

SOVEREIGN CITIZENS: A REASONED RESPONSE  
TO THE MADNESS

by  
Joshua P. Weir\*

*This Comment explores the intricacies of the sovereign citizen movement, often through the lens of the recent Oregon case, United States v. Julison. The Comment begins by explaining the background and history of the movement, starting with its inception in the 1970s. The modern sovereign movement is known for its strange beliefs regarding the legitimacy of the federal government—beliefs that are often perpetuated through violence, fraud, and harassment. Next the Comment delves into the problem of fraud and its costs, with a focus on the accompanying criminal prosecutions along with recent developments in sovereign citizen cases. The Julison case provides the perfect opportunity to explore the question of mens rea in tax fraud cases, and it raises interesting questions with respect to the assertion of the good-faith defense by sovereign-citizen defendants. The Comment continues to develop these themes as it examines the problems that courts have encountered in instructing juries on “good faith” and “deliberate ignorance” in these cases. Next the Comment surveys the various methods for combatting paper terrorism, including pre-filing administrative discretion, post-filing administrative relief, post-filing expedited judicial relief, and enhanced criminal and civil penalties. Most states apply some combination of these techniques in order to achieve a more comprehensive solution to the problem. Finally, the Comment concludes with some brief comments and suggestions for moving forward in the effort to address this problem.*

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\* Washington State Assistant Attorney General; J.D., Lewis & Clark Law School, 2015; B.A., University of Wisconsin – Superior, 2011. Special thanks to Professor Aliza Kaplan for her guidance and support and to the *Lewis & Clark Law Review* staff for their meticulous work and dedication.

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The bureaucracy is a circle from which no one can escape.  
Its hierarchy is a hierarchy of knowledge.<sup>1</sup>

## I. INTRODUCTION

For reasons prosecutors would never fully understand, one October day in 2008, Miles J. Julison walked into the IRS Criminal Investigation Division and began talking with federal agents.<sup>2</sup> This was a bold move. Earlier that year, Julison had filed a completely fictitious tax return that had netted him a refund check for \$411,773.<sup>3</sup> He used the money to buy a \$60,000 Mercedes-Benz, a 23-foot ski boat, a Toyota Sequoia SUV, two wave runners, and two snowmobiles, in addition to paying off his home mortgage and credit cards.<sup>4</sup> In the course of his conversation with the IRS

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<sup>1</sup> KARL MARX, *CRITIQUE OF HEGEL'S 'PHILOSOPHY OF RIGHT'* 47 (Joseph O'Malley ed., Annette Jolin & Joseph O'Malley trans., Cambridge Univ. Press 1970) (1843).

<sup>2</sup> Bryan Denson, *Portland Jury Finds Man Guilty in Bizarre Tax Fraud Known as 'The Process'*, OREGONLIVE (Aug. 9, 2013), [http://www.oregonlive.com/portland/index.ssf/2013/08/portland\\_jury\\_finds\\_man\\_guilty.html](http://www.oregonlive.com/portland/index.ssf/2013/08/portland_jury_finds_man_guilty.html).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*; Press Release, U.S. Attorney's Office, Dist. of Or., Clackamas Man Sentenced to Four Years in Prison for Filing False Claims for \$1.9 Million in Fraudulent Income Tax Refunds (Nov. 21, 2103), <http://www.justice.gov/usao-or/pr/clackamas-man-sentenced-four-years-prison-filing-false-claims-19-million-fraudulent>.

agents, Julison made several comments that prosecutors later described as “standard tax protestor/sovereign citizen positions,” and the IRS quickly opened a criminal investigation on him.<sup>5</sup>

Three months later, Julison tried the tax return trick again, this time claiming the IRS owed him more than \$1.5 million.<sup>6</sup> Unlike before, the IRS did not issue a refund check. Instead, it let Julison know he was under criminal investigation.<sup>7</sup> In September of 2011, a grand jury indicted Julison on two counts of making false claims against the United States in violation of 18 U.S.C. § 287.<sup>8</sup>

Prior to this, Julison had lived an otherwise ordinary life. He graduated from Canby Union High School in 1990, and was married to his wife Katie, with whom he had two young sons.<sup>9</sup> He had no criminal history. Quite the opposite, Julison was a college graduate who had enjoyed some success flipping houses and subdividing properties in the Portland area.<sup>10</sup> But by 2006 his success had waned, and in 2008, Julison was living “on the edge of financial ruin.”<sup>11</sup>

Sometime during this period, Julison became a believer in the “sovereign citizens” movement, including their far-fetched beliefs about the federal income tax.<sup>12</sup> He also became acquainted with a California-based tax preparer named Teresa Marty, who was an Enrolled Agent with the IRS (the highest credential the IRS awards), and who apparently shared his beliefs.<sup>13</sup> When Julison filed his 2007 tax return with Marty’s help,<sup>14</sup> he went through with a scheme popular among sovereign citizens. He used IRS form 1099-OID to report \$583,151 in “other income” that he had never received. He claimed it had all been withheld for taxes and, after

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<sup>5</sup> Government’s Trial Brief at 4, United States v. Julison, No. 3:11-cr-00378-SI (D. Or. July 12, 2013), ECF No. 183; Denson, *supra* note 2.

<sup>6</sup> Denson, *supra* note 2.

<sup>7</sup> *Id.*

<sup>8</sup> Indictment at 1–2, United States v. Julison, No. 3:11-cr-00378-SI, 2011 WL 11047688 (D. Or. Sept. 20, 2011), ECF No. 1 [hereinafter Indictment].

<sup>9</sup> Government’s Sentencing Memorandum at 10, United States v. Julison, No. 3:11-cr-00378-SI (D. Or. Nov. 13, 2013), ECF No. 238 [hereinafter Sentencing Memo].

<sup>10</sup> *Id.*

<sup>11</sup> Denson, *supra* note 2.

<sup>12</sup> Michael Shermer, *A Tale of Tax Returns and Tax Scams*, SCI. AM. (Oct. 15, 2013), <http://www.scientificamerican.com/article/a-tale-of-tax-returns-and-tax-scams/>.

<sup>13</sup> Defense Trial Memorandum at 4, United States v. Julison, No. 3:11-cr-00378-SI (D. Or. July 11, 2013), ECF No. 173 [hereinafter Defense Memo].

<sup>14</sup> Teresa Marty and her firm, Advanced Financial Services, helped at least 250 people file false returns. Marty and her co-conspirators are currently under indictment for 34 counts of filing false claims against the United States, and an additional 22 counts including Conspiracy to Defraud the IRS, Filing False or Retaliatory Liens, and other violations. Superseding Indictment at 1–3, United States v. Marty, No. 2:13-cr-217-KJM (E.D. Cal. Aug. 15, 2013), ECF No. 43 [hereinafter Marty Indictment].

subtracting his tax due, said the IRS owed him a refund of \$411,773.<sup>15</sup>

After the IRS cut him the check in August, Julison was emboldened by success.<sup>16</sup> Not only was he brazen enough to walk right into the IRS, but he also encouraged others to follow the same 1099-OID process he had used.<sup>17</sup> With Julison's assistance, Isaac Birch obtained a fraudulent refund for just over \$480,000 and Benjamin Ficker pulled in \$80,000.<sup>18</sup>

In April of 2009, Julison went so far as to help organize a seminar at a Portland Red Lion hotel where he and others taught attendees how to use the 1099-OID process—for a fee, of course.<sup>19</sup> At the lecture, Julison showed a copy of his refund check and described how he felt.

I got some bonds. I'm gonna be rich. I'm gonna have all kinds of money. . . . I've got stars in my eyes. . . . I'm greedy. . . . You've been holding back the slave. Slave is getting his. I'm here to get mine.<sup>20</sup>

By the time Julison filed his 2008 return claiming interest income of \$2.3 million and demanding a \$1.5 million refund, the IRS was onto him and did not cut a second check.<sup>21</sup> Instead, Julison was indicted.<sup>22</sup>

Julison's strange beliefs, rooted in the ideology of the sovereign citizen movement, were evident when he appeared in U.S. District Court in Portland for a status conference regarding his criminal charges. When given the opportunity to speak, Julison launched into a tirade.

THE DEFENDANT: I am here expressively under protest, for fear of my life, without prejudice to any of my rights. I'm here under duress by special appearance only. . . . I want the record to show that I am the executor, settler, and beneficiary of the Miles J. Julison Estate. I'm not a decedent. I have not granted any consent or authorization to anyone to act or speak on behalf of the estate. I'm alive in my tribunal of mind, body, and spirit.

. . . .

. . . . I do not recognize you. I will not contract, nor will I consent to allow you to judge me. This is a kangaroo court without lawful authority, without an injured party, without a breach of contract. Void proceedings from the start without jurisdiction. This court case is now ordered to be closed, dismissed with prejudice. The complete records to be delivered to me for processing of criminal complaints and tort claims, along with impeachment proceedings against all those who violated their oath. Are there anyone here

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<sup>15</sup> Shermer, *supra* note 12; Sentencing Memo, *supra* note 9, at 4.

<sup>16</sup> Shermer, *supra* note 12.

<sup>17</sup> Sentencing Memo, *supra* note 9, at 6–7.

<sup>18</sup> *Id.* at 5.

<sup>19</sup> *Id.* at 6–7; Denson, *supra* note 2.

<sup>20</sup> Sentencing Memo, *supra* note 9, at 9–10 (quoting the transcript from one of Julison's seminars).

<sup>21</sup> *Id.* at 6–7.

<sup>22</sup> Indictment, *supra* note 8.

that will assist me in arresting—arresting the treason against the American people?

THE COURT: Are you through, Mr. Julison?

THE DEFENDANT: No. And court is adjourned.

THE COURT: All right. Mr. Julison, one of the things that—[Julison turns and begins to walk out] oh wait. It might be in your interest to hear what I have to say, sir. It—a number of people are leaving the courtroom right now, following Mr. Julison, who's left the courtroom. . . . All right. . . . We're now going to continue this hearing without Mr. Julison.<sup>23</sup>

Miles Julison is just one example of a growing number of people who adhere to the ideology of the sovereign citizens movement—or “sovereigns” as they are often called. Julison’s beliefs are typical of the movement. As the Southern Poverty Law Center (“SPLC”) explains, “Sovereigns believe that they—not judges, juries, law enforcement or elected officials—get to decide which laws to obey and which to ignore.”<sup>24</sup>

Since at least 2010, the Federal Bureau of Investigation has classified sovereign citizen extremists as a domestic terrorist movement.<sup>25</sup> Fueled by the recession and easily spread through the anonymity of the internet, this movement has continued to grow.<sup>26</sup> While much has been done to combat the criminal aspect of the movement, it remains an evolving project. The intent of this Comment is to provide some reflection on the efforts taken so far, and to help courts, lawyers, and lawmakers deal with some of the unique problems these people present.

This Comment will proceed in three main Parts. Part II will provide some background on the sovereign citizen movement, outlining some of the more common aspects of the ideology.

Part III will provide a more detailed analysis of the problem of fraud and its costs, the accompanying criminal prosecutions, and recent developments in these cases. This Part will give special focus to the question of mens rea in tax fraud cases, using the 2013 U.S. District Court case *United States v. Julison*<sup>27</sup> as an example. Julison was eventually convicted of both counts of making false claims against the United States after he engaged in the fraudulent 1099-OID process.<sup>28</sup> He was later sentenced to four

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<sup>23</sup> Transcript of Status Conference at 6, 12–13, *United States v. Julison*, No. 3:11-cr-00378-SI (D. Or. Dec. 13, 2011), ECF No. 35.

<sup>24</sup> *Extremist Files, Sovereign Citizens Movement*, S. POVERTY L. CTR., <http://www.splcenter.org/get-informed/intelligence-files/ideology/sovereign-citizens-movement>.

<sup>25</sup> FBI Counterterrorism Analysis Section, *Sovereign Citizens: A Growing Domestic Threat to Law Enforcement*, FBI L. ENFORCEMENT BULL., Sept. 2011, at 20, <https://leb.fbi.gov/2011/september/leb-september-2011>.

<sup>26</sup> Michelle Theret, *Sovereign Citizens: A Homegrown Terrorist Threat and Its Negative Impact on South Carolina*, 63 S.C. L. REV. 853, 854–55 (2012).

<sup>27</sup> *United States v. Julison*, No. 3:11-cr-00378-SI (D. Or. Aug. 9, 2013).

<sup>28</sup> Julison was convicted under 18 U.S.C. § 287. Verdict, *United States v. Julison*, No. 3:11-cr-00378-SI, 2013 WL 5774737 (D. Or. Aug. 9, 2013), ECF No. 226;

years in prison and ordered to pay restitution for the money he obtained.<sup>29</sup> Julison's case illustrates an interesting question that arises when applying the good-faith defense—acknowledged by the Supreme Court in *Cheek v. United States*<sup>30</sup>—in such cases. If sovereigns truly and sincerely believe the conspiracy theory, can they properly succeed with a defense that they did not *willfully* violate the law?

Part III will also look at how far defendants are allowed to go in presenting expert testimony on the good-faith defense, using the *Julison* case as an example. This Part will also explain how and why the *Julison* court instructed the jury on both “good faith” and “deliberate ignorance” in light of the Ninth Circuit's struggle with deliberate ignorance instructions in such cases. Finally, this Comment argues that such instructions are not inconsistent with the Supreme Court's decision in *Cheek* and can play a vital role in helping the jury understand the line defining culpability in these unique cases.

Part IV will focus on recent efforts taken in the fight against sovereigns' “paper-terrorism” tactics. It begins with a brief survey of the different state and federal statutes enacted in response to the increasingly common problem of false liens, and provides a look at the effectiveness of the different approaches. Part V concludes with some brief comments and suggestions for moving forward in the effort to address this problem.

## II. BACKGROUND AND HISTORY

Anti-government sentiment is as old as government itself.<sup>31</sup> But sovereign citizens are not just another political group. Unlike traditional conservative groups that work within the system to enact their agendas to downsize government, sovereigns completely reject the entire system of government they decry as illegitimate.<sup>32</sup> Sometimes calling themselves “Constitutionalists” or “Patriots,” they often assert that the United States needs to be “restored.”<sup>33</sup> Nor are they a cohesive group in any real sense. Rather, they are a loosely knit network of individuals who share common ideas and practices, spread mostly through the internet, books, and sem-

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Indictment, *supra* note 8, at 1–2.

<sup>29</sup> Bryan Denson, *Clackamas Man Who Perpetrated Bizarre IRS Fraud, Bought Himself a Benz, Gets Federal Prison*, OREGONLIVE (Nov. 21, 2013), [http://www.oregonlive.com/clackamascounty/index.ssf/2013/11/clackamas\\_man\\_who\\_perpetuated.html](http://www.oregonlive.com/clackamascounty/index.ssf/2013/11/clackamas_man_who_perpetuated.html).

<sup>30</sup> 498 U.S. 192 (1991).

<sup>31</sup> See generally DAVID F. BURG, A WORLD HISTORY OF TAX REBELLIONS: AN ENCYCLOPEDIA OF TAX REBELS, REVOLTS, AND RIOTS FROM ANTIQUITY TO THE PRESENT (2004) (tracing tax rebellion back to Babylonia in 2350 B.C.).

<sup>32</sup> James Erickson Evans, *The “Flesh and Blood” Defense*, 53 WM. & MARY L. REV. 1361, 1363 (2012).

<sup>33</sup> *Sovereign Citizens: Radicals Exercising ‘God-Given Rights’ or Fueling Domestic Terrorism?*, ABC NEWS (March 8, 2012), <http://abcnews.go.com/US/sovereign-citizens-radicals-exercising-god-rights-fueling-domestic/story?id=15876417&singlePage=true>.

inars.<sup>34</sup>

Julison’s tax fraud was one form of something sovereign citizens refer to as “redemption,” or sometimes “the process,” which is based on a conspiracy theory of grand proportions.<sup>35</sup> Sovereigns believe that the federal government set up by the founders has ceased to exist, and in its place is an illegitimate corporate government based on admiralty law and international commercial law.<sup>36</sup> They believe this government has pledged its citizens as collateral for international debts, and to this end, a secret treasury account is set up in the name of every child born in America.<sup>37</sup> They believe redemption allows them to access this secret account, escape the admiralty jurisdiction, and regain their sovereignty essentially by withdrawing consent or revoking some kind of contract they have been tricked into entering.<sup>38</sup>

Another hallmark of sovereigns is often referred to as “paper terrorism.”<sup>39</sup> As self-styled students of the law, sovereigns are known for their voluminous legal filings. “A simple traffic violation or pet-licensing case can end up provoking dozens of court filings containing hundreds of pages of pseudo-legal nonsense.”<sup>40</sup> In some cases, their filings “can quickly exceed a thousand pages.”<sup>41</sup> Sovereigns are also known for filing numerous counterfeit liens against their opponents as a means of harassment—prosecutors, law-enforcement officials, judges, and other court officials are often targets.<sup>42</sup> And it works. “One state employee said it was scarier to engage with offenders who used sovereign citizen tactics than with murderers, given the prospect of facing lawsuits or fouled credit ratings.”<sup>43</sup>

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<sup>34</sup> *Id.*; see Evans, *supra* note 32, at 1365.

<sup>35</sup> *Extremist Files*, *supra* note 24.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*; Erica Goode, *In Paper War, Flood of Liens Is the Weapon*, N.Y. TIMES, Aug. 23, 2013, [http://www.nytimes.com/2013/08/24/us/citizens-without-a-country-wage-battle-with-liens.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/08/24/us/citizens-without-a-country-wage-battle-with-liens.html?pagewanted=all&_r=0).

<sup>40</sup> *Extremist Files*, *supra* note 24.

<sup>41</sup> *Id.*

<sup>42</sup> See, e.g., Goode, *supra* note 39 (“[Defendants] filed more than \$250 billion in liens, demands for compensatory damages and other claims against more than a dozen people, including the sheriff, county attorneys, the [county] registrar of titles and other court officials.”); Jason Laday, *Sovereign Citizen Court Cases Number 1,200 in Past Year, Says State Judiciary*, SOUTH JERSEY TIMES, (September 16, 2014), [http://www.nj.com/south/index.ssf/2014/09/sovereign\\_citizen\\_court\\_cases\\_number\\_1200\\_in\\_past\\_year\\_says\\_state\\_judiciary.html](http://www.nj.com/south/index.ssf/2014/09/sovereign_citizen_court_cases_number_1200_in_past_year_says_state_judiciary.html) (A sovereign, Michael Rinderle “filed fraudulent commercial liens against the . . . municipal court judge and other officials spanning [three] counties . . . in retaliation over traffic tickets.”).

<sup>43</sup> Goode, *supra* note 39.

### A. *Origins*

The ideas of the sovereign citizen movement originated in white supremacist groups, like the Posse Comitatus and the militia movement of the 1970s and 80s.<sup>44</sup> Posse leader Richard Gale was in California when he published his first manifesto in 1971, and after that, the group spread north into the Pacific Northwest.<sup>45</sup> The movement began as an amalgam of tax resisters and racist “Christian Identity” believers who coalesced around Gale’s ideas of “citizens government,” which essentially espoused vigilante action to combat their perceived injustices.<sup>46</sup> Taking advantage of the farm-foreclosure crisis of the late 1970s, the Posse infiltrated the farm-protest movement and rode it to prominence. As an expert with the SPLC explained, “What the Posse did was put the DNA of its conspiracy theories and Christian Identity philosophy into the cell of the farm movement, which became the carrier for it.”<sup>47</sup>

At its peak, the Posse was a national force. An FBI report in 1976 estimated it had between 12,000 and 50,000 active members, with ten times as many casual supporters.<sup>48</sup> And it was at this time that their activities began to resemble the modern sovereign citizens. They believed that Social Security numbers were actually the numbers of a secret government bank account, and “that one’s name on the Social Security card and secret government account, spelled out in all capital letters, represented a fictional legal construct, not ‘*them*—natural, live, flesh and blood men.’”<sup>49</sup> Sovereigns often refer to this fictional construct as their “strawman.”<sup>50</sup> The Posse also used spurious liens and pro se lawsuits to try and achieve their goals,<sup>51</sup> which has become one of the hallmark tactics of modern sovereign citizens.

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<sup>44</sup> Evans, *supra* note 32, at 1363; Goode, *supra* note 39.

<sup>45</sup> *Roots of Common Law: An Interview with an Expert on the Posse Comitatus*, INTELLIGENCE REP., Spring 1998, at 29 (interview with Daniel Levitas), <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/1998/spring/roots-of-common-law>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Evans, *supra* note 32, at 1367.

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., *McManus v. Kameen*, No. 3:CV-14-469, 2014 WL 1745884 n.1 (M.D. Pa. Apr. 30, 2014). The court noted that the plaintiff “appear[ed] to subscribe to the specious ‘redemptionist’ theory, common among individuals in the sovereign citizen, militia, and tax protester movements. Adherents to this ‘redemptionist’ theory believe ‘that a person has a split personality: a real person and a fictional person called the “strawman.” The “strawman” purportedly came into being when the United States went off the gold standard . . . and, instead, pledged the strawman of its citizens as collateral for the country’s national debt. Redemptionists claim that government has power only over the strawman and not over the live person, who remains free.’” *Id.* (quoting *Monroe v. Beard*, 536 F.3d 198, 203 n.2 (3d Cir. 2008)).

<sup>51</sup> Evans, *supra* note 32, at 1367.

But the economy recovered after the 1980s, Posse leaders died or were sent to prison, and the movement withered.<sup>52</sup> Although the Posse proper died, its ideas have remained very much alive, having found brief returns to the spotlight with the Oklahoma City bombing in 1995 and the 81-day standoff between the FBI and the “Montana Freeman” in 1996.<sup>53</sup>

### B. *Modern-Day Sovereign Citizens*

In the movement’s modern form, the views vary somewhat according to sect, but there are several common characteristics to the ideology that allow them to be classed together under the label of “sovereign citizens.” They are believers in the vast and all-pervasive conspiracy invented by the Posse.<sup>54</sup> Their leaders teach that the United States is no longer a legitimate government.<sup>55</sup> They believe that passage of the Fourteenth Amendment, abandonment of the gold standard, creation of the Federal Reserve Bank, signing of international treaties, or some combination of these, has turned the world financial structure into a sham, where human lives are the only true currency.<sup>56</sup>

In their view, the legal system is a sort of modern-day wizardry that makes this all possible, largely by tricking people into giving up their sovereign (“God-given”) citizenship for inferior federal citizenship when they accept some small government benefit.<sup>57</sup> It is only when tricked into this *federal* citizenship that they must submit to the illegitimate corporate government.<sup>58</sup> The Posse’s religious overtones also persist, as some sovereign leaders still explicitly present their ideas from a religious or metaphysical perspective.<sup>59</sup>

Most importantly, sovereigns believe that by filing the right combination of documents, they can opt out of this system, reclaim their sover-

<sup>52</sup> *Id.* at 1368.

<sup>53</sup> *Id.*

<sup>54</sup> ANTI-DEFAMATION LEAGUE, *THE LAWLESS ONES: THE RESURGENCE OF THE SOVEREIGN CITIZEN MOVEMENT* 3 (2d ed. 2012), <http://www.adl.org/assets/pdf/combating-hate/Lawless-Ones-2012-Edition-WEB-final.pdf>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; Francis X. Sullivan, *The “Usurping Octopus of Jurisdictional/Authority”: The Legal Theories of the Sovereign Citizen Movement*, 1999 WIS. L. REV. 785, 795–808, 811.

<sup>57</sup> Susan P. Koniak, *When Law Risks Madness*, 8 CARDOZO STUD. L. & LITERATURE 65, 75–77 (1996); Sullivan, *supra* note 56, at 797–98.

<sup>58</sup> Sullivan, *supra* note 56, at 797–98.

<sup>59</sup> Koniak, *supra* note 57, at 75–78. Koniak describes the Christian religious narrative that is often used in conjunction with sovereign ideology. For a first-person example of this, see the story of Donald Joe Barber, a sovereign leader who “believes God would approve of what he is doing.” *Sovereign Citizens*, *supra* note 33; *see also* DVD: Accept for Value/Return for Value: A Metaphysical Perspective (Winston Shrout/Solutions in Commerce 2013), <http://www.wssic.info/accept-for-value-return-for-value-a-metaphysical-perspective/>.

eignty, and become “freemen” once again.<sup>60</sup> Many deny that the United States government has any jurisdiction over them.<sup>61</sup> Some accept no authority higher than their locally elected sheriff.<sup>62</sup> Others selectively refuse to abide by laws they disagree with while simultaneously utilizing other laws for their own benefit.<sup>63</sup> Following these beliefs, they frequently shun such basic requirements as taxes, social security, and driver’s licenses.<sup>64</sup> As their legal argument is essentially one of jurisdiction, some even believe their sovereign status makes them immune from prosecution under criminal law.<sup>65</sup>

### C. *Criminal Activity*

#### 1. *Violence*

Beyond what would otherwise just be odd behavior, sovereign citizens are also known for becoming violent when confronted.<sup>66</sup> While many sovereigns are peaceful political protesters engaged in essentially civil disobedience,<sup>67</sup> some are not so harmless. The killing of two sheriff’s deputies in Louisiana in 2012 is attributed to sovereign citizens.<sup>68</sup> The SPLC catalogues the killing of an additional seven law enforcement officers and two civilians by sovereign citizens.<sup>69</sup>

One of the most widely publicized incidents was the 2010 story of fa-

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<sup>60</sup> Sullivan, *supra* note 56, at 809; *see also* Koniak, *supra* note 57, at 77 (“The *other* United States (ours) is the home of the 14th Amendment slave as opposed to *their* United States, home of Freemen: the original, privileged, noble citizens.”).

<sup>61</sup> Evans, *supra* note 32, at 1371–72 (“[T]hey continuously challenge the court on questions of jurisdiction and claim that the court has no authority over them—sometimes even on grounds as irrelevant as what kind of flag hangs in the courtroom or whether their names appear in all capital letters in the indictment.” (footnotes omitted) (internal quotation marks omitted)).

<sup>62</sup> *Id.* at 1366–67.

<sup>63</sup> *Id.* at 1373 (“Employing their far-from-legal conception of ‘common law,’ these defendants appeal to the Uniform Commercial Code, the Bible, self-serving readings of out-of-context precedent, and other far-flung references to support their motions for dismissal, disqualification of judges, and other relief.”).

<sup>64</sup> *Sovereign Citizens*, *supra* note 33.

<sup>65</sup> Evans, *supra* note 32, at 1371–72 (“The argument that flesh and blood defendants present centers on a lack of personal jurisdiction, as the defendant asserts he or she is not a ‘corporate citizen’ but a ‘live flesh and blood man,’ a ‘sovereign citizen.’”).

<sup>66</sup> *Extremist Files*, *supra* note 24.

<sup>67</sup> *See, e.g., Sovereign Citizens*, *supra* note 33 (“[The sovereign citizen] insisted he will always keep up [sic] his fight against the government peaceful, but he did make some forceful statements. ‘We need a revolution, but not a violent one,’ he said. ‘I don’t see a need for violence.’”).

<sup>68</sup> Russell Goldman, *Two Charged With Murder in Shooting of Two Louisiana Deputies*, ABC NEWS (Aug. 23, 2012), <http://abcnews.go.com/US/charged-murder-la-police-shooting/story?id=17067236>.

<sup>69</sup> *Extremist Files*, *supra* note 24.

ther-and-son sovereign duo Jerry and Joseph Kane. A simple traffic stop in West Memphis, Arkansas erupted into a shootout that left both Kanes and two police officers dead.<sup>70</sup> Jerry Kane had long subscribed to the sovereign ideology and raised his son to follow his lead.<sup>71</sup> Joseph was home-schooled, and by the age of nine he could recite the Bill of Rights from memory; reports said the boy even “carried a realistic toy gun everywhere he went.”<sup>72</sup>

A former truck driver, Jerry would drive around the country and put on seminars in which he taught attendees various sovereign citizen methods of debt elimination and foreclosure avoidance. In recent years, Joseph went with his father, and the two would often appear in matching white suits.<sup>73</sup> In May of 2010, the Kanes were coming from a seminar in Las Vegas and heading to a new life in Florida when their van was pulled over by police on a stretch of Interstate 40 known for crime and drug trafficking.<sup>74</sup>

Reports said that Jerry was talking to the two officers peacefully, when Joseph “suddenly leapt out of the minivan and opened fire on the officers with an AK-47 assault rifle.”<sup>75</sup> Police traced their van to a nearby Wal-Mart parking lot, and when they were approached by authorities, they began shooting again and were killed in the ensuing gunfire.<sup>76</sup>

The most deadly attack linked to a sovereign citizen is the 1995 bombing of the Oklahoma City Federal Building which killed 168 people and left hundreds wounded.<sup>77</sup> Terry Nichols, co-conspirator in the bombing, was a self-professed sovereign citizen who had engaged in multiple instances of sovereign behavior. Three years before the bombing, when he was just an unknown “angry resident of Sannilac County, Michigan, [Nichols] wrote a letter to the Michigan Department of Natural Resources stating he was no longer a ‘citizen of the corrupt political corporate State of Michigan and the United States of America’ and was answerable only to the ‘Common Laws.’”<sup>78</sup> Nichols tried to pay a credit card bill with a fictional financial document he had titled a “certified fractional reserve check”; at a 1993 court appearance, Nichols denied that the court had any jurisdiction over him; and “[e]ven when he wrote addresses on

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<sup>70</sup> *Sovereign Citizens*, *supra* note 33.

<sup>71</sup> Shaila Dewan and John Hubbel, *Arkansas Suspects Had Rage Toward Government*, N.Y. TIMES, May 24, 2010, at A12.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Dan Harris, *Deadly Arkansas Shooting By ‘Sovereigns’ Jerry and Joe Kane Who Shun U.S. Law*, ABC NEWS (July 1, 2010), <http://abcnews.go.com/WN/deadly-arkansas-shooting-sovereign-citizens-jerry-kane-joseph/story?id=11065285>.

<sup>76</sup> *Id.*

<sup>77</sup> *Extremism in America: Sovereign Citizen Movement*, ANTI-DEFAMATION LEAGUE, [http://archive.adl.org/learn/ext\\_us/scm.html?xpicked=4](http://archive.adl.org/learn/ext_us/scm.html?xpicked=4).

<sup>78</sup> *Id.*

letters, Nichols made sure to use the abbreviation ‘TDC’ to indicate that he was using the federal zip code under ‘threat, duress and coercion.’”<sup>79</sup>

## 2. *Fraud*

More common to sovereigns than violence, however, is fraud.<sup>80</sup> As these people believe they are each something akin to a sovereign nation, they are known for fabricating their own identification cards, driver’s licenses, license plates, and passports.<sup>81</sup> “[M]ore ambitious[] sovereign citizens have created fictitious financial instruments, such as ‘sight drafts’ and ‘bills of exchange’; fictitious countries . . . and even Native American tribes . . . to help them avoid the reach of the actual government.”<sup>82</sup>

One of the most prominent forms of fraud is what sovereigns call “redemption.”<sup>83</sup> As noted earlier, sovereigns believe that when a person is born, that person’s birth certificate (or Social Security card application) creates a corresponding legal fiction, or “strawman,” in that person’s name.<sup>84</sup> This means that every person has a kind of dual personality; there is the “flesh-and-blood” person on one hand and the fictional strawman on the other.<sup>85</sup> This is important for two reasons. First, they believe that only the strawman really operates in the modern commercial world (engaging in transactions, collecting debts, and contracting with others); accordingly, they believe the government has power over the strawman only, and completely lacks authority over the flesh-and-blood person.<sup>86</sup> Second, and stranger still, sovereigns believe there is a secret bank or trust account for every living person, of somewhere between \$630,000 and \$20 million, in the name of the strawman, that they can access by filing the right combination of documents.<sup>87</sup> Sovereigns believe that when the federal government took U.S. currency off of the gold standard in 1933, it pledged the future earnings of all U.S. citizens as a sort of collateral to secure its debts with foreign countries.<sup>88</sup> Sovereigns contend that the redemption process allows them to essentially take this part of the strawman back from the government and use the money from these accounts for their own purposes.<sup>89</sup> While redemption takes various

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<sup>79</sup> *Id.*

<sup>80</sup> Lorelei Laird, ‘Sovereign Citizens’ Plaster Courts with Bogus Legal Filings—and Some Turn to Violence, A.B.A. J., May 1, 2014, at 54–55, [http://www.abajournal.com/magazine/article/sovereign\\_citizens\\_plaster\\_courts\\_with\\_bogus\\_legal\\_filings/](http://www.abajournal.com/magazine/article/sovereign_citizens_plaster_courts_with_bogus_legal_filings/) (“Most sovereigns are not violent. . .”).

<sup>81</sup> ANTI-DEFAMATION LEAGUE, *supra* note 54, at 20–21.

<sup>82</sup> *Id.* at 20.

<sup>83</sup> *Monroe v. Beard*, 536 F.3d 198, 203 n.2 (3d Cir. 2008); *McManus v. Kameen*, No. 3:CV-14-469, 2014 WL 1745884 n.1 (M.D. Pa. Apr. 30, 2014).

<sup>84</sup> Theret, *supra*, note 26, at 864–65.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Extremist Files*, *supra* note 24.

<sup>88</sup> Theret, *supra* note 26, at 864–65.

<sup>89</sup> *Id.*; *Extremist Files*, *supra* note 24.

shapes, it is essentially nothing more than assorted forms of fraud.<sup>90</sup>

### 3. *Harassment*

The other major tactic associated with sovereign citizens is paper terrorism.<sup>91</sup> According to the SPLC, “[t]he weapon of choice for sovereign citizens is paper.”<sup>92</sup> Sovereigns commonly misuse and abuse the legal system to harass, intimidate, and retaliate against their opponents.<sup>93</sup> Filing frivolous pro se lawsuits, false liens, judgments, bogus tax returns, and other fraudulent documents is a common tactic used to harangue police, attorneys, judges, and private citizens.<sup>94</sup> A report by the New Jersey judiciary recently counted approximately 1,200 cases involving sovereign citizens filed in its superior courts in a single year.<sup>95</sup> While a single criminal case might ordinarily have 60 or 70 entries on the docket, many involving sovereigns have over a thousand.<sup>96</sup> Sovereigns are known for their voluminous filings, which “occupy a disproportionate amount of judicial time and court resources.”<sup>97</sup>

Of course, these tactics often overlap. Anyone dealing with sovereigns should be prepared to encounter any manner of incoherent legalistic gibberish—whether frivolous pro se motions, false liens, or various claims based on the Uniform Commercial Code.<sup>98</sup> When a federal judge in Illinois was recently faced with a sovereign citizen’s “flurry of unintelligible motions,” the judge responded frankly, “I hesitate to rank your statements in order of just how bizarre they are.”<sup>99</sup>

## III. REDEMPTION: GOOD-FAITH MISUNDERSTANDING OR WILLFUL BLINDNESS?

### A. *Costs of Tax Fraud*

Miles Julison is just one of many who have used the 1099-OID scheme to try and get rich quick at the expense of taxpayers. While redemptionist theories have taken various shapes, the 1099-OID scheme is one of the more popular recent versions.<sup>100</sup> The IRS has sought to destroy these myths with Revenue Rulings explicitly debunking the strawman

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<sup>90</sup> FBI Counterterrorism, *supra* note 25, at 21–22.

<sup>91</sup> ANTI-DEFAMATION LEAGUE, *supra* note 54, at 16; *Extremist Files*, *supra* note 24.

<sup>92</sup> *Extremist Files*, *supra* note 24.

<sup>93</sup> ANTI-DEFAMATION LEAGUE, *supra* note 54, at 17.

<sup>94</sup> *Id.*

<sup>95</sup> Laday, *supra* note 42.

<sup>96</sup> *Extremist Files*, *supra* note 24.

<sup>97</sup> Evans, *supra* note 32, at 1373.

<sup>98</sup> Theret, *supra* note 26, at 881; *see* Goode, *supra* note 39.

<sup>99</sup> Goode, *supra* note 39.

<sup>100</sup> INTERNAL REVENUE SERV., THE TRUTH ABOUT FRIVOLOUS TAX ARGUMENTS 42–44 (Jan. 2015), <http://www.irs.gov/PUP/taxpros/The%20Truth%20Jan%202015.pdf>.

theory<sup>101</sup> and other sovereign theories based on jurisdictional arguments and provisions in the Uniform Commercial Code.<sup>102</sup> The Service even has a section expressly addressing the 1099-OID scheme in its publication *The Truth About Frivolous Tax Arguments*, in which it warns taxpayers, “The notion of secret accounts assigned to each citizen is pure fantasy. In addition to potential civil and criminal tax penalties for misuse of the Form 1099-OID, persons who fraudulently use false or fictitious instruments may be guilty of federal criminal offenses . . . .”<sup>103</sup>

Nonetheless, the success of these crude schemes is shocking. Although there appear to be no hard numbers quantifying the actual losses to taxpayers, estimates range from hundreds of millions to close to a billion dollars that have successfully walked out the door of the U.S. Treasury.<sup>104</sup> A quick tally of the losses associated with a single 1099-OID conspiracy alone is staggering.<sup>105</sup>

A few examples show how quickly the numbers can add up. Teresa Marty was the California-based tax preparer who helped Miles Julison obtain his \$411,773 check. But Julison was just one of the sovereigns she assisted with tax-fraud schemes. Marty helped at least 250 other people in 26 states file false returns, with an intended loss upwards of \$60 million.<sup>106</sup> “In response to the false returns, the IRS erroneously issued more than 40 tax refunds, totaling more than \$8 million,” including \$277,832 for Marty’s own false refund.<sup>107</sup> Marty’s operation was unusually successful, in part due to her status as an Enrolled Agent with the IRS.<sup>108</sup>

In another large-scale 1099-OID conspiracy, Ronald L. Brekke—an Orange County, California man—helped close to a thousand people in

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<sup>101</sup> Rev. Rul. 2005-21, 2005-14 C.B. 822 (entitled “Frivolous Tax Returns; Use of ‘Straw Man’ to Avoid Tax”).

<sup>102</sup> Rev. Rul. 2004-31, 2004-12 C.B. 617 (discussing the commercial-redemption theory and frivolous jurisdictional “removal” arguments).

<sup>103</sup> INTERNAL REVENUE SERV., *supra* note 100, at 43.

<sup>104</sup> Transcript of Proceedings: Jury Trial—Volume 2 at 199–200, *United States v. Julison*, No. 3:11-cr-0378-SI (D. Or. Aug. 6, 2013), ECF no. 282. The Government’s own expert, Shauna Henline, Senior Technical Coordinator in the IRS’s Frivolous Return Program, testified on cross-examination that while she was unaware of the exact number, “hundreds of millions” seemed a fair estimate, and possibly a lowball one at that. Henline also noted that over a period of just three years (2007 to 2010), more than \$3.3 trillion dollars was requested using the 1099-OID process. *Id.* at 199–200.

<sup>105</sup> See *1099-OID Tax Fraud Scheme*, U.S. DEPT. OF JUSTICE, January 9, 2015, <http://www.justice.gov/usao-wdmo/1099-oid-tax-fraud-scheme> (collecting press releases).

<sup>106</sup> Press Release, U.S. Dep’t of Justice, California Residents Indicted for Nationwide \$60 Million Fraudulent Tax Refunds Scheme (June 25, 2013), [http://www.justice.gov/sites/default/files/tax/legacy/2013/06/26/Marty\\_Indictment\\_pr.pdf](http://www.justice.gov/sites/default/files/tax/legacy/2013/06/26/Marty_Indictment_pr.pdf).

<sup>107</sup> *Id.*; Marty Indictment, *supra* note 14, at 1–3.

<sup>108</sup> Defense Memo, *supra* note 13, at 4.

three countries claim over \$763 million in fraudulent refunds.<sup>109</sup> Again, the IRS sent out refund checks totaling roughly \$14 million before it realized the returns were fictitious. The Service was only able to claw back just over half of that, leaving Brekke himself with a restitution judgment of \$6.2 million.<sup>110</sup>

A conspiracy based out of Kansas City, Missouri, headed by Gerald A. Poynter, also known as “Brother Jerry Love,” was also responsible for huge losses to the treasury.<sup>111</sup> Poynter and his co-conspirators used 1099-OIDs to file 284 fraudulent returns, with an intended loss of \$96 million. Again, “[t]he IRS mistakenly paid out \$3.5 million on these fraudulent claims.”<sup>112</sup> Poynter eventually pleaded guilty to one count of conspiracy to defraud the government and one count of filing a fraudulent tax return; he was sentenced to 13 years in federal prison and a restitution judgment of \$951,930.<sup>113</sup>

These are only *three recent examples*, and they represent an intended loss of more than \$919 million, and an actual loss of \$25.5 million. Given the numbers, and the fact that these schemes have been going on for years, the estimates of a billion dollars lost to this completely unsophisticated scam seem entirely likely.<sup>114</sup>

### B. *Suggestions*

Given the numbers, the IRS should continue to aggressively pursue the high-level fraudsters like Marty, Brekke, and Poynter. Prosecuting and punishing even mid-level scofflaws like Miles Julison also sends an important message to sovereign citizens. But ultimately, the IRS needs to

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<sup>109</sup> Press Release, U.S. Dep’t of Justice, California Man Sentenced for Tax Fraud Conspiracy that Resulted in More than \$14 Million Tax Loss (June 22, 2012), <http://www.justice.gov/archive/usao/waw/press/2012/June/brekke.html>.

<sup>110</sup> *Id.*

<sup>111</sup> Press Release, U.S. Dep’t of Justice, Georgia Woman Sentenced for False Tax Claims (June 5, 2014), <http://www.justice.gov/usao/mow/news2014/johnson.sen.html>.

<sup>112</sup> Press Release, U.S. Dep’t of Justice, KC Man Pleads Guilty to Leading a Nearly \$100 Million, Nationwide Tax Fraud Conspiracy, Faces 13 Years in Federal Prison (Nov. 7, 2013), <http://www.justice.gov/usao/mow/news2013/poynter.ple.html>.

<sup>113</sup> *Id.*

<sup>114</sup> In 2012, the New York Times reported that treasury officials estimated losses to tax fraud at more than \$5.2 billion per year. Lizette Alvarez, *ID Thieves Loot Tax Checks, Filing Early and Often*, N.Y. TIMES, May 27, 2012, <http://query.nytimes.com/gst/fullpage.html?res=9500E5DB173EF934A15756C0A9649D8B63&pagewanted=print>. The 1099-OID is just one piece in what officials call a worsening “tsunami of fraud.” *Id.* A 2011 report by the Tax Justice Network crunched numbers from the World Bank and estimated that losses from tax evasion costs governments more than \$3.1 trillion in annual revenue across the globe. *Tax Evasion Costs Governments \$3.1 Trillion Annually, Report Says* (N.Y. TIMES), Nov. 28, 2011, [http://www.nytimes.com/2011/11/26/business/global/26iht-tax26.html?\\_r=0](http://www.nytimes.com/2011/11/26/business/global/26iht-tax26.html?_r=0).

stop the checks *before* they go out the door.<sup>115</sup> The Service itself acknowledged this—IRS Deputy Commissioner Steven T. Miller said, “We have gotten much better at it,” but he also admitted, “[we] still have a ways to go.”<sup>116</sup>

Considering the relative rarity of Form 1099-OID being used legitimately in this configuration, it would seem a quick fix for the IRS to flag all such returns for inspection before a refund check could be issued. A legitimate Form 1099-OID is usually filed by a bank, broker, or other financial institution who *issues* a taxpayer’s bonds or debt instrument or pays the ultimate obligation to the taxpayer/bondholder.<sup>117</sup> One copy is sent to the IRS, and one copy is sent to the taxpayer.<sup>118</sup> A relatively simple procedure could be designed to ensure the Form 1099-OID was in fact submitted by the financial institution it purports to be from. While this would place an additional burden on both the IRS and the issuers and could delay some legitimate refunds—it is almost certainly cheaper than even conservative estimates of 1099-OID fraud.

This is in line with suggestions from the Government Accountability Office in a recent report detailing IRS practices like increased pre-refund W-2 matching that could help combat refund fraud based on identity theft.<sup>119</sup> If Congress and the IRS are going to address refund fraud—which the GOA report indicates they are—they should not ignore the substantial theft from American taxpayers caused by sovereign citizens using 1099-OID fraud.

### C. *Mens Rea and the Cheek Defense*

Internal Revenue Code section 7201 provides that “[a]ny person who *willfully* attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony.”<sup>120</sup> Likewise, subsequent sections of the code set the mens rea for various forms of tax fraud, avoidance, and non-payment at the level of “willful.”<sup>121</sup>

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<sup>115</sup> See Alvarez, *supra* note 114 (“The ease of electronic filing and the boom in identity theft have outpaced the agency’s technological ability to detect this sort of fraudulent claim, senior agency officials say.”).

<sup>116</sup> *Id.*

<sup>117</sup> I.R.C. § 1275(c)(2) (2012) (issuer required to submit filings to the Secretary); see also Treas. Reg. § 1.6049-4 (2012) (providing detailed reporting procedures).

<sup>118</sup> See *2015 Instructions for Forms 1099-INT and 1099-OID*, at 4–8, Internal Revenue Service, (Sept. 25, 2014), <http://www.irs.gov/pub/irs-pdf/i1099int.pdf>.

<sup>119</sup> See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-633, *IDENTITY THEFT: ADDITIONAL ACTIONS COULD HELP IRS COMBAT THE LARGE, EVOLVING THREAT OF REFUND FRAUD* 2, 8 (Aug. 2014), <http://www.gao.gov/assets/670/665368.pdf>.

<sup>120</sup> I.R.C. § 7201 (2012) (emphasis added).

<sup>121</sup> See, e.g., I.R.C. § 7202 (2012) (“Any person . . . who willfully fails to collect or truthfully account for and pay over such tax shall . . . be guilty of a felony. . . .”); I.R.C. § 7203 (imposing a misdemeanor for “willfully fail[ing] to pay such estimated

In *Cheek v. United States*,<sup>122</sup> the Supreme Court clarified that a conviction for tax crimes is one of the few areas where ignorance of the law *can* stand as a defense.<sup>123</sup> In light of the complexity and proliferation of the tax code and its related regulations, Congress sought to “soften the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses.”<sup>124</sup>

Accordingly, willfulness requires the government to prove “that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty.”<sup>125</sup> The Court explained that the knowledge component required the government to negate not only the defendant’s claim of ignorance of the law, but also any claim “that because of a misunderstanding of the law, [the defendant] had a good-faith belief that he was not violating any of the provisions of the tax laws,” regardless of whether the belief was objectively reasonable.<sup>126</sup>

In *Cheek*, the defendant was an airline pilot who had been indoctrinated by a group of tax protesters.<sup>127</sup> The group had convinced Cheek that the Sixteenth Amendment was unconstitutional, that they were not taxpayers within the meaning of the Code, and that wages were not income.<sup>128</sup> Cheek argued that because of this indoctrination, as well as his own research, “he sincerely believed that the tax laws were being unconstitutionally enforced and that his actions . . . were lawful.”<sup>129</sup> Therefore, he said he did not act with the willfulness required for conviction.<sup>130</sup>

The Court accepted part of this argument, ruling that a good-faith belief need not be objectively reasonable, and that it was error for the court to exclude evidence of Cheek’s understanding that he did not have to file a return and that wages were not income, “as incredible as such misunderstandings and beliefs about the law might be.”<sup>131</sup> Of course, the more unreasonable the belief is, the more likely it will be for the jury to find it no more than “simple disagreement with known legal duties” and

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tax or tax, make such return, keep such records, or supply such information”) I.R.C. § 7204 (2012) (punishing the willful furnishing of a false or fraudulent statement or willful failure to furnish a required statement); I.R.C. § 7205 (2012) (imposing a misdemeanor for “willfully suppl[y]ing] false or fraudulent information” to an employer).

<sup>122</sup> 498 U.S. 192 (1991).

<sup>123</sup> *Id.* at 200.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 201.

<sup>126</sup> *Id.* at 202.

<sup>127</sup> *Id.* at 194–96.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 196.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 203.

that the government has proven knowledge.<sup>132</sup>

Cheek's belief about the constitutionality of the tax code was an entirely different matter. This was not because the belief was more unreasonable, but because the purpose of the willfulness standard is to prevent penalizing uncertainty "among taxpayers who earnestly wish to follow the law."<sup>133</sup> Quite to the contrary, a belief that the tax code is unconstitutional reveals "full knowledge of the provisions at issue and a studied conclusion, however wrong."<sup>134</sup> And most importantly, in our judicial system, the challenger to the validity of a statute must bear the risk of being wrong. Accordingly, a defendant's view about the *validity* of the tax provision at issue has no bearing on the issue of willfulness, regardless of whether the argument has substance.<sup>135</sup>

The good-faith defense acknowledged by the *Cheek* Court has also been imported into accusations of making false claims against the United States in violation of 18 U.S.C. § 287—the section under which Miles Julison was prosecuted.<sup>136</sup> As one would assume, this defense is popular among sovereign citizens and other more garden-variety tax protesters.<sup>137</sup> Julison asserted it as his primary defense, seeking to negate the element of willfulness by arguing he relied on his tax-preparer Teresa Marty in good faith.<sup>138</sup>

In Julison's case, this defense was not particularly successful. After hearing all the evidence, the jury returned a guilty verdict on both counts. And despite the strong language in *Cheek* providing that the belief need not be reasonable, this seems to be the rule rather than the ex-

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<sup>132</sup> *Id.* at 203–04.

<sup>133</sup> *Id.* at 204.

<sup>134</sup> *Id.* at 205.

<sup>135</sup> *Id.* at 206.

<sup>136</sup> Circuits are split on whether or not a good-faith instruction is required in section 287 cases if there is evidence to support it, but they agree that such a defense exists as part of the specific intent requirement. *United States v. Dorotich*, 900 F.2d 192, 194 (9th Cir. 1990). The circuit court collected cases noting the split, but ultimately decided the "district judge adequately instructed the jury that one element of the government's case was to prove specific intent beyond a reasonable doubt: that Dorotich filed the returns knowing that they were false." *Id.*

In the interest of precision, it is notable that the term "willfully" is omitted from section 287. "Willfulness is not an essential element of the false claims statute." IAN M. COMISKY ET AL., *TAX FRAUD & EVASION* ¶ 3.03[4] (2014). However, the statute *does* require the defendant to make or present the false claim "knowing such claim is false, fictitious, or fraudulent." 18 U.S.C. § 287 (2012). Courts are split on whether this includes additional proof of "intent to deceive or intent to defraud." COMISKY ET AL., *supra* ¶ 3.03[4] & n.102 (collecting cases).

<sup>137</sup> Peter J. Reilly, *Stupid Is As Stupid Does—Tax Protesters and the Cheek Defense*, FORBES (Apr. 8, 2012), <http://www.forbes.com/sites/peterjreilly/2012/04/08/stupid-is-as-stupid-does-tax-protesters-and-the-cheek-defense/>.

<sup>138</sup> Defense Memo, *supra* note 13, at 2–3.

ception.<sup>139</sup> As one commentator noted soon after *Cheek*, “it may be presumed that it is the rare defendant who will be able to convince a jury, made up of persons who pay taxes, that he or she has a good-faith belief that wages are not taxable.”<sup>140</sup>

*Cheek* itself portends this, “Of course, the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties.”<sup>141</sup> The beliefs of sovereign citizens exemplify this rule. Either their beliefs are so outlandish that a jury will simply not give credence to the good-faith argument, or their criminal acts are predicated on the invalidity of the tax laws—a position that *Cheek* does not protect.

Despite this logical dilemma and the reality that juries almost never accept this defense, sovereign citizen defendants will almost invariably assert it.<sup>142</sup> Julison’s case was rare in the extent to which the defense relied on the good-faith defense. Probably rightfully so, as Julison’s supposed reliance on Teresa Marty, an Enrolled Agent with the IRS, made the question of good-faith a much closer one than in many sovereign citizen tax prosecutions.

In closing argument, Julison’s defense attorney Patrick Ehlers told a powerful story where the real villain was not Miles Julison, but Teresa Marty and the other sovereigns who sold him these ideas.<sup>143</sup> To top it off, the IRS had been asleep at the switch, and their Criminal Investigation Division had barely taken Julison seriously when he went to talk with them.<sup>144</sup> But ultimately, the evidence showed that IRS agents *did* inform

<sup>139</sup> Reilly, *supra* note 137.

<sup>140</sup> Daniel Anker, *Cheek v. United States: Beliefs That Tax Credulity Still Get to the Jury*, 41 CASE W. RES. L. REV. 1311, 1325 (1991).

<sup>141</sup> *Cheek v. United States*, 498 U.S. 192, 203–04 (1991).

<sup>142</sup> See, e.g., *United States v. Svoboda*, 633 F.3d 479, 484 (6th Cir. 2011) (“[E]ven if this defense did apply to Svoboda’s crimes, Svoboda’s particular type of good-faith argument is not relevant for the reasons set out in *Cheek v. United States*, because it is not based on a good-faith belief about what the law provides, but rather a belief that the law does not validly constrain him.” (citation omitted)); *United States v. Smith*, 107 A.F.T.R.2d 2011-1989 (D. Colo. 2010) (recounting defendant’s conviction despite arguing good-faith mistake).

<sup>143</sup> Transcript of Proceedings: Jury Trial—Volume 4 at 878, 885, *United States v. Julison*, No. 3:11-cr-0378-SI (D. Or. Aug. 8, 2013), ECF 284 [hereinafter Trial Transcript—Volume 4]. Ehlers told the jury, “Marty was persuasive. . . . You heard her in the beginning, working her magic: This is absolutely true. . . . This is the 1099-OID process. It is perfectly normal to do. We have had successes. She was selling that.” *Id.* at 878. Later, Ehlers argued, “People like Teresa Marty are some of the most dangerous people that the IRS faces.” *Id.* at 885.

<sup>144</sup> *Id.* at 857, 864. In closing, the defense argued, “To the Government, it is \$411,000 out of hundreds of millions of dollars that have been wasted by the Government by the failure to even be able to detect this. Their own people at the IRS didn’t see this. When they did in 2006, they didn’t do anything about it.” *Id.* at 857. Later, Ehlers argued, “we saw the incompetence of [IRS Special Agent Dickerson] and the ridiculous manner in which she handled this case.” *Id.* at 864.

Julison that the 1099-OID scheme was illegal.<sup>145</sup> In addition, there was overwhelming evidence that Julison had tried to cover his tracks on the false OID filings and took measures to avoid detection.<sup>146</sup> This likely sealed Julison's fate.

While Julison ultimately failed, the presentation of psychologist and expert witness Dr. Michael Shermer on the issue of "strange beliefs" was a unique aspect of Julison's case. Whether it will be repeated by other sovereign defendants remains to be seen, but a brief analysis of the testimony and assessment of its usefulness is helpful.

#### *D. Expert Witnesses in Tax Protester Cases Generally*

Since 1975, the Federal Rules of Evidence have explicitly allowed expert witnesses to give opinion testimony, even when it includes "ultimate" issues—those that must be decided by the trier of fact.<sup>147</sup> Rule 704(a) provides that "[a]n opinion is not objectionable just because it embraces an ultimate issue."<sup>148</sup> This general rule governs the scope of most expert testimony in federal courts and allows experts to testify broadly, as long as their testimony is relevant.<sup>149</sup>

Scientific evidence, such as that given by a psychologist, must also satisfy the requirements set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>150</sup> in which the Supreme Court famously charged district courts with an affirmative duty to act as a gatekeeper to ensure the reliability of scientific evidence.<sup>151</sup> *Daubert* also stressed Rule 702's requirement that an expert's testimony be helpful to "assist the trier of fact to determine or understand a fact in issue."<sup>152</sup>

An important limit on the general admissibility of testimony concerning the ultimate issue is Rule 704(b). This subsection unequivocally states, "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense."<sup>153</sup>

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<sup>145</sup> *Id.* at 847–48 (Government's Closing Argument) ("[Julison] walked into the Criminal Investigation Division of the IRS, and they tell him, 'What you are doing is fraud.'").

<sup>146</sup> *Id.* at 830–36 (Government's Closing Argument) (summarizing just some of this evidence).

<sup>147</sup> FED. R. EVID. 704(a); Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat 1928, 1937 (1975).

<sup>148</sup> FED. R. EVID. 704(a).

<sup>149</sup> FED. R. EVID. 401 (providing the general test for relevance); FED. R. EVID. 402 (stating that "[r]elevant evidence is admissible unless" provided otherwise).

<sup>150</sup> 509 U.S. 579 (1993).

<sup>151</sup> *Id.* at 597.

<sup>152</sup> *Id.* at 592 (quoting FED. R. EVID. 702(a)).

<sup>153</sup> FED. R. EVID. 704(b). Language to this effect was added to the rule in 1984 as part of Congressional changes to the insanity defense. See Act of Oct. 12, 1984, Pub. L. 98-473, § 406, 98 Stat. 1837 (1984).

Accordingly, in tax evasion and false claims cases, both the prosecution and defendant are prohibited from providing expert testimony that explicitly opines on whether the defendant's beliefs about the tax law were in good faith.<sup>154</sup>

On the other hand, courts are required to allow expert testimony on so-called "predicate matters" that are one step removed from giving testimony on a defendant's specific mental state.<sup>155</sup> Some courts, such as the Fifth Circuit, have concluded this rule forbids only a *very* direct conclusion on mens rea, and have allowed testimony that is almost indistinguishable from the prohibited testimony.<sup>156</sup> Others, such as the First Circuit, have given this rule more effect, holding the rule "prohibits all direct expert testimony concerning a criminal defendant's intent, regardless of the witness's field of expertise, so long as intent is an element of the crime charged."<sup>157</sup> But even that court has made clear the Rule does not prohibit testimony on predicate facts from which the jury could infer intent, or even from suggesting those inferences.<sup>158</sup>

The Seventh Circuit applied this rule in a criminal tax case, *United States v. Windfelder*,<sup>159</sup> when Rule 704(b) was still fresh in the books. The defendant in *Windfelder* had been convicted of understating income on

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<sup>154</sup> See *United States v. Hauert*, 40 F.3d 197, 200 (7th Cir. 1994) ("Hauert recognizes 'the special limitations imposed upon opinion evidence by expert witnesses under Rule [Fed. R. Evid.] 704(b),' and thus does not appeal the district court's decision to preclude a proffered psychiatric opinion that he was 'credible, sincere and manifests a good faith belief' with respect to IRC obligations." (alteration in original)).

<sup>155</sup> *United States v. Morales*, 108 F.3d 1031, 1037 (9th Cir. 1997). Morales was a bookkeeper prosecuted for "willfully" making false entries in a union ledger. She sought to introduce expert testimony that she had a "weak grasp of bookkeeping principles." The district court refused to admit the testimony. The circuit court held this to be reversible error because the opinion was merely on a predicate matter that did not "necessarily compel the conclusion that Morales did not make the false entries willfully." *Id.*

<sup>156</sup> *United States v. Dotson*, 817 F.2d 1127, 1032 (5th Cir. 1987), *vacated in part on reh'g*, 821 F.2d 1034 (5th Cir. 1987) (holding that the district court did not abuse its discretion in allowing the government's tax expert to testify that the defendant's net worth increased yearly by roughly \$40,000 and that such an increase "is indicative . . . that he willfully and intentionally increased his income knowing full well that he had not reported the taxes due thereon"); see *United States v. Masat*, 896 F.2d 88, 93 (5th Cir. 1990) (holding that Rule 702(b) and *Dotson* did not prevent a defendant from offering expert testimony that he suffered from post-traumatic stress disorder and paranoia, and that his hiding of assets was not motivated by a desire to evade taxes, but by his paranoid desire to protect his property but finding that the evidence was properly excluded as not helpful to the jury).

<sup>157</sup> *United States v. Valle*, 72 F.3d 210, 216 (1st Cir. 1995).

<sup>158</sup> *Id.* (allowing testimony by a police officer that the quantity of crack cocaine found was "consistent with distribution, as opposed to personal use" because the testimony did not directly characterize the defendant's intent).

<sup>159</sup> 790 F.2d 576 (7th Cir. 1986).

his tax return and the return he filed on behalf of his deceased aunt.<sup>160</sup> The court entirely upheld the admission of the expert testimony explaining that the transfers had been made without his aunt's approval, "for his own personal use," "without consideration," and that the assets "should have been included in the decedent's estate"<sup>161</sup> because the testimony was only in respect to the intent of the underlying transactions, not the filing of the tax return.<sup>162</sup> However, the court found it was error to admit testimony that the defendant had "intentionally understated his income" on his tax return, because this was an opinion on the defendant's willfulness, a key element of the crime charged.<sup>163</sup>

Fortunately for the *Julison* court, the Ninth Circuit had also dealt with this very issue in the trial of Irwin Schiff—a man the SPLC dubbed the "'granddaddy' of the tax protest movement."<sup>164</sup> Schiff and two of his colleagues were tried in a 23-day joint trial in which Schiff represented himself.<sup>165</sup> Based on the evidence adduced at trial, Schiff was convicted of tax evasion and conspiracy; additionally, Schiff's outrageous courtroom antics earned him summary convictions on 15 counts of criminal contempt.<sup>166</sup>

One of Schiff's disciples, Lawrence Cohen, was convicted of one count of aiding and assisting in the filing of a false tax return.<sup>167</sup> Before trial, Cohen's attorney gave proper notice that he would seek to introduce expert psychiatric evidence of Cohen's mental disease that would bear on his guilt.<sup>168</sup> Cohen had met with a psychiatrist who diagnosed him as having a "narcissistic personality disorder" that caused him to be "irrational to the point of dysfunction."<sup>169</sup> The doctor's report said that although "Mr. Cohen was not delusional or psychotic and was in possession of basic mental faculties, his will was in the service of irrational beliefs" because of the disorder.<sup>170</sup> The district court sustained the government's

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<sup>160</sup> *Id.* at 577–78.

<sup>161</sup> *Id.* at 580–81.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 582. The court said it was also error to admit testimony that "at the time [the defendant] signed his tax return, he was well aware of what happened to [his aunt's] assets prior to her dying, and he continued to or attempted to purport something other than what really happened," as this was opinion on the defendant's *knowledge*, another element. *Id.* (first alteration in original).

<sup>164</sup> Casey Sanchez, *Return of the Sovereigns*, INTELLIGENCE REP., Spring 2009, at 38, 41, <https://www.splcenter.org/fighting-hate/intelligence-report/2009/sovereign-citizens-movement-resurging> (noting Schiff was not technically affiliated with the sovereign citizens, although he sold books and taught people how to stop paying income taxes).

<sup>165</sup> *United States v. Cohen*, 510 F.3d 1114, 1117 (9th Cir. 2007).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

objection and refused to allow the testimony.<sup>171</sup>

The Ninth Circuit reversed.<sup>172</sup> The panel agreed that *some* of the evidence referenced in the doctor's report likely would have invaded the province of the jury in violation of Rule 702(b), but it disagreed with the trial court's wholesale exclusion.<sup>173</sup> Instead, the trial court should have simply sustained the government's objection to individual questions that were likely to provoke inadmissible evidence.<sup>174</sup> The Ninth Circuit panel also noted that the trial court could have taken additional precautions by discussing the limits on the doctor's testimony before he testified.<sup>175</sup>

*E. The Expert Witness in United States v. Julison*

Based on Rule 704(b) and the case law interpreting it, it was clear that the defense's expert psychologist, Dr. Shermer, could not give an opinion specifically about Julison's mental state regarding the tax scheme.<sup>176</sup> Rather, the question was how close to that line Dr. Shermer could get. The defense cited *United States v. Cohen*,<sup>177</sup> *United States v. Finley*,<sup>178</sup> and a recent district court opinion to argue that "[a]n expert should be allowed to present testimony about a mental state as long as they '[do] not testify on the ultimate label they would affix to the defendant.'"<sup>179</sup>

In its response to the Government's Motion in Limine, the defense asserted that Dr. Shermer's testimony would stay within the confines of

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<sup>171</sup> *Id.* at 1123.

<sup>172</sup> *Id.* at 1126–27. The court cited *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002), in which the court required admittance of expert psychiatric evidence concerning the defendant's delusional disorder that would have helped explain why he continued to believe fictional financial instruments were valid, in spite of the fact they had been repeatedly refused by numerous institutions.

<sup>173</sup> *Id.* at 1126.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See Defendant's Response to Government's Motion in Limine to Exclude or Limit Testimony of Defendant's Expert Witness at 2, *United States v. Julison*, No. 3:11-cr-00378-SI, 2013 WL 5774727 (D. Or. July 31, 2013), ECF No. 206 [hereinafter Defendant's Response Motion in Limine] (acknowledging "an expert witness cannot give opinions on legal conclusions or ultimate issues of law").

<sup>177</sup> 510 F.3d 1114, 1127 (9th Cir. 2007).

<sup>178</sup> 301 F.3d 1000 (9th Cir. 2002). The *Finley* court held it was error in a false claims case for the trial court to exclude expert testimony that the defendant had "an atypical belief system" that would have helped explain "how an otherwise normal man could believe that these [fictional] financial instruments were valid and reject all evidence to the contrary." *Id.* at 1006, 1013. The court also found such testimony acceptable under *Daubert* because it was both reliable and helpful to the trier of fact. *Id.* at 1012–13.

<sup>179</sup> Defendant's Response Motion in Limine, *supra* note 176, at 2 (second alteration in original) (quoting Opinion and Order at 12, *United States v. Mohamud*, 3:10-cr-00475-KI (D. Or. Jan. 4, 2013) (King, J.)).

the Rules of Evidence because he would avoid the prohibited testimony on Julison's *ultimate* mental state. Instead, the defense said, "Dr. Shermer will testify about the factors and indicators of a specific mental state that allows seemingly intelligent individuals to believe in outlandish and even nonsensical ideas," "outline how this type of thinking arises and persists in individuals," and "apply the factors and indicators of his research to the personality traits of Mr. Julison."<sup>180</sup>

After conducting a *Daubert* hearing, Judge Simon ruled on the government's motion from the bench, granting and denying in part.<sup>181</sup> Judge Simon found that Dr. Shermer was a qualified expert in the field of psychology, with a specialty in belief systems that "includes the study of why some people may come to believe things in good faith that most people do not believe or would not accept."<sup>182</sup> Judge Simon also found that Dr. Shermer's knowledge and expertise could be helpful to the jury in deciding whether Mr. Julison's beliefs were in good faith, despite the fact they "are not generally accepted or even considered reasonable by most people."<sup>183</sup>

While Dr. Shermer was allowed to testify, he was limited to giving general testimony "about how some people come to form and hold beliefs that might not be held or even [be] rejected by most people."<sup>184</sup> Judge Simon said that under Rule 704(b), Dr. Shermer could not testify whether Mr. Julison held any particular beliefs in good faith.<sup>185</sup> Additionally, because Dr. Shermer never examined Mr. Julison, Shermer was prohibited from expressing any opinions on Julison's mental condition, "or susceptibility to holding uncommon or atypical beliefs."<sup>186</sup> Nor could Shermer discuss the probable effects of anything Julison may have read, heard, or encountered.<sup>187</sup>

In the end, Dr. Shermer gave this testimony,<sup>188</sup> but it was not enough. After five days of trial, the jury returned a guilty verdict on both counts.<sup>189</sup>

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<sup>180</sup> *Id.* at 3.

<sup>181</sup> Transcript of Pretrial Conference at 22, *United States v. Julison*, No. 3:11-cr-00378-SI, 2013 WL 5774727 (D. Or. Aug. 2, 2013), ECF No 280.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 22–23.

<sup>184</sup> *Id.* at 26.

<sup>185</sup> *Id.* at 23.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 25–26.

<sup>188</sup> Trial Transcript—Volume 4, *supra* note 143, at 737–82 (testimony of Michael Shermer). In an article Shermer later wrote for *SCIENTIFIC AMERICAN*, he indicated that Julison really did believe the sovereign citizen theories wholeheartedly. Shermer, *supra* note 12 ("So my description of you as a true believer is true?" I queried. 'I believe in the blood of the lamb,' [Julison] responded biblically.").

<sup>189</sup> Verdict, *United States v. Julison*, No. 3:11-cr-00378-SI, 2013 WL 5774737 (D. Or. Aug. 9, 2013), ECF No. 226; Press Release, U.S. Attorney's Office, *supra* note 4.

Julison was later sentenced to four years in prison.<sup>190</sup>

*F. Jury Instructions in United States v. Julison*

If it was not Julison's earnestness, it was likely his "good faith" the jury found lacking. The jury received instructions on the good-faith defense explaining that Julison would not be guilty if he "had an honest, good faith belief in the correctness of" his tax returns, "even if he was mistaken in that belief."<sup>191</sup> It also received instruction that Julison's good-faith reliance on a tax preparer would be a complete defense if the jury found he "provided all relevant information" to the preparer, and that he "truthfully and accurately report[ed] all of the taxable income, allowable deductions, and withholding" under the laws.<sup>192</sup> On top of this, the jury was given a definition of good faith that specified:

A good faith belief is one that is honestly and genuinely held. A belief need not be objectively reasonable to be held in good faith. Nevertheless, you may consider whether the defendant's stated beliefs about the IRS Form 1099-OID are reasonable as a factor in deciding whether the belief was honestly or genuinely held.<sup>193</sup>

The instruction also clarified that a disagreement with the law or belief that the law should be different *did not* constitute a defense.<sup>194</sup>

On the other side, the jury also received a prosecution-friendly instruction on "Deliberate Ignorance." This told the jury that it could find Julison guilty if it found beyond a reasonable doubt that he: "(1) was aware of a high probability that the income amount, the withholding amount, or the refund requested" on his tax returns was false, and that he "(2) deliberately avoided learning the truth about the falsity of one or more of these items on his 2007 or 2008 individual income tax return."<sup>195</sup> It also specified that the jury could not find Julison guilty if it found that Julison actually believed the amounts he reported on his tax returns were correct, or if the jury found that he was simply careless.<sup>196</sup> While this instruction is routine in many cases, a unique Ninth Circuit rule prevented its use in criminal tax cases until fairly recently.

*G. The Ninth Circuit, Deliberate Ignorance Instructions, and Cheek*

Traditionally, the question of whether or not a jury should be given a certain instruction is a determination based on whether there is enough

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<sup>190</sup> Press Release, U.S. Attorney's Office, *supra* note 4.

<sup>191</sup> Jury Instructions, United States v. Julison at 11, No. 3:11-cr-00378-SI, 2013 WL 5774714 (D. Or. Aug. 8, 2013), ECF No. 220 (Instruction No. 21).

<sup>192</sup> *Id.* (Instruction No. 22).

<sup>193</sup> *Id.* at 12 (Instruction No. 23).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 10 (Instruction No. 20).

<sup>196</sup> *Id.* at 11 (Instruction No. 20).

evidence to support it, and is therefore within the trial court's discretion.<sup>197</sup> The *substance* of the proposed instruction is a purely legal issue that a court of appeals reviews de novo.<sup>198</sup>

For fifteen years following the 1992 case *United States v. Asuncion*,<sup>199</sup> the Ninth Circuit had provided an exception to this rule, reviewing de novo the decision whether or not to give the jury an instruction on "willful blindness" (or "deliberate ignorance" as Ninth Circuit courts often call it).<sup>200</sup> In 2007, with *United States v. Heredia*, the Ninth Circuit sitting en banc overruled this practice, returning the grant of a willful blindness instruction to the discretion of the trial court.<sup>201</sup>

Since *Cheek* was decided in 1991, and did not specifically address the willful blindness issue, some courts were hesitant to give such an instruction.<sup>202</sup> The Ninth Circuit was among them, having held that in a tax crime case, "[t]he deliberate ignorance instruction incorrectly diluted the government's duty to prove knowledge."<sup>203</sup> In *United States v. Mapelli*, the court held the instruction was appropriate "only when the defendant purposely contrives to avoid learning all the facts, as when a drug courier avoids looking in a secret compartment he sees in the trunk of a car, because he knows full well that he is likely to find drugs there."<sup>204</sup> As recent commentators have noted, this made the Ninth Circuit an outlier in its reticence to give the deliberate ignorance instruction in these cases.<sup>205</sup>

The *Heredia* court, sitting en banc, put an end to this practice.<sup>206</sup> The three-judge panel that first heard the case<sup>207</sup> relied explicitly on *Mapelli* to hold that there was not enough evidence to support the deliberate ignorance instruction by the trial court.<sup>208</sup> This conclusion was then reversed

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<sup>197</sup> See, e.g., *United States v. Johnson*, 459 F.3d 990, 992 n.3 (9th Cir. 2006) ("We review for abuse of discretion whether the factual foundation for a proposed instruction exists.").

<sup>198</sup> *United States v. Feingold*, 454 F.3d 1001, 1007 (9th Cir. 2006).

<sup>199</sup> 973 F.2d 769 (9th Cir. 1992).

<sup>200</sup> See, e.g., *id.* at 772 (conducting de novo review of the decision to instruct the jury on "conscious avoidance"); *United States v. Shannon*, 137 F.3d 1112, 1117 (9th Cir. 1998) ("The standard of review for the propriety of a "deliberate ignorance" . . . is de novo.").

<sup>201</sup> *United States v. Heredia (Heredia II)*, 483 F.3d 913, 922 (9th Cir. 2007) (en banc) ("We therefore abandon the *Asuncion* enterprise and re-adopt the normal rule applicable to jury instructions by reviewing the decision to give a deliberate ignorance instruction for abuse of discretion.").

<sup>202</sup> Rachel Zuraw, *Sniping Down Ignorance Claims: The Third Circuit in United States v. Stadtmayer Upholds Willful Blindness Instructions in Criminal Tax Cases*, 56 VILL. L. REV. 779, 788–90 (2012).

<sup>203</sup> *United States v. Mapelli*, 971 F.2d 284, 285 (9th Cir. 1992).

<sup>204</sup> *Id.* at 286.

<sup>205</sup> Zuraw, *supra* note 202, at 789.

<sup>206</sup> *Heredia II*, 483 F.3d at 924.

<sup>207</sup> *United States v. Heredia*, 429 F.3d 820 (9th Cir. 2005).

<sup>208</sup> *Id.* at 825, 828.

by the en banc court, which found there *was* sufficient evidence to support the instruction.<sup>209</sup> Writing for the court, Chief Judge Kozinski said bluntly that the court was not concerned that the deliberate ignorance instruction “risks lessening the state of mind that a jury must find to something akin to recklessness or negligence. The instruction requires the jury to find beyond a reasonable doubt that defendant ‘was aware of a high probability’ of criminality and ‘deliberately avoided learning the truth.’”<sup>210</sup>

#### H. Comments

With *Heredia*, the Ninth Circuit liberalized the use of deliberate ignorance instructions and allowed their use in tax and fraud cases. Hopefully these instructions—and the deliberate ignorance theory of prosecution—will continue to be an important means of prosecuting sovereign citizens like Miles Julison for tax fraud and false claims.

First, as one of the circuit courts recently explained in *United States v. Stadtmauer*,<sup>211</sup> nothing in *Cheek* is inconsistent with a deliberate ignorance instruction.<sup>212</sup> *Cheek* held that criminal liability did not attach to “a person who, in good faith, is ignorant of [their legal] duty, misunderstands it, or believes it does not exist.”<sup>213</sup> This is a far cry from the “person who *deliberately* avoids learning of a legal duty.”<sup>214</sup>

By definition, one who *intentionally* avoids learning of his tax obligations is not a taxpayer who “earnestly wish[es] to follow the law,” or fails to do so as a result of an “innocent error[ ] made despite the exercise of reasonable care.” Rather, a person who deliberately evades learning his legal duties has a subjectively culpable state of mind that goes beyond mere negligence, a good faith misunderstanding, or even recklessness.<sup>215</sup>

At least according to the *Stadtmauer* court, criminal liability is appropriate for such a person.

Second, the case of Miles Julison is a perfect example of why the deliberate ignorance instruction is important, and why it provides a proper basis for liability in these cases. While the evidence indicated Julison wholeheartedly believed much of the sovereign-citizen conspiracy theories, it is hard to classify this belief as good faith. The deliberate-

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<sup>209</sup> *Heredia II*, 483 F.3d at 924.

<sup>210</sup> *Id.* (citation omitted).

<sup>211</sup> 620 F.3d 238 (3d Cir. 2010).

<sup>212</sup> *Id.* at 256; *see also* *United States v. Anthony*, 545 F.3d 60, 64–65 (1st Cir. 2008); *United States v. Dean*, 487 F.3d 840, 851 (11th Cir. 2007); *United States v. Bussey*, 942 F.2d 1241, 1248–49 (8th Cir. 1991).

<sup>213</sup> *Stadtmauer*, 620 F.3d at 255.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 256 (alterations in original) (citations omitted) (quoting *Cheek v. United States*, 498 U.S. 192, 205 (1991)).

ignorance instruction explains why. The evidence showed Julison was most likely aware of a high probability that what he was doing was illegal, and any belief that his 1099-OID scheme was legal was only in the face of overwhelming evidence to the contrary. His choice to believe the sovereign citizen ideology appears to have been a very deliberate one, predicated on significant research and information.

In this sense, Miles Julison is no different from the drug courier described in *Mapelli*, who deliberately chose not to look in the secret compartment in the trunk of the car because he knew full well what he would find there. He—and other sovereign citizens—should not benefit from the good-faith defense because they refuse to believe the obvious truth. Like the ordinary tax protester described in *Cheek*, they must assume the risk of being wrong.

Hopefully, the Ninth Circuit's *Heredia* opinion, combined with the *Julison* court's decision to issue this instruction, will help eliminate any doubt that the deliberate ignorance instruction is appropriate and can play a vital part in the prosecution of sovereign citizens for tax fraud and false-claim crimes. While juries appear to do the right thing in the vast majority of these cases and reject the good-faith defense,<sup>216</sup> this instruction can help them draw the line between good faith and willful criminal conduct.

#### IV. COMBATING PAPER TERRORISM

The other major problem associated with sovereign citizens is their paper terrorism.<sup>217</sup> The *New York Times* recently reported on this problem, telling what is an increasingly common story.<sup>218</sup> In 2009, Minnesota couple Thomas and Joan Eilertson's Minneapolis home went into foreclosure; a sheriff's sale was held, and in July of 2010 they were evicted.<sup>219</sup>

Somewhere during this time, the Eilertsons met someone online who explained how they too could use the legal system to retaliate by filing liens against the people involved—"death by a thousand paper cuts,"

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<sup>216</sup> See Anker, *supra* note 140, at 1325 ("[I]t may be presumed that it is the rare defendant who will be able to convince a jury, made up of persons who pay taxes, that he or she has a good faith belief that wages are not taxable."). *But see Annual Business Report: Fiscal Year 2012*, INTERNAL REVENUE SERVICE CRIMINAL INVESTIGATION at 9–10, <http://www.irs.gov/pub/foia/ig/ci/REPORT-fy2012-ci-annual-report-05-09-2013.pdf> (detailing prosecution and conviction rates for CID's "questionable refund program," and noting that in 2012, out of the 921 investigations initiated, 574 prosecutions were recommended, 507 indictments or informations were issued, and 262 were sentenced—bringing the total conviction rate to roughly 51%).

<sup>217</sup> See *supra* Part II.C.3.

<sup>218</sup> Goode, *supra* note 39.

<sup>219</sup> Emily Gurnon, *Couple Accused of Harassing Hennepin County Officials with \$114 Billion in Bogus Liens*, PIONEER PRESS, Jan. 5, 2012, [http://www.twincities.com/ci\\_19676868](http://www.twincities.com/ci_19676868).

the anonymous person called it.<sup>220</sup> Under most state laws, the Secretary of State or other filing office must simply accept and file liens under the Uniform Commercial Code and cannot judge their validity.<sup>221</sup> The Eilertsons followed the instructions, filing \$114 billion worth of false liens against a number of County officials including Hennepin County Sheriff Richard Stanek, the County Attorney, the Register of Titles, the Examiner of Titles as well as a number of private attorneys who had represented the banks and credit card companies who sought to collect from them.<sup>222</sup>

Like many of these people, Sheriff Stanek only learned of this when he went to refinance his house and was informed that more than \$25 million of liens encumbered his home and other properties.<sup>223</sup> “It must be a mistake” he said.<sup>224</sup> But it was not—the Eilertsons had done their damage.

Although the perpetrators of this form of harassment do not often try to collect on the liens, their very existence is trouble enough. The liens can create serious financial hardships for victims.<sup>225</sup> Credit ratings are often severely damaged, and the time and expense needed to clear up the liens can be tremendous.<sup>226</sup> Clearing a victim’s name and credit can take months or even years, and sometimes thousands of dollars in legal expenses.<sup>227</sup>

For example, sovereign citizen Richard McLaren, the “self-appointed ‘Chief Ambassador and Consul General’ of the ‘Republic of Texas,’”<sup>228</sup> used false filings to engage in protracted legal battles that cost his victims an estimated \$450,000.<sup>229</sup> Although one of McLaren’s opponents, Stewart Title Company, won a \$1.8 million judgment against him, as well as a permanent injunction prohibiting him from filing more liens against the company, neither of these had any real effect.<sup>230</sup> McLaren is currently serving a 99-year sentence for a kidnapping.<sup>231</sup> He was also convicted in federal court for 26 counts of fraud and conspiracy, for which he was sen-

<sup>220</sup> *Id.*

<sup>221</sup> Goode, *supra* note 39.

<sup>222</sup> Gurnon, *supra* note 219.

<sup>223</sup> Goode, *supra* note 39.

<sup>224</sup> *Id.*

<sup>225</sup> National Association of Secretaries of State, *State Strategies to Subvert Fraudulent Uniform Commercial Code (UCC) Filings: A Report for State Business Filing Agencies* at 3 (Apr. 2014), [http://www.nass.org/component/docman/?task=doc\\_download&gid=1329&Itemid=](http://www.nass.org/component/docman/?task=doc_download&gid=1329&Itemid=) [hereinafter NASS Report].

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> McLaren v. U.S. Inc., 2 F. Supp. 2d 48, 49 (D.D.C. 1998).

<sup>229</sup> Mark Pitcavage, *Paper Terrorism’s Forgotten Victims: The Use of Bogus Liens Against Private Individuals and Businesses*, ANTI-DEFAMATION LEAGUE (June 28, 1998), <http://archive.adl.org/mwd/privlien.html>.

<sup>230</sup> *Id.*

<sup>231</sup> McLaren v. State, 104 S.W.3d 268, 270 (Tex. App. 2003).

tenced to 151 months.<sup>232</sup>

Faced with a sharp increase in these paper terrorism tactics, many states have responded with legislation, including Minnesota.<sup>233</sup> In 2006, the Minnesota legislature criminalized actions like this, making it a gross misdemeanor to knowingly file a false lien with intent to harass or defraud, and a felony to file a false lien against certain public officers with intent to retaliate or influence a judicial proceeding.<sup>234</sup> The Eilertsons were among the first to be prosecuted under this new law, and were charged with 47 counts of fraudulent filing.<sup>235</sup> They were eventually convicted and sentenced to 23 months in prison.<sup>236</sup>

### A. *Different Approaches*

Minnesota's criminalization of filing false liens is just one way states are responding to this "explosion" of "bogus UCC filings."<sup>237</sup> The National Association of Secretaries of State (NASS) has tried to help states deal with this kind of pseudo-legal harassment, and since 2004, NASS has issued recommendations aimed at achieving "a more uniform, nationwide response to the problem."<sup>238</sup> NASS classifies legislation into four basic approaches: (1) pre-filing administrative discretion, (2) post-filing administrative relief, (3) post-filing expedited judicial relief, and (4) enhanced criminal/civil penalties.<sup>239</sup>

Many states, like Minnesota and Oregon, apply a combination of these techniques for a more comprehensive solution. In order to compare and contrast the benefits of each, a brief look at the different approaches is warranted.<sup>240</sup>

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<sup>232</sup> See *United States v. McLaren*, 232 F.3d 207, WL 1272464 at \*3 (5th Cir. 2000).

<sup>233</sup> NASS Report, *supra* note 225, at app. I–IV.

<sup>234</sup> MINN. STAT. § 609.7475 (2014); 2006 Minn. Laws ch. 260, Art. 7, § 13.

<sup>235</sup> *State v. Eilertson*, No. A13-1682, 2014 WL 4288636, at \*1 (Minn. Ct. App. Sept. 2, 2014); Goode, *supra* note 39.

<sup>236</sup> However, Eilertson's sentence was overturned on appeal. *Eilertson*, 2014 WL 4288636, at \*4 (reversing and remanding for resentencing). Eilertson pleaded guilty to 12 counts of false filing, one for each victim, and agreed to a level III sentence. The State agreed to a downward departure if Eilertson removed the liens before sentencing. *Id.* at \*1. Eilertson failed to remove the liens before sentencing, was given the level III sentence, and successfully attacked his sentence on the grounds that the district court improperly substituted his agreement to a level III sentence for the required factual findings necessary to support such a sentence. *Id.* at \*1, \*4.

<sup>237</sup> NASS Report, *supra* note 225, at 4.

<sup>238</sup> *Id.* at 3.

<sup>239</sup> *Id.* at 7.

<sup>240</sup> The reader interested in greater detail on this subject should consult the NASS Report, *id.*, as well as the Pitcavage article, *supra* note 229. Also, the National Conference of State Legislatures published a short book proposing model legislation. DENISE GRIFFIN & L. CHERYL RUNYON, NAT'L CONFERENCE OF STATE LEGISLATURES, THE RADICAL COMMON LAW MOVEMENT AND PAPER TERRORISM: THE STATE RESPONSE

### 1. *Pre-Filing Discretion*

Under the traditional language of the Uniform Commercial Code Article 9, the Secretary of State's office has no authority to verify the legitimacy of documents presented for filing and must file liens and judgments even if they are "blatantly fraudulent."<sup>241</sup> This is one of the main reasons sovereigns, like the Posse Comitatus before them, have been able to use this tactic to harass their opponents in retaliation for their perceived injustices.<sup>242</sup>

Pre-filing discretion tries to close this loophole and nip the problem in the bud by giving filing offices the ability to reject false and fraudulent documents *before* they are filed.<sup>243</sup> As the NASS Report acknowledges, the obvious benefit of this approach is that it prevents the bogus lien from being filed in the first place, and therefore averts the intended harm to the victim.<sup>244</sup> NASS also notes the added bonus of maintaining the integrity of the system by preventing fraudulent entries from becoming part of the public record.<sup>245</sup> The other virtue here is the greater freedom in drafting at this stage; because these statutes only embody filing requirements, they can be phrased broadly without the possibility of running afoul of the void-for-vagueness doctrine or the First Amendment.<sup>246</sup>

The significant downside to this approach is the increased costs associated with the active review of documents presented for filing.<sup>247</sup> Systems need to be implemented, personnel must be trained on what to look for, and some amount of time must be spent actually reviewing the documents.<sup>248</sup> Given this increased burden, smaller filing offices, such as county clerks, may not have the resources to do much good in stopping anything more than the most blatant of frauds.

At least 19 states have adopted some form of statutory pre-filing remedy, although the *amount* of discretion they give the filing office seems to vary considerably.<sup>249</sup> The consensus on this point seems to favor more dis-

(2000). For a social science perspective on the spread of anti-lien statutes during the 1990's, see Robert Chamberlain & Donald P. Haider-Markel, "*Lien on Me*": *State Policy Innovation in Response to Paper Terrorism*, 58 POL. RES. Q. 449–60 (2005) (identifying the variables that led to passage of these laws).

<sup>241</sup> NASS Report, *supra* note 225, at 6.

<sup>242</sup> David Fleishman, *Paper Terrorism: The Impact of the "Sovereign Citizen" on Local Government*, PUB. L.J., Spring 2004, at 7, 8, [http://hflegal.net/files/paper\\_terrorism.pdf](http://hflegal.net/files/paper_terrorism.pdf).

<sup>243</sup> NASS Report, *supra* note 225, at 8.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> See generally Julia Melle, *Illogical Extremes: The Sovereign Citizens Movement and the First Amendment*, 22 TEMP. POL. & CIV. RTS. L. REV. 554 (2013) (dealing more thoroughly with the possible First Amendment conflicts).

<sup>247</sup> NASS Report, *supra* note 225, at 8.

<sup>248</sup> See *id.*

<sup>249</sup> *Id.*

cretion rather than less, with agreement from both the NASS Report and the comments by Mark Pitcavage, a militia and extremist-group watchdog with the Anti-Defamation League.<sup>250</sup> As NASS said, “For a pre-filing remedy to be most effective, it must be comprehensive enough to cover the various types of bogus UCC filings.”<sup>251</sup> Keeping pace with the evolving techniques of sovereign citizens and weeding out their spurious documents requires a “more general standard,” rather than a rule-heavy approach.<sup>252</sup>

NASS points to South Carolina law as a model here,<sup>253</sup> which allows (but does not require) the Secretary of State to reject documents if it “determines that the record is not created pursuant to [the UCC] or is otherwise intended for an improper purpose, such as to defraud, hinder, harass, or otherwise wrongfully interfere with a person.”<sup>254</sup> The law also allows the office to refuse if “the same person or entity is listed as both debtor and secured party, the collateral described is not within the scope of this chapter, or [it is determined] that the record is being filed for a purpose other than a transaction that is within the scope of this chapter.”<sup>255</sup> This explicitly covers some basic sovereign techniques, yet still gives the office authority to reject documents in pursuit of any “improper purpose”—hopefully covering whatever scheme might come along next.

Oregon is another leader in this area, with what one commentator has called one of the “most aggressive” laws.<sup>256</sup> Like South Carolina, Oregon allows a filing office to refuse a document for filing if “the record on its face reveals . . . that the record is being filed for a purpose other than a transaction that is within the scope of this chapter.”<sup>257</sup>

Regulations passed in accordance with the statute further set out reasons for which the filing office can reject a record.<sup>258</sup> These specifically include a number of red flags that should indicate a sovereign citizen, such as collateral descriptions or attachments that contain a Birth Certificate, Driver’s License, Treasury Account number, Bill of Exchange, or simply “dollar amount(s) that are disproportionately large.”<sup>259</sup> Other signals of a sovereign citizen that allow the office to reject the record are references to UCC 1-103 (and their other favorite sections), House Joint Resolution 192 of June 1933, and the following words or phrases: “ex-

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<sup>250</sup> *Id.*; Pitcavage, *supra* note 229 (“[T]here is already some evidence that some laws may be phrased too narrowly.”).

<sup>251</sup> NASS Report, *supra* note 225, at 8.

<sup>252</sup> *See id.*

<sup>253</sup> *Id.*

<sup>254</sup> S.C. CODE ANN. tit. 253, § 36-9-516(8) (2013).

<sup>255</sup> *Id.* § 36-9-516(9).

<sup>256</sup> Sara A. Wiswall, *Remedies for Removing Unlawful Liens or Encumbrances: A Response to “Paper Terrorism,”* 30 MCGEORGE L. REV. 546, 553 (1999).

<sup>257</sup> OR. REV. STAT. § 79.0516(2)(h) (2013).

<sup>258</sup> OR. ADMIN. R. tit. 257, § 160-040-0202 (2014).

<sup>259</sup> *Id.* § 160-040-0202(3)(a).

empt from levy,” “accepted for value,” “actual and constructive notice,” “strawman,” or “notice of dishonor.”<sup>260</sup> This gives Oregon filing offices numerous reasons to refuse sovereign-citizen filings.

## 2. *Post-Filing Administrative Relief*

Traditionally, once a false lien or encumbrance is filed, the UCC severely limits a victim’s recourse.<sup>261</sup> He or she can file an “information statement” that notes the alleged debt is disputed.<sup>262</sup> The victim “debtor” can also demand the lienholder (or “secured party” in the parlance of the UCC) file a “termination statement” acknowledging that the purported lien is invalid.<sup>263</sup> If the lienholder does not respond within a certain time, the victim can file the statement on his or her own.<sup>264</sup> However, the UCC requires the lien—even if no longer effective—to remain in the record for at least a year after it has lapsed.<sup>265</sup> Most states require a court order to completely remove a bogus lien from the public registry.<sup>266</sup>

Post-filing administrative remedies are designed to provide a quicker and less burdensome route to this goal than going through the courts.<sup>267</sup> These laws give the Secretary of State and other filing offices the ability to cancel an existing lien or remove it from the public record.<sup>268</sup> At least fourteen states have such a law.<sup>269</sup>

The downside to these laws is that the false lien still gets filed and the victim often does not find out until it has already caused some kind of trouble for them.<sup>270</sup> Also, because the filing office is terminating a property right by extinguishing the lien, due process requires the office to give the purported lienholder notice and an opportunity to be heard.<sup>271</sup>

Montana law provides a simple, workable example:

If a filing officer receives a complaint or has reason to believe that a lien submitted or filed with the filing officer’s office is improper or fraudulent, the filing officer may reject the submission or remove the filing from existing files after giving notice and an op-

<sup>260</sup> *Id.* § 160-040-0202(3)(c).

<sup>261</sup> See NASS Report, *supra* note 225, at 6.

<sup>262</sup> *Id.*; see U.C.C. § 9-518 (2014) (claim concerning inaccurate or wrongfully filed record).

<sup>263</sup> NASS Report, *supra* note 225, at 6; see U.C.C. § 9-513 (2014) (Termination Statement).

<sup>264</sup> NASS Report, *supra* note 225, at 6; see U.C.C. § 9-513 cmt. 3 (“Bogus” Filings).

<sup>265</sup> NASS Report, *supra* note 225, at 6; see U.C.C. § 9-513 cmt. 5 (explaining that the lien and the termination statement must remain “of record” for at least one year).

<sup>266</sup> NASS Report, *supra* note 225, at 3.

<sup>267</sup> *Id.* at 9.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

portunity to respond to the secured party and the debtor.<sup>272</sup>

Such statutes can help provide quicker and more complete relief to victims by actually removing the lien from the record, while at the same time not placing too large a burden on the filing office to screen everything before it is filed.

### 3. *Post-Filing Expedited Judicial Remedies*

This approach is fairly self-explanatory. It seeks to accelerate the usual judicial-based process for obtaining a court order expunging or removing false liens from the record.<sup>273</sup> At least nine states have adopted this type of remedy.<sup>274</sup> Minnesota is among these, and in addition to its criminal penalties, the state has cut the time it takes to remove a lien down to a matter of weeks.<sup>275</sup>

Under the Minnesota statute, a victim who has been targeted with a bogus lien can file a motion in their local district court, supported by an affidavit briefly stating the facts and explaining the grounds on which the claim for relief is based.<sup>276</sup> After the purported lienholder has been properly served, he or she has 20 days in which to respond and request a hearing.<sup>277</sup> If no response is received, the court will consider the victim's motion on the supporting documentary evidence only, without either a hearing or further testimony.<sup>278</sup> Upon a finding that the lien is invalid, the court can order the lien removed from the public record, so that it will not be reflected in any search.<sup>279</sup>

To make the process even easier on targets of false filings, the statute itself contains all the necessary language for the victim to include in the motion, the supporting affidavit, and even an affidavit of mailing.<sup>280</sup> In addition to providing that there is no filing fee for such a motion,<sup>281</sup> the court can award the prevailing party costs and fees, including attorney fees, if the purported lienholder opposes the motion at a hearing.<sup>282</sup>

### 4. *Enhanced Criminal/Civil Penalties*

Finally, at least fifteen states and the federal government have criminalized the fraudulent submission of certain documents for filing.<sup>283</sup>

<sup>272</sup> MONT. CODE ANN. § 30-9A-420(1) (2013).

<sup>273</sup> NASS Report, *supra* note 225, at 9.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 10 (referring to MINN. STAT. § 545.05 (2012)).

<sup>276</sup> MINN. STAT. § 545.05(3)(b).

<sup>277</sup> *Id.* § 545.05(7).

<sup>278</sup> *Id.* § 545.05(10)(b).

<sup>279</sup> *Id.* § 545.05(11). The lien, along with the court's finding of fact and conclusions of law will be retained for the same period the lien would have been filed. *Id.*

<sup>280</sup> *Id.* § 545.05(4)-(6).

<sup>281</sup> *Id.* § 545.05(3)(b).

<sup>282</sup> *Id.* § 545.05(12).

<sup>283</sup> NASS Report, *supra* note 225, at 10.

Again, at least fifteen states also have some sort of *civil* penalty for filing false liens.<sup>284</sup> While the particulars vary, these statutes are intended to deter and punish false filings as a harassment technique.<sup>285</sup>

*a. Federal Criminal Law*

The federal law is of fairly recent vintage, dating to Congress's passage of the Court Security Improvement Act of 2007.<sup>286</sup> With this Act, the federal government explicitly criminalized filing or attempting to file false liens when the target is a federal judge, law enforcement officer, or employee of the United States.<sup>287</sup> The filer must know or have reason to know "that such lien or encumbrance is false or contains any materially false, fictitious, or fraudulent statement or representation."<sup>288</sup> Also, the filing must be done in retaliation for acts taken by the government official in the performance of his or her duties.<sup>289</sup>

Because the law is both new and relatively narrow in scope, there have not been many prosecutions.<sup>290</sup> The first was former leader of the Montana Freeman, Daniel E. Petersen, who was convicted in 2009 and sentenced to seven-and-a-half years in prison after he filed liens against three federal judges.<sup>291</sup>

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<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 201, 121 Stat. 2534, 2536 (2008).

<sup>287</sup> 18 U.S.C. § 1521 (2012) (referring to federal judges and law enforcement officers explicitly, and other employees and officers by reference to 18 U.S.C. § 1114).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> As of November 29, 2014, a Westlaw search yielded 60 cases citing to § 1521, putting the likely number of actual prosecutions at somewhere fewer than this.

<sup>291</sup> Amy Forliti, *Militia Member Is 1st Sentenced for Retaliation*, BOSTON.COM (Apr. 7, 2010), [http://www.boston.com/news/nation/articles/2010/04/07/militia\\_member\\_is\\_1st\\_sentenced\\_for\\_retaliation/](http://www.boston.com/news/nation/articles/2010/04/07/militia_member_is_1st_sentenced_for_retaliation/). Peterson's story is yet another tale of unbelievably outrageous sovereign-citizen behavior. Peterson and another leader of the Montana Freeman were first convicted of fraud and conspiracy charges in 1996 for using false liens to fund much of the Freeman's ventures. While in prison, Peterson sent a ten-page, handwritten demand letter to then Secretary of State Madeline Albright, demanding \$100 trillion, plus another \$1 billion a day for his "unlawful" confinement. When no response was received, Peterson obtained a "default judgment" from his old friends at the Common Law Court of Justus Township, a court convened by the Freeman. He then began filing lines against the judges who had taken part in his earlier prosecution. Peterson also formed a fake company with the judgment, and sold other inmates shares, promising them returns on their investments when he collected on the judgment. Peterson was apparently warned a number of times that what he was doing was illegal, yet continued until federal prosecutors charged him under § 1521. *Id.*; see Press Release, Fed. Bureau of Investigation, Member of Montana Freeman Militia First to be Sentenced Under Federal Anti-Retaliation Law (Apr. 6, 2010), <http://www.fbi.gov/minneapolis/press-releases/2010/mp040610a.htm>.

The first reported appellate opinion construing section 1521 did not come until 2012, in the Eighth Circuit case of *United States v. Reed*.<sup>292</sup> Defendants in that case, Michael Reed and Gregory Davis, both “irrationally believe[d] that their membership in the Little Shell Nation, an unrecognized Indian tribe, mean[t] they [were] not United States citizens subject to the jurisdiction of the federal courts.”<sup>293</sup> After Judge Daniel Hovland, of the District of North Dakota, denied Reed’s motion to dismiss a fire-arm charge pending against him, Davis and Reed conspired to file a \$3.4 million lien against the Judge and an acting U.S. Attorney.<sup>294</sup>

The two represented themselves at trial and were convicted.<sup>295</sup> On appeal, part of Davis’s argument was that the lien did not sufficiently identify collateral property belonging to debtors, making it ineffective and, therefore, *not* a violation of the statute.<sup>296</sup> The court rejected this, noting that “[t]he prohibition in 18 U.S.C. § 1521 is triggered by the *fil-ing* of a false or fictitious lien, whether or not it effectively impairs the government official’s property rights and interests. Indeed, legal insufficiency is in the nature of the false, fictitious, and fraudulent liens and encumbrances that Congress intended to proscribe.”<sup>297</sup>

Since then, there have been several other circuit court decisions on the new crime.<sup>298</sup> A notable one came in 2014 with *United States v. Williamson*,<sup>299</sup> where the Tenth Circuit upheld the district court’s refusal to give a good-faith instruction, explaining that under the “reason to know” language of section 1521, “a defendant can be guilty even if he honestly believed that he filed a proper lien so long as the belief was not a reasonable one.”<sup>300</sup> Only time will tell how courts will apply section 1521 and, ultimately, how effective the statute will be as a deterrent, but given the possible ten-year sentences, it should at least help in the fight against filings against federal employees.

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<sup>292</sup> 668 F.3d 978 (8th Cir. 2012).

<sup>293</sup> *Id.* at 981.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* Davis testified on his own behalf at trial, explaining his belief that he had a right to file the liens after the government “took Mr. Reed.” *Id.* at 982.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 984–85 (emphasis added).

<sup>298</sup> See, e.g., *United States v. Davenport*, 515 F. App’x 681, 682 (9th Cir. 2013) (upholding a conviction against a challenge that the liens did not attach and that the government did not prove mens rea); *United States v. Chance*, 496 F. App’x 302, 305 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 2740 (2013) (upholding conviction against challenge based on the trial court’s exclusion of an expert witness on mens rea, much like that presented in the *Julison* trial); *United States v. Hoodenpyle*, 461 F. App’x 675, 677, 681–82 (10th Cir. 2012) (affirming that IRS employees are protected under the statute, that it is a well-settled matter of law that the IRS is an agency of the United States, and that the trial court did not commit plain error by instructing the jury on what a lien or encumbrance was under Colorado law).

<sup>299</sup> 746 F.3d 987 (10th Cir.), *cert. denied*, 135 S. Ct. 152 (2014).

<sup>300</sup> *Id.* at 994.

*b. State Criminal Laws*

States have taken a variety of approaches when adding false liens to their criminal statutes.<sup>301</sup> Fortunately, the states have generally *not* drafted as narrowly as did Congress, and instead seek to prevent false filings against private citizens and organizations as well as public employees.<sup>302</sup>

Georgia has one of the broader statutes,<sup>303</sup> making it a crime to file a false “document,” a term which includes liens, encumbrances, documents of title, or other records.<sup>304</sup> There is no requirement that the filing be done in retaliation or with intent to harass.<sup>305</sup> The mental state required for conviction is simply that the defendant knowingly filed, entered, or recorded any document in a court or public record and that the defendant knew or had reason to know the “document [was] false or contain[ed] a materially false, fictitious, or fraudulent statement or representation.”<sup>306</sup> The crime is a felony, punishable by imprisonment for no less than one year and no more than ten, a fine up to \$10,000, or both.<sup>307</sup>

On the other hand, California has a fairly narrow retaliation statute,<sup>308</sup> which essentially follows the federal lead in criminalizing only liens and encumbrances against public officials, pertaining to actions that arise in the scope of their official duties, when the filer acts with intent to harass or influence the official.<sup>309</sup>

But this is only part of California’s efforts to stymie such actions. The State has long made it a felony to knowingly offer false or forged instruments for filing or recording in any public office.<sup>310</sup> The state offers public employees an expedited judicial remedy for removal of liens and encumbrances.<sup>311</sup> And in 2014, California changed the law regarding the removal of bogus liens—making removal a matter of course following

<sup>301</sup> See NASS Report, *supra* note 225, at app. IV.

<sup>302</sup> See *id.*

<sup>303</sup> GA. CODE ANN. § 16-10-20.1 (West 2014). At first, Georgia followed the federal approach, criminalizing only false filings targeting public employees in retaliation for their official duties. 2012 Ga. Laws 582 (H.B. 997). In 2014, the legislature removed these requirements, broadening the statute to its current form that applies to the filing of *any* false or fraudulent documents. 2014 Ga. Laws 626 (H.B. 985).

<sup>304</sup> GA. CODE ANN. § 16-10-20.1(a).

<sup>305</sup> *Id.*

<sup>306</sup> *Id.* § 16-10-20.1(b). There is another prong under which defendants can be convicted if they “[k]nowingly alter, conceal, cover up, or create a document and file, enter, or record it in a public record or court of this state or of the United States knowing or having reason to know that such document has been altered or contains a materially false, fictitious, or fraudulent statement or representation.” *Id.* § 16-10-20.1(b)(2).

<sup>307</sup> *Id.* § 16-10-20.1(c).

<sup>308</sup> CAL. GOV’T CODE § 6223 (West 2014).

<sup>309</sup> *Id.*

<sup>310</sup> CAL. PENAL CODE § 115(a) (West 2014). The filing of forged real estate documents is also criminal under § 115(f)(5).

<sup>311</sup> CAL. CIV. PROC. CODE §§ 765.010–765.030 (West 2015).

conviction (or plea) under the falsified public records statute.<sup>312</sup>

As noted previously, Minnesota has taken a sensible, if somewhat middle of the road, approach. The state has made it a crime for a person to knowingly present a record for filing, or promote the filing of a record that is not “related to a valid lien or security agreement;” or that contains a forged signature (or is based upon a forged signature); or that is presented “with the intent that it be used to harass or defraud any other person.”<sup>313</sup> The crime itself is worded broadly enough to include promoters and anyone who “causes [an invalid record] to be presented for filing.”<sup>314</sup>

The penalties are graded according to certain factors.<sup>315</sup> An ordinary first-time conviction will be a gross misdemeanor.<sup>316</sup> A violation becomes a felony if it is a second offense.<sup>317</sup> It is also a felony if the defendant acts with intent to influence or tamper with a juror or judicial proceeding, or if the crime is committed with intent to retaliate against a list of public officials (including judges, prosecutors, defense attorneys, police officers, sheriffs, deputy sheriffs, or Department of Corrections staff).<sup>318</sup> In this case, the felony is punishable by no more than 5 years in prison and/or fines up to \$10,000.<sup>319</sup>

This strategy of broad but graded crimes or penalties is not uncommon, having been adopted by a number of states.<sup>320</sup> With several large jurisdictions like Texas and New York taking this approach, an increasing amount of case law should become available to help courts and practitioners in these states deal with the construction and application of some relatively new laws.

Finally, there is a group of states, like Oregon, that have simply used their existing criminal statutes for “simulating legal process” to prosecute the filing of false liens and other paper terrorism.<sup>321</sup> These statutes were

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<sup>312</sup> See CAL. PENAL CODE § 115 (West 2015).

<sup>313</sup> MINN. STAT. ANN. § 609.7475 subdiv. 2 (West 2015).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* § 609.7475 subdiv. 3.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> See, e.g., ALA. CODE § 13A-9-12 (LexisNexis 2013); ARK. CODE ANN. § 5-37-215 (2013); N.Y. PENAL LAW § 175.30 (McKinney 2010) (offering a false instrument for filing in the second degree); N.Y. PENAL LAW § 175.35 (McKinney 2015) (amended effective Nov. 1, 2014) (first degree); N.D. CENT. CODE § 41-10-02 (2010); TEX. PENAL CODE ANN. § 37.101 (West 2011); UTAH CODE ANN. § 76-6-503.5 (LexisNexis 2012); W. VA. CODE ANN. § 46-9-516a (LexisNexis 2013) (effective July 12, 2013).

<sup>321</sup> OR. REV. STAT. § 162.355 (2014). In 1997 Oregon updated its law to explicitly include a non-exhaustive list of the type of legal process that cannot be simulated, including liens. 1997 Or. Laws 395. In 2005, Oregon raised the mens rea requirement, so that a violation required the defendant to simulate the legal process “with intent to harass, injure or defraud another person.” 2005 Or. Laws 2. Prior to that, the mens rea requirement had been “knowingly.” See 1971 Or. Laws 1933.

originally passed to combat “common law courts” and some other quasi-legal activities of the Posse Comatatus.<sup>322</sup> Because false liens have been a favorite tactic of the Posse and their ilk since the 1980’s,<sup>323</sup> many of these laws were originally drafted broadly enough to combat this tactic.<sup>324</sup> While this group of statutes may have a slightly older vintage, they can still be readily used to prosecute sovereign citizens and hopefully deter some of their antics.<sup>325</sup>

*c. Civil Penalties*

Civil penalties are one of the most common forms of sanction that can be used against sovereign citizens to fight paper terrorism. Federal Rule of Civil Procedure 11 allows courts to levy sanctions against pro se litigants who file frivolous or improper claims.<sup>326</sup> While not all states have an analogous rule,<sup>327</sup> most do.<sup>328</sup>

Oregon courts also allow sanctions as a tool to deal with sovereign citizens. Oregon Rule of Civil Procedure 17 allows a court to sanction parties under similar circumstances as Federal Rule 11.<sup>329</sup> Oregon also

<sup>322</sup> Daniel Lessard Levin & Michael W. Mitchell, *A Law Unto Themselves: The Ideology of the Common Law Court Movement*, 44 S.D. L. REV. 9, 32–34 (1999).

<sup>323</sup> *Id.* at 33.

<sup>324</sup> *See, e.g.*, FLA. STAT. ANN. § 843.0855 (West 2014) (“Criminal actions under color of law or through use of simulated legal process”); IDAHO CODE ANN. § 18-3005 (West 2014) (“Intimidation by false assertion of authority”); WIS. STAT. ANN. § 943.60 (West 2014) (“Criminal slander of title”); MO. ANN. STAT. § 575.130 (West 2012) (prohibiting the filing of a “nonconsensual common law lien”); MO. ANN. STAT. § 428.105(3) (West 2012) (defining nonconsensual common law lien); S.D. CODIFIED LAWS § 22-11-31 (2014).

<sup>325</sup> *See, e.g.*, *State v. Karczewski*, 138 P.3d 62 (Or. Ct. App. 2006) (affirming without opinion a conviction for simulating legal process where the defendant delivered documents to seven people indicating that they each owed defendant millions of dollars and defendant claimed to have liens against the individuals) (for greater detail see Respondent’s Brief at 2–3, *State v. Karczewski*, 138 P.3d 62 (Or. Ct. App. 2006) (No. CA A122754), 2005 WL 6796118, at \*2–3.)

<sup>326</sup> FED. R. CIV. P. 11(c)(1); *United States v. Martin*, 19 F. App’x 345, 346 (6th Cir. 2001) (ordering a \$4000 sanction against a pro se tax protester for a frivolous appeal and recounting the extensive sanctions he had already received in the 15 years of “obstinate” litigation); *Vukadinovich v. McCarthy*, 901 F.2d 1439, 1445 (7th Cir. 1990) (“Status as a pro se litigant may be taken into account, but sanctions can be imposed for any suit that is frivolous.”); *Auen v. Sweeney*, 109 F.R.D. 678, 680 (N.D.N.Y. 1986) (“It is also permissible to punish a pro se litigant who violates Rule 11 maliciously.” The court ordered the plaintiff to pay costs and attorney fees where the plaintiff argued the income tax was illegal because the 16th Amendment had not been ratified.)

<sup>327</sup> Theret, *supra* note 26, at 882.

<sup>328</sup> Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV 1067, 1094 (1994) (“[A]lmost all of the states have enacted statutes or procedural rules that parallel Federal Rule 11”).

<sup>329</sup> OR. R. CIV. P. 17. Oregon Rule 17 closely mirrors Federal Rule 11.

has a statute that allows for an award of costs and fees against a party who “willfully disobey[s] a court order” or asserts a claim or defense with “no objectively reasonable basis.”<sup>330</sup>

Oregon also recognizes the tort of “slander of title,” which allows a plaintiff to collect damages if four elements are present: “(1) uttering and publishing slanderous words; (2) falsity of the words; (3) malice; and (4) special damages.”<sup>331</sup> The majority of states recognize this tort, with various adaptations.<sup>332</sup>

Further, many of the false lien statutes referenced above have a civil penalty component.<sup>333</sup> According to the NASS report, at least 15 states have such a provision.<sup>334</sup> “Many of these laws permit victims to seek damages, court costs, attorney’s fees, related expenses, and injunctions.”<sup>335</sup> Some of these even provide fines for fraudulent filings, such as the \$500 fee per filing in West Virginia and the Georgia law that allows a fine up to \$10,000.

While these sanctions can possibly act as a deterrent to those dabbling in the sovereign-citizen ideology, it seems highly unlikely to have much effect on the true believers. To a sovereign citizen who believes he is beyond the jurisdiction of the court or who believes he has a legitimately colorable claim that the Secretary of State truly owes him \$100 trillion, the effectiveness of threatening a fine—even a substantial one—seems minimal. “[E]xperience has shown in a number of different states that the individuals who use the tactic of bogus liens are not deterred at all by adverse civil judgments.”<sup>336</sup> And the prospect that a damage award will adequately repair a victim’s injuries seems equally far-fetched.

## V. CONCLUSION

Given this state of affairs, and the tremendous amount of resources someone like Miles Julison or the Eilertsons can cost taxpayers in fraud, litigation, and prison costs, it seems the best strategy is to keep sovereign citizens out of the courtroom as much as possible.

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<sup>330</sup> OR. REV. STAT. § 20.105 (2014).

<sup>331</sup> *Diamond v. Huffman*, 667 P.2d 1040, 1042 & n.1 (Or. Ct. App. 1983).

<sup>332</sup> See W.E. Shipley, Annotation, *Recording of Instrument Purporting to Affect Title as Slander of Title*, 39 A.L.R. 2d 840, 842 (1955) (“There is no doubt that the act of wrongfully filing of record an unfounded claim to the property of another is actionable as slander of title, given the other elements of that action, just as any other spoken or written assertion reflecting on the plaintiff’s ownership would be.”).

<sup>333</sup> NASS Report, *supra* note 225, at 10.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> Pitcavage, *supra* note 229 (“Many of them, in fact, are essentially judgment-proof, while court battles nearly always mean greater expenses in terms of time and money for the other party than for them (since the extremists will usually represent themselves).”).

On the paper-terrorism front, this goal can best be accomplished by taking a holistic approach to the problem that borrows from the best of each of the four methods described above. The broad pre-filing administrative remedy, like that in Oregon, can keep sovereigns' filings from entering the stream to begin with, and help deprive the perpetrators of any power over their victims. A quick administrative remedy like that in Montana, or an expedited judicial remedy as in Minnesota, can help victims clear liens and encumbrances easily and inexpensively, before they do more significant damage.

Of course, criminal sanctions can deter this behavior as well. According to the National Conference of State Legislatures, which has proposed model legislation available for states considering false lien laws, criminal laws can be effective.<sup>337</sup> Missouri passed legislation designed to fight fraudulent liens in 1996, and the "deterrent effect has been unmistakable. . . . [F]alse lien activity has virtually ceased."<sup>338</sup> A Texas county attorney said the problem of bogus filings "dropped off dramatically since the 1997 legislation."<sup>339</sup> Criminal sanctions, and a very real possibility of serious prison time, can have a much more powerful deterrent effect than civil penalties and fee-shifting ever will.

Criminal laws should only be a part of this battle, however, as there seems little indication that they will deter hard-core sovereign believers like Miles Julison. Further, a stint in prison can add to the problem by giving sovereigns a captive audience of fellow prisoners that is uniquely receptive to the ideas they are selling.<sup>340</sup> The SPLC has described the spread of the sovereign-citizen ideology through the prisons as "viral."<sup>341</sup>

The best strategy seems to be keeping these people out of the system if at all possible. The more quickly and unceremoniously courts and other public agencies can dismiss their frivolous filings, the better. Motions to dismiss their spurious lawsuits should be granted liberally, with as little expense to the defense as possible. In federal court, where the plaintiff is proceeding in forma pauperis, dismissal of a baseless claim under 28 U.S.C. § 1915(e) can be an effective tool.<sup>342</sup> With prisoners, the initial screening stage under the Prison Litigation Reform Act should also be used freely.<sup>343</sup> States should consider similar pre-filing screening mecha-

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<sup>337</sup> See GRIFFIN & RUNYON, *supra* note 240, at 9.

<sup>338</sup> *Id.* (internal quotation marks omitted).

<sup>339</sup> *Id.*

<sup>340</sup> Prison may have fueled the fires with some of the examples discussed in this article, such as Daniel Petersen, *supra* note 291, as well as the drama of Mr. Reed and Mr. Davis, *supra* note 292. See also Laird, *supra* note 80, at 58 ("They will go to prison and recruit everybody there," MacNab says. "Look at someone like [notorious tax defier] Irwin Schiff. He's been in and out of prison since the '70s and nothing has awakened him.").

<sup>341</sup> *Extremist Files*, *supra* note 24.

<sup>342</sup> See 28 U.S.C. § 1915(e) (2012).

<sup>343</sup> See 28 U.S.C. § 1915A (2012).

nisms that can ease the burden on already overworked courts, prevent harm to victims of this tactic, and avoid putting fuel on the fire of a sovereign's anger.

The fight against tax evasion and fraud of the type Miles Julison committed is a more difficult problem. Surely Congress needs to tighten the screen at the IRS that has let so many of these false refund claims succeed, including the 1099-OID variety. But the 1099-OID scheme is just one recent method in an evolving and ongoing problem. Greedy men like Miles Julison are sure to think up new and creative ways to try and game the system to get rich quick. As Congress and the IRS try to address this problem, adaptability is key. As sovereign citizens use the anonymity of the internet to spread their ideas, law enforcement can easily keep an ear to the ground there to hear about the new variations of schemes and tricks likely to come down the pipe next. Hopefully, Congress's response to the false refund problem will be broad enough to combat these future frauds.

Aggressive prosecution of the promoters and leaders can increase the deterrent effect, and even mid-level proponents of these schemes like Julison should be pursued and punished for their crimes. But there is surely an important difference between these truly malicious types, and the person who is merely dabbling in sovereign practices or who was simply guilty of being gullible and fell for a persuasive sales pitch. Graded punishments, like Minnesota's, have the benefit of making this distinction and focusing both punishment and resources where they are most effective.

Ultimately, courts dealing with defendants like Miles Julison are tasked with the difficult job of ensuring a fair trial to obstinate defendants who often refuse to cooperate. The court and the attorneys involved in the *Julison* case handled these tough issues extremely well, and this case can serve as a guide to lawyers and courts struggling with some of these problems.<sup>344</sup> Julison's case—and his four-year prison sentence—can also serve as an example to those who might think to follow his lead.

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<sup>344</sup> The Ninth Circuit recently affirmed Julison's conviction, holding that the trial court did not violate his right to represent himself because Julison refused to make the unequivocal decision to proceed pro se and repeatedly failed to go through the required colloquy to assure the court that his waiver of counsel was knowing and voluntary. *United States v. Julison*, No. 13-30330, 2015 WL 3981763 (9th Cir. July 1, 2015), ECF No. 38.