in return, which the borough claimed made the exchange a sale.²²⁹ The court held the fact the borough imposed the license fee on any distribution of literature, whether religious or not, did not ensure the fee's constitutionality.²³⁰ However, even here, Justice Douglas concedes, "We do not mean to say that religious groups and the press are free from all financial burdens of government. . . . It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. If the exercise [of religion] can be taxed then the government is capable of making [the exercise] prohibitively expensive."²³¹

The Free Exercise of religion, for war tax resisters, involves the requirement that resisters abstain from any and all acts in support of war, up to and including the payment of tax. War resisters argue, in turn, that the IRS' attempts to ensure compliance with the Code make the Free Exercise of their faith "prohibitively expensive."

The United States Supreme Court has held the power to tax is a compelling government interest, necessary to the country's survival.²³² For example, the Court has said:

The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.²³³

In *Lee*, the appellee, Lee, argued being required to pay Social Security taxes violated his religious beliefs. Lee was a member of an Old-Order

228. *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943).

229. *Id.* at 107.

230. *Id.* at 115.

231. *Id.* at 112. While Douglas seems to be conceding that subjecting "preachers" to the income tax is permissible under the Constitution, which might arguably defeat the claims of conscientious objectors that the income tax violates their Free Exercise, Douglas is not considering the case of conscientious objectors here. For a conscientious objector, the exercise of their religion is an absolute commitment to nonviolence, including refusing to pay tax if that tax is used to commit "sin." Conscientious objectors have proved they are willing to adhere to this believe even if doing so is costly, including losing their homes, cars, and bank accounts, even going to prison if necessary. However, there are those who are likely being prohibited from the free exercise of their religious beliefs because of the costly nature of compliance—it has, as Douglas notes, become prohibitively expensive to exercise their noncompliance with the "sin" of war.

232. *Nicol v. Ames*, 173 U.S. 509, 515 (1899).

233. *Id.*

Amish faith-based community. One tenet of his faith required him to provide to members of his faith community the sort of assistance Social Security provides and to avoid accepting such assistance from the government.²³⁴ Thus, he sometimes refrained from withholding Social Security taxes when employing members of his community. He argued being required to pay that tax would violate his religious freedom.²³⁵

The Court held there was a conflict between his faith and the requirements of the Social Security system, but imposition of the tax was nevertheless constitutional because of the “overriding governmental interest” in a uniform system of taxation.²³⁶ The Court explained making exceptions to the Code for individual religions would be onerous; the Court used war tax resisters in this example, saying the tax system would not be sustainable if the Court found the claims of war tax resisters valid.²³⁷ But Justice Stevens, in his concurring opinion, stated “In the typical case the taxpayer is not in any position to supply the government with an equivalent substitute for the objectionable use of his money.”²³⁸

Later, in *Hernandez*, the Court held the failure to permit a deduction for payments made by members of the Church of Scientology to branches of the church for “auditing” was not a violation of the Free Exercise Clause.²³⁹ The Court emphasized the mere fact that a particular tax burdened religious freedom did not make that tax unconstitutional, when considered against the public’s need for a sound and workable tax system. The Court was concerned that allowing this particular deduction would lead to ever-increasing requests for accommodations.²⁴⁰ The Court stated, “our decision in *Lee* establishes that even a substantial burden would be justified by the ‘broad public interest in maintaining a sound tax system,’ free of ‘myriad exceptions flowing from a wide variety of religious beliefs.’”²⁴¹

The Court’s concern for uniformity and workability focused on the creation of exceptions by the courts, not by Congress. Congress went on to create exceptions for the Amish.²⁴²

Adams v. Commissioner, decided after the Religious Freedom Restoration Act, held RFRA did not require the federal government (the IRS) to accommodate Adams’s war tax resistance. Adams conceded the govern-

234. *United States v. Lee*, 455 U.S. 252, 255 (1982).

235. *Id.* at 254–55.

236. *Id.* at 257.

237. *Id.* at 260.

238. *Id.* at 262 n.1 (Stevens, J., concurring). Stevens’s comment suggests that were there some alternate system of taxation for those religiously opposed to tax, then they might demonstrate compliance by paying into the alternate system, which is exactly what the Religious Freedom Tax Fund proposes to do.

239. *Hernandez v. Comm’r*, 490 U.S. 680, 698–700 (1989).

240. *Id.* at 699–700.

241. *Id.*

242. 26 U.S.C. § 1402(g) (2012).

ment's interest in taxation is compelling, but argued RFRA required a less restrictive means of furthering that interest and that taxation was a substantial burden on her religious freedom.²⁴³ The court was not swayed, holding, "The least restrictive means of furthering a compelling interest in the collection of taxes . . . is, in fact, to implement that system in a uniform, mandatory way, with Congress determining . . . if exemptions are to [be] built into the legislative scheme."²⁴⁴ The court further objected to the idea the court should be "involved in determining whether a claimant's beliefs are 'sincerely held,'" expressing the court's "resistance to court-created exemptions to the income tax system."²⁴⁵ These last two statements suggest if the court would have had a legislatively-created exemption (such as the Religious Freedom Tax Fund) upon which to base its reasoning, and some other entity was tasked with determining whether the taxpayer was actually a war tax resister (such as the Religious Freedom Tax Fund would provide), the court might have held for Adams.

If Congress enacted the Religious Freedom Tax Act, taxpayers would be in a position to supply the government with an "equivalent substitute" mentioned in *Lee* and alluded to in *Adams*, and for which there is precedent in the Selective Service Act. Moreover, the burden on the tax system would not be onerous, since no new exemptions, deductions, or credits would be created; the existing Code would remain as is but the fund to which the taxpayer's money would be directed would change, thus alleviating the *Hernandez* Court's concerns about workability.

While taxation is a compelling national interest, certainly military defense is also a compelling national interest—indeed, it may be a *more* compelling national interest. And Congress created an exception for conscientious objectors from military service.²⁴⁶ There is no such exception for war tax resisters. Were Congress to create an exception for war tax resisters, requiring payment to an alternate nonmilitary source fund, that exception would eliminate war tax resisters' claims that taxation violates their right to religious freedom. Creation of such an alternative would simply create a "permissive accommodation," a power Congress has utilized on

243. *Adams v. Comm'r*, 170 F.3d 173, 175–76 (3d Cir. 1999).

244. *Id.* at 179.

245. *Id.*

246. See Steve Elliot, *Selective Service Expands Alternatives for Conscientious Objectors*, ARMY.MIL (Apr. 20, 2010), <http://www.army.mil/article/37811/selective-service-expands-alternatives-for-conscientious-objectors>. (As of 2010, the Selective Service expanded alternative service options for conscientious objectors for the first time in 25 years, demonstrating a continued commitment on the part of the agency to continuing to provide forms of alternative service for conscientious objectors. Said Lawrence Romo, Executive Director of the Selective Service, "Few people are aware of that second mission [of providing alternative service for conscientious objectors], but we take it as seriously and devote time and resources to ensuring a just and productive alternative for men sincerely opposed to war.").

several occasions throughout the Code—for example, in exempting self-employed individuals from mandatory participation in Social Security.²⁴⁷

Most recently, Congress has utilized this power when it created religious exceptions to the Affordable Care Act, which shows the current Congress' willingness to consider and adopt such accommodations to laws of universal applicability.²⁴⁸

Following the *Hobby Lobby* decision, war tax resisters contemplate the extension of *Hobby Lobby* to include war tax resistance. Resisters argue the Supreme Court found the ACA constitutional on the basis the ACA is a tax. *Hobby Lobby* permits tax-payers to claim a religious exemption to the ACA tax. Resisters argue that sets a precedent for their religious objection to the income tax.²⁴⁹

While it remains to be seen whether a resister will bring this claim, and how the court might rule on it, the weakness of the argument is that the ACA is a specific type of “tax,” while the income tax is much broader. The *Hobby Lobby* objection is to providing funding for particular items under the ACA tax while war resisters object to funding war under the broader income tax. *Hobby Lobby* merely sought to determine the boundaries of the already-present religious exemption mechanism in the ACA. While it is possible to analogize to war tax resisters, the argument would be much stronger if the Peace Tax Fund were passed, in that war tax resisters would then be objecting to a universal tax, which would then have a religious exemption.

And the majority opinion in *Hobby Lobby* addresses this, relying on its previous ruling in *Lee*.²⁵⁰ The problem in *Lee* was the lack of an alternate mechanism for taxation in that it was the collection, segregation, and careful redistribution of funds that was the undue burden; the Peace Tax Fund works to create an alternate mechanism. And, that is exactly what the ACA does—creates a mechanism for collection of money from objector organizations, segregates it, and carefully redistributes the funds in accordance with the objectors' beliefs.²⁵¹ Similarly, the Peace Tax Fund would collect money from objectors and segregate it.

247. Garrity, *supra* note 10, at 1251. *See also* DoDI, *supra* note 116.

248. *See* 45 C.F.R. 147.131 (exempting religious employers from the requirement to cover certain forms of birth control).

249. *See, e.g.*, Sarah Ruden, *Scalia's Major Screw-Up: How SCOTUS Just Gave Liberals a Huge Gift*, SALON (July 14, 2014, 3:45 PM), http://www.salon.com/2014/07/14/scalias_major_screw_up_how_scotus_just_gave_liberals_a_huge_gift.

250. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2784 (2014) (quoting *Lee*, 455 U.S. at 260).

251. *Id.*

V. THE HISTORY OF THE PEACE TAX FUND

Congresswoman Edith Green of Oregon first introduced the idea of a Peace Tax Fund in 1958.²⁵² Taxpayers would have received up to a 2 percent deduction in their tax liability if they donated to the fund, which Congress intended to be used to support developing nations.²⁵³ Next, Quakers, through their “Peace Committee of the Pacific Yearly Meeting”²⁵⁴ drafted a bill entitled “The Civilian Income Tax Act of 1961” which would have allowed war tax resisters to pay their income taxes to UNICEF;²⁵⁵ unsurprisingly, this bill did not pass. In 1972, Congressman Ronald Dellums (CA) introduced the World Peace Tax Fund Act. Professor Joseph Sax (then on the faculty of Michigan Law School) drafted the act at the request of the Ann Arbor Friends Meeting. This act would have created a conscientious objector status for taxpayers.²⁵⁶ Some iteration of the bill has been introduced at each subsequent congressional session.²⁵⁷

In 1977, Senator Mark Hatfield, a Republican from Oregon, first introduced the bill²⁵⁸ in the Senate and remained one of its staunchest supporters, introducing it again and again. In 1984, Hatfield stated paying his taxes was a violation of his own conscience, as he felt it was morally wrong to use tax dollars to support the arms race.²⁵⁹

The purpose of the bill was, and is, to increase revenue while respecting the religious freedom of conscientious objectors by balancing the compelling need for taxation against the constitutional right to freedom of religion. Congressmen Mathias and Hatfield introduced a previous iteration of the bill, and Mathias best expressed the purpose of the bill in saying:

There is no way for conscientious objectors to accommodate both conscience and country. These are Americans who want to sup-

252. H.R. 12310, 104 Cong. Rec. 7927 (1958). The Peace Tax Fund has been known by many names, including the Religious Freedom Peace Tax Fund Act and the Peace Tax Fund bill. For the sake of consistency, I will use the term “Religious Freedom Tax Fund” to emphasize the purpose behind this bill. *See generally*, *History of the Campaign for a Peace Tax Fund*, National Campaign for a Peace Tax Fund, <http://www.peacetaxfund.org/aboutus/history.htm> (last updated July 25, 2013) (The National Campaign for the Peace Tax Fund phrases the purpose of the bill as legislation that “would provide a way for persons to participate in the tax system without violating their conscientiously held beliefs.”).

253. Kornhauser, *supra* note 22, at 986.

254. *See generally* *About*, PACIFYEARLYMEETING.ORG, <http://www.pacifyearlymeeting.org/about/> (last visited Sept. 8, 2014) (Pacific Yearly Meeting is an organization of Quakers in the Pacific region meeting annually just as the Philadelphia Yearly Meeting described earlier).

255. *See* David R. Bassett, *The Search for Legislative Accommodation*, in FRIENDS COMMITTEE ON WAR TAX CONCERNS, HANDBOOK ON MILITARY TAXES AND CONSCIENCE 105, 109 (Linda B. Coffin ed., 1988).

256. *See id.* at 111.

257. WAR RESISTERS LEAGUE, *supra* note 133.

258. The bill has changed names a number of times. Initially called the “World Peace Tax Fund Act,” it was later called the “Peace Tax Fund Bill” as well as the “Religious Freedom Peace Tax Fund.” For ease of reference, I will call the bill in all its iterations “the bill.”

259. Kornhauser, *supra* note 22, at 986 n.208.

port their country but cannot in good conscience pay that portion of their taxes that is devoted to military spending. The result is reduced revenues for the Federal Treasury and more headaches for the IRS enforcement teams.²⁶⁰

Despite the bill's frequent introductions, Congress has held hearings on the Religious Freedom Peace Tax Fund bill only three times.²⁶¹ Most recently, nearly twenty years ago, the House Ways and Means committee held hearings in 1995.²⁶² The Senate has never held hearings on the bill.

The bill would solve the problem of collection from people who believe any sort of compliance is an act of sin and would thus result in an increase in tax revenue. In 1999, the Joint Committee on Taxation certified the validity of its analysis—performed in 1992 and 1994—which concluded the bill's passage would have resulted in a slight *increase* in revenue for the nation.²⁶³ Nevertheless, the *Chicago Tribune* reported both the IRS and then-president Bush opposed the passage of the bill.²⁶⁴ The Joint Committee has continued to certify that the Bill would increase tax revenue at each introduction of the bill.²⁶⁵

This certification is consistent with the purpose of the bill as described by George E. Brown in 1992. Mr. Brown said the Act would “reduc[e] the present administrative and judicial burden caused when conscientious objectors feel forced to violate laws rather than violate their consciences [T]he Internal Revenue Service will be able to collect full taxes from conscientious objectors without difficulty and added cost and strain on the judicial system.”²⁶⁶

Congressman Lewis introduced the current iteration of the Religious Freedom Peace Tax bill, HR 2483, in the 2013 congressional session.²⁶⁷ The bill provided for alternate taxation for “conscientious objectors” (war tax resisters) for income tax and estate and gift taxes.²⁶⁸ The bill analogizes taxation to the draft and points out that alternate service is available for drafted conscientious objectors but not for taxed conscientious objectors.²⁶⁹

260. 131 CONG. REC. S10296-02 (daily ed. July 29, 1985) (statement of Sen. Charles Mathias).

261. See Kornhauser, *supra* note 22, at 989.

262. *Id.*

263. See Religious Freedom Peace Tax Fund Act, H.R.1454, 106th Cong. (introduced in House on Ap. 15, 1999).

264. Dustun McNichol, *Pacifists Urge Congress To Establish A Peace Tax*, CHICAGO TRIBUNE, http://articles.chicagotribune.com/1992-05-29/news/9202170837_1_conscientious-objectors-peace-fund-taxes-in-past-years.

265. See, e.g., 145 CONG. REC. E679 (daily ed. Apr. 15, 1999) (statement of Hon. John Lewis); H.R. 2483, 113th Cong. (1st Sess. 2013); H.R. 1191, 112th Cong. (1st Sess. 2011); H.R. 2085, 111th Cong. (1st Sess. 2009).

266. 138 CONG. REC. 12, 349 (1992) (statement of Rep. George E. Brown Jr.).

267. See H.R. 2483, 113th Cong. (1st Sess. 2013).

268. See *id.*

269. See *id.* § 2.

The bill declares this is contrary to the tradition of religious freedom as expressed in the First Amendment and as reaffirmed in the Religious Freedom Restoration Act.²⁷⁰

Just as the Selective Service Act created an exemption to a rule of universal applicability and provided for alternate service for conscientious objectors, the bill creates an exemption to a rule of universal applicability by allowing war tax resisters to pay tax to an alternate fund—a sort of alternate service. The bill provides for a fund, called the Peace Tax Fund, which Congress may allocate to any non-military purpose.²⁷¹ The current bill defines military purpose to include: the Department of Defense, intelligence agencies, activities of the Department of Energy which have a military purpose, activities of the National Aeronautics and Science Agency, aid to foreign militaries, and the provision of weapons and training as well as the funding of the development of military installations.²⁷²

VI. IMPROVEMENTS TO THE BILL

A. *Change the Name of the Bill to Reflect Its Purpose*

First, the bill is currently called the Peace Tax Fund which does not adequately reflect the purpose of the bill—religious freedom. Thus, the bill should be called the Religious Freedom Tax Fund.²⁷³ This name would more adequately encompass the purpose behind the bill, which is to support religious freedom for pacifists while increasing revenue. While peace might be a pleasant side effect of the bill, the purpose of the bill is to allow conscientious objectors an alternate way to pay their income tax, out of respect for their right to religious freedom under the First Amendment. A name which more clearly reflects that goal might be more likely to pass.

B. *Include an Explicit Renunciation of an Infringement on Congress' Right to Tax and Spend*

The bill should explicitly state that the purpose of the bill is not to infringe on the right of Congress to exert its taxing and spending power. The current language of the fund handily, but only implicitly, avoids the charge that allowing taxpayers to opt in to a religious freedom tax fund would result in citizens legislating through their tax returns.²⁷⁴ The bill

270. *See id.*

271. Previous iterations of the bill required the funds to be used to support Head Start and WIC, but this provision has been dropped. This is likely a good idea, since that requirement calls into question the constitutionality of the bill as it starts to look like citizens legislating through the income tax and may infringe on Congress' power to tax and spend.

272. *Id.* § 3(b).

273. This was a previous name of a former iteration of the bill.

274. Even if it were true that citizens were “legislating” by selecting where some portion of their tax dollars would go, such a system is already in place for presidential elections. Taxpayers may indicate via their tax return that they want three dollars of their tax liability to go to the

states Congress could use the fund for any other purpose, except for the military purposes described above.²⁷⁵ Here, the taxpayer is not carefully weighing her options and selecting among agencies and programs like a choosy shopper at the grocery. Neither is the taxpayer selecting which programs to fund or defund willy-nilly like a blindfolded child with a piñata; in short, she is not legislating through her tax return. Instead, the taxpayer is simply telling Congress her tax funds should be used for any purpose at all, except those few described by the bill as “military.” Thus, Congress retains the power of the purse the Constitution has given it; however, the people retain their right to freedom of religion through the narrow exception created by the Religious Freedom Tax Fund. Stating this more clearly might better facilitate the passage of the bill.

C. *Continue to Make Provision for a Means of Alternate Taxation*

The bill must retain its provision for continued taxation while directing the funds to a non-military fund. Providing a form of “alternate service” (through taxation) would allow war tax resisters to both pay their taxes and adhere to their religious beliefs. As Senator Hatfield expressed in 1985, the Act would “not serve to lessen tax burdens . . . but instead allow people who are barred by their conscience [sic] to pay federal taxes to once again join the ranks of law-abiding citizens.”²⁷⁶ The Religious Freedom Tax Fund would provide the narrowly tailored solution required under the Constitution and the Religious Freedom Restoration Act, drawing a fine line between the government’s compelling need to tax and the taxpayer’s fundamental right to religious freedom. Thus, the bill might be more likely to pass if it clearly stated it would neither eliminate nor lower the tax of those who seek conscientious objector status.

If the compelling need for national defense can give way to a narrowly tailored exception for conscientious objectors, then the compelling need to tax could be treated similarly.²⁷⁷

D. *Provide a Reliable Method for Determining Conscientious Objector Status*

The bill must be re-drafted to assuage fears that those who are not validly conscientious objectors might attempt to misuse the Fund. The

presidential election campaign. While this is a smaller amount than would be at play if the Peace Tax Fund were to pass, it suggests a greater degree of legislation than the Peace Tax Fund would permit, in that citizens are dictating what must be done with their money. *See generally* Garrity, *supra* note 10, at 1258–59.

275. H.R. 2483 § 4(b), 113th Cong. (1st Sess. 2013).

276. 131 CONG. REC. 19,601 (1985) (statements of Sen. Mark Hatfield).

277. In the 1992 hearings on the bill, Rep. Andy Jacobs, Jr. sponsored the bill, despite having served as a Marine in Korea. *Miscellaneous Tax Bills and the Peace Tax Fund: Hearing Before the Subcomm. On Select Revenue Measures of the House Comm. on Ways and Means*, 102d Cong. 132 (1992).

Peace Tax Fund as currently drafted merely reiterates the requirement that conscientious objectors must be opposed to war in any form, based upon the taxpayers sincerely held religious, moral, or ethical belief as required by the Military Selective Service Act (U.S.C. App. 456(j)).²⁷⁸ It is then up to the Secretary of the Treasury to designate a method for determining the veracity of the taxpayer's conscientious objection claim.²⁷⁹ Previous versions stated explicitly those who had previously obtained conscientious objector status would qualify as conscientious objectors under the Religious Freedom Tax Fund.²⁸⁰ This definition of a conscientious objector should be retained and expanded to allow those pacifists who have not been drafted²⁸¹ but whose belief system would allow them to qualify as conscientious objectors to qualify as objectors to the income tax. The Religious Freedom Peace Tax Fund bill might stand a better chance of passing if the bill made clear the conscientious objector designation is not a low hurdle but would require commitment and effort on the part of the taxpayer to obtain.²⁸² This could be demonstrated by simply borrowing further from the Military Selective Service Act and requiring taxpayers wishing to register as conscientious objectors to undergo the same examination used by the military. The conscientious objector must provide proof of the sincerity of his or her beliefs, through answering a series of questions designed to determine the nature and sincerity of the applicant's beliefs.²⁸³

Note that the determination of conscientious objector status hinges on the applicant showing she is opposed to war in all forms. Thus, merely objecting to a certain unpopular war would not be sufficient to obtain conscientious objector status. Similarly, objecting to a type of war (for example, nuclear war) would be insufficient.²⁸⁴ Note too that the bill should

278. H.R. 2483 § 3(a), 113th Cong. (1st Sess. 2013).

279. *See generally id.*

280. *See, e.g.*, 142 CONG. REC. S3216-04 (daily ed. Mar. 29, 1996).

281. For example, no female conscientious objectors have ever been drafted and thus would need some way, other than previously determined status as a conscientious objector, to establish their war tax resistance claim.

282. "Some critics fear that allowing conscientious objectors to assert their status through the provision of a mere personal statement of beliefs [as was required in the 2003 version of the bill] would provide non-conscientious objectors with an incentive to exploit this accommodation." Garrity, *supra* note 10, at 1255. Garrity goes on to suggest one potential response to such criticism is to require the applicant to pay a fee and to bear the burden of proving he or she is a conscientious objector should the IRS determine to the contrary. *Id.* at 1255-56. However, adopting the current conscientious objector test would more adequately silence those criticisms since this test is already in satisfactory use.

283. However, the investment of time required to prove the sincerity of one's beliefs would likely deter false claims. *See* Kornhauser, *supra* note 22, at 1000 ("Methods could entail enough time and effort to discourage taxpayers from claiming conscientious objector status unless they truly want it.").

284. According to Garrity, one commentator, Karl Manheim, raised concerns that, for example, "a group of Muslims" claiming a religious objection might decide "they didn't want their tax dollars going to support foreign aid or military aid to Israel." *Marketplace: Peace Tax*, NATIONAL PUBLIC RADIO (Sept. 20, 2002) (comments of Karl Manheim). However, as Garrity points out, this

require the objector to acknowledge the legitimacy of the income tax, meaning a person objecting generally to the income tax would not qualify. (This is probably a moot point, since the money would still be assessed and collected but simply redirected; hence, a citizen who objects to taxation in general would be unlikely to seek to pay an alternate tax of equal amount.) This limitation, as well as the burden of the application, addresses some commentators' concerns that passage of the Religious Freedom Tax Fund would "open the floodgates" to claims of conscientious objector status.²⁸⁵

Just as conscientious objectors might augment this record with letters from clergy members or family and friends, war tax resisters should also be permitted to augment their record. And just as the objector is then interviewed by a military agent; under the Religious Freedom Tax Fund, the war tax resister could be interviewed by an IRS field agent.²⁸⁶

Alternatively, instead of requiring each war tax resister to undergo an interview, the resister could fill out the written questionnaire, supply the IRS with any other additional materials, and pay a small fee to receive war resister status. Once certified, the IRS could do what it does best—selectively audit resisters to ensure they are, in fact, properly certified.

Questions interviewers currently ask objectors, and which the IRS could co-opt, typically include the following: How and when did you decide against participation in the military? Why can't you arrange military service within your conscience? What prohibits you from service? Do you fear having to fight or to kill others? What books do you read?²⁸⁷

While it might seem odd to have an IRS field agent questioning a taxpayer's religious beliefs, the purpose of the questioning is limited. The field agent does not need to determine the theological validity of the belief; the agent must only determine that the taxpayer is truthfully representing his or her sincere and deeply-held religious beliefs. Agents routinely interview taxpayers to determine the truthfulness of their claims in relationship to their taxes—this new requirement would not be unduly taxing on the agent's investigative powers. In a way, this is also like what Immigration and Customs Enforcement officers do when they interview applicants who

group "would not be covered under the Religious Freedom Peace Tax Fund Act, because these individuals do not meet the bill's definition of conscientious objectors." Garrity, *supra* note 10, at n.94.

285. *Marketplace: Peace Tax*, NATIONAL PUBLIC RADIO (Sept. 20, 2002) (comments of Karl Mannheim).

286. While the military's method of identifying conscientious objectors could be used, thus saving the IRS the burden of developing such a system, it may not make sense to charge the military with determining whether an object to taxation qualifies. Shifting the burden to the military does not alleviate concerns about government burden but merely protects the IRS from the burden. To insulate the government from cost concerns, objectors could be required to pay to cover the cost of their certification so long as there were a provision that allowed objectors who lacked sufficient funds access to the certification process.

287. These questions are designed to determine how and when the pacifist came to be a pacifist.

claim to have valid marriages. Government agents regularly interview claimants to establish the validity of their claims, so expanding that to include interviewing conscientious objectors would not be burdensome.²⁸⁸

Additionally, since the investigation of a claim of conscientious objection does not unduly burden the free exercise of religion and does not involve excessive entanglement with religion,²⁸⁹ extending a claim of conscientious objection to tax via the Religious Freedom Tax bill would also pass constitutional muster.

Under the military code, after the initial questioning, the objector is then interviewed by a clergyperson. It is unwieldy to involve a clergyperson in the IRS/war tax resister interview process, so this requirement should be omitted from the Religious Freedom Tax Fund bill. After the interviews and record-collection, a recommendation is made to the claimant's commanding officer—under the Religious Freedom Tax bill, the recommendation could be made to the Secretary of the Treasury or the head of the local field office.

The administrative burden of the Religious Freedom Tax Fund bill would be slight, given the IRS is already engaged in the auditing of taxpayers and investigation of dubious claims (albeit related to tax rather than religion) and the IRS could simply adopt the military's system. The burden to the IRS would also be slight because the number of war tax resisters is relatively small.²⁹⁰ It is possible more people would come forward as war tax resisters if there were a legal way to do so, but still, it is likely that number would be small.²⁹¹ Even in the Vietnam era, the number of war tax resisters was estimated to be 40,000. Any administrative cost would likely be offset by the increase in revenue, as war tax resisters currently refusing to pay taxes would begin paying taxes. And given the passion of war tax

288. At the 1992 hearings, Treasury officials were concerned about how the IRS was to determine who was a sincere conscientious objector. *Miscellaneous Tax Bills and the Peace Tax Fund: Hearing Before the Subcomm. On Select Revenue Measures of the House Comm. on Ways and Means*, 102d Cong. 71 (1992). However, using the standard used by the military alleviates this concern because the standard has already been established and used by government officials similarly tasked with determining the sincerity of applicants for conscientious objector status.

289. See Kornhauser, *supra* note 22, at 996–97; Garrity, *supra* note 10, at 1253. As Garrity explains, the IRS's role is similar to that of the Selective Service's role in determining whether a claimed conscientious objector is sincere, and the Selective Service's actions are not excessive entanglement, so, analogously, the IRS's role would not be excessive entanglement.

290. In 1982, the IRS indicated it was aware of 5,017 war tax resisters and that the number decreased to approximately 2000 by 1984 after the introduction of the frivolous filing fee. This number, necessarily, does not include nonfilers of whom the IRS was unaware. The National War Tax Resistance Coordinating Committee estimated in 1987 there were between 10,000 and 20,000 resisters, including those who chose not to file, and in 1990, that there were as many as 10,000. However, in 1992, the IRS stated it did not have "good statistics" on the actual number of war tax resisters but that the number of war tax resisters who informed the IRS that they were resisting was "relatively small." And in 1999, the National War Tax Resistance Coordinating Committee estimated the number of war tax resisters at 10,000–20,000. Kornhauser, *supra* note 22, at 958 n.75.

291. *Id.* at 999–1000.

resisters, most would likely be willing to pay a fee to obtain certification. The cost to levy judgments against war tax resisters would be eliminated.

E. Maintain the Slight Administrative and Financial Burden

Previous iterations of the bill specifically stated the money deposited into the Peace Tax Fund should be deposited “in a manner that minimizes the cost to the Treasury and does not impose an undue burden on such [conscientious objectors] taxpayers.”²⁹² The bill could be amended to state that keeping administrative burdens slight is part of the legislature’s intent in enacting the bill. Additionally, the 2009 iteration of the bill provided that any revenue generated by the fund should be used in accordance with the purposes of the fund, demonstrating an expectation the administrative costs would be less than the revenue acquired, as the bill was expected to increase revenue.²⁹³

The creation of the Religious Freedom Tax Fund would have little practical effect on war funding. Money is the definition of fungible.²⁹⁴ One taxpayer directing her tax monies away from funding war will result in greater proportions of other taxpayers’ money being directed toward war funding. However, the fact that the practical effect of the Religious Freedom Tax Fund would likely be *de minimis* is largely irrelevant. It simply means Congress need not fear inadequate funding of the military, since that funding stream would be met by non-conscientious objector taxpayers. For conscientious objector taxpayers, who believe war is sinful, the fact that withholding their tax money from funding war will have little practical effect would likely be disappointing, but would not alter their argument: they believe the collection of *their* tax money, to be used for war, violates their pacifist beliefs and requires their complicity with sin. That the reallocation of their money would be largely symbolic is of little concern; religion is, by its very nature, symbolic.

Additionally, the Joint Committee on Taxation has repeatedly certified the net effect of the bill would be a slight increase in funding.

292. H.R. 2483, 113th Cong. § 4(a) (1st Sess. 2013).

293. H.R. 2085, 111th Cong. § 4(d) (1st Sess. 2009).

294. See, e.g., Peter J. Reilly, *Freedom Rider Asks To Give Peace A Chance - Peace Tax Fund Act Of 2013*, FORBES MAG., <http://www.forbes.com/sites/peterjreilly/2013/07/23/freedom-rider-asks-to-give-peace-a-chance-peace-tax-fund-act-of-2013/>. Reilly acknowledges the bill would have little practical effect and that he believes federal funding for the military is a wise use of federal funding but nevertheless supports the bill. Garrity gives this example, “Assume that there are only two taxpayers, A and B, each paying \$100 in taxes. Also assume that thirty percent of the budget goes to the military. Without the peace tax fund, \$60 will go to the military (presumably \$30 from each taxpayer), and \$140 will go to nonmilitary spending (\$70 from each taxpayer). If A directs that her tax dollars should go to the peace tax fund, the Treasury still receives \$200 total with \$60 going to the military and \$140 to nonmilitary expenditures. The only difference is that \$60 of B’s money goes to military, leaving only \$40 of her taxes for nonmilitary expenditures because all of A’s tax dollars go to nonmilitary spending.” Garrity, *supra* note 10, at n.100 (quoting Kornhauser, *supra* note 22, at 988).

F. Introduce the Bill Soon Because the Current Congress and Administration Evidence a Willingness to Create Such Exceptions

Despite the concern that passage of the Religious Freedom Tax Fund would create a “slippery slope,”²⁹⁵ the Code already contains religiously motivated exceptions to the income tax.²⁹⁶ The existence of those exceptions shows Congress is both able and willing to stringently limit exceptions to the income tax as necessary.

The recent passage of the Affordable Care Act includes religious exemptions. For example, religious institutions are not required to buy insurance that provides for contraceptive care if provision of contraception violates the religious beliefs of the employer-organization.²⁹⁷ Additionally, the Affordable Care Act provides an exception for the Amish.²⁹⁸ The Amish are also exempt from paying Social Security taxes, under the Code, so long as they are self-employed.²⁹⁹ The willingness of Congress and the administration to provide these religious exemptions to laws of universal applicability suggests the time is right for a new introduction of the Religious Freedom Tax Bill.

G. Remind the Congress That the Bill, Like the Selective Service Act, Provides a Permissive Accommodation

Whether passage of the bill is required under the Constitution is dubious at best—at a minimum, courts have consistently found there is no right to be free from taxation that violates one’s religious beliefs.³⁰⁰ But if Congress passes the bill as a permissive accommodation, then the bill is simply providing *more* religious freedom than is required under the Constitution.³⁰¹

295. This “slippery slope”/flood gates argument is the reason the *Lee* court refused to create a court-made exception for *Lee*. Congress, however, is both able, and seemingly willing, to create limited exceptions to the Code as evidenced by the current system of exemptions, exceptions, deductions, and credits, all designed to encourage behavior or better encapsulate legislative values or goals. Here, this alternative would further the ideal of religious freedom and allow easier collection of tax, both laudable legislative goals.

296. *See, e.g.*, 26 U.S.C. § 107 (2002) (excluding of rental value of the parsonage from gross income); 26 U.S.C. § 170 (2014) (deductions for charitable contributions); 26 U.S.C. § 501 (2010) (regarding tax-exempt organizations); 26 U.S.C. § 1402(e) (2014); 26 U.S.C. § 1402(g) (2014) (regarding exceptions from FICA taxes); 26 U.S.C. § 3127 (2014) (preventing the quandary *Lee* found himself in). Kornhauser, *supra*, note 22 at 967 – 968.

297. *See* 26 U.S.C. § 5000A(d)(2)(A) (2014).

298. *See id.*; 26 U.S.C. § 5000A(d)(2)(B)(ii) (2014).

299. *See* 26 U.S.C. § 1402(g) (2014).

300. The *Muste* court even held there was no First Amendment right to exemption from military service. *Muste v. Comm’r*, 35 T.C. 913, 918–919 (1961). Of course, Congress can always extend additional protections, which is what the Selective Service Act does and which the Religious Freedom Tax Fund would do.

301. “Such permissive accommodation of the free exercise of religion by the legislature has long been recognized and was . . . reaffirmed in *Smith*, even as the case seemed to weaken religious freedom rights. Moreover, the Court stated such legislation is not only permissible, but desir-

This is similar to the Selective Service Act. The Court has not explicitly held conscientious objection is a right under the Constitution but has said once Congress has created such a right, that right must be enforced in such a way that enforcement does not violate the First Amendment.³⁰² It is likely the court would look at the Religious Freedom Tax Fund similarly if a challenge ever arose. Indeed, Professors Mark Tushnet and Michael McConnell testified the Peace Tax Fund Bill (as drafted in 1992) would not violate the Establishment Clause;³⁰³ it is unlikely any of the suggestions mentioned here would violate the Establishment Clause as they deal primarily with how conscientious objectors should be determined—an issue the court has examined.

CONCLUSION

At present, the IRS is expending time and resources to track down war tax resisters. The resisters are putting up significant resistance, refusing to even turn over their records and requiring the IRS to seize and auction their property, garnish their wages, and compel their employers to alter war tax resisters claimed deductions to satisfy the tax debt of the resisters. Many resisters absolutely refuse to comply, risking contempt of court rather than turning over records, thus delaying and complicating collection for the IRS. This difficulty in collection results in loss of revenue for the government. Meanwhile, the resister is trying to avoid complicity with sin, a religious conviction that only increases her resistance to the taxation itself. The idea that the government might compel a citizen to violate his conscience is antithetical to the values expressed in our Constitution. Passage of an amended version of the Religious Freedom Tax Fund would eliminate this tension by increasing revenue to the United States while respecting religious freedom.

able and expected in a society that values religious freedom. Legislatures have long privileged religion in the tax area, and the Court has specifically approved many of these measures.” Kornhauser, *supra* note 22, at 968.

302. See *Gillette v. United States*, 401 U.S. 437, 462 (1971) (Stevens, J., concurring). The Court has consistently examined the constitutionality of the Selective Service Act, not whether a conscientious objector status is required under the constitution. See, e.g., *Welsh v. United States*, 398 U.S. 333, 335 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

303. *Miscellaneous Tax Bills and the Peace Tax Fund: Hearing Before the Subcomm. On Select Revenue Measures of the House Comm. on Ways and Means*, 102d Cong. 182–85, 252–54 (1992).