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Privacy in Taxation

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PRIVACY IN TAXATION

MICHAEL HATFIELD*

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I. INTRODUCTION

As a ten-year-old boy, Robert Donovan began cross-dressing and, as a teenager, felt urges to cut off his penis.¹ At age sixty-five, and then-named Rhiannon O'Donnabhain, she was forced to describe this childhood cross-dressing and adolescent gender anxiety to a federal agency.² Lynnette Harris made derogatory comments about sex with her boyfriend who had hand-written love letters to her.³ She had to reveal both her comments and his love letters to a federal agency.⁴ When Katia Popov's mother-in-law visited from Bulgaria, she shared the bedroom with Katia and her husband.⁵ Katia, in turn, had to disclose this to a federal agency.⁶ Dairy farmer Melvin Nickerson probably never imagined that he would need to disclose his farm journal reading list to a federal agency.⁷ But he did.⁸ Equally unlikely would have been Ramsay and Elizabeth Farah ever anticipating their need to inform a federal agency about one adult son's adultery, another adult son's hot tub use, and their adult daughter's limited college choices.⁹

Which agency was entitled to all of this information? The Internal Revenue Service (IRS). The IRS is authorized to collect any information relevant to the 145,000,000 individual income tax returns filed each year.¹⁰ It does not need probable cause to suspect a crime. It does not need to suspect an understatement of tax. It does not need to suspect a misstatement of any type. A taxpayer may find his or her medical records, love letters, family dynamics, reading habits, or other details of private life subject to the IRS's review.¹¹ This is what happened to Rhiannon O'Donnabhain, Lynette Harris, Katia Popov, Melvin Nickerson, and Ramsay and Elizabeth Farah.

It seems most likely that very few of those who file one of the 145,000,000 individual income tax returns (reporting information on over 289,000,000 individuals) understand how many personal details

1. See discussion *infra* notes 282-89 and accompanying text.

2. See discussion *infra* notes 282-89 and accompanying text.

3. See discussion *infra* notes 332-38 and accompanying text.

4. See discussion *infra* notes 332-38 and accompanying text.

5. See discussion *infra* notes 321-22 and accompanying text.

6. See discussion *infra* notes 321-22 and accompanying text.

7. See discussion *infra* notes 325-31 and accompanying text.

8. See discussion *infra* notes 325-31 and accompanying text.

9. See discussion *infra* notes 314-18 and accompanying text.

10. See discussion *infra* note 339 and accompanying text. This Article focuses on the individual income tax and the privacy interests especially important to individuals. However, other types of taxpayers also have interests in privacy. See, e.g., Joshua D. Blank, *Reconsidering Corporate Tax Privacy*, 11 N.Y.U. J.L. & BUS. 31 (2014) (discussing the relationship between corporate tax privacy and compliance).

11. See discussion *infra* Section IV.C.

may come within the IRS's grasp.¹² If taxpayers read the Internal Revenue Code, the Treasury Regulations, and the related case law, they would be on notice as to the personal details they should be prepared to deliver.¹³ But, of course, it is not surprising that taxpayers do not understand that they may be obligated to turn over such detailed information. Regardless, a miniscule audit rate means that over 99% of taxpayers are never required to meet those obligations.¹⁴ The IRS almost never asks, and so almost no taxpayer will ever know how much information the agency is entitled to review.

There are both practical and principled reasons to be concerned about taxpayer privacy. As a practical matter, the IRS is currently unable to collect much of the information it needs. The cost of this inability to collect needed information is about \$450 billion in uncollected taxes each year.¹⁵ Over the coming decades, the pressure to close this 'tax gap' will press the IRS to increase its use of advanced technology to narrow the related 'information gap.'¹⁶ Taxpayers' love letters, reading lists, medical records, and evidence of family dynamics are increasingly digitized and stored in ways unimaginable even a decade ago. As the IRS becomes practically enabled to access digitized information, on what terms should it access the information? The practical need for a coherent privacy policy in taxation will increase as the technological ability of the IRS to gather information increases.

Furthermore, among government agencies, the IRS has the broadest legal authority to collect information that minimizes privacy, which as a matter of principle, should prompt study of the privacy implications of its behavior.¹⁷ Information is placed within that authority so long as it is relevant for tax purposes.¹⁸ And in the contemporary income tax system, an extraordinary amount of information is relevant for tax purposes. Tax law is not a matter of mere economic measurement.¹⁹ Almost any aspect of personal life can be tax relevant. The tax system is driven by a mix of policies: health care, poverty relief, housing, economic stimulation, environmental protection, and education, for example.²⁰ Labeling a demand for information as a matter of 'tax law' should not make the demand seem more special,

12. See discussion *infra* note 339 and accompanying text.

13. See discussion *infra* Section III.A.1.

14. See discussion *infra* notes 254-59 and accompanying text.

15. See discussion *infra* notes 260-77 and accompanying text.

16. Of course, the IRS would be doing only what every other government agency and privacy company is doing: pursuing the ever-growing gush of data from the Internet-of-Things and other information technology. See discussion *infra* notes 251-78 and accompanying text.

17. See discussion *infra* Sections III.A.1, III.C.

18. See *infra* note 140 and accompanying text.

19. See *infra* notes 290-91 and accompanying text.

20. See *infra* notes 290-95 and accompanying text.

simpler, or less controversial than it would be in another context. If we would be concerned with the Department of Health and Human Services requiring Rhiannon O'Donnabhain to provide the agency with the details of her discussions with her therapist, it should be no less worrisome that it was only the IRS that demanded that information.²¹ The 'tax' label should not obscure the privacy burdens, harms, and risks of these demands.

But, until this Article, these privacy burdens, harms, and risks created by the IRS's demands have been obscured by the tax label. There is more than a century of legal history regulating the use of taxpayer information that the IRS has collected.²² And there has never been legislative concern with the collection of taxpayer information. In 1974, a congressional privacy commission described the required "extensive disclosure of personal information by individual taxpayers to the IRS" as a "basic violation of privacy."²³ However, confined to its congressional mandate, the committee did not investigate the collection of tax information, but focused only on regulating the use of the information once collected.²⁴ Tax scholars too have focused only on the use of information, never its collection.²⁵

This disinterest is striking insofar as the American right to privacy predates the Bill of Rights.²⁶ The right to privacy is described in dozens of laws: torts, criminal law, contracts, federal and state regulatory statutes, and, of course, the Constitution.²⁷ The scholarly interest in privacy first emerged at the end of the nineteenth century. As the computer age dawned in the 1970s, privacy scholarship began to grow, and as the information technology revolution accelerated in the late twentieth century, so too did the growth in privacy scholarship.²⁸ Privacy scholars have argued that in order to be a liberal, democratic, and free society, privacy must be protected.²⁹ They have argued that privacy promotes expressiveness, innovation, and the vitality of both culture and democracy.³⁰ They have articulated ways in which to identify and assess privacy harms, including not only the unwelcome mental states experienced by individuals whose privacy is

21. See discussion *infra* Sections IV.B, IV.C.2.a.

22. See *infra* Section III.B.

23. See *infra* note 202.

24. See *infra* note 202.

25. See *infra* Section III.C.

26. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

27. See *infra* Section II.A.

28. See *infra* Section III.A.

29. See *infra* notes 112-24 and accompanying text.

30. See *infra* notes 118-21 and accompanying text.

invaded but also societal harms such as the impact on the balance of powers between government and individuals.³¹

This Article proposes that tax is a fertile field in which privacy scholars should be working. The privacy burdens of taxpayers have gone unnoticed by privacy scholars. To the extent that privacy scholars are concerned about the dignity of individuals and ensuring that they have “freedom from scrutiny” and “breathing-room” for self-development,³² the threat to dignity, freedom, and breathing-room endured by Rhiannon O’Donnabhain, Lynnette Harris, Katia Popov, Melvin Nickerson, Ramsay and Elizabeth Farah, and other taxpayers deserves scrutiny. To the extent that privacy scholars worry about the peril to a free society, creeping totalitarianism, and undesirable shifts of power that collection of information by government agencies can bring,³³ the IRS’s gathering of information should be no less worrisome than that of other agencies, such as the NSA or FBI.

This Article also proposes that privacy is a societal value that tax scholars should work to incorporate into their research. While unrecognized until now, privacy values are comparable to the values of efficiency, equity, and administrability that tax scholars have long heralded as the markers of a sound tax system. Tax scholars should measure the negative impact of specific tax provisions on privacy, weigh the impact against any benefits achieved, and propose ways to reduce the impact without undermining the benefits. Tax scholars should also consider ways in which fundamental reforms could better protect privacy without compromising—or perhaps even better, achieving—the central goals of a sound tax system. For instance, a reform increasing the standard deduction and personal exemption amounts while decreasing the number of specialized deductions and credits might mitigate privacy concerns while also reducing administrative costs. Moreover, a more radical change in the tax base itself—perhaps a move from an income to a value-added or other consumption tax—could, as a matter of the base’s own logic, require minimal personal information while also enhancing tax enforcement and fairness.

This Article is intended to prompt tax and privacy specialists to work toward articulating a coherent privacy policy for taxation. While any tax system must collect some personal information in order to collect personal tax liabilities, there is always considerable legislative and administrative discretion in deciding what information should be relevant and thus collectible. And that discretion should be guided by a coherent privacy policy, which can only be devised if tax

31. See *infra* notes 116-17, 122-24 and accompanying text.

32. See *infra* notes 108-11.

33. See *infra* Sections II.B.3, I.B.4.

specialists recognize the value of privacy and privacy specialists recognize the breadth and depth of the personal information the IRS is entitled to collect.

Part II of this Article outlines why privacy matters and how concern for privacy has been expressed by legislators, judges, and scholars. Part III provides the history of laws regulating the dissemination of taxpayer information, as well as the related debates among tax scholars. Part IV does what none of the privacy scholars' work described in Part II, nor any of the tax scholars' work described in Part III has done, which is to take privacy in taxation seriously. It describes the tax information collection process, documenting and illustrating the breadth and depth of the intimate details subject to collection. This Part closes with recommendations for articulating a foundation and context for debating privacy in taxation issues. The Article concludes that tax law should be structured so that the collection and use of private information for tax purposes both protects tax revenue and promotes personal privacy.

II. AN OVERVIEW OF PRIVACY

To begin recognizing the privacy issues embedded in tax law, an overview of both the law and theory of privacy is useful. As outlined below, privacy is recognized and protected in tort law, criminal law, the law of evidence, contract law, dozens of statutes, and, of course, the U.S. Constitution. A legal right to privacy is usually some right to control how personal information is collected or used ('informational privacy'). But sometimes the right to privacy is the right to make certain types of personal decisions ('decisional privacy'). While the legal survey below outlines how privacy is protected, the survey of privacy scholars below outlines a sampling of thoughts on why it should be protected. The sampled scholars have argued that respect for privacy is respect for civility, dignity, and autonomy, and that undermining privacy protections undermines creativity, democracy, and the capacity for self-determination.

A. *Privacy and the Law*

Although the labeling of certain protections as 'the right to privacy' did not happen until the 1890s, the protections existed long before. These protections are found in various bodies of law—contract, criminal, and evidence law, for example. Historically, the common law of torts has probably been the most important body of law for defining privacy rights. However, federal statutes enacted since the rise of electronic databases in the 1960s have created a regulatory framework for the collection and use of private information. These federal statutes regulate commercial use of private information, but

more importantly, address government use. Ultimately, the U.S. Constitution limits the government's ability to search for and demand that information be provided, as well as the government's ability to restrict the choices individuals can make with respect to inherently private matters.

1. *Early Developments*

A legal right to privacy was first articulated in 1890 by Samuel Warren and Louis Brandeis in what is among the most influential law review articles of all time³⁴: *The Right to Privacy*.³⁵ Their argument was not that a variety of policies justified creating a legal right to privacy. Rather, it was an argument that a legal right to privacy existed in the common law, even though it had yet to be named exactly.³⁶ Warren and Brandeis argued that there was an overarching principle of privacy protection in the common law.³⁷ It was “the right to be let alone.”³⁸ It was a principle of inviolate personality.³⁹ It was not a matter of the law against defamation, as it was not concerned only with untruthfulness.⁴⁰ Nor was it a matter of contract law, as it was not limited to negotiated relationships.⁴¹ And it was not a mere property right, as it was not merely an issue of financial value.⁴² Though the right to privacy was reflected in the laws of defamation, contract, and property, it transcended these bodies of law. It secured to “each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.”⁴³ Warren and Brandeis argued, at times, that this right deserved protection in tort law with injunctions, and, at times, with criminal sanctions.⁴⁴ Respecting this right was part of what it meant to live a civilized life, to have civil relations with one another.⁴⁵ Its historical development in the law reflected the historical development of civilization.⁴⁶ The law's protection of privacy—its protection of thoughts, emotions, and feelings—was a protection of an advanced

34. More than a century after it was written, the majority, concurrences, and dissent in *Kyllo v. United States*, 533 U.S. 27 (2001), all cited the article.

35. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

36. *Id.* at 193.

37. *Id.* at 197-213.

38. *Id.* at 193.

39. *Id.* at 205.

40. *Id.* at 197.

41. *Id.* at 207-13.

42. *Id.* at 200-04.

43. *Id.* at 198.

44. *Id.* at 219.

45. *Id.* at 195-96.

46. *Id.* at 193-96.

civilization.⁴⁷ And it was most vulnerable to advancements in technology and the media's willingness to fulfill the public's desire for knowing the intimate details of others.⁴⁸

Over 125 years later, various laws recognize and reflect numerous conceptions of privacy rights. In our contemporary setting, we might think first of contract law, given the innumerable 'terms of service' agreements most of us have clicked through online. But, given that privacy harms are not limited to contractual relationships, respect for privacy rights pervades many bodies of law. Respecting the right of individuals to be free from physical encroachments, criminal law protects privacy through laws against trespass, stalking, and bodily invasions.⁴⁹ Criminal law protects private information through laws against blackmail, wiretapping, and identity theft.⁵⁰ Whether in criminal or civil courts, the laws of evidence protect some individuals from being compelled sources of private information. Even though they may be the most efficient sources, under certain circumstances spouses, ministers, attorneys, and physicians may not be compelled to communicate certain information.⁵¹

While contract law, criminal law, and the law of evidence are all sources of privacy law, perhaps the most important sources are the historic common law of torts and the federal statutes regulating institutional use of private information, which were mostly enacted after the 1970s. The taxonomy of tort cases was firmly fixed in 1960, when Dean William Prosser's article *Privacy* was published.⁵² The article presented Dean Prosser's analysis of the right "to be let alone" in over 300 tort cases.⁵³ He described the cases as falling into four categories.⁵⁴ These categories continue to be reflected in the Restatement of Torts. There is the tort of intrusion upon seclusion, which is an intrusion "upon the solitude or seclusion of another or his private affairs or concerns," if the intrusion would be "highly offensive to a reasonable person."⁵⁵ There is the tort of public disclosure of private facts, which is a public disclosure of personal information that would be "highly offensive to a reasonable person" and "not of

47. *Id.* at 195.

48. *Id.* at 196.

49. *See, e.g.*, CAL. PENAL CODE §§ 601, 602 (West 2016) (prohibitions of criminal trespass); § 646.9 (prohibition of stalking); §§ 242, 243, 243.4 (prohibitions of sexual battery); §§ 261-264.2 (prohibitions of rape).

50. *See, e.g.*, WASH. REV. CODE § 9A.56.130 (2016) (prohibition of extortion); § 9.73.030 (prohibition of wiretapping); § 9.35.020 (prohibition of identity theft).

51. *See, e.g.*, N.J. R. EVID. § 509 (marital privilege); § 511 (priest-penitent privilege); § 504 (lawyer-client privilege); §§ 505, 506 (psychologist and physician-patient privileges).

52. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

53. *Id.* at 388-89.

54. *Id.* at 389.

55. RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

legitimate concern to the public.”⁵⁶ There is the false light tort, which occurs when a public disclosure of a private matter places someone “in a false light” that would be “highly offensive to a reasonable person.”⁵⁷ And there is the tort of appropriation, which occurs when someone “appropriates to his own use or benefit the name or likeness of another.”⁵⁸ To these can be added the torts of libel and slander, which Warren and Brandeis considered in their article.⁵⁹ Further, professionals who improperly disclose private information can be subject to a tort suit for breaching confidentiality.⁶⁰ And, anyone who discloses information in a way that “intentionally or recklessly causes severe emotional distress to another” may be sued for infliction of emotional distress.⁶¹

2. Federal Statutes

Not long after Dean Prosser’s seminal categorization of privacy torts, public concern over privacy in the dawning database age became a political concern. A 1965 proposal for a National Data Center galvanized concern and prompted congressional hearings on how private information was being collected. In 1966, Congress passed the Freedom of Information Act to increase government transparency by requiring federal agencies to disclose many types of records to members of the public upon request.⁶² In 1973, the Department of Health, Education, and Welfare recommended a set of “Fair Information Practices” to govern the collection and use of private information.⁶³ These practices prohibit secret record-keeping systems, require institutions keeping records to take steps to prevent misuse, and allow individual subjects to inspect and correct information.⁶⁴ These practices have “played a significant role in framing privacy laws in the United States” and are reflected in multiple statutes.⁶⁵ The first such

56. *Id.* § 652D.

57. *Id.* § 652E.

58. *Id.* § 652C.

59. See Warren & Brandeis, *supra* note 35, at 197; see also RESTATEMENT (SECOND) OF TORTS §§ 558-581 (AM. LAW INST. 1977) (defamatory torts).

60. RESTATEMENT (SECOND) OF TORTS § 874 (AM. LAW INST. 1977) (finding breaches of fiduciary duty manifested in breaches of confidentiality); see also *McCormick v. England*, 494 S.E.2d 431, 437 (S.C. Ct. App. 1997) (finding a breach of a physician’s duty of confidentiality to be actionable).

61. RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965) (finding such disclosure would be “extreme and outrageous”).

62. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966).

63. U.S. DEPT OF HEALTH, EDUC. & WELFARE, RECORDS, COMPUTERS AND THE RIGHTS OF CITIZENS xxii-xxxiii (1973).

64. *Id.*

65. Marc Rotenberg, *Fair Information Practices and the Architecture of Privacy (What Larry Doesn’t Get)*, 2001 STAN. TECH. L. REV. 1, ¶ 44 (2001) (stating that Fair Information Practices frame privacy throughout the world).

statute was the 1974 Privacy Act.⁶⁶ This act also established the U.S. Privacy Protection Study Commission to evaluate and make recommendations on improving federal privacy legislation.⁶⁷

Congressional concern for privacy during this time was not limited to the government's collection of private information. For example, even before the 1974 Privacy Act, Congress passed the Fair Credit Reporting Act to give individuals certain rights regarding the use of their information by credit reporting agencies.⁶⁸ In 1974, information in school records became federally protected under the Family Educational Rights and Privacy Act.⁶⁹ In 1996, medical information became federally regulated.⁷⁰ Under current federal law, use of cable television⁷¹ and videotape rental information⁷² is regulated, as is the online collection of information from children,⁷³ the transmission of unsolicited e-mail,⁷⁴ and the disclosure of private information by financial institutions.⁷⁵

Although federal regulation of the commercial use of private information is significant, the most significant legislation addresses government use of private information. With the Privacy Act of 1974, Congress gave individuals rights in records of their private information held by government agencies, such as the right to inspect and correct those records.⁷⁶ In a number of acts, Congress limited agen-

66. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896. Some states have comprehensive privacy acts similar to the Federal Privacy Act. *See, e.g.*, California's Information Practices Act of 1977, CAL. CIV. CODE §§ 1798 *et seq.* (West 2016); Massachusetts' Fair Information Practices Act, MASS. GEN. LAWS ch. 66A, §§ 1-3 (2016).

67. § 5(a)(1), 88 Stat. at 1905 (establishing the Privacy Protection Study Commission. Codified at 5 U.S.C. § 552a (1976)).

68. Fair Credit Reporting Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114, 1128 (regulating disclosure of credit report-related information).

69. Family Educational Rights and Privacy Act of 1974, Pub. L. No. 93-380, 88 Stat. 571 (1974) (providing educational records are to be protected from disclosure subject to certain exceptions).

70. Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (including rulemaking authority for the Secretary of Health and Human Services to protect patient privacy). Some states have more comprehensive medical privacy statutes. *See, e.g.*, Texas' Medical Privacy Act, TEX. HEALTH & SAFETY CODE ANN. §§ 181.001-181.254 (West 2015).

71. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (including a provision for protecting cable subscriber information).

72. Video Privacy Protection Act of 1988, Pub. L. No. 100-618, 102 Stat. 3195 (protecting the privacy of records maintained by video tape rental providers).

73. Children's Online Privacy Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-728 (regulating the collection of child-related personal data).

74. CAN-SPAM Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (regulating transmissions of unsolicited e-mail messages).

75. Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (including privacy protections for the customers of financial institutions).

76. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (establishing standards for the collection, disclosure, and maintenance of private information).

cies' rights to gather information: the Right to Financial Privacy Act requires subpoenas or warrants to obtain financial records;⁷⁷ the Foreign Intelligence Surveillance Act restricts the gathering of foreign intelligence within the United States;⁷⁸ and the Privacy Protection Act limits the government's ability to search press records.⁷⁹

In a number of federal statutes, however, Congress provided significant authorization to government agencies to collect information. For example, financial institutions⁸⁰ and telecommunication providers⁸¹ are legally forced to assist in certain investigations by government agencies. Perhaps most importantly, after the terrorist attacks on the United States in September 2001, Congress passed the USA PATRIOT Act, which authorized surveillance and other "tools" for collecting private information in order to "[i]ntercept and [o]bstruct [t]errorism."⁸²

3. *Constitutional Law*

Of course, government collection of information raises constitutional issues.⁸³ More than a century before Warren and Brandeis's article on torts and the right to be let alone, the Constitution provided a right to be let alone from government searches. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"⁸⁴ That is, without a warrant, a search may not be conducted if it would violate a reasonable expectation of privacy.⁸⁵ The Fifth Amendment protects people from being forced to communicate incriminating information about

77. Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697 (prohibiting access to financial records generally but providing procedures for law enforcement access).

78. Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (regulating the collection of foreign intelligence through electronic surveillance within the United States).

79. Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (restricting the Government's ability to search and seize the work product of the press).

80. Currency and Foreign Transactions Reporting (Bank Secrecy) Act, Pub. L. No. 91-508, 84 Stat. 1118 (1970) (requiring financial institutions to maintain records so as to aid governmental investigations).

81. Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, 108 Stat. 4279 (1994) (requiring telecommunication carriers to assist law enforcement in legal electronic surveillance).

82. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. In June 2015, the USA FREEDOM Act extended USA PATRIOT Act authorizations. USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268.

83. While the discussion here is on federal issues, some state constitutions expressly protect privacy. *See, e.g.*, ALASKA CONST. art. I, § 22; CAL CONST. art. I, § 1; HAW. CONST. art. I, §§ 6, 7; WASH. CONST. art. I, § 7.

84. U.S. CONST. amend. IV.

85. *Katz v. United States*, 389 U.S. 347, 353 (1967) (finding that an FBI wiretap of a telephone booth conversation violated one's reasonable expectation of privacy and thus violated the Fourth Amendment).

themselves.⁸⁶ The First Amendment guarantees the right to keep secret from the government one's membership in or support of certain groups.⁸⁷ More generally, the Supreme Court has said that the right to privacy is "older than the Bill of Rights" and that the various guarantees of these rights "create zones of privacy."⁸⁸ The Supreme Court has found these zones of privacy to protect the decisions of individuals with respect to activities such as contraception,⁸⁹ abortion,⁹⁰ and homosexual intercourse.⁹¹ In addition to recognizing the interest in independently making decisions in personal matters such as these, the Supreme Court has also recognized a privacy right in "avoiding disclosure of personal matters."⁹² However, the conditions and limits of this constitutional right to information privacy "has been infrequently examined; as a result its contours remain less than clear."⁹³

B. *The Value of Privacy*

It is important to appreciate the variety of protections and regulations the law provides for privacy, but it is also important to appreciate the greater good those protections and regulations promote. As a legal matter, depending on the circumstances, the right to privacy is the right to seclusion, the right not to be embarrassed, the right to be secure against government searches, or the right to make personal decisions. Legally, privacy rights tend to be expressed as an individual's right against other individuals or against government agents. However, despite these expressions, many privacy scholars tend not to articulate privacy merely individualistically. They value privacy for its protection of individual dignity, development, and autonomy but also emphasize that these, in turn, pro-

86. See U.S. CONST. amend. V; see also *infra* notes 155-56 and accompanying text.

87. *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (compelling teachers to divulge membership in or contributions to organizations would violate right to freedom of association); *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (finding that compulsion of NAACP membership records violated the right to freedom of association).

88. *Griswold v. Connecticut*, 381 U.S. 479, 484, 486 (1965) (finding the prohibition of contraceptives to be an unconstitutional violation of marital privacy).

89. *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (limiting contraception to married persons violated Equal Protection Clause); *Griswold*, 381 U.S. at 485-86.

90. *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that the Due Process Clause includes the right to terminate pregnancy in certain situations).

91. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (finding the criminalization of certain homosexual acts violated one's right to private, consensual sexual activity).

92. *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (acknowledging constitutional privacy interests in prescription information but found no violation by statute requiring that personal information be archived).

93. *Davis v. Bucher*, 853 F.2d 718, 719 (9th Cir. 1988); see also *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 465 (1977) (acknowledging the President's constitutional privacy interest in certain records but finding it had not been violated).

vide societal benefits. The following text first mentions privacy critics and then samples privacy scholars' approaches.

1. *Privacy Critics*

Not everyone is a privacy advocate. Those who criticize the concern for privacy often equate it with, and limit it to, a concern for secrecy. For some, this concern is out of date in a world dominated by information technology. Facebook CEO, Mark Zuckerberg, has said that the age of privacy is dead as the social norm for keeping information secret has evolved.⁹⁴ More scholarly critics of the concern for privacy equate it with the ability to hide bad things, be it bad facts or bad acts. Judge Richard Posner has emphasized that privacy as secrecy is the concealment of true facts about oneself, especially "discreditable information" such as immoral or criminal conduct.⁹⁵ He has further argued that "[v]ery few people want to be let alone."⁹⁶ Instead, he believes they want to manipulate others through "selective disclosure of facts about themselves."⁹⁷ Whereas Judge Posner has focused on privacy as the opportunity to gain from deceiving others about oneself, Catherine MacKinnon has focused on privacy as the opportunity for men to oppress women.⁹⁸ This oppression is possible because privacy shields the oppressor, making him unaccountable for his actions.⁹⁹ For critics of privacy like Posner and MacKinnon, the argument is that only the guilty need secrets, and those with nothing to hide have no reason to be concerned for privacy.

2. *Privacy Promotes Personal Thriving*

In their article, Warren and Brandeis described privacy as a way of protecting an individual's personality, which Edward Bloustein

94. Bobbie Johnson, *Privacy No Longer a Societal Norm, Says Facebook Founder*, GUARDIAN, (Jan. 10, 2010), <http://www.theguardian.com/technology/2010/jan/11/facebook-privacy> [<https://perma.cc/7M96-29MC>]. *But see* Madeline Stone, *Tech Billionaires Are Paying Hundreds of Millions to Get Their Privacy Back*, BUSINESS INSIDER (May 16, 2015, 8:14 AM), http://www.businessinsider.com/wealthy-tech-execs-will-go-to-great-lengths-to-protect-their-privacy-2015-5?utm_source=slate&utm_medium=referral&utm_term=partner [<https://perma.cc/XJ2A-8SQT>] (reporting Facebook CEO Mark Zuckerberg's purchase of large parcels of land as private getaway).

95. Richard A. Posner, *The Right to Privacy*, 12 GA. L. REV. 393, 399 (1978) (arguing that a common business motivation for privacy is taking advantage of others' lack of information).

96. *Id.* at 400.

97. *Id.*

98. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 168 (1989) (arguing that for men, the private sphere is one of freedom, whereas for women, it is subordination).

99. *Id.*

interpreted as protecting the individual's dignity and integrity.¹⁰⁰ Echoing Warren and Brandeis describing the protection of an individual's inner life as the mark of advanced civilization, Robert Post has said that privacy safeguards the rules of civility.¹⁰¹ He says it promotes forms of respect for individuals within the community.¹⁰² Julie Cohen has related privacy to "respect for the fundamental dignity of persons."¹⁰³ Anita Allen has connected privacy with spiritual personality, political freedom, and health and welfare.¹⁰⁴

On another level of description, Ruth Gavison has said that "[o]ur interest in privacy" is our interest in determining "the extent to which we are known to others."¹⁰⁵ Alan Westin has said that privacy is what affords space for relief from the multiple roles an individual plays socially, no one of which can be played "indefinitely, without relief."¹⁰⁶ Hannah Arendt wrote that without this relief, without a "reliable hiding place from the common public world . . . from being seen and being heard," a person's life becomes "shallow."¹⁰⁷

Julie Cohen describes privacy as a "freedom from scrutiny and categorization" that serves "vital individual and collective ends."¹⁰⁸ It is "shorthand for breathing room" in self-development.¹⁰⁹ It is within this breathing room, this zone of privacy, that individuals are enabled to "develop and exercise" meaningful autonomy.¹¹⁰ Without meaningful privacy zones, Daniel Solove points out that individuals

100. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 974, 1000-03 (1964) (arguing all privacy torts should be understood as a common affront to human dignity).

101. See generally Robert C. Post, *The Societal Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989) (arguing a key function of privacy is to strengthen civility).

102. *Id.* at 957.

103. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1423 (2000) (arguing for informational privacy premised upon individual autonomy).

104. Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 738 (1999) (setting out a feminist critique of privacy but concluding in favor of a reconstructed liberal conception of privacy).

105. Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423 (1980) (arguing that privacy is the limitation of accessibility to individuals, which promotes "liberty, autonomy, selfhood, and human relations, and furthering . . . free society.>").

106. Alan F. Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM. L. REV. 1003, 1024 (1966).

107. HANNAH ARENDT, *THE HUMAN CONDITION* 71 (1958).

108. Cohen, *supra* note 103, at 1423.

109. Julie E. Cohen, *What Privacy is for*, 126 HARV. L. REV. 1904, 1906 (2013) (arguing that privacy must be understood as dynamic, subjective, and essential to democracy through the lens of surveillance, and that the challenges of technology must be addressed by a new liberal conception of privacy).

110. Cohen, *supra* note 103, at 1373.

become inhibited, self-censor, suffer embarrassment, and experience “powerlessness, vulnerability, and dehumanization.”¹¹¹

3. *Societal Benefits of Privacy*

Julie Cohen argues not only that protecting privacy is a way of protecting an individual’s autonomy, development, and peace-of-mind, but also that these redound to the benefit of a free society through the flourishing of expression, innovation, experimentation,¹¹² informed and reflective citizenship, a vital intellectual culture,¹¹³ and a check on the powers of institutions that otherwise would invade privacy.¹¹⁴ A free society, she warns, “ignores privacy at its peril.”¹¹⁵

Julie Cohen is not alone in emphasizing the role of privacy in a free society. “Privacy is an issue of power,” Daniel Solove has said.¹¹⁶ Jed Rubenfeld has described the right to privacy as the “fundamental freedom not to have one’s life too totally determined by a progressively more normalizing state,” and warned that privacy protects against a “creeping totalitarianism, an unarmed *occupation* of individuals’ lives.”¹¹⁷ Alan Westin has related privacy, autonomy, and democracy this way:

The autonomy that privacy protects . . . is particularly important in democratic societies, since qualities of independent thought, diversity of views, and nonconformity are considered desirable traits for individuals. Such independence requires time for sheltered experimentation and testing of ideas, for preparation and practice in thought and conduct, without fear of ridicule or penalty, and for the opportunity to alter opinions before making them public. The individual’s sense that it is he who decides when to ‘go public’ is a crucial aspect of his feeling of autonomy. Without such time for incubation and growth, through privacy, many ideas and positions would be launched into the world with dangerous prematurity.¹¹⁸

111. Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1393 (2001).

112. Cohen, *supra* note 109, at 1906.

113. *Id.* at 1905-06.

114. Cohen, *supra* note 103, at 1423.

115. Cohen, *supra* note 109, at 1905-06.

116. Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1143 (2002) (arguing that the academic commentary on privacy is unsatisfactory in that it looks for essential characteristics of privacy and proposing a new framework with a pragmatic approach that emphasizes the context of privacy and a bottom up approach to understanding the term).

117. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989) (arguing for an affirmative conception of privacy that looks to consequences rather than prohibitions and emphasizing that legal impositions can so alter an individual’s life as to be seen as totalitarian).

118. Westin, *supra* note 106, at 1023.

In contrast to those critics like Mark Zuckerberg who describe privacy as irrelevant, or critics like Judge Posner and Catherine McKinnon who emphasize it as shield for the guilty, there are many advocates who emphasize the societal good privacy furthers. As Daniel Solove has summarized it, privacy “fosters self-creation, independence, autonomy, creativity, imagination, counter-culture, freedom of thought, and reputation.”¹¹⁹ It benefits a society to protect zones in which individuals can flourish with limited intrusion.¹²⁰ Without privacy protection, he argues, individual activities that contribute to the greater public good are impeded.¹²¹ Privacy protection is not an individualistic agenda.¹²² Anita Allen has said that it is “a precondition of a liberal egalitarian society,” and that the “variety of ways our lives are being emptied of privacy” are a threat to political liberalism itself.¹²³ Emphasizing the role of privacy in the “democratic order,” Paul Schwartz has said that our task in the information technology age is to develop privacy standards that are capable of structuring information use in a way that supports, rather than undermines “deliberative democracy” and the “individual capacity for self-determination.”¹²⁴

4. *Assessing Privacy Harms*

In order to think about protecting privacy in ways that support democracy and the capacity for self-determination, it is helpful to clearly define what protecting privacy looks like in practice. While a philosophical appreciation of privacy may be motivational, a practical analysis of privacy requires a more detailed and contextual approach. What are the specific situations in which we should expect privacy harms to arise?

Ryan Calo has argued that “the vast majority of privacy harms fall into just two categories.”¹²⁵ The first, subjective category “describes unwelcome mental states,” such as anxiety, embarrassment, or un-

119. Solove, *supra* note 116, at 1145-46.

120. Daniel J. Solove, “I’ve Got Nothing to Hide” and Other Misunderstandings of Privacy, 44 SAN DIEGO L. REV. 745, 762 (2007) (critiquing the common argument that law-abiding individuals do not suffer when surveilled and proposing a theory of multidimensional privacy with inherent societal value).

121. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 488 (2006) (proposing a taxonomy in which privacy is not a unified notion but involves different, specific activities).

122. *Id.* at 487-89.

123. Allen, *supra* note 104, at 740, 755.

124. Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1658 (1999) (arguing that privacy is integral to civil society and that new technologies like the internet have tremendous potential for civic and political engagement but also risks).

125. M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1133 (2011) (arguing privacy harms fall within two related but distinct categories: subjective and objective).

ease.¹²⁶ The second, objective category involves the unanticipated “negative, external actions justified by reference to personal information.”¹²⁷ This second type of harm is experienced when a person is a victim of identity theft, gossip, or an inappropriate government action based on data mining.¹²⁸ The first type of harm includes fear over losing control of private information, while the second type includes the adverse consequences that may come from losing control of the information.¹²⁹

Daniel Solove’s approach to categorizing privacy harms is to identify all of the kinds of “socially recognized privacy violations,” accepting their diversity rather than attempting to simplify or reduce the categories.¹³⁰ His categorization is of activities related to “(1) information collection, (2) information processing, (3) information dissemination, and (4) invasion.”¹³¹ Within these four basic groups, he identifies sixteen types of privacy harms.¹³² For example, information collection by surveillance makes individuals uncomfortable; inhibits their freedom, creativity, and self-development; and may increase the power of the policing government over the individuals in an undesirable way.¹³³ Information processing problems include data insecurity, which increases the risk of problems like identity theft,¹³⁴ and exclusion problems, which arise when an individual is powerless to review or correct his or her personal information being collected.¹³⁵ Information processing problems also arise from aggregation, which is when bits of information held by various parties are combined by a single party into a more complete picture than any of the bits revealed.¹³⁶ Information dissemination problems arise, for example, when there is a breach of confidentiality, a harmful disclosure of truthful information, a dissemination of misleading information, or merely an increase in the accessibility of information about an individual.¹³⁷ Problematically invasive activities are unwelcome intrusions¹³⁸ which destroy solitude and rest, cause discomfort and unease, and interfere with inherently personal decisions.¹³⁹

126. *Id.*

127. *Id.*

128. *Id.* at 1143.

129. *Id.*

130. Solove, *supra* note 118, at 483.

131. *Id.* at 489.

132. *Id.* at 490-91.

133. *Id.* at 490, 493-95.

134. *Id.* at 488, 490.

135. *Id.* at 490.

136. *Id.* at 507.

137. *Id.* at 491.

138. *Id.* at 491, 556.

139. *Id.* at 491, 557.

III. TAXATION AND CONFIDENTIALITY

The tax law's provisions on privacy aim to maintain the confidentiality of taxpayer information. In the early twentieth century, there were occasional legislative debates on the benefits of confidentiality versus publicity in terms of promoting compliance. Tax scholars interested in privacy have tended to explore these historical debates, often calling for publicizing some taxpayer information. The following is an overview of the tax law's confidentiality requirements, the history thereof, and related scholarship.

A. *Contemporary Law*

The IRS has expansive legal authority to collect information related to tax liabilities. It collects information both from taxpayers and third parties—such as employers and banks. Once collected, the information is legally protected from inappropriate disclosure and use. The protections are enforced through both civil and criminal sanctions. The following summarizes the laws on collecting and protecting tax information.

1. *Collection of Information*

The IRS has extraordinary authority to collect and examine information. It is entitled to any information potentially relevant to determining any tax liability.¹⁴⁰ The information necessary to determine an individual's tax liability includes all information relevant in determining whether a receipt or benefit is includible in or excludible from income, whether an expense is deductible from income, and which, if any, credits reduce liability.¹⁴¹ Whether certain information is relevant is determined by the interplay of the Internal Revenue Code ("IRC"), Treasury Regulations, administrative rulings, IRS publications, and court cases.¹⁴² The information required can be simple,

140. I.R.C. § 7602 (2012) (examination of books and witnesses); I.R.C. § 7801 (authority of Treasury Department); I.R.C. § 7803 (authority of IRS Commissioner).

141. *See* I.R.C. § 61 (defining gross income); I.R.C. § 63 (defining taxable income); I.R.C. §§ 51-53 (tax excluded from income); I.R.C. §§ 101-140 (defining exclusions from income); I.R.C. §§ 161-210 (deductions against income).

142. For example, section 213 provides specific requirements for deducting medical expenses. The Treasury Regulations require submission of whatever medical expense information "the district director may deem necessary." Treas. Reg. § 1.213-1(h) (as amended in 1979). A special 35-page publication amplifies what information is necessary. *See* INTERNAL REVENUE SERV., PUBLICATION 502: MEDICAL AND DENTAL EXPENSES (2012). IRS administrative rulings address specific situations. *See, e.g.*, Rev. Rul. 55-261, 1955-1 C.B. 307, at 11 (providing that health club fees may be deductible if prescribed for alleviation of specific ailment). Courts also address specific situations. *See, e.g.*, O'Donnabhain v. Comm'r, 134 T.C. 34, 73 (2010) (finding a breast augmentation was merely cosmetic and not a deductible expense for treating gender identity disorder).

such as the amount of a paycheck;¹⁴³ or complex, such as the motivation for taking a trip¹⁴⁴ or making a transfer.¹⁴⁵ Some information is strictly required for determining taxable income, such as an asset's sale price.¹⁴⁶ Other information is required only for optional safe harbors, such as those for excluding gain from the sale of a home.¹⁴⁷ While some relevant information is public, such as one's home address, other information is private, such as one's medical information.¹⁴⁸

The IRS collects information from taxpayers and third parties. Taxpayers are obligated to maintain adequate records, making them available to the IRS.¹⁴⁹ Third parties report information on 97% of taxpayers.¹⁵⁰ The IRS can also summon information from third parties, including a taxpayer's accountant or lawyers.¹⁵¹ Neither the attorney-client nor the accountant-client privilege¹⁵² protect information provided to the professional to prepare a return.¹⁵³ The Fourth Amendment does not protect any information provided by a third party, including a lawyer or an accountant.¹⁵⁴ Nor does the

143. I.R.C. § 61 (gross income includes compensation for services).

144. I.R.C. § 162(a)(2); Treas. Reg. § 1.162-2(a)(2) (1960) (providing that the deductibility of expenses for travel fares, meals, and lodging, etc., depends on the primary purpose of the trip as business or personal).

145. *Comm'r v. Duberstein*, 363 U.S. 278, 285 (1960) (holding the exclusion under I.R.C. § 102 requires that a transferor's motive be "detached and disinterested generosity").

146. I.R.C. § 1001 (determination of gain or loss on asset disposition).

147. *See, e.g.*, Treas. Reg. § 1.121-3 (providing safe harbors for reduced exclusion when a taxpayer fails general requirements).

148. *See* I.R.C. § 213; *see also supra* note 142 (discussing medical deductions).

149. The Treasury Secretary is authorized to require whatever returns, statements, and records are necessary to determine whether or not an individual has a tax liability, and, if so, whatever additional returns, records, and statements are prescribed by the Secretary. *See* I.R.C. § 6001; Treas. Reg. § 1.6001-1(a); Boris I. Bittker, MARTIN J. MCMAHON, JR. & LAWRENCE A. ZELENAK, *FEDERAL INCOME TAXATION OF INDIVIDUALS* ¶ 39.01[8] (3d ed. 2002 & Supp. 2013).

150. 1 NAT'L TAXPAYER ADVOCATE, 2012 ANNUAL REPORT TO CONGRESS 181 (2012). Many third parties are required to routinely provide information: for example, a taxpayer's employer is required to provide payroll information to the IRS. I.R.C. § 6051. Corporations are required to provide dividend payment information. I.R.C. § 6042(a), (c). Finally, those receiving business-related payments of more than \$10,000 must provide information about the payment and payor. Treas. Reg. § 1.60501-1(e)(2).

151. Under section 7602 of the Code, the IRS may summon any information that is potentially relevant to a tax liability. *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 (1984).

152. I.R.C. § 7525 (providing confidentiality privileges relating to taxpayer communications).

153. *United States v. Davis*, 636 F.2d 1028, 1043-44 (5th Cir. 1981) (finding communications related to preparation of returns not privileged); *see also* *United States v. Brown*, 478 F.2d 1038, 1040-41 (7th Cir. 1973) (explaining accounting firms documents generally may be compelled because they are not covered by work product doctrine or attorney-client privilege); MCMAHON & ZELENAK, *supra* note 149, ¶ 47.02[2][b].

154. When a document is held by a third party, there is no expectation of privacy. *Couch v. United States*, 409 U.S. 322, 332-34 (1973) (finding no legitimate expectation of privacy for tax records held by accountant).

Fifth Amendment.¹⁵⁵ Even with respect to information held only by the taxpayer, Fifth Amendment protection is very limited in the tax context.¹⁵⁶

2. Confidentiality of Information

IRC section 6103 is the primary taxpayer confidentiality provision in the tax law. Its general rule is that tax return information is confidential. “Return information” is defined broadly, including virtually any information held by the IRS.¹⁵⁷ With few exceptions, return information may be used only for tax purposes.¹⁵⁸ The exceptions include conditional disclosures to the President,¹⁵⁹ congressional committees,¹⁶⁰ and to law enforcement agents.¹⁶¹ Unauthorized disclosure or use of return information is subject to both civil and criminal sanctions.¹⁶²

B. Legal History

Section 6103 was enacted in 1976 in light of the dawning government database age and in the shadows of President Nixon’s scandalous misuse of taxpayer information.¹⁶³ For the most part, between 1918 and 1976, the Treasury Secretary was authorized to set the terms for disseminating tax information.¹⁶⁴ Before 1918, and in a limited period after 1918, some tax information was publicly available as

155. There is no Fifth Amendment protection for records held by accountants or lawyers. *See generally* Fisher v. United States, 425 U.S. 391 (1976) (compelling lawyer with tax records); *Couch*, 409 U.S. at 322.

156. The Fifth Amendment is no defense for failing to file a return, though a taxpayer may claim privilege as to specific questions concerning a return. *See* 3 WHITE COLLAR CRIME § 19:93, Westlaw (2d ed. database updated July 2016); *see also* JOHN A. TOWNSEND ET AL., TAX CRIMES 310-12 (2d ed. 2015). *See generally* Garner v. United States, 424 U.S. 648 (1976) (incriminating disclosures of gambling). Privilege for records related to a return is also limited. *United States v. Doe*, 465 U.S. 605, 612 (1984) (finding no privilege for voluntarily prepared records).

157. I.R.C. § 6103(b)(2) (providing that “return information” is any information held by the IRS relating to a return or any possibility of liability). This definition “has evolved to include virtually any information collected by the [IRS] regarding a person’s tax liability.” Allan Karnes & Roger Lirely, *Striking Back at the IRS: Using Internal Revenue Code Provisions to Redress Unauthorized Disclosures of Tax Returns or Return Information*, 23 SETON HALL L. REV. 924, 933 (1993) (arguing that §§ 6103 and 7431 have been effective to achieve confidentiality of return information).

158. *See, e.g.*, I.R.C. § 6103(1) (addressing disclosures to agencies such as the Social Security Administration and Department of Labor, and for purposes such as child support enforcement).

159. I.R.C. § 6103(g).

160. I.R.C. § 6103(f) (addressing disclosures made to the Committee on Ways and Means, Committee on Finance, and Joint Committee on Taxation, for example).

161. I.R.C. § 6103(d) (addressing disclosures as part of federal/state information exchange); I.R.C. § 6103(h) (addressing disclosures to law enforcement).

162. I.R.C. § 7431(a) (civil penalties); I.R.C. § 7213A(b) (criminal penalties).

163. *See infra* notes 198-99.

164. *See infra* notes 196-97.

a matter of statute; during the Great Depression, when the income tax targeted only financial elites, there was a movement to publicize more tax information, but it was defeated after a brief success.¹⁶⁵

1. Civil War, the Great Depression, the Computer Age, and Watergate

The first federal income tax was enacted when the Civil War began.¹⁶⁶ Although replaced before effective, the Revenue Act of 1861 made publicity of an assessed tax a condition for imposing a lien on property or other sources of income.¹⁶⁷ The Revenue Act of 1862 addressed publicity more specifically, requiring that assessors advertise in newspapers and by public posting when and where “lists, valuations, and enumerations” were available to examine.¹⁶⁸ This notified taxpayers of the amount they owed, the place and time to pay, and the collector’s authority to collect.¹⁶⁹ It was publicity for communication’s sake, not publicity’s sake.¹⁷⁰ In 1864, Congress authorized the public inspection of income tax returns.¹⁷¹ Some members thought the publicity would assist in revenue collection, and many newspapers opined that it would increase the honesty of both tax collectors and taxpayers.¹⁷²

Within a few years, however, the sentiment reversed. The *New York Times* opined that “a properly organized revenue force” would not need to publicize tax information.¹⁷³ In 1872, in part due to opposition

165. See *infra* notes 185-89.

166. See (Revenue) Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 309 (repealed 1862).

167. *Id.* (“[T]axes, when so assessed and made public, shall become a lien on the property or other sources of said income for the amount of the same . . .”).

168. (Revenue) Act of July 1, 1862, ch. 119, § 15, 12 Stat. 437. Newspaper advertisements and especially public postings (for example, on courthouse doors) were the most practical means of communication. HOWARD M. ZARITSKY, CONG. RES. SERV., HJ5001A, LEGISLATIVE HISTORY OF TAX RETURN CONFIDENTIALITY: SECTION 6103 OF THE INTERNAL REVENUE CODE OF 1954 AND ITS PREDECESSORS 4 (1974).

169. OFFICE OF COMM’R OF INTERNAL REVENUE, HISTORY OF THE INTERNAL REVENUE SERVICE: 1791-1929, at 5 (1930); CONG. GLOBE, 37th Cong., 2d Sess. 1258-59 (1862) (statement of Rep. Porter).

170. The purpose was giving the taxpayer “time to collect his money in order to be ready when the collector arrives.” CONG. GLOBE, 37th Cong., 2d Sess. 1259 (1862) (statement of Rep. Porter).

171. SEC’Y OF THE TREASURY, 38TH CONG., 1ST SESS., REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE YEAR ENDING JUNE 30, 1863, 70 (1863).

172. INTERNAL REVENUE SERV., PUBLICATION 4639: DISCLOSURE & PRIVACY LAW REFERENCE GUIDE 1-2 (2012); REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE, S. DOC. NO. 94-266, ch. 6, at 821-1028 (1975); Richard D. Pomp, *The Disclosure of State Corporate Income Tax Data: Turning the Clock Back to the Future*, 22 CAP. U. L. REV. 373, 381-82 (1993) (outlining the historical debates surrounding the publicity of tax information). Some journalists argued that the 1862 Act’s publicity requirement would help wartime collection by enabling neighbors to spy and look out for government interests, but there is no record that Congress agreed. ZARITSKY, *supra* note 168, at 6-89.

173. Pomp, *supra* note 172, at 382-83.

to the publicity of tax information, Congress allowed the income tax law to expire.¹⁷⁴ In 1894, when Congress next enacted an income tax amendment, it prohibited disclosing tax return information.¹⁷⁵

In 1909, publicizing tax return information was debated by Congress, but only for corporate taxpayers.¹⁷⁶ Publicity was considered a means of regulating corporations, specifically addressing a widespread problem of stock-watering.¹⁷⁷ The resulting legislation provided that corporate tax information would be publicly available on terms issued by the Treasury Secretary.¹⁷⁸ Those terms, it turned out, allowed shareholders of the corporation access to this information and, if the corporation was public, to anyone.¹⁷⁹

The Sixteenth Amendment, which would constitutionalize the individual income tax, was debated by Congress in the same 1909 session. While corporate and individual taxes were legislatively distinct, as a practical matter, their consideration was fused.¹⁸⁰ In 1913, following passage of the Sixteenth Amendment, Congress imposed an income tax on the top 2% of Americans.¹⁸¹ It carried the same publicity provisions of the corporate tax, allowing the Treasury Secretary to decide the terms of access to taxpayer information.¹⁸² The Treasury Secretary declined to allow public access to individual tax information, but did allow federal agencies access.¹⁸³

On occasion, Congress would again debate publicizing tax information. In 1918, Congress decided to require the names of tax return

174. See REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE, *supra* note 166, at 838; Pomp, *supra* note 172, at 383.

175. Revenue Act of August 27, 1894, ch. 349, § 34, 28 Stat. 509, 557-58. The Revenue Act of 1894 was held unconstitutional by the Supreme Court in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

176. Payne-Aldrich Tariff Act of 1909, ch. 6, 36 Stat. 11, 116.

177. President Taft said, "[t]o me the publicity feature of the law is the only thing which makes the law of any special value for it is not going to be a great revenue producer." ROY G. BLAKEY & GLADYS C. BLAKEY, *THE FEDERAL INCOME TAX* 57 (1940) (quoting ARCHIBALD BUTT, TAFT AND ROOSEVELT: LETTERS TO HIS SISTER CLARA 262-63 (1930)); see also Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53, 54 (1990) (arguing the corporate excise tax was, in part, intended for corporate regulation).

178. It was unclear if Section 38 of the Payne-Aldrich Tariff Act of 1909 provided for public access or access only on Presidential order. See 45 CONG. REC. 4136-37 (1910) (statements of Reps. Smith and Fitzgerald). In 1910, Congress clarified that it was the latter. Act of June 17, 1910, ch. 297, 36 Stat. 468, 494. See generally PUBLICATION 4639, *supra* note 166, at 1-3; REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE, *supra* note 166, at 821-1028; ZARITSKY, *supra* note 168.

179. The Treasury Secretary did this seven years later. T.D. 1665, 13 Treas. Dec. Int. Rev. 117 (1910).

180. See, e.g., 44 CONG. REC. 1541, 4437, 4718 (1909).

181. W. ELLIOT BROWNLEE, *FEDERAL TAXATION IN AMERICA: A SHORT HISTORY* 57 (2004).

182. Revenue Act of 1913, Pub. L. No. 63-16, 38 Stat. 114, 177.

183. T.D. 2961, 2 C.B. 250-51 (1920).

filers to be publicized.¹⁸⁴ In 1924, it began requiring their addresses and amounts paid to be publicized too.¹⁸⁵ But in 1925, the Treasury Department reported to Congress that publicity had increased costs and lowered revenue.¹⁸⁶ The Treasury Secretary testified that the publicity provision stimulated investments in tax-exempt securities, decreasing tax revenue.¹⁸⁷ Accordingly, in 1926, Congress scaled back the requirement, again protecting the amount paid as confidential.¹⁸⁸

Within a few years, Great Depression-era resentment of the rich and well-publicized tax evasion scandals prompted Congress to reconsider publicity. At this time, only the top 6% paid income tax.¹⁸⁹ Some politicians wanted to throw “pitiless publicity” upon “the incomes of the rich, the superrich, and the idle rich,” the “burglars of wealth, idle holders of idle capital, lounge lizards of the blue-blooded, and pink-toed aristocracy of wealth.”¹⁹⁰ They argued it would deter evasion, reveal loopholes, and keep tax administrators honest.¹⁹¹ Opponents argued it would make taxpayers into targets for racketeers, unjustly invade privacy, peace, and happiness, and move America towards “goose-stepping” like German Nazis.¹⁹² The proponents won—but only temporarily. Although the Revenue Act of 1934 allowed public inspection of a taxpayer’s “Pink Slip,” the inspection provision was repealed before it became effective.¹⁹³

In order to fund World War II, the income tax ceased to be a class tax, and was imposed on more than 30% of Americans.¹⁹⁴ After that, no legislator called for publicizing more taxpayer information. The IRS remained authorized to release names and addresses of taxpayers, which it continued to do until 1966, when both privacy concerns over Social Security numbers and the efforts to modernize IRS rec-

184. Revenue Act of 1918, ch. 18, 40 Stat. 1057, 1086 (1919).

185. Revenue Act of 1924, ch. 234, 43 Stat. 253, 292-93 (1924).

186. *Revenue Revision, 1925: Hearings Before the H. Comm. on Ways & Means*, 69th Cong. 8-9 (1925).

187. *Cost of Publicity Scored in Treasury*, N.Y. TIMES, Sept. 3, 1925, at 1.

188. Revenue Act of 1926, ch. 27, 44 Stat. 9, 51-52 (1926).

189. BROWNLEE, *supra* note 181, at 87. In 1939, there were 3,900,000 individual taxpayers in a U.S. population of 131,000,000; in 1945, there were 42,600,000 taxpayers in a population of 141,000,000.

190. 74 CONG. REC. 3392-93 (1935) (statement of Rep. Truax).

191. Pomp, *supra* note 172, at 399-400.

192. 74 CONG. REC. 2594 (1935) (statement of Rep. Beiter on making taxpayers “prey for racketeers” and invading their privacy, peace, and happiness); *id.* at 4450 (statement of Sen. Tydings on risk of making Americans into “goose-stepping automatons”).

193. Revenue Act of 1934, ch. 277, 48 Stat. 680, 698, amended by Act of April 19, 1935, ch. 74, 49 Stat. 158. For an account of the campaign to repeal the pink slip provisions, see Marjorie E. Kornhauser, *Shaping Public Opinion and the Law: How a “Common Man” Campaign Ended a Rich Man’s Law*, 73 LAW & CONTEMP. PROBS. 123 (2010).

194. BROWNLEE, *supra* note 181, at 115.

ord-keeping brought the practice to an end.¹⁹⁵ Nevertheless, taxpayer information continued to be used by various federal agencies other than the IRS. By 1974, over 20,000,000 returns were provided to other agencies each year.¹⁹⁶

In 1976, this came to an end with the enactment of IRC section 6103. Congress eliminated the authority of the Treasury Secretary to determine how taxpayer information would be used. This resulted from two broader political movements. The first was the reaction to President Nixon. He aroused political resentment by ordering the broad scale collection of tax information for statistical purposes.¹⁹⁷ And, of course, he aroused a great deal more resentment by accessing the tax information of political enemies.¹⁹⁸

The second political force behind the 1976 overhaul was general congressional concern with how private information was being collected and used. This concern had already led to the 1974 Privacy Act, which restricted the disclosure of personal records and provided individuals the right to access and correct their personal records.¹⁹⁹ The 1974 Privacy Act also established the U.S. Privacy Protection Study Commission.²⁰⁰ As part of this study, Congress directed the Privacy Commission to evaluate the dissemination and use of tax information.²⁰¹ The Commission described the required "extensive disclosure of personal information by individual taxpayers to the IRS" as a "basic violation of privacy," but limited itself to recommendations on the use and dissemination of tax information, as it had been charged to do.²⁰² In June 1976, the Senate Finance Committee issued (substantially similar) recommendations, which became the basis for IRC section 6103, described above.²⁰³

195. Revenue Act of 1926, ch. 27, § 257(e), 44 Stat. 9, 52; Act of Nov. 2, 1966, Pub. L. No. 89-713, § 4(a), 80 Stat. 1107, 1109; *see also* S. Rep. No. 89-1625, at 8-9 (1966).

196. REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE, *supra* note 166, at 854-56; STAFF OF THE JOINT COMM. ON TAXATION, 94TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, at 313-14 n.3 (1976).

197. Two House subcommittees held hearings related to the executive orders, and in response, President Nixon revoked both orders. PUBLICATION 4639, *supra* note 166, at 7-8; REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE, *supra* note 172, at 875-76; ZARITSKY, *supra* note 168, at 1.

198. This access was cited in the proposed Articles of Impeachment. H.R. REP. NO. 93-1305, at 3 (1974).

199. U.S. DEP'T OF JUSTICE, OFFICE OF PRIVACY AND CIVIL LIBERTIES, OVERVIEW OF THE PRIVACY ACT OF 1974, at 4 (2015), <http://www.justice.gov/opcl/file/639731/download> [<https://perma.cc/Y29F-RDRE>].

200. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, 1906. The Privacy Protection Study Commission was established as part of the Privacy Act of 1974. 5 U.S.C. § 552a (2012).

201. Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896, § 5(b)(2)(B)(ii).

202. PRIVACY PROT. STUDY COMM'N, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 537, 560 (1977).

203. For the most part, the differences between I.R.C. section 6103 as enacted and the Privacy Commission's recommendations were not significant. For a review of the differ-

2. *Historical Reflections*

In reviewing the legislative history and debates over the past century and a half, several points stand out. The first is the extraordinary class warfare language that was part of Great Depression politics. One would be stunned to hear any American politician today describe investors as “burglars of wealth, idle holders of idle capital, lounge lizards of the blue-blooded, and pink-toed aristocracy of wealth.”²⁰⁴ This language highlights the fact that the income tax at the time was only on the wealthy. Once it became a mass tax, political calls for publicizing tax information ceased.

A second point is that the argument that public access to taxpayer information would help criminals victimize taxpayers was prescient. During the Great Depression, opponents dismissed this concern. But, even with the confidentiality of information today, identity theft using taxpayer information remains one of the greatest problems the IRS has been unable to solve.²⁰⁵

A third point is that the experimental increase in publicity failed. Tax collections decreased and the expenses of tax administration increased. The Treasury Secretary concluded that reducing privacy distorted economic choices, stimulating tax-exempt investments and chilling taxable investments.²⁰⁶ Given that a principal goal of tax policy is to minimize the distortion of economic behavior, the Treasury Secretary’s report deserves attention as a report on a real-world experiment in privacy policy.²⁰⁷

Finally, note that legislation and debates have focused on regulating the disclosure of tax information, never its collection. The congressionally-appointed Privacy Commission considered the “extensive disclosure of personal information by individual taxpayers to the IRS” to be a “basic violation of privacy.”²⁰⁸ But it is this exceptional observation that highlights the absence of similar observations by others. Legislatively, taxpayers’ interest in privacy has been equated with the interest in avoiding inappropriate disclosure.

ences, see PRIVACY PROT. STUDY COMM’N, *supra* note 202, at 541-59; S. REP. NO. 94-938, at 315-49 (1976).

204. 74 CONG. REC. 3392-93 (1935) (statement of Rep. Truax).

205. 1 NAT’L TAXPAYER ADVOCATE, 2015 ANNUAL REPORT TO CONGRESS 180-87 (2015) (listing identity theft as one of the top 20 “most serious problems”).

206. *See supra* note 186.

207. *See, e.g.*, PHILIP D. OLIVER, TAX POLICY 1 (2d ed. 2004) (arguing that a usual criterion for tax policy is the notion of “economic efficiency versus economic distortions”).

208. PRIVACY PROTECTION STUDY COMM’N, *supra* note 202, at 560.

C. Contemporary Scholarship

Tax scholars' interest in privacy and taxation emerged after IRC section 6103 was enacted in 1976. Two types emerged. The first assumes the section 6103 approach of presumptive confidentiality with limited secondary use for government purposes. Some of this scholarship takes a general approach.²⁰⁹ Much more of this first type of scholarship, however, focuses on technical aspects of the tax information regime, usually arguing for moderate modifications.²¹⁰ The

209. See, e.g., Boris I. Bittker, *Federal Income Tax Returns—Confidentiality vs. Public Disclosure*, 20 WASHBURN L.J. 479 (1981) (discussing competing interests of privacy and publicity, noting privacy concerns have no role in determining information required to be disclosed to the IRS, which may share information with other agencies through I.R.C. § 6103); Joseph J. Darby, *Confidentiality and the Law of Taxation*, 46 AM. J. COMP. L. 577 (1998) (discussing tax confidentiality provisions within the context of a self-assessment system); Hayes Holderness, *Taxing Privacy*, 21 GEO. J. POVERTY L. & POL'Y 1 (2013) (arguing that low-income citizens are inappropriately forced to relinquish privacy for public assistance (including Earned Income Tax Credit) or, alternatively, be subject to a de facto tax by foregoing assistance to maintain privacy); Arthur R. Miller, *Tax Compliance Versus Individual Privacy: A Conflict Between Societal Objectives*, in INCOME TAX COMPLIANCE: A REPORT OF THE ABA SECTION OF TAXATION INVITATIONAL CONFERENCE ON INCOME TAX COMPLIANCE 173-85 (1983) (discussing privacy implications of technological advancement, then makes proposals regarding the gathering, maintenance, and use of personal information); Paul Schwartz, *The Future of Tax Privacy*, 61 NAT'L TAX J. 883 (2008) (addressing the history of tax confidentiality provisions, arguing that tax information is becoming less special as it is held by third parties, though securing tax information is increasingly important); William A. Edmundson, Note, *Discovery of Federal Income Tax Returns and the New "Qualified" Privileges*, 1984 DUKE L.J. 938 (1984) (arguing that the Federal Rules of Civil Procedure are sufficient to prevent abuse in tax cases, and therefore, there is no need for special tax privilege); see also Vivian M. Raby, *The Freedom of Information Act and the IRS Confidentiality Statute: A Proper Analysis*, 54 U. CIN. L. REV. 605 (1985) (arguing that the tax confidentiality regime and FOIA are generally at odds but could be reconciled through FOIA exemptions).

210. See, e.g., James N. Benedict & Leslie A. Lupert, *Federal Income Tax Returns—The Tension Between Government Access and Confidentiality*, 64 CORNELL L. REV. 940 (1979) (outlining permissible uses of tax return information other than for determining tax liabilities); Cynthia Blum, *The Flat Tax: A Panacea for Privacy Concerns?*, 54 AM. U. L. REV. 1241 (2005) [hereinafter Blum, *The Flat Tax*] (arguing that current IRS information gathering does not raise significant privacy concerns and that a flat tax would not significantly improve privacy as changes would mostly affect only the wealthy); Cynthia Blum, *Sharing Bank Deposit Information with Other Countries: Should Tax Compliance or Privacy Claims Prevail?*, 6 FLA. TAX REV. 579 (2004) [hereinafter Blum, *Sharing*] (arguing that safeguards on tax information exchange with treaty partners would protect privacy interests); Margaret Ann Irving, *Managing Information Privacy in the Information Age*, 53 ADMIN. L. REV. 659 (2001) (describing the creation of the IRS Office of the Privacy Advocate and its articulation of key privacy policies and why technological advancements make privacy concerns more important); Karnes & Lirely, *supra* note 157; Michelle M. Kwon, *Whistling Dixie About the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions*, 29 VA. TAX REV. 447 (2010) (suggesting balancing tax confidentiality policies and whistleblower program policies); Miller, *supra* note 209; Edward A. Morse, *Whistleblowers and Tax Enforcement: Using Inside Information to Close the "Tax Gap,"* 24 AKRON TAX. J. 1 (2009) (proposing changes to the whistleblower program to improve the effectiveness of the examination function); Franziska Hertel, Note, *Qui Tam for Tax?: Lessons from the States*, 113 COLUM. L. REV. 1897 (2013) (proposing allowing qui tam lawsuits alleging tax fraud and arguing this would pose no greater threat to privacy than does current law);

second type considers a more radical use of taxpayer information. This scholarship echoes the 1930s 'Pink Slip' debate, arguing for or against publicity to improve tax compliance.²¹¹

1. Characteristics

Both types of scholarship tend to share five characteristics. Each article has at least one of these characteristics, and many have all five. These characteristics constitute the prevailing scholarly framing of tax privacy. The framework has been determined by legislative history and is limited to articulating policies for the use and dissemination of taxpayer information. None of it articulates a policy for collecting information.

One shared characteristic is that privacy is considered quite narrowly. It tends to be equated with the right to prevent disclosure.²¹² Some scholarship expresses concern for protecting against inadvertent disclosure and provides for close regulation of secondary uses by other agencies.²¹³ Other scholarship considers increasing disclosure to achieve various goals, such as greater securities regulation, whistle blower programs, or privatized tax collection.²¹⁴ More radical scholarship argues for publicizing taxpayer information in order to improve compliance or promote reform.²¹⁵ Only one article considers

Christina N. Smith, Note, *The Limits of Privatization: Privacy in the Context of Tax Collection*, 47 CASE W. RES. L. REV. 627 (1997) (discussing the privacy concerns raised by proposals to privatize tax collection); see also Dennis J. Ventry, Jr., *Whistleblowers and Qui Tam for Tax*, 61 TAX LAW. 357 (2008) (arguing that private enforcement would be effective for tax law).

211. See, e.g., Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 EMORY L.J. 265 (2011) (arguing that tax confidentiality improves compliance by allowing strategic disclosures that highlight enforcement strengths and conceal enforcement weaknesses); Joshua D. Blank & Daniel Z. Levin, *When Is Tax Enforcement Publicized?*, 30 VA. TAX REV. 1 (2010); Marjorie E. Kornhauser, *Doing the Full Monty: Will Publicizing Tax Information Increase Compliance?*, 18 CANADIAN J.L. & JURIS. 1 (2005) (arguing that publicizing tax information would improve compliance and taxpayer education); Marc Linder, *Tax Glasnost for Millionaires: Peeking Behind the Veil of Ignorance Along the Publicity-Privacy Continuum*, 18 N.Y.U. REV. L. & SOC. CHANGE 951 (1990) (arguing that publicizing the tax information of millionaires would improve public understanding of income disparities and wealth inequalities); see also Stephen W. Mazza, *Taxpayer Privacy and Tax Compliance*, 51 U. KAN. L. REV. 1065 (2003) (arguing for publicly identifying those who fail to pay taxes, criminally evade taxes, and invest in abusive shelters in order to improve overall compliance).

212. See, e.g., Bittker, *supra* note 209, at 480, 493-94; Blank, *supra* note 211; Blum, *The Flat Tax*, *supra* note 210, at 1282; Darby, *supra* note 209, at 587; Irving, *supra* note 210, at 668; Kornhauser, *supra* note 211, at 5-7, 9, 17-18, 21-22; Linder, *supra* note 211, at 967, 969; see also Mazza, *supra* note 211, at 1068, 1071.

213. See, e.g., Irving, *supra* note 210, at 668-70; Miller, *supra* note 209, at 179; see also Schwartz, *supra* note 209, at 884, 891.

214. See, e.g., Benedict & Lupert, *supra* note 210, at 962-64; Hertel, *supra* note 210, at 1925-28; see also Kwon, *supra* note 210, at 475-76.

215. See generally Kornhauser, *supra* note 211; Linder, *supra* note 211; see also Mazza, *supra* note 211.

privacy more broadly than the interest in avoiding disclosure of information already collected by the IRS.²¹⁶

A second characteristic is the focus on taxpayer compliance. The premise is that taxpayers provide information because they trust the IRS to keep it confidential.²¹⁷ Often, the issue is framed as a tradeoff—a balancing of compliance incentives with greater disclosure.²¹⁸ Those arguing for greater disclosure claim it would achieve other goals—such as a better public understanding of the need for tax reform—without materially undermining compliance.²¹⁹ One argument supporting the view that confidentiality may not play a significant role in taxpayers “trusting” the IRS is that many taxpayers already choose to disclose private information to third parties, are increasingly doing so, and in some circumstances even knowingly have their information disclosed by third parties to the public, take for example, the salary information of government and public corporate employees.²²⁰ More radical scholarship denies any legitimate interest in keeping tax information confidential, describing publicity as “citizen-oriented” and privacy as “pathology.”²²¹

A third characteristic of the scholarship is its disinterest in the privacy interests affected by the collection of tax information. The scholarship is focused on the disclosure of information by the IRS, but not the collection of information by the IRS.²²² The broad legal authority of the IRS to collect information is described, as are the legally insufficient challenges to that authority.²²³ And, the need for the IRS to collect information in order to apply the law is noted.²²⁴ But the scholarship is generally not concerned with articulating what privacy interests ought to constrain the IRS’s collection of information.

216. See generally Holderness, *supra* note 209 (arguing that low-income citizens are inappropriately forced to relinquish privacy for public assistance (including EITC) or, alternatively, be subject to a de facto tax by foregoing assistance to maintain privacy).

217. See, e.g., Blank, *supra* note 211, at 267-68; Blum, *Sharing*, *supra* note 210, at 605, 609; Darby, *supra* note 209, at 577; Mazza, *supra* note 211, at 1071; see also Schwartz, *supra* note 209, at 891, 895-97, 899.

218. See, e.g., Blank, *supra* note 211, at 273; Kornhauser, *supra* note 211, at 7-9, 17-18, 21-22; Linder, *supra* note 211, at 967; see also Mazza, *supra* note 211, at 1120, 1140 n.322.

219. See, e.g., Kornhauser, *supra* note 211, at 99; Linder, *supra* note 211, at 959-61, 965, 969, 975, 980; Mazza, *supra* note 211, at 1076, 1120.

220. See, e.g., Kornhauser, *supra* note 211, at 101-02; Schwartz, *supra* note 209, at 883, 896.

221. See, e.g., Linder, *supra* note 211, at 965, 968-70.

222. See, e.g., Bittker, *supra* note 209, at 479; Blum, *Sharing*, *supra* note 210, at 622-23; Darby, *supra* note 209, at 577; Kornhauser, *supra* note 211, at 101-03, 107-08, 115-16; Mazza, *supra* note 211, at 1071-75; Schwartz, *supra* note 209, at 891, 897-99.

223. See, e.g., Bittker, *supra* note 209, at 484, 488; Blum, *Sharing*, *supra* note 210, at 609-12, 622-23; Blum, *The Flat Tax*, *supra* note 210, at 1255-57; Bridget J. Crawford, *Taxation, Pregnancy and Privacy*, 16 WM. & MARY J. WOMEN & L. 327, 354, 357 (2010); Schwartz, *supra* note 209, at 897-99.

224. Benedict & Lupert, *supra* note 210, at 945; Blank, *supra* note 211, at 284-86; Linder, *supra* note 211, at 951-53, 967-76; Mazza, *supra* note 211, at 1098-1101.

A fourth characteristic is describing, or at least emphasizing, tax information as financial information. While there is notice that information not expressible in dollar amounts is also required for tax reporting, the focus is almost wholly on dollar-amount information.²²⁵ The scholarship focused on public disclosure of tax information equates confidentiality with concealing a taxpayer's ability to pay tax, and argues for various benefits, like imminent tax reform if the public were shown the prevalent disconnect between financial ability and tax liability.²²⁶ Still, other scholarship considers why taxpayers prefer keeping financial information confidential, such as to avoid their wealth being targeted by family or criminals.²²⁷ But none of the scholarship focuses on the breadth and depth of non-dollar amount information relevant to determining liabilities.

A fifth characteristic is the determinative influence of tax legislation and history. No tax scholar has explored the range of privacy issues in taxation. Rather, the scope of the articles is limited in one of two ways. First, most of the articles are confined to considering privacy within the framework of IRC section 6103 and related legislation.²²⁸ Even those articles that are not technically oriented are oriented solely within the section's conceptual framework of presumptive confidentiality and exceptional disclosure. Second, while more radical articles re-consider the presumption of confidentiality, they do so by appealing to prior legislative debates, especially the Great Depression-era debates.²²⁹

2. Critique

There are several shortcomings the body of scholarship shares, to greater and lesser degrees. Some of the articles make significant contributions, especially in popularizing legal history or bringing empirical work to bear on tax compliance issues.²³⁰ But none addresses the broader privacy issues in taxation.

The contemporary tax scholarship ignores the value of privacy as a topic. It expresses no concern that the expansive authority of the

225. See, e.g., Bittker, *supra* note 209, at 482; Linder, *supra* note 211, at 970-71, 976; Miller, *supra* note 209, at 174; Schwartz, *supra* note 209, at 896-98.

226. See, e.g., Linder, *supra* note 211, at 952-53, 969, 971, 973-78, 980, 983.

227. See, e.g., Blum, *Sharing*, *supra* note 210, at 603-05.

228. See, e.g., Benedict & Lupert, *supra* note 210, at 941; Blank, *supra* note 211, at 279; Blum, *Sharing*, *supra* note 210, at 621-22; Darby, *supra* note 209, at 577-78; Mazza, *supra* note 211, at 1068-69, 1092-93, 1099; Schwartz, *supra* note 209, at 896-99.

229. See, e.g., Blank, *supra* note 211, at 274-79; Kornhauser, *supra* note 211, at 101; Linder, *supra* note 211, at 952-53, 964-67, 976-79; Mazza, *supra* note 211, at 1088-92.

230. See, e.g., Blank, *supra* note 211 (drawing on psychological work to defend individual tax privacy in terms of increasing compliance, which is the usual grounds on which privacy is attacked).

IRS to invade taxpayers' privacy may have negative impacts on taxpayers' self-development²³¹ and autonomy,²³² as well as their dignity and integrity.²³³ Nor does the scholarship express concern that this impact, in turn, could undermine innovation,²³⁴ citizenship, and culture.²³⁵ There is no concern that taxpayers may become inhibited, self-censor, suffer embarrassment, and experience "powerlessness, vulnerability, and dehumanization."²³⁶ And, there is no concern that the inquisitions by the IRS may be inappropriate in a liberal, democratic, and free society.²³⁷ The contemporary scholarship expresses no concern in structuring the collection of tax information in a way that supports both revenue collection and privacy.

The contemporary scholarship tends to characterize privacy as no more than a hurdle to more effective tax administration. The more extreme scholarship tends towards being radically anti-privacy, at least with respect to the wealthy.²³⁸ It characterizes arguments for privacy as arguments to hide relevant facts. It does not consider how a privacy policy could guide which facts are made relevant in the law. Mistaking privacy as an obstacle of an improved tax system rather than a societal good not only presents a false dichotomy, but it obscures ways in which tax law might be improved.

The contemporary scholarship also problematically emphasizes the financial components of tax information. Obviously, a tax liability or refund is a dollar amount. But much, if not most tax information is not expressible in dollar amounts. A taxpayer may receive \$50, but whether it is includible (taxable) or excludible (non-taxable) is not a dollar amount issue. For example, if the transferor was motivated by a disinterested generosity, the \$50 is excludible as a gift under the general rule of section 102(a).²³⁹ However, even if the motivation were disinterested generosity, if the transferee is an employee of the transferor, the amount is taxable under the exception in section 102(c). But, if the employee were to receive \$50 worth of "flowers, fruit, books, or similar property" because the employee is experiencing a

231. See Cohen, *supra* note 109, at 1906-07.

232. See Cohen, *supra* note 103, at 1423-28.

233. See Bloustein, *supra* note 100, at 974, 1000-01.

234. See Cohen, *supra* note 109, at 1906.

235. *Id.* at 1905.

236. Solove, *supra* note 111, at 1393.

237. See Allen, *supra* note 104, at 740.

238. See, e.g., Linder, *supra* note 211, at 962 (arguing that privacy is an enemy of progressive politics); *id.* at 965 (arguing that publicizing tax information is citizen-oriented); *id.* at 968-69 (arguing privacy is a cult, a pathology, and a prejudice); *id.* at 969 (arguing there is "no legitimate privacy interest" in tax information and no need to accommodate any alleged privacy interest); *id.* (arguing that privacy is not a civil liberties issue).

239. See *generally* Comm'r v. Duberstein, 363 U.S. 278, 294 (1960) (interpreting I.R.C. § 102(a) to determine whether the transfer of a Cadillac was a gift).

“family crisis,” then the gift would not be includible.²⁴⁰ It seems likely that the employee who received such “flowers, fruits, books, or similar property” would be stunned to learn he or she needed to substantiate the crisis in order to avoid taxability. Similarly, surprise seems likely for a taxpayer who reports a dollar amount of medical expenses but is then required provide details that otherwise would be protected from government scrutiny. For example, reporting a dollar amount of a medical expenses related to an abortion entitles the IRS to collect the details relevant to determining the legality of the abortion, such as the month of pregnancy at the time of the abortion.²⁴¹ Or, consider that if the taxpayer pays a Christian Science health practitioner, little additional information would be necessary to substantiate the deduction,²⁴² but if the payment was to a Scientologist auditor or a native healer, the taxpayer may have to provide a great deal more information.²⁴³ The point is not that every tax return opens the taxpayer to inquiries into family crises, health, and religion. The point is that there is little part of a taxpayer’s life that may not become tax relevant under certain circumstances, and the IRS is authorized to demand whatever information is relevant. The dollar amounts reported are the tip of the iceberg.

The final shortcoming is the general disinterest in examining the consequences of collecting information.²⁴⁴ Taxpayers’ privacy interests are not limited to checking the government’s authority to disclose information. Taxpayers also have an interest in how much of their information is collected by the government. The current schol-

240. Treas. Reg. § 1.132-6(e)(1) (as amended in 1992).

241. IRS, Form 1040 U.S. Individual Income Tax Return (2015), <https://www.irs.gov/pub/irs-prior/f1040--2015.pdf> [<https://perma.cc/8RW5-XG2L>] (Line 40, itemized deductions); IRS, Schedule A (Form 1040) Itemized Deductions (2015), <https://www.irs.gov/pub/irs-prior/f1040sa--2015.pdf> [<https://perma.cc/8YSB-LZHN>] (Line 1, medical and dental expense). Given state law variations on legality and gestational age, information on gestational age is relevant. Rev. Rul. 73-201, 1973-1 C.B. 140 (deductibility of medical expenses of legal abortion); Rev. Rul. 97-9, 1997-1 C.B. 77 (legality essential to deductibility).

242. Payments to Christian Science practitioners have long been considered deductible by the IRS. Rev. Rul. 55-261, 1955-1 C.B. 307. Christian Scientists consider illness illusory, so their medical practitioners encourage faith. *ENCYCLOPEDIA OF RELIGION* 1745-48 (Lindsay Jones ed., 2d ed. 2005).

243. Unlike payments to Christian Science practitioners, payments for “processing” by Scientologists were held not deductible. *Brown v. Comm’r*, 62 T.C. 551 (1974), *aff’d per curiam*, 523 F.2d 365 (8th Cir. 1975) (rejecting contention that the Tax Court erred in denying a tax deduction for medical expense cost of Scientology “processing”). Payments to native Samoan healers have also been disallowed. *Tautolo v. Comm’r*, 34 T.C.M. (CCH) 1198, 1200 (1975) (finding payments to Samoan healers not deductible because not recommended by other physicians, bore no relationship to specific malady, and not strongly believed to be effective).

244. *Contra* Holderness, *supra* note 209, at 25-32 (describing privacy harms from information collection in the context of public assistance programs, including the Earned Income Tax Credit (EITC)).

arship excludes from consideration what information is demanded under current law and practice, rather than considering if the law and practice ought to be modified. Tax policy is a mix of politics, policies, and compromises. By failing to consider the breadth, depth, and nature of information collected under this mix, and instead only how to use the information once collected, the current scholarship is unable to make some very important contributions.

IV. PRIVACY AS A TAX POLICY

Since 1976, tax privacy law has provided presumptive confidentiality with exceptional disclosures for tax information once it is collected.²⁴⁵ Tax privacy scholarship has remained fixed within the legislative approach, taking no note of the value of privacy except to the extent confidentiality incentivizes providing information.²⁴⁶ Tax privacy scholarship has been siloed. It has not addressed the risks of excessive information collection. Outside of tax scholarship, several privacy scholars have argued for protecting privacy because doing so advances other important interests such as human development, dignity, and the capacity for self-determination; these, in turn, contribute to an innovative culture, a free society, and a deliberative democracy.²⁴⁷ Protecting individuals from excessive observation, scrutiny, and categorization is good not only for the individual but for society.²⁴⁸

A. How Systemic Dysfunction Protects Taxpayer Privacy Today

The law protecting privacy in tax administration has not been written with an eye towards protecting taxpayers from the ill effects of excessive information collection. The law has been written only to protect information from inappropriate use and dissemination. But no one has sounded alarms, declaring that the demand for private information for tax purposes is undermining the dignity or development of Americans, American culture, or democracy. So, why is it that, on the one hand, tax law has so little regard for its demands of private information, but, on the other hand, none of the pernicious effects of excessive privacy demands have been reported by scholars, lawyers, or politicians?

The answer is that privacy is inadvertently protected in our tax system, and it is protected through the system's dysfunction. The legal authority of the IRS to collect tax-relevant information is expan-

245. See *supra* notes 197-208 and accompanying text.

246. See *supra* Section III.C.1.

247. See *supra* Part II.

248. See *supra* Part II.

sive, and the amount of information that is tax relevant is equally expansive.²⁴⁹ But, the funding and the human and technological resources of the IRS are not.²⁵⁰ Taxpayer privacy has been protected by an under-resourced IRS that is consequently limited to auditing less than 1% of individual income tax returns.²⁵¹ In 99% of cases, the only information collected by the IRS is what is provided with the return. With few exceptions, returns require only that the taxpayer report his or her conclusions—as to deductibility, for example—without reporting any substantiating analysis or information. Most of the information relevant for determining the correct application of the law to the facts is never known to the IRS. For example, a taxpayer making a deductible charitable contribution is legally required to maintain records with a good deal of information.²⁵² But almost none of this information is submitted to the IRS with the return.²⁵³ The taxpayer is supposed to be prepared to provide this information to the IRS. But, with the miniscule audit rate, the IRS is almost certain not to know whether a particular taxpayer had the information—or even had any idea of what information was relevant. The IRS is almost certain to never know whether the contribution was properly deducted.

However, it is not that the IRS is so good at tax administration that it does not need to audit more taxpayers. Quite the contrary,

249. *See supra* Section III.A.1.

250. INTERNAL REVENUE SERV. ADVISORY COUNCIL, 2014 PUBLIC REPORT 9 (2014), <https://www.irs.gov/pub/irs-utl/2014-IRSAC-Full-Report.pdf> [<https://perma.cc/U2FT-R7AD>]; U.S. TREASURY INSPECTOR GEN. FOR TAX ADMIN., DECLINING RESOURCES HAVE CONTRIBUTED TO UNFAVORABLE TRENDS IN SEVERAL KEY AUTOMATED COLLECTION SYSTEM BUSINESS RESULTS (2014), <http://www.treasury.gov/tigta/auditreports/2014reports/201430080fr.pdf> [<https://perma.cc/RQA2-X2GN>]; NAT'L TAXPAYER ADVOCATE, 2014 ANNUAL REPORT TO CONGRESS, at viii (2014), <http://www.taxpayeradvocate.irs.gov/userfiles/file/2014-Annual-Report/Volume-One.pdf> [<https://perma.cc/M756-XP84>] (highlighting the significant decline in the IRS's budget); NAT'L TAXPAYER ADVOCATE, 2013 ANNUAL REPORT TO CONGRESS, at 20-21 (2013), <http://www.taxpayeradvocate.irs.gov/userfiles/file/2013FullReport/Volume-1.pdf> [<https://perma.cc/NH66-YRP6>] (arguing that the IRS needs additional funding).

251. In 2014, 99.1% of individual returns were not audited. Of the 0.9% audited, about 71% were mere “correspondence” audits with the remainder involving meeting with an auditor. INTERNAL REVENUE SERV., Data Book (2014) 23 tbl.9a, <https://www.irs.gov/pub/irs-soi/14databk.pdf> [<https://perma.cc/V7XY-C4AH>] (189,656,600 total returns / 983,025 correspondence audits = 71%). The term “audit” does not include automated contact through IRS's Math Error Program (notifying taxpayers of self-evident math errors), the Automated Underreporter program (notifying of discrepancies between sources of information), or returns rejected for specific suspicions (e.g., identity theft). *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-151, TAX GAP: IRS COULD SIGNIFICANTLY INCREASE REVENUES BY BETTER TARGETING ENFORCEMENT RESOURCES 3-5 (2012), <http://www.gao.gov/assets/660/650521.pdf> [<https://perma.cc/B9QR-MX2U>] (Math Errors and Automated Underreporter programs); *see also* INTERNAL REVENUE SERV., 2013 DATA BOOK, at iii (2013), http://www.irs.gov/file_source/pub/irs-soi/13databk.pdf [<https://perma.cc/UXJ4-U6AB>] (rejecting returns with indicia of fraud or identity theft).

252. *See* Treas. Reg. § 1.170A-13 (as amended in 1996) (record keeping and return requirements for charitable deduction).

253. INTERNAL REVENUE SERV., 2013 1040 INSTRUCTIONS, at A-9 (2013).

more audits would lead to the collection of more tax revenue and would probably improve compliance overall.²⁵⁴ The limited number of audits reflects the limited resources of the IRS—it is not an agency strategy. For the most part, returns are selected based on an automated scoring of factors likely to reveal additional revenue to be collected.²⁵⁵ Returns are ranked by these scores, and then certain returns are selected for audit based on available resources.²⁵⁶ However, due to resource limitations, not all returns determined likely to produce additional revenue can be audited.²⁵⁷ This means that the IRS must focus its investigatory resources on that very small number of returns: 0.9%.²⁵⁸ This miniscule rate does not reflect confidence in the remaining 99.1% of returns, but rather reflects the practical inabilities of the IRS to gather the information needed to determine taxpayers' liabilities.²⁵⁹

The current system in which the IRS has broad legal authority but actually reviews very little information inadvertently succeeds at protecting taxpayer privacy. But, it fails in collecting the taxes owed. It is as if the New York Police Department were authorized to search anyone in the city at any time, but the crime rate soared because there were only a dozen police officers in the city. The tax compliance gap—the difference between the income tax liability legally owed and the amount timely paid—is about *\$450 billion* each year.²⁶⁰ To put that into context, consider that the Department of Defense budget is about *\$673 billion*.²⁶¹ The tax compliance gap is almost four times the size of the Department of the Treasury budget (which includes the IRS).²⁶² And, it is larger than the *combined* budgets of the Small

254. MICHAEL I. SALTZMAN & LESLIE BOOK, *IRS PRACTICE & PROCEDURE* ¶ 8.01[1], at 1 (2016).

255. *Id.* ¶ 8.01[2], at 2.

256. *Id.*

257. *Id.* ¶ 8.01[1], at 1.

258. *See id.* ¶ 8.01[1], at 1 n.4.

259. U.S. TREASURY INSPECTOR GEN. FOR TAX ADMIN., *IMPLEMENTATION OF FISCAL YEAR 2013 SEQUESTRATION BUDGET REDUCTIONS*, at 8-9 (2014), <http://www.treasury.gov/tigta/auditreports/2014reports/201410025fr.pdf> [<https://perma.cc/8QDG-S4SH>]. *See generally* Jonathan Barry Forman & Roberta F. Mann, *Making the Internal Revenue Service Work*, 17 FLA. TAX REV. 725 (2015) (offering proposals for improving function without increased resources).

260. This is the gross tax gap. *IRS Releases New Tax Gap Estimates; Compliance Remains Statistically Unchanged from Previous Study*, INTERNAL REVENUE SERV. (Jan. 6, 2012), <https://www.irs.gov/newsroom/irs-releases-new-tax-gap-estimates-compliance-rates-remain-statistically-unchanged-from-previous-study> [<https://perma.cc/MA7J-KS29>]. Some argue that the tax gap is higher. *See, e.g.*, Eric Toder, *What Is the Tax Gap?*, 117 TAX NOTES 367 (2007) (criticizing gap measurement methodology).

261. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2013*, at 84 (2012), <https://www.gpo.gov/fdsys/pkg/BUDGET-2013-BUD/pdf/BUDGET-2013-BUD.pdf> [<https://perma.cc/4VS6-D5W3>].

262. *Id.* at 167 (about \$110 billion).

Business Administration,²⁶³ the National Science Foundation,²⁶⁴ the Department of Homeland Security,²⁶⁵ the Department of the Interior,²⁶⁶ the Department of State and Other International Programs,²⁶⁷ the Department of Education,²⁶⁸ the Department of Housing and Urban Development,²⁶⁹ the National Aeronautics and Space Administration,²⁷⁰ the Department of Energy,²⁷¹ the Environmental Protection Agency,²⁷² the Department of Commerce,²⁷³ the Department of Justice,²⁷⁴ and the Department of Labor.²⁷⁵ Except to the (relatively small) extent that the gap reflects delinquent taxpayers financially unable to pay,²⁷⁶ the gap reflects tax-relevant information the IRS does not have: information revealing a taxpayer who should have filed a return but did not, or who did file a return but understated income or overstated exemptions, deductions, or credits.²⁷⁷ In the current system, taxpayer privacy is protected by the same dysfunction that protects the tax gap: the practical inability of the IRS to gather tax-relevant information not included on the tax return.

The tax gap has been called the “great white whale of deficit reduction,” and, not surprisingly, closing the gap is an ongoing political concern.²⁷⁸ When both government agencies and private companies pursue the “growing gush of data” generated by an ever-increasing number of internet-connected devices,²⁷⁹ the hopes of politicians and tax administrators to more successfully leverage information tech-

263. *Id.* at 194 (about \$1.4 billion).

264. *Id.* at 190 (about \$7.5 billion).

265. *Id.* at 121 (about \$55 billion).

266. *Id.* at 135 (about \$13 billion).

267. *Id.* at 156 (about \$60 billion).

268. *Id.* at 100 (about \$72 billion).

269. *Id.* at 128 (about \$46 billion).

270. *Id.* at 185 (about \$18 billion).

271. *Id.* at 105 (about \$35 billion).

272. *Id.* at 181 (about \$9 billion).

273. *Id.* at 76 (about \$9 billion).

274. *Id.* at 141 (about \$37 billion).

275. *Id.* at 149 (about \$102 billion).

276. Failure to pay is the smallest of the three sources. *IRS Releases New Tax Gap Estimates*, *supra* note 260.

277. *Tax Complexity, Compliance, and Administration: The Merits of Simplification in Tax Reform: Hearing Before the S. Comm. on Fin.*, 114th Cong. 1-2 (2015) (statement of Sen. Orrin G. Hatch, Chairman, S. Comm. on Finance).

278. *Complexity and the Tax Gap: Making Tax Compliance Easier and Collecting What Is Due: Hearing Before the S. Comm. on Fin.*, 112th Cong. 3 (2011) (statement of Sen. Orrin G. Hatch).

279. Richard Clarke, *Richard Clarke on the Future of Privacy: Only the Rich Will Have It*, WALL ST. J. (July 7, 2014, 3:45 PM), <http://online.wsj.com/articles/richard-clarke-on-the-future-of-privacy-only-the-rich-will-have-it-1404762349>; see RICK SMOLAN & JENNIFER ERWITT, *THE HUMAN FACE OF BIG DATA* (2012); Solove, *supra* note 108, at 1394.

nology in tax administration will be fulfilled.²⁸⁰ Between the pressure of the tax gap and the efficiency potential of information technology, we should expect the IRS to collect more and more tax-relevant information over the next twenty-five years.²⁸¹ Narrowing the informational disparity between taxpayers and the IRS will also narrow the inadvertent protection of taxpayer privacy. As the tax gap is narrowed by the narrowing of the gap between the information the IRS has and the information taxpayers have, the inadvertent protection of taxpayer privacy will also be narrowed.

B. *The Privacy Burden*

If the law deems certain taxpayer information relevant and burdens the taxpayer with being prepared to provide it, we should consider the burden on the taxpayer's privacy as if he or she is prepared to provide the information. No doubt, there is comfort in the ignorance most taxpayers have as to what information is subject to IRS review. However, this is a false comfort and is something only those audited are likely to realize. But to know the privacy burdens of various tax provisions, we should consider the burdens shouldered by those who are audited, rather than those who merely entered receipt totals as prompted by their return preparation software. For example, consider that, with respect to her medical expense deduction,²⁸² Rhiannon O'Donnabhain had to disclose that as a 10-year-old boy she began secretly cross-dressing;²⁸³ as a teenager, she wanted to be rid of her penis;²⁸⁴ she had held a knife while feeling the urge to cut off her penis;²⁸⁵ her children were embarrassed and angered by her;²⁸⁶ and

280. Jay A. Soled, *Call for the Gradual Phase-Out of All Paper Tax Information Statements*, 10 FLA. TAX REV. 345, 360-64 (2010) (calling for third parties to provide information through an IRS website that taxpayers could use to prepare returns, reducing burdens on both the IRS and taxpayers); 1 NAT'L TAXPAYER ADVOCATE, 2009 ANNUAL REPORT TO CONGRESS 343 (2009), https://www.irs.gov/pub/irs-utl/2_09_tas_arc_vol_1_lr.pdf [<https://perma.cc/3QKR-4G6K>]; *Prepared Remarks of IRS Commissioner Doug Shulman to the Leaders and Legends Series, Johns Hopkins Carey Business School, Baltimore*, INTERNAL REVENUE SERV. (May 18, 2011), <https://www.irs.gov/newsroom/prepared-remarks-of-irs-commissioner-doug-shulman-to-the-leaders-legends-series-johns-hopkins-carey-business-school-baltimore> [<https://perma.cc/6MPY-Q7ZE>]; OBAMA '08, *Barack Obama's Comprehensive Tax Plan*, http://www.moveleft.org/obamas_promises/Factsheet_Tax_Plan_FINAL.pdf [<https://perma.cc/MH7E-25YA>].

281. See Michael Hatfield, *Taxation and Surveillance: An Agenda*, 17 YALE J.L. & TECH. 319, 340-50 (2015).

282. *O'Donnabhain v. Comm'r*, 134 T.C. 34, 76-77 (2010) (finding hormone therapy and sex reassignment surgery are deductible expenses to treat gender identity disorder disease but breast augmentation is not).

283. *Id.* at 35.

284. Petition for Redetermination of Deficiency, *O'Donnabhain*, 134 T.C. 34 (No. 6402-06), 2006 WL 1056936, at 5(c).

285. *O'Donnabhain*, 134 T.C. at 40 n.17.

she hesitated to take female hormones so long as her son was still in high school.²⁸⁷ Her therapist provided the government with details of their counseling sessions and her professional opinions, including that the therapist had ruled out O'Donnabhain's cross-dressing as a mere sexual fetish.²⁸⁸ Her surgeon provided details of her gender reassignment surgery, including that the surgery was intended to leave her capable of sexual arousal.²⁸⁹ The point here is not that the taxpayer should be protected from any queries beyond the receipt totals. But rather, that perhaps something less than unbridled inquisition would suffice.

Obviously, the IRS needs the authorization to collect relevant information. But the question is, what information *should* be relevant for tax purposes? Privacy concerns should not be dismissed with “but *we have to know that* in order to apply the law.” The issue is not what the law deems relevant, but rather what the law ought to deem relevant. Tax law is not science. It is not even economics.²⁹⁰ It does not involve aiming at a scientific measure of the economic ability to pay tax—some objective measure that logically unfolds and must be followed wherever it leads. There is no Platonic form of “taxable income” determining what information is tax relevant. Tax law embodies many competing policies and compromises. Revenue collection sits alongside health care, poverty relief, housing, education, and economic stimulation in terms of goals pursued through the tax system.²⁹¹ Even with a fundamental, economics-oriented tax provision like depreciation deductions, the law is not driven by economics, accounting,

286. *Id.* at 39 n.14.

287. *Id.* at 39 n.12.

288. *Id.* at 63.

289. *Id.* at 41.

290. Tax law concepts that significantly deviate from “normal” economic conceptions include life insurance payments, the realization requirement, imputed income, accelerated depreciation, and expensing capital outlays. Such deviations are measured each year in government reports. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-167SP, TAX EXPENDITURES: BACKGROUND AND EVALUATION CRITERIA AND QUESTIONS (2012), <https://www.gao.gov/assets/660/650371.pdf> [<https://perma.cc/7SEX-TSJZ>]. However, presuming there are “normal” conceptions is contentious. See BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES & GIFTS ¶ 3.6, at *2 (2015).

291. The deviations identified in the tax expenditure budget usually reflect policies other than revenue collection. As Kristin Hickman has put it, “Congress increasingly relies on the Internal Revenue Service to administer government programs that have little to do with raising revenue and much more to do with distributing government benefits to the economically disadvantaged, subsidizing approved activities, and regulating outright certain economic sectors like nonprofits, pensions, and health care.” Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1717, 1750 (2014). The National Taxpayer Advocate has argued that administering social benefit programs is beyond the IRS mission statement. NAT'L TAXPAYER ADVOCATE, 2010 ANNUAL REPORT TO CONGRESS 15 (2010), https://www.irs.gov/pub/tas/2010arcmsp2_irsmission.pdf [<https://perma.cc/PK8G-SKZU>].

or revenue collection but rather, a policy of economic stimulation.²⁹² There is no reason that minimizing privacy burdens cannot be valued alongside promoting health care, poverty relief, and economic growth.

But the point is not just that a pro-privacy policy can be added into the mix of tax policies. Rather, it is that we should be concerned that there are few (if any) activities that cannot be swept into the tax code. It should not be that the expansive reach of the tax code removes the privacy concerns we might otherwise have. The privacy issues that would be debated if the Department of Health and Human Services were to require anyone who underwent gender reassignment surgery to submit details of any prior urges to genital mutilation and hatred by close family members should also be debated in the tax context, as this is the type of information Rhiannon O'Donnabhain was required to report to the IRS. This is not to say that medical deductions should not require substantiation. But, using the tax code to subsidize medical care should not obscure the fact that this is a health care policy and not a revenue collection policy. In whatever way privacy interests ought to be balanced in federal healthcare policies, those interests also ought to be similarly balanced when those policies are pursued through the tax code. If providing certain information to government agents would make someone anxious, embarrassed, or otherwise uneasy, that is a subjective privacy harm regardless of the agency.²⁹³ If requiring individuals to report this type of information shifts or upsets the balance of power between individuals and institutions, then such a requirement is a threat to a free and democratic society, not just an emotional injury to an individual.²⁹⁴ If it chills behavior, undermines personal development, or offends human dignity, then it does these regardless of the title of the statute.²⁹⁵ Titling information requirements "tax" does not alter the consequences.

C. *The Invasiveness of Tax Law*

To appreciate the invasiveness of tax law, noticing how many non-financial personal details are required on the most commonly filed individual income tax return, the Form 1040, is only a first step. What is required on the face of the return is just the tip of the iceberg. The iceberg itself is what the taxpayer must be prepared to

292. See, e.g., Yoram Margalioth, *Not a Panacea for Economic Growth: The Case of Accelerated Depreciation*, 26 VA. TAX REV. 493, 508-10 (2007) (arguing against IRS providing accelerated depreciation).

293. See Calo, *supra* note 125, at 1133 and accompanying text.

294. See Allen, *supra* note 104, at 738 and accompanying text; Rubinfeld, *supra* note 117, at 784; Solove, *supra* note 116, at 1145-46.

295. See generally discussion *supra* Part II.

provide to substantiate the face of the return. It is the information the IRS is authorized to collect from all taxpayers, though the IRS only collects it on the 1% who are audited. While the details of taxpayer audits are not disseminated by the IRS, those taxpayers who appeal their audits have their personal information publicized in court records. By sampling these cases, as well as the IRC, Treasury Regulations, and IRS publications, the extent of the tax law's invasiveness becomes apparent. These samplings show how notes from therapist sessions, love letters, reading lists and details of daily life, family dynamics, and personal plans are routinely tax relevant.

1. *Face of the Tax Return: The Tip of the Iceberg*

First consider a few examples of the non-financial information required on the face of Form 1040. The return reveals the taxpayer's occupation and whether or not he or she has lost a job, retired, prematurely invaded his or her retirement accounts, or moved fifty or more miles away.²⁹⁶ It reveals whether the taxpayer or the taxpayer's dependent is a college student, the name of his or her college, the type of study program, how long he or she has been studying, and whether or not he or she has been convicted of a drug felony.²⁹⁷ The return reveals whether the taxpayer is married, and, if married, whether or not the spouse is blind or disabled or whether the taxpayer is recently widowed or divorced.²⁹⁸ It reveals the taxpayer's citizenship status and whether or not the taxpayer is blind, has health insurance, or medical expenses.²⁹⁹ It also reveals the number of children who live with the taxpayer and those of the taxpayer's children who do not live with him or her due to divorce or separation.³⁰⁰ The

296. IRS, Form 1040 U.S. Individual Income Tax Return (2016) [hereinafter 2016 Form 1040] <https://www.irs.gov/pub/irs-prior/f1040--2016.pdf> [<https://perma.cc/5XMT-3PY2>] (signature block, occupation; Lines 15, 16, 20, retirement benefits; Line 19, unemployment benefits; Line 59, early distributions from retirement accounts; Line 26, moving expenses); IRS, Form 3903 Moving Expenses (2016), <https://www.irs.gov/pub/irs-prior/f3903--2016.pdf> [<https://perma.cc/Z5EP-BH94>].

297. 2016 Form 1040, *supra* note 296, <https://www.irs.gov/pub/irs-prior/f1040--2016.pdf> [<https://perma.cc/5XMT-3PY2>] (Line 34, tuition and fees); IRS, Form 8863 Education Credits (2015), <https://www.irs.gov/pub/irs-prior/f8863--2015.pdf> [<https://perma.cc/X97V-PWG7>] (Line 22, educational institution identifying information; Line 24, study program and course load; Line 25, years of post-secondary education; Line 26, drug-related felony conviction).

298. 2016 Form 1040, *supra* note 296 (Lines 2, 4, 5, marital status; Lines 11, 31a, alimony received and paid; Line 39a, blind spouse); IRS, Form 2441 Child and Dependent Care Expenses (2015) (Part II, Line 2, identifying care recipient).

299. 2016 Form 1040, *supra* note 296 (Line 39b, dual status alien; Line 39a, blind taxpayer; Line 61, health care coverage; Line 40, itemized deductions); IRS, Schedule A (Form 1040) Itemized Deductions (2016) [hereinafter 2016 Schedule A], <https://www.irs.gov/pub/irs-prior/f1040sa--2016.pdf> [<https://perma.cc/C75V-HTHY>] (Line 1, medical and dental expenses).

300. 2016 Form 1040, *supra* note 296 (Line 6, dependent children exemptions).

return reveals the citizenship and residency status of such children, whether the taxpayer has adopted a child and, if so, whether the child has a disability, special needs, or is foreign born.³⁰¹ Finally, it reveals whether the taxpayer has placed a child or disabled spouse in day care, and, if so, the name of the daycare provider.³⁰²

But to understand how much information is relevant in determining income tax liability—and thus within the IRS's authority to review—it is misleading to look only at the face of the return. We should look at what taxpayers who are audited must reveal to substantiate the face of their returns. No doubt, it would be quite a surprise for the 99% of taxpayers who are not audited to realize how many details of their personal lives are subject to scrutiny and categorization for tax purposes.

There are an extraordinary number of private details about personal lives that may be tax relevant. To identify details as private does not mean it is necessarily unjust to collect those details. Line-drawing is inevitable, and details necessary to discern the line should not necessarily be off-limits. But, the lines ought to be drawn with an awareness of the invasive nature of gathering the details on either side of the line. Privacy concerns do not necessarily outweigh other factors. Still, privacy concerns should be weighed with the other factors. What type of society would we be fostering if all taxpayers were actually forced to provide all of the tax-relevant information that they are legally obligated to be prepared to provide? Would it contribute to or undermine expression and innovation?³⁰³ Would it express respect for individual personality, dignity, and integrity?³⁰⁴ Would it unduly reduce the number of spaces in which individuals could find relief from scrutiny and categorization?³⁰⁵ Would it increase Americans' experiences of powerlessness, vulnerability, and dehumanization?³⁰⁶ Would there be unjustifiable risks of inappropriate use if all of the information were aggregated?³⁰⁷ It is not to say that the IRS should not collect what information is relevant; but rather that what is relevant should be defined based on

301. IRS, Schedule 8812 (Form 1040A or 1040) Child Tax Credit (2016), <https://www.irs.gov/pub/irs-prior/f1040s8--2016.pdf> [<https://perma.cc/92Z7-W7SZ>]; 2016 Form 1040, *supra* note 296, <https://www.irs.gov/pub/irs-pdf/f1040.pdf> (Line 54, credits); IRS, Form 8839 Qualified Adoption Expenses (2016), <https://www.irs.gov/pub/irs-pdf/f8839.pdf> (disability, special needs, or foreign birth of adopted child).

302. IRS, Form 2441 Child and Dependent Care Expenses (2015), <https://www.irs.gov/pub/irs-pdf/f2441.pdf> (Part I, identifying care provider; Part II, identifying child or dependent).

303. *See* Cohen, *supra* note 109, at 1909, 1911.

304. *See* Bloustein, *supra* note 100, at 1000-01; Warren & Brandeis, *supra* note 35, at 195.

305. *See* Cohen, *supra* note 109, at 1906; Westin, *supra* note 106, at 1020-24.

306. *See* Cohen, *supra* note 103, at 1423-28.

307. *See* Solove, *supra* note 121, at 490.

the presumption that the IRS is going to collect it—each and every time, from each and every taxpayer.

2. *Substance of the Tax Return: The Iceberg*

(a) *Example: Therapist's Sessions, Medical Advice, and Family Dynamics*

To begin moving from the tip to the mass of tax-relevant information consider what information is collectible on every taxpayer who claims the medical expense deduction.³⁰⁸ It is claimed on about 10,000,000 tax returns each year.³⁰⁹ A miniscule number of those taxpayers will be required to provide any more information than what is required on the face of the return. Of course, that does not mean that what is provided on the face of the return is the only information relevant to determining one's tax liability. Very few taxpayers have any idea of what they should be prepared to reveal. Rhiannon O'Donnabhain was certainly forced to reveal more private information than most taxpayers are likely to be prepared to reveal when entering an amount of medical expenses on the faces of their returns. Does it seem likely that she suffered anxiety, embarrassment, or unease by having the details of her perception of her genitalia, her gender, her relationship with her children, and her discussions with her therapist scrutinized and categorized for tax purposes?³¹⁰ But under current law, she was required to reveal whatever information the IRS deemed necessary.³¹¹ O'Donnabhain was not a criminal; she was not a would-be tax evader; and she was not even wrong to claim the deduction. She rightfully deducted the costs of the surgery, and was entitled to most, though not quite all of the \$5,115 tax savings she reported on her return as a result of her total medical expense deductions. But, because she was part of the 1% who are audited, she was obligated to reveal to the IRS whatever information the IRS considered relevant.

(b) *Example: YMCA, Cancer, and Adult Children*

Of course, it is no surprise that substantiating a medical expense deduction would raise privacy issues. But provisions that seem “merely” financial raise significant issues too. Consider the provision

308. I.R.C. § 213 (2012) (providing a deduction for substantial medical expenses).

309. Less than 7% of returns claim medical expense deductions. See Justin Bryan, *Individual Income Tax Returns, 2011*, in INTERNAL REVENUE SERV., STATISTICS OF INCOME BULLETIN 5, 60 (2013), <https://www.irs.gov/pub/irs-soi/13inreturnsfallbul.pdf> [<https://perma.cc/S9HA-P83J>].

310. See *supra* text accompanying notes 125-26.

311. Treas. Reg. § 1.213-1(h) (1960) (requiring whatever the IRS deems necessary).

excluding gain on the sale of a home.³¹² As an exclusion, it is not even reported on the face of the return.³¹³ Thus, so long as the taxpayer is not audited, it may never occur to the taxpayer to consider what types of details may be relevant. Ramsay and Elizabeth Farah found out that their involvement in the Rotary Club, the YMCA, the Maryland Symphony Orchestra, and the local swim club was relevant.³¹⁴ As was Mrs. Farah's diagnosis with an aggressive form of cancer.³¹⁵ But, perhaps more surprisingly, it was also relevant that their daughter Veronica applied to only one college, was admitted and attended there, that she worked in various restaurants and night clubs while in college, and that her parents routinely visited her to give her medication;³¹⁶ that their son Frederick liked to use the hot tub at their home with his friends;³¹⁷ and that their daughter-in-law, Christina, spent many nights with them owing to their son, Patrick, engaging in extramarital sexual activities.³¹⁸ The adultery of one adult son, the hot-tubbing of another adult son, and the number of colleges to which an adult daughter applied and her need for her parents to medicate her were all tax relevant for excluding gain on the sale of the parents' home. Imagine a system in which every taxpayer, considering selling his or her home, knew these sorts of details of their lives and their adult children's lives were subject to scrutiny for determining the tax consequences of a sale. Would that be a system likely to cause a sense of powerlessness, vulnerability, or dehumanization?³¹⁹ How would it affect how the taxpayer relates to the government?³²⁰ Would the concern be different if this type of information was reportable to the Department of Housing and Urban Development or the mortgage-holding banks?

(c) *Example: Living Rooms, Daughters, Mothers-in-Law*

Many other facially financial provisions raise similar issues. Consider what Katia Popov had to reveal as a result of taking a "home

312. I.R.C. § 121(a) (excluding gain on principal residence sales).

313. Both exclusions and deductions lower taxable income. However, unlike deductions, exclusions are usually not reported on the return. Compare 2016 Schedule A, *supra* note 299 (Lines 1-4, medical deduction; Lines 16-19, charitable deduction), with I.R.C. § 121 (2012) (home gain exclusions not reported on Form 1040), and INTERNAL REVENUE SERV., PUBLICATION 523: SELLING YOUR HOME 14 (2015), <https://www.irs.gov/publications/p523/ar02.html> [<https://perma.cc/YRP7-S9DN>].

314. *Farah v. Comm'r*, 94 T.C.M. (CCH) 595, 599-600 (2007).

315. *See id.* at 597.

316. *See id.* at 596.

317. *See id.* at 597.

318. Brief for the Petitioner, *Farah*, 94 T.C.M. (CCH) 595 (No. 23412-05), 2007 WL 5113055, at 28-29.

319. *See Cohen, supra* note 103, at 1398; Solove, *supra* note 121, at 487-88.

320. *See Rubinfeld, supra* note 117, at 784; Solove, *supra* note 116, at 1143.

office” deduction.³²¹ A professional violinist, Katia Popov had to describe not only her practice routines at home, but also the layout of her apartment, the furnishings in her dining and living room, whether her four-year-old daughter was allowed to play in the living room, and additionally, she had to disclose that she, her husband, her daughter, and, on occasion, her Bulgarian mother-in-law slept in the same bedroom.³²² How do you think providing this information affected Popov’s sense of “breathing room?”³²³ Even though she proved herself entitled to the \$700 tax savings that she had claimed, do you think she considered revealing that her mother-in-law shared the bedroom with her and her husband worth it? Do you think she experienced any “unwelcome mental states” by providing this information?³²⁴ If everyone who entered the receipt totals for a home office deduction into their return preparation software was aware of the privacy invasiveness brought into play by the deduction, how many would still claim it? Which society is preferable, the one in which there are no home office deductions or the one in which the government reviews who sleeps where in a house to ensure that mothers-in-law never sleep in the “home office?” Are there less invasive ways to draw the relevant lines?

(d) *Example: Reading Lists, Winter Drives, and Fun*

Consider what Melvin Nickerson had to document in order to prove that he was a sufficiently motivated farmer entitled to business deductions.³²⁵ It was relevant that he “was born in 1932 in a farming community in Florida,” and that he “worked evenings and weekends on his father’s farm until he was 17,”³²⁶ that he spent his weekends working on his farm, commuting five hours through Illinois and Wisconsin, even during the winter, but often without his wife and children,³²⁷ and that he “read trade journals and Government-sponsored agricultural newsletters.”³²⁸ Consider that the Treasury Regulations specifically made relevant whether “the taxpayer derives personal pleasure from engaging in the activity. . . .”³²⁹ This prompted the IRS to argue that Nickerson was too “motivated by a love of farming that stems from his childhood” to be entitled to business deductions from

321. The home office deduction was about 35% of the total business deductions Popov claimed. *Popov v. Comm’r*, 76 T.C.M. (CCH) 695, 696 (1998).

322. *Id.* at 697.

323. *See* Cohen, *supra* note 109, at 1906.

324. *See* Calo, *supra* note 125, at 1133 and accompanying text.

325. *Nickerson v. Comm’r*, 700 F.2d 402, 404-05 (7th Cir. 1983).

326. *Id.* at 403.

327. *Id.*

328. *Id.* at 407.

329. Treas. Reg. § 1.183-2(b)(9) (1972).

his farm.³³⁰ Nevertheless, Nickerson prevailed in substantiating his farming business deductions because the court was convinced he did not drive “five hours in order to spend his weekends working on a dilapidated farm solely for fun, or that his family derived much pleasure from the experience.”³³¹ To be clear, Nickerson rightfully deducted his business expenses. He was starting a new business. He was dedicated. He was a hard worker—indeed, he had two jobs, which is what caused his tax troubles. What if every American beginning a new business was forced to detail and defend his or her business plan, as Nickerson was? Would it chill creativity and innovation if everyone undertaking a business venture knew he or she might need to provide his or her reading lists for government review and determination of sincerity, as Nickerson did?

(e) Example: Love Letters, Derogatory Comments, and Gifts

Consider Lynette Harris, who needed to disclose handwritten love letters to show she had reason to believe that presents from her sex partner were indeed gifts and not payments.³³² Would a system in which everyone who receives gifts must be prepared to turn over the details of their sex lives contribute to the sort of relationship between government and citizens that we want in a free society?³³³ Would it shift power in undesirable ways?³³⁴ Is it at all relevant that the love letters that needed to be revealed were written by someone other than the taxpayer? What does this say about the invasiveness of the law when a federal judge can easily summarize the “current law on the tax treatment of payments to mistresses,” which is not to be mistaken for the law on the tax treatment of payments to prostitutes?³³⁵ For mistresses, “cash and property [are] received from a lover as gifts,” which are tax-free.³³⁶ Prostitutes, however, receive only “specific payments for specific sessions of sex,” which are taxable.³³⁷ How many people who receive gifts from lovers are prepared to reveal to the government what Harris had to reveal: that, despite making “derogatory statements about sex” with the man who gave her the gifts, his letters gave her reason to believe that he at least thought the re-

330. *Nickerson*, 700 F.2d at 407.

331. *Id.*

332. *United States v. Harris*, 942 F.2d 1125, 1130 (7th Cir. 1991) (overturning tax evasion convictions for failing to report payments from lover).

333. *See Allen*, *supra* note 104, at 738; *Solove*, *supra* note 116, at 1145-46; *Westin*, *supra* note 106, at 1023-24.

334. *See Solove*, *supra* note 116, at 1143.

335. *Harris*, 942 F.2d at 1131.

336. *Id.* at 1133-34.

337. *Id.* at 1134.

lationship a loving one.³³⁸ If we would not prefer a society in which everyone who receives a gift must be prepared to reveal whatever may be relevant to determining the giver's state-of-mind, why have we created a tax system that needs these revelations? Harris prevailed in proving she was no tax evader. But, it seems unlikely that most other Americans are as prepared as Harris was to reveal her private life. The salaciousness of her situation should not distract us from realizing how vulnerable taxpayers are to such open-ended inquiries into their relationships. Given the extensive digital trails of information Americans are compulsively creating with social media and other technologies, such inquiries now could be made much more quickly and deeply than in Harris's case. She, after all, turned over handwritten letters; today, e-mail, texts, tweets, photos, videos, social media postings, and GPS coordinates are searchable and retrievable in far more efficient ways.

D. Privacy Concerns in Context

Of course, tax administrators are not reviewing medical records, reading lists, and love letters in order to monitor and regulate personal lives. These information pursuits are within the context of collecting revenue to fund government programs in one of the most economically and technologically advanced countries on earth. Arguably, privacy harms are merely collateral damage to an essential function. Personal lives are often scrutinized through the legal system, and it is not clear that scrutiny for tax purposes should be more concerning. Indeed, some may argue that the IRS is already so over-burdened that privacy-motivated obstacles to its enforcement efforts would be too much to add, or too likely to benefit only economically elite taxpayers, especially to the extent demands for personal information are related to the taxpayer's demands for tax benefits. While it is important to consider these larger points within the context of demands for taxpayer information, it is equally important to realize how these concerns distort rather than focus the bigger picture.

1. Professional Indifference to Information Demands

Above, it was noted that even if all sorts of ill effects might come from an excessively invasive tax system, tax scholars have not sounded alarms. As professionals, it is easy to accept collateral damage when the mission is important, and knowing the importance of the tax system, as well as its complications, tax scholars have not been disturbed by the tax system's privacy burdens. The

338. *Id.*

O'Donnabhain, Nickerson, Popov, and Harris cases are commonly included in income tax casebooks. Indeed, their familiarity, as well as that of other litigated tax cases likely has desensitized tax lawyers from noticing the ways in which taxpayers' personal lives—and those of their family members—are opened for government scrutiny and categorization. As lawyers, we know the importance of facts in disputes, and our strategic appreciation of the factual case, along with our familiarity with the legal methods of gathering facts, makes us professionally numb when personal lives are split open for dissection and discussion. But, these taxpayers were merely taxpayers, filing their returns and taking their chances with the audit lottery. Individual tax returns report information on over 289,000,000 individuals each year.³³⁹ The information relevant to those returns includes not only the financial information of the taxpayer but also all sorts of personal information of the taxpayer, his or her spouse and dependents, and, as we can see above, even family members who are not dependents, such as the Farahs' adult children and socially related third parties, such as Harris's boyfriend. If the audit lottery did not protect taxpayer privacy, and each taxpayer had to provide all of the information relevant to determining his or her tax liability, surely professional numbness to privacy issues would be replaced by personal queasiness. At least for those of us whose lives are reflected on the face of tax returns.

2. *Drawing Lines in Light of Information Obligations*

Of course, tax scholars also know that lines must be drawn and distinctions made in any legal system. In our tax system, it is necessary to draw lines between bona fide businesses and expensive hobbies (which a farm like Melvin Nickerson's might be) or between gifts and compensation for services (which the payments to Lynette Harris might have been), between square footage in the home used for personal purposes and that for business purposes (which Katia Popov's living room was), or which of a taxpayer's residences is the 'principal' one for which gain can be excluded (which was the issue for Mr. and Mrs. Farah). But, currently, almost none of the taxpayers with these issues actually provide any of the information the line-drawing obligates them to be prepared to provide. If we imagine a world in which all of the taxpayers had to provide all of their tax relevant infor-

339. INTERNAL REVENUE SERV., SOI TAX STATS - INDIVIDUAL INCOME TAX, TABLE 1 2011, <http://www.irs.gov/uac/SOI-Tax-Stats-Individual-Income-Tax>Returns> [<https://perma.cc/4S3H-NA38>]. About 145,000,000 returns are filed each year, claiming about 289,300,000 personal exemptions. INTERNAL REVENUE SERV., IRS BULLETIN ON INDIVIDUAL RETURNS 9-10 (2013) [hereinafter 2013 IRS BULLETIN], <http://www.irs.gov/pub/irs-soi/13inreturnsfallbul.pdf> [<https://perma.cc/SFP9-KWLF>].

mation, we would be imagining a world of dystopian fiction. There is no legal objection that these taxpayers could have raised to resist providing this information. This is the information deemed relevant under current law. The privacy harms of the federal government inspecting our medical records, our adult children's hot-tubbing and marital lives, how we arrange our living rooms, what is written in our love letters, and whether or not we read enough about our business interests are all limited for the time being by the IRS's practical inability to collect so much information. Our privacy is protected only by an underfunded IRS. It is not that the IRS should not collect what is relevant, but rather, that what is relevant should be defined on the presumption that the IRS is going to collect it—each and every time, from each and every taxpayer.

3. *Over-Burdened IRS Unduly Burdened by Privacy Claims*

In the contemporary context of an underfunded IRS, raising concerns about taxpayer privacy might be mischaracterized as an attempt to unduly burden an already unduly-burdened system.³⁴⁰ But privacy should not be understood as a mere obstacle to efficient tax administration. Much of the contemporary scholarship on tax privacy does this, however.³⁴¹ It is as if only would-be tax evaders have an interest in minimizing how they are scrutinized and categorized. The scholarship echoes the arguments against privacy that only the guilty have secrets to hide.³⁴² But this mistakes the function of privacy. Privacy should be protected because it protects human development, dignity, and the capacity for self-determination, and these in turn contribute to an innovative culture, a free society, and a deliberative democracy.³⁴³ Protecting individuals from excessive observation, scrutiny, and categorization is not an individualistic agenda, but rather one of promoting societal good.³⁴⁴ No one argues that the values protected by the Constitution ought to be ignored to the extent that they impede efficient policing. A society in which the police do not have legitimate authority to search all of us is a society in which most of us prefer to live, even if it means fewer criminals are searched and fewer crimes prevented. Privacy protections may cover the guilty as well as the innocent, but that is not an argument against privacy. Mistaking privacy for an obstacle to an improved tax system rather than a societal good itself pre-

340. See *supra* note 250.

341. See discussion *supra* in Section III.C.

342. See *supra* notes 95-99 and accompanying text.

343. See Cohen, *supra* note 109, at 1906; Schwartz, *supra* note 124, at 1660.

344. See Cohen, *supra* note 103, at 1423; Solove, *supra* note 120, at 763.

sents a false dichotomy. It obscures the ways in which tax law might be reformed to greater serve societal good.

4. *Widely Distributed Privacy Burdens of the Tax System*

Some might argue that reforming tax law to promote privacy would, ultimately, protect economic elites as they are the ones who actually pay the most—and presumably evade the most. Historically, the anti-tax privacy political agitation came from political progressives focused on economic elites.³⁴⁵ But that historical agitation must be seen in its historical context: an income tax imposed only on the economic elites.³⁴⁶ By the end of World War II, the income tax had become a mass tax, and the anti-privacy political agitation had ended.³⁴⁷ Some contemporary scholars have tried to spark an anti-tax privacy movement by appealing to this historic effort.³⁴⁸ But the historic situation and income tax regime of that period has long since passed. Today's situation and regime is extraordinarily different. This is no longer a tax system focused on economic elites; it reports information on over 90% of the U.S. population.³⁴⁹ Indeed, far from being a system focused on the economic elites, about one-third of the individual income tax returns filed report less than \$20,000 in adjusted gross income.³⁵⁰ Today's income tax system covers even the very poor who file income tax returns only to collect cash welfare payments through the Earned Income Tax Credit (EITC). Approximately 19% of the returns filed claimed the EITC, which is the most significant anti-poverty cash payment government program.³⁵¹ The audit rate on returns claiming the EITC is twice what it is for individual return filers, generally.³⁵² The tax system also covers those low-to-moderate income individuals and families who qualify for government subsidized health insurance under the Affordable Care Act.³⁵³ With a tax system that has developed over the past half century such that it is no longer focused on

345. See *supra* notes 189-93 and accompanying text.

346. See *supra* notes 181, 189 and accompanying text.

347. See *supra* note 194 and accompanying text.

348. See generally Kornhauser, *supra* note 211; Linder, *supra* note 215.

349. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock/> (the population reported is for April 15, 2012, which was the due date for the 145,000,000 returns filed claiming 289,300,000 exemptions).

350. INTERNAL REVENUE SERV, Table 1, *supra* note 339.

351. 2013 IRS BULLETIN *supra* note 339, at 22 tbl.1, 68 tbl.4 (27,911,726 returns filed claiming EITC / 145,370,240 total returns filed).

352. DATA BOOK TABLE 9A, *supra* note 244.

353. See IRS, Form 8962 Premium Tax Credit (2016), <https://www.irs.gov/pub/irs-prior/f8962--2016.pdf> [<https://perma.cc/3TVG-2UAD>] (Lines 1-6, measuring household income relative to poverty line).

collecting revenue but also on spreading economic benefits, protecting privacy is not about protecting economic elites.

5. *Paying for Tax Benefits with Information*

Privacy concerns also should not be dismissed on the notion that taxpayers are only burdened if they choose certain benefits. There is no argument that non-compliant taxpayers should be entitled the same protections as compliant ones. The argument is that careful thought should be given to what is demanded as compliance. Personal information is not just demanded to verify deductions and credits that benefit taxpayers. It is also demanded to determine what is included in gross income. Even if deductions and credits were always optional, inclusion is never optional. And, it is not always the case that deductions and credits are optional.³⁵⁴ But more importantly, to frame privacy as a compliance issue only for those who choose to make use of the benefits versus those financially able to forego them, fails to consider how those privacy choices would impact the effectiveness of tax-based incentives and ignores the societal good of protecting privacy. Hayes Holderness has made the point that, economically, providing a benefit only for those willing to surrender privacy is a *de facto* tax on privacy.³⁵⁵ As a matter of equity, it should never be that those who can financially afford greater privacy from the government are the only ones who should have it. Making privacy into a personal choice of tax benefits also ignores why tax benefits are often provided, which is to incentivize certain behavior. For example, to the extent the housing market is stimulated and sustained by excluding gains on the sale of homes, the incentives to sell would be undermined if taxpayers rationally considered the privacy burdens of the exclusion. Those taxpayers who value privacy more would be less sensitive to the incentive and those who value it less would be more sensitive to the incentive. Using the tax code to tether the housing market to privacy sensitivities makes no sense. Similarly, to the extent that the medical expense deduction is used to subsidize health care, making the subsidy amount inverse to an individual's privacy concerns makes no sense. To impose a greater tax burden on those who choose greater privacy would discourage privacy, not only reducing the personal and societal benefits of privacy, but also reducing various societal benefits intended to be achieved through the tax code.

354. See James Edward Maule, *No Thanks, Uncle Sam, You Can Keep Your Tax Break*, 31 SETON HALL LEGIS. J. 81, 84 (2006) (characterizing the debate over the obligatory nature of deductions as one of the deepest and longest-lasting).

355. Holderness, *supra* note 209, at 32.

6. *Information Already Known to Third Parties*

It has been argued that what information is collected for tax purposes is not especially private, as it is usually financial information often times already held by third parties.³⁵⁶ If, in fact, whatever privacy burden imposed on taxpayers is imposed independently of the tax system, then, perhaps it is not so important to worry about privacy in the tax system. It is largely true that much financial information is held by third parties before it is reported to the IRS for tax purposes. To some extent, this reasoning is circular, however, as third parties maintain a great many of their records because they are required to do so for tax reporting purposes.³⁵⁷ But, more importantly, even if most financial information is held by third parties, as pointed out above, much tax information is not financial information. That Katia Popov's daughter was not allowed to play in the living room, that the Farahs had an adulterous son, that Melvin Nickerson read farming newsletters, that Lynette Harris had handwritten love letters, and that Rhiannon O'Donnabhain's children hated her gender reassignment is not financial information.

No doubt, despite its personal rather than financial character, some of this information would have been held by third parties regardless of whether the IRS sought it. But some of those parties would have also had a confidential relationship with the taxpayer, such as Rhiannon O'Donnabhain and her therapist. That taxpayers provide personal information while seeking specialized help should not mean that we should have no hesitation to demand that it be provided to the IRS. Some of the information may have been available in public records; perhaps the Farahs' son's divorce court proceedings revealed his extramarital activities. Some of it may have been casually known to any number of individuals or available through a quick online search, like the Farahs' involvement in the local Rotary Club. But, when even publicly available information is aggregated, privacy concerns increase rather than decrease.³⁵⁸ Aggregation allows the holder of the aggregated information to know more than any of the third parties who held only a part of the information. The Supreme Court has recognized the qualitative difference that comes from aggregating data. It has held, for example, that access by the press to rap sheets containing all of an individual's criminal convictions can be restricted, even though each of those convictions is publicly available independently.³⁵⁹ By depositing all of this information

356. See Schwartz, *supra* note 209, at 883, 896.

357. See 1 NAT'L TAXPAYER ADVOCATE, *supra* note 150, at 181.

358. See Solove, *supra* note 121, at 506-10.

359. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764, 780 (1989) (finding rap sheets are exempt from disclosure under the Freedom of

into a single space, the risks of inappropriate use or dissemination, either through the negligence of insiders or theft by outsiders, greatly increases.³⁶⁰ In short, the fact that tax information is held by third parties, regardless of its collection by the IRS, may be relevant in assessing the privacy harms of the IRS also collecting this information. But it does not mean that there are no privacy concerns as to the IRS collecting it as well.

Finally, unlike the information taxpayers have provided to third parties for whatever reason, the taxpayer is legally compelled to provide the information to the IRS. When a taxpayer signs a tax return, he or she is swearing or affirming under penalties of perjury that it is true and correct to the best of his or her knowledge and belief.³⁶¹ Filing a false return is a felony.³⁶² Taxpayers are legally compelled to provide substantiating information to the government, whether it is the paycheck information that is already known to their employers, the personal information known only to their therapists and surgeons, or details as to where the visiting mother-in-law slept, which is known to no one outside the family. The taxpayer cannot choose not to disclose the information.

E. Recommendations

How should tax law be reformed to promote privacy? This is the first time this question has been asked. But it is not legislative proposals that are needed at this point, but rather a foundation on and context from which society can articulate and debate proposals. What is needed is scholarly attention to building that foundation and articulating that context. What is needed is for privacy scholars to recognize tax law as a fertile field for privacy research and for tax scholars to recognize privacy as an important good to cultivate within the tax field.

1. Privacy as a Tax Policy

To identify an information requirement as a privacy burden is not necessarily to condemn it. Rather, it is to identify an analysis to be

Information Act as a summary of information is vastly different from information held in scattered public sources).

360. Andy Greenberg, *OPM Now Admits 5.6M Feds' Fingerprints Were Stolen by Hackers*, WIRE (Sept. 23, 2015, 11:30 AM), <https://www.wired.com/2015/09/opm-now-admits-5-6m-feds-fingerprints-stolen-hackers/> [<https://perma.cc/7GSR-LZAR>] (providing that over 21,000,000 Social Security Numbers and 5,600,000 fingerprints stolen from government databases).

361. 2016 Form 1040, *supra* note 296 (signature block).

362. I.R.C. § 7206 (2012) (signing a return not believed to be true and correct as to every material matter is a felony).

made. It is to ask, is this burden justifiable? Privacy burdens in taxation are like complexity in taxation in that, at first glance, both always seem better to be reduced. But both privacy burdens and complexity in taxation may often reflect benefits that are tightly targeted to individual circumstances, making it difficult to reduce either the invasiveness or the complexity without reducing the benefits.³⁶³

In general, it seems likely that personal privacy invasions may often be justified by the need to assess personal circumstances. However, tax scholars should pursue this question in particular ways, searching to balance specific harms and benefits. First, provisions should be assessed one-by-one, cataloging the information that is potentially relevant. This requires a good familiarity with the tax law and practices. For example, a superficial review would not catch the personal information that Melvin Nickerson had to provide to prove the deductibility of his dairy farm business expenses, or the information Mr. and Mrs. Farah had to provide related to the sale of their home. Second, the usefulness of specific information in implementing the specific policies of the provisions—and in minimizing the potential for fraud on all provisions—must be understood. For example, while acknowledging that some sensitive information must be provided to substantiate expenses, and acknowledging a history of taxpayer aggressiveness with deducting medical expenses, surely there is a reasonable way to limit IRS inquiry so that no one need be put through what Rhiannon O'Donnabhain went through. Surely not everyone who claims a medical expense deduction needs to provide his or her therapist and surgeon's notes for IRS review.

In addition to proposals for specific provisions like these, tax scholars should consider more fundamental reforms. These reforms may provide fewer targeted benefits, but greater general ones. For example, it may be that eliminating deductions and credits tied to personal and mixed personal-business expenses would eliminate the greatest privacy harms in one stroke. By increasing the standard deduction and personal exemption in exchange for this elimination, private information may be better protected without affecting overall tax liabilities. It may be that taxpayers like Katia Popov, Rhiannon O'Donnabhain, and Mr. and Mrs. Farah would benefit more, in terms of both privacy protection and tax liability, if they were provided higher standard deductions and personal exemptions, even if the

363. BITTKER & LOKKEN, *supra* note 290, ¶ 3.8 (“One of the most obvious features of the federal income tax is its complexity. . . . The reasons for complexity are probably many. There often is a tension between the goals of simplicity and fairness. Simple statutes may not be fair because they lump together taxpayers who, in fairness, should be treated differently. Statutes that comprehensively address relevant distinctions between taxpayers tend to be complex.”).

home office business deduction, medical expense deduction, and principal residence gain exclusion were eliminated. It certainly would be cheaper for the IRS to administer and taxpayers to comply with a law less demanding of complex, personal details.

Ultimately, pushing along this continuum towards fundamental reform, tax scholars will arrive at questions of the tax base itself. Which tax base best balances privacy promotion with revenue collection, efficiency, equity, and other goals? It may be that the individual income tax as it has evolved over the past century, targeting dozens of goals other than measuring financial ability and collecting revenue according to ability, is too unwieldy to continue if privacy concerns are seriously considered. It may be that seriously considering privacy concerns means cleaning-up the income tax base. Or, it may mean arguing for a new base. A value-added-tax, retail sales tax, or other consumption-based taxes by their very nature require less personal information. Regardless of the reform advocated, advocates should take privacy implications into account when articulating proposals.

2. Situating Tax Law as a Field for Privacy Scholars

The tax field is fertile for scholars with more general privacy-related agendas. Like national security, taxation is an inherent government power. However, unlike national security, taxation is not focused on wrong doing, nor is it focused on a small number of individuals deserving increased scrutiny. If gathering information for security purposes is akin to searching for needles in haystacks, collecting information for tax purposes is more akin to measuring the straws. When each year the government gathers information on 289,000,000 individuals through a single agency, the *prima facie* case for privacy scholarship focused on that agency has been made. When the information gathered includes love letters, like those written to Lynnette Harris; the reading habits of small business owners like Melvin Nickerson; the sleeping arrangements of families like Katia Popov's; the therapy sessions of patients like Rhiannon O'Donnabhain; and the marital discord, hot tub enthusiasm, and college aspirations of adult children, as well as the health and social club membership of home sellers like Mr. and Mrs. Farah, a case for real privacy concern has been made. That none of these taxpayers were suspected as terrorists should make their plight more, rather than less interesting to privacy scholars, and more, rather than less important as well.

What has protected taxpayer privacy up to this point has been neither law nor policy, but practical inability. And what threatens taxpayer privacy now is the technological reduction of practical inabilities. The protection of privacy by real-world limitations rather

than legal ones has been noted and studied by privacy scholars before, but without noting the role of under-resourcing the IRS in protecting hundreds of millions of individuals.³⁶⁴ And while other privacy scholars have taken interest in how the technological future may be one in which “everything may reveal everything,” that is, the devices connected to the Internet of Things may provide data valuable for others purposes, those scholars have been focused on tasks such as predicting credit-worthiness or insurability.³⁶⁵ Other privacy scholars have focused on how Big Data mining is increasingly relevant to important issues like credit worthiness and insurability, and what safeguards should be implemented.³⁶⁶ But no privacy scholar has focused on how data from the Internet of Things or Big Data mining may be pursued for tax purposes. There is no reason to doubt that the IRS will be among all the government agencies and private companies on earth pursuing and analyzing this “growing gush of data.”³⁶⁷

Perhaps the greatest goal for privacy scholars focused on tax should be discerning if this growing gush of private information can be channeled for tax purposes without shipping us into a dystopian future.³⁶⁸ Warren and Brandeis understood the concern that privacy reflect an advanced state of law and civilization, one in which the inner life of individuals was prized and protected.³⁶⁹ Privacy scholars have pushed that idea along, articulating how privacy is essential for the thriving of both autonomous individuals and free societies. Yet, the ongoing information technology revolution will challenge both individuals and societies in unprecedented ways. As information technology revolutionizes tax administration in the coming decades, those benefits may include lower compliance burdens on individual taxpayers and lower administrative costs for the government. But, given how much personal information will be covered by the coming technology and how much personal information is potentially tax relevant, it is hard to have anything but a dystopian vision of this future—a vision in which individuals’ inner lives are so burdened that the great achievements of our society shrivel. It will be up to the most creative of the privacy scholars to articulate a vision in which the government efficiently collects information to

364. Harry Surden, *Structural Rights in Privacy*, 60 S.M.U. L. REV. 1605 (2007) (arguing privacy is not primarily protected by the law but rather real-world structures and practical limitations).

365. Scott R. Peppet, *Regulating the Internet of Things: First Steps Towards Managing Discrimination, Privacy, Security, and Consent*, 93 TEXAS L. REV. 85, 93 (2014).

366. See Cohen, *supra* note 103, at 1399-1400.

367. See Clarke, *supra* note 279; see also Hatfield, *supra* note 281, at 338-50.

368. See Hatfield, *supra* note 281, at 339-50.

369. Warren & Brandeis, *supra* note 35, at 195.

tax individuals justly while protecting the inherent dignity of their inner lives—that is, their privacy.

V. CONCLUSION

A therapist's notes, hand-scrawled love letters, and an entrepreneur's reading lists may be relevant to determining a tax liability and, thus, may be within the IRS's authority to collect. But these burdens on taxpayer privacy are not a matter of a rogue bureaucracy pursuing what it should not. The burdens are a matter of legislative, administrative, and judicial decisions deeming information relevant for tax liabilities. Despite the extraordinary reach of the IRS into private lives, the law and scholarship have focused only on regulating what the IRS does with the private information it possesses, not the burdens it imposes when it collects information. While the burdens on human dignity and a free society posed by systemic disregard for personal privacy is, in principle, always a matter of legitimate concern, the ongoing information technology revolution transforms the matter into a pressing practical concern. The law should deem relevant for tax purposes only what information can be collected consistently with respect for privacy. Technologically, the time is coming when almost all information will be far more easily pursued and collected than has been imaginable.³⁷⁰ The tax policy goal should be to structure the collection and use of private information for tax purposes in ways that support, rather than undermine "deliberative democracy" and the individual's "capacity for self-determination" while efficiently and justly maximizing tax revenue collection.³⁷¹ To invoke Samuel Warren and Louis Brandeis, the goal should be a tax system appropriate for both an advancing economy and an advancing civilization.

370. See Hatfield, *supra* note 281.

371. Schwartz, *supra* note 124, at 1658 (expressing privacy concerns for corporations, although not within a specific tax context).

