Taxpayer Privacy and Tax Compliance

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I. INTRODUCTION

Projections of an expanding federal budget deficit have once again magnified the problem of noncompliance with the federal tax laws. The IRS's most recent estimate of the individual income "tax gap"—the amount of tax imposed but not voluntarily and timely paid—exceeded $166 billion.2 Concerns over how the Government can achieve the highest possible degree of voluntary compliance with the tax laws date back to the origin of the federal income tax itself.3 In more recent times, practitioner groups,4 academics,5

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1. The Congressional Budget Office's most recent estimate of the budget deficit places it at more than $400 billion. CONGRESSIONAL BUDGET OFFICE, MONTHLY BUDGET REVIEW: FISCAL YEAR 2003 (June 9, 2003). The $400 billion figure includes off-budget surpluses in the Social Security trust funds.


3. See the discussion in Part III, infra. The compliance issues discussed in this article relate primarily to federal income taxes paid by individuals. Although some of the issues raised may also relate to corporate income, estate and gift, and employment and excise taxes, those systems have their own unique compliance problems that are not fully addressed in this paper. The privacy interests of individual taxpayers are also distinct from those of corporations and other entities. For a discussion of the privacy interests of corporations and a proposal to permit States to release publicly the tax data of publicly-traded corporations, see Richard D. Pomp, The Disclosure of State Corporate Income Tax Data: Turning the Clock Back to the Future, 22 CAP. U. L. REV. 373 (1993).


5. For a survey of the academic research, see James Andreoni et al., Tax Compliance, 36 J. ECON. LITERATURE 818 (1998).
and Government officials\(^6\) have issued numerous economic and theoretical studies examining the many factors that influence a taxpayer's willingness to comply or not comply. These factors can be grouped into two broad categories: Disincentives for noncompliance (civil and criminal enforcement, monetary penalties); and positive incentives for compliance (taxpayer service, assistance, and education).

As between the two broad categories, researchers traditionally have devoted more attention to disincentives for noncompliance; in particular, the role that civil tax audits and taxpayer penalties play in an individual's decision to comply.\(^7\) Politicians and Government policy makers also tend to view tax compliance as a question of enforcement, comparing estimates of the immediate, marginal revenue yield per additional budget dollar devoted to IRS enforcement activities.\(^8\) Similarly, the basic economic model of tax evasion, developed by Allingham and Sandmo, is based on a limited cost/benefit analysis.\(^9\) This model predicts that a taxpayer will evade taxes when the expected gains from evasion, determined in part by the tax rate, exceed the expected value of the punishment, determined by the probability of detection and the resulting penalty if caught.\(^10\) Increasing the probability


\(^7\) See, e.g., John S. Carroll, *How Taxpayers Think About Their Frames and Values*, in *WHY PEOPLE PAY TAXES* 49 (Joel Slemrod ed., 1992) [hereinafter WHY PEOPLE PAY] ("Economists have relied most heavily on indices of costs and benefits of taxpaying embodied in income levels, marginal tax rates, audit rates, and other quantitative measures of compliance . . .").

\(^8\) As part of the IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, Congress considered both enforcement and taxpayer service when it enacted Code provisions that limited the IRS’s investigatory authority during an audit and expanded taxpayer rights and protections against alleged IRS abuse. See, e.g., IRC §§ 7602(d) (limiting the use of financial status examination techniques to determine the existence of unreported income); 6404(g) (limiting the accrual of interest and penalties if IRS does not timely notify taxpayer of disputed liability). Whether improved taxpayer service increases a taxpayer’s incentive to comply remains unclear. See Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 U. KAN. L. REV. 971 (2003) [hereinafter Reformed IRS]. Concerns over declining audits rates since the enactment of the 1998 Act and the effects of that decline on taxpayers’ compliance behavior have once again focused attention on enforcement. Charles O. Rossoti, REPORT TO THE IRS OVERSIGHT BOARD: ASSESSMENT OF THE IRS AND THE TAX SYSTEM (Sept. 2002). President Bush’s 2004 budget recommendation for the IRS includes additional funding earmarked for increased enforcement programs aimed at specific areas of noncompliance. George Guttman, *The IRS’s Fiscal 2004 Budget: More or Less?*, 98 TAX NOTES 486, 486 (2003). See generally Byron L. Dorgan, *Narrowing the $100 Billion Tax Gap*, 37 TAX NOTES 925 (1987) (discussing the relationship between increased IRS funding and increased compliance).


\(^10\) According to the basic model, "an individual is assumed to maximize the expected utility of the
of detection and the magnitude of the penalty decreases tax evasion, according to the model, because rational individuals respond to the increased cost of cheating by evading less.\footnote{11}

While economic analysis based on the Allingham and Sandmo model supports the conclusion that an additional dollar spent on enforcement results in several more dollars of additional revenue collected,\footnote{12} the model does not explain the effect of increased enforcement activity on overall levels of compliance,\footnote{13} or why the United States enjoys a relatively high level of tax compliance even though, given the low audit and penalty rates in this country, the economic model would predict much lower compliance levels.\footnote{14}

evasion gamble, weighing the certain benefits of successful evasion against the risky prospect of detection and punishment. The sole factor that motivates any compliance is the fear of getting caught and penalized." James Alm et al., Deterrence and Beyond: Toward a Kinder, Gentler IRS, in WHY PEOPLE PAY, supra note 7, at 311, 313; see also Andreoni et al., supra note 5, at 841.


12. See C. EUGENE STEUERLE, WHO SHOULD PAY FOR COLLECTING TAXES?: FINANCING THE IRS 23-35 (1986) (reviewing the research). Earlier models estimating the direct revenue increase (additional tax and penalty collection) obtained from increasing the audit rate are based on cost calculations from audit data held by the IRS and on regression analysis. Id. at 24–32; see also Frank Malanga, The Relationship Between IRS Enforcement and Tax Yield, 39 NAT'L TAX J 333, 335–36 (explaining the model).

13. STEUERLE, supra note 12, at 32–33. More sophisticated models estimating the "ripple effect" of increased enforcement (that is, the general deterrent effect of audits on noncompliance by the general taxpaying community) confirm that increasing the audit rate has a positive influence on taxpayer compliance, although the studied effect varies from strong to weak. See Alan H. Plumley, The Impact of the IRS on Voluntary Tax Compliance: Preliminary Empirical Results, 2002 NAT'L TAX ASS'N 95TH ANN. CONF. ON TAX'N [hereinafter Experimental Results] (estimating that a one percentage point increase in the 1991 audit rate (defined as the number of audits started each year as compared with the number of returns filed in the prior year) from .65% to 1.65% would have resulted in an additional $56 billion of voluntarily reported tax); Jeffrey A. Dubin et al., The Effect of Audit Rates on the Federal Individual Income Tax, 1977-1986, 43 NAT'L TAX J 395, 405 (1999) (empirical results estimating that the "spillover effects" of audits produce six out of every seven dollars of additional revenue generated by IRS examinations); Ann D. Witte & Diane F. Woodbury, The Effect of Tax Laws and Tax Administration on Tax Compliance: The Case of the U.S. Individual Income Tax, 38 NAT'L TAX J 1, 8 (1985) (suggesting, based on empirical testing, that increased audit rates have an "important and salutary effect" on voluntary compliance); Kurt J. Beron et al., The Effect of Audits and Socioeconomic Variables on Compliance, in WHY PEOPLE PAY, supra note 7, at 67, 84 (finding weak deterrent effects from audits).

14. Brian Erard & Jonathan S. Feinstein, The Role of Moral Sentiments and Audit Perceptions in Tax Compliance, 49 PUB. FIN. 70, 72–42 (1994); Eric A. Posner, Law and Social Norms: The Case of Tax Compliance, 86 VA. L. REV. 1781, 1782 (2000) [hereinafter Law and Social Norms]. At least one of the reasons why the economic model does not fully explain observed levels of taxpayer compliance is that it does not directly incorporate the Government's information return matching program, which helps the IRS detect a taxpayer's failure to report certain kinds of income. Under this program, payors submit information returns (such as Form W-2 for wages) to taxpayers and also send copies of these returns to the IRS. IRS computers match these information returns with the taxpayer's individual return in order to verify whether the taxpayer reported the correct amount of income and to facilitate enforcement in the absence of such compliance. The matching process dramatically increases the taxpayer's chances of
In an attempt to answer these questions and to help better explain taxpayers' evasion decisions, other researchers have expanded upon the basic economic model to consider the role of positive incentives for compliance, such as improved taxpayer service and reduced tax law complexity. Still others have investigated the effects of individual attitudes and collective social norms on compliance. This research seeks to incorporate into the compliance analysis psychological factors such as shame, embarrassment, and guilt, as well as taxpayer perceptions of fairness, satisfaction with the Government, and moral commitments to honest reporting.

Although theoretical and empirical compliance research has expanded to incorporate a variety of factors, the role of privacy and its effect on a taxpayer's willingness to comply has received little direct attention. This may be due to the fact that it is difficult to formalize a privacy concept that can be incorporated into economic models of compliance. The failure of researchers to address informational privacy issues is interesting given that policy makers consistently declare that preserving the confidentiality of taxpayer information submitted to the IRS is important to the functioning of the voluntary tax compliance system. The focus on taxpayer confidentiality is being detected for noncompliance and, according to some commentators, is a much more effective means of ensuring compliance than hard enforcement activities such as random audits. See Thomas G. Vitez, Information Reporting and Withholding as Stimulants to Voluntary Compliance, in ABA COMPLIANCE REPORT, supra note 4, at 191, 191–92 ("There is no question but that the withholding and information reporting system operates as a most persuasive stimulant of voluntary compliance.").

15. Compare Kent W. Smith, Reciprocity and Fairness: Positive Incentives for Tax Compliance, in WHY PEOPLE PAY, supra note 7, at 223, 242–46 (experimental results supporting the argument that responsive service from the IRS is a positive incentive that affects taxpayers' normative commitments to tax compliance), with Lederman, Reformed IRS, supra note 8, at 992-96 (finding that available evidence does not support the conclusion that better service increases compliance).


17. See text accompanying notes 29–44 for a discussion of some of these theories.

18. See Andreoni et al., supra note 5, at 850–52 (reviewing research testing the relationship among tax compliance and moral obligations, perceptions of fairness with the tax system, and satisfaction with the Government).

19. DEPARTMENT OF THE TREASURY, REPORT TO THE CONGRESS ON SCOPE AND USE OF TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS, VOLUME I: STUDY OF GENERAL PROVISIONS 34 (OCT. 2000) [hereinafter DISCLOSURE STUDY]; STAFF OF THE JOINT COMMITTEE ON TAXATION, STUDY OF
embodied in Internal Revenue Code section 6103, which declares that tax return information shall be confidential.\textsuperscript{20} This protection extends not only to information appearing on the taxpayer’s actual return, but to virtually all information relating to a taxpayer’s liability, including the fact that the taxpayer is, was, or will be subject to a civil tax audit or a criminal tax investigation.\textsuperscript{21} Disclosures made by IRS agents in violation of this confidentiality proscription can lead to civil and criminal penalties for the Government.\textsuperscript{22}

This paper explores the relationship between taxpayer privacy and tax compliance and makes the argument that protecting taxpayer privacy interests and permitting the IRS to selectively disclose taxpayer information to the public are not mutually exclusive objectives. In fact, an uncritical focus on taxpayer confidentiality by Government policy makers has limited the IRS’s efforts to create publicity campaigns that could result in dramatic improvements in overall levels of income tax compliance.

Part II sets the stage by reviewing economic and social norm theories of tax compliance in an effort to determine how publicity can play a role in improving taxpayer compliance. This Part concludes that publicizing successful IRS enforcement actions can have a positive impact on taxpayer compliance by increasing a taxpayer’s perceived risk of being punished for evasion and by strengthening social norms of compliance. To begin making the case for disclosure exceptions to section 6103 that would allow the IRS to publicize enforcement efforts, Part III traces the notion of taxpayer confidentiality

\begin{footnotesize}
\textsuperscript{20} I.R.C. § 6103(A).
\textsuperscript{21} I.R.C. § 6103(b)(2).
\textsuperscript{22} I.R.C. §§ 7431, 7213.
\end{footnotesize}
since the introduction of the income tax and discusses how Congress’s con-
ception of confidentiality has changed over time. This Part also examine
the current statutory provisions governing taxpayer confidentiality, primarily
Code section 6103, and the circumstances under which the IRS may disclose
taxpayer return information without the taxpayer’s consent. Part IV takes a
closer look at the nature of taxpayer privacy interests in return information in
an effort to identify when and under what circumstances disclosure would
offend privacy expectations. As part of this discussion, Part IV examines the
current debate over how those privacy expectations are affected by prior re-
lease of the information into the public domain by some third party source.
Finally, Part V proposes statutory disclosure exceptions that would permit
the IRS to publicize the names and identifying details of taxpayers who en-
gage in one of three types of noncompliance: Criminal tax evasion; failure
to pay tax after assessment; and investments in abusive tax shelters. With
respect to each proposal, the discussion weighs the taxpayer’s privacy inter-
ests in the disclosed information against the Government’s interests in pub-
cizing noncompliance and its behavioral effects on the noncompliant tax-
payer and the attitudes and compliance incentives of other taxpayers.

II. THE LINK BETWEEN TAX COMPLIANCE AND TAXPAYER PRIVACY

A. Does Confidentiality Promote Compliance?

A Privacy Commission study issued in 1977 describes the purported re-
relationship between confidentiality and tax compliance as follows:

[T]he Commission believes that the effectiveness of this country’s tax system de-
pends on the confidentiality of tax returns and related information. While no one
has tried to measure how the knowledge that other Federal and State agencies can
inspect tax returns affects an individual taxpayer, the Commission believes that
widespread use of the information a taxpayer provides to the IRS for purposes
wholly unrelated to tax administration cannot help but diminish the taxpayer’s
disposition to cooperate with the IRS voluntarily. This is not to say that the tax-
payer will decline to cooperate, but that his incentive to do so may be weakened.
Such a tendency in itself creates a potentially serious threat to the effectiveness of
the Federal tax system. 23

23. PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY
540 (July 1977); see also Taxpayer Compliance Improvement Act of 1982: Hearings Before the Sub-
comm. on Oversight of the Internal Revenue Service of the Senate Comm. on Fin., 97th Cong., 2d Sess.
358, 359–61 (1982) (testimony of Assistant Treasury Secretary Don Lubick listing taxpayer privacy as one
of four goals, along with fairness, voluntariness, and efficiency, that impact taxpayer compliance).
A more recent study of taxpayer confidentiality conducted by the Treasury Department also asserts a positive link between confidentiality and compliance, yet the authors’ proof of this connection is indirect and weak. As evidence of the relationship between compliance and confidentiality, the Treasury Study cites an internal IRS report that linked a reduction in filing and an increase in misreporting to the Government’s ability to disclose taxpayer return information to State agencies for the purpose of administering the federal refund offset program. The refund offset program permits the IRS to withhold a federal tax refund otherwise owed the taxpayer and to pay over that amount to the appropriate agency in order to satisfy unpaid child support obligations of the taxpayer and debts for past-due State taxes. The Treasury Department administers the program by matching information about unpaid obligations supplied to it by State officials with information drawn from the taxpayer’s individual income tax return.

The IRS’s conclusion about the resulting decrease in filing and reporting compliance by those taxpayers subject to the refund offset program has been called into question, and any link that might exist between the change in taxpayer behavior and the limited disclosure of return information is unclear. More likely, the reported reduction in future compliance by those taxpayers who had a tax refund withheld under the offset program in an earlier year was prompted by their efforts to avoid paying debts they thought they had successfully avoided, rather than because their privacy rights were offended.

The claim that preserving taxpayer confidentiality promotes compliance (and the inverse, that violating a taxpayer’s privacy expectations reduces a taxpayer’s willingness to comply) finds some possible support in the literature, but the proposition has never been directly proven. One group of studies concludes that individuals’ perceptions of procedural fairness in their dealings with decision makers have a positive impact on compliance with

24. Treasury Department, Disclosure Study, supra note 19, at 34. The confidentiality study by the Joint Committee on Taxation cites the same IRS report to support the conclusion that privacy promotes compliance. Joint Committee, Confidentiality Study, supra note 19, at 128.

25. Treasury Department, Disclosure Study supra note 19, at 34 (citing Internal Revenue Service Research Division, The Impact of Nontax Refund Offsets on Voluntary Compliance (Feb. 1993).

26. I.R.C. § 6402(c), (e).


28. General Accounting Office, Tax Policy: Refund Offset Program Benefits Appear to Exceed Costs (GAO/GGD-91-64) 19-22 (May 1991); see also Plumley, Determinants, supra note 6, at 28 (empirical analysis finding that refund offsets did not have a statistically significant effect on taxpayers’ willingness to file returns).
legal obligations.\textsuperscript{29} Statistical analysis by Professor Kent Smith suggests that similar perceptions operate in the tax administration context: A commitment to procedural fairness on the part of the IRS will enhance a taxpayer’s willingness to comply with the tax laws.\textsuperscript{30} Professor Smith theorizes that the relationship between procedural fairness and compliance may be due to the fact that citizens who perceive that the governing authority is attempting to be fair will reciprocate by showing a greater willingness to cooperate. Perceptions of fair treatment will also cause citizens to develop a sense of legitimacy and allegiance toward the governing authority. The resulting impact on behavior is primarily indirect, increasing the taxpayer’s normative commitment towards compliance.\textsuperscript{31}

Professor Smith bases his conclusions about the role of procedural fairness on an analysis of survey data drawn from in-person interviews. Smith identified four attitudinal inquiries used in the survey that he correlated with the concept of procedural fairness, one of which tested the respondent’s view of whether “IRS procedures and practices are fair and reasonable ones that respect the rights of taxpayers.”\textsuperscript{32} While Smith found a positive relationship


\textsuperscript{30} Smith, supra note 15, at 232. Professor Smith also concludes that responsive service by the IRS fosters allegiance to and cooperation with the tax system, but asserts that a sense of procedural justice probably has a stronger impact on a taxpayer’s compliance decision. \textit{Id.} at 228 (“If the primary, lasting effect of positive actions by the authorities is on taxpayers’ normative commitment to compliance, then it is reasonable to expect that the more normatively based of the two components has the stronger effect on normative commitments. Thus, I would predict that the perception of procedural fairness probably has the stronger effect on normative commitment and, indirectly, on compliance.”) Whether more responsive service by the IRS has a positive effect on compliance levels is subject to debate. See sources cited supra note 8.

\textsuperscript{31} \textit{Id.} at 225–26. Other researchers posit that fair treatment by Government regulators increases taxpayers’ internal “tax morale,” leading to a greater commitment towards compliance. See, e.g., Frey, supra note 11, at 176 (“A cooperative atmosphere and basic trust between taxpayers and the tax officials strengthens tax morale.”); see also John T. Scholz & Mark Lubell, \textit{Trust and Taxpaying: Testing the Heuristic Approach to Collective Action}, 42 AM. J. POL. SCI. 398, 404, 410 (1998) (finding that a taxpayer’s trust that the Government “will do what is right” decreases the likelihood of noncompliance).

\textsuperscript{32} Smith, supra note 15, at 231. The response was based on a six point scale, ranging from strongly disagree to strongly agree. The remaining three inquiries were (1) “I am confident that the IRS would never try to take more money from me than they should”; (2) “IRS employees have an unusual amount of honesty and integrity”; and (3) “You can depend on the IRS to keep accurate tax records.” \textit{Id.}

It should be noted that procedural justice theory, in its many applications, has been criticized because it is based in large part on laboratory preference rankings, which some commentators claim are artificial and do not expose real preferences. Louis Kaplow & Steven Shavell, \textit{Fairness Versus Welfare},
between a taxpayer's sense of procedural justice and his attitude towards compliance, it is impossible to discern from the data whether the respondents incorporated privacy rights and expectations into their responses, and Smith admits that the data does not indicate how taxpayers form perceptions of procedural fairness in the tax administration context. 33 However, if policy makers are correct in their belief that taxpayers value confidentiality, then a perception on the part of the public that the IRS does not respect their privacy interests could generate resentment and a diminished commitment towards compliance. 34

Another theory of tax compliance based on social norms also recognizes

33. Smith, supra note 15, at 246. The criteria used to evaluate a person's sense of procedural justice in other law enforcement contexts also do not directly incorporate privacy considerations. Researchers typically test factors such as the authorities' motivations and honesty, opportunities for correcting erroneous determinations, the authorities' ability to suppress bias, consistent treatment among participants, and decision quality and accuracy. Tyler, supra note 29, at 128–31. Commenting on Smith's conclusion, Richard Lempert suggests that judgments of fair procedure depend upon "voice" (the opportunity to explain one's case to the decision maker); process control; and official politeness and respect for rights. Richard Lempert, Commentary, in WHY PEOPLE PAY, supra note 7, at 251, 254. Within the income tax administration and controversy process, the taxpayer has little opportunity to exercise either voice or process control. While respect for rights might include privacy considerations, Lempert does not raise the issue. Id., see also Karyl A. Kinsey, Deterrence and Alienation Effects of IRS Enforcement: An Analysis of Survey Data, in WHY PEOPLE PAY, supra note 7, at 259, 281 [hereinafter Alienation Effects] (suggesting that second-hand information about inequitable treatment of other taxpayers by the IRS increases future intentions towards noncompliance); Worsham, supra note 29, at 27–30 (incorporating factors relating to inconsistency in enforcement and use of inaccurate information during enforcement into an analysis of tax compliance based on procedural justice theory).

34. Other fairness perceptions relating to the tax laws have also been shown to affect taxpayers' compliance decisions. For example, research indicates that compliance is affected by perceived levels of tax evasion by others, Steven M. Sheffrin & Robert K. Triest, Can Brute Deterrence Backfire? Perceptions and Attitudes in Tax Compliance, in WHY PEOPLE PAY, supra note 7, at 193, 203, see Scholz & Lubell, supra note 31, at 398, 404 (concluding that, based on survey and tax return data, a belief that other citizens are paying what they "legally owe" enhances compliance with federal income tax laws), and by perceptions about whether the taxpayer is receiving his fair share of public goods provided by the Government, see Massimo Bordignon, A Fairness Approach to Income Tax Evasion, 52 J. PUB. ECON. 345, 360 (1993) (finding that tax evasion is positively related to a taxpayer's perception that his share of public expenditures is unrelated to his tax payments).
a relationship between confidentiality and a taxpayer’s incentive to comply. Professor Eric Posner models tax compliance as a means of signaling an individual’s willingness to cooperate with others in a repeated game. 35 Under Posner’s theory, a taxpayer whose behavior is consistent with a social norm of tax compliance benefits from profitable, cooperative relationships with desired partners. This category of market actors, whom Posner refers to as “good types,” is distinguished from the category of “bad types,” whose failure to adhere to the norm of compliance (tax cheating) signals to others that they should be avoided. 36 An individual’s status as a good type or a bad type rests of private information, but his preferences can be revealed through his observable failure to comply with the tax laws. Once revealed to others as a tax cheat, the bad type is stigmatized and is thereby prevented from entering into future beneficial interactions with good types. 37

Posner goes on to posit that Government actors (in this case, the IRS) can play a role in the signaling process in one of two ways: (1) By altering its enforcement activities in such a way to strengthen desirable signals and thereby enhance the stigma associated with tax noncompliance, 38 and (2) by sending out signals of its own through its treatment of taxpayers in an attempt to reinforce the notion that tax compliance is a positive signal associated with good types. 39 In this latter role, the Government itself must con-

35. Posner, Law and Social Norms, supra note 14, at 1786. See generally ERIC A. POSNER, LAW AND SOCIAL NORMS (2000) [hereinafter SOCIAL NORMS] (setting forth the general scope of Professor Posner’s theory of social norms and applying it in numerous contexts, of which tax compliance is merely one). Posner’s signaling theory is complicated and by his own admission “messy.” Posner, Law and Social Norms, supra note 14, at 1791. It has drawn criticism for, among other reasons, assuming that norms relating to large-scale collective actions such as tax compliance will be enforced through dyadic or small-scale interactions. Russell Hardin, Law and Social Norms in the Large, 86 Va. L. Rev. 1821, 1824-28 (2000). Others have criticized the theory because its operation depends in large part upon generalized knowledge of information that typically remains private. See infra notes 78-80 and accompanying text. While Professor Posner’s theory may not fully explain observed levels of tax compliance in the United States, his focus on how social norms operate externally helps illuminate the role of publicity and its potential impact on taxpayer behavior. It is for these reasons, primarily, that the signaling theory is discussed below. 36. Posner, Law and Social Norms, supra note 14, at 1786. More specifically, social norms allow individuals to signal to others that they have a low discount rate, meaning that they value the future benefits associated with long-term cooperative relationships so much that they are willing to forgo immediate benefits in exchange. Bad types have high discount rates, meaning that they tend to value immediate gains over the delayed benefits arising from future cooperation. Id. 37. Id. at 1789-90. For a discussion of how stigma associated with detected evasion might vary among different categories of taxpayers, see sources cited supra note 330. 38. Id. at 1792-98. The role of the IRS in enhancing positive and negative signals through its enforcement activities is discussed in Part V. 39. Id. at 1972 ([ If people regard themselves as playing the signaling game with the government, then the government might enhance or weaken tax compliance by playing in the right way, which means sending appropriate signals. Under this approach, people care about the government’s discount rate. The government cannot manipulate social norms; it can decide only whether to raise levels of trust by comply-
vince market actors that it and its agents operate as good types. If, for instance, the IRS engages in behavior that alienates taxpayers who are prone to compliance, these taxpayers may lose trust in the Government and the Government's goal of tax compliance can cease to be a strong positive signal. To maintain this trust and cooperation, the IRS must engage in "good tax collecting behavior." According to Posner, good tax collecting behavior includes maintaining the confidentiality of taxpayer information.  

Posner's signaling model is consistent with theories of procedural fairness, yet neither provides a direct connection between confidentiality and compliance. In the absence of such a link, some commentators have raised the question of whether tax compliance could be strengthened without any privacy protections for return information, or with weaker policies than currently exist. These commentators point out that during the early years of the federal income tax, taxpayer return information was open to the public for inspection and, at times, publicized in newspapers. As explained in more detail in Part III, publicizing return information was viewed as method of encouraging accurate reporting. With friends, neighbors, and business associates privy to the taxpayer's income and deduction figures, the belief was that taxpayers would feel pressure—legal, moral, social, or otherwise—to report honestly.  

Today, given the number of individual income tax returns filed and the amount of information contained in each return, it is impractical to consider releasing individual tax returns to the public on a wholesale basis. Moreover, owing to the vast flood of personal and financial data that would enter the public domain, any direct deterrent effect would likely be small and
limited to a few taxpayers already in the public eye. Disclosure of certain limited classes of return information, on the other hand, may play a positive role when it comes to tax compliance. As explained below, econometric and social norm theories of tax compliance suggest that publicity campaigns highlighting the revenue authority’s successful enforcement efforts can positively impact two important factors affecting taxpayer compliance: (1) The taxpayer’s awareness of the risk of sanctions associated with noncompliant behavior; and (2) the taxpayer’s attitudes and motivations toward compliance.\textsuperscript{44}

\textbf{B. A Positive Role for Publicity}

One way in which publicity surrounding the IRS’s enforcement efforts can affect tax compliance is by influencing taxpayers’ beliefs about the possibility of detection and punishment. The Allingham and Sandmo model discussed above predicts that a taxpayer’s evasion decision depends upon the probability of detection and the magnitude of the resulting fine once he is detected.\textsuperscript{45} In making this calculation, it is the taxpayer’s subjective beliefs about the possibilities of detection and punishment that are important, rather than the actual risk.\textsuperscript{46} Research suggests that most taxpayers’ information about the actual risk of detection and punishment is inaccurate. In the face of incomplete and ambiguous information about the likelihood of sanctions, most taxpayers tend to overestimate their chances of being detected and fined,\textsuperscript{47} which, as the model would predict, has a positive impact on compli-

\textsuperscript{44} See Durst, supra note 4, at 46 (“Advertising and other public relations efforts probably can affect compliance both by appeals to social conscience and by increasing taxpayer awareness of the possibility of detection and sanctions. Quite probably, efforts aimed at both efforts will yield the best results.”); see also Erard & Feinstein, supra note 14, at 71 (“Many different elements probably play a role in the failure of the standard model to explain compliance behavior, but we believe that the two most important explanations relate to taxpayer motivations and taxpayer perceptions of the probability of an audit.”).

Evidence from State revenue department programs incorporating publicity into their compliance strategy is discussed in Part V in connection with specific recommendations for narrowly tailored disclosure exceptions that balance the taxpayer’s privacy rights with the Government’s interest in maintaining and improving compliance levels. The remainder of this Part II focuses on economic and social norm theories supporting the use of publicity as a means of reducing noncompliance.

\textsuperscript{45} The taxpayer’s effective tax rate, which determines the amount of tax savings resulting from evasion, is the other component of the taxpayer’s decision.

\textsuperscript{46} See Nehemia Friedland, A Note on Tax Evasion as a Function of the Quality of Information About the Magnitude and Credibility of Threatened Fines: Some Preliminary Research, 12 J. APPLIED SOC. PSYCHOL. 54, 54-55 (1982) (“The two key determinants of the effectiveness of deterrence are the severity of threatened sanctions and their credibility, i.e., the subjective probability that the threat will be carried out.”) (cites omitted).

\textsuperscript{47} Erard & Feinstein, supra note 14, at 78 (reviewing survey and psychological evidence explaining this phenomenon). Other factors, including knowledge of the tax laws, prior audit experience, and a moral commitment to honesty, have been shown to have an impact on a taxpayer’s subjective assessment of his
Researchers in the area of communication and behavior have sought to explain how a person's perceptions of his detection and punishment risks are formed. These researchers conclude that one's fear of detection and sanction depends, in part, upon the way in which threat messages are communicated. Information about the threat of sanctions communicated through the mass media causes individuals to overestimate their probability of detection, as compared with deterrence messages received through interpersonal communication, which tend to provide listeners with a more accurate indication of their actual risk of detection and punishment. One possible explanation for this divergence relates to the content of the message being conveyed through the media:

The media . . . base their news coverage on police information and court action, which focus attention on crimes that are solved and on the guilty who are punished. Space is devoted to success and conveys the impression that law enforcement is fairly effective . . . . The disproportionate coverage and emphasis on success lead one to drastically underestimate the frequency of criminal activity and to inflate the actual risk of punishment. Overestimation of sanctions is a reasonable outcome to expect.\footnote{See Andreoni et al., supra note 5, at 844–46 (reviewing the research).}

\footnote{See Andreoni et al., supra note 5, at 846 ("[A] high subjective probability of detection is associated with significantly more compliant behavior."); Robert Mason, A Communication Model of Taxpayer Honesty, 9 L. & Pol'y 246, 256 (1987) ("Fear of sanctions, . . . is related to compliance; those with low fear levels admit they evade their taxing responsibilities."); see also Friedland, supra note 46, at 54, 55 ("ambiguous information about the severity of sanctions and their likelihood might limit a potential offender’s ability to ‘calculate’ the net utility of the offense and thereby compel him or her to exercise caution. In addition, the deterrent quality of ambiguous information might be enhanced by the human tendency to expect the worst when faced with ambiguity or uncertainty.").}

\footnote{See Mason, supra note 48, at 246–47 (reviewing research derived from criminal law studies); see also Kinsey, Alienation Effects, supra note 33, at 259, 269–70 (finding that taxpayers who have been audited are more likely to communicate to others their opinions about the fairness of the IRS, rather than communicate messages relating to risks of detection).}

\footnote{Mason, supra note 48, at 247 (citing Michael R. Geerken & Walter R. Grove, Deterrence: Some Theoretical Considerations, 9 L. & Soc'y Rev. 424 (1975)). Mass media reports have an impact on taxpayers' subjective beliefs about the possibility of detection because most individuals are believed to be biased by an "availability heuristic." When a person employs the availability heuristic, they estimate the probability that an event will occur based upon salient or memorable incidents. See Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, in JUDGMENT UNDER UNCERTAINTY 3, 11 (Daniel Kahneman et al. eds., 1982) ("[A] class whose instances are easily retrieved will appear more numerous than a class of equal frequency whose instances are less retrievable."). Incidents publicized extensively in the media, therefore, can lead actors to overestimate their probability of occurrence. See generally Thomas Gilovich & Dale Griffin, Heuristics and Biases: Then and Now, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGEMENT 1, 8-15 (Thomas Gilovich et al. eds., 2002) (reviewing critiques of heuristics research).}
Survey analysis involving Oregon taxpayers supports the assertion that deterrence messages communicated through mass media are related to increased perceptions of detection and punishment for tax evasion.\textsuperscript{51} The survey data also indicate that publicity surrounding successful criminal tax evasion cases brought by the Government played an important role in shaping taxpayers’ perceptions. During the year the Oregon survey was taken and in the year immediately preceding the survey, tax-related articles appearing in the Oregon press were dominated by reports of indictments, followed by successful convictions, for federal tax evasion.\textsuperscript{52} According to the author, such attention in the media would suggest that the IRS has an effective criminal fraud unit, thereby leading readers to conclude that the risk of detection was high.\textsuperscript{53}

If vague and incomplete information about a taxpayer’s probability of detection plays a role in fostering compliance, then publicized accounts indicating that tax evasion is widespread and undetected (such as estimates of the prevailing tax gap) might reduce taxpayers’ subjective perceptions of risk and punishment, thereby negatively affecting compliance levels. Experimental results are consistent with this view. Using student survey responses, Sheffrin and Triest tested their thesis that publicity surrounding tax gap figures tended to be “alarmist and defeatist” and reduced aggregate levels of tax compliance, while “specific and detailed stories about compliance problems” were less likely to have a negative impact.\textsuperscript{54} After reading a statement about the magnitude of the tax gap, student responses yielded a large, statistically significant decrease in the students’ perceived probability of being detected if they were cheating by a small amount, and a small, statistically insignificant increase in their perceived probability of being detected if they were cheating by a large amount.\textsuperscript{55} The authors interpreted their results as evi-

\textsuperscript{51} Mason, \textit{supra} note 48, at 255–56.
\textsuperscript{52} \textit{Id.} at 253–54. Other tax articles appearing in the Oregon press during the relevant time period related to State and federal tax law changes, proposals for tax relief, and IRS office hours. Stories relating to a taxpayer’s moral obligation to pay, the low likelihood of being audited, and widespread noncompliance did not appear. \textit{Id.} at 254.
\textsuperscript{53} See \textit{id.} at 253–54. The author also speculates that mass media messages may foster compliance directly: “Perhaps media messages also trigger internalized norms and values associated with obeying the law or somehow tap the conscience of those who believe that they have a civic duty to comply with tax laws.” \textit{Id.} at 256 (citing Quint C. Thurman et al., \textit{Neutralization and Tax Evasion: How Effective Would a Moral Appeal Be in Improving Compliance to Tax Laws?}, 6 L. & POL’Y 309 (1984)).
\textsuperscript{54} Sheffrin & Triest, \textit{supra} note 33, at 193, 211. The statement intended to relay specific compliance problems emphasized increased enforcement through new computer technology aimed at detecting inaccurate returns. \textit{Id.} at 211. Although the authors did not test the proposition, media attention focusing on low audit coverage may also discourage compliance by reducing beliefs about the chances of being caught evading taxes. See Durst, \textit{supra} note 4, at 47 n.45 (asserting that media attention focusing on low audit coverage is a “form of publicity which almost certainly discourages compliance.”)
\textsuperscript{55} Sheffrin & Triest, \textit{supra} note 33, at 212.
dence that tax gap publicity decreases a taxpayer’s overall perceived probability of detection.\footnote{56}{Id. at 214 n.14.} Reducing a taxpayer’s subjective belief about the likelihood of detection runs counter to the authors’ overall findings that increasing one’s perceived risk of detection decreases noncompliance.\footnote{57}{Id. at 205.}

Publicity surrounding IRS enforcement efforts may affect not only a taxpayer’s subjective perception about his risk of detection, but can also impact on the taxpayer’s intrinsic motivations and attitudes toward compliance and noncompliance.\footnote{58}{There are many moral, ethical, and sociological factors that may affect a taxpayer’s compliance decision. \textit{See}, e.g., Sheffrin & Triest, \textit{supra} note 33, at 199 (incorporating variables testing attitudes toward the Government, the perceived honesty of other taxpayers, and past contact with the IRS into survey analysis of compliance); Erard & Feinstein, \textit{supra} note 14, at 75–77 (incorporating “moral sentiments” of guilt and shame). These researchers maintain that intrinsic motivations and a taxpayer’s perception of his risk of detection are interdependent. \textit{See} Sheffrin & Triest, \textit{supra} note 33, at 214 (“Our findings suggest that the effect on compliance from an increase in the perceived probability of detection may be overestimated if attitudes are neglected in the analysis.”); Erard & Feinstein, \textit{supra} note 14, at 70 (“[W]e find evidence of considerable heterogeneity and a general upward bias in audit perceptions amongst filers, and we find that the importance of the sentiment of shame in explaining reporting behavior is much more sensitive than the sentiment of guilt to the degree of bias in audit perceptions.”).} The Sheffrin and Triest experiment, for example, led the authors to conclude that publicizing the tax gap increased the degree to which a taxpayer views other taxpayers as dishonest, an intrinsic factor tending to negatively impact a taxpayer’s attitude toward compliance.\footnote{59}{Sheffrin & Triest, \textit{supra} note 33, at 213.}

The conclusion that tax gap publicity decreases aggregate compliance levels is consistent with compliance theories based on reciprocal social norms. Laboratory experiments reveal that individuals tend to act as reciprocators.\footnote{60}{See Lederman, \textit{Interplay}, \textit{supra} note 9 (explaining game simulations that test collective action problems).} More specifically, the reciprocity model holds that individuals will cooperate with others, through a sense of honor or altruism, if they perceive that others are behaving cooperatively. If they perceive that others are not cooperating, they are moved by a sense of pride or resentment to withhold future cooperation.\footnote{61}{Dan M. Kahan, \textit{Trust, Collective Action, and Law}, 81 B.U. L. REV. 333, 333–34 (2001) [hereinafter \textit{Collective Action}].} These observations suggest that when individuals believe that others are contributing to the public good by paying their taxes, these individuals tend to respond by complying as well. In contrast, a belief that others are evading taxes tends to weaken the norm of compliance and causes others to reciprocate by also evading.\footnote{62}{Dan M. Kahan, \textit{Signaling or Reciprocating? A Response to Eric Posner’s Law and Social} [Page]}
Dan Kahan to conclude that publicized audit campaigns by the IRS can increase noncompliance, as the campaigns lead individuals to infer that more taxpayers than they initially thought were cheating. If this were true, then publicity decrying the magnitude of the tax gap would likely have a similar impact on taxpayers’ perceptions of cheating by others.

Professor Kahan goes on to speculate that publicizing the names of tax cheats, a practice employed on a limited scale by the IRS, could also cause individuals to overestimate the extent of tax evasion, thereby generating a reciprocal motivation to evade rather than comply. Such speculation is not supported by the evidence and runs counter to related norms-based theories. For example, experimental models testing the effects of punishment on cooperative behavior find that the ability of participants to penalize players who free ride reinforces cooperative norms, not undermines them. Further, Kahan himself admits that certain types of penalties do not generate negative reciprocal responses. Criminal penalties, in particular, are unlikely to undermine or crowd out compliance norms because individuals tend to perceive criminal sanctions as being directed against dishonest outliers.

Norms, 36 U. RICH. L. REV. 367 (2002) [hereinafter Reciprocating]. In collective action settings, participants resent being taken advantage of by others. Beliefs that others are evading trigger resentment, which inhibits compliance. This behavioral response, in turn, can strengthen the perception of others that most taxpayers cheat, thereby further weakening compliance norms. Id. at 379; see also FRANK A. COWELL, CHEATING THE GOVERNMENT: THE ECONOMICS OF EVASION 108 (1990) (“[A] person’s propensity to dodge taxes seems to be strongly affected by the number of other people who are already doing the same.”).

63. Kahan, Collective Action, supra note 61, at 324 (“The mechanism for these effects appears to be social cueing. When government engages in dramatic gestures to make individuals aware that the penalties for tax evasion are being increased, it also causes individuals to infer that more taxpayers than they thought are choosing to evade. This inference, in turn, triggers a reciprocal motive to evade, which dominates the greater material incentive to comply associated with the higher than expected penalty.”). Professor Kahan’s theory is related to the “crowding out” effect; that is, the tendency of outside regulation to interfere with a person’s internal motivation to comply. See Frey, supra note 11, at 176 (“Tighter monitoring and heavier fines for tax evasion implicitly and often explicitly, imply that the tax authorities put no faith in the individual’s and firms’ tax morale. As their intrinsic motivation is not recognized, the actors feel that they may as well be purely opportunistic, thereby reducing their ‘overjustification.’”).

64. For a discussion of a proposal to expand the IRS’s authority to publicize identifying information relating to tax evaders, see infra Part. V.A.

65. Kahan, Reciprocating, supra note 62, at 381. “The result would be not more compliance but less.” Id.

66. See Lederman, Interplay, supra note 9. Professor Lederman also questions other conclusions drawn by Professor Kahan based on his reciprocity theory. See id. (arguing that his conclusion that increasing audit rates reduces compliance is not supported by the evidence he presents).

67. Kahan, Collective Action, supra note 61, at 345 (explaining what he refers to as the “expressive theory of law”).

68. See id. (“Precisely because criminal laws are understood to embody collective values and attitudes, the advent of the penalty may cause individuals to infer that other citizens now do regard the behavior in question as unambiguously wrong and are prepared, at this point, to refrain from engaging in it themselves. Individuals are now more likely to forbear, not only because the expected penalty has gone
stead of reducing a taxpayer's motivation to reciprocate, criminal penalties can reassure those who are otherwise committed to compliance that tax evaders are getting their just deserts. Publicizing the imposition of criminal penalties in specific cases, therefore, should trigger a sense of reassurance, thereby bolstering, or at least maintaining, positive reciprocal tendencies.

Results derived from tax compliance models incorporating intrinsic considerations of guilt and shame also suggest that publicizing IRS enforcement actions can affect a taxpayer's evasion decision. According to these researchers, taxpayers, when deciding whether to evade, take into account not only State-imposed costs that may apply if their evasion is detected (monetary penalties, imprisonment), but also psychic costs. These psychic costs can include internally generated feelings of guilt arising from acts of evasion that go undetected, and externally generated feelings of shame arising from acts of evasion that are detected. A survey study by Grasmick and Bursick up, but because the expected willingness of others to forbear moves them (morally) to reciprocate.

Kahan further explains that whether regulatory incentives, such as penalties, reinforce or counteract tendencies to reciprocate may depend upon whether actors operate in an equilibrium of high trust or low trust. If trust is absent, because taxpayers believe that tax evasion is common, then penalties might serve the function of restoring trust and kickstarting the creation of strong reciprocal norms. Id. at 346. There is not a good measure of taxpayer perceptions surrounding the current level of tax noncompliance; that is, whether taxpayers operate in a high or low trust equilibrium. Informal surveys suggest, however, that taxpayers' internal compliance norms are weakening. See INTERNAL REVENUE SERVICE OVERSIGHT BOARD, 2001 ANNUAL REPORT (EXECUTIVE SUMMARY) tbl. ES-1 (2002) (noting that between 1999 and 2001 the percentage of survey participants who think that it is "not at all" acceptable to cheat on income taxes decreased from 87% to 76%).

69. See Richard C. Stark, A Principled Approach to Collection and Accuracy-related Penalties, 91 TAX NOTES 115, 118 (2001) ("[T]he criminalization of intentional or willful noncompliance provides a necessary foundation to the perception that our income tax is the law of the land. It is important that one who completes his tax return honestly and timely pays his tax liability know that another who intentionally chooses not to do so is subject to criminal penalty; otherwise, the compliant taxpayer is likely to feel like a chump, and the noncompliant taxpayer to think that noncompliant conduct is rewarded rather than deterred.") (footnote omitted).


71. The terminology used by researchers varies. Grasmick and Bursick, for example, conceive of "guilt" and "shame" as internalized, self-imposed punishments reflecting physiological discomfort associated with lowered self-esteem (anxiety, depression), and "embarrassment" as a socially imposed punishment, also resulting in physiological discomfort, as well as loss of valuable personal and business relationships. Harold G. Grasmick & Robert J. Bursick, Jr., Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model, 24 L. & SOC'Y REV. 837, 840-41 (1990). In their model, Erard and Feinstein refer to "guilt" as the feeling a taxpayer has when he underreports and escapes detection and "shame" as the feeling a taxpayer experiences when he underreports and is caught. Erard & Feinstein, supra note 14, at 71; cf. Gordon, supra note 70, at 798 (distinguishing between private stigma
introduced intrinsic motivations of guilt and shame into the economic model of tax evasion and found evidence that guilt has a strong deterrent effect on tax cheating, but the threat of shame does not. Grasmick and Bursick, supra note 71, at 854. The survey results indicated that anticipated feelings of guilt associated with noncompliance had a greater deterrent effect than the perceived threat of legal sanctions. Id. at 851; see also STAFF OF THE JOINT COMMITTEE ON TAXATION, TAX AMNESTY (JCS-2-98) 10 (Jan. 1998) [hereinafter AMNESTY STUDY] (“Another cost factor is the guilt that one might feel after evading taxes. While guilt, or more broadly one’s feelings about the morality of paying one’s taxes, is not often modeled in the economic analysis of tax evasion, it clearly is a factor that influences human behavior. If one expects to feel guilty from tax evasion, less tax evasion will be engaged in.”). Cf. Thurman et al., supra note 53, at 323–25 (concluding that those who anticipate feelings of guilt associated with tax evasion are less likely to evade, but also finding that guilt feelings can be overcome by beliefs that tax proceeds are wasted, tax evasion is widespread, and evasion is a victimless crime).

73. Erard & Feinstein, supra note 14, at 71–72. The Amnesty Study also includes shame (“damage to the reputation of the taxpayer if evasion is detected”) in the list of factors that influences a taxpayer’s willingness to comply. JOINT COMMITTEE, AMNESTY STUDY, supra note 72, at 3.

74. Grasmick & Bursick, supra note 71, at 855 (“We asked respondents if ‘most of the people whose opinions they value would lose respect’ for them if they committed the offenses. It is possible that among some or all respondents an affirmative response means that they think they would suffer a loss of respect if others knew about the transgression but they did not necessarily believe others would find out about the offense. If the perceived risk of detection by significant others is zero, then even if the perceived certainty times the severity of embarrassment [their terminology for shame] if detected is high, the actor is experiencing no threat of [shame].”).

75. Shaming penalties “produce (if they work) an unpleasant emotional experience for the offender, which potential offenders will want to avoid and actual offenders will want to avoid repeating. . . . Depending on the nature of his communal attachments, he may suffer adverse consequences from members of the community, who may gossip about him or refuse to engage in various forms of social and economic intercourse with him.” Stephen P. Garvey, Can Shaming Punishments Educate?, 65 U. CHI. L. REV. 733, 751–52 (1998). The impact of shaming penalties on the evader is discussed in more detail in Part V, infra.

76. See Posner, Law and Social Norms, supra note 14, at 1793 (“The stigma of the ex-convict is severe, and it is no exaggeration that many fear that stigma as much as, or more than, fines or imprison-
The potential for shame and stigma are also an important component in Professor Posner's signaling theory, although some commentators have discounted their role. Professor Dan Kahan, for example, finds Posner's theory of social norms an unconvincing explanation of tax compliance because compliance signals in the tax context are hard to observe:

In order for any species of behavior to signal something about a person's discount rate, that behavior must be readily observable. In the United States, at least, whether a person is complying with her tax obligations can't be observed by members of the public generally. There is no public registry of individual tax returns, which are in fact protected from disclosure by privacy legislation.

Posner points out, however, that in the case of tax compliance, signals may be sent indirectly:

The particular signal that is relevant in the present context is that of compliance with the law. In a given community, it may be the case that compliance with the law, or with some laws but not others, serves as a signal of one's type. For this to be true, it is not necessary that everyone observe whether a particular person actually complies with the tax law at any given time. Such observation can come about indirectly. If a person does not comply with the tax laws, and he is subsequently detected and prosecuted, his failure to follow the tax laws becomes known. Tax compliance, then, is observable in a stochastic sense. The person who fails to comply is revealed (by the state) to be a bad type, and he is accordingly stigmatized.

It is this fear of stigma generated by observable acts of noncompliance, Posner concludes, that is the source of tax compliance.

Publicizing acts of evasion, therefore, represents a potentially important role for the Government in the signaling model, although it is a role that must be carried out judiciously. An overly aggressive campaign to publicize every act of evasion could harm compliance in one of two ways: (1) The

77. For an explanation of the theory, see text accompany notes 35–40.
78. Kahan, Reciprocal, supra note 62, at 378 (footnote omitted); see also Lederman, Interplay, supra note 9 ("In effect, [Posner's] argument suggests not that people send signals by paying taxes (because, after all, at least in the United States, tax compliance generally cannot be observed) but rather, that in an economic calculus of whether to evade tax, individuals must factor in not only the nominal sanction but also the stigma or shunning they would experience if caught.") (footnotes omitted).
80. Id. at 1799.
stigma associated with evading and being caught might disappear;\textsuperscript{81} and (2) Taxpayers may view the campaign as a violation of their privacy rights, causing them to develop a negative view of the Government, which, as explained above, could weaken their inclination to comply.\textsuperscript{82} Professor Posner is fully aware of the risks and benefits of disclosure and publicity: "Enhancing signaling . . . might occur with publication of names, but the signaling might also be undermined—tax compliance would come to be associated with sycophancy toward the government—or at least offset by losses resulting from reduced cooperation with the schoolmarmish tax agency."\textsuperscript{83} A more limited publicity campaign, however, highlighting serious acts of noncompliance detected and punished by the IRS, would be less likely to generate resentment or undermine the signaling process. Suggesting a balanced publicity campaign that takes into account both the benefits associated with limited disclosure and taxpayer privacy concerns is the subject of the remainder of this article.

As we have seen thus far, economic models of tax evasion and tax compliance theories suggest that publicity focusing on successful IRS enforcement actions can play a positive role in maintaining and improving levels of tax compliance by increasing a taxpayer's perception of his risk of detection and punishment and by strengthening the taxpayer's internal motivation toward compliance. This publicity also has the potential to counteract press reports of the tax gap and low audit rates, which have the effect of reducing taxpayer compliance levels. Publicity campaigns that highlight specific acts of noncompliance, however, must fit within the confidentiality restrictions of section 6103, otherwise the Government risks liability for unauthorized disclosure of return information. Given Congressional concern about protecting taxpayer confidentiality, politicians and policy makers must be convinced that any proposal that might be interpreted as an infringement on taxpayer privacy is outweighed by a legitimate Government purpose. Before considering a taxpayer's privacy interests in depth, it is helpful to examine

\textsuperscript{81} Id. at 1813. This concern is related to Professor Kahan's claim that too much publicity about the extent of noncompliance can undermine reciprocal tendencies. See supra note 65 and accompanying text.

\textsuperscript{82} See supra notes 30–34 and accompanying text; id. at 1804 ("One of the ways that the government cooperates is by keeping tax information confidential. People might believe that the government should keep secret the names of tax violators, or at least the names of tax violators who do not engage in egregious violations.").

\textsuperscript{83} Id. On the general issue of privacy, Posner comments: "To say that a person values privacy is the same thing as saying that he fears the enforcement of social norms. . . . A person's concern for his privacy is not just a concern about concealing discreditable or embarrassing information about himself; it is a concern about protecting himself from being shunned because of his failure (currently or in the past) to conform to unpredictable signaling equilibriums." POSNER, SOCIAL NORMS, supra note 35, at 221.
Congress's current conception of taxpayer confidentiality and how it developed.

III. THE EVOLVING NOTION OF TAXPAYER CONFIDENTIALITY

A historical review of the development of the federal income tax from its beginning in the middle of the Nineteenth Century to the present reveals Congress's indecision as between policies that permitted disclosure of personal taxpayer data to the public and policies designed to preserve confidentiality. In more recent times, particularly since 1977, the Internal Revenue Code has embodied a general rule of confidentiality for tax returns and return information, yet this general rule yields to numerous exceptions that permit the IRS to disclose tax return information for legitimate purposes. Congress's current conception of taxpayer confidentiality, therefore, can accommodate disclosure exceptions that further the goal of improving the tax administration process and tax compliance.

A. Pre-1976 Legislation

Debate surrounding taxpayer privacy and confidentiality dates back to the enactment of the first income tax in the United States, passed to finance the Civil War. Accompanying legislation permitted the revenue authorities to release taxpayer names and assessed tax liabilities through publication of an assessment list. Publicizing the assessment list was thought to encourage compliance by reducing the possibility of undetected tax evasion.


85. I.R.C. § 6103.


87. Revenue Act of 1862, ch. 119, §§ 14, 15, 12 Stat. 432, 436-39. The authority to publish tax assessments provided by the 1862 Act was confirmed a few years later by an amendment that explicitly called for public release of the assessment lists. Act of June 30, 1864, 13 Stat. 218, 228 ("[T]he duty of the assessor . . . to submit the proceedings of the assessors . . . and the annual list taken and returned as aforesaid, to the inspection of any and all persons who may apply for that purpose.").

88. CONFIDENTIALITY LEGISLATIVE HISTORY, supra note 84, at 4-8 ("[S]uch publicity would make every citizen a deputy tax collector, spying on neighbors and looking out for the government's interests.").
legislation also provided for newspaper publication of a collector list, showing the amount each taxpayer owed and the time and place for payment. Newspaper publication had its critics, however. Future President James Garfield, then a member of the House of Representatives, maintained that publishing taxpayer information in the newspaper was offensive to notions of taxpayer privacy and an ineffective method of ensuring that taxpayers reported their income accurately. While newspaper publication of assessment and collector lists was eventually prohibited, the information remained open for public inspection.

Congress allowed the first income tax to expire in 1872, and when the tax was reintroduced in 1894, Congress included provisions in the legislation affirmatively prohibiting both the printing and publishing of any income tax return. These anti-disclosure provisions were reinforced by criminal penalties. After the 1894 tax was declared unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*, as a direct tax not apportioned among the States, it was not until 1913 that the individual income tax was re-enacted, following certification of the Sixteenth Amendment's ratification by the States. The Revenue Act of 1913 declared that tax returns "shall constitute public records and be open to inspection... Provided, That any and all such returns shall be open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President." Shortly thereafter, in response to the President's refusal to exercise his authority to permit public inspection, Congress enacted legislation requiring the Commissioner to make the names of individual taxpayers who had filed returns available to the public.

The policy favoring disclosure was strengthened in the 1920s. The Revenue Act of 1924 reintroduced the practice of making taxpayers' names

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90. CONFIDENCE LEGISLATIVE HISTORY, supra note 84, at 6-7.
92. Revenue Act of 1894, ch. 349, § 34, 28 Stat. 509, 557. Until 1939, Congress enacted revenue acts every two to three years, each constituting a separate body of federal tax law.
93. Id. at 558.
94. 157 U.S. 429 (1895).
95. In the interim, Congress passed the Payne-Aldrich Tariff Act of 1909, ch. 6, 36 Stat. 11, 112, which imposed an excise tax on corporations. The Tariff Act included conflicting language relating to the issue of whether corporate returns were public records. Legislation in 1910 designed to resolve the issue resulted in a compromise: Corporate returns were to be made public, but only upon the order of the President. Act of June 17, 1910, ch. 297, 36 Stat. 468, 494.
96. Tariff Act of 1913, ch. 16, § 2(G)(d), 38 Stat. 114, 177 (emphasis in original). The 1913 Act permitted State tax officials access to tax returns filed by corporations and other business entities without the prior approval of the President. Id.
and corresponding liabilities available to the public. Those in favor of publicizing taxpayer return information asserted that publicity would discourage tax evasion and promote honesty, presumably by drawing attention to suspiciously low tax liabilities. Opponents of the measure, led by the Secretary of the Treasury at the time, Andrew Mellon, were not convinced by the supporters' progressive tones:

While the government does not know every source of income of a taxpayer and must rely upon the good faith of those reporting income, still in the great majority of cases this reliance is entirely justifiable, principally because the taxpayer knows that in making a truthful disclosure of the sources of his income, information stops with the government. It is like confiding in one's lawyer.

Secretary Mellon went on to criticize the publicity provision in the 1924 Act as leading to nothing more than "the gratification of idle curiosity and the filling of newspaper space at the time the information is released." His statements reflected the prevailing practice of newspaper publishers to report the amount of taxes paid by prominent taxpayers, a right upheld by the Supreme Court in *United States v. Dickey*. Two years later, Congress removed the provision that permitted publication of taxpayer liabilities, but retained a provision allowing for public disclosure of the names and addresses of those who filed a return.

In the wake of Congressional hearings in the early 1930s exposing tax loopholes for the wealthy, Congress returned to the idea of publicizing taxpayer names and annual liabilities as a method of combating noncompliance.

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98. Revenue Act of 1924, ch. 234, § 257(b), 43 Stat. 253, 293 ("The Commissioner shall . . . cause to be prepared and made available to public inspection . . . lists containing the name and the post-office address of each person making an income-tax return . . . together with the amount of the income tax paid by such person.").


100. *Hearings on Revenue Revision Before the House Ways and Means Committee, 69th Cong. 8–9 (1925).*

101. S. Rep. No. 94-266, at 1039 n.51 (citing *Hearings on Revenue Revision Before the House Ways and Means Comm.*, 69th Cong. 8–9 (1925)).


103. 268 U.S. 378, 387 (1925) ("Information, which everybody is at liberty to acquire and the acquisition of which Congress seemed especially desirous of facilitating, in the absence of some clear and positive provision to the contrary, cannot be regarded as otherwise than as public property, to be passed on to others as freely as the possessors of it may choose. The contrary view requires a very dry and literal reading of the statute quite inconsistent with its legislative history and the known and declared objects of its framers.").

104. Revenue Act of 1926, ch. 27, § 257(c), 44 Stat. 9, 52.
and highlighting the need for tax reform. The Revenue Act of 1934 included a highly controversial "pink slip" provision. This provision, had it taken effect, would have required taxpayers to attach to their returns a paper slip (pink in color) that contained the taxpayer's gross income, deductions, net income, credits, and tax owed. The slips would be made available for public inspection for a period of three years from the return filing date.

Although economic models of tax evasion and theories of tax compliance norms had yet to be formulated, debate over the legislation that eventually repealed the pink slip requirement retroactively included references to the effects of publicity on compliance norms, although no legislator used that specific language. Echoing Posner's signaling model, some supporters of the reporting requirement believed the publicity resulting from release of return information would be an effective means of coercing taxpayers into compliance:

If taxpayers are evading the payment of their just share of taxes and leaving others to bear an unjust burden, throw the light of publicity and show the evading taxpayers and the amount of taxes that are being evaded and relieve the honest taxpayers from more than their just portion and share.

Consistent with reciprocal norm theories, other supporters of the pink slip reporting requirement thought that tax return confidentiality facilitated tax avoidance and covered up preferential treatment by Treasury officials, both of which they believed had a negative effect on the willingness of other taxpayers to comply:

We can never have in this country conviction in the public mind that the income-tax law is being adequately and vigorously administered or that all taxpayers are carrying their fair and proportionate share of the burden imposed under the income-tax law so long as the return is protected by the secrecy provision of the existing law.

105. As it had in the past, the income tax during the 1930s applied only to the wealthiest citizens, covering no more than the top 5% of the population. President Franklin Roosevelt and his supporters sought to use the tax system not only as a method of generating revenue, but as a way of breaking up what they believed were unjust concentrations of wealth. See Caroline C. Jones, Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II, 37 BUFF. L. REV. 685, 688–93 (1988/89) (containing an excellent discussion of the political and economic considerations surrounding the development of the income tax during the first half of the Twentieth Century); see also Robert J. Haws, A Brief History of American Resistance to Taxation, in ABA COMPLIANCE REPORT, supra note 4, at 113.

108. 79 CONG. REC. 4445 (1935) (statement of Sen. LaFollette). Senator Huey Long was also an avid supporter of publicizing tax returns: "It is my business to find out whether you are making me pay an
Opponents of the pink slip provision, who eventually won its repeal, warned that releasing the information to the public would facilitate blackmail, kidnapping, and related crimes:

I believe the amount of income that any one of our citizens earns is solely a confidential matter between that citizen and his Government and is not the business of any other person, whether a snooper, a racketeer, or the editor of a great newspaper. Let people mind their own business.109

With the elimination of the pink slip provision, the state of the law surrounding disclosure of individual tax return information reverted, essentially, to the 1913 model: Tax returns were public records, but open to inspection only if they fell within the parameters of an Executive Order calling for disclosure, or within the parameters of Treasury disclosure regulations approved by the President.110 During the next four decades, Congress avoided tough questions relating to taxpayer privacy by allowing the President and his advisors to decide who had access to taxpayer information. Congress eventually repealed the IRS's authority to release public lists of taxpayer names and address in 1966,111 although the IRS could state, in response to an inquiry, whether a taxpayer had or had not filed a return for a particular year.112 During this same period, the release of taxpayer return information by the IRS within the federal Government and to State agencies grew rapidly.113 Regulations were adopted that permitted the IRS to release tax return information to virtually

109. Id. at 3389 (statement of Rep. O'Connor); see also H.R. Rep. No. 74-313, at 1 (1935) (Treasury Study concluding that disclosure of individual tax returns was of "slight benefit to the Treasury in the prevention of tax evasion, which is the main argument advanced for such publicity."). See generally Pomp, supra note 3, at 398–405 (explaining the political forces for and against disclosure).

110. See I.R.C. § 6103(a)(2) (prior to amendment in 1976). The disclosure (or confidentiality) provision was re-enacted as Code section 6103 by the Internal Revenue Code of 1954, ch. 736, 68A Stat. 1, 753–55.

111. Pub. L. No. 89-713, § 4(a)(k), 80 Stat. 1107, 1109 (1966). The repeal reflected the IRS’s move to microfilm for maintaining tax data and the fear that releasing the microfilm would permit third parties to have access to the taxpayer’s social security number.


113. A specific disclosure exception permitting State taxing authorities access to federal returns was eventually written into the statute. I.R.C. § 6103(b) (before amendment in 1976).
all federal agencies merely upon the agency’s request. Another set of regulations allowed blanket access, without the necessity of providing a specific reason, to certain federal agencies for regulatory and statistical compilation purposes.\textsuperscript{114} By the early 1970s, the IRS released annually millions of tax returns to federal and State governmental agencies.\textsuperscript{115}

Privacy concerns escalated during the mid-1970s. Public reaction to the Watergate scandal, as well as fears over the proliferation of computerized data banks, moved Congress to strengthen privacy rights throughout the Government.\textsuperscript{116} The Privacy Act of 1974, which predated revisions to Code section 6103 governing taxpayer confidentiality, made important inroads into privacy protection, yet somewhat surprisingly, Congress did not consider the specific problem of tax return confidentiality when it enacted the Privacy Act protections against unauthorized disclosure.\textsuperscript{117} The Privacy Act


115. The Freedom of Information Act (FOIA), enacted in 1966 in response to the closed file policies of some Government agencies, also plays a role in determining the balance between confidentiality and disclosure of tax return information. 5 U.S.C. § 552. In the tax area, FOIA’s broad purpose is to ensure that the IRS’s decision-making processes are open to the public. The disclosure-oriented purpose of FOIA contrasts with the confidentiality concerns expressed in Code section 6103. Tension exists, for example, when a third party requests taxpayer-specific documents from the IRS through FOIA. In such cases, the IRS can use section 6103 as an excuse to withhold the documents. Under FOIA Exemption 3, the IRS may withhold information that is specifically exempted from disclosure by another statute. 5 U.S.C. § 552(b)(3); see Gutman, \textit{Confidentiality}, supra note 41, at 318 (arguing that the IRS benefits from a strict confidentiality statute by using it as a shield against disclosure of the agency’s internal decision-making processes). As discussed below, section 6103 also operates independently of FOIA to protect the privacy interests of taxpayers against unauthorized use and disclosure of return information. For a discussion of the interaction between FOIA and section 6103, see LEANDRA LEDERMAN & STEPHEN W. MAZZA, TAX CONTROVERSIES: PRACTICE AND PROCEDURE ch. 3 (2d ed. 2002); see also JOINT COMMITTEE, CONFIDENTIALITY STUDY, supra note 19, at 196–201 (recommending that section 6103 should pre-empt FOIA in the case of tax return and return information, thereby making section 6103, rather than FOIA, the primary means by which parties could request disclosure of return information). On the pre-emption issue, compare Zale Corp. v. Internal Revenue Service, 481 F. Supp. 486, 490 (D.D.C. 1979) (stating that section 6103 is the sole standard governing release of return information), with Grasso v. Internal Revenue Service, 785 F.2d 70, 75 (3d Cir. 1986) (“It is thus evident that section 6103 was not designed to replace FOIA . . . .”).

116. JOINT COMMITTEE, 1976 BLUEBOOK, supra note 114, at 314. The Watergate hearings also revealed attempts by the Nixon administration to punish its political enemies by initiating IRS audits. JOINT COMMITTEE, CONFIDENTIALITY STUDY, supra note 19, at 255–56.

117. 5 U.S.C. § 552a; JOINT COMMITTEE, 1976 BLUEBOOK, supra note 114, at 315. The Privacy Act leads a double life. On the one hand, it protects against unwarranted invasions of privacy by restricting the use and dissemination of personal information by Government agencies, including the IRS. 5 U.S.C. § 552a(b). On the other, the statute grants individuals access to records and information compiled by Government agencies about them. \textit{Id.} at § 552a(d). Most courts have ruled that Code section 6103 pre-empts the Privacy Act when it comes to tax returns and return information. \textit{See, e.g.}, Gardner v. United States, 213 F.3d 735, 739 (D.C. Cir. 2000) (stating that section 6103 pre-empts Privacy Act regarding claims that the IRS made unauthorized disclosures of taxpayer’s return information to a third
did, however, establish the Privacy Protection Study Commission, a panel charged with reporting to Congress on a number of privacy issues, including whether the IRS should continue its existing practice of making tax return information available to other agencies for nontax purposes.\textsuperscript{118} Recommendations from the Privacy Commission and a series of hearings on existing disclosure regulations caused Congress to amend Code section 6103 to recharacterize tax returns from their status as public records to their current status as confidential documents, subject to disclosure only as provided by statute.\textsuperscript{119}

B. The Privacy Protections of Code Section 6103

With the amendments to Code section 6103 in 1976, Congress declared that "returns and return information shall be confidential."\textsuperscript{120} This "presumption" of confidentiality remains in effect today. The categories of information protected from disclosure are broadly defined.\textsuperscript{121} The taxpayer's "return" includes not only his Form 1040, but also any attachments or supporting schedules. The term "return information" is defined to encompass virtually all data related to a taxpayer's tax determination, including the type, source, and amount of his income, payments, and deductions. The term also includes any information developed or obtained by the IRS during the course of an audit or investigation of the taxpayer, as well as the mere fact that the taxpayer's return has been or is being audited or investigated.\textsuperscript{122} As discussed in Part IV, the privacy protections afforded by section 6103 are


\textsuperscript{119} \textsc{TREASURY DEPARTMENT, DISCLOSURE STUDY, supra} note 19, at 20–21.

\textsuperscript{120} I.R.C. § 6103(a) (emphasis added).

\textsuperscript{121} To disclose means "the making known to any person in any manner whatever a return or return information." I.R.C. § 6103(b)(8).

\textsuperscript{122} I.R.C. § 6103(b)(2). Courts have confirmed the broad scope of the statute's language. \textit{See}, e.g., Branch Ministries Inc. v. Richardson, 970 F. Supp. 11, 18 (D.D.C. 1997) ("[t]his language is extremely broad . . . ."); Lehrfeld v. Richardson, 954 F. Supp. 9, 13 (D.D.C. 1996) ("[r]eturn information is defined broadly by the statute to include almost any information compiled by the IRS in connection with its determination of a taxpayer's liability."). The term return information does not include data in a form that cannot be associated with or identify, directly or indirectly, a particular taxpayer. I.R.C. § 6103(b)(2). Thus, for example, statistical compilations derived from taxpayer return information that do not identify a specific taxpayer are excluded from the definition of return information. I.R.C. § 6103(b)(2); Church of Scientology v. Internal Revenue Service, 484 U.S. 9, 17 (1987).
backed up by civil and criminal penalties for unauthorized inspection and disclosure. 123

When Congress established the general rule of confidentiality in section 6103 it did not guarantee the taxpayer absolute protection against disclosure. The confidentiality rule so boldly stated in the first clause of the statute is qualified by more than a dozen detailed exceptions, each of which authorizes disclosure of return information outside the IRS. 124 According to the legislative history, the disclosure exceptions represent Congress’s attempt to “balance the particular office or agency’s need for the information with the citizen’s right to privacy, as well as the impact of the disclosure upon the continuation of compliance with our country’s voluntary tax assessment system.” 125

Most of the exceptions in section 6103 permitting the IRS to release return information represent the necessities associated with administering a tax system that is dependent upon the free flow of information. The taxpayer, for example, has access to his own return information and may designate access by others, including his representative. Spouses, in the case of a joint return, have a right of access, as do partners in a partnership, and one percent or greater shareholders of a corporation. 126 Government agencies with a right of access include the Treasury Department and Department of Justice, whose investigators and attorneys can use the information to investigate a taxpayer’s civil and criminal tax liability. 127 Once Government attorneys gain access to the information, they may re-disclose it as part of a judicial proceeding relating to the taxpayer’s liability. For example, IRS attorneys can introduce return information as evidence in a Tax Court proceeding in which the taxpayer is the petitioner. Similarly, attorneys in the tax division

123. See infra notes 173–78 and accompanying text (discussing I.R.C. §§ 7431 (civil cause of action against Government for unauthorized inspection or disclosure); 7213, 7213A (criminal penalties for unauthorized disclosure and unauthorized inspection)).

124. I.R.C. § 6103(c)-(t). In addition to the exceptions in Code section 6103, the Tax Reform Act of 1976 also provided for disclosure of certain types of nonbinding written determinations prepared by the IRS, including letter rulings and determination letters. I.R.C. § 6110. To protect against disclosure of otherwise confidential information, the IRS must delete any identifying details from the written determination before it is made available for public inspection. I.R.C. § 6110(c). (f); Treas. Reg. § 301.6110-5.


126. I.R.C. § 6103(e)(1), (7).

127. I.R.C. § 6103(h)(2). Federal Government attorneys may also gain access to a taxpayer’s return information for use in determining the civil or criminal tax liability of another taxpayer, but only if the information may be relevant to the resolution of an issue pertaining to the third party or there is a transactional relationship between the taxpayer and the third party. I.R.C. § 6103(h)(2). Furthermore, upon court order, disclosure of return information to Government agency employees may be made for nontax criminal investigatory purposes (e.g., theft, illegal payments, bribery, kickbacks). I.R.C. § 6103(i). The IRS also shares return information with State and local tax authorities, which may use return information to administer their own tax systems. I.R.C. § 6103(d).
of the Department of Justice can place return information into the court record during a grand jury proceeding or during the criminal trial of a taxpayer for tax evasion.\textsuperscript{128}

The IRS may also disclose return information on either a general or case-by-case basis to other federal agencies for reasons entirely unrelated to tax administration. Return information is available on a general, continuing basis if it is directly related to the programs administered by the agency in question. The Bureau of the Census and the Department of Commerce, for instance, may obtain access for statistical purposes.\textsuperscript{129} Upon specific request, the IRS can disclose return information necessary to administer other federal agency initiatives ranging from food stamp and low-income housing programs, to the federal student loan program and the blood donor locator service.\textsuperscript{130}

While no exception in section 6103 expressly permits the IRS to release return information to the general public, a number of exceptions allow for limited release outside a federal or State agency. As part of a civil or criminal tax investigation, for example, an IRS employee may disclose return information to third parties for the purpose of gathering evidence that is not otherwise reasonably available to the investigator.\textsuperscript{131} Thus, an IRS agent investigating a taxpayer may disclose to the taxpayer's business associates and customers the fact that the taxpayer is under audit—a disclosure that constitutes the release of return information—if it is necessary to obtain relevant information from these third parties. The IRS is also authorized by section 6103 to disclose to the public agreements entered into between a taxpayer and the IRS compromising the taxpayer's assessed liability.\textsuperscript{132} Finally, the amount of an outstanding tax lien may be disclosed to private persons who have an interest in the underlying property.\textsuperscript{133}

\begin{footnotes}
\footnote{128. I.R.C. § 6103(h)(4). The Government can also introduce return information as evidence in a third party judicial proceeding if the information is "directly related" to the third party's case.}
\footnote{129. I.R.C. § 6103(j).}
\footnote{130. I.R.C. § 6103(l)(3) (student loan); (l)(7) (food stamps and housing); (m)(6) (blood donor).}
\footnote{131. I.R.C. § 6103(k)(6); see, e.g., DiAndre v. United States, 968 F.2d 1049, 1052 (1992) (disclosure exception allowed IRS agent during an investigation relating to alleged unreported income to mail circular letters to taxpayer's customers for the purpose of obtaining information on payments made to the taxpayer), cert. denied sub nom. Metro Denver Maint. Cleaning v. United States, 507 U.S. 1029 (1993).}
\footnote{132. I.R.C. § 6103(k)(1). The instances in which the IRS may be willing to compromise a taxpayer's assessed liability are set forth in Code section 7122.}
\footnote{133. I.R.C. § 6103(k)(2).}
\end{footnotes}
Many commentators view the amendments to section 6103 as a watershed event in the development of taxpayer privacy protections.\(^{134}\) This is an overreaction. Viewed as a whole, Congress's 1976 revisions to section 6103 did not appreciably reduce the instances of permissible return information disclosure; the legislation merely imposed greater regulation on those seeking access. Most of the disclosure exceptions in section 6103, in fact, represent codifications of the pre-1976 disclosure regulations.\(^{135}\) In those instances in which restrictions were strengthened, Congress was concerned primarily with limiting use and disclosure of return information for political and for nontax reasons, rather than for purposes that facilitated tax administration efforts.\(^{136}\) To guard against politically motivated misuse of return information, for example, Congress not only removed presidential control over the release of return information to other Government agencies, but it severely limited executive branch access to return information by requiring that the President, in most cases, personally request access and state the reason for doing so.\(^{137}\) For the same reason, access by Congressional committees was also restricted.\(^{138}\) Congress also strengthened disclosure rules to require that the Justice Department obtain court approval before gaining access to a taxpayer's return information for use in a nontax criminal investiga-

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134. See, e.g., Joseph J. Darby, Section IV: Confidentiality and the Law of Taxation, 46 AM. J. COMP. L. 577, 579 (1998) ("Section 6103 begins boldly by stating that 'returns and return information shall be confidential,' a dramatic change from the prior statutory rule characterizing returns as 'public records.'") (footnotes omitted).

135. Compare I.R.C. § 6103(h) (access by Treasury employees whose duties require inspection for tax administration purposes), with Treas. Reg. § 301.6103(a)-1(e) (1975) (access by Treasury employees "whose official duties require inspection of returns"). The pre-existing disclosure regulations were repealed to the extent that they were inconsistent with the statutory exceptions included in the 1976 Act. JOINT COMMITTEE, 1976 BLUEBOOK, supra note 114, at 315. See generally James N. Benedict & Leslie A. Lupert, Federal Income Tax Returns—The Tension Between Government Access and Confidentiality, 64 CORNELL L. REV. 940, 950 (1979) (explaining the reasoning behind the 1976 Act revisions to section 6103).

136. "[S]ection 6103 grew out of a desire to protect return information from unfettered use by the President and various Federal agencies." TREASURY DEPARTMENT, DISCLOSURE STUDY, supra note 19, at 33.

137. See Rueckert v. Internal Revenue Service, 775 F.2d 208, 210 (7th Cir. 1985) ("Section 6103 was enacted in response to the use of tax return information for political purposes revealed during Watergate."). The President retains the authority to conduct a "tax check" of prospective appointees, confirming whether they filed income tax returns during the past three years or have been penalized for tax noncompliance. I.R.C. § 6103(g)(2).

Claims that the executive branch caused the IRS to initiate politically motivated audits resurfaced in the wake of President Clinton’s impeachment. See, e.g., Judicial Watch, Inc. v. Rossotti, 317 F.3d 401 (4th Cir. 2003) (dismissing Judicial Watch's request to enjoin IRS audit of organization because organization failed to satisfy an exception to the Anti-Injunction Act). Congress included a provision in the IRS Restructuring and Reform Act of 1998 that prohibits the executive branch from requesting that an IRS investigation be initiated or terminated. I.R.C. § 7217.

tion.\footnote{I.R.C. § 6103(i); see Treas. Reg. § 301.6103(i)-1 (procedures and restrictions on disclosure).} Probably the most important privacy protection introduced in 1976 was the provision that conditions an agency’s receipt of return information on its compliance with a comprehensive system of administrative safeguards and record keeping requirements. These safeguards, which have been strengthened over the years, seek to assure that return information disclosed outside the IRS is not used for purposes other than the purposes for which it was initially disclosed.\footnote{I.R.C. § 6103(p); Joint Committee, 1976 Bluebook, supra note 114, at 339. The Code calls on the recipient to maintain technical and physical safeguards against unauthorized release, and calls on the IRS to maintain a record of all inspection and disclosure requests. I.R.C. § 6101(p)(3)(a), (4)(a). The IRS also must issue an annual report to the Joint Committee on Taxation specifying the number of disclosures made and the general purpose of each. The report is issued publicly. I.R.C. § 6103(p)(3)(B). See, e.g., Revenue Act of 1978, Pub. L. No. 95-600, § 701(bb), 92 Stat. 2763, 2921-22 (granting access to National Institute for Occupational Safety and Health); Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 356(a), 96 Stat. 324 (relaxing standard for Justice Department access to return information for nontax criminal purposes); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 5111(b), 104 Stat. 288-272, 272-73 (granting access to Social Security Administration). See generally Joint Committee, Confidentiality Study, supra note 19, at 270-79 (recounting post-1976 amendments to section 6103).}

The balance Congress struck in 1976 between concerns over taxpayer confidentiality and the Government’s legitimate uses for return information has evolved over the years. The number of disclosure exceptions has increased.\footnote{I.R.C. § 6103(i)(3), (7). Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107-134, § 201, 115 Stat. 2427, 2440 (2002).} Most recently, in response to the September 11, 2001 attacks, Congress amended section 6103 to permit the IRS to share information with law enforcement agencies investigating potential terrorist activities.\footnote{Taxpayer Browsing and Protection Act, Pub. L. No. 105-35, 111 Stat. 1104 (1997) (enacting section 7213A, which provides for penalties for computer browsing of taxpayer return information by IRS employees). The 1998 Reform Act’s primary contributions to taxpayer privacy protection were a call for a review of the existing rules, IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3802, 112 Stat. 685, 782, and a requirement that the instructions to Form 1040, the Individual Income Tax Return, include a statement informing taxpayers that their return information could be disclosed to parties outside the IRS. id. § 3508, 112 Stat. 685, 772. The IRS was considered to have already fulfilled the latter requirement even before the mandate was enacted. H.R. Conf. Rep. No. 105-599, at 298 (1998).} And while Congress eventually found it necessary to strengthen the penalties for misuse of return information by IRS employees,\footnote{During 2002, the IRS made 3.3 billion disclosures of tax return and return information. The majority, 2 billion, were made to State Governments, and another 1 billion disclosures were made to the Census Bureau. Disclosures to child support agencies totaled 10 million, disclosure to the Congressional Budget Office numbered 9.5 million, and 7.5 million were made to the General Accounting Office. Staff of the Joint Committee on Taxation, Disclosure Report for Public Inspection to} the number of wrongful disclosure claims each year has been relatively few given the total number of disclosures the IRS makes on an annual basis.\footnote{2002-2003
With all this said, what conclusions about Congress's conception of taxpayer confidentiality can be drawn from a historical analysis of section 6103? First, Congress's view of the relationship between taxpayer privacy and tax administration has varied widely over the years. While legislation in the early part of this Century permitting public disclosure of return information was eventually repealed, at no point in the history of the tax system was return information granted the protection of complete confidentiality. Second, the privacy concerns that led to the 1976 revisions to Code section 6103 were not wide-ranging, but specific to issues such as whether the executive branch should have unfettered access to return information and whether the IRS should supply return information to other Government agencies for uses unrelated to tax administration. Third, Congressional action in 1976, creating a presumption of confidentiality for return information, is not synonymous with a guarantee of absolute privacy protection. What the presumption of confidentiality means is that, in all cases, the Government's use of tax return information for purposes other than determining the individual's tax liability must be justified, both in terms of the Government's interest and any possible infringement on the taxpayer's privacy interests.

Consequently, if expanding the number of disclosure exceptions in section 6103 requires that policy makers balance the Government's interest in disclosure against taxpayers' privacy rights, it becomes necessary to examine the scope of those rights and determine what protections they entail. Failure to do so could result in disclosure exceptions that are either too narrow, thereby preventing the Government from utilizing return information for legitimate purposes, or too broad, thereby offending taxpayers' reasonable privacy expectations. The discussion below takes an expansive look at taxpayer privacy interests, revealing that the scope of a taxpayer's privacy rights relating to return information varies based upon the intended use of the information by the IRS and whether the information has already been disclosed in the public domain.

INTERNAL REVENUE CODE SECTION 6103(P)(3)(C) FOR CALENDAR YEAR 2001 (JCX-41-02) (2002). The Joint Committee reported that between 1994 and 1999, the Government lost 24 unauthorized disclosure cases and won 97. JOINT COMMITTEE, CONFIDENTIALITY STUDY, supra note 19, at 180. The Joint Committee Confidentiality Study also cites to a report by William Webster, which concluded that no evidence of systematic or repeated disclosure violations by the IRS Criminal Division existed. Id. at n.788 (citing William H. Webster, Review of the Internal Revenue Service's Criminal Investigation Division (April 1999)).
IV. IDENTIFYING A TAXPAYER’S PRIVACY RIGHTS

Privacy, as a societal value, is generally recognized as a positive interest, although the scope and extent of its value is subject to debate. Privacy, as an individualized interest, may be even more difficult to define because an individualized notion of privacy rests on a series of subjective evaluations. In the context of privacy interests relating to an individual’s personal and financial data, what one individual may consider to be an intensely personal piece of information worthy of privacy protection, another individual may be willing to share freely with Government regulators or with the public at large. Quantifying an individual’s privacy expectations is also made difficult because the concept of privacy takes on meaning only when the individual’s privacy interests are threatened in some direct or indirect way.


146. Samuel Warren and Louis Brandeis, in one of the earliest attempts to develop a generalized right of privacy, defined privacy as the right “to be let alone.” Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 193 (1890). Later formulations are slightly more specific, but still lack a workable degree of precision. See, e.g., ARTHUR R. MILLER, THE ASSAULT ON PRIVACY 25 (1971) (“[T]he basic attribute of an effective right of privacy is the individual’s ability to control the circulation of information relating to him . . . .”); ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967) (“Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”). For a discussion of the development of a legal right to privacy in the United States see DAVID M. O’BRIEN, PRIVACY, LAW, AND PUBLIC POLICY (1979).

147. See Rehnquist, supra note 145, at 4–6 (distinguishing the notion of privacy as a defense against intrusion and the notion of privacy as a defense against Government regulation); see also United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989) (distinguishing between an individual interest in avoiding disclosure of personal information and an interest in independently making certain kinds of decisions without Government interference). Here, the interest in avoiding disclosure of personal matters is implicated.

148. During the 1970s, for example, Congress reacted to allegations of privacy invasions by enacting legislation responsive to the specific threat. See, e.g., Family Education and Privacy Act of 1974, 20 U.S.C. § 1232g (regulating disclosure of students’ school records by federally-funded educational institutions); Fair Credit Reporting Act of 1970, 15 U.S.C. § 1681 (providing consumers the right to determine the type of information in consumer credit files and the right to correct errors). Another surge of legislation occurred in the late 1980s. See, e.g., Video Privacy Protection Act of 1988, 18 U.S.C. § 2710; Computer Matching and Privacy Protection Act of 1988, 5 U.S.C. § 552a. See generally David H. Flaherty, On the Utility of Constitutional Rights to Privacy and Data Protection, 41 CASE W. RES. L. REV. 831, 831 (1991) (“Privacy is like freedom: we do not recognize its importance until it is taken away. In that sense, it is a personal right that we assume we have yet take for granted—until something or someone infringes on it.”); Kenneth L. Karst, “The Files”: Legal Controls over the Accuracy and Accessibility of Stored Personal Data, 31 L. & CONTEMP. PROBS. 342, 343–44 (1966) (“Hardly anyone in our society can keep altogether secret very many facts about himself. Almost every such fact, however personal or sensitive, is known to someone else. Meaningful discussion of privacy, therefore, requires the recognition that ordinarily we deal not with an interest in total nondisclosure but with an interest in selective disclosure.”).
Moreover, privacy is a multi-faceted concept, implicating proscriptions against intrusiveness (the extent to which the individual should be forced to divulge information), misuse (the extent to which protections against unauthorized use should exist); and unauthorized disclosure (the extent to which information should remain confidential). The federal income tax system implicates all three of these privacy concerns, and they are discussed, in turn, below.

A. Intrusiveness

When it comes to collecting individually identifiable data, it is often said that the IRS compiles more information about more people than any other agency. Much of the information the IRS collects is considered highly sensitive. The individual income tax return, for example, requires the taxpayer to reveal his place of residence, marital status, dependents, the source of his income, and an annual measure of the taxpayer’s financial well-being. To obtain itemized deductions, the taxpayer may be forced to reveal even more intimate details, including the taxpayer’s religious affiliation and whether the taxpayer is under the care of a doctor or psychiatrist.

Notwithstanding the sensitive nature of some tax return information, the taxpayer cannot withhold these details from the IRS based on a generalized claim of privacy protection. Congress has granted the IRS broad authority to require that taxpayers maintain detailed books and records to support the tax treatment of their income and deductions. These records might never have to be revealed were it not for the investigatory authority granted the IRS by Code section 7602. This provision gives the IRS the power to “examine any books, papers, records, or other data which may be relevant” to determining

149. See generally Privacy Protection Study Commission, supra note 23, at 13–21.
152. I.R.C. §§ 170 (charitable contribution deduction); 213 (medical expense deduction). Internal Revenue Service, Schedule A—Itemized Deductions 2002, lines 1–4 (Medical and Dental Expenses), lines 15–18 (Gifts to Charity).
153. I.R.C. §§ 6001 (“Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe. Whenever in the judgment of the Secretary it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, render such statements, or keep such records, as the Secretary deems sufficient to show whether or not such person is liable for tax under this title.”); 6201(a) (“The Secretary is authorized and required to make the inquiries, determinations, and assessments of all taxes . . . imposed by this title . . .”).
the correctness of the taxpayer's return, as well as the authority to issue an 
administrative summons requiring the taxpayer to produce those records. 154 
Although the IRS must seek a court order before enforcing an administrative 
summmons compelling disclosure, 155 the prima facie case the IRS must present 
to obtain the order is, in most cases, easily satisfied. The IRS need not show 
probable cause, but only that the information is sought for a legitimate pur-
pose, is relevant to the investigation, is not already in the IRS's possession, 
and is requested using the required notice procedures. 156

Once the IRS requests access to the taxpayer's books and records, the 
taxpayer is given a limited opportunity to protect his privacy interests by 
challenging in court the IRS's right to receive the records it seeks. This 
right, however, arises only after the IRS institutes a summons enforcement 
proceeding. As part of the enforcement hearing, the taxpayer can challenge 
the IRS's summons authority by claiming that the records sought are not 
relevant to the investigation, yet the concept of relevancy in this context is 
not very confining. Relevancy, for these purposes, is not defined in an evid-
entiary sense: Information is relevant when it could merely "shed some 
light" on the taxpayer's liability. 157 The taxpayer can also resist enforcement 
of the summons based upon a claim that the requested information is pro-
tected by the attorney-client confidentiality or work product privileges. 158 At 
least where the IRS seeks factual information relating to the taxpayer's re-
turn, a common law privilege claim almost never applies because the infor-

154. I.R.C. § 7602(a); see United States v. Norwest Corp., 116 F.3d 1227, 1231 (8th Cir. 1997) 
(stating that, given the agency's broad mandate to investigate and audit persons who may be liable for 
taxes, courts should be wary of restricting that authority so as to undermine the efficacy of the federal tax 
system.).

155. I.R.C. §§ 7604(a); 7402(b). Because of the broad authority granted the IRS, most taxpayers 
comply with the administrative summons voluntarily or attempt to negotiate the scope of the requested 
material with the IRS agent in charge, rather than force the IRS to institute an enforcement proceeding. 
Willful failure to comply with a summons is a misdemeanor. I.R.C. § 7210.

Eighth Circuit has referred to the IRS's burden of proof under Powell as "minimal." Norwest Corp., 116 
F.3d at 1234. The IRS typically satisfies its burden under Powell by presenting a sworn affidavit of the 
IRS agent who issued the summons attesting to the satisfaction of each element. See, e.g., La Mura v. 
United States, 765 F.2d 974, 979 (11th Cir. 1985).

157. Norwest Corp., 116 F.3d at 1233; see also United States v. Southwestern Bank & Trust Co., 
693 F.2d 994, 996 (10th Cir. 1982); United States v. Kis, 658 F.2d 526, 537 (7th Cir. 1981), cert. denied, 

158. United States v. Riewe, 676 F.2d 418, 420 n.1 (10th Cir. 1982). As additional grounds, the 
taxpayer can claim that the summons is procedurally defective, or that the IRS issued the summons in bad 
faith. United States v. LaSalle Nat'l Bank, 437 U.S. 298, 308 (1978). The taxpayer bears the burden of 
mation sought is rarely conferred in the course of a confidential relationship.

Constitutional defenses to an IRS summons are also of limited benefit to a taxpayer seeking to withhold factual information relating to his tax liability. If the information sought by the IRS would be incriminating, the taxpayer may exercise his Fifth Amendment rights, but the taxpayer must assert the claim on a document-by-document basis. Courts do not recognize a blanket assertion of self-incrimination in the tax context. Moreover, the precise scope of the Fifth Amendment protection against disclosure of information to the IRS is unclear. The Supreme Court has held that an individual cannot refuse to file a tax return based on a Fifth Amendment privilege claim, yet the same individual cannot be convicted of failing to file a return if he files a return on which he asserts his Fifth Amendment rights. In any case, as a means of shielding information from the IRS, a claim of self-incrimination is of little use to the average taxpayer simply because the taxpayer has no grounds for asserting the privilege.

The IRS’s expansive authority to obtain taxpayer information also extends to facts and records held by third parties, including the taxpayer’s employer, bank, customers, and business associates. When considering the enforcement of third party summonses, the Supreme Court has stated that the taxpayer typically has no legitimate expectation of privacy in information held by third parties. While the taxpayer is granted some procedural safe-

159. See, e.g., United States v. Frederick, 182 F.3d 496, 500–02 (7th Cir. 1999) (attorney- and federally authorized tax practitioner-client privileges generally do not apply to documents or communications prepared or made during the course of tax return preparation), cert. denied, 582 U.S. 1154 (2000).


161. See, e.g., In re Proceedings Before August 6, 1984 Grand Jury, 767 F.2d 39, 41 (2d Cir. 1985) (leaving open the question of whether the Fifth Amendment protects the contents of non-business, private records).

162. United States v. Sullivan, 274 U.S. 259, 263 (1927); cf. Grosso v. United States, 390 U.S. 62, 71 (1968) (permitting taxpayer to exercise Fifth Amendment privilege by simply failing to file a return in case involving federal gambling taxes; any disclosure in connection with payment of gambling taxes would tend to incriminate the taxpayer).


164. See Clark v. Commissioner, 744 F.2d 1447, 1447 (10th Cir. 1984) (rejecting taxpayer’s Fifth Amendment claim when made without evidence supporting a real and substantial danger of incrimination).

165. I.R.C. §§ 7602; 7609.

166. See United States v. Miller, 425 U.S. 435, 442 (1976) (rejecting a Fourth Amendment claim with respect to bank records maintained under the Bank Secrecy Act).
guards, these rights are limited. Once the IRS issues a summons to the third party requesting documents, the taxpayer about whom the records are sought must be notified and is granted the right to bring a proceeding to quash the summons and thereby prevent the third party from divulging the information. The taxpayer’s grounds for contesting the third party summons are essentially the same as those that apply to information held directly by the taxpayer, which, as noted above, provide little protection against disclosure.

In short, the IRS’s power to compel disclosure of information that many would consider personally sensitive—both from the taxpayer himself and from third parties—is expansive. Neither Congress nor the courts recognize a generalized right of privacy as a defense against submitting information relevant to the determination of the taxpayer’s tax liability. The IRS’s sweeping data collection authority is a tacit recognition on the part of Congress that a workable system of income tax administration necessarily involves some degree of intrusion into a taxpayer’s privacy. And while the confidentiality provision in section 6103 is not directly implicated by questions of the IRS’s power to compel disclosure of information from the taxpayer, the taxpayer’s willingness to submit the information without the threat of summons seems to depend, at least in part, upon assurances that the data collected by the IRS will be utilized for a proper purpose. Determining when use and disclosure are proper is the primary function of section 6103. Any proposal to amend section 6103, therefore, must take into account both the use and disclosure aspects of the taxpayer’s privacy interest, which are discussed in more detail below.

167. I.R.C. § 7609(a) (notification), (b)(2) (proceeding to quash). The taxpayer institutes the proceeding in United States District Court. I.R.C. § 7609(h). In the case of third party summonses, the taxpayer also is entitled to reasonable advance notice before the IRS contacts third parties with respect to examination or collection activities regarding the taxpayer. I.R.C. § 7602(c)(1). In addition, the IRS must provide the taxpayer, annually or upon request, reports setting forth the names of third parties contacted with respect to the taxpayer’s liability determination. I.R.C. § 7602(c)(2); Treas. Reg. § 301.7602-2.

168. See S. Rep. No. 94-938, at 370 (1976) (taxpayer stands in the shoes of the third party record keeper and can assert defenses to enforcement available to the record keeper).


170. See PRIVACY PROTECTION STUDY COMMISSION, supra note 23, at 537 (“The fact that tax collection is essential to government justifies an extraordinary intrusion on personal privacy by the IRS, but it is also the reason why extraordinary precautions must be taken against misuse of the information the Service collects from and about taxpayers.”).
B. Misuse and Unauthorized Access

Whether acquired voluntarily or through the threat of a summons enforcement action, the store of individually identifiable information collected by the IRS is vast. With so much taxpayer information at the IRS’s disposal, individualized cases of misuse and inadvertent leakage of tax return information outside the agency seem inevitable.\footnote{See Frank Zimring, Conference Remarks, Tax Compliance Versus Individual Privacy: A Conflict Between Social Objectives, in ABA COMPLIANCE REPORT, supra note 4, at 393–95 (arguing for greater emphasis on technological advances that would restrict use and dissemination of taxpayer information in computerized files). Efforts by the IRS to update its computer technology and expand electronic tax return filing have also raised confidentiality concerns. See generally Anthony D. Skidmore, The Internal Revenue Service Is Shifting American Taxpayers from a Paper Based Filing System to Electronic Filing—Is the IRS Offering a Capable System That Protects Taxpayer Confidentiality?, 19 J. MARSHALL J. COMPUTER & INFO. L. 367 (2001) (discussing confidentiality issues surrounding IRS’s electronic filing program); E. Maria Grace, Note, Privacy vs. Convenience: The Benefits and Drawbacks of Tax System Modernization, 47 FED. COMM. L.J. 409 (1994) (recommending improved access and software security controls for IRS’s planned technology modernization efforts).} Much more damaging to taxpayer privacy expectations are official misconduct and patterns of abuse left

Concerns about misuse of and unauthorized access to personal information incorporated into centralized databases are not limited to data collected by the IRS. During the 1960s, Government officials seeking to improve administrative efficiency pushed for the creation of a national data bank that would include all information reported by United States citizens to the federal Government, including their tax information. Fears of unauthorized access to such information by parties outside the Government and concerns about misuse of the information by the Government itself led policy makers to reject the idea.

See George Washington University Computers-in-Law Institute, Second Annual Conference on Computers and Taxes 43–44 (1967) ("Despite the unprecedented possibilities for law enforcement and cooperation within the federal system which the unit would create, the erosion to privacy which would result is readily apparent.").

In the private sector as well, advances in computer technology have paved the way for the creation of centralized stores of personal information by health care entities and financial service providers. Concerns surrounding the confidentiality of medical records led Congress to enact the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, while concerns over misuse of individually identifiable personal information gathered by financial institutions led Congress to enact the Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1443 (1999). The Gramm-Leach-Bliley Act requires financial institutions to notify customers of their privacy policies relating to customers’ personal information and give customers the opportunity to opt out of most disclosures to third parties. 15 U.S.C. § 6802(b)(1). Whether the increased use of private databases reduces an individual’s expectation of privacy or, conversely, heightens concerns about privacy protection, is subject to debate. Compare Gutman, Confidentiality, supra note 41, at 322 (suggesting that because certain types of return information are available from other sources, privacy expectations among taxpayers have diminished), with Treasury Department, Disclosure Study, supra note 19, at 33–34 (contending that availability of return information from other sources does not diminish taxpayers’ reasonable expectations that information will be kept confidential by the IRS). It could be that individuals are more willing to disclose sensitive information to a private business entity because the individual perceives that he or she is receiving a good or service in exchange. See generally Privacy Protection Study Commission, supra note 23, ch. 1. Because many taxpayers may not perceive an apparent benefit from their tax payments, their privacy expectations in the information submitted to the IRS remain strong. Further, in the private sector, the individual typically has more control over what information gets recorded about him, as compared with the tax administration system where the disclosure of information is only nominally “voluntary.” See supra notes 150–70 and accompanying text.
unchecked. For example, allegations that President Nixon and others in his administration used tax return information to punish the administration’s critics led to calls for greater privacy protections and, eventually, to severe restrictions on Presidential access to tax return information.172 More recently, Congress responded to charges that IRS employees were browsing through taxpayer records for non-work-related purposes by passing the Taxpayer Browsing Protection Act of 1997.173 In addition to creating criminal liability for willful, unauthorized inspection of tax return information,174 the Act also provided for civil liability for unauthorized inspection of tax returns by IRS employees and others with access to the returns. The cause of action under section 7431 created by the 1997 legislation permits the aggrieved taxpayer to sue the Government for actual and punitive damages.175

The Taxpayer Browsing Protection Act represents Congressional recognition of a legitimate privacy expectation on the part of a taxpayer relating to the use of and access to individually identifiable tax data. Congress’s granting the taxpayer the right to initiate a civil lawsuit against the Government and to collect monetary damages raises this privacy expectation to a legally enforceable interest. As further evidence of Congress’s concerns about violations of taxpayer privacy interests, the Code requires that the taxpayer whose files were accessed in violation of the statute be notified if the offending employee is criminally charged. This notification procedure facilitates the taxpayer’s enforcement of his privacy rights.176


173. Pub. L. No. 105-35, 111 Stat. 1104 (1997). The most egregious example of unauthorized access involved Richard W. Czubinski, a member of the Ku Klux Klan, who allegedly used his access as an IRS telephone assistant to look at the tax records of perceived enemies and two fellow white supremacists he suspected of spying on him for the Government. His conviction for violating the federal wire fraud and computer fraud statutes was overturned on appeal by the Court of Appeals for the First Circuit. United States v. Czubinski, 106 F.3d 1069, 1076 (1st Cir. 1997). Desire on the part of Congress to create criminal liability within the Internal Revenue Code for unauthorized access led, in part, to the passage of the anti-browsing legislation. See STAFF OF THE JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF Tax Legislation Enacted in 1997, at 506–07 (1997).

174. I.R.C. § 7213A(a)(1). The resulting penalty is a fine of up to $1000 and/or imprisonment of up to one year, plus discharge from employment. I.R.C. § 7213A(b).

175. I.R.C. § 7431(a). Damages are in an amount equal to the greater of $1,000 for each unauthorized act of inspection, or actual damages sustained, plus attorney’s fees and possibly punitive damages if the inspection was willful or resulted from gross negligence. I.R.C. § 7431(c).

176. I.R.C. § 7431(e). By contrast, the taxpayer’s opportunity to challenge the validity of an IRS summons seeking access to personalized information does not rise to the status of a legally protected right.
The privacy interests protected by the 1997 anti-browsing legislation are not all-encompassing. Civil liability on the part of the Government arises only when the instance of unauthorized inspection is knowing or negligent.\textsuperscript{177} Furthermore, inspection is considered unauthorized only when it violates the provisions of Code section 6103. Even then, the Government can avoid liability if the employee's actions resulted from a good faith, but erroneous, interpretation of section 6103.\textsuperscript{178} Thus, while the Code recognizes as worthy of protection the taxpayer's privacy interests relating to unauthorized use of return information once it is in the hands of the IRS, the parameters of those privacy rights take into account the Government's legitimate uses for the information.

C. Unauthorized Disclosure

What may be the most important component of a taxpayer's privacy interest in tax return information, and the one most directly implicated by any proposal to expand the IRS's authority to publicize enforcement actions, is the expectation that the IRS will hold information collected from the taxpayer in confidence and not disclose the data for unauthorized purposes.\textsuperscript{179} The taxpayer's privacy expectations relating to the confidentiality of his return information have also been raised to the status of legally enforceable rights. Code section 7431, which authorizes civil damages for unauthorized inspection of tax return information, provides for the same measure of damages in the case of unauthorized disclosure.\textsuperscript{180}

\textsuperscript{177} I.R.C. § 7431(a)(1). Criminal liability under Code section 7213A results only when the inspection is willful. I.R.C. § 7213A(a).

\textsuperscript{178} I.R.C. § 7431(b).

\textsuperscript{179} A taxpayer's privacy rights relating to misuse and unauthorized disclosure may overlap. A hypothetical case in which the IRS transfers information to another Government agency to enforce the draft registration requirement could be viewed as a case of unauthorized use or unauthorized disclosure.

\textsuperscript{180} "If any officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision..."
As noted above, Code section 6103 determines the line between when disclosure is authorized and when it is not: If no violation of section 6103 occurs, then no liability on the part of the Government exists. Lawsuits alleging wrongful disclosure based upon the IRS’s past efforts to publicize tax enforcement and investigatory actions have led to a split among the circuits. The difference of opinion, which rests primarily on the question of whether the taxpayer retains privacy rights in return information that has already been publicly disclosed, is discussed below.\textsuperscript{181}

1. Disclosing Return Information Already in the Public Domain

In \textit{Lampert v. United States}\textsuperscript{182} the Ninth Circuit reviewed the consolidated appeal of three District Court cases, each denying the taxpayer’s request for damages under section 7431 for wrongful disclosure based on press releases prepared by the IRS. Two of the three appeals involved criminal tax cases.\textsuperscript{183} In \textit{Peinado v. United States},\textsuperscript{184} one of the three consolidated cases, the press release announced that the defendant had pled guilty to tax evasion charges and had been sentenced. In \textit{Figur v. United States},\textsuperscript{185} another of the

\textsuperscript{181} The issue of whether section 6103, in its current form, permits the IRS to disclose enforcement activities, and the issue of whether Congress should amend the statute to facilitate this type of publicity are, of course, two separate questions, yet the debate over the former helps inform the debate over the latter.

\textsuperscript{182} 854 F.2d 335 (9th Cir. 1988), cert. denied, 490 U.S. 1034 (1989). The Ninth Circuit describes the purpose of section 6103 as a means “to protect the flow of information between taxpayers and the Internal Revenue Service by controlling the disclosure of tax information by government employees.” \textit{Id.} at 336 (\textit{citing} Stokartz v. United States, 831 F.2d 893, 894 (9th Cir. 1987), cert. denied, 485 U.S. 1033 (1988)).

\textsuperscript{183} In the third case on appeal, \textit{Lampert v. United States}, 87-1 USTC \& 9361 (N.D. Cal. 1987), the press release related to an action to enjoin the defendant from promoting the sale of abusive tax shelters. 884. 669 F. Supp. 953, 954 (N.D. Cal. 1987) (“[I]t was not the intent of Congress in enacting section 6103 to penalize the government for issuing a press release repeating information that is already a matter of public record. A press release that simply announces or broadcasts what is already known from court proceedings is not a disclosure as that term is defined in section 6103.”).

\textsuperscript{184} 669 F. Supp. 515, 518 (N.D. Cal. 1987) (“\textit{G}overnmental press release disseminating return information contained in the public record does not violate section 6103.”).
cases, the press release summarized the tax evasion charges against the taxpayer/defendant. The Ninth Circuit noted that the disclosure exception in section 6103(h) authorized the Department of Justice and the United States Attorney's Office, which jointly conduct most criminal tax prosecutions and grand jury proceedings, to disclose taxpayer return information during judicial proceedings involving a taxpayer's criminal tax liability.\textsuperscript{186} The court acknowledged, however, that neither section 6103(h) nor any other disclosure exception permitted the Government to re-disclose through a press release return information that had been introduced into the public domain as part of a criminal tax proceeding.

Despite the absence of an exception specifically permitting disclosure, the Ninth Circuit nonetheless concluded that the Government did not violate section 6103 when it issued the press releases concerning the taxpayers' criminal conduct. According to the Ninth Circuit, "once return information is lawfully disclosed in a judicial forum, its subsequent disclosure by press releases does not violate [section 6103]."\textsuperscript{187} In reaching this conclusion, the court considered the taxpayer's privacy interests in the return information: "We believe that Congress sought to prohibit only the disclosure of confidential tax return information. Once tax return information is made a part of the public domain, the taxpayer may no longer claim a right of privacy in that information."\textsuperscript{188}

The Ninth Circuit is not the only court that believes that an individual's privacy rights diminish once information becomes part of the public record. The Supreme Court addressed the question in \textit{Cox Broadcasting Corp. v.}

\textsuperscript{186} I.R.C. § 6103(h)(4)(A). Code section 6103(h)(2) grants the Justice Department and United States Attorney's Office access to a taxpayer's return information for use in investigating a taxpayer for a criminal tax violation. A criminal tax case usually begins with an investigation by the IRS's Criminal Investigation Division (CID). If the CID agent conducting the investigation believes that the facts warrant criminal prosecution, and the IRS Chief Counsel's Office agrees, the case is transferred to the Tax Division of the Department of Justice. After a review by the Justice Department's Tax Division, the case may be referred to a United States Attorney for prosecution or a grand jury investigation. For a complete discussion of criminal tax procedure, see \textit{LEDERMAN & MAZZA, supra note 115, ch. 14.}

\textsuperscript{187} \textit{Lampert}, 854 F.2d at 337.

\textsuperscript{188} \textit{Id.; see also} Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) (stating that judicial proceedings are public records). The Ninth Circuit reiterated its position that disclosure of return information already in the public domain does not violate section 6103 in \textit{Schrambling Accountancy Corp. v. United States}, 937 F.2d 1485, 1488 (9th Cir. 1991). \textit{Schrambling} involved the disclosure of return information contained in a Notice of Federal Tax Lien, which is filed by the IRS to protect its priority against other creditors of the taxpayer. I.R.C. §§ 6321, 6323. The Sixth Circuit, also in a case involving information disclosed through the filing of a federal tax lien, agreed with the Ninth Circuit's view that return information loses its confidentiality protection once it is made public. \textit{Rowley v. United States}, 76 F.3d 796, 801 (6th Cir. 1996). \textit{Schrambling} is discussed below in connection with the proposal to publish the names of delinquent taxpayers.
Cohn,189 which involved a Georgia statute making it a misdemeanor to publicize a rape victim's name. A television reporter obtained the name of a deceased rape victim from the criminal indictment of her assailant and broadcast the victim's name during a news story. The victim's father sought damages against the broadcaster based on a claim of invasion of privacy. The Georgia Supreme Court allowed the cause of action to go forward.190 On appeal, the Supreme Court denied the father's claim, concluding that any privacy interests the father might have had were overridden by First Amendment concerns.191 Citing its earlier opinion in Craig v. Harney,192 the Supreme Court noted that "[w]hat transpires in the court room is public property . . . . Those who see and hear what transpired can report it with impunity."193 The Court also considered the law surrounding the tort of invasion of privacy when it analyzed the father's privacy interest. The Restatement of Torts, the Court noted, would not impose liability when the defendant publicizes information about a plaintiff that is already public. "According to [the Restatement], ascertaining and publishing the contents of public records are simply not within the reach of these kinds of privacy actions."194

The principle that an individual's privacy interest fades when the information already appears in the public record was extended to tax return information in United States v. Posner.195 In Posner, the District Court refused the defendant's request for a protective order that would have prevented a local newspaper from inspecting his tax returns that had been admitted into evidence during the criminal trial of his co-defendant. Rejecting the defendant's argument that section 6103 buttressed his right of privacy in the return

190. Id. at 471–75.
191. Id. at 496–97.
193. Cox Broadcasting Corp., 420 U.S. at 492 (quoting Craig v. Harney, 331 U.S. at 374); see also Nixon, 435 U.S. at 609 (holding that the press has the right to publicize information in public court records, although not the right to obtain physical access to the information).
194. Cox Broadcasting Corp., 420 U.S. at 493–94. The Supreme Court's discussion was based on a 1967 tentative draft of the Restatement (Second) of Torts. Id. For a discussion of tort law aspects of privacy see Marc Linder, 'Tax Glasnost' for Millionaires: Peeking Behind the Veil of Ignorance Along the Publicity-Privacy Continuum, 28 REV. L. & SOC. CHANGE 951 (1990–91). Whether an invasion of privacy exists for tort purposes also depends upon the issue of whether the facts disclosed are public or private. William L. Prosser, HANDBOOK ON THE LAW OF TORTS 843 (3d ed. 1964). As one basis for distinguishing public and private facts, Prosser asks whether the information is "a matter of public record, and open to public inspection." Id. at 836.
information, the court ruled that, even when the information is part of a federal tax return, once that information is in the public domain, entitlement to privacy is lost.\(^{196}\)

By contrast, the Fourth Circuit has refused to adopt the Ninth Circuit’s public records exception to section 6103 and has held that the Government can still be liable for wrongful disclosure even if the return information the IRS discloses has already been released into the public domain. In *Mallus v. United States*,\(^ {197}\) the Fourth Circuit affirmed the Government’s liability for damages in a case in which the IRS distributed reports to a group of tax shelter investors notifying them that the shelter promoters had been convicted of criminal tax fraud. The IRS continued to distribute the information even after the promoters’ fraud convictions had been overturned on appeal. The Fourth Circuit rejected the Government’s argument that “the Ninth Circuit’s [public records exception] strikes a better balance between the Government’s legitimate interests in disclosing return information to administer the tax laws and a taxpayer’s reasonable expectation of privacy.”\(^ {198}\) According to the Fourth Circuit, it is Congress’s job to balance these interests, not the courts”\(^ {199}\).

Section 6103(a) prohibits the disclosure of taxpayers’ “return information,” “except as authorized by this title,” . . . . In so providing, Congress strictly circumscribed the contexts in which Government officers or employees may disclose such information. Unless the disclosure is authorized by a specific statutory exception, section 6103(a) prohibits it. The Government points to no such exception—and we are aware of none—permitting the disclosure of return information” simply because it is otherwise made available to the public.\(^ {200}\)

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196. *Id.* at 936. In support of its holding in *Posner*, the court relied on *Cooper v. Internal Revenue Service*, 450 F. Supp. 752 (D.D.C. 1977). *Cooper* involved an attempt by the IRS to use section 6103 as a shield against disclosing the information under the Freedom of Information Act (FOIA). The plaintiff in *Cooper* made a FOIA request for return information introduced in a prior Tax Court proceeding. The IRS denied the request on the basis that the information sought was protected from disclosure by section 6103, which also operates as an exception to the FOIA statute. See *supra* note 115. Rejecting the IRS’s claim that section 6103 applied to the information sought, the court ruled that, notwithstanding the fact that the documents sought were return information within the meaning of the statute, the documents lost their confidentiality protection as a result of the prior disclosure in a judicial proceeding. *Id.* at 754-55; see also *Thomas v. United States*, 671 F. Supp. 15, 16 (E.D. Wis. 1987) (“Once tax return information enters the public domain, the taxpayer no longer has any privacy interests in that information.”).

197. 993 F.2d 1111 (4th Cir. 1993).
198. *Id.* at 1120.
199. *Id.*
200. *Id.* at 1119. The court also rejected the Government’s argument that the disclosures were authorized under section 6103(h)(4)(C), which permits disclosure of return information as part of an administrative or judicial tax proceeding. The Government maintained that the disclosures were made during an audit of the shelter investors, which it characterized as an administrative tax proceeding. Relying on a technical reading of the statute, the Fourth Circuit refused to accept this characterization, although it indicated that, had the Government raised the argument, the releases might have been permitted under section
In an effort to avoid the conflict between the Ninth and Fourth Circuits over whether a public records exception to section 6103 exists, the Seventh Circuit in *Thomas v. United States*201 adopted an intermediate position, which has subsequently been adopted, with some modifications, by the Fifth and Tenth Circuits. Commentators have labeled the middle ground position the “independent” or “immediate” source test.202 This test, as it was first applied in *Thomas*, led the Seventh Circuit to reject the taxpayer’s argument that the IRS wrongfully disclosed in a press release the details of a Tax Court case in which the court upheld the IRS’s penalty assertion against the taxpayer for filing a frivolous suit.203 According to the Seventh Circuit, no wrongful disclosure occurred because the information in the press release was drawn from the Tax Court opinion, not the taxpayer’s tax return.204

We believe that the definition of return information comes into play only when the immediate source of the information is a return, or some internal document based on a return . . . and not when the immediate source is a public document lawfully prepared by an agency that is separate from the Internal Revenue Service and has lawful access to tax returns. The Tax Court is such an agency.205

In *Thomas*, while the taxpayer’s return may have been the original source of the information, because it was not the immediate source of the disclosure, the Government had no liability. The Seventh Circuit made limited references to the taxpayer’s privacy interests in the information released and to the Government’s interest in disclosing the information. However, the court was able to avoid a decision over which of the two interests pre-

6103(k), which allows for release of return information to third parties for investigatory purposes. *Id.* at 1121–24.

201. 890 F.2d 18 (7th Cir. 1989).

202. One commentator has identified four elements associated with the test: “[F]irst, that an agency separate from the Internal Revenue Service lawfully obtained the taxpayer’s return or return information; second, that this separate agency made an authorized disclosure of the information; third, that the disclosure was made in a public document; and, fourth, that the Service’s subsequent disclosure was based on the information contained in the separate agency’s disclosure.” R. Tracy Sprouls, IRC §§ 7431 and 7433: Civil Remedies for Abusive Practices by the IRS, 1 FLA. TAX REV. 563, 569 (1993).


204. *Id.* at 20.

205. *Id.* at 21. Note that the immediate source test would not permit the IRS to re-disclose federal tax lien information that the IRS had already placed into the public record by filing a Notice of Federal Tax Lien. In that case, the IRS itself would be the source of the information, rather than another agency. *See infra* notes 284–85 and accompanying text.
vailed by ruling that section 6103 did not prohibit the IRS from publicizing a Tax Court opinion.\textsuperscript{206}

The Tenth Circuit adopted the immediate source test in \textit{Rice v. United States}\textsuperscript{207} and used it to shield the Government from liability for wrongful disclosure after the IRS issued two press releases, one reporting the taxpayer’s conviction for criminal tax fraud and the other reporting his prison sentence.\textsuperscript{208} Quoting the Seventh Circuit’s formulation of the immediate source test expressed in \textit{Thomas}, the court concluded that no violation of section 6103 would exist if the IRS employee who prepared the press releases obtained her information from a review of the indictment or from attending the taxpayer’s trial and sentencing, rather than directly from the IRS’s investigatory files.\textsuperscript{209} The court was then forced to review the record, which it concluded revealed no evidence that the IRS employee’s press release information came from an impermissible source. “Like it or not,” the court noted, “a trial is a public event.” Consequently, the press releases drawn from the trial proceedings did not publicize the taxpayer’s return information; instead, they publicized documents and proceedings that were a part of the public record.\textsuperscript{210}

\textsuperscript{206} On the issue of whether the taxpayer retained a privacy interest in the information contained in the Tax Court opinion, the \textit{Thomas} court noted that is did not need to decide whether “disclosure of the information by the Tax Court removed the protective cloak of section 7431.” The court went on to say, however, that its conclusion did not indulge the fiction that “every item of information contained in a public document is known to the whole world, so that further dissemination can do no additional harm to privacy—as if only secrets could be confidences.” \textit{id.} at 20 (citing \textit{United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press}, 489 U.S. 749 (1989)).

On the question of whether the IRS’s disclosure tactics were justified, the court initially stated that whether the IRS’s desire to “trumpet its victory” to the taxpayer’s neighbors was a fair and effective way to administer the tax system was subject to debate. \textit{id.} Later in the opinion, however, the court seemed to acknowledge a potential Government interest in disclosure. \textit{id.} at 21 (“It strikes us that the government should be allowed to tell its side of the tax-protestor story.”).

\textsuperscript{207} 166 F.3d 1088 (10th Cir.), cert. denied, 528 U.S. 933 (1999).


\textsuperscript{209} \textit{id.} at 1091.

\textsuperscript{210} The Tenth Circuit in \textit{Rice} distinguished its earlier ruling in \textit{Rodgers v. Hyatt}, 697 F.2d 899 (10th Cir. 1983). In \textit{Rodgers}, the Tenth Circuit rejected the Government’s argument that information made part of the public record through in-court testimony could not form the basis for a wrongful disclosure claim. \textit{Rodgers} did not involve a press release, but statements made by an IRS agent, Hyatt, during the course of an investigation of the tax liability of Rogers, the taxpayer. Early in the investigation, the IRS issued a third party summons to the taxpayer’s bank seeking financial information. During a hearing to enforce the third party summons, Hyatt was subpoenaed as a witness by the taxpayer’s own attorney. In testimony elicited by the taxpayer’s attorney, Hyatt speculated that the taxpayer might be selling stolen oil and underreporting the receipts. Two months later, during the course of an investigation of one of the taxpayer’s clients, Hyatt brought up the rumors of stolen oil. Based on this statement to the third party client, the taxpayer sued for wrongful disclosure. \textit{id.} at 900.

As the basis for his appeal of the lower court’s refusal to grant him a new trial, Hyatt contended that
The Fifth Circuit in *Johnson v. Sawyer*\(^{211}\) also adopted the immediate source test. The opinion is instructive because the court was more willing, compared to the Seventh and Tenth Circuits, to express its views on whether the taxpayer retains a privacy interest in return information made part of the public record. The *Johnson* decision issued by the Fifth Circuit was the culmination of over ten years of litigation between the taxpayer, Johnson, and the IRS.\(^{212}\) The case arose out of press releases issued by the IRS reporting the taxpayer’s conviction for willfully filing a fraudulent return.\(^{213}\)

the return information he disclosed—the rumors of unreported income—had been developed and disclosed during the course of the summons enforcement hearing in District Court, and therefore were made a part of the public record. Hyatt characterized the wrongful disclosure action as “nothing more or less than a statutorily sanctioned suit for invasion of privacy,” which, as the Supreme Court had noted in *Cox Broadcasting*, would have resulted in no liability if the defendant were merely giving further publicity to facts that were already a matter of public record. *Id.* at 903. The Tenth Circuit refused to comment directly on Hyatt’s contention of loss of confidentiality. “The issue in this case . . . is not the loss of ‘confidentiality’ or ‘privacy’ but, rather, whether under the circumstances, Hyatt made an unauthorized disclosure of tax return information.” Even assuming the loss of confidentiality, the court said, the disclosures were not authorized. *Id.* at 906.

The Tenth Circuit maintained that its decision in *Rice*, permitting disclosure based on public records, was not contrary to its decision in *Rodgers*. According to the court, implicit in its decision to uphold the jury’s verdict in *Rodgers* was its finding that the source of the information disclosed was internal Government documents prepared in connection with the taxpayer’s return, rather than the summons enforcement hearing. Thus, the court maintained, under both *Thomas* and *Rodgers*, whether information about a taxpayer may be classified as return information, qualifying for the protections of section 6103, depends upon the immediate source of the information. *Rice*, 166 F.3d at 1091. The Tenth Circuit’s efforts at reconciling *Rodgers* and *Rice* are dubious at best, since the court in *Rodgers* focused on whether a disclosure exception existed, rather than on whether the information disclosed was return information in the first instance.

211. 120 F.3d 1307 (5th Cir. 1997). The cause of action in *Johnson* was a suit under Code section 7217, the predecessor of section 7431. Section 7217, which applied to unauthorized disclosures made before September 4, 1982, permitted the aggrieved party to sue an IRS employee in his personal capacity for civil damages arising from an act of wrongful disclosure of return information. I.R.C. § 7217 (repealed by Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 357(b)(1), 96 Stat. 324, 646).

212. Johnson originally filed his complaint for wrongful disclosure in 1983. He amended the complaint to include a claim against the Government under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671–80, based on a theory of negligent supervision. Johnson was awarded $10 million in damages on the FTCA claim, 760 F. Supp. 1216, 1233 (S.D. Tex. 1991), but the award was reversed on appeal and the claim dismissed, 47 F.3d 716, 738 (5th Cir. 1995) (en banc). As a result of a jury trial in 1996 on the wrongful disclosure claim, Johnson was awarded $9 million in actual and punitive damages, as well as pre-judgment interest. *See Johnson*, 120 F.3d at 1314.

213. The press releases revealed, among other information, the taxpayer’s address, age, job title, his guilty plea to the criminal charges, the resulting punishment, and that he was civilly liable for back taxes, interest, and penalties. *Johnson*, 120 F.3d at 1311. Before pleading guilty, Johnson and his attorney went to great lengths to limit publicity surrounding the proceedings in an effort to enable Johnson to retain his employment. His employer had told Johnson that he could retain his position with the company, even after pleading guilty to criminal tax evasion, so long as the criminal charges generated no publicity that could damage the company’s reputation. In return for the guilty plea, the United States Attorney in charge
After reviewing the split among the circuits, the Fifth Circuit noted that all courts that had considered the issue concluded that section 6103 does not include an exception that specifically permits the IRS to disclose return information previously disclosed in open court. The remainder of the court’s analysis is couched in terms of whether, given the unambiguous language of the statute, Congress could have intended such a result.\textsuperscript{214} According to the Fifth Circuit, section 6103 does not distinguish between confidential (private) and non-confidential (public) tax return information:

[Section] 6103’s protection does not disappear simply because tax return information has been disclosed in the public record and has therefore arguably lost its confidentiality. In enacting section 6103 as a prophylactic ban, Congress was determining that a taxpayer has a statutorily created “privacy” interest in all his tax return information, despite the fact that some of it is not entirely “secret.”\textsuperscript{215}

In support of this position, the Fifth Circuit cited the Supreme Court’s decision in \textit{United States Department of Justice v. Reporters Committee for Freedom of the Press},\textsuperscript{216} in which the Court recognized that an individual might retain a privacy interest in information even though the information has been disclosed in the public record.\textsuperscript{217}

\begin{footnotes}
\footnote{of the prosecution agreed to help keep the proceedings out of the public record to the greatest extent possible. For example, the criminal information sheet identified Johnson by his legal name “Elvis Johnson,” when he was known in the community colloquially as “Johnny.” The information sheet also reflected the address of Johnson’s attorney in Houston, rather than Johnson’s home address in Galveston. The United States Attorney also assured Johnson that no press release would be issued. Without the United States Attorney’s knowledge, an IRS public affairs officer issued the press release to media outlets in Johnson’s home town of Galveston. According to Johnson, the resulting publicity forced him to resign his position under pressure and relocate to another geographic division of the company and accept a reduced salary. \textit{Id.} at 1310–12.}
\footnote{\textit{Id.} at 1318-19 (“[W]e follow the plain language of the statute unless it would lead to a result ‘so bizarre’ that Congress ‘could not have intended it.’”).}
\footnote{\textit{Id.} at 1323 (footnotes omitted). The Fifth Circuit also repeated statements it made in an earlier appeal of the case:}

\begin{quote}
Congress was not determining that all the information on a tax return would always be truly private and intimate or embarrassing. Rather, it was simply determining that since much of the information on tax returns does fall within that category, it was better to proscribe disclosure of all return information, rather than rely on ad hoc determinations by those with official access to returns as to whether particular items were or were not private, intimate, or embarrassing. Because such determinations would inevitably sometimes err, ultimately a broad prophylactic proscription would result in less disclosure by return handlers of such sensitive matters than would a more precisely tailored enactment.
\end{quote}

\textit{Id.} at 1322 (\textit{quoting Johnson v. Sawyer}, 47 F.3d 716, 735 (5th Cir. 1995) (en banc)).

\textit{214. Id.} at 1318-19 (“[W]e follow the plain language of the statute unless it would lead to a result ‘so bizarre’ that Congress ‘could not have intended it.’”).

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\end{quote}

\textit{216. Id.} at 1322 (\textit{quoting Johnson v. Sawyer}, 47 F.3d 716, 735 (5th Cir. 1995) (en banc)).

\textit{217. Johnson}, 120 F.3d at 1323. In the course of the \textit{Johnson} opinion, the Fifth Circuit also rejected the IRS’s arguments based on \textit{Cox Broadcasting Corp. v. Cohn}, 420 U.S. 469 (1975), which the
The Supreme Court’s reflections in *Reporters Committee* on an individual’s privacy interests arose out a newspaper’s FOIA request for access to rap sheets prepared by the FBI. Included in any rap sheet is a descriptive summary of an individual’s criminal convictions, as well as a history of arrests, charges, and incarcerations. The FBI maintained that the information contained in its rap sheet database fell within a FOIA exemption that allowed it to withhold investigatory records compiled for law enforcement purposes where production of the records could “reasonably be expected to constitute an unwarranted invasion of personal privacy.”\textsuperscript{218} The newspaper seeking disclosure argued that because the events summarized in the rap sheets had been previously disclosed to the public, the subject’s privacy interest in avoiding disclosure approached zero. The Court rejected this view as reflecting a “cramped” notion of privacy.\textsuperscript{219} The Supreme Court understood the privacy interest at issue in *Reporters Committee* to be the individual’s right to control the dissemination of personal information. The Court admitted that while this privacy interest may diminish once the information is made a part of the public record, the individual does not forfeit his privacy interest entirely.\textsuperscript{220} The Court concluded that disclosing the rap sheets would not further the purpose of FOIA, which is to guard against excessive Government secrecy, thus the subject’s privacy interest prevailed.\textsuperscript{221}

According to the Fifth Circuit, the Supreme Court’s conclusion in *Reporters Committee* that an individual may retain some privacy interest in information that has been disclosed publicly undermined the Ninth Circuit’s

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\textsuperscript{218} 5 U.S.C. \S 552(b)(7)(C) (2002).

\textsuperscript{219} *Reporters Comm.*, 489 U.S. at 762.

\textsuperscript{220} *Id.* at 762–63 n.1 (*citing* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494–95 (1975)). The Court also found a difference between a person’s privacy interest in public information that is scattered among various locations throughout the country, and a centralized database that summarizes otherwise publicly available information into a single document. *Id.* at 763.

\textsuperscript{221} According to the Court, the policy of full disclosure of Government operations under FOIA is not fostered “by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about the agency’s own conduct.” *Id.* at 772. The Court rejected the newspaper’s assertion that disclosing the rap sheet of the particular party at issue in *Reporters Committee* would serve the public interest because it might reveal improper dealings between the convicted party and a member of Congress. Such an interest is not the type protected by FOIA, the Court said. *Id.* at 773. Justice Blackmun, in his concurring opinion, believed that prohibiting the release of any party’s rap sheet without conducting a request-by-request balancing of the party’s privacy interests was too inflexible. *Id.* at 780 (Blackmun, J., concurring).
public records exception and was further evidence that Congress could not have intended such an exception when it enacted section 6103. Whatever privacy interest the taxpayer might retain in the information is adequately protected, the Fifth Circuit said, by focusing on the source of the information claimed to be wrongfully disclosed, rather than on its public character.\footnote{Johnson, 120 F.3d at 1323.} The Fifth Circuit also disapproved of the Ninth Circuit’s efforts to balance the taxpayer’s privacy expectations with the Government’s legitimate interests in disclosing return information. Quoting the Fourth Circuit in \textit{Mallas}, the court stated, “It is for Congress \ldots{} to ‘strike a balance’ between these interests [and it] has done so in section 6103, without articulating [a public records] exception.”\footnote{Id. at 1322 (quoting \textit{Mallas} v. United States, 993 F.2d 1111, 1121 (4th Cir. 1993)). The Fifth Circuit remanded the case for a new trial because the judge erroneously instructed the jury. \textit{Id.} at 1329. The IRS eventually settled the suit. \textit{Joint Committee, Confidentiality Study, supra} note 19, at 81.}

2. Analyzing the Various Approaches

It is not necessary to decide whether the public records exception advocated by the Ninth Circuit, the Fourth Circuit’s narrow reading of section 6103, or the immediate source test adopted by the Seventh, Tenth, and Fifth Circuits, reflects the best reading of current section 6103.\footnote{The Eighth Circuit also has cited \textit{Thomas} in an unpublished opinion to deny a claim for wrongful disclosure based upon release of public information. Noske v. United States, 1993 U.S. App. LEXIS 17480, at *5 (8th Cir. July 15, 1993) (holding that no violation of section 6103 existed when IRS provided local newspaper with a copy of a District Court opinion dealing with abusive tax shelter case).} It is only necessary to establish that, in light of the proposals to permit the IRS to publicize successful IRS enforcement actions, each approach fails to protect the interests of taxpayers and the Government, and thus Congressional action is warranted.\footnote{For a discussion of the gaps left open by section 7431 and its relationship with another Code provision, section 7433, granting taxpayers the right to sue the Government for IRS employee misconduct, see Sprouls, \textit{supra} note 202, at 563.}

Both the Ninth Circuit and the Fourth Circuit, representing the two extreme positions on the issue, erroneously analyze a taxpayer’s privacy interest in return information as if that interest were an absolute, rather than a relative concept. The Ninth Circuit’s basis for creating a public records exception to the general rule of confidentiality in section 6103 is premised on the absence of a privacy interest on the taxpayer’s part.\footnote{“We agree when once information is lawfully disclosed in court proceedings, \textsection{} 6103(a)’s directive to keep return information confidential is moot.” \textit{Lampert} v. United States, 854 F.2d 335, 338 (9th Cir. 1988) (quoting \textit{Figur} v. United States, 662 F. Supp. 515, 517 (N.D. Cal. 1987)). \textit{See supra} notes 182–88 and accompanying text.} This analysis is
flawed and incomplete. While it may be true that a taxpayer’s privacy rights diminish once return information is released into the public domain, it does not follow that the taxpayer’s rights are completely eliminated. In the normal case, the fact that information is legally accessible by the public does not necessarily mean that this right of access will be exercised. More importantly, merely because information may be available for public inspection does not mean that the taxpayer has no interest in limiting widespread disclosure of that information. The Supreme Court in Reporters Committee recognized a distinction between an individual’s privacy interest in information that is available to the public through court records and the active dissemination of that information by the Government.227 According to the Court, the individual’s privacy interest varies based upon the degree of public dissemination.228 The Ninth Circuit in Lampert, however, ignores this distinction and implies that information that is available in the public record is, for that fact alone, entitled to no further privacy protection and may be disclosed without additional harm to the taxpayer.

The Ninth Circuit’s reliance on the absence of a privacy interest on the part of the taxpayer to support its public records exception also results in a disclosure exception that is too broadly conceived. A public records exception of the type advocated by the Ninth Circuit would permit the subsequent disclosure of return information, regardless of the manner in which it became part of the court record. Thus, for example, a taxpayer who pleads facts relating to an asserted tax deficiency as part of a typical Tax Court case would thereby waive any section 6103 privacy protections he might have in those facts. This, in effect, would put the taxpayer in the position of choosing between contesting an asserted deficiency and relinquishing entirely his privacy rights.229 Such an exception would also allow the IRS to eliminate a


228. Id. at 762.

229. See Husby v. United States, 672 F. Supp. 442, 444 (1987) (“If the public records exception asserted by the Government were adopted, taxpayers could either challenge government notices of deficiency by filing Petitions with the United States Tax Court, or they could enjoy the protections of § 6103 against unauthorized disclosure, but not both. Under the Government’s theory, once the Petition is filed, all return information related to the dispute becomes fair game for IRS disclosure, § 6103 notwithstanding. Congress could not have intended such an absurd result.”).

It is true that almost any litigant is put in a position of having embarrassing and sensitive facts disclosed as part of a civil case. As the legislative history to section 6103 makes clear, however, Congress enacted section 6103 to prevent the widespread use of taxpayer information for improper purposes. See
taxpayer's privacy interest in return information merely by including that information as part of a court filing, thereby placing it on the record. The potential for abuse brought about by such an exception is troubling. Finally, a broad public records exception is inconsistent with the exceptions that Congress has crafted in the past. Even when a statutory disclosure exception permits the IRS to release information for tax administration purposes, Congress has narrowly tailored the exception to allow only the minimum amount of disclosure necessary to carry out the intended purpose.\textsuperscript{230}

The Fourth Circuit, as well, adopts too narrow a view of the taxpayer's privacy rights. For the Fourth Circuit, the question of wrongful disclosure turns not on whether the information disclosed is confidential, but on whether disclosure of information already in the public domain is expressly authorized by the statute. This limited view of section 6103 divorces the notion of confidentiality from the taxpayer's privacy rights in the return information.\textsuperscript{231} The legislative history to section 6103 makes clear, however, that when Congress amended the statute in 1976 to establish a general rule of confidentiality, it understood the concept of confidential return information to be reflective of the taxpayer's privacy rights.\textsuperscript{232} The Fourth Circuit's unwillingness to consider the limits of the taxpayer's privacy rights in otherwise public information and the Government's legitimate uses for the information may be justified from the standpoint of statutory construction, but the result it reaches reflects an incomplete view of taxpayer confidentiality and unnecessarily limits the IRS's legitimate use of enforcement data to improve taxpayer compliance.

Worst of all are those circuits that claim to protect the taxpayer's privacy rights by applying the immediate source test to determine whether the IRS wrongfully disclosed return information.\textsuperscript{233} The results in these cases are

\textit{supra} Part III.A. A broad public records exception would allow the IRS to violate this legislative purpose.\textsuperscript{230} See, e.g., I.R.C. § 6103(k)(6) (authorizing disclosure of return information by IRS employees in connection with tax investigations only "to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available").

231. The Fifth Circuit in Johnson v. Sawyer also views the concept of taxpayer confidentiality as distinct from the taxpayer's privacy interests in return information: "If the immediate source of the information claimed to be wrongfully disclosed is tax return information . . . , the disclosure violates § 6103, regardless of whether that information has been previously disclosed (lawfully) in a judicial proceeding and has therefore arguably lost its confidentiality." Johnson v. Sawyer, 120 F.3d 1307, 1318–19 (5th Cir. 1997) (emphasis in original).

232. "Questions were raised and substantial controversy created as to whether the extent of actual and potential disclosure . . . breached a reasonable expectation of privacy on the part of the American citizen with respect to such information. . . . Congress stave to balance the particular office or agency's need for the information involved with the citizen's right to privacy." Joint Committee, 1976 Bluebook, supra note 114, at 326-27. See supra Part III.B.

233. The taxpayer's privacy interest "is furthered by a construction of § 6103 that premises a violation on the source of the information claimed to be wrongfully disclosed, not its public or non-confidential
based on a contrived view of taxpayer privacy. For these courts, when the IRS publicizes taxpayer data drawn from court records, the IRS is not disclosing return information within the meaning of section 6103(b), but merely publicizing data that is otherwise publicly available. While this strained interpretation allows the court to sanction the release of return information in certain cases without creating a judicial exception to section 6103, it is difficult to comprehend how such an interpretation preserves taxpayer privacy interests. If the IRS’s efforts to publicize tax information that has been incorporated into a court record would otherwise offend taxpayer privacy expectations, it would be of little solace to the taxpayer about whom the information is disclosed, or the remainder of the taxing community for that matter, to know that the IRS had two identical sources of data, but drew the facts from one data source that is not protected from disclosure, while preserving the confidentiality of identical facts contained in another data source.234 It is the nature of the information disclosed, not its source, that impacts on the taxpayer’s privacy expectations.

The immediate source test also suffers from a number of other deficiencies. First, the conclusion that taxpayer information made public through a court opinion is not “return information” within the meaning of section 6103(b) is unsupported by the statutory language.235 The broadly worded definition of “return information” consists of a list of types of data (taxpayer identity, amount of income, credits, deductions, tax payments, the existence

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234. The Seventh Circuit in Thomas seems to be aware of the legal fiction created by the immediate source test: “We may seem by this ruling to be condoning the ‘laundring’ of confidential information . . . .” Thomas, 890 F.2d at 20.

235. The court in Johnson v. Sawyer also looked to section 6103(p) to bolster its conclusion that Congress could not have intended a public records exception when it revised section 6103 in 1976. Section 6103(p) sets forth record keeping requirements that agencies receiving taxpayer information must abide by to protect the confidentiality of that information. Section 6103(p)(4) provides that these security requirements do not apply “with respect to return or return information if, and to the extent that, such return or return information is disclosed in the course of any judicial or administrative proceeding and made a part of the public record thereof.” Johnson, 120 F.3d at 1321. According to the Fifth Circuit, this language indicates that when Congress revised section 6103, it considered the possibility that return information might otherwise be publicly available, and yet did not create a disclosure exception to govern that information. Id.; cf. Figur v. United States, 662 F. Supp. 515, 517 n.1 (N.D. Cal. 1987) (relying on section 6103(p) as evidence that Congress did not intend to grant confidentiality protection for information released in the public domain.). Whether the Fifth Circuit’s interpretation is correct is not firmly established by the legislative history, see id. (citing S. Rep. No. 94-938, at 343 (1976)), but what it does indicate is that Congress did not believe that otherwise publicly available return information warranted the same level of privacy protection as return information that had not been publicly disclosed.
of a tax investigation, etc.) with no reference to the source of the data.\textsuperscript{236} In fact, the statute provides that return information includes any data "received by, recorded by, prepared by, furnished to, or collected by [the IRS] with respect to a return or with respect to the determination of . . . [the taxpayer's] liability."\textsuperscript{237} Regardless of the source, if the information the IRS includes in a press release falls within the description of return information in section 6103(b), the information is not removed from that statutory description by virtue of the fact that it might also appear in a court record.

Having liability for wrongful disclosure turn on the source of the information disclosed may also lead to liability on the part of the Government that is not consistent with the policies underlying section 6103. Under the immediate source test, it is not sufficient for the IRS merely to establish that the information included in the press release appeared somewhere in the court record. Evidence must exist that the IRS derived the information from that public source, as opposed to its own files.\textsuperscript{238} As that test was applied in Johnson v. Sawyer, the Fifth Circuit concluded that the IRS had wrongfully disclosed through its press releases the following four items of return information: Johnson’s middle initial; his age; his home address; and his employer.\textsuperscript{239} Viewed in isolation and outside the unique context of the Johnson case, none of these items, with the possible exception of the taxpayer’s age, seems particularly sensitive from a privacy standpoint.\textsuperscript{240} If the disclosure of

\begin{itemize}
\item \textsuperscript{236} I.R.C. § 6103(b)(2)(a). By contrast, the definition of "taxpayer return information" does hinge upon the source of the information: "The term 'taxpayer return information' means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates." I.R.C. § 6103(b)(3). See J. Hudson Duffalo, Note, The Buttoned Lip: The Controversy Surrounding the Disclosure of Tax Return Information, 53 ALB. L. REV. 937, 952 ("Such information should not be deemed converted into nontax return information merely because it can also be found in a court record.").
\item \textsuperscript{237} I.R.C. § 6103(b)(2)(a).
\item \textsuperscript{238} See Johnson, 120 F.3d at 1325–26 (footnotes omitted):

As for Johnson’s middle initial (E), there is a dispute, outside this record, over whether it was previously disclosed in public on the docket sheet for the 1981 criminal proceeding. However, because a § 6103 violation is premised on the source of the information claimed to be wrongfully disclosed, we need not determine whether the middle initial is in the public record, because it is not relevant to the question of whether § 6103 was violated. As noted above, in providing [the IRS public affairs officer] with the identifying information in the releases, [the IRS employee] relied on Johnson’s return file or information he had otherwise gathered about Johnson, not on any public (court) document. Therefore, the middle initial disclosure was a violation of § 6103.
\item \textsuperscript{239} Id. at 1326. The Fifth Circuit had ruled in an earlier opinion that information relating to Johnson’s criminal charge and the resulting penalties for conviction were not return information within the meaning of section 6103. Id. at 1324.
\item \textsuperscript{240} Because of the facts of the case, the identity of Johnson’s employer was a highly sensitive matter. See supra note 213. In other cases, this information would undoubtedly be part of the court record and, assuming the press release was derived from the record and not the IRS’s files, could not form the
the taxpayer's name and his criminal conviction for tax evasion cannot form
the basis for a wrongful disclosure claim because those items appeared in
and were taken from the court record, it seems illogical to permit an unau-
thorized disclosure claim to stand based on return information that is merely
incidental to the taxpayer's criminal activities.\footnote{241} Nevertheless, if a taxpayer
could establish that the IRS wrongfully released a single item of return in-
formation, regardless of its sensitivity to the taxpayer's privacy interests, this
single act could form the basis for a cause of action and lead to protracted
litigation.

As the law currently stands, courts determine the amount of privacy pro-
tection a taxpayer has in return information that has become part of the pub-
lic domain. None of the three prevailing judicial interpretations of section
6103, however, is satisfactory. Moreover, inconsistent holdings have led to
uneven application of the law and a resulting uncertainty on the part of the
IRS about its current efforts to publicize noncompliance.\footnote{242} Leaving im-
portant questions of taxpayer privacy and confidentiality in the hands of the
courts runs counter to Congress's larger purpose when it overhauled section
6103 in the 1970s: To consolidate all disclosure exceptions into a single
statute and to give Congress exclusive authority to decide when disclosure
was proper or improper.\footnote{243} For these reasons, a statutory solution resolving
the conflict is warranted.

When advocating for additional disclosure exceptions, the best approach
is to acknowledge that the taxpayer has some privacy interest in his return
information, and then to establish that the Government's interest in utilizing
that return information outweighs the taxpayer's interest in keeping the in-
formation confidential. Because the Government's interest in disclosure and
the taxpayer's privacy interests will vary depending upon the context, the

\footnote{241} The Fifth Circuit in \textit{Johnson} remanded the case for a new trial because the District Court
judge's jury instructions failed to clarify that only the four items of information, and not the fact of the
taxpayer's criminal penalty, had been wrongfully disclosed. \textit{Id.} at 1326–28. The Government settled
Johnson's case before another trial took place. Given the prior awards in earlier proceedings, the Gov-
ernment was obviously fearful that a wrongful disclosure award based on only the four items of return
information would result in recovery for the taxpayer in excess of $3.5 million, the amount for which the
parties eventually settled the case. \textit{See Joint Committee, Confidentiality Study, supra note 19, at
186. The result in \textit{Johnson} may not seem unfair given the surrounding facts, but the test applied in the
case holds out the possibility of unfair treatment of the Government based on minor errors of fact.}

\footnote{242} The Supreme Court has refused to resolve the conflict. \textit{Harris v. United States}, No. 01-20543,

\footnote{243} \textit{Joint Committee}, 1976 \textit{Bluebook}, \textit{supra} note 114, at 313–15. \textit{See supra Part III.}
balancing analysis must be narrowly tailored to each proposed disclosure exception. This analysis is the subject of Part V.

V. BALANCING TAXPAYER PRIVACY INTERESTS WITH IMPROVED COMPLIANCE—PROPOSALS TO PUBLICIZE IRS ENFORCEMENT EFFORTS

Incorporating the analysis developed in Parts II, III, and IV, this Part presents the case for three additional disclosure exceptions to Code section 6103, each of which would permit the IRS to implement a media campaign publicizing the effectiveness of its enforcement efforts. The first exception would confirm the IRS’s authority to publicize successful criminal enforcement actions, the second would permit the IRS to publicize a list of taxpayers who fail to pay their assessed tax liabilities, and the third would permit the IRS to publicize the names of taxpayers who invest in tax shelter transactions that the IRS and Treasury consider to be abusive. The goal is to improve aggregate levels of tax compliance by enhancing awareness of sanctions for tax evasion and increasing taxpayers’ social commitment towards their tax obligations. The details of these proposals and their impact on taxpayer privacy interests are discussed below.

A. Publicizing Criminal Tax Convictions

Under existing law, the Government is permitted to publicize statistics listing the number of criminal tax convictions obtained each year and the amount of tax and fines collected, as long as the information released does not point to an identifiable party.244 Releasing this largely impersonal data to the public does not implicate the same privacy concerns as would publicizing information about a specific act of criminal tax fraud. Highlighting aggregate measures of IRS criminal enforcement activity, however, may not send a strong deterrence message and may, to the contrary, undermine taxpayer compliance norms because taxpayers may perceive that the level of enforcement activity is too low.245 Conversely, the IRS can advance the deterrent value of its criminal enforcement activities by publicizing the names of defendants, the facts surrounding their convictions, and the resulting punishment. As discussed in Part II, research suggests that these types of communications tend to increase a taxpayer’s perceptions of being detected and punished for evasion, while at the same time strengthening the taxpayer’s

244. I.R.C. § 6103(b) ("[Return information] does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.").
245. See supra notes 58–63.
willingness to comply by satisfying his desire to see others sanctioned for not cooperating with the larger group. 246

The IRS’s current efforts to communicate strong and meaningful deterrence messages are hampered by the lack of an exception in section 6103 permitting disclosure of return information relevant to criminal tax proceedings. This remains the case even though the criminal defendant’s privacy interests in the return information are diminished by virtue of the fact that most of the information has already been released into the public domain through court records and filings. 247 A narrowly tailored exception specifically authorizing disclosure in this context would better serve to protect the privacy interests of all taxpayers both when compared to current law and to proposals for more broadly worded exceptions. 248

In two recent studies, the Treasury Department and the Joint Committee on Taxation recommended that Congress amend section 6103 to resolve the conflict surrounding the confidentiality of publicly available return information. 249 For its part, the Joint Committee recommended that Congress exclude from the protection of section 6103 “returns and return information properly made a part of public records, i.e., court records and lien filings, pursuant to Federal tax administration activities.” 250 The Treasury Department’s recommendation would go farther, permitting the subsequent release of return information made part of the public record as a result of any activity or enforcement action, not just federal tax administration activities. 251

The Joint Committee and Treasury proposals, both of which essentially adopt the Ninth Circuit’s public records exception, suffer from the same deficiencies associated with the Ninth Circuit’s analysis; namely, the proposals

246. See supra Part II.B.

247. The taxpayer’s identity, as well as the existence and nature of the tax evasion charge, would fall within the expansive definition of return information. I.R.C. § 6103(b). Current IRS guidelines surrounding its publicity efforts are found in the Internal Revenue Manual. INTERNAL REVENUE MANUAL 31.4.20. News releases are prepared by the IRS Criminal Investigation Division and are usually attributed to either the United States Attorney handling the tax fraud prosecution, or jointly to both the United States Attorney and the IRS. Id. at 31.4.20.4.

248. Taxpayer privacy expectations are better protected when taxpayers are aware of the circumstances under which information can be released, as opposed to relying on ad hoc judicial determinations. A statutory disclosure exception can also help mold taxpayer’s privacy expectations, leading to a diminished sense of procedural unfairness once the IRS discloses the information. See supra notes 29–34 and accompanying text.

249. TREASURY DEPARTMENT, DISCLOSURE STUDY, supra note 19, at 36; JOINT COMMITTEE, CONFIDENTIALITY STUDY, supra note 19, at 197–98.

250. JOINT COMMITTEE, CONFIDENTIALITY STUDY, supra note 19, at 197–98.

251. TREASURY DEPARTMENT, DISCLOSURE STUDY, supra note 19, at 36.
consider only one-half of the disclosure equation.\textsuperscript{252} Other than the exception granting the taxpayer access to his own return information, the remaining disclosure exceptions in section 6103 limit the release of return information to a circumscribed use. Without specifying how the information can be legitimately used, the broadly-worded disclosure exceptions advocated by the Joint Committee and the Treasury would invite abuse by IRS personnel and would place taxpayers in the position of choosing between litigating a civil tax controversy, thereby placing their return information in the public domain, and risking the public dissemination of this information for any purpose the IRS sees fit.\textsuperscript{253} Furthermore, because the anti-browsing limitation in section 7431 also depends upon a violation of section 6103, a public records exception would permit IRS personnel to access a broad category of return information for unauthorized purposes without the threat of punishment.\textsuperscript{254}

A disclosure exception limited to return information relevant to a taxpayer’s criminal tax conviction would be at once narrower than a public records exception, and broader than an exception based upon the immediate source interpretation of section 6103 adopted by the Seventh, Tenth, and Fifth Circuits. As discussed above, the immediate source test allows the IRS to re-disclose only that information that becomes part of the public record, and then only if the information is derived from a source other than internal IRS files.\textsuperscript{255} The disclosure exception advocated here would not turn on the information’s source, which as discussed above serves no legitimate privacy goal, nor would the exception be limited to return information that appears somewhere in the public record. An exception focusing on the source of the information could inhibit the IRS’s ability to send an effective deterrence message. In many cases, for example, media outlets are not interested in reprinting IRS news releases because identifying details about the taxpayer/defendant, such as his occupation and place of residence, are not included in the public record and therefore cannot be incorporated into the press release.\textsuperscript{256} Even if the media publicizes the redacted news release, its potential deterrent effect is diminished. Those who read the story may not

\begin{itemize}
\item \textsuperscript{252} See supra notes 226–30 and accompanying text.
\item \textsuperscript{253} These potential results are discussed in more detail in Part IV.C.2.
\item \textsuperscript{254} For a discussion of the 1997 anti-browsing legislation, see the text accompanying notes 173–78.
\item \textsuperscript{255} See supra notes 201–23 and accompanying text.
\item \textsuperscript{256} American Bar Ass’n Comm’n on Taxpayer Compliance, supra note 2, at 371 (suggesting that the IRS, as part of its efforts to publicize criminal cases, should provide details relating to the individual characteristics of those convicted, particularly their occupations and industries; by doing so, the agency increases the chances that media outlets will print the information).
\end{itemize}
internalize a threat of adverse consequences because they cannot easily relate to the defendant’s actions and circumstances.257

Striking a balance in favor of the Government’s interest in highlighting the success of its criminal enforcement activities is made easier because of the solid theoretical basis that supports the use of such publicity to improve taxpayer compliance levels. Empirical evidence also supports the Government’s interest. Past studies testing the deterrent effects of criminal tax prosecutions on taxpayer compliance yielded conflicting results.258 A more recent research study by Alan Plumley, however, which analyzes individual income tax data compiled over a ten-year period, concludes that criminal tax prosecutions have a strong, positive effect on tax compliance by the general population.259

The Plumley study analyzed the impact of a number of compliance initiatives, including criminal tax convictions, on the willingness of taxpayers to file voluntary their tax returns and to report the correct amount of income and deductions.260 The study is particularly useful because it estimated both the “direct” revenue effects of these initiatives—how much the Government would collect from the offending taxpayer in additional tax liability and penalties—and the “indirect” revenue effect, which measures the increase in voluntary compliance in the taxpaying population as a whole induced by the general deterrent effect of the compliance initiative.261 Plumley’s statistical analysis showed that criminal tax convictions had only a slight positive di-

257. The IRS’s inability to release complete identifying information could also result in cases of mistaken identity and lead to embarrassment for those who share the same name as the person convicted. For these reasons, the Treasury Department proposal would permit the IRS to release elaborative facts not contained in the public record with respect to criminal cases without the threat of liability for wrongful disclosure. TREASURY DEPARTMENT, DISCLOSURE STUDY, supra note 19, at 36–37.

258. Compare Witte & Woodbury, supra note 13, at 1, 8 (finding that the probability and magnitude of criminal penalties are not significantly related to compliance), with Steven Klepper & Daniel Nagin, Tax Compliance and Perceptions of the Risks of Detection and Criminal Prosecution, 23 L. & SOC’Y REV. 209, 210 (finding that the perceived risk of criminal prosecution for tax evasion is a powerful deterrent to noncompliance).

259. Plumley, Determinants, supra note 6, at 36.

260. More specifically, the criminal tax enforcement variable was based on the number of criminal tax convictions obtained per million people. Id. at 18. In addition to IRS enforcement activities, which included the number of audits, the number of nonfiler notices issued, and the number of information documents matched, the study tested four other categories of compliance determinants: tax policy, burden/opportunity, IRS responsiveness, and demographics/economics. See id. at 12–20 (explaining each determinant in detail).

261. Plumley referred to the deterrent effect of the compliance initiative on those who were not contacted as the “ripple effect.” The indirect effect measure also included the effect of the initiative on the subsequent compliance of those actually contacted, which Plumley referred to as the “subsequent year” effect. Id. at 2.
rect revenue effect, which is not surprising given that the cost of criminal investigations is high when compared to the amount of tax and fines recovered from the defendant. The study found, however, that criminal tax convictions had a highly significant indirect revenue effect, particularly when it came to a taxpayer’s willingness to report the correct amount of income on the return.

While the Plumley study quantified the indirect behavioral responses to criminal tax convictions, it did not provide a basis for interpreting why taxpayers responded as they did. Plumley’s suggested explanation for the increase in voluntary compliance induced by the IRS’s criminal enforcement activities, however, is consistent with the theories discussed in Part II and supports the proposal for an exception permitting disclosure of criminal tax convictions:

[T]he most important influence that these convictions have on the general population may be to satisfy the typical taxpayer that criminals are not going scott-free, thus encouraging him to pay his “fair share.” When the opposite perception prevails (i.e., that scofflaws get away with flagrant tax violations), it could very well cause some otherwise law-abiding taxpayers to under report some of their own income in protest.

262. Publicity surrounding a tax evasion conviction might have a negative effect on the tax evader’s future reporting behavior (subsequent year effect) if his perception of the Government becomes more unfavorable, which it likely will, or if he uses the information he obtains during the investigation to develop a different, more effective form of noncompliance. However, having been detected and punished, the evader might have less opportunity to engage in certain types of noncompliance in later years, particularly failure to file noncompliance. See generally Brian Erard, The Influence of Tax Audits on Reporting Behavior, in WHY PEOPLE PAY, supra note 7, at 95, 103–05 (finding that taxpayers who experienced a significant audit adjustment in one year showed improved compliance in a subsequent year).

Concerns that publicity would diminish the rehabilitative effects of criminal punishment could be addressed through plea agreement negotiations, allowing the offender to avoid publicity in exchange for his agreement to comply with his reporting obligations for a certain number of future years. Similar conditions are placed upon taxpayers who enter into installment agreements with the IRS to spread payment of their liability over a span of years and upon those who compromise their liability with the IRS. I.R.C. § 7121.

263. Plumley, Determinants, supra note 6, at 36. The study showed that criminal convictions had a positive, but smaller impact on taxpayers’ willingness to report the correct amount of deductions. Id. The study also compared the cost effectiveness of the five IRS activities found to have a positive impact on voluntary compliance. While criminal convictions were found to be the least cost-effective activity among the five, the marginal indirect revenue-to-cost ratio of criminal tax convictions was still 16.3 to 1, a ratio greater than the average direct revenue effects of audits. According to Plumley’s findings, “a realistic expansion of CID activities may produce more indirect revenue than the largest realistic expansion of TDI [nonfiler] notices—even though TDI notices are the most cost effective in producing indirect revenue.” Id. at 40.

264. Id. at 36. Compare the IRS’s justifications for the press releases in Johnson v. Sawyer:

[Having those limited resources . . . one of the ways that the Internal Revenue Service had determined to best enforce the laws is to make sure that when someone is prosecuted and punished for a federal tax crime, in this case a felony, that everybody knows about it, and so they
According to Plumley, the IRS’s primary means of influencing the general population through its criminal enforcement activities is by publicizing successful cases.\textsuperscript{265} As further evidence of this point, the study found that a related variable—the number of criminal investigations \textit{started} by the IRS each year—did not produce a statistically significant indirect revenue effect. It follows that starting new criminal investigations would not have a measurable effect on compliance, Plumley concluded, because the IRS makes no effort to publicize newly opened criminal investigations, as it does with criminal convictions.\textsuperscript{266} 

have a public affairs office, and the public affairs office makes press releases, and the press releases are intended to tell the people of the United States two things:

No. 1. pay your taxes and be fair with your government, and be fair with your fellow taxpayers, because if you don’t, we have this elite group of highly skilled agents out there who are going to catch you and they are going to prosecute you.

And No. 2, the message to the vast majority of honest, hard-working tax-paying American citizens is this: We are making sure that other people are like you. We are making sure . . . everyone out there is toeing the line like you and paying your taxes and being fair with Uncle Sam and your neighbor; and so, they write press releases, and they send them out to radio stations and to newspapers, and they especially do that in the period right before tax day, April 15th of each year.

\textit{Johnson v. Sawyer}, 120 F.3d 1307, 1335-36 (5th Cir. 1997).

\textsuperscript{265} Plumley, \textit{Determinants}, supra note 6, at 18. The effects of publicity on taxpayer compliance are likely to be most effective in the post-conviction setting. As a result, the proposed exception to section 6103 is limited to press releases announcing criminal tax fraud convictions and guilty pleas. Publicizing pre-conviction proceedings in criminal tax fraud cases, such as indictments and other pre-trial actions, are likely to have little deterrent effect because of the unknown resolution of the case and may backfire on the IRS if the defendant is found not guilty or the charges are dropped. \textit{See} Michael G. Little, \textit{Extra-Judicial Discussion of Taxpayer Information: The IRS Bully Is Still on the Block}, 43 FLA. L. REV. 1041, 1067-69 (arguing that pre-trial press releases should be prohibited because of the potential for abuse). Publicizing criminal fraud charges brought against an individual and then not publicizing the fact that the individual was eventually found not guilty may also offend taxpayers’ perceptions of procedural fairness. \textit{See supra} notes 29-34 and accompanying text for a discussion of procedural fairness concerns.

The primary purpose of the disclosure exception for criminal tax convictions is to improve voluntary compliance, rather than to operate as a threat the IRS could use against taxpayers. It might be mentioned, however, that the prospect of adverse publicity should the taxpayer be convicted of criminal tax fraud could be an effective bargaining tool for the Government during settlement negotiations with the criminal defendant.

\textsuperscript{266} Plumley, \textit{Determinants}, supra note 6, at 39. A study of compliance initiatives taken in Massachusetts, including increasing the profile of the State’s criminal investigation bureau, also suggests a positive relationship between publicizing criminal tax convictions and increased compliance. \textit{See Robert M. Melia, Is the Pen Mightier Than the Audit?}, 34 TAX NOTES 1309, 1313 (1987) ("The emphasis of the Criminal Investigation Bureau (CIB) also has become more communications oriented. Formerly, the CIB was used as a collector of last resort. The strategy was to get the taxpayer to settle and move on to the
Creating a disclosure exception giving the IRS specific authority to publicize criminal tax convictions would not require the agency to exercise this authority in all possible instances. Some criminal tax convictions carry weaker deterrence messages than others, and some might carry no deterrence message at all. Criminal tax evasion cases involving the taxpayer's failure to report income arising from illegal drug sales, for example, may not send a clear deterrent signal to the general population and may, in fact, serve to reassure those who are inclined to evade by small amounts that the IRS is concerned only with catching evasion involving illegal activities or large dollar figures. Some commentators have also suggested that criminal tax cases involving high-profile defendants such as Leona Helmsley and Al Capone do not relay a strong deterrent message because average taxpayers are unable to identify with these defendants. This could be true, but it is just as likely that high-profile cases emphasize the abilities and enforcement power of the IRS's criminal investigators, sending the message that "If the IRS can get these untouchables, certainly they can get me." In any event, it is just as

next case without taking up a lot of staff time developing the case for referral to the Attorney General. Because of this strategy, the Bureau labored in anonymity. The CIB strategy now is designed to bring high impact cases to trial, so that the public becomes aware of the Department's criminal enforcement capability. While such cases take much staff time to develop, the research reviewed in this paper would suggest that the deterrent effect is worth the effort.

267. See AM. BAR ASS'N COMM'N ON TAXPAYER COMPLIANCE, supra note 2, at 371 ("For small-time offenders, the link between accused criminal tax evaders and themselves is limited. Those who cheat by small amounts may even be reassured by the lack of stories about similar offenses."); cf. Richard C. Wassenaar, Commentary, in ABA COMPLIANCE REPORT, supra note 4, at 375, 376 ("We must also ask what general compliance attitudes would be if the general taxpayer public had the perception that no or little effort was devoted by the IRS to prosecuting those involved in illegal activities, those individuals making millions by their involvement in the illegal narcotics business, or other organized criminal activities.").

268. Joshua D. Rosenberg, The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane, 16 VA. TAX REV. 155, 199 (1996) ("In our country, the models for tax evasion are often wealthy, important, and successful people. Unfortunately, when we hear about Leona Helmsley evading taxes and going to jail, some of us say to ourselves 'we had better pay our taxes,' but many others tend to engage in an internal dialogue that sounds more like 'this rich woman evaded her taxes; from what I hear, most other rich people do, and probably I should or I'll be losing out.'"); see also Karyl A. Kinsey, Theories and Models of Tax Cheating, 18 CRIM. JUST. ABSTRACTS 403, 408 (1986) [hereinafter Theories and Models] ("The impact of mass media probably . . . depends upon the perceived similarity of people who have been arrested and convicted for tax crimes to those who consume mass media reports. People who cheat on taxes by small amounts may not identify with large cheaters whose convictions are reported in the papers and on television news."); Sheffrin & Triest, supra note 33, at 210 ("[Leona Helmsley's] conviction was based on taking business deductions on items for personal use. The average taxpayer does not have the opportunity for this type of activity, although the activity itself would come as no surprise to the average taxpayer. Her case would probably do more detriment to the perceptions of fairness (the system is slanted to the rich) than to general perceptions of overall compliance."). Publicity surrounding sympathetic defendants, such as Willie Nelson, may trigger a negative response to the IRS's efforts to enforce the tax laws and might be downplayed by the IRS, to the extent possible.

269. Wassenaar, supra note 267, at 376; see Smith, supra note 15, at 244 ("The positive effect of the fairness of the tax system on the likelihood for large cheaters being caught suggests that detecting and
important that the IRS communicate its success in detecting and punishing "average" criminal defendants, thereby sending the message that all tax evasion is wrong and that all who seek to avoid their tax responsibilities will be rooted out and punished. 270

B. Publicizing Delinquent Tax Accounts

The disclosure exception for criminal tax conviction data would clarify existing IRS practice and allow the agency to tailor its message for maximum deterrent effect. The second proposal, allowing the IRS to publicize the names of taxpayers who fail to pay timely their assessed income tax liability, would grant the IRS a new, although not completely novel, enforcement tool. The Government has used public lists in the past to promote tax compliance. During the early years of the federal income tax, Congress authorized the revenue authorities to publish taxpayers’ names and their tax liabilities, but eventually repealed the practice because of concerns that the media used the information merely to generate scandal, rather than for legitimate purposes. Starting in the 1920s, Congress granted public access to taxpayers’ names and their reported tax liabilities, but did not require the Government to publicize the data. The right to inspect a taxpayer’s declared liability continued until the mid-1960s when the IRS’s computerized records system made the inspection system impracticable. 271

The disclosure exception advocated here would not allow for the wholesale release of taxpayers’ returns or their reported liabilities: Publicizing this information would almost certainly offend most compliant taxpayers’ privacy expectations and would not serve a strong Government purpose. In contrast, a disclosure exception that permits the IRS to publicize the names of those taxpayers who refuse to pay their assessed tax liability, if narrowly tailored to capture chronic delinquents, could help combat an important type

punishing gross violations of the law is considered to be part of a fair tax system.”).

270. The IRS could reinforce this message by including additional material informing the public that most taxpayers comply with their tax obligations, but that those few who seek to evade will face serious adverse consequences. See Lederman, Interplay, supra note 9 (suggesting a letter campaign along these lines).

271. See supra Part III.A. Some States continue to permit public access to limited amounts of return information. For example, upon payment of a $4 fee, Wisconsin residents have access to the amount of income tax paid by both individuals and corporations. Wis. Stat. § 71.11(44)(b) (1984). A few States require that the revenue department publish the names of taxpayers receiving certain types of tax credits. E.g., W. Va. Code § 11-10-5(b) (2003); Ark. Code Ann. § 26-18-303(b)(11)(Q) (Michie 1987).
of tax noncompliance—failure to pay—and complement the IRS’s collection efforts.\(^{272}\)

As the law currently exists, the IRS cannot begin the administrative collection process until the taxpayer’s liability is formally assessed.\(^{273}\) Tax liability voluntarily reported by the taxpayer on his return can be assessed with little further action by the IRS, while tax liability in addition to that reported on the return must be assessed using deficiency procedures that typically require the IRS to issue a Notice of Deficiency and grant the taxpayer the opportunity to contest the proposed assessment in Tax Court.\(^{274}\) Once assessment takes place, the taxpayer's debt is fixed and the IRS can demand payment.\(^{275}\) If the taxpayer refuses to pay, a tax lien in favor of the Government automatically attaches to all the taxpayer’s real and personal property.\(^{276}\) The federal tax lien is often referred to as a “secret lien” because once it attaches, no further action on the part of the IRS is required to establish the Government’s interest in the taxpayer’s property or its priority against certain categories of competing creditors. Nonetheless, the IRS will often publicly record its lien by filing a Notice of Federal Tax Lien in either a State-level or county-level recording office, or with a State court.\(^{277}\) The

\(^{272}\) For a complete discussion of tax collection procedures see LEDERMAN & MAZZA, supra note 115, at 561-649.

\(^{273}\) The IRS can also seek to collect an unpaid assessment through a judicial process by filing a lawsuit to foreclose on the Government’s federal tax lien or to reduce the tax lien to a personal judgment. I.R.C. §§ 7401; 7403. Because of the cost and delay associated with collection-related lawsuits, the IRS does not use judicial procedures nearly as often as it uses administrative procedures. LEDERMAN & MAZZA, supra note 115, at 561.

\(^{274}\) The administrative collection process involves a variety of disclosure issues. See Allan Barnes & Roger Lirely, Striking Back at the IRS: Using Internal Revenue Code Provisions to Redress Unauthorized Disclosure of Tax Returns or Return Information, 23 SETON HALL L. REV. 924, 945-48 (1993) (discussing disclosure issues relating to levy procedures). Recently, the Bush Administration proposed that the Government privatize some aspects of the collection process. Some of the functions to be performed by private firms would require that the firm have access to taxpayer return information, thereby raising privacy concerns. Amy Hamilton, IRS Considers Privatizing Tax Collection, and a Lot More, 98 TAX NOTES 652, 652-53 (2003). For a thorough discussion of privacy issues raised by a proposal to privatize tax collection, see Christina N. Smith, The Limits of Privatization: Privacy in the Context of Tax Collection, 47 CASE W. RES. L. REV. 627 (1997) (concluding that privatization would impermissibly infringe on taxpayer privacy rights).

\(^{275}\) I.R.C. §§ 6201 (summary assessment procedures); 6213 (deficiency assessment procedures).

\(^{276}\) I.R.C. § 6321. After issuing another series of pre-levy notices, the IRS can eventually seize the taxpayer’s property and sell it to satisfy the amounts owed. I.R.C. §§ 6320 (post-levy notification): 6330 (pre-levy notification): 6331 (levy authority). The levy and sale remedy has become less and less common in recent years, and some commentators believe that the dramatic drop in enforced collection action has led to lower compliance rates. Rossoitti, supra note 8, at 2; GENERAL ACCOUNTING OFFICE, IRS MODERNIZATION: CONTINUED IMPROVEMENTS IN MANAGEMENT CAPABILITY NEEDED TO SUPPORT LONG-TERM TRANSFORMATION (GAO-01-700T) 8 (May 8, 2001).

\(^{277}\) I.R.C. § 6323; see Treas. Reg. § 301.6103(k)(6)-1(b)(6) (authorizing disclosure of tax return information necessary to establish liens against the taxpayer’s assets, or to levy on, seize, or sell assets to
IRS does not file the Notice of Federal Tax Lien to publicize the delinquent taxpayer’s noncompliance, but to protect its lien priority as against creditors who otherwise would have an interest superior to the Government’s.  

Once the Notice of Federal Tax Lien is recorded, the delinquent taxpayer’s name and the amount of the unpaid liability are open for public inspection and may be accessed by private parties without specifying a purpose. The public nature of the lien information formed the basis of the Ninth Circuit opinion in Schrambling Accountancy Corp. v. United States, in which the court extended the “public records” exception it established in Lampert to return information contained in tax lien notices filed with a county recorder’s office. The court reiterated its earlier holding in Lampert that return information in the public domain is no longer confidential and, therefore, is not entitled to privacy protection. In the process, the Ninth Circuit rejected the lower court’s attempt to distinguish between return information released into the public record as part of a judicial proceeding, and information released through filing a Notice of Federal Tax Lien. In fact, the Ninth Circuit noted, the entire purpose of recording the lien, unlike including information in a court document, is to put the public on notice that the lien exists: “Recording the information in the County Recorder’s office

satisfy an outstanding tax liability). State law determines in which recording office the IRS must file the Notice of Federal Tax Lien. I.R.C. § 6323(f). In some States, tax liens encumbering personal property must be filed with the Secretary of State’s Office, while liens encumbering real property must be filed with the recorder’s office in the county in which the real property is located. See, e.g., KAN. STAT. ANN. § 79-2614 (2002). In other States, tax officials are authorized to file a certificate of debt in State court. The certificate is entered into a judgment docket, thereby making the delinquency a matter of public record. E.g., N.J. STAT. ANN. § 54: 49-12 (West 2002).

278. I.R.C. § 6323(a). The Notice of Federal Tax Lien, Form 668, includes the taxpayer’s name and address, the type of taxes and the tax periods involved, the dates of assessment, the taxpayer’s identification number, and the unpaid balance of the assessment.

279. 937 F.2d 1485 (9th Cir. 1991), cert. denied, 502 U.S. 1066 (1992). An IRS agent erroneously issued a number of Notices of Levy without following the required notification procedures. The Notices of Levy included return information, which the taxpayer asserted the IRS had wrongfully disclosed. The IRS conceded that it issued the Notice of Levy in violation of the Code, but claimed that it did not disclose confidential return information because the information contained in the Notices of Levy had already been made a part of the public domain through the lien filings. Id. at 1486–87.

280. The Ninth Circuit’s Lampert decision is discussed in the text accompanying notes 182–96, supra.

281. Schrambling, 937 F.2d at 1490. As a result, the improper levies in both cases did not trigger damages under section 7431. Reviewing a companion case, Allen v. United States, the Ninth Circuit ruled that information disclosed by the taxpayer in his bankruptcy petition, which is available for public inspection, also triggers the public records exception to section 6103. Id. at 1489.

282. The District Court in Schrambling reasoned that while the decision to bring a criminal prosecution is governed by strong institutional constraints, a Notice of Federal Tax Lien is an informal matter. It does not begin an adversarial proceeding and is not subject to judicial review. Id. at 1488.
thus exposes the information to as much, if not greater, publicity than publication in a judicial proceeding.'

As for the other courts involved in the public records debate, neither the Fourth Circuit's strict interpretation of section 6103, which recognizes no public records disclosure exception of any kind, nor the immediate source analysis adopted by several other courts, would permit the IRS to re-disclose return information that has entered the public record through a recorded tax lien. In the latter case, subsequent disclosure would violate section 6103 because the IRS itself, rather than an outside agency such as the Tax Court, constitutes the source of the information. The Treasury Department's and the Joint Committee's suggested statutory amendments excluding "return information properly made a part of public records" from confidentiality protection would encompass information contained in lien filings, but both groups recommended against disclosing the names of delinquent taxpayers as a means of improving voluntary compliance.

The Treasury and Joint Committee released their recommendations as part of a Congressionally-mandated study of whether the practice of publishing the names of non-filers would improve compliance. Publicizing the names of taxpayers who fail to file a return also was rejected, primarily because of privacy concerns. The privacy concerns expressed, however, did not relate to the inherent confidentiality of the return information that would be released. Instead, both groups expressed worry over the damage a tax-

283. Id. at 1489. The Sixth Circuit agrees with the Ninth Circuit's holding in Schrambling regarding the status of return information disclosed by recording a Notice of Federal Tax Lien. See Rowley v. United States, 76 F.3d 796, 801 (6th Cir. 1996) ("O)nce a taxpayer's return information becomes part of the public domain through the filing and recording of a judicial lien, it loses its confidentiality and is not protected by Section 6103 if republished by the Internal Revenue Service for tax administration purposes.").

284. See Mallis v. United States, 993 F.2d 1111 (4th Cir. 1993) and text accompanying notes 197-200.

285. See Thomas v. United States, 890 F.2d 18, 21 (7th Cir. 1989) ("We believe that the definition of return information comes into play only when the immediate source of the information is a return or some internal document based on a return, . . . and not when the immediate source is a public document lawfully prepared by an agency that is separate from the Internal Revenue Service and has lawful access to tax returns."). (emphasis added). The Fifth Circuit's interpretation of the immediate source test might recognize an exception. The court in Johnson v. Sawyer seemed to focus more on the IRS's internal documents as the source of the information, rather than an agency separate from the IRS. See Johnson v. Sawyer, 120 F.3d 1307, 1324 (5th Cir. 1997) ("U)nder our analysis, § 6103 is violated only when tax return information—which is not a public record open to public inspection—is the immediate source of the information claimed to be wrongfully disclosed."). Because the Fifth Circuit creates an artificial definition of return information that focuses on the information's source rather than its content, the opinion is difficult to interpret beyond its specific facts. See supra notes 238-41 and accompanying text.

286. TREASURY DEPARTMENT, DISCLOSURE STUDY, supra note 19, at 35; JOINT COMMITTEE, CONFIDENTIALITY STUDY, supra note 19, at 240.

payer might suffer if he were publicly identified as a non-filer even though he merely filed his return late, or did not file because he was not legally required to do so.\textsuperscript{288} It is true that failure to file a return is not a good measure of noncompliance because a person who does not file, even when obligated to do so, may not owe any tax liability and may, to the contrary, be entitled to a refund. By comparison, the risk of identifying someone as a tax delinquent when they have no outstanding balance due is considerably less likely. The Treasury and Joint Committee nevertheless rejected the idea of publicizing the names of federal income tax delinquents because of the same, largely overestimated, concerns about misidentifying taxpayers.

Putting aside for the moment the possibility of mistaken identity, disclosing an individual's name as part of list of delinquent taxpayers would still involve some invasion of the taxpayer's privacy interests, yet the privacy interests at issue are limited. The information publicized—the taxpayer's name, address, the fact that the taxpayer was delinquent in payment, and the amount of the delinquency—would not reveal intimate financial details about the taxpayer, as would disclosing the taxpayer's entire return. The practice would not, for instance, disclose the taxpayer's income or expenses, or any financial relationship the taxpayer had with another party. And as noted by the Ninth Circuit, the public availability of this same information diminishes the taxpayer's privacy expectations, which in this case relate not so much to his return information as to his failure to abide by a legal obligation to pay his taxes when due.

As before, to justify an exception to section 6103 permitting the IRS to publicize a delinquent taxpayer list, it is not necessary to conclude that the taxpayer's privacy interests in the return information are entirely eliminated by prior disclosure into the public domain. In fact, if a taxpayer's privacy expectations were eliminated when the lien is recorded, the IRS's disclosure campaign would have no impact on the taxpayer's incentive to pay off his debt because presumably he would feel no shame or stigma for failing to pay. The empirical studies that tested the effects of nonpecuniary costs such as guilt and shame on tax evasion decisions focused on reporting noncompliance (unreported income and overstated deductions) rather than failure to

\textsuperscript{288} \textsc{Treasury Department, Disclosure Study, supra note 19. at 35 ("[T]he risk of inaccuracies and unnecessary embarrassment or other adverse consequences outweigh any possible benefits to be derived from such a program. Moreover, to the extent such inaccuracies erode taxpayers’ confidence in the tax system, tax compliance could be negatively impacted."); Joint Committee, Confidentiality Study, supra note 19. at 239.}
pay. However, the stigmatizing effects that the researchers detected were based on a much broader social norm of tax compliance—"the obligation to pay one's fair share of taxes to the government"—which obviously includes a failure to pay component. It also seems reasonable to expect that disclosing an individual's willful failure to pay his tax debt when he is otherwise financially able to do so could damage a person's reputation among his peers and disrupt his current and future business relationships; or, in the words of Professor Posner, signal that the delinquent taxpayer is a "bad type".

It is the taxpayer's fear of these adverse consequences that underlies the Government's interest in disclosing delinquent accounts. The experience of a number of State revenue departments provides empirical data supporting the view that taxpayers will respond to this particular threat of stigma. The Connecticut Department of Revenue, for example, is one of a growing number of State revenue agencies that maintains a publicly disclosed list of individuals and businesses that are delinquent in paying their State income and sales taxes. The Connecticut program, the first implemented, has served as a model for other States.

Starting in 1997, the Connecticut authorities began publicly disclosing on its Internet website and through press releases the names of the State's top 100 delinquent taxpayers. The Connecticut revenue officials initiated

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289. See Erard & Feinstein, supra note 14, at 72, 80 (incorporating a measure of both "taxable income" and "total positive income" into an expected utility model); Grasmick & Bursick, supra note 71, at 845 (measuring motivational response to tax cheating on respondents' answers to whether they would "fail to report certain income or claim an undeserved deduction"). These studies are discussed in more detail in the text accompanying notes 70–76.

290. Erard & Feinstein, supra note 14, at 75.

291. Posner, Law and Social Norms, supra note 14, at 1789, 1808; see JOINT COMMITTEE, CONFIDENTIALITY STUDY, supra note 19, at 238–39 ("[S]ome people may not wish to do business with someone who is not current with regard to Federal taxes . . . . It is exactly the fear of those consequences that some believe will increase compliance by providing an incentive for persons to file returns (or pay outstanding liabilities). ").

292. The remaining States include Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, and North Carolina. The District of Columbia's Office of Tax and Revenue also includes a list of delinquent taxpayers on its website. The Illinois and Montana revenue departments have temporarily removed their Internet disclosure sites. In 2003, the Georgia Department of Revenue was granted the authority to publish a list of tax liens against individuals and businesses. 2003 Ga. Laws 556 (enacting GA. CODE ANN. § 48-3-29).

293. See GENERAL ACCOUNTING OFFICE, TAX ADMINISTRATION: FEW STATE AND LOCAL GOVERNMENTS PUBLICLY DISCLOSE DELINQUENT TAXPAYERS (GAO-GGD-99-165) 5-6 (Aug. 24, 1999) [hereinafter PUBLICITY REPORT].

294. The website address is http://www.drs.state.ct.us/delinq/top100.html. The Connecticut program, like most others, list both individual and business taxpayers. Legal authority for the disclosure program varies from State to State. Most of these States have statutory provisions similar to section 6103 that protect the confidentiality of return information. The Connecticut legislature, however, enacted a special provision that gives the revenue authorities explicit statutory authority to release the information,
the disclosure list as a method of applying "social" pressure to encourage taxpayers to pay their tax obligations.\textsuperscript{295} The officials report that the program has yielded "outstanding" results: "Since the first posting over four years ago, [the revenue department] has collected $107.9 million from delinquent accounts, and reduced cases in the collections portfolio by more than 28 percent."\textsuperscript{296} Other States also report positive results.\textsuperscript{297} According to Louisiana State officials, the Louisiana Department of Revenue’s "Cybershame" program, an Internet site that lists the names of delinquent taxpayers, yielded over $700,000 in overdue tax payments from chronic delinquent taxpayers within the first six months.\textsuperscript{298}

These reported success rates must be viewed with some amount of skepticism because revenue authorities might have collected in any event at least a portion of the amounts recovered. Nevertheless, the public lists of delinquents must have some impact on a taxpayer’s incentive to comply—whether through shame, stigma, or guilt—as the following description of Massachusetts’s program attests:

The results [of the publicity campaign] have been impressive. For example, this past month a list was released disclosing the names of 294 corporations owing $7 million dollars. But in the process of compiling this list, 128 corporations paid in full or entered payment agreements for a total of $5.3 million. In other words, just threatening public disclosure caused corporations to pay 43 percent of the total de-

\textsuperscript{295} GENERAL ACCOUNTING OFFICE, PUBLICITY REPORT, supra note 293, at 2.

\textsuperscript{296} State of Connecticut Department of Revenue Services, Commissioner’s Welcome (last visited March 19, 2003), available at http://www.drs.state.ct.us/Commessage/message.html/.

\textsuperscript{297} See GENERAL ACCOUNTING OFFICE, PUBLICITY REPORT, supra note 293, at 7 ("Revenue office officials believe that their public disclosure programs improve compliance. They base their views mostly on anecdotal evidence from statistics on accounts receivable and collections.").

linquencies identified. Similar results were achieved with individual taxpayers, with 209 taxpayers paying in full or entering into payment agreements to avoid public disclosure. What makes these results especially impressive is that those corporations and individuals were among Massachusetts' largest, hardcore delinquents. 299

States that publicize the names of delinquent taxpayers have sought to measure only the direct revenue effects of their programs, rather than the indirect effects these programs might have on compliance norms. While the indirect effects may be hard to measure, the IRS, once granted a disclosure exception permitting it to release the identifying details surrounding a taxpayer's delinquent account, can tailor the program to ensure that any indirect compliance incentives that result are positive. For example, to avoid sending the message that failure to pay noncompliance is rampant, thereby interfering with taxpayers' instincts towards cooperation, the IRS might publish only the names of the most chronic delinquents, or only those with outstanding liabilities above a certain amount. Some delinquent taxpayers who meet these thresholds might still be left off the list. Publishing the names of taxpayers who have not paid for legitimate reasons, such as health problems and unforeseen circumstances, might send a mixed deterrence message and could end up generating negative attitudes towards the IRS, thereby undermining compliance. To ensure that the IRS publishes the names of only those taxpayers who willfully fail to pay, the publicity threat should be applied as a last resort, after the taxpayer has exhausted all his post-assessment review opportunities. 300 Waiting until no further collection avenues are open to the IRS, save for levy and sale, should also help ensure that the IRS does not

299. Melia, supra note 266, at 1312. Louisiana officials report that some taxpayers came forward and paid their debts in order to prevent their names from being publicized. Louisiana Cybershame Site, supra note 298. Not all segments of the population, of course, would respond to a threat of this type of disclosure. Tax protesters, who do not believe they have a constitutional obligation to pay federal income taxes, might view inclusion on the list as a badge of honor, at least among their relatively small ranks. Kinsey, Theories and Models, supra note 268, at 410. Third parties with whom the protestor seeks to carry on business and personal relationships, however, might not view his failure to pay quite so lightly and could exert external pressure on the tax protestor to pay his debts. See infra note 330 and accompanying text.

300. After filing a Notice of Federal Tax Lien, the Code requires that the IRS grant the taxpayer an opportunity to request a Collection Due Process Hearing, during which the taxpayer can raise the possibility of collection alternatives, such as paying the liability over time through an installment agreement, or compromising the amount of the liability based on economic hardship. I.R.C. § 6320; Treas. Reg. §§ 301.6320-1, 301.6330-1. Waiting until the taxpayer exhausts this administrative remedy, which might eventually involve review by the Tax Court, would separate those delinquent taxpayers who have the ability to pay from those who do not. Only the names of the former would be published. As most States do, the IRS should also notify the taxpayer before disclosing his name on the list and give him, if he has not had the opportunity already, a final chance to pay or enter into a payment agreement. See GENERAL ACCOUNTING OFFICE, PUBLICITY REPORT, supra note 293, at 12–13 (describing Connecticut’s practice).
mistakenly list a taxpayer as a delinquent when he no longer owes the tax. 301
Notwithstanding these technical details, the practice of publicizing delinquent taxpayer lists holds the promise of being an effective incentive toward compliance for the delinquent taxpayer, and a means of strengthening social norms of tax compliance.

C. Publicizing the Identity of Tax Shelter Investors

The final recommendation is likely to be the most controversial of the three, and possibly the most effective means of improving taxpayer compliance. The third proposal would establish a disclosure exception in section 6103 permitting the IRS to publicize the names and identifying details of taxpayers who invest in tax shelter transactions the IRS has declared abusive. 302 Government policy makers and IRS officials consider tax shelters to be one of the most serious tax compliance problems facing the self-assessment system, not only because of the tax dollars lost to schemes that generate artificial losses and inflated deductions, but also because of the ad-

301. If the IRS makes too many mistakes, taxpayers could lose confidence in the accuracy of the information, which could hinder voluntary compliance. Overall, States report few erroneous disclosures. According to the GAO Report, Connecticut officials claimed they made no inaccurate disclosures. GENERAL ACCOUNTING OFFICE, PUBLICITY REPORT, supra note 293, at 383. District of Columbia and Montana officials reported one mistake each. Id. at 385, 387. North Dakota officials, however, discontinued an effort to publicize unsatisfied liens because of publicity about frequent errors. Id. at 375. Before publicizing the taxpayer’s data, IRS officials should double-check its accuracy. Moreover, monthly reviews might be made in order to determine whether someone listed as a delinquent has subsequently paid. Once they do, their names should be promptly removed from the list.

302. It should be noted at the outset that my proposal is subject to same criticisms leveled against other proposals to reduce the tax shelter problem; namely, the difficulty of separating abusive tax shelter transactions from legitimate business ventures. The discussion below assumes that the IRS can distinguish between an abusive transaction and run-of-the-mill tax planning. See Lawrence Zelenak, When Good Preferences Go Bad: A Critical Analysis of the Anti-Tax Shelter Provisions of the Tax Reform Act of 1986, 67 TEX. L. REV. 499, 524 (1989) (distinguishing between “legitimate” and “abusive” tax shelters). See generally Peter C. Canellis, A Tax Practitioner’s Perspective on Substance, Form and Business Purpose in Structuring Business Transactions and in Tax Shelters, 54 SMU L. REV. 47, 55-57 (2001) (distinguishing between tax practitioners and tax shelter practitioners); David A. Weisbach, Ten Truths About Tax Shelters, 55 TAX L. REV. 215, 220–24 (2002) (arguing that tax planning is not a right and that approaching the problem of abusive tax shelters as if it were is counter productive). As a starting point, the IRS could publicize the names of those participants in transactions the IRS characterizes as “listed transactions” within the meaning of the section 6011 regulations, which require that shelter investors disclose to the IRS their participation in certain tax shelters. Treas. Reg. § 1.6011-4(b)(2). Listed transactions are those the IRS considers to be tax avoidance transactions. Id. The IRS periodically releases notice to the public of investments it considers to be listed transactions. See, e.g., Notice 2001–51, 2001–2 C.B. 190. Advance notice to potential investors of the possibility of having their names released publicly satisfies most fairness concerns, and should have a significant deterrent effect, as explained below.
verse affects these transactions have on taxpayer compliance norms. Former IRS Commissioner Charles Rossotti, before leaving his post, lamented the IRS’s inability to respond effectively to the proliferation of tax shelter investments:

Recognizing the IRS’ diminished capacity, promoters and some tax professionals are selling a wide range of tax schemes and devices designed to improperly reduce taxes to taxpayers based on the simple premise: they can get away with it. When this perception becomes increasingly widespread, the essential pillar of our tax system is lost—namely, the belief of honest taxpayers that if someone does not pay what he or she owes, then the IRS will do something about it.

Congress has given the IRS an array of enforcement tools aimed specifically at tax shelter activities, from monetary penalties on those who promote them and those who invest to registration and disclosure requirements. Still, the tax shelter industry thrives and policy makers have not yet reached an agreement on how best to respond. Some commentators recommend strengthening existing penalties and expanding required disclosure.

303. See S. Rep. No. 99-313, at 714 (1986) (“Extensive shelter activity contributes to public concerns that the system is unfair, and to the belief that tax is paid only by the naive and the unsophisticated... To the extent that [taxpayers] feel that they are bearing a disproportionate burden with regard to the costs of government because of their unwillingness or inability to engage in tax-oriented investment activity, the tax system itself is threatened.”). Tax shelters used by corporations to generate losses and deductions and defer reporting income are another serious compliance problem, but one beyond the scope of this article. For a summary of recent academic research on corporate tax shelters see Christopher H. Hanna, Symposium: Business Purpose, Economic Substance, and Corporate Tax Shelters: Introduction, 54 SMU L. REV. 3 (2001); Deborah H. Schenk, Symposium on Corporate Tax Shelters, Part I: Forward, 55 TAX L. REV. 125 (2002).

304. Rossotti, supra note 8, at 2. For its part, the Bush Administration proposes expanding the IRS’s 2004 operating budget by 5.25% as compared to the previous year. A portion of this additional funding is earmarked for increased audit and enforcement programs combating tax shelter activities by high-income taxpayers. See David Cay Johnston, Budget Gives I.R.S. More Money to Investigate Tax Cheats, N.Y. TIMES, Feb. 5, 2003, at A23.

305. See, e.g., I.R.C. §§ 6700 (penalty for promoting abusive tax shelters); 6707 (penalty for failure to register tax shelters as required by section 6111(a)); 6708 (penalty for failure to maintain lists of investors in potentially abusive tax shelters as required by section 6112); see also I.R.C. § 7408 (action to enjoin person from promoting abusive tax shelters).

306. See, e.g., I.R.C. §§ 6662(b)(1) (negligence penalty); 6662(b)(2) (substantial understatement penalty). While taxpayers are expected to disclose their participation in certain types of tax shelter investments (technically referred to as “reportable transactions”), there is no penalty for failing to do so. See I.R.C. § 6011. The Treasury has proposed legislation that would impose a penalty for failure to disclose a reportable transaction, and has issued proposed regulations under section 6662 that would prohibit a taxpayer who engages in a reportable transaction from relying upon the advice of a tax practitioner to avoid the accuracy-related penalty, unless the taxpayer disclosed the transaction pursuant to section 6011. Prop. Treas. Reg. § 1.6662-4(c)(2).

307. I.R.C. §§ 6111; 6112. A promoter required to register a tax shelter who does not do so is subject to a penalty equal to the greater of $500 or 1% of the aggregate amount invested in the shelter. I.R.C. § 6707(a).
of tax shelter activity by participants, while others believe that altering the substantive tax law, either by repealing tax preferences on which these transactions hinge or by codifying anti-abuse rules, is the better approach. Efforts aimed at clarifying the substantive law surrounding tax shelters are unlikely to be effective because this approach merely affects, if at all, the supply of available shelter investments. History reveals, however, that the supply of tax shelters is constrained only by the creativity and greed of tax shelter promoters, both of which seem limitless.

The more effective approach to combating tax shelters is to reduce taxpayer demand. The unfortunate fact, as former Commissioner Rossotti noted, is that demand remains strong because taxpayers with access to tax shelter advice—typically high-income individuals—perceive that they can


310. See Pearlman, supra note 308, at 292 (“Tax shelters that do not work are not a substantive law problem; they are primarily a tax enforcement problem, and they require an enforcement response.”). Pearlman’s comments relate to both individual and corporate tax shelters Id. at 290; see also Canellos, supra note 302, at 69 (“The key to deterrence for all classes of tax shelters is reporting and penalties.”).


311. See McMahon, supra note 309, at 1748 (“Congress, the Treasury, and the IRS simply cannot keep pace with the army of hardworking tax mavens who are engaged in the never-ending design of new shelters.”).

take advantage of questionable tax benefits and "get away with it." This perception reflects a comparison each taxpayer makes between the expected gains and the expected costs of evasion. Proposals to increase the costs associated with this form of evasion, such as increasing monetary penalties for abusive tax shelter investments, should, according to theory, reduce taxpayer demand. Yet, increasing penalties is also unlikely to have a significant impact on taxpayer decisions because, without a credible threat of being detected, the threat of punishment is greatly diminished.

In order to stem the demand for abusive tax shelter investments, the threat of detection must be real and, at present, it is not. Part of the IRS's difficulty in identifying tax shelter investors is the veil of secrecy under which the tax shelter industry operates. Many tax shelters are marketed in conjunction with confidentiality agreements, which protect both the promoter's idea (and his profit) and the investor's identity. Moreover, the tax benefits generated by abusive tax shelters are not immediately apparent to an IRS examining agent reviewing the investor's return. In fact, the IRS typically learns of new varieties of tax shelters from third party sources such as informants and newspaper articles.

313. Rossetti, supra note 8, at 2.
314. See supra notes 9–11 and accompanying text.
315. See Alison Bennett, Williams Voices Concern About Tax Shelters Being Marketed After Government Crackdown, BNA DAILY TAX REP., at G-3 (Mar. 3, 2003) (repeating concerns expressed by IRS Chief Counsel over marketing of "son of BOSS" tax shelter after IRS issued Notice 2000-44 denying purported losses from transaction and warning of adverse consequences for those who invest and promote these deals). The threat of increased penalties also is reduced by the existence of tax shelter opinion letters issued by promoters and practitioners. Opinion letters, which are designed to insulate the taxpayer from penalty assessments, contain representations about the likelihood of the tax benefits being upheld by a court. While many drafters rely on overly optimistic conclusions about the investment's chance of success, opinion letters have proven to be effective penalty insurance for taxpayers. Michael J. Graetz & Louis L. Wilde, The Economics of Tax Compliance: Fact and Fantasy, 38 NAT'L TAX J. 355, 358 (1985). As a means of deterring tax shelter investments, criminal tax penalties have been largely ignored. Taxpayers who invest in abusive tax shelters have not been prosecuted for criminal tax evasion because criminal violations require proof of a willful state of mind and deliberate behavior on the part of the taxpayer. See, e.g., I.R.C. § 7201; Spies v. United States, 317 U.S. 492, 499 (1943) (requiring an affirmative act of evasion). Willful intent can be difficult to establish in tax shelter cases when a favorable tax shelter opinion letter exists. Graetz & Wilde, supra at 358. For a discussion of the role that tax practitioners play in facilitating abusive tax shelters see Canellos, supra note 302, at 56 ("The tax shelter professional is a different breed, by experience, temperament, reputation, and calling .... Instead of providing a tax structure for a real business transaction, the tax shelter adviser creates an artificial transaction that takes advantage of a loophole."). See generally Suzanne Scotchmer, The Effect of Tax Advisers on Tax Compliance, in ABA COMPLIANCE REPORT, supra note 4, at 182 (discussing the efficiency and social costs associated with third party advice from tax professionals).

Only recently has the IRS made a concerted effort to eliminate the intense secrecy that surrounds abusive tax shelters. The agency’s first effort relied on a voluntary disclosure program under which investors were given the opportunity to report their involvement in certain identified transactions in exchange for penalty waivers. Based on the limited information available, the response to this offer of limited immunity has been disappointing. A more promising enforcement campaign focuses on tax shelter promoters and the requirement in Code section 6112 that the promoter maintain lists of those taxpayers who invest in certain potentially “abusive” shelters, including those marketed under conditions of confidentiality. The list maintenance rules in Code section 6112 also require that the list of tax shelter investors be made available for inspection by the IRS upon its request.

Believing that some law and accounting firms were not complying with the list maintenance requirements, the IRS recently began targeting promoters for audit. These promoters have received administrative summons from the IRS seeking lists of customers and descriptions of all transactions for which lists should be maintained. In those cases in which promoters failed to respond to the summons, the Department of Justice has instituted several summons enforcement actions, including a proceeding against the accounting firm KPMG, seeking information on all tax shelter strategies the

318. See ECONOMIST, Face Value: Charles Grassley, Class Warrior, Feb. 22, 2003, at 64; Lee A. Sheppard, Basis Shifting Settlements Not Playing Well, 97 TAX NOTES 1128 (2002); cf. Alison Bennett, IRS Probing 78 Tax Shelter Promoters; 239 Summonses Issued for Investor Lists, BNA DAILY TAX REP., at G-1 (Apr. 16, 2003) [hereinafter Investor Lists]. The requirement in section 6011(a) mandating that the taxpayer disclose his participation in certain abusive tax shelters has, apparently, gone largely unheeded. Interestingly, one of the criteria that determines the type of transaction that must be disclosed is whether the investor entered into the transaction under conditions of confidentiality. Treas. Reg. § 1.6011-4(b)(3) (applicable to transactions entered into on or after January 1, 2003).
319. I.R.C. § 6112(a). “Potentially abusive” transactions are defined with reference to the types of transactions the promoter (technically, the material advisor) is required to register with the IRS under section 6111. I.R.C. §§ 6112(b)(1); 6111(d)(1).
320. I.R.C. § 6112(c)(1)(a); Treas. Reg. § 301.6112-1(g)(1).
321. Bennett, Investor Lists, supra note 318, at G-1. The IRS has also begun to initiate audits threatening tax shelter promoters with penalties for their failure to comply with the registration and list maintenance requirements. See Alison Bennett, Five Tax Shelter Promoter Cases Referred to Department of Justice, Williams Said, BNA DAILY TAX REP., at G-8 (Mar. 11, 2003). Recently, Ernst & Young agreed to pay the Government $15 million to settle issues relating to the firm’s compliance with tax shelter registration and list maintenance requirements. Interestingly, the Government required that the settlement be made public. Alison Bennett, Ernst & Young to Pay $15 Million to Settle Audit of Tax Shelter Disclosure, Registration, BNA DAILY TAX REP., at G-1 (July 3, 2003).
firm marketed since 1998. In a controversial move, the Department of Justice, as part of its summons enforcement petition, released the names of

322. See United States v. KPMG LLP, 237 F. Supp. 2d 35 (D.D.C. 2002) (reviewing sample of documents from privilege log for application of attorney-client, work product, and other privileges). In a high-profile summons enforcement action against the accounting firm BDO Seidman, clients of the firm sought to intervene in the enforcement proceedings based on assertions that the federally authorized tax practitioner (FATP) privilege in Code section 7525 prevented the accounting firm from releasing their names to the IRS. The IRS maintains that, as a general rule, a taxpayer’s identity is not a privileged matter. Treas. Reg. § 301.6112-1(g)(2); see Tillotson v. Boughner, 350 F.2d 663, 666 (7th Cir. 1965) (ruling that, in the typical case, client identity is not a communication and therefore does not fall within the scope of the attorney-client privilege). The United States District Court for the Northern District of Illinois eventually denied the clients’ motions. Although the court found that an identity privilege does exist under section 7525, it concluded that the privilege did not apply in most of the cases before it because, among other reasons, the clients engaged the accounting firm for the purpose of preparing tax returns rather than for the purpose of receiving tax advice. United States v. BDO Seidman LLP, No. 02-C4822, 2003 U.S. Dist. LEXIS 1634, at *3-4 (N.D. Ill. Feb. 5, 2003). The Seventh Circuit in United States v. BDO Seidman LLP, 337 F.3d 802 (7th Cir. 2003); Nos. 02-3914-15, 2003 U.S. App. LEXIS 14658 (7th Cir. July 23, 2003), affirmed the lower court’s denial of the clients’ motions and rejected the clients’ identity privilege claims. According to the Seventh Circuit, the tax shelter clients were not entitled to claim the FATP privilege to prevent the accounting firm from disclosing documents to the IRS that would reveal their identity because the clients had not established that release of their identities would disclose a confidential communication. The Seventh Circuit went on to comment on the clients’ interests in preventing disclosure:

[T]he [clients’] participation in potentially abusive tax shelters is information ordinarily subject to full disclosure under the federal tax law. Congress has determined that tax shelters are subject to special scrutiny, and anyone who organizes or sells an interest in tax shelters is required, pursuant to I.R.C. § 6112, to maintain a list identifying each person to whom such an interest was sold. This list-keeping provision precludes the [clients] from establishing an expectation of confidentiality in their communications with BDO, an essential element of the attorney-client privilege and, by extension, the § 7525 privilege. At the time that the [clients] communicated their interest in participating in tax shelters that BDO organized or sold, the [clients] should have known that BDO was obligated to disclose the identity of clients engaging in such financial transactions. Because the [clients] cannot credibly argue that they expected that their participation in such transactions would not be disclosed, they cannot now establish that the documents responsive to the summonses, which do not contain any tax advice, reveal a confidential communication.

Id. at *23-24 (citations omitted); see also United States v. Arthur Andersen, LLP, No. 02-C6790, 2003 U.S. Dist. LEXIS 14228 (N.D. Ill. Aug. 15, 2003) (holding that, in light of the Seventh Circuit’s decision in BDO Seidman, accounting firm must disclose identities of clients who invested in tax shelters marketed by the firm).

The Department of Justice also recently filed suit to enforce IRS summonses seeking tax shelter promotion information from the law firm of Jenkins & Gilchrist. Earlier, the IRS obtained approval from the United States District Court for the Northern District of Illinois to serve the law firm with a John Doe summonses seeking from the firm the names of tax shelter investors. More Source Documents Available in Jenkins & Gilchrist Summons Case, BNA DAILY TAX REP., at G-2 (Aug. 21, 2003). The law firm has announced that it will resist the summonses on claims of attorney-client privilege. Alison Bennett, Jenkins & Gilchrist Refusing to Hand over Shelter Investor Names Despite IRS Summonses, BNA DAILY TAX REP., at G-8 (June 23, 2003).

For an excellent discussion of the attorney-client and tax practitioner privileges in the context of summonses seeking the identity of tax shelter investors see Lee A. Sheppard, Confidentiality and Customer Relations, 99 TAX NOTES 1303 (2003). Ms. Sheppard concludes that neither the attorney-client nor tax practitioner privilege should apply to requests for taxpayer identities.
clients who might have purchased tax shelters from KPMG.\textsuperscript{323} The document was not sealed, thus the names of potential tax shelter investors became part of the public record.\textsuperscript{324}

Most commentators viewed the release of these names as a deliberate act on the part of the Government "to scare the living daylights out of taxpayers."\	extsuperscript{325} Criticism of the Government's action followed, primarily based on the fact that the Government released the court documents to the press before they were available to KPMG, and based on charges of political partisanship.\textsuperscript{326} In response, the IRS issued a Chief Counsel Notice advising IRS attorneys that any documents filed with a court should redact the names of third parties.\textsuperscript{327} The grounds for criticism may be valid, but they cannot be leveled against a practice of publicizing the names of abusive tax shelter investors after the IRS confirms that the taxpayer was an actual participant. In fact, the promoters' relentless efforts to avoid their obligations under the list maintenance requirements, and the mild furor that accompanied the news that the IRS had identified a group of potential investors, indicates that public disclosure could be a highly effective means of closing down an industry that thrives on confidentiality.

The two disclosure exceptions already considered relied on the availability of return information in the public domain to justify, in part, a disclosure exception. With the IRS's new policy of redacting names from public documents in summons enforcement actions, it becomes more difficult to convince Congress that the taxpayer's privacy interests in the information subject to disclosure are diminished. Yet, what would be disclosed under a plan to publicize the names of tax shelter participants may be return information.

\textsuperscript{323} Specifically, the Justice Department attached KPMG's unredacted privilege logs to the enforcement petition. Sheryl Stratton, \textit{KPMG Promoter Summons Enforcement Action Goes to Court}, 97 TAX NOTES 26, 26 (2002).

\textsuperscript{324} Although not completely free from doubt, the release of client names arguably fell within an exception to the confidentiality rule in section 6103(h)(4)(C), which permits the IRS to release return information about a taxpayer that directly relates to a transactional relationship between a person who is a party to a proceeding and in which the taxpayer directly affects the resolution of the proceeding. See Constance Parten, \textit{Release of Client Names Probably Legal but Repeat Ill-Advised, Speakers Say}, BNA DAILY TAX REP., at G-6 (Oct. 4, 2002).

\textsuperscript{325} \textit{Id.}

\textsuperscript{326} See, e.g., \textit{The IRS Out of Control}, WALL ST. J., July 17, 2002, at A16. Criticism also stemmed from the fact that one of the names disclosed was a Republican candidate running for governor of California, while the lead litigator at the Justice Department was an activist for the Democratic Party. \textit{Id.} The IRS Chief Counsel and the Treasury Department General Counsel both expressed the view, after the fact, that the names from the privilege logs should have been redacted. David D. Aufhauser et al., \textit{Letters to the Editor: There Should Be No "Gratuitous Humiliation"}, WALL ST. J., July 22, 2002, at A15.

tion within the meaning of section 6103, it is not information in which the taxpayer has a particularly strong privacy interest. In fact, preserving the confidentiality of the taxpayer’s participation in a transaction, the success of which is based primarily on his escaping detection by the IRS, does not serve to promote voluntary compliance, but to undermine it.

Although there may be little supporting empirical evidence, there is reason to believe that disclosing the identity of abusive tax shelter investors would increase levels of voluntary compliance both by those who might be tempted to make similar investments and by taxpayers in general.328 As in the case of criminal convictions, publicity surrounding the IRS’s success at tracking down shelter participants would likely increase a potential investor’s own perception of being detected and punished, leading him to conclude that the benefits of the investment no longer justify its costs. News that participants are being caught and punished would also counteract the effects of media reports that leave taxpayers with the impression that these artificial tax schemes are available only to high-income taxpayers, thereby undermining the fairness of the voluntary compliance system.329 At the same time, this publicity would confirm for compliant taxpayers that those who do not pay their fair share would be called to account.

328. The saga of Stanley Works’ bid to reincorporate in Bermuda, an offshore tax haven, in an effort to reduce its United States tax liability provides an example of how the public spotlight might play a role in a taxpayer’s decision to engage in abusive or unfair practices. In May of 2002, the shareholders of Stanley Works, a well-known manufacturer of hand tools, narrowly approved the reincorporation proposal, which reportedly would have saved the company $30 million in taxes annually. The plan was put on hold when the Connecticut Attorney General brought suit against the corporation claiming that Stanley provided some shareholders with misleading information about the vote. See David Cay Johnston, Vote on an Offshore Tax Plan Is Roiling a Company Town, N.Y. TIMES, May 9, 2002, at A1 (describing the controversy surrounding the corporation’s decision to reincorporate). After harsh criticism from legislators, institutional investors, and the corporation’s own employees, Stanley’s CEO, John Trani, announced the withdrawal of a planned second shareholder vote on the reincorporation proposal. Phyllis Plicht & Glenn R. Simpson, Bowing to Pressure, Stanley Works Drops Plan for Bermuda Tax Move, WALL ST. J., Aug. 2, 2002, at A1. Some of the criticism from politicians took on a decidedly populist tune. See, e.g., Lloyd Doggett, Doggett Statement on Stanley Works Withdrawal of Reincorporation Plans, 2002 TAX NOTES TODAY 150-61 (Aug. 5, 2002) (“As long as any American company can flee offshore to avoid U.S. taxes on U.S. income, these tax dodgers enjoy an unfair advantage over their U.S. competitors who stay and pay their fair share.”). While, in the press, Trani attributed the decision to forego future reincorporation plans to a promise that Congress would pass legislation improving United States corporations’ global competitiveness, others believe that the decision was due to adverse publicity surrounding the corporation’s efforts to avoid tax. John M. Moran, Stanley Board’s About-Face Followed a Barrage of Criticism, HARTFORD COURANT, Aug. 3, 2002, at A1; see David Cay Johnston, Musical Chairs on Tax Havens: Now It’s Ireland, N.Y. TIMES, Aug. 3, 2002, at C1 (declaring, following the publicity surrounding Stanley Works, that efforts by United States companies to reincorporate in Bermuda were “nearly dead”).

The amount of guilt or shame that a tax shelter investor might experience if his name is disclosed to the public will, of course, vary among taxpayers because some have internalized compliance norms that are stronger than others. Commentators have suggested, for instance, that some taxpayer groups, in particular tax shelter investors, might be less susceptible to enforcement efforts that rely on appeals to intrinsic motivations. While the potential investor's internalized sense of guilt may not be subject to manipulation, the stigmatizing effects of being revealed as an abusive tax shelter investor may be hard to avoid. As evidence, consider the case of William Esrey, former chief executive of Sprint, a large U.S. telecommunications company, who was audited by the IRS because of his use of tax shelter devices designed to delay reporting stock option profits. Shortly after the audit began, Esrey was forced by the company's board of directors to resign his position. As the magnitude of the revenue loss to the Government from abusive tax shelters becomes clearer, the stigma associated with these transactions should only increase.

330. See, e.g., Posner, Law and Social Norms, supra note 14, at 1794 ("Aggressive use of tax shelters is not stigmatizing until the shelters are definitely forbidden."). Professor Posner goes on to differentiate three groups of taxpayers: mainstream; deviant; and marginal taxpayers. According to his signaling theory, deviants (those in high crime communities, for instance) are least likely to respond to compliance signals, while mainstream taxpayers are most likely to respond. Id. at 1792–96. Numerous studies based on both empirical data and laboratory testing have explored the relationship between aggregate income and evasion. While the basic tax evasion model predicts that evasion should increase as income rises, these studies reveal unclear results. See Andreoni et al., supra note 5, at 838-40 (reviewing the studies). The perception that high-income taxpayers are more prone to evasion than others may be due to the fact that high-income taxpayers have a greater opportunity to underreport income and overstate deductions. See Lederman, Interplay, supra note 9 (differentiating taxpayers with wage and investment income subject to third party reporting and taxpayers with cash-based businesses).

331. Sprint's chief operating officer, Ronald LeMay, was also forced to resign because of his use of the same tax shelters. Martha McNeil Hamilton, Sprint to Pay Out $50 Million: Settlement of Shareholder Suits Also Results in Change in Board, WASH. POST, Mar. 20, 2003, at E6; see also Ken Brown & Rebecca Blumenstein, Sprint Garners Tax Benefits from Executives' Use of Option, WALL ST. J., Feb. 13, 2003, at A1 (describing efforts by Esrey and LeMay to unwind exercise of stock options after learning that IRS might institute audit and company's interests in preventing them from reversing their exercise of the options). The tax shelters the two executives apparently bought were declared abusive by the IRS in Notice 2002-35, 2002-1 C.B. 992, and Notice 2002-50, 2002-2 C.B. 98. Lee A. Sheppard, Dissecting the Compensatory Option Sale Shelter, 98 TAX NOTES 871, 871 (2003). According to one reporter, the publicity surrounding the cases of Esrey and LeMay was "widely believed to have a chilling effect on other executives considering such deals." David Cay Johnston, I.R.S. Takes Aim at Big Shelters and Hopes Message Filters Down, N.Y. TIMES, July 6, 2003, § 1, at 1.
VI. CONCLUSION

The perception that preserving the confidentiality of return information promotes tax compliance may seem intuitive, but the link between the two is more complex than policy makers have recognized. Operating under the assumption that preserving confidentiality and permitting disclosure of return information are largely exclusive objectives, policy makers have been unwilling to embrace compliance initiatives that involve publicizing return information. A closer examination of taxpayer privacy interests reveals, however, that restricted disclosure of return information for narrow purposes can be part of an effective compliance strategy, while at the same time preserving taxpayers' reasonable expectations of privacy. Empirical research and compliance theories also support this position, suggesting that publicity can play a positive role in discouraging noncompliant behavior and increasing the public's commitment to the tax system.

With these observations forming a basis, this article proposes disclosure exceptions authorizing the IRS to publicize its enforcement efforts aimed at three specific types of noncompliance: criminal tax evasion; failure to pay assessed taxes; and investments in abusive tax shelters. The discussion examined the privacy interests implicated by each of the proposed disclosure exceptions, concluding that the benefits to the Government in each case outweigh any threats to taxpayer privacy interests. Although the proposals may not respond to all the details necessary to put them into practice, the proposals are more than merely starting points. They hold the prospect of dramatically improving levels of tax compliance and should complement the IRS's existing efforts to detect and sanction those taxpayers who evade their tax obligations.