

EYES WIDE SHUT: SURVEYING EROSION IN THE PROFESSIONALISM OF THE TAX BAR

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TABLE OF CONTENTS

I.	INTRODUCTION	589
II.	THE EVIDENCE.....	591
	<i>A. Corporate Inversion Technique</i>	592
	<i>B. Life Insurance Technique</i>	596
III.	THE IMPLICATIONS	598
	<i>A. Law as a Profession</i>	598
	<i>B. Analyzing the Evidence</i>	602
	1. In Terms of the Sociological Definition of “Profession”	603
	<i>a. The Tax Lawyer’s Commitment to Altruism</i>	603
	<i>b. The Failure to Fulfill the Commitment to Altruism</i>	608
	<i>c. The Failure to Self-Regulate</i>	611
	2. In Terms of Its Impact on the Professionalism of the Tax Bar	611
IV.	CONCLUSION.....	614

I. INTRODUCTION

Voicing concerns shared by many lawyers, a number of commentators have lamented what they perceive as an erosion of the

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legal “profession” into the legal “business.”¹ To others, however, this feeling that the practice of law is losing its distinctive status and is joining the ranks of common occupations often appears to be no more than just that – a vague impression that the way in which lawyers deal with clients, and each other, has, over time, changed for the worse.² When viewed from this perspective, these lamentations can easily be dismissed either as the most recent iteration of a never-ending crisis in professionalism or as nostalgia for a time that seems rosier only in retrospect.³

Nevertheless, erosion of any sort is a slow-moving, gradual process, and its visible effects become noticeable only as they accumulate with the passage of time. The effects of what appears to be a true erosion in the professionalism of the tax bar have recently begun to accumulate, providing evidence that the generalized impression of a decline may actually be grounded in reality. The purpose of this essay is to document and draw attention to this evidence, as commentators seem to have overlooked its implications for the tax bar and, more generally, for the legal profession. By drawing attention to this evidence, this essay hopes to spur members of the tax bar to reflect seriously both on their own actions and on the standards of professional conduct to which they hold themselves and

¹ See, e.g., Alfred M. Butzbaugh, *President's Page: Historical Perspective*, 79 MICH. B.J. 462 (2000) (commenting on the challenges facing the legal profession, including overcrowding, lay encroachment, and the erosion of the practice of law into a business); Richard C. Reuben, *Change of Course Needed: Elder Statesman Says Acceptance of Law as Business Will Break the Profession*, 80 A.B.A. J. 99 (1994) (lamenting the fact that “law has become a business,” and decrying the commercialization of the practice of law and the failure of lawyers to maintain their independence from clients).

² See generally Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549 (1996); Nancy J. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773, 780-82 (1987) [hereinafter Moore, *Professionalism*]; Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 296-307 (1998).

³ See Rhode, *supra* note 2, at 283-84; Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 144, 145 (Robert L. Nelson et al. eds., 1992) [hereinafter *LAWYERS' IDEALS/LAWYERS' PRACTICES*]. See generally Galanter, *supra* note 2, at 552-58. It is particularly interesting to compare the themes that recurred during the period studied by Solomon (e.g., commercialization, failure to maintain independence from clients, overcrowding of the profession, and lay encroachment) with the themes of the articles cited in note 1 above.

2003]

Eyes Wide Shut

591

their peers.⁴

II. THE EVIDENCE

The evidence of the decline in the professionalism of the tax bar takes the form of a growing number of articles in lay publications (e.g., *The New York Times* and *Forbes* magazine) that provide technical discussions of legal, but ethically questionable, tax avoidance techniques.⁵ The articles bring these techniques to the attention of the general public in the ostensible hope that public understanding (and outrage) will either spur the government to action or shame the participants into abandoning the use of the techniques.⁶ During the

⁴ A grassroots approach to addressing this decline in professionalism is consistent with the shift of nonlegal governance of the profession from the bar as a whole to smaller subgroups of the bar, such as the community of lawyers practicing in the specialty area of taxation:

“Legalized” regulation will undoubtedly continue to dominate the normative structure of the legal profession, through court-promulgated rules, increasingly intrusive common law, and public statutes and regulations. As a consequence, the dominant normative institution for the legal profession will no longer be “the bar,” meaning the profession as a substantially inclusive fraternal group. The bar has become too large, diverse, and balkanized in its practice specialties for the old informal system to be effective as an institution of governance

This is not to say that leadership in the profession will disappear. But leadership goes where the action is. As an inclusive fraternal relationship plays a decreasing role in the profession at large, organization and leadership will emerge in other professional settings. It seems evident that the most effective nonlegal governance in the profession of the future will be through the law firm and subspecialty practice fields.

Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1279 (1991).

⁵ See James S. Eustice, *Abusive Corporate Tax Shelters: Old “Brine” in New Bottles*, 55 TAX L. REV. 135, 136 & n.6 (2002) (remarking on the newness of “the rapt attention that has been paid to this issue [i.e., corporate tax shelters] in virtually every forum, including the popular media as well as the more traditional fora,” and commenting on the relative rarity of “discussions of technical tax issues in *The New York Times*, *The Wall Street Journal*, and other financial publications”); see also Sheldon D. Pollack, *Revenge of the Muckrakers*, 75 TAX NOTES 255, 256 (Apr. 14, 1997) (indicating that journalists only began to pay “considerable attention” to tax policymaking in the 1980s; before that “it usually did not attract much attention by the popular media” because “the substance of tax policymaking is highly technical and arcane”).

⁶ See ALEXANDER DYCK & LUIGI ZINGALES, *THE CORPORATE GOVERNANCE ROLE OF THE MEDIA* (Ctr. for Research in Sec. Prices, Working Paper No. 543, 2002), at <http://gsbwww.uchicago.edu/fac/finance/papers/corporate%20governance.pdf>, for a

year 2002, a number of such articles appeared in *The New York Times*.⁷ This essay focuses on two groups of these articles and their repercussions. Because each group of articles considers a different tax avoidance technique, the two groups will be described separately below before considering the implications of the articles as a whole.

A. Corporate Inversion Technique

The first group consists of a barrage of articles (several appearing on the front page) concerning the expanding number of U.S. companies that have been expatriating through outbound inversion transactions.⁸ An outbound corporate inversion “is a transaction through which the corporate structure of a U.S.-based multinational group is altered so that a new foreign corporation, typically located in a low- or no-tax country, replaces the existing U.S. parent corporation as the parent of the corporate group.”⁹ These transactions are motivated by the ability to achieve “substantial tax savings without any meaningful operational or financial statement change.”¹⁰

discussion of the impact that the media can have on corporate governance.

⁷ In addition to the articles cited in the notes that follow, see, for example, David Cay Johnston, *A Tax Break for the Rich Who Can Keep a Secret*, N.Y. TIMES, Sept. 10, 2002, at C1; and David Cay Johnston, *Big Accounting Firm's Tax Plans Help the Wealthy Conceal Income*, N.Y. TIMES, June 20, 2002, at A1. David Cay Johnston is the author of many of the articles cited below, and he, in fact, won a Pulitzer Prize for his tax reporting during the year 2000. See THE PULITZER BOARD PRESENTS: THE PULITZER PRIZE WINNERS 2001: BEAT REPORTING, at <http://www.pulitzer.org/year/2001/beat-reporting/> (last visited Nov. 9, 2002).

⁸ See, e.g., David Cay Johnston & Jonathan D. Glater, *Effort to Curb Tax Havens Could Be Costly for Consultant*, N.Y. TIMES, Aug. 6, 2002, at C1; David Cay Johnston, *G.O.P. Is Moving to Slow Action on Tax Loophole*, N.Y. TIMES, June 18, 2002, at C1; David Cay Johnston, *Officers May Gain More than Investors in Move to Bermuda*, N.Y. TIMES, May 20, 2002, at A1; David Cay Johnston, *Tax Treaties with Small Nations Turn into a New Shield for Profits*, N.Y. TIMES, Apr. 16, 2002, at A1; David Cay Johnston, *U.S. Corporations Are Using Bermuda to Slash Tax Bills*, N.Y. TIMES, Feb. 18, 2002, at A1 [hereinafter Johnston, *Using Bermuda*]. See also the numerous articles cited in notes 17-29 below.

⁹ OFFICE OF TAX POLICY, U.S. DEP'T OF TREASURY, CORPORATE INVERSION TRANSACTIONS: TAX POLICY IMPLICATIONS 1 (2002), available at <http://www.treas.gov/press/releases/docs/inversion.pdf> [hereinafter TREASURY INVERSION REPORT]. For a description of the technical structure of these inversion transactions, see TREASURY INVERSION REPORT, *supra*, at 4-5; and N.Y. STATE BAR ASS'N TAX SECTION, REPORT ON OUTBOUND INVERSION TRANSACTIONS 14-20 (2002), available at http://www.nysba.org/Content/ContentGroups/Section_Information1/Tax_Section_Reports/1014report.pdf [hereinafter NYSBA INVERSION REPORT].

¹⁰ NYSBA INVERSION REPORT, *supra* note 9, at 8; see also TREASURY

Corporations that engage in inversion transactions are able to reduce their U.S. tax liability on both (i) their foreign source income (effectively converting our extant worldwide tax regime with a foreign tax credit into a territorial tax regime¹¹) and (ii) more troublingly, their U.S. source income (by combining the inversion with earnings-stripping transactions such as the concomitant creation of intercompany debt).¹² This tax savings can be achieved with only limited effects on the actual management and operations of the company (e.g., the corporate headquarters need not be moved offshore).¹³ The recent rise in the number of corporate inversions has been attributed to

increased market acceptance of the transaction. Until Tyco inverted successfully in 1997, investment bankers generally assumed that a U.S. company would pay an unacceptable price in its share value if it reincorporated in Bermuda. . . .

INVERSION REPORT, *supra* note 9, at 15, 18.

¹¹ The taxation of foreign source income raises the potential for double taxation. When a U.S. corporation engages in foreign business activities, both the United States (as the country of residence) and the foreign country where the business activities are conducted (as the country that is the source of the income) may claim the right to tax the income earned from those activities. There are two accepted approaches to alleviating the burdens created by double taxation. On the one hand, the country of residence may choose to tax domestic corporations on their worldwide income (i.e., income from both domestic *and* foreign sources) and provide them with a credit against their domestic tax liability equal to the amount of foreign taxes paid on foreign source income (i.e., the country of residence could adopt a worldwide tax regime with a foreign tax credit). On the other hand, the country of residence may simply choose to refrain from taxing domestic corporations on their foreign source income (i.e., the country of residence could adopt a “territorial” tax regime).

Which of these two approaches is preferable as a policy matter is the subject of debate. See, e.g., Michael J. Graetz, *Taxing International Income: Inadequate Principles, Outdated Concepts, and Unsatisfactory Policies*, 54 TAX L. REV. 261, 269-75 (2001); Ernest R. Larkins, *Double Tax Relief for Foreign Income: A Comparative Study of Advanced Economies*, 21 VA. TAX REV. 233 (2001); Robert J. Peroni, *Back to the Future: A Path to Progressive Reform of the U.S. International Income Tax Rules*, 51 U. MIAMI L. REV. 975, 980-86 (1997). The United States chose early on to adopt a worldwide tax regime with a foreign tax credit rather than a territorial tax regime. See I.R.C. §§ 11, 901, 904; Treas. Reg. § 1.11-1(a) (as amended in 1976); Michael J. Graetz & Michael M. O’Hear, *The “Original Intent” of U.S. International Taxation*, 46 DUKE L.J. 1021, 1022-23 (1997).

¹² See NYSBA INVERSION REPORT, *supra* note 9, at 8-9; see also TREASURY INVERSION REPORT, *supra* note 9, at 12-14; Reuven S. Avi-Yonah, *For Haven’s Sake: Reflections on Inversion Transactions*, 95 TAX NOTES 1793, 1794 (June 17, 2002).

¹³ TREASURY INVERSION REPORT, *supra* note 9, at 15.

[A]fter Tyco, it became clear that share prices do not drop as a result of reincorporation – on the contrary, recently inverting companies have seen their share prices rise in reaction to the expected tax savings.¹⁴

Once brought to light in *The New York Times* and other lay publications,¹⁵ these corporate inversions struck a moral chord both with legislators and with the general public.¹⁶ The corporate expatriates were accused of shirking their obligation to bear their fair share of the cost of government – from which they continue to benefit even after engaging in inversion transactions (because the move offshore is accompanied by only limited operational changes).¹⁷ With the events of September 11, 2001 still fresh in the minds of many, politicians cast their moral objections in patriotic terms; in other words, they viewed the corporate expatriates as “refusing to pay their fair share of taxes and so support the military at a time of threat from terrorism.”¹⁸ In their patriotic fervor, federal lawmakers proposed

¹⁴ Avi-Yonah, *supra* note 12, at 1794.

¹⁵ See NYSBA INVERSION REPORT, *supra* note 9, at 1 nn.1-6, for a sampling of the lay publications in which stories about corporate inversion transactions appeared.

¹⁶ See *id.* at 25 (“[T]he attack on inversion transactions may be based in part on ‘moral’ grounds rather than pure tax policy.”); see also John Thorndike, *Tax History – Civilization at a Discount: The Morality of Tax Avoidance*, 95 TAX NOTES 664 (Apr. 29, 2002) (placing the moral debate over corporate inversions in historical perspective by briefly recounting the moral arguments made in connection with President Roosevelt’s crusade to close tax loopholes in the late 1930s). For example, the California state treasurer phrased his objections to corporate inversions in the following terms:

“The danger in their thinking is that if everyone does it, then it undermines the economy as a whole. The issue is how do you change the culture of thinking that you do not have to play fair? You have to start with the most odious of practices, those that on their face strike most Americans as wrong, and the Bermuda business certainly does that.”

David Cay Johnston, *Pressure on Companies Using Tax Dodge*, N.Y. TIMES, July 27, 2002, at C3 [hereinafter Johnston, *Pressure on Companies*].

¹⁷ See, e.g., Richard Dery, Letter to Editor, *Dear I.R.S.: Forward to Bermuda*, N.Y. TIMES, May 15, 2002, at A22; Jim George, Letter to Editor, *Dear I.R.S.: Forward to Bermuda*, N.Y. TIMES, May 15, 2002, at A22; Martin Gittelman, Letter to Editor, *The Bermuda Triangle of Taxes*, N.Y. TIMES, Feb. 20, 2002, at A20; Atul Karnik, Letter to Editor, *The Bermuda Triangle of Taxes*, N.Y. TIMES, Feb. 20, 2002, at A20.

¹⁸ Alison Mitchell, *Companies Use Ex-Lawmakers in Fight on Offshore Tax Break*, N.Y. TIMES, Aug. 10, 2002, at A1; see also Johnston, *Pressure on Companies*, *supra* note 16 (indicating that similar patriotic arguments were made by labor leaders).

2003]

Eyes Wide Shut

595

legislation that would not only shut down the inversion technique, but would also ban or restrict the award of federal contracts to corporate expatriates and repeal tax breaks to companies that expatriated after September 11, 2001.¹⁹ At the state level, the California state treasurer issued an order that banned corporate expatriates “from state contracts that are under his control and from selling their commercial paper to the state’s \$45 billion pooled fund for state and local governments.”²⁰

Stanley Works, which was the only existing or planned corporate expatriate that verged on being a household name,²¹ quickly became the poster child for the debate over corporate inversions.²² The New Britain, Connecticut tool company was harshly criticized by legislators, national labor leaders, local officials, its own employees, and *The New York Times*’ editorial desk for its planned reincorporation in Bermuda.²³ The company’s expatriation even became an issue in a Connecticut congressional race between two incumbents who were being pitted against each other due to redistricting.²⁴

The saga of Stanley Works’ planned reincorporation in Bermuda was closely followed in *The New York Times*. In support of its expatriation, Stanley Works cited competitive pressures not only from foreign companies, but also from American competitors that had already expatriated (namely, Cooper Industries, Inc. and Ingersoll-

¹⁹ Carl Hulse, *Senate Moves Against Tax-Haven Companies*, N.Y. TIMES, Aug. 1, 2002, at C1; see also Mitchell, *supra* note 18; David E. Rosenbaum, *Democrats Take Aim at Offshore Tax Havens*, N.Y. TIMES, May 6, 2002, at A19.

²⁰ Johnston, *Pressure on Companies*, *supra* note 16.

²¹ Johnston, *Using Bermuda*, *supra* note 8.

²² See Virginia Groark, *Stanley Works Is Staying, and a Tax Issue Remains, Too*, N.Y. TIMES, Aug. 11, 2002, § 14, at 1 (“Stanley Works’ plan drew national attention. In recent months, everyone from John Sweeney, president of the A.F.L.-C.I.O., to state politicians have criticized the move.”); see also David Cay Johnston, *Vote on an Offshore Tax Plan Is Roiling a Company Town*, N.Y. TIMES, May 9, 2002, at A1 [hereinafter Johnston, *Vote on Tax Plan*] (“[C]ritics hope to turn this vote into a referendum on whether the growing number of American companies with proposals similar to Stanley’s should be allowed to promote the interests of shareholders without also considering the interests of the nation and the companies’ home communities.”).

²³ See Editorial, *The Bermuda Tax Triangle*, N.Y. TIMES, May 13, 2002, at A16; see also Johnston, *Pressure on Companies*, *supra* note 16; Johnston, *Vote on Tax Plan*, *supra* note 22; *Stanley Works Backs Away from a Move to Avoid Taxes*, N.Y. TIMES, Aug. 2, 2002, at C1 [hereinafter *Stanley Works Backs Away*].

²⁴ Groark, *supra* note 22; see also Rosenbaum, *supra* note 19.

Rand Company).²⁵ The shareholder vote on Stanley Works' inversion plan took place on May 9, 2002.²⁶ After declaring that the plan had been approved by shareholders, Stanley Works threw out the vote the next day when it was sued by the State of Connecticut, which expressed concern about voting irregularities, "and was contacted by investigators for the Securities and Exchange Commission."²⁷ After planning a second shareholder vote, the company withdrew the plan from shareholder consideration as a result of "the growing prospect of legislation in Washington to resolve what it characterized as inequities in the United States tax laws."²⁸ After Stanley Works abandoned its planned expatriation, an article in *The New York Times* pronounced the "[e]fforts by American companies to save on taxes by reincorporating in Bermuda and other offshore tax havens [to be] nearly dead."²⁹

B. Life Insurance Technique

The second group of articles concerns a technique that uses life insurance to avoid the gift, estate, and generation-skipping transfer taxes. This technique was developed by an estate tax attorney from a well-respected New York firm who worked together with an insurance agent from California.³⁰ Relying on a 1996 private letter ruling,³¹ the technique was predicated on the purchase of life insurance at highly

²⁵ Groark, *supra* note 22; *see also* Johnston, *Vote on Tax Plan*, *supra* note 22.

²⁶ *Stanley Works Backs Away*, *supra* note 23.

²⁷ *Id.*; *see also* Groark, *supra* note 22.

²⁸ *Stanley Works Backs Away*, *supra* note 23.

²⁹ David Cay Johnston, *Musical Chairs on Tax Havens: Now It's Ireland*, N.Y. TIMES, Aug. 3, 2002, at C1 [hereinafter Johnston, *Musical Chairs*]. Shortly before Stanley Works withdrew its inversion proposal, PricewaterhouseCoopers abandoned its plan to incorporate its consulting arm in Bermuda and instead decided to sell it to I.B.M. David Cay Johnston, *In Lieu of Bermuda, Business Is Sold*, N.Y. TIMES, July 31, 2002, at C8. But, even as the move to offshore tax havens was being pronounced dead, tax advisers did not feel stymied in their efforts to save money for their corporate clients. Instead, they apparently began to cast about for alternate destinations for corporate expatriates. *See* Johnston, *Musical Chairs*, *supra*.

³⁰ David Cay Johnston, *Death Still Certain, but Taxes May Be Subject to a Loophole*, N.Y. TIMES, July 28, 2002, § 1, at 1 [hereinafter Johnston, *Loophole*]. The lawyer who developed this technique is a partner at Milbank, Tweed, Hadley & McCloy LLP. *Id.*

³¹ Reportedly, the developers relied on Private Letter Ruling 9636033 (Sept. 6, 1996). *Treasury, IRS Crack Down on Abusive Split-Dollar Arrangements*, 96 TAX NOTES 1181, 1181 (Aug. 26, 2002).

2003]

Eyes Wide Shut

597

inflated rates.³²

The payment of a premium on a life insurance policy over which the payer retains no control is a taxable gift.³³ Given this general rule, one might wonder why a tax avoidance technique would be predicated on voluntarily paying more than absolutely necessary to purchase a life insurance policy. However, the payer using this technique would reduce the amount of gift tax that would normally be imposed on the premium payment by reporting as a taxable gift only the lowest price charged by the insurance company for the policy (rather than the higher premium that was actually paid).³⁴ In an example described in *The New York Times*, an individual paid a \$550,000 premium (just for the first year) on a policy that was also offered by the insurance company for \$50,000, its lowest price.³⁵ Assuming that the individual paid gift tax at the highest marginal rate currently in effect (i.e., fifty percent),³⁶ the gift tax on the \$50,000 reported gift would have been only \$25,000, while the gift tax on the \$550,000 actual premium paid would have been \$275,000 (for a gift tax savings of \$250,000).³⁷ Therefore, by employing this technique, the individual would have reduced the gift tax on a gift of \$550,000 from \$275,000 to \$25,000. Promoters of this technique argued that even the reduced gift tax (in this example, \$25,000) could be avoided by shifting the gift tax obligation to a spouse through the use of a trust.³⁸

The insurance company would then invest the difference between the lowest price charged and the actual premium paid for the life insurance policy.³⁹ The return on that investment – which, incidentally, would grow tax-free – was to be used to fund future premiums on the policy.⁴⁰ Structured properly, the purchased life insurance, when paid at the insured's death, would not be included in the insured's gross estate for estate tax purposes and would be received by her heirs free of income tax.⁴¹ Thus, as a result of using

³² See Johnston, *Loophole*, *supra* note 30.

³³ Treas. Reg. § 25.2511-1(h)(8) (as amended in 1997).

³⁴ Johnston, *Loophole*, *supra* note 30.

³⁵ *Id.*

³⁶ I.R.C. §§ 2001(c), 2502(a).

³⁷ Johnston, *Loophole*, *supra* note 30.

³⁸ *Id.*

³⁹ David Cay Johnston, *U.S. Bans a Method to Avoid Estate Tax with Life Insurance*, N.Y. TIMES, Aug. 17, 2002, at A1 [hereinafter Johnston, *U.S. Bans Method*].

⁴⁰ *Id.*

⁴¹ See Johnston, *Loophole*, *supra* note 30; see also I.R.C. §§ 101, 2042.

this technique, the person purchasing the life insurance policy would have been able to transfer a substantial sum of money to her heirs at a minimal (or no) gift tax cost and at no estate tax cost whatsoever.

Critics argued that this technique went far beyond the bounds of the 1996 private letter ruling upon which it relied, and “should fail because it is wholly outside the intent of Congress in giving tax breaks for life insurance.”⁴² The technique was shut down by the Treasury Department and the Internal Revenue Service (Service) shortly after Representative Lloyd Doggett sent a copy of *The New York Times* article to Pamela F. Olson, Acting Assistant Secretary of the Treasury for Tax Policy.⁴³

III. THE IMPLICATIONS

A. Law as a Profession

To grasp the implications of these articles for the profession, it is first necessary to understand exactly what we mean when we refer to the law as a “profession” and to ourselves as “professionals.” To put the question more pointedly, do we mean the same thing when we refer to a lawyer as a professional that we mean when we refer to someone as a “professional” athlete or when we refer to someone as doing a “professional” job? Or does the word “profession” take on a different meaning when it is applied to lawyers?

As these questions imply, the term “profession” (and, by extension, the term “professional”) has a number of different meanings and uses.⁴⁴ In common speech, the term “professional” is used to differentiate between amateurs and professionals.⁴⁵ In this sense, a professional is someone who engages in an occupation “for pay and who intends to make a living from it.”⁴⁶ This is the sense in which the term is used when we refer to professional athletes, professional hairdressers, and professional firefighters. “Professional”

⁴² Johnston, *Loophole*, *supra* note 30.

⁴³ Johnston, *U.S. Bans Method*, *supra* note 39.

⁴⁴ See Stephen F. Barker, *What is a Profession?*, 1 PROF. ETHICS 73, 74 (1992); see also Howard S. Becker, *The Nature of a Profession*, in 2 EDUCATION FOR THE PROFESSIONS: THE SIXTY-FIRST YEARBOOK OF THE NATIONAL SOCIETY FOR THE STUDY OF EDUCATION 27, 27 (Nelson B. Henry ed., 1962).

⁴⁵ Barker, *supra* note 44, at 79; Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 LAW & SOC'Y REV. 713, 716 (1999).

⁴⁶ Barker, *supra* note 44, at 79.

2003]

Eyes Wide Shut

599

is also used in common speech to indicate that “work measures up to a high standard of proficiency.”⁴⁷ This is the sense in which the term is used when we refer to the work that someone has done as a “professional” job.⁴⁸ These lay definitions of the term are rather broad and can potentially include within their ambit many different occupations.

A narrower, historical definition of “profession” has also been identified.⁴⁹ In this historical sense, the “key elements [of] professionalism . . . are the creation of and recognition of trained expertise and the structuring of occupations around this expertise.”⁵⁰ Certain of the occupations that are classified as professions under this definition

are able to restrict entry by enforceable licensing rules based on recognized expertise (such restrictions can extend from physicians and lawyers to insurance agents and stock brokers . . .). Others may be able to achieve a recognition of a strong credentialing process outside a state-based enforcement structure Still other[s] . . . have no licensing process and at best a weak credentialing process, but nonetheless are associated with an expertise that has led to the appellation “professional” (e.g., managers, computer programmers).⁵¹

Professionalism in this sense is one of the “key features” of modern developed economies.⁵²

A yet narrower, sociological definition of “profession” has also been identified.⁵³ Although there is a lack of consensus concerning the traits that are essential to classification of an occupation as a profession in the sociological sense,⁵⁴ several traits do seem to recur in

⁴⁷ *Id.* at 80.

⁴⁸ *Id.*

⁴⁹ *See* Kritzer, *supra* note 45, at 716-17.

⁵⁰ *Id.* at 717.

⁵¹ *Id.* at 716-17.

⁵² *Id.* at 717.

⁵³ *See id.* at 716-17.

⁵⁴ *See* Moore, *Professionalism*, *supra* note 2, at 778; *see also* Robert A. Rothman, *Deprofessionalization: The Case of Law in America*, 11 *WORK & OCCUPATIONS* 183, 183 (1984). Putting aside the difficulties in formulating a set of “necessary and sufficient conditions for being a profession,” the term is generally thought to express approval “of according prestige and high pay to those in that occupation.” Barker, *supra* note 44, at 74; *see also* Ronald D. Rotunda, *Professionalism, Legal Advertising*,

discussions of the sociological definition. These discussions commonly posit an occupation that: (i) requires the mastery of “some esoteric and difficult body of knowledge”⁵⁵ (with mastery of such knowledge normally being acquired through lengthy specialized education and training); (ii) is marked by altruistic motivations (i.e., the individual professional’s commitment to clients and public service surpasses her self-interest in making money from engaging in the activity);⁵⁶ and (iii) is self-regulating (meaning that it determines and controls entry into the profession and enforces a specialized code of ethics that applies to those admitted to the practice of the profession).⁵⁷ It is this sociological definition of “profession” that I believe most lawyers have in mind when they refer to the law as a profession and to

and Free Speech in the Wake of Florida Bar v. Went For It, Inc., 49 ARK. L. REV. 703, 705 (1997). Because of the term’s positive connotations, members of occupations that are generally not considered to be professions often refer to themselves as professionals in an effort to persuade others that they are entitled to more prestige and a higher income. *See* Barker, *supra* note 44, at 75-77. Stephen Barker has referred to this practice as using the term “profession” as an “emotive weapon[.]” *Id.* at 77.

⁵⁵ Becker, *supra* note 44, at 35.

⁵⁶ Some may be ill at ease with the use of the word “altruism” to describe this trait. “Altruism” suggests that professionals (including lawyers) selflessly pursue the welfare and interests of others and “stand above the ‘sordid considerations’ of acquisition and economics, ‘devoting their lives to “service” of their fellow men.’” Moore, *Professionalism*, *supra* note 2, at 783 (quoting TALCOTT PARSONS, *The Professions and Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY* 34, 43 (rev. ed. 1954)). Some commentators, including Talcott Parsons, have proposed using the term “disinterestedness” in place of “altruism.” *See id.*; *see also* Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1239 n.43 (1995).

⁵⁷ *See* TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 6 (5th ed. 2001); *see also* Becker, *supra* note 44, at 35-37; COMM’N ON PROFESSIONALISM, AM. BAR ASS’N, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986), *reprinted in* 112 F.R.D. 243, 261-62 (providing definition formulated by Eliot Freidson); John Kultgen, *Evaluating Codes of Professional Ethics*, in *PROFITS AND PROFESSIONS: ESSAYS IN BUSINESS AND PROFESSIONAL ETHICS* 225, 236 (Wade L. Robison et al. eds., 1983) [hereinafter *PROFITS AND PROFESSIONS*]; Lisa H. Newton, *Professionalization: The Intractable Plurality of Values*, in *PROFITS AND PROFESSIONS*, *supra*, at 23, 23-24; Barker, *supra* note 44, at 86-87, 92-93; Kritzer, *supra* note 45, at 717-18; Pearce, *supra* note 56, at 1237-40; Richard A. Posner, *Professionalisms*, 40 ARIZ. L. REV. 1, 2 (1998); Rotunda, *supra* note 54, at 706-13; Harold L. Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137, 138, 140-41, 146 (1964); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1307-14 (1995).

themselves as professionals.⁵⁸

Some commentators view these three traits (i.e., esoteric knowledge, altruism, and self-regulation) as the basic elements of a bargain between society and the profession.⁵⁹ This social contract theory of professions has its roots in the work of sociologist Talcott Parsons.⁶⁰ Under this Parsonian view, society grants the profession a legal monopoly on the practice of the profession in exchange for a promise that it will be practiced for the public good and in accordance with the high standards set forth in the profession's ethical code.⁶¹ Society enters into this bargain in order to control the quality of the services rendered by the profession, because the esoteric nature of the knowledge possessed by the profession makes it difficult for the public "to evaluate either the process of rendering services or the outcome."⁶² This asymmetry of expertise also necessitates granting the profession the right to enforce the bargain through self-regulation.⁶³ The profession's commitment to altruism renders this bargain acceptable to society, which is assured that the profession will neither use its knowledge to exploit clients nor to "advance . . . clients' interests at the expense of society."⁶⁴ Thus, from the Parsonian perspective,

a profession's code of ethics can serve both ideological and regulative functions. As ideology, a code articulates the various ideas that an occupation uses to achieve or maintain its special rights and privileges. . . . [I]t also serves the

⁵⁸ See Moore, *Professionalism*, *supra* note 2, at 777-78.

⁵⁹ See William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 496-97 (1995); see also Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 6-7 (1988); Moore, *Professionalism*, *supra* note 2, at 783-84; Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 12-14 (1989) [hereinafter Moore, *Usefulness*]; Newton, *supra* note 57, at 34-35 (describing the work of philosopher Stephen Toulmin); Pearce, *supra* note 56, at 1231-32, 1237-40.

⁶⁰ See Gallagher, *supra* note 59, at 496-97; see also Moore, *Professionalism*, *supra* note 2, at 782-84. For a first-hand description of Parsons' perspective, see, for example, TALCOTT PARSONS, *A Sociologist Looks at the Legal Profession*, in ESSAYS IN SOCIOLOGICAL THEORY 370 (rev. ed. 1954).

⁶¹ Moore, *Usefulness*, *supra* note 59, at 12-13; see also Newton, *supra* note 57, at 34.

⁶² RICHARD L. ABEL, *AMERICAN LAWYERS* 21 (1989).

⁶³ See Gallagher, *supra* note 59, at 496; see also Pearce, *supra* note 56, at 1231, 1239.

⁶⁴ Pearce, *supra* note 56, at 1240.

important function of establishing standards by which the profession can be held to public account. After all, society may have delegated responsibility to professionals, but it has the power to relieve them of this responsibility if they fail to live up to their public promises.⁶⁵

Other commentators approach the sociological definition more skeptically. Adherents of this critical perspective, which is grounded in the work of sociologist Max Weber, see “professionalism as a project of cartelization.”⁶⁶ For them, the mastery of an esoteric body of knowledge, the professed commitment to altruism, and the ethical rhetoric are just a means of defending the profession from competitive pressures; they are a “mere rationalization for the institutional features of the professional ideal that secure immunity from the market – entry restrictions, preclusion of lay practice, prohibition of advertising and solicitation, and price fixing.”⁶⁷ In addition, because prestige and high pay are accorded to members of a profession, adherents of this critical perspective see the professionalism project as a means for professionals to increase their upward social mobility.⁶⁸

B. Analyzing the Evidence

Having obtained a clearer understanding both of the relevant definition of “profession” and of the ways in which that definition can be conceptualized, we can now consider how the stories of the corporate inversion and life insurance techniques evidence an erosion in the professionalism of the tax bar. This analysis will proceed as follows: first, we will revisit these stories and recast them in terms of the sociological definition of “profession” by examining whether the tax bar, in either situation, fulfilled its commitment to altruism and demonstrated adequate enforcement of its code of ethics through self-regulation; then, we will explore the implications of these stories for

⁶⁵ Moore, *Usefulness*, *supra* note 59, at 13 (footnotes omitted); *see also* Kultgen, *supra* note 57, at 245-56.

⁶⁶ Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in *LAWYERS’ IDEALS/LAWYERS’ PRACTICES*, *supra* note 3, at 230, 231; *see also* Gallagher, *supra* note 59, at 497-99; Rothman, *supra* note 54, at 184; Solomon, *supra* note 3, at 149. For a more detailed treatment of this Weberian view of professions, *see*, for example, ABEL, *supra* note 62, at 14-30. *See also* ABEL, *supra* note 62, at 30-34, for a description of the Marxist view of professions.

⁶⁷ Gordon & Simon, *supra* note 66, at 231.

⁶⁸ ABEL, *supra* note 62, at 25-27; *see also* Barker, *supra* note 44, at 74; Gallagher, *supra* note 59, at 498.

the tax bar and, more generally, for the legal profession as a whole.

1. In Terms of the Sociological Definition of “Profession”

a. The Tax Lawyer’s Commitment to Altruism

The legal profession’s commitment to altruism is manifested most directly in its written code of ethics. The American Bar Association first memorialized its code of ethics in 1908 when it adopted the Canons of Professional Ethics.⁶⁹ The Canons were replaced by the Model Code of Professional Responsibility⁷⁰ (Model Code) in 1970, and, ultimately, by the Model Rules of Professional Conduct⁷¹ (Model Rules) in 1983.⁷² The Model Code and Model Rules have served as the basis for nearly all of the various state codes of legal ethics.⁷³

A variety of provisions in the Model Rules evince the legal profession’s commitment to serving the public good. Indeed, the first paragraph of the preamble to the Model Rules makes clear that a lawyer is not only a representative of clients, but also “an officer of the legal system and a public citizen having special responsibility for the quality of justice.”⁷⁴ The preamble goes on to specify that, in her role as a public citizen, “a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”⁷⁵ The lawyer should also “further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”⁷⁶

Several of the Model Rules prohibit attorney conduct that would either undermine the legal system or waste public resources: Model Rule 3.1 prohibits lawyers from filing or defending frivolous claims;⁷⁷

⁶⁹ See 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 1.10 (3d ed. 2002).

⁷⁰ MODEL CODE OF PROF’L RESPONSIBILITY (1980).

⁷¹ MODEL RULES OF PROF’L CONDUCT (2002).

⁷² See 1 HAZARD & HODES, *supra* note 69, §§ 1.11-14.

⁷³ *Id.* §§ 1.11 at 1-19, 1.15 at 1-26; app. B. For a succinct history of the legalization of these ethical norms, see Hazard, *supra* note 4, at 1249-60.

⁷⁴ MODEL RULES OF PROF’L CONDUCT pmb. ¶ 1.

⁷⁵ *Id.* at pmb. ¶ 6.

⁷⁶ *Id.*

⁷⁷ *Id.* at R. 3.1; see also *CTR. FOR PROF’L RESPONSIBILITY, AM. BAR ASS’N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT* 300 (4th ed. 1999) [hereinafter *ANNOTATED RULES*] (“When a lawyer takes part in instituting a frivolous

Model Rule 3.2 requires lawyers to make reasonable efforts to expedite litigation;⁷⁸ Model Rule 3.3 imposes on lawyers a duty of candor toward the tribunal;⁷⁹ Model Rule 3.4 imposes an obligation on lawyers to act fairly toward the opposing party and counsel, and includes specific prohibitions against falsifying evidence, assisting a witness to testify falsely, and making frivolous pre-trial discovery requests;⁸⁰ and Model Rule 3.5 prohibits lawyers from attempting to influence a judge, juror, prospective juror, or other official as well as from engaging in conduct that is intended to disrupt a tribunal.⁸¹ A commitment to the public good can also be detected in Model Rule 1.6, which permits an attorney to disclose confidential client information “to prevent reasonably certain death or substantial bodily harm,”⁸² and in Model Rule 4.1, which requires lawyers “to be truthful when dealing with others on a client’s behalf.”⁸³ To ensure that the system operates fairly, Model Rule 6.1 provides that it is the “professional responsibility” of each lawyer “to provide legal services to those unable to pay.”⁸⁴

lawsuit, that lawyer . . . jeopardizes the reputation of the legal profession and the judicial system . . .”).

⁷⁸ MODEL RULES OF PROF’L CONDUCT R. 3.2; *see also id.* at R. 3.2 cmt. (“Dilatory practices bring the administration of justice into disrepute.”); ANNOTATED RULES, *supra* note 77, at 307 (“Courts and commentators long have recognized that lawyers’ dilatory tactics impede the administration of justice and that such delay is a burden upon opposing parties and a waste of public resources.”).

⁷⁹ MODEL RULES OF PROF’L CONDUCT R. 3.3; *see also id.* at R. 3.3 cmt. ¶ 2 (“This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.”); ANNOTATED RULES, *supra* note 77, at 315 (“Thus, the lawyer’s first duty is to the court and the proper administration of justice. Implicit in the lawyer’s role as officer of the court is the general duty of candor.” (citation omitted)).

⁸⁰ MODEL RULES OF PROF’L CONDUCT R. 3.4; *see also id.* at R. 3.4 cmt. ¶ 1 (“The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.”).

⁸¹ *Id.* at R. 3.5.

⁸² *Id.* at R. 1.6(b)(1). Some commentators have, however, criticized Model Rule 1.6(b)(1) for demonstrating an unduly narrow commitment to the public good. *See* 1 HAZARD & HODES, *supra* note 69, §§ 9.19-21.

⁸³ MODEL RULES OF PROF’L CONDUCT R. 4.1 cmt. ¶ 1.

⁸⁴ *Id.* at R. 6.1; *see also* ANNOTATED RULES, *supra* note 77, at 479 (“A traditional rationale for lawyers’ pro bono obligation is that as officers of the court, lawyers have a responsibility to the system of justice by ensuring its fair operation.”).

The Model Rules do not, however, purport to be an exhaustive compendium of the ethical norms that lawyers must consider when deciding upon an appropriate course of professional conduct.⁸⁵ It is expected that lawyers will also be guided by their own moral compass and by the norms imposed on them by their peers.⁸⁶ For tax lawyers, the uncodified norms that guide professional conduct have generally been acknowledged to include a duty to the revenue system.⁸⁷

⁸⁵ See MODEL RULES OF PROF'L CONDUCT pmb. ¶ 16 ("The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law."); see also RESTATEMENT OF THE LAW GOVERNING LAWYERS 3 (2000) ("Other constraints, such as ideals and habits of morality, will often guide conduct of a good person who also aspires to serve as an honorable and public-spirited lawyer, and much more powerfully and pervasively than merely legal obligations."); BEAUCHAMP & CHILDRESS, *supra* note 57, at 6-7 ("[P]rofessionals may mistakenly suppose that they satisfy all relevant moral requirements if they obediently follow the rules of the code, just as many people believe that they discharge their moral obligations when they meet all relevant legal requirements."); 1 HAZARD & HODES, *supra* note 69, § 1.2 at 1-4 ("Many legally binding [ethical] rules incorporate an element of discretion Since these choices are by hypothesis not based upon legal compulsion, lawyers perforce must fall back upon personal notions of morality and proper conduct in deciding what to do."); *id.* § 1.3 at 1-6 ("[T]he three sources of norms governing lawyers are, roughly, 'code law,' 'other' law, and moral obligation.").

⁸⁶ The preamble to the Model Rules clearly acknowledges this expectation:

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

MODEL RULES OF PROF'L CONDUCT pmb. ¶ 7. Commentators have also recognized the need for internal or external moral guidance:

[M]ost lawyers probably impose some form of moral code upon themselves, or accept its imposition by others. These norms are usually not as well defined as other norms, and their violation is not subject to official sanction. Nonetheless, they have sufficient force in the life of many lawyers to qualify as a form of "law."

1 HAZARD & HODES, *supra* note 69, § 1.3 at 1-6; see also *id.* § 1.2 at 1-4 to 1-5 ("[L]awyers are governed by moral and political considerations, including peer pressure, not simply the positive commands of law.").

⁸⁷ See, e.g., BERNARD WOLFMAN ET AL., STANDARDS OF TAX PRACTICE § 101.2 (5th ed. 1999); Mortimer M. Caplin, *Responsibilities of the Tax Advisor – A Perspective*, 40 TAXES 1030, 1032 (1962); Frederic G. Corneel, *Guidelines to Tax Practice Second*, 43 TAX LAW. 297, 301-02 (1990); Michael C. Durst, *The Tax Lawyer's*

The need for a duty to the revenue system is said to arise out of the fact that the adversary in tax matters is always the government, which relies on self-assessment to collect taxes.⁸⁸ Unlike other adversaries, who can be expected “to scrutinize critically the lawyer’s statements,”⁸⁹ the government lacks the resources to audit more than a small portion of the returns that are filed by taxpayers.⁹⁰ Consequently, the tax lawyer may often be the ultimate arbiter of what the revenue laws require.⁹¹

The tax lawyer’s duty to the revenue system has been conceptualized as requiring her to “balance the immediate demands of [her] clients against the public’s interest in a sound tax system which operates in accord with policy judgments reached through a democratic process.”⁹² For example, in the tax planning context, the goal is to strike an appropriate balance between “excessive conservatism and reckless optimism.”⁹³ If a tax lawyer’s advice is excessively conservative, she risks “depriv[ing] the client of tax benefits to which the client is legally entitled.”⁹⁴ If, on the other hand,

Professional Responsibility, 39 U. FLA. L. REV. 1027, 1028, 1031 n.9, 1050 n.81 (1987); Linda Galler, *The Tax Lawyer’s Duty to the System*, 16 VA. TAX REV. 681, 687-98 (1997) (book review); Randolph E. Paul, *The Responsibilities of the Tax Adviser*, 63 HARV. L. REV. 377 (1950); Loren D. Prescott, Jr., *Challenging the Adversarial Approach to Taxpayer Representation*, 30 LOY. L.A. L. REV. 693, 715 (1997); Randolph W. Thrower, *Preserving the Integrity of the Federal Tax System*, 33 N.Y.U. INST. ON FED. TAX’N 707, 709-10 (1975); Johnnie M. Walters, *Ethical and Professional Responsibilities of Tax Practitioners*, 17 GONZ. L. REV. 23 *passim* (1981); Ann Southworth, Note, *Redefining the Attorney’s Role in Abusive Tax Shelters*, 37 STAN. L. REV. 889, 891, 908-12, 918 (1985). *But cf.* Mark H. Johnson, *Does the Tax Practitioner Owe a Dual Responsibility to His Client and to the Government? – The Theory*, 15 S. CAL. TAX INST. 25 (1963); Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 KAN. L. REV. 847, 851, 871, 909 (1999) (summarily asserting that tax lawyers have no duty to the tax system or society in general).

⁸⁸ Galler, *supra* note 87, at 694.

⁸⁹ Durst, *supra* note 87, at 1034.

⁹⁰ *See id.*; *see also* Galler, *supra* note 87, at 694-95; Walters, *supra* note 87, at 36.

⁹¹ *See* Durst, *supra* note 87, at 1035; *see also* Prescott, *supra* note 87, at 713-14; Southworth, *supra* note 87, at 910-11.

⁹² Galler, *supra* note 87, at 693. Some commentators have conceptualized the duty to the revenue system as imposing an obligation on tax lawyers to use their specialized knowledge to improve both the content and administration of the tax laws. *See* Corneel, *supra* note 87, at 301-02; Paul, *supra* note 87, at 386; *see also* Johnson, *supra* note 87, at 35-37.

⁹³ Durst, *supra* note 87, at 1028.

⁹⁴ *Id.*

2003]

Eyes Wide Shut

607

a tax lawyer's advice is excessively optimistic, she may not only aid her client in shirking all or a portion of the client's "rightful share of taxation," but may also erode the overall level of compliance with the tax system (and, ultimately, reduce or eliminate the effectiveness of the tax as a source of government revenue) by contributing to a general sense among taxpayers that "others are avoiding their proper shares of taxation."⁹⁵ The Treasury Department and Service have described the importance of the duty to the revenue system in the following terms:

While it is generally agreed that a practitioner owes a client competence, loyalty and confidentiality, it also is recognized that a practitioner has responsibilities to the tax system as well. . . . [T]he ability of the IRS to accomplish its mission efficiently and effectively depends on reliance on tax practitioners to be fair and honest in their dealing with the IRS and to foster confidence by their clients in our tax system and in tax compliance.⁹⁶

Despite being referred to as a duty to the abstract and impersonal revenue "system," one commentator has envisaged the obligees of this duty as the more concrete and sympathetic class of "unrepresented citizens who ascribe value to a well-functioning tax system."⁹⁷ All citizens have a general interest in ensuring the government's ability to fund itself.⁹⁸ More immediately, however, each citizen also has an interest in ensuring that the burden of funding the government is borne by each taxpayer in accordance with the allocation prescribed by their democratically-elected representatives.⁹⁹ After all, to the extent that one taxpayer is able to avoid a portion of her tax burden, that burden must be taken up by every other taxpayer.¹⁰⁰

⁹⁵ *Id.*

⁹⁶ Tax Practitioners, 51 Fed. Reg. 29,113, 29,113 (proposed Aug. 14, 1986) (withdrawn by Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, and Enrolled Actuaries Before the Internal Revenue Service, 57 Fed. Reg. 46,356, 46,356 (Oct. 8, 1992)).

⁹⁷ Southworth, *supra* note 87, at 912.

⁹⁸ Galler, *supra* note 87, at 694.

⁹⁹ *Id.*

¹⁰⁰ Walters, *supra* note 87, at 37 ("Under our self-assessment tax system, where each taxpayer is charged with returning and paying his fair share of our tax burden, any reduction, lawful or unlawful, impacts adversely on the tax burdens of every other American, including even the lawyer representing that taxpayer.").

b. The Failure to Fulfill the Commitment to Altruism

The descriptions of the corporate inversion and life insurance techniques that appeared in *The New York Times* demonstrate a failure on the part of the tax lawyers involved to comply with their generally-acknowledged duty to the revenue system. Using the corporate inversion technique, tax lawyers from well-respected firms¹⁰¹ have assisted their clients in reducing their U.S. tax liability on income from both U.S. and foreign sources. At a general level, it can be argued that the corporate inversion transactions are shams because those employing the technique are able to claim substantial reductions in their U.S. tax liability “without in substance affecting [their] ownership, headquarters, operations or business practices.”¹⁰² As the Treasury Department has pointed out, “[t]he fact that our tax law operates so that substantial reductions in U.S. taxes are available through a transaction that is more form than substance is troubling to policy makers and the public alike.”¹⁰³

More specifically, some commentators have justified on competitiveness grounds the attempt by multinational corporations to use the inversion technique to eliminate the U.S. tax on their foreign profits and thereby create a de facto territorial tax regime.¹⁰⁴ They argue that many other countries employ territorial tax systems that are more favorable than the U.S. foreign tax credit regime and that give their corporate residents a corresponding advantage over U.S. companies.¹⁰⁵ Opponents have countered this argument by reminding

¹⁰¹ For example, both Cooper Industries, Inc. and Nabors Industries, Inc. received tax advice from Skadden Arps Slate Meagher & Flom LLP in connection with their inversion transactions, Ingersoll-Rand Company received tax advice from Baker & McKenzie in connection with its inversion transaction, and Foster Wheeler Corp. received tax advice from White & Case LLP in connection with its inversion transaction. See, e.g., COOPER INDUS. LTD., FORM S-4: REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933 exhibit 8.1 (July 6, 2001) (containing the tax opinion of Skadden Arps); FOSTER WHEELER LTD., FORM S-4: REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933, at 46 (Dec. 21, 2000) (indicating that White & Case had rendered a tax opinion concerning the transaction); INGERSOLL-RAND CO. & INGERSOLL-RAND CO. LTD., PROXY/PROSPECTUS 53 (Nov. 2, 2001) (indicating that Baker & McKenzie had rendered a tax opinion concerning the transaction); NABORS INDUS. LTD., FORM S-4: REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933 exhibit 8.1 (Apr. 17, 2002) (containing the tax opinion of Skadden Arps).

¹⁰² NYSBA INVERSION REPORT, *supra* note 9, at 25.

¹⁰³ TREASURY INVERSION REPORT, *supra* note 9, at 18.

¹⁰⁴ NYSBA INVERSION REPORT, *supra* note 9, at 22.

¹⁰⁵ See *id.*

2003]

Eyes Wide Shut

609

defenders of corporate expatriates that it is the prerogative of Congress – and *not* of multinational corporations – to change the tax laws, and that, until Congress chooses to do so, “it is not appropriate for taxpayers to have an easy ‘end run’ around the system Congress has enacted.”¹⁰⁶

In contrast, the reduction of U.S. tax on domestic profits that can be achieved by pairing a corporate inversion with earnings-stripping transactions encounters widespread opprobrium because this tax reduction is not accompanied by a corresponding reduction in business activities carried on within the United States.¹⁰⁷

The tax lawyers who have assisted their clients in implementing corporate inversions have breached their duty to the revenue system by undermining the integrity of that system. As the Tax Section of the New York State Bar Association has argued, these transactions “may undermine our corporate tax system in two respects: (1) they result in tax avoidance that, even if technically permissible under current law, runs contrary to many of its policies, and (2) they create problems of perception that may undermine the integrity of our voluntary compliance system.”¹⁰⁸ Politicians and the public have responded with their own judgment that corporations engaging in these transactions are shirking their obligation to pay their fair share of the total tax burden, especially at a time when the country must shoulder the added burden of funding the war on terrorism.¹⁰⁹ Thus, on the qualitative scale of tax planning advice described above,¹¹⁰ these tax lawyers seem to have leaned too far toward the recklessly optimistic end of the spectrum.

With respect to the life insurance technique, a tax lawyer from a well-respected New York firm worked with an insurance agent to develop a technique to aid wealthy individuals in avoiding the estate, gift, and generation-skipping transfer taxes by overpaying for life insurance. This technique appears to have relied entirely on a private letter ruling for support. Only the taxpayer to whom a private letter ruling has been issued may rely on that ruling,¹¹¹ and the Internal

¹⁰⁶ *Id.* These commentators further point out that the de facto territorial tax regime created by these multinational corporations is often more favorable than the de jure regime under which their competitors are taxed. *See id.*

¹⁰⁷ *Id.* at 24.

¹⁰⁸ *Id.* at 2.

¹⁰⁹ *See supra* notes 15-20 and accompanying text.

¹¹⁰ *See supra* note 93 and accompanying text.

¹¹¹ Treas. Reg. § 601.201(l)(1) (as amended in 2002); Rev. Proc. 2002-1, 2002-1 I.R.B. 1, § 12.01-.02.

Revenue Code prohibits private letter rulings from being cited as precedent.¹¹² While it may be appropriate for a tax lawyer to turn to a private letter ruling when there is no published guidance concerning the tax treatment of a bona fide transaction, it seems quite dubious to structure a transaction entirely around a private letter ruling, especially when the transaction is expected to generate substantial tax benefits and the promoters of the transaction require participants to sign confidentiality agreements.¹¹³ Even if one does not find this behavior suspicious, however, the *New York Times* article that disclosed this technique indicated that many estate tax lawyers believed that the technique stretched the “ruling so far that it no longer provides protection in an I.R.S. audit.”¹¹⁴ The article also indicated that opponents of the technique further argued that it “should fail because it is wholly outside the intent of Congress in giving tax breaks for life insurance, the I.R.S. ruling on the plan notwithstanding.”¹¹⁵

As was the case with the corporate inversion technique, the tax lawyers who developed and/or assisted their clients in implementing the life insurance technique breached their duty to the revenue system by undermining the integrity of that system. Other tax lawyers have perceived the technique as being contrary to the spirit of, and the policies underlying, the tax laws. The technique also undermines public confidence in the revenue system by making it appear that those with sufficient wealth need not pay their fair share of the overall tax burden. The latter sentiment was echoed in the remarks made by Representative Doggett after the Treasury Department shut down the life insurance technique:

“I am encouraged that this particular tax shelter has been shut down, but for every narrow loophole that is closed, there are dozens if not hundreds more tax shelter schemes that remain available to be exploited by those who choose not to pay their fair share for necessities like national security.”¹¹⁶

¹¹² I.R.C. § 6110(k)(3). Tax practitioners may, however, cite them in an effort to fend off the imposition of penalties. *See* Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 1998) (stating that private letter rulings issued after October 31, 1976 are counted as “authority for purposes of determining whether there is substantial authority for the tax treatment of an item”).

¹¹³ *See* Johnston, *Loophole*, *supra* note 30.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Johnston, *U.S. Bans Method*, *supra* note 39.

2003]

Eyes Wide Shut

611

Thus, once again, on the qualitative scale of tax planning advice described above,¹¹⁷ these tax lawyers seem to have leaned too far toward the recklessly optimistic end of the spectrum.

c. The Failure to Self-Regulate

The descriptions of these tax avoidance techniques demonstrate not only the failure of the tax lawyers involved to comply with their duty to the revenue system, but also the failure of the tax bar to police itself and to enforce its commitment to serve the public good. Both the report on corporate inversions by the Tax Section of the New York State Bar Association and the comments by tax lawyers in the articles on the life insurance technique indicate that many tax lawyers were troubled by these techniques and their potential negative impact on the revenue system. In addition, many of the lawyers who were involved in developing and/or implementing these techniques were from well-respected firms and presumably value their professional reputations. Yet, despite both its professed concern and the sensitivity of many of the lawyers involved to the besmirching of their respective reputations, the tax bar failed to exert sufficient pressure on the lawyers involved so as to cause them to cease participating in these ethically questionable transactions. In fact, just the opposite occurred with respect to the life insurance technique – rather than attempting to put a stop to the technique, other tax lawyers joined in the questionable behavior by copying the technique and creating variations of it.¹¹⁸

2. In Terms of Its Impact on the Professionalism of the Tax Bar

One of the hallmarks of professional status is self-regulation. From the Parsonian perspective, society grants the power of self-regulation to a profession as part of the bargain that it has made with the profession. Pursuant to this bargain, society cedes a legal monopoly to the profession in an effort to control the quality of services rendered by individual professionals, because the general public lacks the expertise to judge the professional's performance of her work. This asymmetry of expertise also necessitates granting the profession the right to enforce the bargain through self-regulation.

¹¹⁷ See *supra* note 93 and accompanying text.

¹¹⁸ Christine J. Harris, *Variations of Publicized Estate Planning Technique Raise Questions*, 96 TAX NOTES 1039, 1039 (Aug. 19, 2002); see also Johnston, *Loophole*, *supra* note 30.

From the Weberian perspective, the profession uses self-regulation (along with its mastery of an arcane body of knowledge and its commitment to altruism) as a means of legitimizing both the protections that it receives from market pressures and the enhanced social status of its members. Whether one chooses to embrace the Parsonian or Weberian perspective, the stories of the corporate inversion and life insurance techniques promise to have a profound impact on the continuing ability of the tax bar – and the legal profession of which it is a part – to justify its claim to self-regulation and, in turn, its claim to the benefits and privileges of professional status (e.g., protection from competition, higher than average income, and enhanced social status).

That lawyers, in practice, fail to regulate themselves adequately should not come as a surprise to many. Indeed, some commentators cite this failure in support of arguments that the laity should be afforded a greater role in the regulation of lawyers.¹¹⁹ Nevertheless, the stories of the corporate inversion and life insurance techniques tell us much more than that. They tell us not only that lawyers have failed to fulfill their commitment to serve the public good and to police such failures, but also that, contrary to the presuppositions of the social contract theory and to the arguments of lawyers attempting to further their Weberian project of cartelization, the laity *can* effectively regulate the activities of lawyers – and, more importantly, *that it has already begun to do so*.

The underlying rationale of the traditional argument for self-regulation is that the profession's mastery of an arcane body of knowledge renders lay regulation impracticable. It is assumed that the uninitiated simply have no basis for judging whether the conduct of an individual professional complies with the norms of conduct that are generally acknowledged by the larger professional community. The stories of the corporate inversion and life insurance techniques chip away at this rationale for self-regulation by attesting to (i) the ability of a journalist to gain an understanding of a technical tax planning technique; (ii) the ability of that journalist to explain both the technique and its implications in plain language to the general public; and (iii) in the case of the corporate inversion technique, the ability of the general public to grasp that explanation and its implications and to act upon them. As a result, these stories belie the

¹¹⁹ See DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 143-47, 158-65 (2000); see also Gallagher, *supra* note 59, at 490-92.

2003]

Eyes Wide Shut

613

traditional argument for self-regulation by demonstrating the laity's ability to regulate the professional conduct of lawyers and to police the profession's failure to fulfill its commitment to altruism.

As the stories of lay regulation accumulate,¹²⁰ the ongoing process of demythologizing the regulation of lawyers will accelerate, and the legal profession's claim to self-regulation will become increasingly tenuous.¹²¹ From a Parsonian perspective, as the process of demythologization advances, society may decide to re-evaluate the bargain that it has made with the legal profession. Having grasped that self-regulation is not dictated by necessity, society may decide to relieve the legal profession of its regulatory responsibilities and shift them (in whole or in part) into the hands of the laity. From a Weberian perspective, the legal profession's attempts to legitimize its project of cartelization will be undermined as the process of demythologization advances. Eventually, the legal profession may find itself in a position where it can no longer successfully defend its claim to self-regulation.

But loss of the power to self-regulate has broader implications than just the formalization of lay control over the regulation of the profession. Without the power to self-regulate, which is considered to be one of the defining characteristics of a profession, the ability of lawyers to claim the benefits and privileges of professional status will be cast in serious doubt.¹²² Thus, by undermining the rationale for self-regulation, the stories of the corporate inversion and life insurance techniques will not only contribute to the erosion of the legal profession's claim to self-regulation, they will also contribute to the erosion of its claim to the benefits and privileges of professional

¹²⁰ See, e.g., Diana B. Henriques & Floyd Norris, *Rushing Away from Taxes: The Capital Gains Bypass – A Special Report*, N.Y. TIMES, Dec. 1, 1996, § 1, at 1; Floyd Norris, *New Tax Law Takes Aim at Estee Lauder*, N.Y. TIMES, Aug. 6, 1997, at D1; Janet Novack & Laura Saunders, *The Hustling of X Rated Shelters*, FORBES, Dec. 14, 1998, at 198; Sheryl Stratton, *Treasury Targets Tax Deferral Strategies*, 70 TAX NOTES 347 (Jan. 22, 1996).

¹²¹ This is especially true when this de facto lay regulation of tax lawyers is considered in conjunction with the creeping external regulation of lawyers by administrative agencies such as the Securities and Exchange Commission and the Treasury Department. See Hazard, *supra* note 4, at 1256-57. For the most recent congressional intervention, see Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745, 784 (2002).

¹²² In the view of at least one commentator, self-regulation may be *the* defining characteristic of a profession for structural functionalists. ABEL, *supra* note 62, at 37 (“If structural functionalism had to distinguish professions by means of a single characteristic, self-regulation would be a prime candidate.”).

status.

IV. CONCLUSION

Despite a generalized feeling among lawyers that the practice of law has been undergoing a change for the worse, it has been relatively easy for skeptics to dismiss as unsubstantiated the recurring claims that the legal “profession” is slowly becoming the legal “business.” However, by providing concrete evidence of an erosion in the professionalism of the tax bar, the stories of the corporate inversion and life insurance techniques (and the similar stories that have preceded them and that will undoubtedly follow them) demonstrate that this feeling may, in fact, be grounded in reality. This essay has attempted to draw attention to this erosion in professionalism by documenting the most recent events in which it has manifested itself and by considering its implications for the tax bar and for the legal profession as a whole.

By raising awareness of the changes in the profession that are occurring before our eyes, this essay aims to spur members of the tax bar to reflect seriously on (i) their own actions and how they may have contributed to the erosion in professionalism; (ii) whether there is any value or benefit to having an independent legal “profession” (other than the self-serving economic benefits normally attendant to a monopoly); and (iii) in light of their thoughts with respect to the previous two points, whether the standard of conduct to which they actively hold themselves and their peers is sufficiently rigorous.