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## LEGAL ETHICS AND FEDERAL TAXES, 1945-1965: PATRIOTISM, DUTIES, AND ADVICE

by

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*We are professional men not mere hired hands.*<sup>1</sup>

### I. INTRODUCTION

In 2013 we will celebrate (or, at least, commemorate) the century-mark of the Sixteenth Amendment and the federal income tax.<sup>2</sup> We should anticipate a flow of historical reflections on this first century of income

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1. Edmond N. Cahn et al., *Ethical Problems of Tax Practitioners: Transcript of the Tax Law Review's 1952 Banquet*, 8 TAX L. REV. 1, 9 (1952) [hereinafter Cahn et al., *Ethical Problems*] (statements by Jerome Hellerstein).

2. U.S. CONST. amend. XVI. For an introduction to the politics of the Sixteen Amendment ratification and the 1913 Revenue Act adoption, see W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA: A SHORT HISTORY 49-57 (2d ed. 2005) [hereinafter BROWNLEE, TAXATION IN AMERICA].

taxation.<sup>3</sup> These historical reflections on the income tax should develop our understanding of what has changed in the past century, and just as importantly, what has not changed, and will give us some idea of why one change occurred rather than another in any given case. It is likely that these reflections will focus on acts of Congress, nearly acts of Congress, and acts urged on Congress by enthusiastic supporters of one persuasion or another; the ebb and flow of economic theories and fiscal policies; responses to political, business, and technological changes; and, of course, important court cases that went this way and that way and, sometimes, the right way.

Yet the history of the income tax is, in large part, also the history of tax lawyers. Without these lawyers working to interpret the tax code, to advise clients on planning with the tax code, and to advocate for the rights of clients under the tax code, the income tax system would not be what it has become. The role of these lawyers, especially their own sense of right and wrong, is rarely the subject of legal histories. Economics, politics, and financial innovations may make better reading, and may be better at explaining legal histories, but legal history includes legal ethics.

This article is devoted to exploring the legal ethics writings by tax lawyers in a pivotal period of income tax history: 1945-1965,<sup>4</sup> the first two decades of the federal income tax as we now know it. Although the income tax began in 1913, it was World War II that created the modern mass income tax: in 1939 there were 3.9 million individual income tax taxpayers but by

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3. Such reflection has already begun as a recent symposium was held at Duke to examine the history of the federal income tax. The Duke symposium included several particularly interesting pieces on “some lesser-known aspects of the history of the federal income tax.” Lawrence A. Zelenak, *Foreword: The Fabulous Invalid Nears 100*, 73 LAW & CONTEMP. PROBS. i, iii (2010). This symposium focused in large part on what Professor Zelenak described as “losers’ tax history,” — that is “tax roads considered by Congress but not taken, or taken briefly and then abandoned” — is particularly obscure. *Id.* at i. One particularly interesting article describes the period in which the government disclosed the tax return information of certain high-income taxpayers, while another explains how close the 1940s proponents of replacing the mass income tax with a sales tax came to victory. Marjorie E. Kornhuaser, *Shaping Public Opinion and the Law: How a “Common Man” Campaign Ended a Rich Man’s Law*, 73 LAW & CONTEMP. PROBS. 123 (2010); Lawrence A. Zelenak, *The Federal Retail Sales Tax That Wasn’t: An Actual History and an Alternative History*, 73 LAW & CONTEMP. PROBS. 149 (2010).

4. I have focused on the ethics literatures in the *Tax Law Review*, the *NYU Institute on Federal Income Taxation*, the *USC Institute for Major Tax Planning*, and *Taxes*, but also reviewed some often-cited pieces from outside these periodicals, such as Randolph E. Paul, *The Lawyer as a Tax Adviser*, 25 ROCKY MNTN. L. REV. 412 (1952) [hereinafter Paul, *Tax Adviser*] (this journal became the *University of Colorado Law Review* in 1963).

1945 there were 42.6 million.<sup>5</sup> This period was also one of significant progress in the administration of the income tax: the Internal Revenue Code was re-organized in 1954 and, following widespread corruption scandals, the Bureau of Internal Revenue was re-organized as the Internal Revenue Service.<sup>6</sup> Thus, the tax lawyers writing on ethics issues during this period were the first generation to be considering the role of the tax lawyer in the modern tax system. Perhaps the most importance difference between the income tax system then and now is that the system then enjoyed broad-based and bi-partisan support while imposing an extremely high top-end marginal rate of taxation (91-94 percent for most of this period).<sup>7</sup>

This income tax system and these writers should also be placed in their even broader social, political, and legal context. These writers belonged to the generation that had confronted totalitarianism, the Holocaust, and the

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5. Though the richest 1 percent accounted for 32 percent of the income tax revenue, by the end of the war, almost 90 percent of the labor force filed income tax returns and 60 percent paid income taxes. The marginal rates of taxation ranged from 50 percent to more than 90 percent during the war. In 1940, the income tax accounted for only 16 percent of all taxes collected at all levels of government, but by 1950 it accounted for more than 51 percent. The implementation of the new mass tax regime “succeeded because of the popularity of the war effort.” The two were connected in the public mind in some part due to a Walt Disney-produced propaganda cartoon starring Donald Duck and watched by more than 32,000,000 theatre-going Americans in 1942. BROWNLEE, *TAXATION IN AMERICA*, *supra* note 2, at 115–17.

6. In the early 1950s, a string of corruption scandals prompted Congress to investigate the Bureau of Internal Revenue, where it discovered the consequences of political patronage and substantial corruption. More than 200 then-current and former tax officials resigned, were removed, and/or were indicted. In 1952, Truman released a plan that reorganized the Bureau, and the reorganization carried over into the Eisenhower administration. Joseph J. Thorndike, *Reforming the Internal Revenue Service: A Comparative History*, 53 ADMIN. L. REV. 717, 755–59, 761–64 (2001) [hereinafter Thorndike, *Reforming*].

7. “The winning of World War II and a postwar surge of economic prosperity, which followed so closely on the heels of the Great Depression, all helped produce a popular, bipartisan consensus of support for sustaining the basic [tax] policy shifts undertaken during the Roosevelt administration.” BROWNLEE, *TAXATION IN AMERICA*, *supra* note 2, at 100–01. This national optimism is reflected not only in the tax policy of the time but also in the Baby Boom, of course. The highest marginal tax rates during this period were: 94 percent in 1945; 91 percent in 1946-1951; 92 percent in 1952-1953; 91 percent in 1954-1963; 77 percent in 1964; and 70 percent in 1965. The history of federal individual income tax rates is available from the Tax Foundation. The Tax Foundation, <http://www.taxfoundation.org/publications/show/151.html> (last visited Jan. 15, 2011) [hereinafter Tax Foundation].

Great Depression.<sup>8</sup> During the time they were writing, the United States engaged in nuclear warfare to end World War II,<sup>9</sup> the Cold War began, and the Cuban revolution both began and ended.<sup>10</sup> Senator McCarthy conducted a witch-hunt for communists.<sup>11</sup> The Rosenbergs were executed for conspiring to commit espionage.<sup>12</sup> The Soviet Union admitted supplying arms to the North Vietnamese and demonstrations against the war in Vietnam spread.<sup>13</sup> The Civil Rights movement emerged: Rosa Parks and the students at the lunch counters refused to leave their respective seats, *Brown v. Board of Education* was handed down, federal troops were sent into Arkansas and Mississippi, and the Voting Rights Act was passed.<sup>14</sup> There were massive labor strikes.<sup>15</sup> The President of the United States was assassinated.<sup>16</sup> These events should be kept in mind as the literature of the period was read, as these events make clear that the period in which this literature was produced was certainly not simpler, fairer, or more moral than our own.

This Article is divided into two primary sections. Part II is a description of literature of the era, and Part III is a reflection on the literature. Part II has several parts. It introduces the writers (II.A) and describes their philosophical professionalism (II.B) and the patriotic tone of their writings (II.C). It then describes their debates over a special duty to the system (II.D) and disclosing arguable points in a tax return (II.E). It concludes with their practical advice for tax lawyers (II.F) and their policy suggestions for the tax system (II.G). The reflective Part II provides historical context and connections between topics that may not otherwise be evident.

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8. BERNARD GRUN, THE TIMETABLES OF HISTORY 522 (3d ed. 1991) [hereinafter GRUN, TIMETABLES].

9. *Id.* at 524.

10. *Id.* at 528, 542–44.

11. *Id.* at 536.

12. *Id.*

13. GRUN, TIMETABLES, *supra* note 8, at 554.

14. *Id.* at 538, 550–54.

15. *Id.* at 528.

16. *Id.* at 552.

## II. LEGAL ETHICS FOR TAX LAWYERS: A REVIEW OF THE 1945-1965 LITERATURE

### A. *The Literature's Authors*

The men (and they were all men)<sup>17</sup> writing on legal ethics and federal taxes between 1945 and 1965 were professional heavyweights. Among them were preeminent tax lawyers who were founders of preeminent law firms. Randolph E. Paul was a founder of Paul, Weiss, Rifkind, Wharton & Garrison.<sup>18</sup> Mortimer M. Caplin was a founder of Caplin & Drysdale.<sup>19</sup> Merle H. Miller was a founder of (the firm now known as) Ice Miller.<sup>20</sup>

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17. Throughout these essays, I have intentionally followed these writers' use of masculine pronouns and references to lawyers exclusively as male. This underscores what a different world it was in which these men wrote, as well as underscoring how that different world was not long ago or in a place far away.

18. After graduating from New York Law School, Mr. Paul began his law career as a switchboard operator at a New York firm. Five years into his career, he accepted a job from a tax attorney — and eventually would become an architect of the modern income tax system. He was one of the most influential tax advisors to President Roosevelt, arguing the adoption of a Keynesian approach to regulating the economy through tax policy. In his private practice, his clients included Henry Ford, Standard Oil Co., and General Motors. He was also a prolific writer. He died while testifying before a congressional committee — complaining about President Eisenhower's tax policies. TAX HISTORY PROJECT, *Historical Perspectives, Profiles in Tax History: Randolph E. Paul*, <http://www.taxhistory.org/thp/readings.nsf/cf7c9c870b600b9585256df80075b9dd/afd2a67073f6b87085256f8600681f74?OpenDocument> (last visited Jan. 16, 2011) [hereinafter TAX HISTORY PROJECT].

19. See, e.g., Mortimer M. Caplin, *What is Good Tax Practice: A Statement of the Problem and the Issues Involved*, 21 N.Y.U. ANN. INST. ON FED. TAX'N. 9 (1963) [hereinafter Caplin, *Good Tax Practice*]. Mortimer M. Caplin practiced law in New York City from 1941 to 1950 (except for his time in military service) and then began teaching at the University of Virginia School of Law in 1950. In 1961, he was appointed U.S. Commissioner of Internal Revenue where he served until July 1964, when he resigned to form the law firm Caplin & Drysdale. On leaving the U. S. government, he received the Alexander Hamilton Award, the highest award conferred by the Secretary of the Treasury, for his "distinguished leadership." He is also the recipient of the Achievement Award from the Tax Society of New York University; Judge Learned Hand Human Relations Award, American Jewish Committee; Tax Executives Institute Distinguished Service Award; Veterans of Foreign Wars Public Service Award; and the Virginia State Bar and Virginia Society of Certified Public Accountants Award. He has received honorary degrees from the University of South Carolina, Washington College, and St. Michael's College. VIRGINIA LAW, *Mortimer M. Caplin*, <http://www.law.virginia.edu/lawweb/faculty.nsf/FHPbl/mcaplin> (last visited Mar. 28, 2011) [hereinafter VIRGINIA LAW].

20. See Merle H. Miller, *Morality in Tax Planning*, 10 N.Y.U. ANN. INST. ON FED. TAX'N. 1067 (1952) [hereinafter Miller, *Morality*]. Merle H. Miller was

Others were tax partners in prestigious firms. Norris Darrell was a partner in Sullivan & Cromwell.<sup>21</sup> Adrian W. DeWind was a partner in Paul, Weiss, Rifkind, Wharton & Garrison.<sup>22</sup> Thomas N. Tarleau was a partner in Willkie Farr & Gallagher.<sup>23</sup> And, of course, some of the writers were well known

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with the Office of Chief Counsel of the Bureau of Internal Revenue prior to joining Ice Miller as a partner in 1940 and beginning the firm's federal tax practice. Jerry Crimmins, *Ice, Miller Celebrates its 100th Anniversary*, *Ice Miller Law Bulletin*, (Apr. 12, 2010) [http://www.icemiller.com/enewsletter/ICE.news/IM\\_100\\_Law\\_Bulletin.htm](http://www.icemiller.com/enewsletter/ICE.news/IM_100_Law_Bulletin.htm). He was instrumental in founding the Indianapolis affiliate of the American Civil Liberties Union (ACLU) — some in the Indianapolis legal community believed that the ACLU was connected to communism, but Mr. Miller and his firm believed that the ACLU was good for the law profession and the community they served. Ice Miller, L.L.P., *Firm History*, [http://www.icemiller.com/firm\\_history.aspx](http://www.icemiller.com/firm_history.aspx) (last visited Jan. 17, 2011). Mr. Miller and his firm partner Harry Ice were both Eagle Scouts, and they founded the I and M Firesets Company to manufacture and sell flint and steel fire starting kits to Boy Scouts. The company was later passed down through the hands of various scouts and troop leaders in Indianapolis. Ice Miller, L.L.P., *Firm Fact Sheet for 100 Year Celebration*, <http://www.icemiller.com/news/100YearFacts.htm> (last visited Jan. 17, 2011).

21. Norris Darrell, *Some Responsibilities of the Tax Adviser in Regard to Tax Minimization Devices*, 8 N.Y.U. ANN. INST. ON FED. TAX'N 983 (1950) [hereinafter Darrell, *Tax Minimization Devices*]. “Mr. Darrell was a partner of Sullivan & Cromwell for 42 years and president of the American Law Institute for 15 years. He represented the law firm in Paris and Berlin from 1928 to 1930 and was made a partner in 1934. He was elected to the Council of the American Law Institute in 1947 and headed a project that laid the groundwork for the Internal Revenue Code of 1954. He retired in 1976, N.Y. TIMES, *Norris Darrell, Lawyer and Tax Expert*, 90, (Aug. 15, 1989), <http://www.nytimes.com/1989/08/15/obituaries/norris-darrell-lawyer-and-tax-expert-90.html> [hereinafter, N.Y. TIMES]. Mr. Darrell was the son-in-law of legal legend Learned Hand and, as the executor of his estate, was instrumental in assisting Hand's former clerk and Stanford Law School professor Gerald Gunther write a biography of the famed jurist. See Gerald Gunther, *‘Contracted’ Biographies and Other Obstacles to ‘Truth,’* 70 N.Y.U. L. REV. 697 (1995).

22. In addition to serving as the head of the tax department at Paul, Weiss, Rifkind, Wharton & Garrison, working at the Treasury Department drafting legislation to fund the war, and advising Presidents John F. Kennedy and Lyndon B. Johnson, Mr. DeWind became a founder of Human Rights Watch and served on the boards of the NAACP Legal Defense and Educational Fund, the National Coalition Against Censorship and the Lawyers Alliance for Nuclear Arms Control. Dennis Hevesi, *Adrian DeWind, Tax Expert and Human Rights Watch Founder, Dies at 95*, N.Y. TIMES, (Aug. 19, 2009), <http://www.nytimes.com/2009/08/19/nyregion/19dewind.html>.

23. BORIS I. BITTKER, PROFESSIONAL RESPONSIBILITY IN FEDERAL TAX PRACTICE xi (1965) [hereinafter BITTKER, PROFESSIONAL RESPONSIBILITY].

law professors: Professor John M. Maguire (Harvard),<sup>24</sup> Professor John Potts Barnes (Virginia),<sup>25</sup> Professor Edmond Cahn (New York University),<sup>26</sup> Professor Jerome Hellerstein (New York University),<sup>27</sup> Dean Erwin N. Griswold (Harvard),<sup>28</sup> and Professor Boris Bittker (Yale), who authored more than 15 books and whose name is a contemporary synonym for tax treatises.<sup>29</sup>

Many of these writers were also significantly involved in government, politics, and the social and legal movements of the day. Randolph E. Paul was one of the most influential tax advisors to President Roosevelt, arguing the adoption of a Keynesian approach to regulating the economy through tax policy.<sup>30</sup> Norris Darrell was president of the American Law Institute for 15 years and also worked on the groundwork for the Internal Revenue Code of 1954.<sup>31</sup> Mortimer M. Caplin was the Commissioner of the Internal Revenue Service under John F. Kennedy, during a time of significant tax reform.<sup>32</sup> Dean Erwin N. Griswold joined the Lyndon B. Johnson administration as Solicitor General, and then continued as Solicitor General in the Richard M. Nixon administration, eventually arguing over 100 cases before the Supreme Court (including the Pentagon

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24. John M. Maguire, *Conscience and Propriety in Lawyer's Tax Practice*, 13 TAX L. REV. 27 (1957) [hereinafter Maguire, *Conscience and Propriety*].

25. John Potts Barnes, *The Lawyer and the Voluntary Assessment System*, 40 TAXES 1034 (1962) [hereinafter Barnes, *Voluntary Assessment System*].

26. See Cahn et al., *Ethical Problems*, *supra* note 1. See also Edmond N. Cahn et al., *What Makes A Successful Tax Lawyer? A Tax Law Review Symposium*, 7 TAX L. REV. 1 (1951) [hereinafter Cahn et al., *Successful Tax Lawyer*].

27. See Cahn et al., *Ethical Problems*, *supra* note 1, at 4. (Mr. Hellerstein contributed a paper entitled "Ethical Problems in Office Counseling" at the symposium banquet).

28. See Erwin N. Griswold, *The Blessings of Taxation: Recent Trends in the Law of Federal Taxation*, A.B.A. J., Dec. 1950, at 999 [hereinafter Griswold, *Blessings of Taxation*].

29. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23. For tax lawyers, Professor Bittker needs no footnoted introduction. He wrote over 100 articles and at least 15 books. However, his focus was always on his students. At one point he even told the Shah of Iran that he could not work on his tax case, no matter what the pay, until after the current semester. He began his teaching career at Yale Law School only four years after graduating from the school. Professor Bittker was also an environmentalist who served many years as a Trustee with the Natural Resources Defense Council, an avid adventurer, and tremendous photographer. See Yale Law Report, *Boris I. Bittker 1916 – 2005*, <http://www.law.yale.edu/YLR/pdfs/v53-1/531bittker.pdf> (last visited Jan. 16, 2011).

30. See TAX HISTORY PROJECT, *supra* note 18.

31. See N.Y. TIMES, *supra* note 21.

32. See VIRGINIA LAW, *supra* note 19.

Papers case).<sup>33</sup> Merle H. Miller was a founder of the American Civil Liberties Union in Indianapolis.<sup>34</sup> Adrian DeWind was a founder of Human Rights Watch and served on the boards of the NAACP Legal Defense and Educational Fund, the National Coalition Against Censorship and the Lawyers Alliance for Nuclear Arms Control.<sup>35</sup> Professor Boris Bittker was a Trustee with the Natural Resources Defense Council<sup>36</sup> and Professor Edmond Cahn wrote broadly, authoring books such as *The Sense of Injustice — An Anthropocentric View of the Law* (New York University Press, 1949), *The Moral Decision — Right and Wrong in Light of American Law* (Indiana University Press, 1955), and *The Predicament of Democratic Men* (MacMillan Company, 1961).

### B. Philosophical Professionalism

The tax bar of this time evidenced a remarkable philosophical sensitivity. In 1949, for example, the Committee on State and Federal Taxation of Real Property, Probate and Trust Law of the American Bar Association issued a report on the importance of natural law for tax jurisprudence.<sup>37</sup> The report began:

[T]axation both in its purpose and its method, is at once a function of government, and, under a philosophy of government by law rather than by men, a process of law. As a function of government, taxation, therefore, of necessity finds roots and justification in the philosophy of government. As a process of law by which it, as a function of government, is exercised, it of necessity finds its roots and justification in the philosophy of law.<sup>38</sup>

Having framed taxation between philosophy of government and philosophy of law, the report continued that “tax laws must of necessity be subject to, and limited by, certain basic underlying moral principles by virtue of our

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33. Associated Press, *Erwin N. Griswold; Former Solicitor General*, L.A. TIMES (Nov. 21, 1994) [http://articles.latimes.com/1994-11-21/news/mn-65525\\_25\\_1\\_solicitor-general](http://articles.latimes.com/1994-11-21/news/mn-65525_25_1_solicitor-general).

34. See Darrell, *Tax Minimization Devices*, *supra* note 21.

35. See *supra* note 22.

36. See BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23.

37. Joseph F. McCloy et al., *The Moral Issue*, 27 TAXES 9 (1949) [hereinafter McCloy et al., *Moral Issue*] (this was a portion of a report Mr. McCloy, Chairman of the Committee on State and Federal Taxation, Section of Real Property, Probate and Trust Section, presented to the Committee at a prior meeting).

38. *Id.*

American philosophy of government and law,” which the report identified as “the unchanging principles of the natural law.”<sup>39</sup> The report then explains implications of these moral principles, such as taxes being rightfully imposed only to secure material, spiritual, and social rights of the governed, and that “in imposing taxes, a due proportion to the wealth of each citizen must be observed, as distributive justice demands, so that the burden will not exceed the resources of the individual and he will be proportionately compensated by the services which come to the people from the tax money.”<sup>40</sup> The impetus for this report appears to have been concern about the influences of legal realism, which “conceives the law to be the rule of conduct imposed in specific situations by our courts and based upon the court’s interpretation of the feelings, morals and other standards of conduct currently prevailing in the community.”<sup>41</sup> The committee warned that legal realism was contrary to natural law, and that it elevated the authority of courts at the expense of the authority of “the Supreme Lawgiver, man’s Creator.”<sup>42</sup>

The tax bar’s philosophical orientation was broader than philosophy of law. This broad interest was on full display at the 1952 *Tax Law Review* banquet, which was dedicated to discussing Ethical Problems of Tax Practitioners. The discussion began with topics such as preparing corporate records to justify accumulating earnings to expand the business (when the purpose for accumulation may have been more the lawyer’s idea than the client’s) but developed into an argument over “whether our generation is worse or better than previous generations have been.”<sup>43</sup> Thomas N. Tarleau maintained that Americans were not “in a degenerate age” but merely “a more self-conscious age,” while Professor Edmond Cahn maintained that Americans of the day were too “outer-directed,” insufficiently “inner-directed,” and generally too conformists with “the obsessive need to be like everyone else.”<sup>44</sup> In good law professor style, Dean Miguel A. de Capriles (New York University) framed another argument of the evening as “the problem of obedience to the unjust law,” questioning the tax lawyers — without explanation or follow-up — with “it seems to me that we are taking for granted, are we not, that the Socratic answer is still the right one?”<sup>45</sup>

That there would be a banquet discussion on the ethical problems of tax practitioners evidences the concern these men had for the state of their

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39. *Id.*

40. *Id.* at 10–11.

41. *Id.* at 10.

42. McCloy et al., *Moral Issue*, *supra* note 37, at 10.

43. Cahn et al., *Ethical Problems*, *supra* note 1, at 15 (remarks of Bruno Schachner).

44. *Id.* at 2, 10, 14.

45. *Id.* at 23 (statement of Miguel A. De Capriles, Dean at New York University School of Law).

profession in 1952. If “civic and moral obligations were being fulfilled currently to even a reasonably satisfactory extent, they would not have played so significant a part in the discussion” at the banquet.<sup>46</sup> On the one hand, there was concern regarding widespread ethical failures among tax lawyers<sup>47</sup> but, on the other hand, there was comfort in the progressing ethical sensitivity of lawyers — or at least an increase in their discussions of ethics.<sup>48</sup> Professor John Potts Barnes characterized the increase as a “sudden burst of interest in the tax lawyer’s ethics.”<sup>49</sup> He wondered if this burst was a passing fad of the sort that often makes the rounds of lawyers meetings,<sup>50</sup> a reflection of great failings among tax lawyers, or a reflection of a more general “awakening of lawyers generally to the need . . . for shoring up the ethical foundations of the profession.”<sup>51</sup> He decided, however, that this burst of interest was due to “the realization . . . of the special significance of the tax lawyer’s ethical standard,” especially in a voluntary assessment system.<sup>52</sup>

There was a chorus of calls for greater definition of the tax lawyer’s ethical standard. Mortimer Caplin described the need for “authoritative guidance in prelitigation tax practice,” including an identification of “practices which, though not necessarily in technical violation of an ethical code, are, in the words of Mr. Justice Stone . . . looked upon . . . as ‘things that are not done.’”<sup>53</sup> Norris Darrell was comforted by the increase in legal ethics discussions at conferences and by committees, and hoped the tax bar would become more involved.<sup>54</sup> Professor John M. Maguire had a more specific hope: for the full connotations of the tax lawyer’s special obligations

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46. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 18.

47. Cahn et al., *Ethical Problems*, *supra* note 1, at 32 (statements of Jerome R. Hellerstein).

48. Norris Darrell, *The Tax Practitioner’s Duty to His Client and His Government*, 7 PRAC. LAW. 23, 39 (1961) [hereinafter Darrell, *Tax Practitioner’s Duty*] (this article was based on various addresses, including the N.Y.U. Institute on Federal Taxation in 1958 where it was subsequently published). *See* Darrell, *Conscience and Propriety in Tax Practice*, *infra* note 82; Paul, *Tax Adviser*, *supra* note 4, at 412.

49. Barnes, *Voluntary Assessment System*, *supra* note 25, at 1034.

50. Describing fads in subjects discussed at legal conferences, he wrote “I have observed that a subject considered a lively one for discussion at one tax conference is not unlikely to appear on the program of another and another and to be written about until it has lost the appeal of both novelty and timeliness.” *Id.* I suppose this is as true today as then.

51. *Id.*

52. *Id.*

53. Mortimer M. Caplin, *Responsibilities of the Tax Adviser — A Perspective*, 40 TAXES 1030, 1031 (1962) [hereinafter Caplin, *Perspective*].

54. Darrell, *Tax Practitioner’s Duty*, *supra* note 48, at 39–40.

to be “spelled out” by a bar committee;<sup>55</sup> that is, for the tax bar to be given “marching orders” in “a number of commonplace situations produced by tax practice.”<sup>56</sup>

The concern for the ethical well-being of the tax bar was not limited to committee-crafted solutions to commonplace situations, however. There was a concern that deeper problems were eroding the profession. Sensitive to the increasing time and energy required to be expended by tax lawyers, Professor Cahn bemoaned the “steady-flowing river of texts, services, and articles” about taxation that “any tax expert, who is unfortunately required to earn his living while trying to maintain his expertness” must read in order to keep up-to-date.<sup>57</sup> Worse, he feared that lawyers were becoming the “jackals of the bourgeoisie,” desiring only to “live the same lives, obtain for their wives the same type of coats, and ride around in the same automobiles” as their “mercantile neighbors.”<sup>58</sup> When arguing that “we may be fast losing our status as a profession and becoming nothing more than skilled merchant-clerks,”<sup>59</sup> he thought this loss followed the loss of the sense of “moral responsibility” and “civic nobility.”<sup>60</sup> He described the deeper problem as lawyers succumbing to an emerging “obsessive need” in American culture to “be like everyone else, to have the same possessions as everyone else, to follow the same pattern in the pursuit of material goods.”<sup>61</sup> The result was that as lawyers gave into this consumerism, its mentality would transform them into being “what the communists have always said the lawyers were in a capitalist society . . . jackals of the bourgeoisie.”<sup>62</sup>

### C. Patriotism

Nineteen fifty-two was the year of the philosophically reflective *Tax Law Review* banquet, and also a year in which the Cold War was heated. There were large scale bombings in Korea (the armistice came in 1953) and

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55. Maguire, *Conscience and Propriety*, *supra* note 24, at 48.

56. *Id.* at 45.

57. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 2–3. Randolph E. Paul described the “wearisome quota of suggestion and criticism and dogma” that “constantly pour[s] out” from tax magazines and journals. Randolph E. Paul, *The Responsibilities of the Tax Adviser*, 63 HARV. L. REV. 377, 378 (1950) [hereinafter Paul, *Responsibilities*] (This article is an adaptation, with minor revisions, of an address before the 1949 Second Annual Institute on Federal Taxation, University of Southern California School of Law). He even footnotes to an “inventory of the growing mass of tax materials.” *Id.* at n.8.

58. Cahn et al., *Ethical Problems*, *supra* note 1, at 2.

59. *Id.*

60. *Id.* at 3.

61. *Id.* at 2.

62. *Id.*

the communistic threat was on the minds of Americans. In Professor Cahn's mind, individuality, moral responsibility, and civic nobility buttressed lawyer professionalism against the potentially accurate criticisms of the communists.

Merle H. Miller sounded a very similar tone, praising an intentional and international movement of "Moral Re-armament" as perhaps "the most potent challenge to Communism in the struggle for men's minds," and framed moral appeals to fidelity to the tax law in this context.<sup>63</sup> To Mr. Miller, the time was one in which there was a "great battle between the West and East" in which good tax lawyers contributed "greatly to the well being of the country at large" by "kill[ing] off a bad tax scheme."<sup>64</sup> In this time of great battle, he did not think any tax lawyer wanted to be known for drafting minutes giving "reasons for not paying out dividends" or writing "long instruments setting up tricky trusts."<sup>65</sup> For Mr. Miller, the risk that American capitalism might fail in this great battle was real, and it was the touchstone for developing sound tax law ethics:

We are engaged in a most challenging economic struggle. Before too many years will be answered the question as to which economic system is more efficient, that in which the properties are owned by the government and operated by government employees, or that in which the people own the sources of production, the factories, the distribution facilities, and from these sources of wealth chip in their share toward assembling resources to be used for the common defense and general welfare of the people. It is the system of taxation which supplies the very life blood of the government operating under the latter system . . . .<sup>66</sup>

Mr. Miller characterized the situation as "the present emergency," and thought a tax lawyer ought to "do his best to maintain in his fellow citizens a proper respect for the methods we have set up under a democratic system for the collection of each citizen's share" of the burden of responding to the

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63. Miller, *Morality*, *supra* note 20, at 1068. The reference to "Moral Re-armament" appears to be to the group begun by American Lutheran minister Frank Buchman, which is now known as the *Initiatives of Change International*. Mr. Buchman's philosophy of moral awakening was very influential at this time. Though not much discussed today, the organization was very active at the end of World War II, but may be best known today for its connections with the founding of Alcoholics Anonymous. See *Initiatives of Change International*, <http://www.iofc.org/history> (last visited Jan. 15, 2011).

64. Miller, *Morality*, *supra* note 20, at 1076.

65. *Id.* at 1075.

66. *Id.* at 1082–83.

emergency.<sup>67</sup> Merle H. Miller believed that despite feeling that he was personally “carrying the full brunt of our defense effort” by paying large tax liabilities, “I can pay the full liability as shown, with even some concessions in the knowledge that a great deal more would not be an overpayment for the privilege of American citizenship.”<sup>68</sup> (Anecdotal evidence suggests that some clients may have felt similarly<sup>69</sup>). Dean Griswold compared the need for increased revenue during the Cold War to the need for increased revenue during the “past ten years . . . devoted to protecting us against the Nazi aggression,” concluding that there were no expenditures Americans could make that would “benefit us more than that we pay to the Government in taxes [.]”<sup>70</sup> Indeed, he wrote that “taxation is a benefit, not a curse” in that it finances our organized society, and that rather than “groaning about the burden of taxes” on our money we should remember that we would not have had money, had it not been for what taxes finance.<sup>71</sup> During this threat to national security, it was important to remember the benefits of taxation he argued, because “the present state of the world, and the need for protecting ourselves from the threats directed at our society,” meant an increased tax burden, and the prospect of keeping the war (and communism) localized meant that it would be cheaper to pay “its cost currently, and we will be better off in the long run if we do.”<sup>72</sup> He was worried that in the “midst of a real shooting war” in Korea, the unfairness of the tax law would be increased through “loopholes and special privileges” and “handouts,” such as those for the “oil and gas interests.”<sup>73</sup> The need for a high tax burden and the unfairness of its distribution prompted Dean Griswold to argue that tax lawyers had a “public responsibility” to work to ensure that the tax burden was distributed fairly.<sup>74</sup> He lamented the tax bar’s failures with this responsibility during this threat to the national security.<sup>75</sup>

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67. *Id.* at 1083.

68. Merle H. Miller, *A Taxpayer’s Duty to his Fellow Taxpayers*, 19 N.Y.U. ANN. INST. ON FED. TAX’N. 1, 9 (1961) [hereinafter Miller, *Taxpayer’s Duty*]. Given the tax rates of the day, one wonders the effective tax rate under which Mr. Miller did labor — he may have good reason to feel as if he were personally carrying a great share of the defense burden.

69. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 104–05.

70. Griswold, *Blessings of Taxation*, *supra* note 28, at 1002. In reflecting on the Supreme Court’s tax jurisprudence during the war against Nazi aggression, it is interesting that he concluded the Court favored the Government in those in some part “because there was a war on.” *Id.* at 1000.

71. *Id.* at 1002.

72. *Id.*

73. *Id.* at 1057.

74. *Id.*

75. Griswold, *Blessings of Taxation*, *supra* note 28, at 1057.

Other writers also referenced the Cold War in the tax ethics context. Mortimer Caplin pointed out that “our strength as a nation is dependent upon our ability, year after year, to raise many billions of dollars,” much of which was specifically for the sound financing of “our defense programs” and “missile and space programs.”<sup>76</sup> According to Dean Griswold, the privileges of American citizenship were not limited to personal safety but, included effectively financing collective improvements to society,<sup>77</sup> and by another writer more specifically included financing “social security, unemployment insurance, four-lane highways and other blessings of modern government.”<sup>78</sup>

Merle H. Miller directly connected the efforts of revenue agents with those who work on “the assembly lines where are built the rockets and missiles to provide our security” and “those in the armed forces,” writing that it is the revenue agents who are responsible for securing the funds to pay the assembly workers and armed forces members.<sup>79</sup> Robert N. Miller echoed this characterization, writing that the agents were “patriotic” and “sustained in their work by a justifiable pride in their organization.”<sup>80</sup> He pointed out that it was a “vital duty of the Treasury . . . to maintain dignity and self-respect in this body of men on whom the government must rely for every dollar of the government’s revenue.”<sup>81</sup>

On the one hand there was a theme of characterizing the revenue agents as important enlistees in the Cold War, since it was their work collecting the funds that made the government’s spending possible, but, on the other hand, the need to police a mass tax touched concerns especially acute during the Cold War. Both Robert N. Miller and Norris Darrell thought it was very important that tax administration be conducted without descent into a “terrorizing” or “police state” mentality on behalf of the revenue agents, further reflecting Cold War distinctions between the U.S. and communist regimes.<sup>82</sup> Mortimer Caplin expressed concern that “the huge sums needed to finance our Government” be raised without violating our “democratic traditions.”<sup>83</sup> And Professor Boris Bittker raised the fear of “Big Brother,” warning that too close a sympathy for the revenue-collecting

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76. Caplin, *Good Tax Practice*, *supra* note 19, at 9.

77. Griswold, *Blessings of Taxation*, *supra* note 28, at 1002.

78. Peter James Wikel, *Grandfather Paid Taxes Too*, 37 TAXES 329 (1959).

79. Miller, *Taxpayer’s Duty*, *supra* note 68, at 8.

80. Robert N. Miller, *Human Elements in the Federal Tax System*, 10 N.Y.U. ANN. INST. ON FED. TAX’N 1049, 1050 (1952).

81. *Id.*

82. *Id.*; Norris Darrell, *Conscience and Propriety in Tax Practice*, 17 N.Y.U. ANN. INST. ON FED. TAX’N. 1, 23 (1959) [hereinafter Darrell, *Propriety in Tax Practice*]. Both Robert Miller and Mr. Darrell tied this concern with the honesty of taxpayers.

83. Caplin, *Good Tax Practice*, *supra* note 19, at 13.

necessities may lead to the belief that the Treasury Department “represents ‘all of us’ and hence embodies a virtue superior to that of any of us.”<sup>84</sup>

#### D. Duty to the System

Is the tax lawyer a special species of lawyer, one with special duties not shared by other lawyers? The legal ethics writers in this time wrote of tax lawyers’ “duties,” “roles,” “relationships,” “responsibilities,” “loyalties,” and “obligations”<sup>85</sup> owed to clients, as well as those owed to the “government,” the “Treasury,” “our government and its agents,” the “public interest,” the “country,” “society,” the “state,” “other taxpayers,” “professional responsibility,” “public responsibility,” and the “United States.”<sup>86</sup> Some writers described the tax lawyer as having a “double” or “dual” sets of duties (e.g., “dual responsibility to his client and the

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84. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 268. Professor Bittker’s allusion suggests a study of references to contemporary literature in tax literature might be interesting.

85. *E.g.*, Cahn et al., *Ethical Problems*, *supra* note 1, at 9 (“duty” was used by Professor Hellerstein); Miller, *Morality*, *supra* note 20, at 1081, (“duty” was used by Mr. M. Miller); Miller, *Taxpayer’s Duty*, *supra* note 68, at 5 (“role” was used by Mr. M. Miller); H. Brian Holland et al., *What is Good Tax Practice: A Panel Discussion*, 21 N.Y.U. ANN. INST. ON FED. TAX’N.23, 25 (1963) [hereinafter Holland et al., *Panel Discussion*] (“obligation,” “loyalty,” “responsibility,” and “relationship” were used by in the headings and in the text of Seymour S. Mintz’s remarks); BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 241 (“responsibility” was used by Professor Bittker).

86. *E.g.*, Mark H. Johnson, *Does the Tax Practitioner Owe a Dual Responsibility to his Client and to the Government? — The Theory*, 15 U.S.C. L. SCH. INST. ON MAJOR TAX PLANNING 25 (1963) [hereinafter Johnson, *Theory*] (using the term “government”); Milton Young, *Does the Tax Practitioner Owe a Dual Responsibility to His Client and to the Government? — The Practice*, 15 U.S.C. L. SCH. INST. ON MAJOR TAX PLANNING 39 (1963) (using the term “government”); Barnes, *Voluntary Assessment System*, *supra* note 25, at 1036 (using the term “government”); Cahn et al., *Ethical Problems*, *supra* note 1, at 10 (“treasury” was used in the statements by Thomas Tarleau); Miller, *Morality*, *supra* note 20, at 1081, 1083 (using the term “our government and its agents” and “country”); Maguire, *Conscience and Propriety*, *supra* note 24, at 44 (using the term “public interest”); Darrell, *Propriety in Tax Practice*, *supra* note 82, at 2 (using the term “society”); Caplin, *Good Tax Practice*, *supra* note 19, at 25 (using the term “society”); Holland et al., *Panel Discussion*, *supra* note 85, at 25 (Mr. Mintz used the term “state” and Hugh F. Culverhouse used the term “other taxpayers”); BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 95 (statement by Norris Darrell using the term “professional responsibility”); BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 241 (Professor Bittker used the term “United States”); and Caplin, *Perspective*, *supra* note 53, at 1032 (using the term “public responsibility”).

government,") and at least one described a "triple" set of responsibilities.<sup>87</sup> While the discussion was generally limited to "our" government, a question was raised as to whether or not the same duty owed to "our" government was also owed to other governments.<sup>88</sup>

Professor Jerome Hellerstein premised his description of a tax lawyer's duty to the system on denying that the citizen's relationship to his government was comparable to a plaintiff's adversarial relationship with a defendant.<sup>89</sup> Professor Hellerstein argued that a citizen owes "his government and his neighbors the duty of paying his share of taxes," even though doing so may get him labeled as a "sucker" in the business community.<sup>90</sup> He argued that tax lawyers "owe to our Government and to ourselves" the use of "our skill and experience and the great confidence which our clients repose in us . . . to improve the tax morality of the community."<sup>91</sup>

Professor Hellerstein's objective for tax lawyers was to develop a sense in the general community and in clients specifically that citizens should pay their share of taxes. Specifically, he argued for developing "generally ethical standards which require full and fair disclosure by the taxpayer, [and] which abhor fraud, whether obvious or cloaked in elegantly drawn documents or befuddled by the stretching of judgments or the magnifying of doubts."<sup>92</sup> He described this duty as the need to "curb the excesses of the businessmen whom we represent."<sup>93</sup> He suggested these ethical standards were necessary to avoid "moral schizophrenia or chaos."<sup>94</sup> He thought that accomplishing this goal would require tax lawyers to change their sense of duty, at least in some particulars, but that doing so would lead to tax lawyers living "happier lives," as well as to a "fairer distribution of the tax results."<sup>95</sup>

Professor Hellerstein's references to disclosure and fraud, as well as his desire to enlist tax lawyers to improve tax morale, indicated that his

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87. Holland et al., *Panel Discussion*, *supra* note 85, at 29 (Mr. Crane C. Hauser included a duty to one's self (i.e., professional reputation)).

88. Maguire, *Conscience and Propriety*, *supra* note 24, at 36; Darrell, *Propriety in Tax Practice*, *supra* note 82, at 2; BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 97.

89. Cahn et al., *Ethical Problems*, *supra* note 1, at 9 (statements of Jerome R. Hellerstein).

90. *Id.*

91. *Id.*

92. *Id.*

93. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 14.

94. See Cahn et al., *Ethical Problems*, *supra* note 1, at 9 n.4 (citing M.R. COHEN & F.S. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 595 (1951)).

95. *Id.* at 32.

understanding of the duty to the system was oriented primarily on the duty to undermine abuses and evasion. The duty to the system, in his mind, was the duty to refrain from acts such as backdating documents or advising clients to take unauthorized deductions<sup>96</sup> — activities that he thought were “widespread.”<sup>97</sup> Thus, while he argued for a duty to the system, other than the duty to improve tax morale, the duties he had in mind were not clearly beyond those applicable to all lawyers.

Professor John M. Maguire separated the tax lawyer’s duties into two categories. The first category consisted of duties applicable to tax controversies handled by the courts. When tax controversies reached the courts, tax lawyers had “few if any ethical problems differing from those encountered by trial lawyers generally.”<sup>98</sup> The second category consisted of tax controversies prior to their submission to the courts. With these matters, tax lawyers had a “double responsibility,” one to the client and one to the public interest.<sup>99</sup> Professor Maguire did not attempt to explicate the details of these “additional obligations” on tax lawyers, but instead called for the full connotations of these obligations to be “spelled out,” perhaps, by a committee of the American Bar Association Section of Taxation.<sup>100</sup> He did not consider this to be a speculative matter, but instead a specific derivation of guidance from the general standards of Circular 230.<sup>101</sup> While he was mostly concerned for a “systematic” approach to be articulated by a bar committee, he also thought individuals and firms should consider framing their own code for navigating their obligations.<sup>102</sup>

Professor Maguire premised the defense of tax lawyers’ special obligations on the idea that the revenue system simply required “a high degree of acquiescence and cooperation from taxpayers and their experts.”<sup>103</sup> In other words, in his view, the need to have a “proper pattern” for tax lawyer conduct was related to the income tax being “a system of voluntary compliance”<sup>104</sup> with the details of these duties being grounded in the Treasury Department’s regulation of tax lawyers.<sup>105</sup> Professor Maguire’s concern with the duty to the system was not related to philosophical reflections on tax lawyering, but instead related to the tax bar’s need for

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96. *Id.* at 5, 7.

97. *Id.* at 5.

98. Maguire, *Conscience and Propriety*, *supra* note 24, at 30.

99. *Id.* at 44–45.

100. *Id.* at 48.

101. *Id.*

102. *Id.* at 46.

103. Maguire, *Conscience and Propriety*, *supra* note 24, at 45.

104. *Id.* at 28.

105. *Id.* at 45.

“marching orders” in “a number of commonplace situations produced by tax practice.”<sup>106</sup>

Thomas N. Tarleau characterized the ethical problems encountered by tax lawyers as “largely the same as those of any lawyer dealing with an adversary.”<sup>107</sup> He wrote that no lawyer, including a tax lawyer, is entitled to engage in “trickery” or make false statements or misrepresentations.<sup>108</sup> Every adversarial conflict in the legal system brings into tension the lawyer’s responsibility to his client and “his ethical responsibilities as a member of the bar,” and so, in large part, the same responsibilities that are generally applicable to lawyers cover the ethical problems raised in tax practice.<sup>109</sup>

However, Mr. Tarleau argued that tax lawyers are special in two ways. First, tax lawyers always have the same party on the other side: the Treasury Department.<sup>110</sup> Second, tax lawyers are also enrolled members of the Treasury Department’s bar.<sup>111</sup> One of the most striking consequences of this distinctiveness is that unlike other lawyers who are “free to furnish his adversary facts or refuse to furnish them,” Mr. Tarleau believed that the Treasury Department is entitled to all pertinent information and the tax lawyer is obligated to provide it.<sup>112</sup> There is no tactical choice available on providing information. This means, he thought, that the tax lawyer always has “an obligation to engage in open-handed dealing with the representatives of the Department” when it came to the facts.<sup>113</sup> He believed such an obligation was sensible because the taxpayer has sole “control of the facts.”<sup>114</sup>

There are limits and complications to disclosure, of course. Mr. Tarleau considered the limits of disclosure provided by the attorney-client privilege, but also situations in which he argued the privilege is not available, such as return preparation.<sup>115</sup> He also emphasized the threshold issue of determining whether or not particular facts are “material” and must be

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106. *Id.*

107. Cahn et al., *Ethical Problems*, *supra* note 1, at 10.

108. *Id.*

109. *Id.*

110. *Id.* at 13.

111. *Id.* at 10.

112. Maguire, *Conscience and Propriety*, *supra* note 24, at 11.

113. *Id.* at 12.

114. *Id.* He also argued that a lawyer taking care to deliver the pertinent facts and vouch for their accuracy “insures and protects his own most available asset — his good reputation.” *Id.* at 13. Query the relevance of the professional reputation of the attorney. This is his goodwill. It benefits all of his clients. However, there may be a conflict between his clients. By disclosing unfavorable facts in one client’s situation, the lawyer may thereby purchase a greater goodwill with the agent who may help with other clients but the disclosure will hurt this one.

115. *Id.* at 14.

disclosed or “merely evidentiary” and accordingly need not be disclosed.<sup>116</sup> Thus, while Mr. Tarleau argued that a general obligation to disclose facts to the Treasury Department makes the practice of tax law inherently distinctive, he did not conclude this was a blanket obligation.

Merle H. Miller premised the tax lawyer’s duty to the system on patriotism. He wrote that a tax lawyer

owes a great duty the country that has educated him, and made possible his present success. He must do his best to maintain in his fellow citizens a proper respect for the methods we have set up under a democratic system for the collection of each citizen’s share to meet the present emergency [i.e., the Cold War.] He must inculcate in each citizen a respect for the system, and a proper respect for the part which honesty plays in that system. It is an awesome responsibility. Pray God that we may have the moral caliber to meet it.<sup>117</sup>

Mr. Miller waxed eloquently about the duty to avoid “aiding and abetting taxpayers in their suspicion, distrust[,] and even animosity toward those who are writing and enforcing our tax laws.”<sup>118</sup> He understood why a “layman” might interpret particular applications of the tax law as arbitrary, and thus the tax lawyer “who should be seeing the overall picture with its many insolvable problems” ought to increase the layman’s respect for the system.<sup>119</sup> He thought that a lawyer in another field may be permitted to “indulge himself in the luxury of agreeing with his client as to everything the client said about the opposing party,” but this indulgence is not available to the tax lawyer.<sup>120</sup> Instead, the tax lawyer is obligated to correct his client’s misconceptions of the system, urging on the client not only respect for the system but an appreciation of the importance of honesty in their compliance with the system.<sup>121</sup> Mr. Miller described the American system as “an honor system,” that was necessary to supply the “very life blood of the government” as it engaged in the struggle against communism.<sup>122</sup> For Mr. Miller, the tax lawyer’s duty to “our government and its agents” was the duty

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116. *Id.* at 11.

117. Miller, *Morality*, *supra* note 20, at 1083.

118. *Id.* at 1081.

119. *Id.*

120. *Id.* at 1081–82.

121. *Id.* at 1083.

122. Miller, *Morality*, *supra* note 20, at 1083.

to encourage honesty and compliance in taxpayers, a duty which was especially important given the Cold War's demands.<sup>123</sup>

Mr. Miller's philosophy of tax lawyering did not merely emphasize the duty of tax lawyers and taxpayers to the government, but also highlighted the "moral obligations owing by taxpayers one to another, because of their reciprocal positions as taxpayers."<sup>124</sup> Stressing that "no taxpayer lives alone," he noted that "most of us recognize a duty, whether or not enacted into law, to govern our acts with due regard to the effect which our conduct may have on others."<sup>125</sup> Mr. Miller was especially concerned with how the acts of taxpayers "affect other taxpayers favorably or adversely."<sup>126</sup> He described the consequences of these acts in several situations, such as how a taxpayer's experience with a revenue agent may in large part reflect that revenue agent's experience with other taxpayers.<sup>127</sup> If a revenue agent has been dealing with a very resistant taxpayer, he will have one sort of attitude, but if the revenue agent has been dealing with a "victim" who gave up some "absurd concession," he will have quite another attitude.<sup>128</sup> Another example noted by Mr. Miller was how taxpayers affect one another by using overworked gimmicks.<sup>129</sup> The effect of these acts is such that we should realize that "most of our woes are brought upon us not by the original voluntary acts of Congress or the dyspepsia of the Revenue Agent, but as the inevitable result of fellow taxpayers who took a good thing too far . . ."<sup>130</sup>

Mr. Miller emphasized that when it comes to "pick[ing] up any part of the tab," the "government" is not a taxpayer.<sup>131</sup> There are no cases in which the government is one side with all the taxpayers in different situations on the other.<sup>132</sup> Rather, in any case, there is one taxpayer on one side and all the other taxpayers on the other.<sup>133</sup> A "victory" for "the taxpayers" is one in which the tax burden is to be shared equitably; a defeat is one in which "one class [of taxpayers] is going to get by for less."<sup>134</sup>

Norris Darrell phrased his conception of the special duties of a tax lawyer in terms of "certain social responsibilities," including "the duty, putting it baldly, to help make our self-assessing income tax system work;

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123. *Id.* at 1081.

124. Miller, *Taxpayer's Duty*, *supra* note 68, at 2.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. Miller, *Taxpayer's Duty*, *supra* note 68, at 3.

130. *Id.* at 5.

131. *Id.* at 7.

132. *Id.* at 6-7.

133. *Id.*

134. Miller, *Taxpayer's Duty*, *supra* note 68, at 7.

and the duty . . . to lend . . . one's special talents and experiences to . . . improving that system in the public interest."<sup>135</sup> He believed a tax lawyer has a duty to his client and "a duty to live up to his professional responsibility."<sup>136</sup>

Echoing Merle H. Miller, Mr. Darrell considered a large part of this duty to be educating and influencing clients to conduct their tax affairs "as honorably and ethically as the adviser would himself act under similar circumstances."<sup>137</sup> He believed this was necessary to the success of the voluntary compliance system, and thus necessary to avoid "police state methods" in tax collection.<sup>138</sup> He encouraged tax lawyers to help their clients understand the "public policy reasons underlying the tax rules affecting them."<sup>139</sup> He thought this encouragement would help clients "understand the moral implications of what they do," and develop more farsighted judgments on tax matters.<sup>140</sup> He argued that "ethical propriety and legal effectiveness in tax planning often shade into each another," frequently resulting in the ethically questionable plan being also practically questionable.<sup>141</sup>

Mr. Darrell charged each tax lawyer with "a further duty, namely, a duty to do what he can to help make the tax law more fair, practical and equitable and to improve its administration."<sup>142</sup> He encouraged each tax lawyer to "speak out as a citizen," using his expertise to improve the tax system, "whatever the immediate effect upon his client's pocketbook may be."<sup>143</sup> While emphasizing that the lawyer advocating for change in the system was not working on behalf of a client, he pointed out that "clients usually understand this" and respect it.<sup>144</sup> He did not consider the duty to work to improve the system (even with a cost to the client) to be inconsistent with the duty to give "full devotion" to his client.<sup>145</sup>

Even as Mr. Darrell affirmed that a tax client facing the Treasury Department as his adversary is entitled to expect the same from his lawyer as

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135. Darrell, *Propriety in Tax Practice*, *supra* note 82, at 2.

136. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 95. This chapter of Professor Bittker's book was a transcription of the first in a series of five talks on "Lawyers' Problems of Conscience," sponsored by the Harvard Student Bar Association, in which Mr. Darrell gave a talk entitled "Responsibilities of the Lawyer in Tax Practice." *Id.* at 87.

137. Darrell, *Propriety in Tax Practice*, *supra* note 82, at 23.

138. *Id.*

139. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 101.

140. *Id.*

141. *Id.*

142. Darrell, *Propriety in Tax Practice*, *supra* note 82, at 24.

143. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 102.

144. *Id.* at 102, 103.

145. Darrell, *Propriety in Tax Practice*, *supra* note 82, at 22.

a criminal defendant facing prosecution, he expressed uncertainty about “everyday administrative tax practice.”<sup>146</sup> He described this situation as “perplexing, and one the area is especially in need of further study and clarification,” specifically the question of whether the tax lawyer owed greater or lesser duties to the Treasury Department than he would a court.<sup>147</sup> Mr. Darrell expressed doubts about the possibilities of a neat and categorical resolution of this particular issue, but had no doubts that tax lawyers had social responsibilities to educate their clients on the importance of ethics in the voluntary compliance system, as well as being involved in other ways to improve the system.

Even among those writers who did not directly address the theoretical aspects of a general duty to the system, there were several who, like Merle H. Miller and Norris Darrell, insisted on the duty to educate clients on the ethics of tax compliance and the duty to avoid characterizing the IRS as an unreasonable adversary applying arbitrary rules. Agreement on this specific duty to the system was voiced by Boston tax lawyer H. Brian Holland (Ropes and Gray),<sup>148</sup> Regional Commissioner of Revenue Dean J. Barron,<sup>149</sup> Mortimer M. Caplin,<sup>150</sup> and Robert N. Miller.<sup>151</sup>

Like Mr. Darrell, Professor Boris I. Bittker made clear that he considered a tax client and a criminal defense client to be in the same situation — having the government as an adversary and a lawyer who should be devoted to him.<sup>152</sup> He did not think that tax practice was special as a consequence of the government being on the other side. Nor did he think that being a member of the Treasury Bar should dilute a lawyer’s obligation to his client.<sup>153</sup> On the contrary, he suggested it was all the more important to be independent. He wrote “[t]here is a shadow of Big Brother . . . in these suggestions that the lawyer has special obligations to the Treasury because it regulates his admission to practice or because it represents ‘all of us’ and hence embodies a virtue superior to that of any of us.”<sup>154</sup> He insisted that while “[t]he adversary system of administering governmental rules and regulation unquestionably has its drawbacks[,]” the right of citizens to deal with the government at arm’s length had such important advantages that it should not be abandoned.<sup>155</sup>

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146. *Id.*

147. *Id.* at 22–23.

148. Caplin, *Good Tax Practice*, *supra* note 19, at 23.

149. *Id.*

150. *Id.* at 23, 35.

151. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 9.

152. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 267.

153. *Id.* at 267–68.

154. *Id.*

155. *Id.* at 270.

Professor Bittker did not think tax practice was a special kind of legal practice.<sup>156</sup> He considered the debate over a special duty to the system to be academic, arguing that those who stress the lawyer's duty to the client still believe the lawyer cannot engage in fraud, and those who stress the lawyer's duty to the government do not believe the lawyer must completely open his files to the government.<sup>157</sup> He thought that agreement on the issues was to be found in specific situations, not general propositions.<sup>158</sup> Personally, he believed that the ethics rules common to all lawyers, and statutory requirements such as a tax return "being verified under the penalties of perjury," were sufficient to guide ethical tax practice and therefore there was no need to conjure special duties in an attempt to do so.<sup>159</sup>

Randolph E. Paul staked-out a position similar to that taken by Professor Bittker. He framed the question in terms of whether or not Circular 230 provides "a standard of conduct different from that which binds the general practitioner representing clients in private litigations,"<sup>160</sup> much like Professor Maguire had framed it.<sup>161</sup> Although at one time Mr. Paul had claimed there were special obligations on the tax lawyer, he later was content to claim that it "is far from clear."<sup>162</sup> By this, he did not intend to "deprecate the need of a high standard of ethics in the practice of tax law[,]"<sup>163</sup> but instead considered it debatable whether the high standard of ethics applicable to tax lawyers was meaningfully distinguishable from the high standard applicable to all lawyers.<sup>164</sup>

Mr. Paul also seemed to doubt the usefulness of settling these types of questions in the abstract, preferring instead to discuss the ethical demands in concrete cases.<sup>165</sup> After considering several such cases, he concluded that

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156. *Id.* at 274.

157. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 268.

158. *Id.*

159. *E.g., id.* at 241, 269.

160. Paul, *Tax Adviser*, *supra* note 4, at 425.

161. *See* Maguire, *Conscience and Propriety*, *supra* note 24.

162. Paul, *Tax Adviser*, *supra* note 4, at 425. Mr. Paul is the one who mentions his own conversion on this point. *Id.* at 425 n.58 (citing his "Responsibilities of the Tax Adviser."). Both his Rocky Mountain Law Review and Harvard Law Review articles are tremendously insightful and nicely written, though the latter Rocky Mountain Law Review article presumably is more reflective of his later thought. In the earlier Harvard Law Review article, he explicitly championed the idea that the tax lawyer must not treat the sovereign government as a mere adversary, as well as going to lengths in other ways to emphasize the uniqueness of tax practice vis-à-vis other legal fields. *See* Paul, *Responsibilities*, *supra* note 57.

163. Paul, *Tax Adviser*, *supra* note 4, at 425.

164. *Id.*

165. *Id.*

he had no definitive answer but doubted whether a tax attorney had any special responsibility.<sup>166</sup> While he countenanced the possibility that there are special rules that may apply to tax lawyers prior to a case entering litigation, he found it “clear enough that they cease to apply when a civil tax case reaches the litigation stage . . . .”<sup>167</sup> He concluded his analysis with one point on which he was certain: a tax lawyer ought to use his special expertise and experience to improve the tax law — and that he ought to do so regardless of potential client objections to the position he takes.<sup>168</sup>

New York City tax lawyer and treatise author Mark H. Johnson argued against any special tax lawyer duty to the system by focusing on the effects of suggesting to clients that their tax lawyers have dual responsibilities. Mr. Johnson’s argument begins with distinguishing between “the people collectively as a citizenry” and “individual citizens as separate taxpayers.”<sup>169</sup> A collective citizenry may trust its government and understand the need for its government to be funded.<sup>170</sup> However, an individual taxpaying citizen also knows that in a tax case he will either prevail and pay less or the government will prevail and he will pay more.<sup>171</sup> Thus, the individual taxpayer does have an interest adverse to the government’s interest, even if the collective citizenry does not.<sup>172</sup>

Mr. Johnson emphasized that the individual taxpayer wants advice from a lawyer who is “worried about *him* . . . .”<sup>173</sup> Mr. Johnson argued that it is very important that each individual taxpayer is satisfied that his personal tax lawyer has an undivided duty to him, subsequently giving him the benefit of “all doubts and of all choices.”<sup>174</sup> Only if this duty is satisfied will the individual taxpayer rely on his tax lawyer.<sup>175</sup> If he believes his tax lawyer is not worried exclusively about him, he will resort to self-help.<sup>176</sup> The long-term consequence of tax clients being told their lawyers are not worried exclusively about them would be “wholesale tax evasion . . . by a skeptical and unadvised citizenry.”<sup>177</sup>

Whereas others argued that the voluntary compliance system justifies special duties on tax lawyers, Mr. Johnson argued that imposing

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166. *Id.* at 430.

167. *Id.*

168. Paul, *Tax Adviser*, *supra* note 4, at 434.

169. Johnson, *Theory*, *supra* note 86, at 28.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 29.

174. Johnson, *Theory*, *supra* note 86, at 30.

175. *Id.*

176. *Id.*

177. *Id.*

special duties on tax lawyers would undermine the voluntary compliance system:

[S]ince the absolute condition to a taxpayer's compliance is his confidence in his expert's advice, the whole community has a stake in instilling that confidence . . . we must assure the taxpayer that the advice he gets is being directed to his own best interest. He must feel sure that he is not getting the advice of a conscientious revenue agent, nor even the advice of a conscientious Tax Court judge. He must know he is getting the advice of his own counselor and advocate. He must know, in other words, that his adviser is in his own corner, and is not in the middle of the ring as a referee. Only then can the taxpayer be expected to be trustful enough to throw away his tip sheets and stifle his own protective instincts.<sup>178</sup>

Mr. Johnson offered another argument against imposing special obligations on tax lawyers. He attributed the “remarkably coherent, uniform, and equitable body of law” enjoyed by Americans to the adversarial process with tax lawyers on one side and government lawyers on the other.<sup>179</sup> Tax lawyers provided a tremendous and necessary benefit to the system, not because of any special duty incumbent upon them, but by merely acting as lawyers.<sup>180</sup> In addition to serving this essential role, Mr. Johnson encouraged tax lawyers to engage in “disinterested public service,” such as work in bar associations where, he insisted, the lawyers were not to bring their client's cases to bear.<sup>181</sup>

Like Professor Bittker, Mr. Johnson believed that the ethics rules applicable to all lawyers were sufficient for tax lawyers.<sup>182</sup> He argued that the recognition of boundaries on a tax lawyer's behavior was not recognition of a special responsibility to the government.<sup>183</sup> Rather, lawyering within boundaries —such as avoiding fraudulent representations — was simply “a matter of my dignity and pride as a lawyer.”<sup>184</sup> Mr. Johnson emphasized this point stating: “I would hate to think that this is considered some special obligation of the *tax lawyer*.”<sup>185</sup>

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178. *Id.* at 30–31.

179. Johnson, *Theory*, *supra* note 86, at 27.

180. *Id.* at 35–36.

181. *Id.* at 36.

182. *Id.* at 32.

183. *Id.*

184. Johnson, *Theory*, *supra* note 86, at 33.

185. *Id.*

Professor John Potts Barnes denied that it was the tax lawyer's role to be "the keeper of the taxpayer's conscience or an instrument for the implementation of the voluntary assessment system . . . ." <sup>186</sup> Much like Professor Bittker and Mr. Johnson, he believed that the general ethical obligations of all lawyers to "act fairly and honestly" and "be law-abiding" and "to advise compliance with the law" was sufficient to guide tax lawyers, as well. <sup>187</sup> Professor Barnes did not hesitate to characterize the client and the Treasury Department's relationship as adversarial, writing that this does not reflect any particular view of the government, but simply reflects that the individual taxpayer, regardless of political orientation, "carries on a running battle" to minimize his income tax liabilities. <sup>188</sup> Similar to the arguments made by Mr. Johnson, Professor Barnes insisted that a lawyer advising his client on how to lawfully minimize taxes was not "thwarting or defeating the system" but, on the contrary, was "assisting in its proper working, because the taxpayer is as much entitled to the benefits of the law as he is obligated by its burdens." <sup>189</sup>

Professor John Potts Barnes believed that the tax lawyer's ethics did have special significance in the voluntary assessment system. <sup>190</sup> However, it did not involve the tax lawyer taking on a special role of any sort. Much like Mr. Johnson, Professor Barnes argued that the tax lawyer, simply by lawyering, "contributes to the effective operation" of the tax system. <sup>191</sup> However, this is neither because the tax lawyer is motivated by some special duty to the system nor because he sets out with the intention of improving the system. Rather, it is because he is merely "motivated by the impulse to give the advice that is for the best interest of the client" and within the general limits of legal ethics. <sup>192</sup> Any duty that would limit the effectiveness of the tax lawyer's devotion to the client is one that, perhaps paradoxically, would undermine the benefits to the system provided by the tax lawyer.

Much like Mr. Darrell, Washington D.C. tax attorney Seymour S. Mintz (Hogan & Hartson) was unable to define a strictly adversarial relationship between tax clients and the government prior to the two entering the courtroom. <sup>193</sup> With respect to tax advice, he pondered the question of whether or not tax lawyers had "some greater degree of responsibility to be objective" than lawyers giving advice in other fields. <sup>194</sup> "The answer to the

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186. Barnes, *Voluntary Assessment System*, *supra* note 25, at 1039.

187. *Id.* at 1037–36, 1039.

188. *Id.* at 1037.

189. *Id.* at 1035.

190. *Id.*

191. Barnes, *Voluntary Assessment System*, *supra* note 25, at 1035.

192. *Id.*

193. Holland et al., *Panel Discussion*, *supra* note 85, at 23, 58.

194. *Id.* at 24.

question is not easy,” he said.<sup>195</sup> Mr. Mintz identified three possible answers, each of which had some support in the tax bar.<sup>196</sup> First, he said there was a “sizeable segment” of the tax bar which believes the ethical considerations applicable to tax lawyers are merely those applicable in other fields.<sup>197</sup> Circular 230, according to this view, is nothing but a detailed “implementation or an elaboration” of how those considerations are to be applied in the tax field.<sup>198</sup> Second, he said there was a “larger group” who believed that there was “something special and peculiar about practicing in the tax field . . . .”<sup>199</sup> This position could be justified by any one or a number of considerations: the self-assessment system “cannot work in a purely adversary context;” the sovereign is simply not the same as a “purely civil adversary;” the taxpayer has control of all the facts; or tax lawyers are members of the Treasury Bar and, at the minimum, that membership “demands a higher duty of disclosure . . . .”<sup>200</sup> Finally, he said there was a “midway” position unconcerned with theoretical resolutions and grounded pragmatically:

[Y]ou are never really up against the gun to determine whether the practitioner does have dual responsibilities, that is, one set of responsibilities to his client and another set to the government, but that it is just good business for you, for the client and for the government to try to minimize adversary aspects just as much as possible, and to increase the disclosure aspects just as much as possible, and thereby to improve relationships among the three of you as much as possible.<sup>201</sup>

For Mr. Mintz, practicing tax law at the borderline was “just not good tax practice or good tax business . . . .”<sup>202</sup> With this fact of practice in mind, he concluded it was a “mere academic exercise when we discuss the degree to which there is this dual relationship . . . .”<sup>203</sup> In his mind, “it is in our best interest to act as if there were a dual responsibility,” regardless of the academic conclusion.<sup>204</sup>

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195. *Id.*

196. *Id.* at 24–26.

197. *Id.* at 24–25.

198. Holland et al., *Panel Discussion*, *supra* note 85, at 25.

199. *Id.*

200. *Id.* at 25–26.

201. *Id.* at 26.

202. *Id.*

203. Holland et al., *Panel Discussion*, *supra* note 85, at 27.

204. *Id.*

Others shared Mr. Mintz's conviction that the difference between good tax ethics and a good tax practice may be merely academic, at least in many circumstances. IRS Chief Counsel Crane C. Hauser argued the tax lawyer's professional reputation within the IRS offices was not "simply a matter of ethics" but "a matter of dollars and cents to the practitioner."<sup>205</sup> Indeed, Mr. Hauser suggested that rather than speaking of dual responsibilities to client and government, it would be useful to invoke a third responsibility: the lawyer as to himself, that is, to preserve his professional reputation.<sup>206</sup> Mortimer Caplin and Mr. Holland agreed that "we will find ourselves pretty good tax advisers" by avoiding advice that raises ethical concerns within us.<sup>207</sup> New York City tax lawyer Milton Young (Young, Kaplan & Edelstein) followed this sentiment as well, writing that a moral reaction is "often a correct forecast of the effectiveness of the plan itself."<sup>208</sup> For Mr. Young, it was reasonable to speak of a dual duty to the client and government, but he emphasized that a "dual responsibility" is not necessarily a conflicting one.<sup>209</sup> It is good for *both* the government and the client to avoid bad tax planning, he thought.

#### E. Duty of Disclosure

Alongside the debate on the general duty to the system was the more specific debate on whether or not there was a duty to disclose "doubtful but arguable points in a tax return."<sup>210</sup> Norris Darrell argued there was.<sup>211</sup> For Mr. Darrell, the relevant issue was not his own professional judgment on the taxability of the issue but rather his professional judgment as to whether "the government would probably seek to tax it."<sup>212</sup> Although he argued for a general rule to disclose any item that "might be considered taxable by the tax authorities," he also argued for an exception.<sup>213</sup> The exception would be those situations in which "there were many courts decisions uniformly in his client's favor but as to which the government bullheadedly simply hadn't yet

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205. *Id.* at 29.

206. *Id.*

207. *Id.* at 38. Mortimer Caplin believed that tax lawyers should "accept their special responsibilities," and that they should be "willing to work cooperatively for stronger and better tax administration not only for their own interest, but in the interest of the nation, as well." Caplin, *Good Tax Practice*, *supra* note 19, at 21.

208. Johnson, *Theory*, *supra* note 86, at 39–40.

209. *Id.* at 39.

210. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 92 (quoting Norris Darrell).

211. *Id.*

212. *Id.*

213. *Id.*

given up.”<sup>214</sup> And into the calculations of the government’s probable interest — and whether or not the interest was merely bullheaded — Mr. Darrell also cited the need to consider potential penalties (e.g., for disregarding regulations) and potential tactical decisions (e.g., making and reporting gifts in a year in which the need to file a gift return was debatable — so as to start the statute of limitations).<sup>215</sup> Despite his unambiguous argument for a duty to disclose, it was, ultimately, merely a presumptive duty. He recognized the “difficulty of generalizing,” and wrote that the decision “depends upon your best judgment as to the law, the merits of any claim of taxability and the government’s probable attitude.”<sup>216</sup>

Mr. Darrell asserted a presumptive general duty to disclose, and shared his thoughts on what factors might overcome the presumption, but he did not argue for it from specific theoretical premises. Professor Jerome Hellerstein, in contrast, deduced a disclosure duty from his theoretical conviction that the taxpayer and the government were not in an adversarial relationship in the way a plaintiff and defendant would be.<sup>217</sup> Professor Hellerstein thought that the prevailing norm of the tax bar was “perfectly clear” that there was no duty to “recommend full and fair disclosure” in situations in which the lawyer is “reasonably clear” that the Bureau would decide the issue adversely, but “not as clear as to what the results will be in the courts.”<sup>218</sup> And he believed this would be appropriate were the taxpayer and the government in a typical adversarial relationship.<sup>219</sup> Denying that to be the relationship, and desiring that tax lawyers would work to improve “tax morality,” he urged tax lawyers to bring their influence “to bear in order to develop in the community generally ethical standards which require full and fair disclosure by the taxpayer.”<sup>220</sup> Professor Hellerstein did not elaborate on what “full and fair disclosure” meant, nor when it should be provided or what counter-considerations there might be. He lamented the current ethical comfort with the lack of disclosure, urging a higher standard, but not considering the practicalities, at least not in the way Mr. Darrell did.<sup>221</sup>

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214. *Id.*

215. Darrell, *Propriety in Tax Practice*, *supra* note 82, at 10–11.

216. *Id.* at 11.

217. Cahn et al., *Ethical Problems*, *supra* note 1, at 9 (statements of Jerome R. Hellerstein).

218. *Id.* at 8.

219. *Id.* at 9.

220. *Id.*

221. Due to his rhetorical style, Professor Hellerstein’s thoughts on the subject are arguably ambiguous. He describes the prevailing norm with specificity but his own assessment of it is rather general. Professor John Maguire concluded that Professor Hellerstein did not argue for a higher duty of disclosure. Maguire, *Conscience and Propriety*, *supra* note 24, at 42 n.60. Randolph Paul concluded that he did. Paul, *Tax Adviser*, *supra* note 4, at 427. While Professor Hellerstein’s

Randolph Paul did not analyze the duty to disclose in light of an abstract relationship between the taxpayer and the government, nor did he lament the current practice. Instead, he described the current practice as more nuanced than Professor Hellerstein took it to be. In situations where the legal issues are in a “thicket of obscurity” or lack a “yardstick for the measurement,” such as the ones Professor Hellerstein considered specifically, Mr. Paul was at ease with the prevailing norm not to disclose.<sup>222</sup> Nor did he think disclosure should be warranted when an issue has been “repeatedly decided favorably to taxpayers” but the Bureau continues a “policy of persistent litigation.”<sup>223</sup> However, he believed that most tax lawyers would insist the client disclose in order to make substantially debatable issues “automatically come to the attention of the revenue agent.”<sup>224</sup> In general, Mr. Paul characterized the disclosure territory as one in which “many borderline problems constantly arise.”<sup>225</sup> While he did not stake-out a theoretical position, given his focus on the merits of the underlying issue, and whether or not the Bureau was unreasonably litigating an issue, in practical terms it seems quite likely that Mr. Paul’s and Mr. Darrell’s positions would reach similar results.

Professor Boris Bittker provided the most thorough analysis of the issue. Though Professor Bittker thought the issue would be better discussed at the taxpayer-level (as did Professor Barnes),<sup>226</sup> he left the discussion at the professional-level as this was where it usually occurred. Professor Bittker focused on whether or not there was a “professional obligation” to disclose debatable items, contrasting this from more practical considerations, such as disclosing to avoid the possibility of a penalty or an extended statute of limitations or disclosing for “a tactical advantage vis-a-vis other debatable items in the return . . . .”<sup>227</sup>

Professor Bittker identified two arguments for a general professional obligation of disclosure. First, the practitioner may be wrong about the taxability of the item, and disclosure permits the orderly resolution of it.<sup>228</sup> Second, a taxpayer ought not to benefit from the mere volume of returns,

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rhetoric obscures his reasoning in some places, I believe Mr. Paul provided the more sensitive reading, characterizing Professor Hellerstein as having “regretfully concluded” that the prevailing norm was against disclosure whereas Professor Maguire restated Professor Hellerstein’s description of the prevailing norm without catching the fairly clear sense of his regret as to it. *Id.*

222. *Id.*

223. *Id.* at 428.

224. *Id.*

225. *Id.*

226. Barnes, *Voluntary Assessment System*, *supra* note 25, at 1038.

227. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 251.

228. *Id.* at 252.

which, without disclosure, might often mean the taxpayer receives a tax benefit to which he is not truly entitled.<sup>229</sup>

In contrast, Professor Bittker argued, first, while disclosure is already required in certain specific situations (e.g., receipt of stock in allegedly tax-free reorganizations), neither the Regulations nor the Service imposes a general obligation of disclosure.<sup>230</sup> Second, if there were a general obligation, the burden on the Service would be increased tremendously as there would be “hundreds of thousands of riders” filed annually.<sup>231</sup> Third, if there a general obligation of disclosure, it should extend to matters not usually reflected on returns (e.g., exclusions) and should not be limited to matters that are (e.g., deductions).<sup>232</sup> Fourth, there are often complex issues underlying the relevant tax issue (e.g., allocation of costs of goods sold), and if there were an obligation of disclosure related to the relevant tax issue, it would need to extend to the underlying issues.<sup>233</sup>

Professor Bittker argued that the fundamental issue was the purpose of the tax return. On the one hand, the purpose of the return might be considered to present the taxpayer’s opinion as to his tax liability — his and his tax advisor’s honest beliefs about the liability.<sup>234</sup> On the other hand, the purpose of the return might be considered to present to the government all it “ought to know to make the most efficient use of its auditing facilities . . . .”<sup>235</sup> If one has the “honest-belief approach to the tax return,” then honestly presenting one’s opinion as to the liability is required but flagging an issue on which the Service is expected to disagree is not. However, if one has the “audit-assistance concept,” then flagging the issue for the Service should be required.

Professor Bittker held the honest-belief approach. He thought requiring taxpayers to engage in audit-assistance would be counter-productive. “[A] vague concept of taxpayer disclosure for debatable items” would not be an efficient assistance to the Service, and it would impose significant “moral wear and tear” on the taxpayers (e.g., it would encourage “hypocritical” claims that certain issues were not really debatable).<sup>236</sup> If the Service determines to seek more specific information in certain situations, then it should do what it has already done which is to specify what information it wants in which situations.<sup>237</sup> Specificity — backed with potential penalties — would be an efficient and clear approach, while an

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229. *Id.*

230. *Id.* at 252–53.

231. *Id.* at 253.

232. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 253–54.

233. *Id.*

234. *Id.* at 254.

235. *Id.*

236. *Id.* at 255.

237. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 255.

overarching duty to disclose whatever the practitioner thought the Service might want to review would not.

Professor Boris Bittker admitted the “full-disclosure” approach carried a loftier “vision of taxpayer cooperation with the government in a common search of truth” than did his own approach.<sup>238</sup> But Professor Bittker (who suspected the full-disclosure approach reflected the influence of securities disclosure law on legal practice)<sup>239</sup> was not alone in rejecting it. He was joined by Professor John M. Maguire, who suspected considerable hypocrisy on the disclosure issue, writing, “[T]here are more words of conscientious subservience to the idea of open returns openly arrived at than unpublicized practice justifies in fact.”<sup>240</sup> Gerald Wallace believed that so long as the “attorney is of the position that the Bureau’s position is wrong,” there is no duty to disclose simply “for the purpose inviting close examination.”<sup>241</sup> Mark H. Johnson believed that having “a reasonable basis for an advantageous position” is what counts, and there is no reason to “provoke controversy by advertising the grounds on which it might be attacked.”<sup>242</sup> Mortimer M. Caplin also did not argue for a general disclosure obligation, focusing instead on what is specifically required under Circular 230 or as a result of signing a return,<sup>243</sup> urging the American Bar Association and the American Institute of Certified Public Accountants to provide guidance.<sup>244</sup>

#### F. Practical Advice for Tax Lawyers

The tax lawyers writing on ethics between 1945 and 1965 gave considerable practical advice on becoming a good tax lawyer. The 1951 *Tax Law Review* dedicated its annual banquet to discussing the making of a successful tax lawyer. The symposium’s speakers included Robert N. Miller, Mark Johnson, and Professor Harry J. Rudick (New York University and Lord, Day & Lord) who each presented prepared remarks on specific themes. Randolph E. Paul, Norris Darrell, and Merle H. Miller were not featured

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238. *Id.*

239. *Id.* at 271. Professor Bittker was not the only writer connecting issues of tax return disclosure with those of securities disclosures. Mortimer Caplin also connected the two, simply by questioning if tax disclosure standards should be the same as what “the SEC requires in a prospectus.” Caplin, *Good Tax Practice*, *supra* note 19, at 19.

240. Maguire, *Conscience and Propriety*, *supra* note 24, at 42.

241. Cahn et al., *Ethical Problems*, *supra* note 1, at 31 (statements by Gerald Wallace).

242. Johnson, *Theory*, *supra* note 86, at 32.

243. Caplin, *Good Tax Practice*, *supra* note 19, at 17; Caplin, *Perspective*, *supra* note 53, at 1033.

244. *Id.*

speakers at the 1951 symposium, but they did provide advice on advising in other venues.

Mark H. Johnson emphasized education as the foundation to being a good tax lawyer. He believed that given the variety of non-tax legal issues with which tax lawyers must be familiar, a tax lawyer “probably must place more reliance than most lawyers upon the adequacy of his law school education.”<sup>245</sup> The importance of a broad legal education for the tax lawyer was not, however, Mr. Johnson’s exclusive focus. He indicated the importance of studying “the great literature of the world.”<sup>246</sup> Without a tax lawyer having done so, even “the surface of his speech and writing will reflect the narrowness of his learning and make his judgment suspect.”<sup>247</sup> Mr. Johnson also argued that a tax lawyer must be knowledgeable in world history, as he believed that such knowledge gave “perspective for the immediate eddies and currents of the law” and “data for long-term appraisal and predictions.”<sup>248</sup> Mr. Johnson believed that the cultural taste for this type of learning is “pretty well developed by the time a young man arrives at law school” and so only if he arrives at law school with such a “desirable background and habits” does he have much of a chance of not “retrogressing.”<sup>249</sup> In addition to knowing the humanities, Mr. Johnson also argued that a good tax lawyer must know calculus (for understanding life expectancy curves); economics and statistics (for understanding supply and demand curves, and especially useful for dealing with the excess profits tax); government; public finance; and accounting (for the tax lawyer, a “balance sheet or income statement must be read as easily a baseball box score.”)<sup>250</sup>

The tax lawyer, Mr. Johnson argued, must understand that he is “a lawyer who knows something about taxes” and never a “‘tax expert’ who happens to be a lawyer.”<sup>251</sup> He must “know as much law as any other lawyer,” beginning with “contracts, sales, property, equity, wills, corporations, partnerships, agency, and negotiable instruments,” and, in addition, he must know “the principles of administrative law . . . Tax Court practice, and the Federal Rules . . . [and] all the law of evidence.”<sup>252</sup> Most of all, he must know the Internal Revenue Code “at least as well as a minister knows his Bible,” and keep an “orderly mental catalogue” of regulations,

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245. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 4 (statements by Merle H. Miller).

246. *Id.* at 5.

247. *Id.*

248. *Id.*

249. *Id.*

250. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 5 (statements by Mark H. Johnson).

251. *Id.* at 2.

252. *Id.* at 3–4.

rulings, and cases (specifically including obsolete authorities as “[t]he obsolete is . . . key to the current.”).<sup>253</sup> In order to succeed, a tax lawyer must be reconciled to the fact that he always needs to do “more research on specific problems than is required of his brethren in general practice,” and that the “economic justification is that he will spend less additional time for his client on those phases of his work than the general practitioner will spend in finding the tax law.”<sup>254</sup>

Finally, Mr. Johnson underscored the importance of the tax knowledge one gains only by “experience.”<sup>255</sup> The tax lawyer learns “the workings of the Bureau” by experience.<sup>256</sup> The tax lawyer develops a reliable predictive intuition as to “a tax official’s reaction” by experience.<sup>257</sup> The tax lawyer acquires a reliable clairvoyance in his “guesswork as to long term ‘trends’” by experience.<sup>258</sup> And it is only by experience the tax lawyer learns to recognize “patterns in tax problems and solutions.”<sup>259</sup>

Professor Harry J. Rudick addressed the symposium on the skills necessary for being a successful tax lawyer. He thought these skills were “pretty much the same as the skills required for success in the practice of other fields . . . .”<sup>260</sup> Some of these skills, he argued, could “only be acquired by experience,” however, he added that others “are inherent” and “[t]he latter may be nurtured and developed but unlike cultured pearls, their seeds cannot be implanted.”<sup>261</sup> Whether acquired by experience or birth, he believed that “the great majority of the tax practitioners who have achieved success” have, “in significant measure,” the skills identified.<sup>262</sup>

Professor Rudick’s list of skills was varied. He considered a “good memory” as among the most indispensable skills for a successful tax lawyer.<sup>263</sup> For example, “when a client telephones and wants the answer to an answerable question,” since “[i]n the vast majority of cases the question is one which the practitioner has looked up before,” the quality of the practitioner’s memory can save the client “time and expense.”<sup>264</sup> Of course,

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253. *Id.* at 2.

254. *Id.* at 4.

255. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 2 (statements by Mark H. Johnson).

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 5 (statements by Harry J. Rudick).

261. *Id.* at 6.

262. *Id.* at 8.

263. *Id.* at 6.

264. *Id.*

not every tax question is readily answerable, but if it is, memory likely will be the resource that provides the answer. Along with a good memory, a successful tax lawyer needs to be able to write well and speak well, being careful to avoid “verbosity and pomposity.”<sup>265</sup> The successful tax lawyer also needs the ability to administer the law office: “to select and train assistants, delegate work to them, and appraise that work.”<sup>266</sup> The tax lawyer who tries to do it all himself eventually suffers professionally, and his “usefulness to business world and the bar are circumscribed.”<sup>267</sup>

Finally, the successful tax lawyer must also have good judgment and be decisive.<sup>268</sup> Good judgment, being “a compound of experience, knowledge, and talent,” is

[T]he ability to look at a case “in the round” and not merely from a single viewpoint; to approach a problem objectively and without bias; to evaluate the importance of the separate issues of a case in relation to the entire case; to weigh the chances of success in litigation; and to foresee the probable consequences of success or failure in relation to the whole enterprise . . . . Judgment includes knowing when to listen, when to argue, and when to stop listening and arguing. It includes an ability to change one’s mind . . . .<sup>269</sup>

When it comes time to make a judgment, the tax lawyer must do so decisively rather than in an “equivocal or wishy-washy” way.<sup>270</sup> It is the “problems which do not permit . . . categorical solution” that are most likely to be submitted to the successful tax lawyer, and even where the “suggested answer is no more than an informed guess, the practitioner is not excused from stating his position — with an appropriate caveat, of course.”<sup>271</sup>

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265. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 7 (statements by Harry J. Rudick). As an aside, Professor Rudick notes that “the lower schools” ought to work harder to remedy writing defects in their students, as his law students were making “[m]istakes in grammar and spelling” and sentence structure in their “examination papers.” *Id.* Given the regularity with which this complaint is heard among law professors today, there is some odd comfort in his expression of concern, even though I fear he would indict my own lower schools.

266. *Id.* at 8.

267. *Id.*

268. *Id.* at 7–8.

269. *Id.* at 8.

270. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 7 (statements by Harry J. Rudick).

271. *Id.* at 7.

Robert N. Miller addressed the symposium on “the successful tax lawyer’s character and personal relationships.”<sup>272</sup> He thought a tax lawyer must have a “youthful and daring spirit” because “a peculiar quality of tax controversies is that each one is likely to present at least some unique features” and so the tax lawyer “will often be called on to enter territory which is relatively unexplored . . . .”<sup>273</sup> This “daring spirit” is different from the spirit of a lawyer who “never knows when he is licked.”<sup>274</sup> The successful tax lawyer must “recognize the real weaknesses of a situation” and, more importantly, must be able “to induce the client to recognize them — even the client who would rather not.”<sup>275</sup> A good tax lawyer must have “in a special degree the quality of patience,” especially when “dealing with Government conferees,” and must be able to foresee “each possible difficulty . . . the Bureau men” may discover.<sup>276</sup> Additionally, a successful tax lawyer must be able “to use effectively in his work a number of partners and assistants, as well as experts in the field of accounting, engineering, and economics.”<sup>277</sup>

Perhaps the most interesting highlight of Mr. Miller’s very practical advice is that he subjects it all to the following preface:

[A] truly successful lawyer’s career must be consistent with the lawyer’s own achievement of a well-balanced life as an individual and as a member of the bar . . . . A professional man who gets the details of his own life into a tangle is not likely to exhibit broad intelligence in guiding the affairs of other people; the tax field, particularly, calls for exercise of general wisdom, because there are very large areas in which the adviser can get no decisive help from established precedents.<sup>278</sup>

According to Mr. Miller, a good tax lawyer must have a well-ordered life in order to advise well another — that is, if a lawyer’s wisdom is not sufficient to govern his own life, how could it be useful to his clients? As Mr. Miller put it, the successful practice of tax law may rely more on practical wisdom than technical analysis.<sup>279</sup>

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272. *Id.* at 1 (statements by Robert N. Miller).

273. *Id.* at 9.

274. *Id.* at 10.

275. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 10 (statements by Robert N. Miller).

276. *Id.* at 10–11.

277. *Id.* at 10.

278. *Id.* at 9.

279. *Id.* at 12.

Although not part of the 1951 symposium, Norris Darrell took time to provide very specific advice on tax advising. Mr. Darrell described a typical tax client as someone who wants “to keep his taxes down . . . taking advantage of every possible loophole in the law” but who “seldom comprehends the difference between sound and border-line transactions.”<sup>280</sup> The tax lawyer has to make a judgment as to the “elusive line between what may be done and what dare not be done with reasonable tax safety.”<sup>281</sup> He described the common situation in which a tax lawyer finds himself:

We have oftentimes found ourselves in the uncomfortable position of having to cast a wet blanket over tax minimization schemes developed by overly enthusiastic planners, with the attendant risk that we may appear in the eyes of our clients, who too often confuse cleverness for competence, to be more negative than constructive minded.<sup>282</sup>

Mr. Darrell wrote that “cleverness is not competence” and “the too-clever, overly-enthusiastic tax planner is likely to be either a limited or an irresponsible man.”<sup>283</sup> But it is “inexcusable to frustrate appropriate and desirable action because of a lurking fear, born of confusion; only the incompetent will do that.”<sup>284</sup> While the good tax lawyer “must only too often disappoint clients and only too often turn down the fashionable tax device of the moment,” he need not always “take a line so conservative that his clients drop off to more daring advisers.”<sup>285</sup> Being either unduly clever or unduly fearful is incompetent and irresponsible.<sup>286</sup> Mr. Darrell sketches out the steps for competent tax advice — infused not only with “care and caution,” but also “constructive imagination and ingenuity . . . .”<sup>287</sup>

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280. Darrell, *Tax Minimization Devices*, *supra* note 21, at 983.

281. *Id.*

282. *Id.* Other ethics writers identified the common need to throw a wet blanket on tax advice with the risk of appearing too negative-minded. Often times, the alleged advice comes not from another lawyer or an accountant but the neighbor “Joe,” whose lawyers “dreamed up a wonderful scheme whereby he could save thousands of dollars in taxes without risking anything.” Holland et al., *Panel Discussion*, *supra* note 85, at 35–36. Of course, Joe, having advised his neighbor of the wonders of his tax lawyers, prompts the neighbor to ask his own lawyer, “Why don’t you consider setting up a scheme like that for me?” *Id.*

283. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 100.

284. Darrell, *Tax Minimization Devices*, *supra* note 21, at 988.

285. *Id.*

286. *Id.*

287. *Id.*

To give good tax advice, a tax lawyer must first “make that ‘most inordinate expenditure of time’” in understanding the statute, regulations, and rulings.<sup>288</sup> The “second tool” the lawyer should acquire is “a thorough knowledge of [the] so-called tax common law . . . .”<sup>289</sup> Third, the tax lawyer “should be thoroughly acquainted with administrative procedure.”<sup>290</sup> Fourth, the tax lawyer must “know how to investigate the ultimate reality” of the relevant facts, including the “client’s real desires and best interests,” bearing in mind that a client is sometimes “influenced too greatly by saving taxes” and influenced too little by “what he would really want to do” if he “considered the matter more carefully in the light of his own best interests and those of his family.”<sup>291</sup> The lawyer must also remember the difference between “facts as related orally by the client and facts which can be proved to a Court.”<sup>292</sup> He must be ready to dig up the facts like “a miner who digs up mounds of earth to reach the ore.”<sup>293</sup> Mr. Darrell emphasized that being a good tax lawyer “requires training, experience and real work” in order to “marshal and analyze facts effectively, and to be able to identify a transaction by its right name . . . .”<sup>294</sup>

Having taken these steps, the tax lawyer has not finished his job but has just begun the most important part of it. He must realize that the steps “function only to make judgments informed, and cannot . . . take the place of judgment.”<sup>295</sup> He must recognize that the “the line is not a static but a shifting one.”<sup>296</sup> He must ponder the relevant history and likely changes, being careful to interpret “the overriding Congressional purpose” involved.<sup>297</sup> He must realize that a good tax plan should be “adapted to survive amid the interplay of living social forces” and never “simply jig-saw cut . . . .”<sup>298</sup> It is with these issues that Mr. Darrell believed “that considerations of moral and ethical propriety and legal effectiveness . . . often shade into each other” insofar as a “foul-smelling” plan is “likely to be adjudged ineffective” eventually.<sup>299</sup> In this realm of professional judgment,

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288. *Id.* at 984.

289. Darrell, *Tax Minimization Devices*, *supra* note 21, at 984.

290. *Id.*

291. *Id.* at 983, 985.

292. *Id.* at 985.

293. *Id.*

294. Darrell, *Tax Minimization Devices*, *supra* note 21, at 985.

295. *Id.*

296. *Id.* at 989.

297. *Id.*

298. *Id.* at 988.

299. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 101.

Mr. Darrell compares the tax lawyer with “the perfume smeller or the wine taster.”<sup>300</sup>

Finally, in arriving at his final judgment, the good tax lawyer never loses “sight of the fact that the tax consideration is only one of the many factors that should be taken into account,” and that “[i]ll-considered action to escape taxes may prove . . . tragic . . . .”<sup>301</sup> He must then have “a character, and a breadth of background, training and experience in business and personal affairs” that will enable him “to put all aspects of the matter before his client in their proper light so that the client may be guided toward a wise decision.”<sup>302</sup>

Much as Mr. Darrell characterized clients as apt to confuse technical cleverness for practical judgment, Merle H. Miller believed they were likely to have “more faith in technicalities” than their lawyers do.<sup>303</sup> They think tax lawyers must have “a bag of tricks that greatly reduces our clients’ taxes and probably get us out altogether on our own.”<sup>304</sup> Or so they may think, “until they call on upon us in a professional way and usually leave in amazement after being told that they really owe more than they thought they did when they came to see us.”<sup>305</sup>

Rather than finding tax lawyers to be technical magicians with secrets for sale, Mr. Miller thought the client was more likely to find a professional who considers his primary job to be preventing his clients “from going off on screwy tantrums, diverting their energies into non-productive tax avoidance activities, to the great detriment of our productive system and our tax collecting system.”<sup>306</sup> Whereas Mr. Darrell wrote that tax lawyers often have to throw a “wet blanket” on such tantrums,<sup>307</sup> Mr. Miller provided a more graphic description, writing that a tax lawyer spends

nine-tenths of his time killing schemes believed by the proponents to be new, but which were actually dead and buried many Revenue Acts and many decisions ago. As we grow old in the practice, this mortality rate bothers us less and less, and we come to suspect that the scheme is bad even

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300. *Id.* The tax lawyer’s use of the “smell test” was mentioned in Holland et al., *Panel Discussion*, *supra* note 85, at 23, 38, 43. The image of the nose as a useful guide to the tax lawyer appears to have been in circulation among tax lawyers for quite some time.

301. Darrell, *Tax Minimization Devices*, *supra* note 21, at 988.

302. *Id.*

303. Miller, *Morality*, *supra* note 20, at 1075.

304. *Id.* at 1074.

305. *Id.* at 1074–75.

306. *Id.* at 1076.

307. Darrell, *Tax Minimization Devices*, *supra* note 21, at 983.

before we have heard it. Once a man has become reconciled to the proposition that there is little new under the sun, this job of decimating someone else's brain child becomes rather perfunctory, and even loses some of its zest.<sup>308</sup>

Mr. Miller concluded by writing, "The man who can kill off a bad tax scheme at its inception is contributing greatly to the well being of the country at large."<sup>309</sup> Unfortunately, as he put it, "Infanticide is as abhorrent in the intellectual, as in the physical realm," and so while "[i]t is easy to kill off someone else's scheme," it is "most difficult to maintain that critical attitude with respect to one's own creations."<sup>310</sup> And thus, the challenge for a good tax lawyer is to maintain that critical attitude with respect to his own advice.<sup>311</sup> Mr. Miller pointed out that we must guard ourselves against becoming too "enmeshed in the same wishes which motivate our clients" for when this happens we are "rendered easier to please with our own answers" and "are most apt to fit together the letter of the statute and the court decisions" in coming up with "an answer that will satisfy everyone" — except the "moral sense of the revenue agent and the court that will test it."<sup>312</sup> Those lawyers, he continued, who may have "been able to invoke righteous indignation" when killing off some other advisor's "flagrant tax scheme" may often "fall victim to a lack of moral sensibilities in testing their own brain creations."<sup>313</sup> Thus, Mr. Miller urged that tax lawyers "should be as zealous in developing a sense of moral fairness as in acquiring a technical working knowledge of the Code."<sup>314</sup> The good tax lawyer needs both technical knowledge and the sense of moral fairness which is necessary for testing his own tax advice.

Mr. Miller put great emphasis on this moral sense.<sup>315</sup> He argued that applying this moral sense to interpreting the tax code was what courts did when settling cases.<sup>316</sup> Citing cases like *Gregory, Clifford*, and *Court Holding Co.* as evidence, Mr. Miller wrote, "We have witnessed during the past twenty years the growth of court-made law which is to our tax law what equity was to the old common law."<sup>317</sup> The moral sense of the tax lawyer was similar to this equitable sense of the courts, and it was an essential

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308. Miller, *Morality*, *supra* note 20, at 1075.

309. *Id.* at 1076.

310. *Id.*

311. *Id.*

312. *Id.*

313. Miller, *Morality*, *supra* note 20, at 1076.

314. *Id.* at 1077.

315. *Id.* at 1070.

316. *Id.* at 1068.

317. *Id.* at 1070–72.

qualification of the good tax lawyer because it had become an essential aspect of evolving tax law. As part of this evolution, statutory formalities were often “completely or partially disregarded” by the courts “to the extent necessary to achieve a ‘right’ result.”<sup>318</sup> And what was the source of the sense of a right result? It was nothing other than “the moral sensibilities of the courts today.”<sup>319</sup> This sense of “morality in our courts is the only known factor accountable” for the decisions cited, he argued.<sup>320</sup> Mr. Miller wrote, “There is a sense of morality rampant in our courts today, ready to take care of any omission of Congress, or any brilliant scheme of the most brilliant genius” if such an omission or scheme would “result in an unfair dislocation” of tax burden.<sup>321</sup> The practical tax lawyer considers the long term when eyeing “a loophole which long research fails to discount . . . .”<sup>322</sup> The practical tax lawyer “will not hesitate to condemn a plan merely on the ground that it offends his own moral sensibilities” because such a plan is “apt to be found deficient by a court that would have less desire to find the plan effective than would the tax counselor.”<sup>323</sup> Lawyers assuming their “own moral sensibilities were irrelevant as guides” in interpreting the tax law was the reason that “[m]any clients are in trouble today.”<sup>324</sup> “[N]ow that morality is part of our tax laws,” a taxpayer cannot “afford to have a tax advisor whose sense of morality is less acute than that of the courts.”<sup>325</sup>

Randolph E. Paul emphasized the importance of tax lawyers beginning with a coherent “philosophy on the subject of tax avoidance.”<sup>326</sup> Mr. Paul urged tax lawyers to accept that because “[d]ifferent tax consequences may flow from the different methods of accomplishing the same ultimate economic result,” it follows that taxpayers “are plainly entitled to select the method which results in the lower tax liability.”<sup>327</sup> He believed that there was no reason to “hesitate to advise the client fully and frankly in choosing among ‘the oddities in tax consequences’ that emerge from the different methods of accomplishing the same economic result.”<sup>328</sup> The tax lawyer’s personal, ethical, or policy concerns are not relevant to this task; his task is simply “to help the client reduce his tax liability to the lowest possible

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318. Miller, *Morality*, *supra* note 20, at 1070–72.

319. *Id.*

320. *Id.* at 1072.

321. *Id.* at 1073–74.

322. *Id.* at 1074.

323. Miller, *Morality*, *supra* note 20, at 1074.

324. *Id.* at 1076.

325. *Id.* at 1076–77.

326. Paul, *Tax Adviser*, *supra* note 4, at 414.

327. *Id.* at 416.

328. *Id.* at 418–19.

legal level or save him from a greater tax liability than his transactions need to carry.”<sup>329</sup>

Unlike Mr. Johnson, Professor Rudick, and Mr. Robert N. Miller, Mr. Paul warned that “too many qualifications in other areas of the law may be a handicap to the tax lawyer.”<sup>330</sup> He thought it important that a tax lawyer not have too much “vested intellectual interest” in other areas of the law,” as it might make him “overanxious to apply in tax territory principles which will not be welcome there.”<sup>331</sup> Income taxation is distinctive in considerable part due to its being a young field of law, starting only “a little more than a quarter of a century ago.”<sup>332</sup> In comparison with other fields of law, Mr. Paul considered tax law to be less concerned with “form and technicality,” and more oriented towards a “search for underlying substance and basic realities.”<sup>333</sup> In one article, Mr. Paul emphasized the differences between tax lawyers and other lawyers, but then, having undergone a philosophical conversion on the specialness of tax lawyering, he later emphasized the similarities, at least for certain ethics purposes.<sup>334</sup> But even that change in his own thinking, his practical caution of too much interest in non-tax fields was presumably unconnected with his more abstract shift in ethical philosophy.

He wrote that when the tax client comes in, that client “may have a specific plan in mind or he may have a general objective,” and he has come to check with the tax lawyer “whether a given course of conduct will produce unforeseen tax liability or whether a foreseen liability may be minimized.”<sup>335</sup> Unlike Mr. Darrell or Mr. Miller, Mr. Paul’s criticism of clients was not that they had too much faith in technicalities but rather their “ingenuity and uncanny cunning at concealing and suppressing facts,” which, he continued, “pass my poor powers of description.”<sup>336</sup> In order to get at the facts, he

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329. *Id.*

330. See Paul, *Responsibilities*, *supra* note 57, at 380.

331. *Id.*

332. *Id.* at 381.

333. *Id.*

334. *Id.* In this article, Mr. Paul also distinguished tax law from other fields by citing that its controversies were between the taxpayers and their government rather than a private adversary. He asserted this “puts the public interest into the equation and enormously complicates the responsibilities of the tax adviser.” In his later article in the *Rocky Mountain Law Review*, he instead argued that the tax field was not as distinctive from other legal fields, at least not sufficiently distinctive to necessarily require different ethical norms. He is explicit about his change of mind on this point. Paul, *Tax Adviser*, *supra* note 4, at 425, n.58 (citing his *Harvard Law Review* article). For his earlier point of view, see Paul, *supra* note 162.

335. Paul, *Tax Adviser*, *supra* note 4, at 414.

336. Paul, *Responsibilities*, *supra* note 57, at 382.

suggested that the lawyer prepare for the “client in writing exactly what he has told the lawyer orally.”<sup>337</sup> This technique works because the client “will hardly be able to resist the temptation to demonstrate the mistakes his lawyer has made,” which “may be humiliating to the lawyer” but, he added, “a little mortification is a small price for the discovery of the essential facts.”<sup>338</sup>

He also criticized clients who “come to a lawyer to cover their own tracks.”<sup>339</sup> These clients, he wrote, “want to follow a given course of action” and want “the lawyer to share blame if results are disappointing.”<sup>340</sup> He cautioned lawyers in these situations, especially if they are tempted “to give an immediate opinion.”<sup>341</sup> Mr. Paul continued with a reminder that even though competition for the client pressures the tax lawyer to give in and “slant opinions in the direction of a client’s desires,”<sup>342</sup> a lawyer should always recall that “[i]n tax law the day of reckoning is often on earth and not in heaven.”<sup>343</sup> Or, as he otherwise puts this sobering thought: “[T]he tax adviser’s failure will be measurable in dollars and cents, the client’s dollars and cents — and the tax adviser’s, as well.”<sup>344</sup>

Like Mr. Darrell and Mr. Miller, Mr. Paul was careful to make clear that the tax lawyer should not “put undue trust in the letter of the law.”<sup>345</sup> He argued it is important that the tax lawyer consider “interstitial judicial legislation,” as well as understanding that “the policy of tax statutes is not always to be found in the literal meaning” used in the statutes, because the statutes “derive vitality from the obvious purpose as which they are aimed.”<sup>346</sup> The tax lawyer, he elaborated, must consider not only what the law is, but also what it “will become” when giving advice.<sup>347</sup> Continuing, Mr. Paul indicated that the tax lawyer must know the statute, the regulations, the rulings, the courts decisions, and the “suggestion and criticism and dogma” of the “[m]agazines, law reviews, [and] periodicals.”<sup>348</sup> Mr. Paul added the tax lawyer must also have the “gift of controlled intuition,” the ability to think “with his profound intestines” when giving his systematized predictions.<sup>349</sup>

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337. *Id.* at 383.

338. *Id.*

339. *Id.*

340. *Id.*

341. Paul, *Responsibilities*, *supra* note 57, at 383–84.

342. *Id.* at 385.

343. *Id.*

344. *Id.* at 379.

345. Paul, *Tax Adviser*, *supra* note 4, at 417.

346. *Id.*

347. *Id.*

348. Paul, *Responsibilities*, *supra* note 57, at 378.

349. *Id.* at 379.

In writing what may well be the best single paragraph on tax advising, Mr. Paul warned:

Above all things, a tax attorney must be an indefatigable skeptic; he must discount everything he hears and reads. The market place abounds with unsound avoidance schemes which will not stand the test of objective analysis and litigation. The escaped tax, a favorite topic of conversation at the best clubs and the most sumptuous pleasure resorts, expands with repetition into fantastic legends. But clients want opinions with happy endings, and he smiles best who smiles last. It is wiser to state misgivings at the beginning than to have to acknowledge them ungracefully at the end. The tax adviser has, therefore, to spend a large part of his time advising against schemes of this character. I sometimes think the most important word in his vocabulary is "No;" certainly he must frequently use this word most emphatically when it will be an unwelcome answer to a valuable client, and even when he knows that the client may shop for a more welcome answer in other offices which are more interested in pleasing clients than they are in rendering sound opinions.<sup>350</sup>

### G. Reform Agenda

In the articles and essays devoted to professional ethics, some of the tax lawyers also expressed opinions on certain tax reform needs. Professor Bittker, for example, encouraged the Treasury Department to license or to enroll all return preparers in order to reduce the abuses of the system, such as a preparer's wholesale manufacturing of tax deductions and credits.<sup>351</sup> Both Mortimer Caplin and he mentioned the possibility of moving to a British-styled system in which returns certified by accountants or lawyers would be subject to less scrutiny.<sup>352</sup>

New York City tax lawyer and treatise-author Jacob Rabkin complained about the complexity of the tax law, writing, "[N]o society developed on so fine-spun a statute or set of laws can help from failing from its sheer weight."<sup>353</sup> Mr. Merle H. Miller thought the solution to the problem

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350. Paul, *Tax Adviser*, *supra* note 4, at 416.

351. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 237–38.

352. Caplin, *Good Tax Practice*, *supra* note 19, at 20–21; 15 U.S.C. § 33 (repealed 1970); BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 249.

353. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 17 (statements by Jacob Rabkin).

of complexity in the code was to accept imperfections in the code. He warned against ever pursuing the improvement of the code, “for the perfect code would be so complex that its inherent complexities would make it imperfect.”<sup>354</sup>

Tax expenditures and tax lobbying were also indicted.<sup>355</sup> Contrasting the importance of funding the Cold War with the growth of tax expenditures, Mr. Merle H. Miller complained of a Congress using the tax code “not only to raise the vast sums we need to maintain . . . a garrison state” but also to address economic and social issues.<sup>356</sup> He argued that special provisions for one group of taxpayers “may well prove a trap . . . for some other unsuspecting taxpayers.”<sup>357</sup> He also argued that such special provisions have negative effects on economic competition: “[A] tax advantage obtained by some scheme, may more than offset the greater production efficiency of a competitor.”<sup>358</sup> Similarly, New York City tax lawyer and treatise-author Richard Kilcullen complained of the complications that arise when Congress grants “special tax privilege[s] . . . in favor of a particular group,”<sup>359</sup> and Adrian W. DeWind worried about the dangers that tax planning has for business when it distorts activities merely for tax savings.<sup>360</sup> Dean Griswold lamented the increase of “loopholes and special privileges” and “handouts” in the tax codes, specifically identifying those for the oil and gas industry.<sup>361</sup>

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354. Miller, *Taxpayer's Duty*, *supra* note 68, at 7.

355. The protest against tax expenditures and other reform rhetoric organized around the concept of a “comprehensive tax base” was analyzed by Professor Bittker, in “*Comprehensive Tax Base*” as a Goal of Income Tax Reform, 80 HARV. L. REV. 925 (1967).

356. Miller, *Taxpayer's Duty*, *supra* note 68, at 7.

357. Cahn et al., *Ethical Problems*, *supra* note 1, at 22 (statements by Merle H. Miller).

358. Miller, *Morality*, *supra* note 20, at 1069. It is notable that Mr. Miller phrased the struggle between capitalism and communism in terms of efficiency. Remembering that Mr. Miller was focused on establishing the efficiency of capitalist economy over a communist economy his point is not only about business efficiency, like Mr. DeWind's, but also about national security. *Id.* at 1083.

359. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 15 (statements by Richard Kilcullen (McGuigan & Kilcullen, New York City)); JOYCE STANLEY AND RICHARD KILCULLEN, THE FEDERAL INCOME TAX: A GUIDE TO THE INCOME TAX PROVISIONS OF THE INTERNAL REVENUE CODE, (*Tax Club Press 1948*).

360. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 14 (statements by Richard Kilcullen discussing remarks by Mr. DeWind). Mr. DeWind had in mind plans such as “trying to channel otherwise ordinary business income, otherwise individual surtax income into the ‘dreamland’ of capital gains rates.” *Id.*

361. Griswold, *Blessings of Taxation*, *supra* note 28, at 1057. Dean Griswold's reference to “the gross inequities of the law in favor of the oil and gas interests” prompted Mr. Rex G. Baker, General Counsel of the Humble Oil and

Mark H. Johnson had a list of problems in the tax system. He said that there were certain pressures that would continue to prevent the development of a “sound system of law and a sound system of administration,” including: “lawyers who are economically or spiritually marginal . . . confiscatory tax rates, silly tax laws, . . . revenue agents who have to come up with a deficiency, [and] a silly Court Holding Company rule where, if you take one rule, you come out one way and another, another.”<sup>362</sup> He said that “unless you eliminate” these pressures, you are always going to have an unsound tax system.<sup>363</sup>

### III. REFLECTIONS

When reviewing the tax ethics literature of this era, it is useful to keep in mind that the authors were practical, professionally accomplished men. Remembering the law firms to which many of these belonged reminds us these were not idealists concerned with abstract notions of professionalism, but men whose practice and clientele were as demanding as any today.<sup>364</sup> Several of the writers mention the client-related pressures in which tax lawyers work. Norris Darrell wrote that the good tax lawyer “must only too often disappoint clients and only too often turn down the fashionable device of the moment,” acknowledging the risk that his disappointed clients may “drop off to more daring advisers.”<sup>365</sup> Merle H. Miller described the tax lawyer’s job, in large part, as routinely decimating some other tax advisor’s “brain child,” leaving clients disappointed with the lack of a bag of technical tricks for sale.<sup>366</sup> Randolph E. Paul warned that competitive pressures may tempt the lawyer to “slant opinions in the direction of a client’s desires” and away from good judgment.<sup>367</sup> Mr. Paul emphasized the importance of the word “no,” and acknowledged that “the client may shop for a more welcome answer in other offices.”<sup>368</sup> There is also mention of the importance of office management skills, the importance

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Refining Co. to write Dean Griswold, and thus began a correspondence between the two eventually published in Baker and Griswold, *Percentage Depletion — A Correspondence*, 64 HARV. L. REV. 361 (1951).

362. Cahn et al., *Ethical Problems*, *supra* note 1, at 27–28 (statements by Mark H. Johnson).

363. *Id.* at 28.

364. *See supra* Part II.A. and text at notes 18–23.

365. Darrell, *Tax Minimization Devices*, *supra* note 21, at 988.

366. Miller, *Morality*, *supra* note 20, at 1075.

367. Paul, *Responsibilities*, *supra* note 57, at 385.

368. *See supra* text at note 350.

of being able to work with partners and assistants,<sup>369</sup> and an articulation of the business model for tax specialists.<sup>370</sup> This practical grounding of these writers is especially interesting given their philosophical sensitivities and commitments to duties (such as defending the tax system to clients) that may seem more likely to have been deduced by someone unconcerned with financial, competitive, and practical pressures.

In this practice-oriented content, it initially may be surprising to discover the 1949 tax committee on the importance of natural law. But when the tax committee issued its report, the importance of natural law was not considered to be an academic issue.<sup>371</sup> In the 1930s, the skepticism of the legal realists and positivists had prevailed among legal theorists and lawyers. However, the rise of totalitarianism in the 1930s and 1940s “forced many to think again.”<sup>372</sup> The rejection of natural law jurisprudence by German lawyers had been blamed for their legal authorizations of Nazi acts.<sup>373</sup> The result in America was a retreat from both realism and positivism and a revival of natural law jurisprudence.<sup>374</sup> Thus, the tax bar likely had the fear of totalitarianism in mind when it produced its report on natural law, emphasizing the necessity of the objective moral grounding of reliable legal analysis. This historical context reveals the practical concerns behind the report, though the report itself had no practical guidance.

Despite the tax committee’s consensus on natural law, the tax lawyers expressed differences on the relationship between law and morals. Both Merle H. Miller and Norris Darrell emphasized the objective continuum between the law and morals, and even claimed a very practical connection between the two. Both explained the important role of a lawyer’s moral sense in his daily work. Mr. Miller believed the lawyers and judges shared a moral sense, and he believed that adherence to the moral sense by lawyers and judges would lead them toward the same legal conclusions.<sup>375</sup> Mr. Darrell believed that a sustainable tax plan was one in which legal and moral propriety often shade into one another.<sup>376</sup> Mr. Miller and Mr. Darrell’s view

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369. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 8, 10 (statements by Harry J. Rudick and Robert N. Miller).

370. *Id.*

371. McCloy et al., *Moral Issue*, *supra* note 37, at 9–11.

372. Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 *YALE L.J.* 423, 427–34 (1996) (discussing how the problem of totalitarianism of Nazi Germany and the Soviet Union transformed American legal thought).

373. *Id.*

374. *Id.*

375. *See supra* text at notes 317–25.

376. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 101 (statements by Norris Darrell).

was that law and morality are coherent, and that good legal judgment requires good moral judgment. In their view, morality was theoretically objective and practically essential.

In contrast, Randolph E. Paul was convinced that the tax lawyer's moral sense had no place in legal analysis.<sup>377</sup> His concern was that the lawyer's moral sense might be a risk to the client's objective. Interestingly, Mr. Paul explicitly pushes the lawyer away from his moral concerns when providing tax advice in the same context as pushing the lawyer away from his policy concerns. Given Mr. Paul's role as a key tax policy advisor for Franklin D. Roosevelt,<sup>378</sup> it may well be that Mr. Paul was keenly aware of advantages his clients were provided under the tax code that, on policy grounds, he believed should not be available. His emphasis on tax lawyers being involved in tax legislation, even if it was not in the interests of their clients, may evidence this concern.<sup>379</sup> It may well be that Mr. Paul was focusing on tax benefits to which the client's entitlement was certain, warning only that the tax lawyer's personal sense that the law's policy was ill-founded were irrelevant. In contrast, Mr. Miller and Mr. Darrell appear to have been focusing on tax benefits that were uncertain and the importance of an equitable sense when assessing the technicalities of the uncertainties. After all, Mr. Miller, at least, emphasized that the lawyer and judge share this sense and as it guides judges, so it should guide lawyers. Mr. Paul never mentions judges considering these issues, which suggests these would not be the types of issues on which the moral sense of judges would be relevant. Perhaps Mr. Paul was merely arguing that when a tax benefit is certain, the lawyer's moral or political sense against it should not be an impediment to his client claiming it.

The tax lawyers writing on these topics were devoted American patriots united by their Cold War concerns. Merle H. Miller focused on the tax system as the "very life blood of the government operating" under the capitalist system.<sup>380</sup> Mr. Miller characterized taxes as the price paid for maintaining the capitalist system. Remembering that the highest marginal tax rate at the time Mr. Miller was writing was 92 percent<sup>381</sup> makes evident how high the risk of communism must have been in his estimation. From our perspective today, his argument seems almost paradoxical: The government should take up to 92 percent of taxpayers' taxable income in order to protect them from the system in which the government has 100 percent "of the

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377. Paul, *Tax Adviser*, *supra* note 4, at 418–19.

378. *See supra* note 18.

379. *Id.*

380. Miller, *Morality*, *supra* note 20, at 1082–83.

381. The highest marginal tax rates during this period were: 94% in 1945; 91% in 1946-1951; 92% in 1952-1953; 91% in 1954-1963; 77% in 1964; and 70% in 1965. TAX FOUNDATION, *supra* note 7.

properties.”<sup>382</sup> He argued that not only should Americans pay their share of taxes but they should do so knowing that “paying a great deal more would not be an overpayment for the privilege of American citizenship.”<sup>383</sup> While he did not urge Americans to pay more than their fair share, his sentiment brings to mind the contrasting remark made in an earlier time by Judge Learned Hand that there is not a “patriotic duty to increase one’s taxes.”<sup>384</sup> Dean Griswold argued that with this national security threat, there were no expenditures Americans could make that would “benefit us more than that we pay to the Government in taxes[.]”<sup>385</sup> Mortimer Caplin, Robert N. Miller, and Norris Darrell also explicitly sounded patriotic tones — praising the defense of country and the government agents who worked to defend the government’s revenue<sup>386</sup> — and Professor Hellerstein emphasized the duties a lawyer owes to his government as a citizen.<sup>387</sup> This patriotism was no doubt inspired by Cold War threats, but it also reflects the broad support for the mass income tax policy.<sup>388</sup> Even though the highest marginal income tax rates for most of this period were over 90 percent,<sup>389</sup> and even though during the early 1950s, more than 200 federal tax officials resigned, were removed,

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382. Miller, *Morality*, *supra* note 20, at 1082–83.

383. *See* Miller, *Taxpayer’s Duty*, *supra* note 68, at 9.

384. *Helvering v. Gregory*, 69 F.2d 809, 810–11 (2d Cir. 1934), *aff’d*, 293 U.S. 465 (1935).

385. Griswold, *Blessings of Taxation*, *supra* note 28, at 1002. In reflecting on the Supreme Court’s tax jurisprudence during the war against Nazi aggression, it is interesting that he concluded the Court favored the Government in those in some part “because there was a war on.” *Id.* at 1000.

386. *See supra* text at notes 76–81.

387. Cahn et al., *Ethical Problems*, *supra* note 1, at 9 (statements by Jerome Hellerstein).

388. The broad support was produced by the defeat of the totalitarian regimes in World War II and the post war surge in prosperity. BROWNLEE, *TAXATION IN AMERICA*, *supra* note 2, at 119–20. This new system had brought big changes in a small period of time: From 1939 to 1945, the number of individual income tax payers increased more than ten-fold (from 3.9 million to 42.6 million). Though the richest 1 percent accounted for 32 percent of the income tax revenue, almost 90 percent of the labor force was now filing income tax returns. *Id.* at 115–17. In 1940, the income tax accounted for only 16 percent of all taxes collected at all levels of government, but by 1950 it accounted for more than 51 percent. The implementation of the new mass tax regime “succeeded because of the popularity of the war effort.” The two were connected in the public mind in some part due to a Walt Disney-produced propaganda cartoon starring Donald Duck and watched by more than 32,000,000 theatre-going Americans in 1942. *Id.*

389. *See supra* note 381.

and/or were indicted in connection with a string corruption scandals,<sup>390</sup> these tax lawyers presented themselves as patriotic and optimistic supporters of their government and its tax system.

There was considerable agreement among the writers that tax lawyers were in need of moral improvement,<sup>391</sup> as were their clients.<sup>392</sup> It seems likely, and was explicitly mentioned by several, that there could be considerable agreement on the resolution of specific moral problems, even though there might be considerable disagreement on the more abstract issue of whether or not tax lawyers had a special “duty to the system.”<sup>393</sup> Indeed, emphasizing the practical rather than theoretical, several of the writers claimed that moral problems need not even be debated in strictly moral terms, as they were convinced that good morals, good lawyering, and good business coincide.<sup>394</sup> The pragmatism of these men led them not only to prefer solving particular problems to arguing theoretically, but also led them to collapse the moral, technical, and business aspects of tax lawyering into what today we might call a “best practices” approach.

Those writers who argued for a special duty for tax lawyers emphasized the self-assessing nature of the system and the need for strong moral principles among the taxpayers in the context of their duties as citizens in a democracy.<sup>395</sup> Professor Maguire mentioned the “high degree of acquiescence and cooperation” needed from both taxpayer and their experts.<sup>396</sup> Norris Darrell phrased it as the duty “to help make our self-assessing income tax system work,”<sup>397</sup> which included, in his mind, making it work without requiring police state methods.<sup>398</sup> Merle H. Miller emphasized that the duty to be honest and comply with the democratically-implemented tax system was especially important given the Cold War’s demands.<sup>399</sup> Professor Hellerstein argued that a citizen “owes his

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390. In the early 1950s, a string of corruption scandals prompted Congress to investigate the BIR, where it discovered the consequences of political patronage and substantial corruption. More than 200 then-current and former tax officials resigned, were removed, and/or were indicted. In 1952, Truman released a plan for reorganized the BIR, and the reorganization carried over into the Eisenhower administration. Thorndike, *Reforming*, *supra* note 6, at 755–59, 761–64.

391. *See supra* text at notes 47–56.

392. *See supra* text at notes 93, 129, 137, 303, 336, 339.

393. *See supra* Part II.D.

394. *See supra* text at notes 303, 323.

395. *See supra* text at notes 90, 117, 124, 125.

396. Maguire, *Conscience and Propriety*, *supra* note 24, at 45.

397. Darrell, *Propriety in Tax Practice*, *supra* note 82, at 2.

398. *Id.* at 23.

399. Miller, *Morality*, *supra* note 20, at 1083.

government and his neighbors” his share of taxes, and that this recognition was necessary to avoiding moral chaos in the tax system.<sup>400</sup>

In addition to the claims about a general special duty, there were claims about specific duties tax lawyers owed. One commonly cited duty was becoming involved in improving the tax law and its administration. Norris Darrell and Randolph E. Paul both argued that the tax lawyer should be willing to improve the system, even if it meant taking positions contrary to the positions of his clients.<sup>401</sup> Mark H. Johnson made a related but different point, which was that the tax lawyer ought not to work to advance his client’s positions through the bar associations but engage only in “disinterested public service” there.<sup>402</sup>

A second commonly cited duty was the duty of tax lawyers to educate their clients in an effort to improve their tax morality. Merle H. Miller argued that the tax lawyer ought to increase the layman’s respect for the system and always be careful to correct his client’s misconceptions.<sup>403</sup> He believed the tax lawyer ought to increase the client’s respect for the system and appreciation of honestly complying.<sup>404</sup> Professor Hellerstein argued the tax lawyers’ duty to improve tax morality extended beyond his clients and to the community at large.<sup>405</sup> The duty of a tax lawyer as a tax ethics educator (at least for his clients) had wide support among the writers in the period.<sup>406</sup> One wonders what today’s tax lawyers would think of such a duty.

Perhaps the debate over whether or not tax lawyers had a special duty to the tax system can be understood, in part, as an effort to identify the benefits tax lawyers provided to the tax system. In some part, the different characterizations of the benefits tax lawyers provided seem to reflect whether the writer was focused on the tax lawyer as a litigator or focused on the tax lawyer as an advisor. Those who focused on litigation emphasized the benefits lawyers provide through the adversarial system. Mark H. Johnson attributed the coherence, uniformity, and equitable nature of the tax law to tax lawyers functioning as adversaries with the government on behalf of their clients.<sup>407</sup> He thought that a client knowing “his advisor is in his own corner, and is not in the middle of the ring as a referee” increased the client’s support for the tax system and, as a result, reduced the temptation of clients to

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400. *See supra* text at notes 89–95.

401. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 102–03 (statements by Norris Darrell); Paul, *Tax Adviser*, *supra* note 4, at 434.

402. Johnson, *Theory*, *supra* note 86, at 36.

403. Miller, *Morality*, *supra* note 20, at 1083.

404. *Id.*

405. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 14.

406. *See supra* text at notes 121, 137, 148–51.

407. Johnson, *Theory*, *supra* note 86, at 27, 35.

engage in wholesale tax evasion.<sup>408</sup> Professor Barnes also argued that the tax lawyer, simply by lawyering, makes the tax system more effective.<sup>409</sup>

Those who argued for a special duty on tax lawyers were less focused on lawyers as adversaries and more focused on lawyers as advisors. For example, Professor Hellerstein focused on advising clients about deductions and preparing transactional documents when arguing for a duty to the system.<sup>410</sup> Norris Darrell argued that the tax lawyer ought to convince the client to behave as he, the lawyer, would when faced with the duty to calculate and report his own tax liabilities.<sup>411</sup> He thought it was important for the tax lawyer to be willing to disappoint the client with his advice.<sup>412</sup> And Merle H. Miller thought the tax lawyer contributed “greatly to the well being of the country at large” by killing off bad tax schemes at inception.<sup>413</sup> Professor Maguire, Thomas N. Tarleau, Norris Darrell, Randolph E. Paul, and Seymour S. Mintz all agreed that tax lawyers engaged in litigation are engaged in an adversarial process not significantly different than others — but that more perplexing ethical issues of tax practice occur outside of the court room.<sup>414</sup>

One perplexing issue outside the court room was whether or not to disclose “doubtful but arguable points in a tax return.”<sup>415</sup> Only Professor Hellerstein argued for disclosing all positions it was reasonably clear the government would oppose, regardless of the strength of the taxpayer’s or government’s position.<sup>416</sup> Other writers focused on the quality of the government’s anticipated position. Norris Darrell and Randolph E. Paul argued that it is difficult to lay down a general rule, but usually debatable issues should be disclosed unless the debate would arise only because the government was unreasonably stubborn on a given issue.<sup>417</sup> Gerald Wallace took this approach a step further, concluding there should be no duty of

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408. *Id.* at 31.

409. Barnes, *Voluntary Assessment System*, *supra* note 25, at 1035.

410. *See* Cahn et al., *Ethical Problems*, *supra* note 1, at 5, 7 (statements by Jerome Hellerstein).

411. Darrell, *Propriety in Tax Practice*, *supra* note 82, at 23.

412. Darrell, *Tax Minimization Devices*, *supra* note 21, at 988.

413. Miller, *Morality*, *supra* note 20, at 1076.

414. Cahn et al., *Ethical Problems*, *supra* note 1, at 10 (statements by Thomas Tarleau); Maguire, *Conscious and Propriety*, *supra* note 24, at 30; Darrell, *Propriety in Tax Practice*, *supra* note 82, at 22–23; Holland et al., *Panel Discussion*, *supra* note 85, at 24 (statements by Seymour S. Mintz).

415. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 92 (statements by Norris Darrell).

416. *See supra* text at notes 218–21.

417. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 92; *supra* text at notes 224–27.

disclosure so long as one believed the government's position to be wrong.<sup>418</sup> Making the duty to disclose turn on anticipating the government's response and being able to assess the quality of that response before it is made is a more complicated standard than assessing the quality of one's own position. Mark H. Johnson and Boris Bittker each focused on the assessing one's own position, with Mr. Johnson claiming no disclosure was needed so long as the position was reasonable, and Professor Bittker claiming no disclosure was needed so long as it reflects an honest belief about the tax liability.<sup>419</sup> In addition to the substantive quality of the position, Professor Bittker cited concerns about overwhelming the government with disclosures and the difficulty in defining the lines of a general duty of disclosure.<sup>420</sup> His concern was that the lofty rhetoric of taxpayers actively cooperating with the government should be checked by the likelihood of unintended consequences. The discussion of the duty of disclosure highlights the complexity of the tax lawyer's role in a self-assessing system — the need to self-assess the quality of one's own legal advice, the need to assess the quality of the government's anticipated legal response, and the administrative needs and limits of the system. Notably, no one alleged that an adversarial relationship between the taxpayer and the government meant that the government had no right to demand disclosure or that the taxpayer had the right to engage in the audit lottery.

There was wide agreement that there was no special duty on tax lawyers who were litigating. But Boris Bittker,<sup>421</sup> Mark J. Johnson,<sup>422</sup> and Professor John Potts Barnes<sup>423</sup> were adamant that there was no special duty on tax lawyers in any situations, and Randolph E. Paul, though not "adamant" about the lack of such special duty, thought it was rather doubtful.<sup>424</sup> None of these lawyers, however, should be understood as arguing for a low ethical standard. Indeed, their concern was quite different. They argued that all lawyers are subject to high ethical standards, and to claim that tax lawyers are subject to especially high standards runs the risk of implying other lawyers are subject to lesser standards. Their concern was to defend the ethical integrity of the bar as a whole, worrying that characterizing tax lawyers as having special ethical concerns made too much

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418. Cahn et al., *Ethical Problems*, *supra* note 1, at 31 (statements by Gerald Wallace).

419. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 253–55; Johnson, *Theory*, *supra* note 86, at 32.

420. BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 253.

421. *Id.* at 267–69.

422. Johnson, *Theory*, *supra* note 86, at 28.

423. Barnes, *Voluntary Assessment System*, *supra* note 25, at 1039.

424. Paul, *Tax Adviser*, *supra* note 4, at 425. See Maguire, *Conscious and Propriety*, *supra* note 24, at 27.

of a difference between tax lawyers and other members of the bar. From this perspective, the debate over a special duty of tax lawyers reflects an interesting tension between those authors who emphasized the similarities between tax lawyers and other lawyers, and those who emphasized the differences between different types of lawyers. Was the tax lawyer a tax professional who happened to be lawyer or a lawyer who happened to have tax expertise? One wonders how much this discussion indirectly reflected concerns over how the tax field ought to be divided between lawyers and accountants. During this period, accountants were being accused of engaging in the unauthorized practice of law for tax-related work,<sup>425</sup> lawyers who were also accountants were forbidden from practicing both professions,<sup>426</sup> and, as Dean Griswold put it, “[t]he two great professions of law and accountancy were squared away for a battle royal.”<sup>427</sup> Perhaps this battle with accountants persuaded those who denied any special duty on tax lawyers to do so as an effort to establish that tax lawyers were not only primarily but essentially and exclusively lawyers, sharing professional commonalities with all the other members of the bar but no other profession. Tax lawyering was lawyering, and only tax lawyers were authorized to do it, was perhaps the subsurface theme. Interestingly, within only a couple of years, Randolph E. Paul, one of the most influential tax lawyers during this time, switched his emphasis from the differences between tax lawyers and other lawyers to the similarity between the two. Perhaps this shift was influenced in some part by his sensitivity to this inter-professional debate, and his lending his weight to the proposition that tax lawyers were lawyers, not a unique or hybrid “tax professional” with duties and powers still open for description.<sup>428</sup>

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425. See, e.g., *Agran v. Shaprio*, 127 Cal. App. 2d Supp. 807, 273 P.2d 619 (1954).

426. In 1961 the ABA Standing Committee on Professional Ethics issued Ethics Opinion 297, which prohibited a lawyer-accountant from practicing both. The following year, Opinion 305 took the position that those who are both lawyers and accountants are not entitled to hold themselves out only as accountants but to engage in the practice of law. Maintaining the division between lawyers and accountants was foremost in the mind of at least some members of the Committee. Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY’S L. REV. 343, 436 (2008) [hereinafter Ariens, *American Legal Ethics*].

427. Erwin N. Griswold, *Role of Lawyer in Tax Practice*, 10 U.S.C. SCH. L., MAJOR TAX PLANNING 1, 1 (1958) (commenting on the consequence of the *Agran* case creating strife between lawyers and accountants). See also Erwin N. Griswold, *Lawyers, Accountants and Taxes*, 10 REC. ASS’N B. CITY N.Y. 52 (1955) reprinted in 18 TEX. B. J. 109 (1955); Erwin N. Griswold, *A Further Look: Lawyers and Accountants*, 41 A.B.A. J. 1113 (1955).

428. Paul, *Tax Adviser*, *supra* note 4, at 425. See Maguire, *Conscious and Propriety*, *supra* note 24, at 27.

When it came to describing how it is tax lawyers ought to go about being good tax lawyers, perhaps the most interesting emphasis was the de-emphasis of technical analysis. Randolph E. Paul characterized tax law as less formal and technical than other fields of law.<sup>429</sup> Robert N. Miller claimed the tax lawyers have to rely more on practical wisdom than technical analysis,<sup>430</sup> and Merle Miller argued that confidence in a technical approach to taxation was the mark of naïve clients rather than good tax lawyers.<sup>431</sup> Norris Darrell described the acquisition of knowledge of the tax code, regulations, and rulings, as one requiring “an inordinate expenditure of time,” but only the very first step in tax advising.<sup>432</sup> This technical knowledge had to be placed in the light of the client’s situation, legal history, Congressional purpose, and moral propriety.<sup>433</sup> The tax lawyer was called upon for his judgment, which Mr. Darrell compared with that of a “perfume smeller or wine tester,” and certainly never called upon to cleverly “jig-saw cut” technical arguments.<sup>434</sup> Merle Miller emphasized the importance of being “as zealous in developing a sense of moral fairness as in acquiring a technical working knowledge of the Code,” as he believed that a lawyer who failed to accept the relevance of his own moral sensibilities would push his clients into trouble.<sup>435</sup> Randolph E. Paul warned against putting “undue trust in the letter of the law,” remembering the underlying purpose of the law, and relying on professional intuition when giving tax advice.<sup>436</sup> In sum, broad judgment was what a tax lawyer needed and not mere technical expertise.<sup>437</sup> This judgment is informed not only by knowledge of the law and its purpose, but also, Mark H. Johnson argued, by the study of literature and history.<sup>438</sup> Robert N. Miller described the necessary type of judgment not as a professional attribute but a personal one — the judgment that led the lawyer into a well-balanced personal life was what he had in mind.<sup>439</sup> Thus, in these tax lawyers’ minds, good technical analysis was necessary but insufficient for good tax lawyering. Good tax lawyers were wise, not merely clever.

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429. Paul, *Responsibilities*, *supra* note 57, at 381.

430. *Id.* at 9.

431. Miller, *Morality*, *supra* note 20, at 1075.

432. Darrell, *Tax Minimization Devices*, *supra* note 21, at 984.

433. *Id.* at 985–89; BITTKER, PROFESSIONAL RESPONSIBILITY, *supra* note 23, at 101 (statement by Norris Darrell).

434. Darrell, *Tax Minimization Devices*, *supra* note 21, at 988.

435. Miller, *Morality*, *supra* note 20, at 1076–77.

436. Paul, *Tax Adviser*, *supra* note 4, at 417.

437. *See* Paul, *Responsibilities*, *supra* note 57, at 378–79, 381, 385; Paul, *Tax Adviser*, *supra* note 4, at 416–17.

438. Cahn et al., *Successful Tax Lawyer*, *supra* note 26, at 4–5 (statements by Mark H. Johnson).

439. *Id.* at 9 (statements by Robert N. Miller).

In the past decade especially, we have become accustomed to detailed practice regulation from the Treasury Department<sup>440</sup> — and detailed comments from tax bar committees.<sup>441</sup> It is helpful to remember there was not the same type of guidance, regulation, or committee work during most of the period in which these lawyers were writing.<sup>442</sup> Indeed, some of the lawyers called for increased efforts of exactly this sort. Professor Maguire called for “marching orders” from the bar or Treasury Department for “a number of commonplace situations produced by tax practice,” and his call was echoed by Norris Darrel and Mortimer Caplin.<sup>443</sup> The tax lawyers writing in 1945-1965 were sketching their personal approaches on ethical issues without having to consider, or having the benefit of considering, much sustained corporate reflection and articulation. It is interesting that they also sketched their ethical approaches without significant reference to either the ABA canon of professional ethics or any state bar’s rules; today it would be unthinkable that a lawyer would seriously analyze professional ethics issues without using the ethics rules *as rules*. Perhaps the boldness with which some of these older approaches were expressed is attributable to the then wide-open range of the discussion, unbounded by much formal guidance or regulation, much bar committee work, or much interest in formal ethics rules. Their bold and open discussion preceded the evolution of legal ethics into the law of lawyering,<sup>444</sup> and it shows.

One is left to ponder what the perspective of these earlier tax lawyers with their earlier understanding of professional ethics would have on many of today’s issues. With their philosophical concern for the relationship between law and morals, how would they perceive the orientation of the discourse on the technical regulation of the profession by the Treasury

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440. See David Weisbach and Brian Gale, *The Regulation of Tax Advice and Advisors*, 130 TAX NOTES 1279 (Mar. 14, 2011).

441. See, e.g., *ABA Tax Section Offers Views on Proposed Circular 230 Guidelines*, TAX NOTES, Dec. 20, 2010, at 1319.

442. There was some committee work in this area. For example, in 1951, the American Bar Association and the American Institute of Certified Public Accountants issued an advisory Statement of Principles relating to Practice in the Field of Federal income Taxation. See *Lawyers and Certified Public Accountants: A Study of Interprofessional Relationships*, 36 TAX LAW. 26, 27 (1982). In 1965 the American Bar Association issued Formal Opinion 314 on standards for tax return advice. See ABA Comm. on Prof’l Ethics, Formal Op. 314 (1965) *reprinted in* 51 A.B.A. J. 671 (1965).

443. See *supra* notes 53–56, 105; see generally *supra* Part II.F.

444. For a discussion of the development of legal ethics into the law of lawyering governed by the ABA Model Rules, see, e.g., Ariens, *American Legal Ethics*, *supra* note 426, at 444–53.

Department?<sup>445</sup> With their interest in improving both the tax savings and the tax morality of their clients, how would they perceive the attacks and defenses of tax shelter lawyering?<sup>446</sup> With their emphasis on providing solid tax advice, what would they make of today's opinion and disclosure standards?<sup>447</sup> If they had witnessed the last half-century's developments of tax law, tax lawyering and tax law administration, how would their ideas of the duty to the system have developed?<sup>448</sup> Given their love of country and their experience of the Cold War and near-confiscatory tax rates, how would they react to today's anti-tax rhetoric during the "War on Terror" and much, much lower rates? While it is interesting to ponder how the tax lawyers of more than half century ago would consider us today, it is perhaps more interesting to ponder how the tax lawyers of 2065 will.

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445. See, e.g., Camilla E. Watson, *Legislating Morality: The Duty to the Tax System Reconsidered*, 51 U. KAN. L. REV. 1197, 1197 (2003); David T. Moldenhauer, *Circular 230 Opinion Standards, Legal Ethics and First Amendment Limitations on the Regulation of Professional Speech by Lawyers*, 29 SEATTLE U. L. REV. 843, 874 (2006).

446. See, e.g., Richard Lavoie, *Deputizing the Gunslingers: Co-Opting the Tax Bar into Dissuading Corporate Tax Shelters*, 21 VA. TAX REV. 43, 90 (2001).

447. See, e.g., Brett R. Wells, *Voluntary Compliance: "This Return Might Be Correct But Probably Isn't,"* 29 VA. TAX REV. 645 (2010).

448. See, e.g., David J. Moraine, *Loyalty Divided: Duties to Clients and Others — the Civil Liability of Tax Lawyers Made Possible by Acceptance of a Duty to the System*, 63 TAX LAW. 169, 172 (2009).