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RAIDING THE CONFESSIONAL—THE USE OF INCOME TAX RETURNS IN NONTAX CRIMINAL INVESTIGATIONS

INTRODUCTION

Income tax returns are an essential investigatory tool in the battle against white collar and organized crime. The use of the returns to enforce nontax criminal laws, however, poses serious threats to both the effective functioning of the taxation system and the taxpayer's right to privacy.

In 1976, Congress, attempting to strike a balance between these competing interests, enacted section 6103(i) of the Internal Revenue Code (IRC). This section allows the use of federal income tax returns for the purpose of enforcing nontax criminal laws, while imposing safeguards to protect the taxpayer's privacy. Congress has continued to reevaluate the balance struck by section 6103(i); it is presently considering two proposals to amend section 6103(i)—one that would afford increased protection of the taxpayer's privacy, and a second that would increase government access to tax return information.

Many states, on the other hand, prohibit the use of tax returns to enforce


Federal Tax Return Privacy: Hearings Before the Subcomm. on Administration of the Internal Revenue Code of the Senate Comm. on Finance, Part II, 1-2 (1976) [hereinafter cited as Senate Hearings II] (statement of Hope Eastman);
cf. Boske v. Comingore, 177 U.S. 459, 469-70 (1900) ("The interests of persons compelled, under the revenue laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded.")


5. I.R.C. § 6103(i); see notes 118-26 infra and accompanying text.


nontax criminal laws. These jurisdictions have tipped the scales completely in favor of the taxpayer's privacy, thereby hindering effective state prosecution of complex crimes. This Note considers whether such an approach continues to be justified. Part I surveys the various state confidentiality provisions, focusing on those states that prohibit the use of income tax returns in nontax criminal investigations. Part II then analyzes these strict state prohibitions in light of the policies they were designed to serve. Finally, Part III examines the federal confidentiality provision and the recent proposals to amend it.

I. STATE INCOME TAX CONFIDENTIALITY PROVISIONS

Every state that imposes an income tax has enacted a statute that in some way limits the disclosure of information included on income tax returns. It is

8. See notes 34, 40-46 infra and accompanying text.

9. See notes 95-100 infra and accompanying text.


well settled that state governments have the power to limit the disclosure of


reports, such as tax returns, which are required by law. Absent an express statutory provision, however, the protection accorded them does not rise to the level of an evidentiary privilege. Indeed, while some jurisdictions create such an evidentiary privilege, others merely bar extrajudicial disclosure of the reports.

In general, the state confidentiality provisions prohibit state officials and employees from indiscriminately disclosing state income tax returns. Public inspection of any information reported in the

12. See In re Valecia Condensed Milk Co., 240 F. 310, 311-14 (7th Cir. 1917); Featherstone v. Norman, 170 Ga. 370, 397, 153 S.E. 58, 71 (1930); Roberts Tobacco Co. v. Michigan Dep't of Revenue, 322 Mich. 519, 529, 34 N.W.2d 54, 59 (1948); Oklahoma Tax Comm'n v. Clendinning, 193 Okla. 271, 275, 143 P.2d 143, 146 (1943); Peden v. Peden's Adm'r, 121 Va. 147, 160-61, 92 S.E. 984, 988 (1917). See United States v. Dickey, 268 U.S. 378, 386 (1925) (Supreme Court assumed that Congress had the power to forbid or allow the publication of income tax returns).


14. 8 J. Wigmore, supra note 11, § 2377, at 781; Required Report, supra note 11, at 290-91. Because recognition of an evidentiary privilege for required reports may impede the "judicial search for truth . . . [the courts] have historically confined the cloak of secrecy to the narrowest scope consistent with the language and subject matter of the required reports statute." In re Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373, 378 n.10 (3d Cir. 1976); see Stephenson v. Millers Mutual Fire Ins. Co., 236 F. Supp. 420, 423 (D. Ariz. 1964); Agnew v. Agnew, 52 S.D. 472, 480-81, 17 N.W. 633, 636-37 (1928); 2 J. Weinstein & M. Berger, supra note 11, § 502(03), at 502-7; 8 J. Wigmore, supra note 11, § 2377, at 781; Required Report, supra note 11, at 287.


returns is unlawful.17 Most states, however, do permit some state officials, provides that forms containing the amount of income tax reported as paid or payable shall be made available for public inspection by residents of Wisconsin. Id. The revenue department is required to notify the taxpayer of the identity of the person requesting the information, his address, the reasons given for inspection and the information that was inspected. Id. Under a prior statute, Wisconsin allowed public inspection of income tax returns. 1923 Wis. Laws ch. 39. The purpose of this "experiment" was "to prevent persons liable for the tax from concealing their income and to permit verification of the completeness of their returns." Report on Administrative Procedures of the Internal Revenue Service to the Administrative Conference of the United States, S. Doc. No. 94-266, 94th Cong., 2d Sess. 1020 n.691 (1975) (hereinafter cited as Administrative Report). In 1953, however, the provision providing for public inspection of returns was repealed and the present provision enacted. 1953 Wis. Laws ch. 303. The "Wisconsin experiment" produced some undesirable results. The requests to inspect the returns generally fell into one of three categories: "(1) requests for gossip or perhaps 'prurient curiosity,' (2) requests for commercial purposes such as mailing lists designed to reach certain economic classes, and (3) requests for political or scandalous purposes where publicity was desired to damage the taxpayer in some way, perhaps in some cases by revealing half truths or embarrassing information." Administrative Report, supra, at 1020 n.691. See also Va. Code § 58-46 (Supp. 1979) (statute forbids public disclosure of tax return information but governor is empowered to direct that it be public).


other than officers and employees of the taxing agencies, to inspect income tax returns. In a few of these jurisdictions, any government official is authorized to inspect tax returns when it is necessary in the performance of his official duties. Other states specifically identify the government officials who are authorized to inspect returns. Thus, for example, disclosure of certain tax return information to the state legislature, welfare department, workmen's


20. See, e.g., Cal. Rev. & Tax. Code § 19284 (West 1970) (legislative committee of either assembly or senate); Idaho Code § 63-3077 (1976) ("duly constituted committee of either branch of the state legislature"); Md. Ann. Code art. 81, § 300(a) (Supp. 1979) (information can be disclosed pursuant to a proper judicial or legislative order); Minn. Stat. Ann. § 290.61 (West Supp. 1980) (abstracted financial data that cannot be used to identify an individual taxpayer can be disclosed upon a request by the majority of the senate or house tax committee members); Tenn. Code Ann. § 67-134(e) (Supp. 1979) (for purposes of tax administration, but only upon a lawfully executed subpoena); Va. Code § 58-46 (Supp. 1979) (disclosure is permitted to a duly constituted committee of the General Assembly); Wis. Stat. Ann. § 71.11(44)(c)(3) (West Supp. 1979-1980) (to legislative committee on organization but only if approved by a majority of quorum of its members and only if the tax return is disclosed at a closed meeting).

21. See, e.g., Alaska Stat. § 43.05.230(a) (1977) (in connection with official proceedings or investigations of the child support enforcement agency); Cal. Rev. & Tax. Code § 19286.5 (West Supp. 1980) (returns of applicants for or recipients of welfare benefits may be disclosed to the director of social services); Ind. Code Ann. § 6-2-1-29 (Burns Supp. 1979) (same); Mass. Ann. Laws ch. 62c, §§ 21(b)(b)(9) (disclosure of whether a recipient of public assistance program received interest authorized to the commissioner of public welfare), (10) (disclosure of a return of recipient of veteran's benefits authorized to the director of employment security, the commissioner of public welfare, or the commissioner of veterans' services) (Michie/Law. Co-op Supp. 1980); N.M. Stat.
compensation department, municipal governments, the governor, the secretary of state and the state attorney general is often authorized. Most

Ann. § 7-1-8(M) (1979) (disclosure of last known address of all names certified by the central parent locator unit as being the names of absent parents of children receiving public financial assistance); N.Y. Tax Law § 697(e) (McKinney Supp. 1979-1980) (disclosure to the department of social services allowed for purpose of determining the eligibility of applicants for public welfare and to locate absent parents).


23. Disclosure of tax return information to political subdivisions of the state is typically limited to the purpose of tax administration. See, e.g., Colo. Rev. Stat. § 39-21-113(7) (1973) (to county assessor for purposes relating to the assessment of ad valorem tax); Ga. Code Ann. § 91A-3711(c) (1980) (disclosure to county assessor of amount of inventory and depreciable assets claimed by the taxpayer); Ky. Rev. Stat. § 131.190(2) (Supp. 1978) (to cities for "official use only"); N.M. Stat. Ann. § 7-1-8(R) (1979) (disclosure of names, taxpayers' identification numbers, and addresses of registered taxpayers in a municipality to that municipality); N.Y. Tax Law § 697(g) (McKinney 1975) (to cities for administration of personal income tax or unincorporated business income tax only); Ohio Rev. Code Ann. § 5747.18 (Page Supp. 1978) (names, addresses and identification numbers of taxpayers who may be subject to municipal tax to officers of the municipal corporation); Tenn. Code Ann. § 67-134(d) (Supp. 1979) (to authorized official of unit of local government for the purpose of ascertaining whether proper local taxes are being paid); Va. Code § 58-46 (Supp. 1979) (commissioner of the revenue, director of finance, or similar collector of county city or town taxes can inspect the returns in the performance of his official duties); W. Va. Code § 11-10-5(g) (Supp. 1979) (municipality can inspect returns for municipal tax purposes).


states also permit disclosure to the tax administrators of other states and the federal government. 27

In tax proceedings, tax returns enjoy no confidentiality.28 Thus, many states specifically permit the disclosure of tax returns for use in court proceedings arising under the tax laws.29 In proceedings not arising under the tax laws, however, the confidentiality statutes in most states prohibit government officials from complying with a subpoena.30 In the majority of jurisdic-


28. "To confer a privilege in such cases would defeat the more efficient administration of the agency that the legislature was attempting to create by enacting the protective provision." Comment, Federal Rules of Evidence and the Law of Privileges, 15 Wayne L. Rev. 1286, 1304 (1969).


tions, this prohibition does not create an evidentiary privilege for the tax returns in the hands of the taxpayer; in fact he may be required to secure a copy of his return from the state. The courts in these jurisdictions have noted that the state policies in favor of confidentiality should be a prime consideration in determining whether to compel a party to produce his tax records.

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31. In re Hines, 69 F.2d 52, 52 (2d Cir. 1934) (applying New York law); Constantine v. Constantine, 274 Ala. 374, 378-79, 149 So. 2d 262, 266-67 (1963); Bailey v. Bruce, 132 Ga. App. 782, 786, 209 S.E.2d 135, 138 (1974); Bianchi v. Pattison Pontiac Co., 258 So. 2d 388, 389-90 (La. Ct. App. 1972); State ex rel. Boswell v. Curtis, 334 S.W.2d 757, 762-63 (Mo. Ct. App. 1960); Schriock v. Schriock, 128 N.W.2d 852, 863 (N.D. 1964); see Losavio v. Robb, — Colo. —, 579 P.2d 1152, 1157 (1978) (en banc) (secrecy statute does not create a testimonial privilege); DonBullian v. DeLisa, 246 Md. 734, 738, 230 A.2d 349, 351 (1967) (state tax returns admissible as evidence; question of privilege not considered); Banks v. Macenka, 5 Pa. D. & C. 3d 318 (Pa. Dist. Ct. 1978) (same). But see Webb v. Standard Oil Co., 49 Cal. 2d 509, 319 P.2d 621 (1957); Leave v. Boston Elevated Ry., 306 Mass. 391, 28 N.E.2d 483 (1940). The Webb court held that the California secrecy statute implicitly created a privilege for state tax returns in the taxpayer's hands. Although the California Supreme Court has expressly refused to overrule Webb, Crest Catering Co. v. Superior Court, 62 Cal. 2d 274, 277, 398 P.2d 150, 152, 42 Cal. Rptr. 110, 112 (1965) (en banc), that court has noted that "no attempt has been made . . . to define the full ambit of the privilege." Sav-on Drugs, Inc. v. Superior Court, 15 Cal. 3d 1, 8, 538 P.2d 739, 743, 123 Cal. Rptr. 283, 287 (1975) (en banc). The lower California courts have begun to define the parameters of the taxpayer privilege. For example, in Wilson v. Superior Court, 63 Cal. App. 3d 825, 134 Cal. Rptr. 130 (1976), the court noted that the taxpayer privilege was not expressly created by statute, but was "interpolated" both from the secrecy statute that prohibited disclosure by public employees and from the underlying policy. Thus, because the privilege was judicially created, "[i]t is for the courts to interpret [its] meaning." Id. at 829, 134 Cal. Rptr. at 132-33. The Wilson court held that a taxpayer waives the privilege of confidentiality attaching to copies of his income tax returns when he files a lawsuit placing the contents of those returns directly in issue. Id. at 830, 134 Cal. Rptr. at 133; see Miller v. Superior Court, 71 Cal. App. 3d 145, 149, 139 Cal. Rptr. 521, 523-24 (1977) (tax return privilege does not apply in the context of a proceeding to enforce child support orders made pursuant to the state's Family Law Act when the privilege is invoked by the defaulting party).


Perhaps the greatest divergence among the jurisdictions on tax return confidentiality concerns the use of tax information in nontax criminal investigations and proceedings. Many states expressly prohibit the use of income tax returns in nontax cases. A lesser number of jurisdictions do not expressly prohibit such disclosure and, because confidentiality provisions are narrowly construed, would appear to permit the use of tax information in criminal investigations. Finally, the relevant statutes in a third group of jurisdictions are ambiguous on such disclosure. In a number of these last jurisdictions, however, it is unlawful to disclose tax information in a nontax proceeding except in accordance with a judicial order. Such provisions have


36. See note 14 supra.


in a few jurisdictions been interpreted as prohibiting disclosure in any nontax criminal proceeding.39

The dichotomy with respect to the availability and use of tax return information in nontax criminal investigations is exemplified by the procedures used in New York and Wisconsin. New York's confidentiality provision,40 one of the type expressly prohibiting the use of return information in any nontax proceedings,41 excepts from its ban any disclosure made "in accordance with [a] proper judicial order."42 In New York State Department of Taxation and Finance v. New York State Department of Law,43 the state's law department, relying on the judicial order exception and general notions of interagency cooperation,44 sought to compel the state's tax department to produce income tax returns for a grand jury investigation into organized crime.45 The tax department's refusal to comply with the request was upheld by the New York court of appeals, which strictly construed the statute and its exception:

Absent possible circumstances so extraordinary that they plumb the very depths of judicial and Grand Jury power, a "proper order" is one which either effectuates the enumerated exceptions within the statute or which arises out of a case in which the report is itself at issue, as in a forgery or perjury prosecution.46

In New York, therefore, state prosecutors are foreclosed from obtaining income tax information for use in their criminal investigations. Wisconsin, on the other hand, expressly permits the use of tax return information in non-tax criminal proceedings.47 The returns, however, may only be used if a court order is issued based on findings that there is reasonable cause to believe that a criminal act has been committed, that the return information is probative evidence of a matter in issue and that the information sought cannot reasonably be obtained from another source.48


41. See note 34 supra and accompanying text.


44. Id. at 581-82, 378 N.E.2d at 114, 406 N.Y.S.2d at 751.

45. Id. at 578, 378 N.E.2d at 112, 406 N.Y.S.2d at 749.

46. Id. at 582, 378 N.E.2d at 114, 406 N.Y.S.2d at 752.


48. Id. § 71.1144)(g)(a)-(c). It is noteworthy that the Wisconsin provision is identical to the provision governing the disclosure of federal income tax returns for use in nontax criminal investigations. See notes 122-26 infra and accompanying text. See also Conn. Gen. Stat. § 12-520 (1979) (disclosure of tax returns to any officer or department of the state government when there is reasonable cause to believe that there is a violation of any state law).
There are two basic policy considerations supporting confidentiality of tax information. The primary state policy is to encourage citizens to make truthful and complete disclosure in their tax returns. When "[a]n attempt to get [information] by mere compulsion might be tedious and ineffective . . . and a concession of anonymity . . . meaningless[,] . . . it is expedient for the government to promise to cloak the information in some special degree of secrecy in exchange for ready and truthful disclosure." In jurisdictions that strictly enforce the confidentiality provisions, this proscription against the use of tax information in nontax proceedings also benefits the filing citizen by respecting his individual privacy and by reducing the possibility of self-incrimination.

A secondary state policy underlying the confidentiality provisions is easing the government's "housekeeping" burden. This policy seeks to prevent disclosure of the opinions of executive officials, to preserve state documents from wear and tear, and to avoid inconvenience to the state due to repeated demands for disclosure of tax information. The importance that the state legislatures attach to both of these policies is evidenced by the stringent penalties provided for violation of the confidentiality provisions, including fines, imprisonment and temporary and permanent dismissal from office.


50. 8 J. Wigmore, supra note 11, § 2377, at 781 (footnote omitted).

51. See note 33 supra and accompanying text.

52. New York State Dept' of Taxation & Fin. v. New York State Dept' of Law, 44 N.Y.2d 575, 579, 378 N.E.2d 110, 112-13, 406 N.Y.S.2d 747, 750 (1978); see Wales v. Tax Comm'n, 100 Ariz. 181, 184-85, 412 P.2d 472, 475 (1966) (en banc) ("[u]ndoubtedly, the Legislature of Arizona, in requiring that tax returns and reports be kept secret, was fully cognizant of the Fifth Amendment . . . for it makes possible a variety of criminal prosecutions from information obtained by reason of an inspection of a tax return extorted under compulsion of law"); IBM Corp. v. State, 71 Mich. App. 526, 540, 248 N.W.2d 605, 612 (1976) (protection of the taxpayer's privacy is contemplated by the confidentiality statute).

53. Required Report, supra note 11, at 286-87; see In re Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373, 380 n.14 (3d Cir. 1976); 2 J. Weinstein & M. Berger, supra note 11, ¶ 502[02], at 502-5 to -6.


Most state confidentiality provisions barring the use of tax information in nontax criminal proceedings are commendable attempts at furthering the governmental interest in complete disclosure while simultaneously protecting the privacy of the state's citizens. The existence of such provisions, however, can be justified only if the policies involved are actually furthered by application of the statutes. If the provisions are ineffective in furthering state policy, they do not so much present a double benefit as a double threat: they lull the filing citizen into a false sense of security as to the confidentiality of his returns while hampering the state in prosecuting criminals for nontax violations.

II. Effectiveness of Strict Income Tax Confidentiality


56. Required reports statutes "both state and federal, may generally be assumed to embody policies of significant dimensions." Advisory Comm.'s Notes to Proposed Rule 502 of Fed. R. Evid., 56 F.R.D. 183, 235 (1972); see United States v. King, 73 F.R.D. 103, 106 (E.D.N.Y. 1976). This view, however, is not universally held. One commentator discussing required reports statutes has noted that "in legislative halls when bills requiring such reports are proposed the need for encouraging frank and full reports looms large to the proponents [of the confidentiality statutes], but the judges and lawyers who would urge the need for truth in litigation are not alerted to oppose the privilege." C. McCormick, supra note 13, at 239.

57. See note 34 supra and accompanying text.

requiring the state taxing agencies to refuse disclosure. Such statutes, however, may no longer effectuate their original purposes. The continued validity of the confidentiality provisions can best be analyzed by measuring them against the four criteria generally used to determine whether a communication should be judicially recognized as privileged: (1) the relationship sought to be protected must be one that should be sedulously fostered; (2) the communication must originate in the confidence that it will not be disclosed; (3) the confidentiality accorded to the communication must be essential to the maintenance of the relationship; and (4) the injury that would inure to the relationship because of disclosure must outweigh the benefits resulting from disclosure.59

The confidentiality provisions would appear to satisfy the first of these four criteria. The relationship sought to be fostered by the confidentiality statutes is that between the taxpayer and the government. This relationship is an integral component of the government's taxing power—a power that is basic to the ultimate purpose and function of any government.60 The successful development of this taxpayer/government relationship takes on added importance because most jurisdictions have adopted a voluntary, self-assessment taxation system.61 Were it not for the taxpayers' voluntary compliance, the governmental resources expended in administering the tax laws would be enormously increased.62 Consequently, the state governments are fully justified in taking steps to ensure that the taxpayer/government relationship is sedulously fostered.

The second criterion—that the communication originate in the confidence that it not be disclosed—is not met. Although a taxpayer may expect that his tax returns will generally be treated as confidential,63 he cannot reasonably expect that his return will not be used for the purpose of enforcing nontax criminal laws. For example, the federal courts are not bound by the state

59. Oleksiw v. Weidener, 2 Ohio St. 2d 147, 149, 207 N.E.2d 375, 377 (1965); State v. Antill, 176 Ohio St. 61, 64, 197 N.E.2d 548, 551 (1964); 8 J. Wigmore, supra note 11, § 2192, at 70.


confidentiality statutes,\textsuperscript{64} nor are they likely to recognize the privilege created by those statutes as part of the federal common law of privileges.\textsuperscript{65} Because

\textsuperscript{64} In re Grand Jury Subpoena, 468 F. Supp. 575, 577-78 (N.D.N.Y., appeal dismissed, 607 F.2d 566 (2d Cir. 1979); United States v. Shamster, 79 Cr. 546 (S.D.N.Y. Sept. 20, 1979) (confidentiality statute in New York Corporate Tax Law did not bar the disclosure of corporate tax returns for possible use in a federal criminal trial); In re New York State Sales Tax Records, 382 F. Supp. 1205, 1206 (W.D.N.Y. 1974) (confidentiality statute in New York State Sales Tax Law did not bar production of sales tax returns to a federal grand jury); cf. United States v. King, 73 F.R.D. 103 (E.D.N.Y. 1976) (confidentiality statute in New York State Personal Income Tax Law did not bar production of personal income tax return for use in a federal criminal trial). In In re Grand Jury Subpoena, a federal grand jury investigating organized crime activities subpoenaed several personal income tax returns from the New York State Department of Taxation and Finance. 468 F. Supp. at 575-76. The department moved to quash the subpoena, asserting that compliance would contravene § 697(e) of the New York Tax Law. Id. at 576. The court denied the department's motion to quash notwithstanding its finding that § 697(e) did prohibit compliance with the subpoena. Id. at 576-77; see N.Y. Tax Law § 697(e) (McKinney Supp. 1979-1980). The court held that the supremacy clause of the United States Constitution mandated that the state secrecy statute yield to the federal grand jury power. 468 F. Supp. at 577-78; see U.S. Const. art. VI, § 2. A similar result has been reached when other state-created privileges were at issue. See, e.g., United States v. Chiarella, 588 F.2d 1358, 1372 (2d Cir. 1979) rev'd on other grounds, 100 S. Ct. 1108 (1980) (New York statute prohibiting the disclosure of statements made on application for unemployment benefits does not bar the production of the statements for use in a federal criminal prosecution); In re Special April 1977 Grand Jury, 581 F.2d 589, 592-93 (7th Cir.), cert. denied, 439 U.S. 1046 (1978) (Illinois statute did not preclude the production of state attorney general's records before a federal grand jury); In re Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373, 377 (3d Cir. 1976) (rule of court that retainer agreements are privileged did not bar compliance with federal grand jury subpoena); United States v. Thorne, 467 F. Supp. 938, 940-41 (D. Conn. 1979) (state statute prohibiting the disclosure of arrest and court records in cases that culminate in not guilty findings does not bar the production of court records pursuant to a federal subpoena); United States v. Blasi, 462 F. Supp. 373, 374 (M.D. Ala. 1979) (motion of Alabama Director of Industrial Relations to quash a grand jury subpoena directed at documents privileged by state statute was denied); SEC v. First Tenn. Bank, 445 F. Supp. 1341, 1344 (W.D. Tenn. 1978) (SEC subpoena upheld notwithstanding a state statute that prohibited a fiduciary from disclosing financial records absent either the customer's consent or a demand served on the customer). The same has been true even when the privilege is created by the state's constitution. See United States v. Gillock, 100 S. Ct. 1185, 1190 (1980) (state constitutional speech or debate privilege does not create a privilege in federal courts for state legislators); In re Grand Jury Proceedings, 563 F.2d 577, 582 (3d Cir. 1977) (same); United States v. Craig, 537 F.2d 957, 958 (7th Cir.) (en banc) (same), cert. denied, 429 U.S. 999 (1976).

\textsuperscript{65} Although the confidentiality statutes are not controlling, the federal courts can recognize a federal common law for privileges under Federal Rule of Evidence 501. Fed. R. Evid. 501. This rule provides that the federal common law of privileges governs in federal criminal prosecutions. Id. Rule 501, however, is intended to give the courts a "flexible standard" with which to develop the federal common law of privileges on a case-by-case basis. United States v. Gillock, 100 S. Ct. 1185, 1190 (1980); Trammel v. United States, 100 S. Ct. 906, 911 (1980); In re Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373, 379 (3d Cir. 1976); United States v. Allery, 526 F.2d 1362, 1366 (6th Cir. 1975); Lewis v. United States, 517 F.2d 236, 238 n.4 (9th Cir. 1975); United States v. King, 73 F.R.D. 103, 105 (E.D.N.Y. 1976); 2 D. Louisell & C. Mueller, Federal Evidence § 201, at 411-12 (1972); 2 J. Weinstein & M. Berger, supra note 11, ¶ 501[02], at 501-20.4-5; Krattenmaker, Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach, 64 Geo. L.J. 613, 645-46 (1976). Two federal courts, however, have declined to recognize a state required reports privilege as a federal common law
state returns have been used in federal criminal investigations\(^6\) it is at least arguable that an expectation of confidentiality is not in fact reasonable.

Even if the federal courts were to recognize a federal common law privilege, the confidentiality statutes could not withstand the scrutiny demanded by the third privilege criterion. The privilege accorded to state officials to refuse to disclose tax returns for purposes of enforcing nontax criminal laws is not essential to the maintenance of the taxpayer/government relationship. The confidentiality statutes do not foster their primary objective of encouraging honest reporting on state income tax returns.\(^6\) Confidentiality per se is not essential to the advancement of honest reporting; most states rely primarily on other methods to achieve this goal.\(^6\) These include civil and criminal sanctions for failing to file returns or for filing returns that are incomplete,\(^6\) cooperation with other taxing authorities\(^7\) and techniques for

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\(^6\) See In re Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373 (3d Cir. 1976); United States v. King, 73 F.R.D. 103 (E.D.N.Y. 1976). In King, a federal prosecutor issued a subpoena duces tecum directing the New York City Department of Finance to furnish certain New York City income tax returns. The city, contending that a provision in the New York City Administrative Code prohibited compliance, moved to quash the subpoena. Id. at 104. The New York City confidentiality statute at issue in King is similar in form to New York State's. See note 11 supra. Judge Weinstein denied the motion to quash the subpoena, stating that "[w]e cannot accept the contention that the important federal interests at stake are to be sacrificed in order to avoid, at most, an insignificant adverse impact on a state policy that is, at best, marginally served by the local statutory scheme." 73 F.R.D. at 109. Although neither court decided that federal courts will never recognize a federal common law privilege for state required reports, it is unlikely that they will do so. This conclusion is further supported by the recent Supreme Court decision in United States v. Gillock, 100 S. Ct. 1185 (1980). In that case, the Supreme Court declined to recognize a federal common law privilege for state legislatures. Id. at 1190. The case indicates the strong policy in the federal courts that favors the admissibility of evidence, and consequently disfavors the creation of privileges. See also Trammel v. United States, 100 S. Ct. 906, 911 (1980); United States v. Nixon, 418 U.S. 683, 709-10 (1974); In re Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373, 382 (3d Cir. 1976); 8 J. Wigmore, supra note 11, § 2192, at 73. This is especially true in a criminal prosecution. See United States v. Nixon, 418 U.S. 683, 709 (1974).


\(^6\) See notes 49-50 supra and accompanying text.

\(^6\) See In re Grand Jury Subpoena, 468 F. Supp. 575, 577 (N.D.N.Y.), appeal dismissed, 607 F.2d 566 (2d Cir. 1979); United States v. Shamster, 79 Cr 546 (S.D.N.Y. Sept. 20, 1979); In re Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373, 377, 380 (3d Cir. 1976) (disciplinary proceedings and judicial refusal to enforce unfiled retainer agreements were two effective means, other than a privilege provision, that could ensure compliance with a court rule requiring that retainer agreements be filed with the court). In King, Judge Weinstein took judicial notice that "criminal statutes, cooperation with other taxing authorities and techniques for withholding taxes at the source. . . . are immeasurably more effective than are privilege provisions." 73 F.R.D. at 108.

\(^6\) For example, in New York a willful attempt to evade tax, failure to file a return or the filing of a fraudulent return is a misdemeanor, punishable by a fine not to exceed $5,000, or imprisonment not to exceed one year, or both, at the discretion of the court. N.Y. Tax Law § 695(a) (McKinney 1975 & Supp. 1979-1980).

\(^7\) Most states permit other states to inspect income tax returns for the purpose of adminis-
withholding taxes. Thus, the promise of an ironclad prohibition against disclosure is at best a peripheral inducement to honest reporting. Even if the confidentiality statutes were more than a peripheral inducement, it is not clear that the state's promise of confidentiality does in practice induce honest reporting. In analyzing this speculative policy rationale, an examination of the effect of increased federal income tax return confidentiality is instructive. In 1976, Congress dramatically increased the degree of confidentiality accorded to federal income tax returns. Many proponents of the change predicted that the increased confidentiality would benefit the tax administration system because more honest reporting by the taxpayers would be encouraged. The anticipated result, however, has not occurred; to the contrary, voluntary compliance has actually decreased. Thus, there is no guarantee that increased confidentiality will result in increased candor on state income tax returns.

When analyzing the state confidentiality statutes' effect on voluntary compliance with the tax laws, it is also important to understand the nature of the information protected. In many cases, state income tax returns require essentially the same information as federal income tax returns. Because the IRC expressly authorizes the Internal Revenue Service (IRS) to disclose federal income tax returns for purposes of enforcing federal nontax criminal statutes, a taxpayer would be unlikely to report potentially damaging information in his federal return. Consequently, because of the similarities between the state and federal forms, the taxpayer will be likely to file incomplete returns with the state as well. Finally, because state income tax

71. See note 27 supra and accompanying text. Similarly, the IRS is permitted to allow states to inspect federal income tax returns. See note 110 infra and accompanying text.
74. Id. at 109; cf. In re Grand Jury Impaneled Jan. 21, 1975, 541 F.2d 373, 383 (3d Cir. 1976) (rationale that court rule making required reports privileged encouraged honest reporting was "speculative").
75. See notes 101-26 infra and accompanying text.
76. See, e.g., Administrative Report, supra note 16, at 943, 1022; Senate Hearings, supra note 1, at 200, 228, 235, 238 (statements of Sen. Lowell P. Weicker and former IRS commissioners Mortimer M. Caplin, Sheldon S. Cohen, & Randolph W. Thrower); House Hearings, supra note 1, at 134 (statement of Sheldon S. Cohen, former IRS Commissioner). Mr. Cohen, referring to a case in which a criminal defendant's tax returns were used against him, stated that "after all, Mr. Garner did pay his tax. The next time around Mr. Garner will not pay his tax." Id.
77. See notes 118-26 infra and accompanying text.
78. See note 55 infra and accompanying text.
79. See In re Hines, 69 F.2d 52, 53 (2d Cir. 1934) ("The [tax return] information given to [the
returns are subject to subpoena in federal criminal investigations, any protection accorded to the returns by the state that might arguably encourage honest reporting is rendered ineffectual because of the availability of the tax returns to federal law enforcement authorities.

Just as the state policy in favor of honest reporting is not furthered by the maintenance of the privilege, neither is the state policy in favor of taxpayer privacy substantially furthered. Although the privacy concern is well-founded—a tax return provides a skeletal financial and personal profile of the taxpayer—the privacy of only a few taxpayers would be intruded upon by the use of state income tax returns in nontax criminal investigations.

federal and New York governments is substantially the same. No greater confidence is placed in one than in the other." (emphasis added)); United States v. King, 73 F.R.D. 103, 108-09 (E.D.N.Y. 1976) ("Since the requirement to file state and city tax returns is similar to the federal revenue provisions, a scheme to evade federal taxes by filing false returns . . . would almost necessarily include consistent action concerning state and city returns."). The likelihood that the taxpayer will fail to report incriminating data on both federal and state returns is increased because the state and federal governments share tax return information. See note 27 supra and accompanying text; note 110 infra and accompanying text. Thus, if the taxpayer fails to report incriminating data on his federal return, but, relying on the state confidentiality provision, reports that same information on his state return, his chances of being prosecuted for federal income tax evasion are increased.

80. See notes 64-65 supra and accompanying text.

81. Brief for Amicus Curiae at 5, New York State Dep't of Taxation & Fin. v. New York State Dep't of Law, 44 N.Y.2d 575, 378 N.E.2d 110, 406 N.Y.S.2d 747 (1978) ("There is no societal benefit to be obtained by maintaining that New York State tax records are immune from grand jury subpoena in state criminal investigations, when they are subject to subpoena in federal criminal investigations. Certainly the additional disclosure in state criminal investigations would not significantly alter the situation so as to deter from candid revelations those taxpayers who would be undeterred by the availability of federal grand jury subpoenas.").

82. See note 52 supra and accompanying text.

83. See Administrative Report, supra note 16, at 827. One observer has stated that a tax return "is a confessional, and in that respect maybe we ought to treat it as a confessional." Senate Hearings, supra note 1, at 235 (statement of Sheldon S. Cohen, former IRS Commissioner). See also Boskee v. Comingore, 177 U.S. 459, 470 (1900).

84. See House Hearings, supra note 1, at 27 (statement of Richard L. Thornburgh) (use of federal income tax returns to aid in the prosecution of official corruption and white collar crime affects .007% of all returns filed); House Hearings II, supra note 1, at 39 (statement of Jay Waldman) (the use of federal income tax returns in nontax criminal investigations does not implicate a "mass privacy question"). It is arguable that the exceptions to the nondisclosure rule set out in the state confidentiality statutes detract from the policy goals set by the legislatures. In some states, however, the exceptions in the statute are related to the administration of the tax laws, or relate to the eligibility for aid voluntarily solicited from the state. Thus, the disclosure can be said to have a voluntary character. See New York State Dep't of Taxation & Fin. v. New York State Dep't of Law, 44 N.Y.2d 575, 580-81, 378 N.E.2d 110, 113-14, 406 N.Y.S.2d 747, 751 (1978). State courts have also recognized that the privilege accorded state income tax returns is not absolute. The exceptions recognized by those courts, however, have occurred when the taxpayer waived the confidentiality of the returns, see Wilson v. Superior Court, 63 Cal. App. 3d 825, 830, 134 Cal. Rptr. 130, 133 (1976) (privilege waived when taxpayer files a lawsuit placing the contents of his tax returns directly in issue); Strycker's Bay Apts., Inc. v. Walsh, 67 Misc. 2d 134, 137, 323 N.Y.S.2d 563, 566-67 (Sup. Ct. 1971) (disclosure of housing project residents' income tax returns was permitted solely on the ground that the residents waived any right to confidentiality by residing in publicly aided housing that was subject to income requirements), or
Moreover, if the tax returns were not available, the same information could be obtained from other sources, the only difference being the added burden to the government. This concern arose because tax returns were, and continue to be, compelled from the taxpayer by the government, thereby raising the possibility of a fifth amendment violation. This issue was squarely faced by the Supreme Court in Garner v. United States. In Garner, the defendant contended that the use of his federal tax returns as evidence against him in a nontax criminal prosecution violated his fifth amendment rights. The Court held that a person who invokes a fifth amendment privilege as to his tax return must do so when he files the return—the privilege may not be claimed once the potentially incriminating information has been disclosed. It appears that a clearly superior state policy was implicated. See Miller v. Superior Court, 71 Cal. App. 3d 145, 149, 139 Cal. Rptr. 521, 523 (1977) (public policy of enforcing child support obligations). It is noteworthy that the Miller court found evidence of the strong policy set out in California's tax return confidentiality statute. Id. at 148-49, 139 Cal. Rptr. at 523.

For example, the information contained on a tax return could be obtained from bank records, payroll records, and accountant's records. House Hearings, supra note 1, at 29 (statement of Richard L. Thornburgh). If the government were forced to rely on these sources, however, it would be required to canvass large numbers of financial institutions, a "cumbersome, inartful, and expensive" procedure. Id. at 28; see 126 Cong. Rec. S2380 (daily ed. Mar. 11, 1980).

66. See note 52 supra and accompanying text.


68. U.S. Const. amend. V. The fifth amendment provides in relevant part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Id. Generally, this amendment protects a person from being compelled to give testimony that may tend to incriminate him. McCarthy v. Arndstein, 266 U.S. 34, 40 (1924). The privilege encompasses not only answers that would in themselves support a conviction but also protects answers that would "furnish a link in the chain of evidence needed to prosecute [a person] for a federal crime." Hoffman v. United States, 341 U.S. 479, 486 (1951); see United States v. Yurasovich, 580 F.2d 1212, 1215 (3d Cir. 1978). The amendment "reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial." Malloy v. Hogan, 378 U.S. 1, 7 (1964); see Rogers v. Richmond, 365 U.S. 534, 540-41 (1961).


86. See note 52 supra and accompanying text.
pears, therefore, that the fifth amendment, applicable to the states through the fourteenth amendment,92 is not violated by use of the state tax returns in nontax prosecutions.93 It is also noteworthy that a taxpayer's fifth amendment rights are not completely emasculated by the use of the returns to enforce nontax criminal laws—he is afforded the opportunity to claim the privilege when he files his return.94

When the prohibition against the use of state income tax returns for the purpose of enforcing criminal laws is analyzed in light of the third criterion, therefore, it is apparent that the privilege is not essential to encourage honest reporting, affords minimal protection to the taxpayer's privacy and allows the taxpayer a second opportunity to assert fifth amendment rights. The legislative concern with these policies, however, begins to pale when balanced, under the fourth criterion, against the benefits to be deprived from the use of the returns in other investigations. The importance of tax return information in the fight against organized and white collar crime, public corruption and narcotics trafficking has been frequently emphasized.95 The information is


94. See note 91 supra and accompanying text.

necessary because "complex crimes are difficult ... to detect as there are seldom any innocent bystanders to witness the offenses and the victims, who may comprise a significant sector of the population, are usually unaware that they have been victimized."96 Thus, tax return information is essential to establish the occurrence of a crime.97 For example, fictitious transactions are often used to disguise the illegal payments associated with illegal schemes. To pierce that disguise, the government must compile a complete financial profile of all suspected participants in the scheme. Tax returns provide a starting point for those profiles.98 Although this information is available from other sources,99 special problems attend its collection. For example, attempts to gather the information from another source could alert the subject of the government's investigation, giving him the opportunity to destroy other evidence or in some way obstruct the investigation.100 The usefulness of this information clearly outweighs any negligible impact on the state policies that support the prohibitions against the use of tax returns for the purpose of enforcing nontax criminal laws. Consequently, New York and states with similar provisions should adopt a statute that will strike a balance between the policies underlying the confidentiality provisions and the usefulness of the returns in enforcing nontax criminal statutes. Such a statute has recently been adopted by the federal government.

III. FEDERAL INCOME TAX CONFIDENTIALITY

Prior to 1976, federal income tax returns and tax return information were treated as a "generalized governmental asset."101 Although public disclosure of tax returns was prohibited, federal agencies, including federal prosecutors, enjoyed almost unlimited access to them.102 Congress, however, discontinued

(daily ed. Mar. 11, 1980) (remarks of Sen. Nunn); Letter from Kevin D. Rooney, Ass't Att'y Gen. for Admin., to Allen R. Voss (Nov. 13, 1978), reprinted in Comptroller General's Report, supra note 76, at 54. This information is used "more often for investigative purposes than for trial." Id. at 52.


98. House Hearings, supra note 1, at 28 (statement of Richard L. Thornburgh).

99. See note 85 supra and accompanying text.

100. House Hearings, supra note 1, at 29 (statement of Richard L. Thornburgh). Another problem is the added expense and delay occasioned by the government's reliance on alternative sources. Id. at 28-29; see note 85 supra and accompanying text.


102. See Senate Report, supra note 1, at 317, reprinted in [1976] U.S. Code Cong. & Ad. News at 3746-47; General Explanation, supra note 1, at 314, reprinted in 1976-3 C.B. at 327-28; Administrative Report, supra note 16, at 827-1023. Prior to its amendment in 1976, IRC § 6103 provided that tax returns and tax return information were public records that could be disclosed either upon order of the President or under rules and regulations provided by the Secretary of the Treasury and approved by the President. Revenue Act of 1916, Pub. L. No. 64-271, § 14(b), 39 Stat. 756 (1916) (current version at I.R.C. § 6103(a)). This loosely drawn statute resulted in
this practice when it enacted the 1976 Tax Reform Act, substantially revising the IRC section that governs tax return confidentiality. In amending the statute, Congress sought to balance the government's need for information against the taxpayer's right to privacy and the government's interest in maintaining the effectiveness of the federal voluntary self-assessment tax system.

Section 6103 of the IRC now provides that tax returns and tax return information may not be disclosed except as specifically provided in the statute. For example, disclosure is authorized to congressional commit-

widespread dissemination of tax returns and return information by the IRS. Administrative Report, supra note 16, at 829.

104. Id. § 1202 (codified at I.R.C. § 6103).
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Delegates, to the President or his designated employees, to certain federal officers and employees for the purpose of administering the tax laws, to state tax officials, and to certain federal agencies for statistical purposes. More important, although section 6103 expressly permits disclosure of taxpayer return information to officers and employees of a federal agency for use in federal nontax criminal investigations or judicial proceedings, it limits the opportunities for such disclosure.

The proposed use of tax return information in nontax criminal investigations and proceedings was the most controversial issue surrounding the Tax Reform Act. The proponents of such use, most notably the Justice Department, contended that tax return information is essential to combat white collar crime, organized crime, public corruption, and narcotics trafficking. The opponents, on the other hand, were concerned with the effect that disclosure would have on individual privacy, and the functioning of the federal tax system. In balancing these competing interests, Congress con-


107. I.R.C. § 6103(f). Disclosure is authorized to the three congressional committees that oversee the IRS, id. § 6103(f)(1), to the chief of staff of the Joint Committee on Taxation, id. § 6103(f)(2), and to nontax committees. Id. § 6103(f)(3).

108. Id. § 6103(g)(1). The statute specifically authorizes disclosure of the tax return of an individual designated for possible appointment to a federal office by the President. Id. § 6103(g)(2)

109. Id. § 6103(h). The term "tax administration" is defined as "the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes . . . and the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, and includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws or statutes." Id. § 6103(b)(4).

110. Id. § 6103(d). The disclosure of federal income tax returns to any state agency, body or commission that is charged with the administration of the state tax laws is authorized only for the purpose of tax administration. Id. For the corresponding state provisions, see note 27 supra and accompanying text.

111. I.R.C. § 6103(j). For example, this subsection authorizes the disclosure of tax returns to the Bureau of the Census, the Bureau of Economic Analysis of the Commerce Department, and the Federal Trade Commission for statistical use. Id. § 6103(j)(1), (2).

112. Id. § 6103(j).


114. See note 95 supra and accompanying text.


cluded that "the information that the American citizen is compelled by our tax laws to disclose to the Internal Revenue Service [is] entitled to essentially the same degree of privacy as those private papers maintained in his home." Thus, Congress amended section 6103(i) to accommodate both the interest in the taxpayer's privacy and the legitimate need for the information to enforce nontax criminal laws.

Unlike other subsections of section 6103, subsection (i) distinguishes between "return information" and "information from [the] taxpayer." Return information, the information generally protected by section 6103, is any information collected by the IRS, without regard to the source. This information can be disclosed by the IRS, upon a written request by the head of a federal agency, for use in a nontax criminal investigation. Moreover, if the IRS discovers evidence of a possible nontax criminal violation, it may disclose that information, in writing, to the head of the appropriate federal law enforcement agency.

Conversely, information from the taxpayer is information supplied to the IRS by, or on behalf of, the taxpayer. Any disclosure of this information for the purpose of enforcing nontax criminal laws must be preceded by an ex parte order. If the IRS discovers evidence of a possible nontax criminal

118. I.R.C. § 6103(i)(1)(A). Prior to the effective date of the amendment, the Justice Department was authorized to receive tax return information for use in nontax criminal proceedings when it was "necessary in the performance of . . . official duties." Former Treas. Reg. 301.6103(a)-1(g), T.D. 7266, 1973-1 C.B. 593. Federal prosecutors were required to make an application in writing and show: the name and address of the person for whom the return was made; the kind of tax involved; the taxable period covered by the return; and the reason why inspection was desired. Id. The requirement that reasons for the inspection be stated was "largely a charade." Administrative Report, supra note 16, at 859. Thus, federal prosecutors could obtain tax return information by routine requests to the IRS. United States v. Praetorius, 451 F. Supp. 371, 372-73 (E.D.N.Y. 1978); see, e.g., United States v. Costello, 255 F.2d 876, 883 (2d Cir.), cert. denied, 357 U.S. 937 (1958); United States v. Tucker, 316 F. Supp. 822, 826 (D. Conn. 1970). Consequently, before the Tax Reform Act of 1976, the Justice Department was the largest user of tax returns on an individual case-by-case basis, as opposed to a "mass" basis for statistical use. Senate Report, supra note 1, at 317, reprinted in [1976] U.S. Code Cong. & Ad. News at 3746; see Administrative Report, supra note 16, at 831.
119. I.R.C. § 6103(b).
120. Id. § 6103(i)(2). The request must include "(A) the name and address of the taxpayer with respect to whom such return information relates; (B) the taxable period or periods to which the return information relates; (C) the statutory authority under which the proceeding or investigation is being conducted; and (D) the specific reason or reasons why such disclosure is or may be material to the proceeding or investigation." Id.
121. Id. § 6103(i)(3).
122. Id. § 6103(b)(3). It is clear that this definition is intended to encompass information supplied by the taxpayer during an audit or in response to an administrative summons. Corey, supra note 106, at 1271-72; see General Explanation, supra note 1, at 316, reprinted in 1976-3 C.B. at 328. Moreover, this definition has been interpreted as encompassing corporate records, bank records, agent interviews, and Federal Bureau of Investigation information. 126 Cong. Rec. S2379 (daily ed. Mar. 11, 1980).
123. I.R.C. § 6103(i)(1). The temporary regulations make an exception to the ex parte order requirement when there is a joint tax and nontax-related investigation. The court proceeding is
violation, it may not sua sponte disclose that information to another federal agency.\textsuperscript{124} To obtain the information, the head of the interested federal agency\textsuperscript{125} must apply to a district court judge for an order that will only be granted upon a showing that:

(i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;
(ii) there is reason to believe that such return or return information is probative evidence of a matter in issue related to the commission of such criminal act; and
(iii) the information sought to be disclosed cannot reasonably be obtained from any other source, unless it is determined that, notwithstanding the reasonable availability of the information from another source, the return or return information sought constitutes the most probative evidence of a matter in issue relating to the commission of such criminal act.\textsuperscript{126}

Despite Congress' attempt to strike a balance between competing interests, section 6103(i) has been the subject of an ongoing controversy. Two proposed amendments to this section have been introduced in Congress. The House bill, which incorporates recommendations of the Privacy Protection Study Commission,\textsuperscript{127} proposes changes that would increase the protections accorded to the taxpayer's privacy.\textsuperscript{128} The Senate bill, on the other hand, the result of hearings held by the Senate Permanent Subcommittee on Investigations,\textsuperscript{129} proposes amendments that would increase access to tax return information by federal law enforcement agencies.\textsuperscript{130} To analyze the effects of these proposed amendments on section 6103(i), and on tax return confidentiality in general, three distinct elements should be considered: (1) the information protected, (2) the character of the required court proceeding, and (3) the showing that must be made to obtain the court order.

not required when the nontax matter arises out of the same factors and circumstances giving rise to the tax investigation or proceeding. The proceeding must be authorized as a proceeding involving tax administration at the request of the IRS, and, if the tax portion of the joint proceedings is terminated for any reason, the Department of Justice attorney working on the nontax portion must obtain a court order prior to further use of the returns. Temp. Treas. Reg. § 404.6103(h)(2)-1(a)(2), T.D. 7550, 1978-2 C.B. 322-23. The Justice Department has called this regulation "cumbersome and inefficient [but] helpful" as a vehicle for coordination of nontax cases with tax investigations. Letter from Kevin D. Rooney, Ass't Att'y Gen. for Admin., to Allen R. Voss (Nov. 13, 1978), reprinted in Comptroller General's Report, supra note 76, at 51, 56. The Privacy Protection Study Commission, on the other hand, has criticized this measure as an "easy way to avoid the Tax Reform Act's restrictions on the disclosure of tax data for non-tax criminal law enforcement." Privacy Protection Study Commission, Personal Privacy in an Information Society 557-58 (1977) [hereinafter cited as Privacy Report].

124. I.R.C. § 6103(i)(3).
125. In the case of the Justice Department, the Attorney General, the Deputy Attorney General, or any Assistant Attorney General may authorize the application. Id. § 6103(i)(1)(B).
126. Id.
The controversy surrounding the information protected stems from the distinction drawn by the present section between return information and information from the taxpayer. The House bill proposes that this distinction be eliminated, thus requiring a court order to disclose any information obtained by the IRS. The Senate bill would narrow the scope of the information protected. The latter proposal would distinguish "return information"—information required by law to be filed with the IRS—from, "nonreturn information"—all other information obtained by the IRS. The express purpose of this amendment is to eliminate the increased protection accorded to corporate records, bank records, agent interviews, and FBI information under the present scheme.

The proponents of the Senate bill are concerned primarily with the prosecutorial need for the information to investigate nontax criminal violations. They contend that the taxpayer's privacy would be adequately protected if the proposed amendment were adopted, notwithstanding the decrease in the amount of information accorded heightened protection. The Senate proposal, as well as the present statute, is apparently grounded on the theory that information in the hands of someone other than the taxpayer cannot be confidential. This rationale, however, fails to acknowledge that "[c]oncerns about invasions of personal privacy are not synonymous [sic] with Fifth Amendment protections." Although there is generally no constitutional protection accorded records in the hands of third parties, records

131. See notes 119-26 supra and accompanying text.
134. S. 2402, 96th Cong., 2d Sess. § 3, 126 Cong. Rec. S.2377 (daily ed. Mar. 11, 1980). Under this bill, any disclosure of non-return information would be authorized upon a written request by an attorney for the government. Id. § 7(i)(2)(A), 126 Cong. Rec. at S2377. The written request must set forth the name and address of the taxpayer, the taxable periods to which the information relates, and that the request is made in connection with an investigation that may result in the enforcement of a specific criminal statute. Id. This requirement is similar to the showing required under the present statute to obtain nontaxpayer return information. See note 120 supra and accompanying text. Moreover, the Senate proposal would place an affirmative burden on the IRS to notify the Justice Department whenever it uncovers evidence, other than from a tax return, of a nontax criminal violation. S. 2402, 96th Cong., 2d Sess. § 7(i)(2)(b)(4), 126 Cong. Rec. at S2377; see 126 Cong. Rec. S2375-76 (daily ed. Mar. 11, 1980) (remarks of Sen. Nunn).
138. See Privacy Report, supra note 123, at 556, 563.
139. Id. at 563.
140. Neither the fourth amendment nor the fifth amendment protects records in the possession of third parties. See, e.g., Smith v. Maryland, 99 S. Ct. 2577 (1979) (phone company records of defendant's phone calls were not protected by the fourth amendment); United States v. Miller,
such as credit card and banks files can often reveal the personal affairs of the taxpayer.\textsuperscript{141} Moreover, third party records are usually not maintained at the taxpayer’s option. Often, the third party is required by law to keep the records open for the IRS’s inspection.\textsuperscript{142} Other third party records are obtained through the IRS’s summons power and thus are not willingly relinquished to the IRS.\textsuperscript{143} Thus, regardless of the source, records obtained by the IRS should be accorded an equivalent degree of privacy.

The second element to be considered is the character of the court proceeding. The present federal statute, which requires an ex parte proceeding,\textsuperscript{144} contemplates an in camera inspection of the returns by a district court judge.\textsuperscript{145} Although the House bill proposes that the proceedings be adversarial,\textsuperscript{146} the ex parte nature of the proceeding appears fully justified. To afford the taxpayer an opportunity to contest the disclosure of his tax returns would hinder law enforcement\textsuperscript{147} and result in two major disadvantages. First, the taxpayer would be put on notice that he was being investigated, thus giving him the opportunity to obstruct the investigation.\textsuperscript{148} Second, an adversarial proceeding would result in needless delays.\textsuperscript{149} Because the taxpayer’s privacy interest is adequately protected by the requirement that an

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\item[(141)] Privacy Report, supra note 123, at 556; see note 83 supra and accompanying text.
\item[(142)] Privacy Report, supra note 123, at 556.
\item[(143)] Id.
\item[(144)] See notes 122-26 supra and accompanying text.
\item[(145)] United States v. Praetorious, 451 F. Supp. 371 (E.D.N.Y. 1978); see Senate Report, supra note 1, at 329, reprinted in [1976] U.S. Code Cong. & Ad. News at 3758; General Explanation, supra note 1, at 324, reprinted in 1976-3 C.B., at 336. The Justice Department expressed its fears that the added requirement of obtaining the court order would result in costly administrative delays, especially in light of the requirement that an in camera review be made. Letter from Kevin D. Rooney, Asst. Atty. Gen. for Admin., to Allen R. Voss (Nov. 13, 1978), reprinted in Comptroller General’s Report, supra note 76, at 51, 54-55. To alleviate such costly delays, the Senate bill proposes that the court be required to act on the application for an ex parte order within five days of receipt. S. 2402, 96th Cong., 2d Sess. § 7(i)(1)(C). The Justice Department expressed its fears that the added requirement of obtaining the court order would result in costly administrative delays, especially in light of the requirement that an in camera review be made. Letter from Kevin D. Rooney, Asst. Atty. Gen. for Admin., to Allen R. Voss (Nov. 13, 1978), reprinted in Comptroller General’s Report, supra note 76, at 51, 54-55. To alleviate such costly delays, the Senate bill proposes that the court be required to act on the application for an ex parte order within five days of receipt. S. 2402, 96th Cong., 2d Sess. § 7(i)(1)(C). The Justice Department expressed its fears that the added requirement of obtaining the court order would result in costly administrative delays, especially in light of the requirement that an in camera review be made. Letter from Kevin D. Rooney, Asst. Atty. Gen. for Admin., to Allen R. Voss (Nov. 13, 1978), reprinted in Comptroller General’s Report, supra note 76, at 51, 54-55. To alleviate such costly delays, the Senate bill proposes that the court be required to act on the application for an ex parte order within five days of receipt. S. 2402, 96th Cong., 2d Sess. § 7(i)(1)(C). The Justice Department expressed its fears that the added requirement of obtaining the court order would result in costly administrative delays, especially in light of the requirement that an in camera review be made. Letter from Kevin D. Rooney, Asst. Atty. Gen. for Admin., to Allen R. Voss (Nov. 13, 1978), reprinted in Comptroller General’s Report, supra note 76, at 51, 54-55. To alleviate such costly delays, the Senate bill proposes that the court be required to act on the application for an ex parte order within five days of receipt. S. 2402, 96th Cong., 2d Sess. § 7(i)(1)(C).
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impartial party rule on the request for the information after inspecting the returns in camera, an adversarial proceeding is not justified on grounds of fairness. Consequently, the ex parte procedure strikes a proper balance between the government's need for the information, and the taxpayer's right to privacy.

The final disputed element is the nature of the showing the government agency must make to gain access to the information. Under the present statute, the government must demonstrate that there is "reasonable cause" to believe that a specific criminal act has been committed, that the tax return is probative of a matter in issue, and that the return cannot reasonably be obtained from another source.\textsuperscript{151} The House bill proposes, instead, that the reasonable cause standard be replaced with a "probable cause" standard.\textsuperscript{152} The reasonable cause standard, however, is the better approach.\textsuperscript{153} When investigating organized or white collar crime, public corruption and narcotics trafficking, law enforcement authorities often are unaware of a specific criminal act that has been committed.\textsuperscript{154} Thus, a showing of probable cause would be virtually impossible to meet.\textsuperscript{155} Consequently, investigators would be deprived of information necessary to even pursue an investigation.

Furthermore, the present requirement that the information be relevant to a specific criminal act\textsuperscript{156} is unwarranted. The more realistic approach taken by the Senate bill, given the nature of the investigations in which tax return information is useful,\textsuperscript{157} would require a demonstration that the information is needed for an investigation which may result in the "enforcement of a

\begin{footnotes}
\item[150] See notes 122-26 supra and accompanying text.
\item[151] See note 126 supra and accompanying text.
\item[152] H.R. 354, 96th Cong., 1st Sess. § 5(b) (1979) (on file with the Fordham Law Review); see Privacy Report, supra note 123, at 553-57. Another proposal would establish a two-tier procedure. "Initially, the government would have to prove probable cause in an ex parte proceeding." Benedict & Lupert, supra note 106, at 960 n.120. If the government could not meet that burden, however, notice would be given to the taxpayer and at a second, contested hearing the government's burden would be reduced to "reasonable cause." Id. Other commentators, however, believe that the "reasonable cause" standard sufficiently protects the taxpayer's privacy. Comptroller General's Report, supra note 76, at 23; Benedict & Lupert, supra note 106, at 958-60.
\item[153] "Probable cause . . . exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." Berger v. New York, 388 U.S. 41, 55 (1967). The reasonable cause standard is an intentionally lesser standard than probable cause. Senate Report, supra note 1, at 328, reprinted in [1976] U.S. Code Cong. & Ad. News at 3758. See generally United States v. Ramsey, 431 U.S. 606, 612-13 (1977) (reasonable cause standard interpreted as less stringent than the probable cause standard). \textit{But see} People v. Blackman, 81 Misc. 2d 12, 14, 364 N.Y.S.2d 704, 707 (Sup. Ct. 1975) (terms "reasonable cause" and "probable cause" used interchangeably); People v. Lombardi, 18 A.D.2d 177, 180, 239 N.Y.S.2d 161, 164 (2d Dep't 1965) (per curiam) (same). The Privacy Protection Study Commission has interpreted this standard to mean that there must be "some basis to believe that a crime has been committed." Privacy Report, supra note 123, at 555.
\item[155] See notes 96-97 supra and accompanying text.
\item[156] See note 122 supra and accompanying text.
\item[157] See notes 96-100 supra and accompanying text.
\end{footnotes}
specifically designated federal criminal statute." Finally, the Senate bill proposes to eliminate the third requirement of the present statute, that the information be unavailable from another source. This would also appear to be justified. In most cases the requested information is available from another source. Thus, it would normally be impossible to make the required showing. The special problems associated with obtaining such information, however, appear to justify the elimination of this requirement.

CONCLUSION

Although IRC section 6103(i) is not free from controversy, it has proven that individual privacy and legitimate governmental needs can be successfully balanced. By prohibiting nontax prosecutorial use of income tax returns, many states have refused to strike that balance, with little appreciable gain to the policies sought to be advanced. First, the state's interest in encouraging candid self-reporting is merely speculatively and incidentally furthered. Second, the state's interest in protecting individual privacy is at best marginally served. Finally, the taxpayer's fifth amendment rights are not violated by such use. Consequently, those states should follow the federal example and attempt to achieve an acceptable balance between the policies underlying the confidentiality statutes and the usefulness of tax return information in investigating nontax criminal violations.

The federal statute, and the recent proposals to amend it, offer useful guidelines that the states should utilize in developing a statute that would strike an equitable balance between the policies served by the confidentiality statutes and the need for tax return information. For example, a state statute should require an ex parte order for the disclosure of any tax return information regardless of the source. This requirement, which calls for the judgment of an impartial third party and prevents overzealous state prosecutors from indiscriminately inspecting income tax returns, would sufficiently protect a taxpayer's privacy. To ensure that state prosecutors have access to the information when there is a legitimate need for it, however, they should merely be required to show that there is reasonable cause to believe that the information contained in the return is material and relevant to an investigation that may result in the enforcement of a specifically designated nontax criminal statute. In striking such a balance, the states will be taking an

159. Id. § 7(i)(A)(ii), 126 Cong. Rec. at S2377.
161. See notes 85, 99-100 supra and accompanying text.
162. See notes 87-81 supra and accompanying text.
163. See notes 82-85 supra and accompanying text.
164. See notes 86-94 supra and accompanying text.
165. The present statute and the House and Senate bills do not adequately balance the state's interest in protecting privacy with the government's need for information. They do, however, provide guidelines for a statute that would strike that balance.
166. See notes 131-43 supra and accompanying text.
167. See notes 144-61 supra and accompanying text.
important step forward in their fight against crime, at little cost to individual privacy.

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