

**I Fought the Law and the Law Won:  
How the Role of Attorneys in the Tax Protestor Movement Has Shifted  
From Changing the Law to Winning Acquittals**  
Jessica Barclay-Strobel

Table of Contents

I.	Introduction .....	1
II.	Tax Protestors’ Characteristics and the Internal and External Forces Which Contribute to the Movement’s Lack of a National, Unified Litigation Strategy .....	2
III.	The State of the Law: The Criminal Defense of Willfulness and Use of Injunctions .....	4
IV.	Three Types of Attorneys Who Represent Tax Protestors in Criminal Cases and Civil Injunctions .....	5
a.	The Pragmatists: Bill Cohan and Michael Minns.....	6
i.	Getting Started: Pragmatists’ Serendipitous Discovery of the Specialty .....	6
ii.	Pragmatists’ “Outsider” Status Within the Tax Protestor Movement .....	7
iii.	Pragmatists’ Political and Personal Views Let Them Sympathize with Their Underdog Clients .....	7
b.	The Tacticians: Robert Barnes and Peter Goldberger .....	9
i.	Getting Started: Tacticians’ Cultivation of the Specialty as an Outgrowth of Their Support for Other Movements .....	9
ii.	Tacticians’ Views of Tax Protestor Clients and Their Movement Vary According to the Tacticians’ Political Beliefs.....	9
c.	Cause Lawyers: Larry Becraft, Jeff Dickstein, Donald MacPherson, and Sheldon Waxman.....	11
i.	Getting Started: Cause Lawyers’ Openness to Clients’ Legal Theories Bring Them to the Specialty .....	12
ii.	Cause Lawyers Share Their Tax Protestor Clients’ Distrust of Hierarchies and Legal Expertise .....	13
V.	The Role of Attorneys within the Movement .....	13
a.	Pragmatists’ and Tacticians’ Perception of Their Role As Attorneys Differs From That of Cause Lawyers .....	13
b.	Because Pragmatists, Tacticians, and Cause Lawyers Have Different Goals, They Have Competing Views on Their Clients’ Ideal Litigation Strategy and the Direction of the Tax Protestor Movement .	16
VI.	The Motivations of Attorneys Who Represent Tax Protestors .....	17
a.	Attorneys Who Represent Tax Protestors, Especially Cause Lawyers, Risk Significant Damage to Their Career and Financial Repercussions .....	17
b.	Attorneys Who Represent Tax Protestors May Gain Professional Recognition and Personal Satisfaction .....	20
c.	Does the Ineffectiveness of Cause Lawyer’s Litigation Strategy to Convince Courts to Adopt Tax Protestors’ Legal Theories Belie the Sincerity of These Attorneys’ or Their Clients’ Beliefs?.....	22
VII.	The Role of Attorneys in the Future: The Decline of the Cause Lawyer .....	26
a.	The Injunctions Against Tax Protestors’ Speech May Allow Tacticians to Eclipse Cause Lawyers....	26
b.	The Reduction of Criminal Defenses Renders Cause Lawyers Either Ineffective or Redundant .....	26
VIII.	Conclusion.....	27

## I. Introduction<sup>1</sup>

The vast majority of United States citizens pay their taxes.<sup>2</sup> However, since the 1970s, there has been tremendous growth<sup>3</sup> in a small movement of “tax protesters”<sup>4</sup> who oppose the income tax because they believe it is illegal or inapplicable to them. The tax protestors’ belief that their opposition is rooted in the “correct” interpretation of tax law distinguishes them from individuals who oppose the income tax on moral grounds, such as conscientious objectors, or for financial reasons, such as those who believe taxes are too high.<sup>5</sup> The legal underpinnings of the tax protestor movement also explain tax protestors’ fixation on the courts as a site of change. Yet, despite their enthusiasm for the law, tax protestors suffer from a Cassandra complex: they have been blessed with an epiphany regarding the illegality of taxes, but are cursed by an inability to convince others of their legal theories.<sup>6</sup>

This article explores the fraught relationship between the tax protestors and attorneys, the types of attorneys who represent tax protestors, these attorneys’ roles and motivations, and the future for attorneys within this movement. First, I conclude that the lack of a national, unified litigation strategy for the tax protestor movement stems from both internal weakness – its antipathy to authority generally and distrust of attorneys specifically – and external pressure by government. Next, I profile three types of attorneys who specialize in tax protestor cases – pragmatists, tacticians, and cause lawyers – and explore whether the futility of tax protestor litigation belies the sincerity of cause attorneys who advance tax protestors’ legal arguments in

---

<sup>1</sup> I would like to thank the fascinating attorneys who agreed to be interviewed for this article and who were so kind as to share their insights into the movement and the role of attorneys within it: Robert E. Barnes, Lowell H. Becraft, William A. Cohan, Jeffrey A. Dickstein, Peter Goldberger, Donald W. MacPherson, Michael L. Minns, and Sheldon Waxman. I would also like to thank prominent tax protestor leader Steve Hempfling for his interview and insights.

<sup>2</sup> See U.S. DEP’T OF THE TREASURY, UPDATE ON REDUCING THE FEDERAL TAX GAP AND IMPROVING VOLUNTARY COMPLIANCE 1 (2009) available at [http://www.irs.gov/pub/newsroom/tax\\_gap\\_report\\_-final\\_version.pdf](http://www.irs.gov/pub/newsroom/tax_gap_report_-final_version.pdf) (“The IRS has estimated the overall voluntary compliance rate to be approximately 84 percent.”).

<sup>3</sup> See Danshera Cords, *Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systematic Costs*, 2005 B.Y.U.L. REV. 1515, 1517-18 (2005) (noting a more than twenty-fold increase in tax protestor filings with the IRS from 1979 to 2001).

<sup>4</sup> This article uses the term “tax protestor” instead of “tax denier” because the former seems to be the traditional and often preferred term of members of the movement. See, e.g., Telephone Interviews with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009) (stating belief that the government is engaged in a game of semantics and substituted “tax denier” for “tax protestor” because the latter conjures up for a jury the American tradition of protest speech); Jeffrey A. Dickstein, Esq., (Nov. 3, 2009) (stating that “whenever the government wants to do something to someone, they put a name on it,” which is why the government has now substituted “tax denier” for “tax protestor”); *but see* Telephone Interviews with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009) (stating that the terms “tax denier” and “tax protestor” are “synonymous,” but recognizing that Congress has stated that only the former is appropriate); Michael L. Minns, Esq., Minns Law (Oct. 14, 2009) (stating that he feels “protestor” is “pejorative” and thus “denier” is the preferred term, but also defining a tax protestor as simply “someone who exercises their First amendment rights to be critical of” the current tax structure and wryly noting that “protesting taxes . . . is a political necessity if you’re going to run for office”).

<sup>5</sup> See Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFFALO L. REV. 819, 917 (2002) (identifying this type of protestor as one who has “some theoretical or political element that questions the legitimacy of the tax” and distinguishing this type from conscientious objectors or those who fail to pay for financial reasons); Cords, *supra* note 3, at 1516 (“Those who believe that the tax system is illegal or inapplicable are commonly referred to as tax protestors.”).

<sup>6</sup> For a list of invalid tax protestor arguments, such as the argument that wages are not “income” and therefore not subject to tax, see INTERNAL REVENUE SERV., THE TRUTH ABOUT FRIVOLOUS TAX ARGUMENTS (2009) available at [http://www.irs.gov/pub/irs-utl/friv\\_tax.pdf](http://www.irs.gov/pub/irs-utl/friv_tax.pdf).

court. Finally, I conclude that shifts in the legal landscape over the last three decades will likely result in cause lawyers becoming either obsolete or redundant.

## II. Tax Protestors' Characteristics and the Internal and External Forces Which Contribute to the Movement's Lack of a National, Unified Litigation Strategy

Tax protestors have traditionally been associated with militias located in rural enclaves that reject a centralized government, but this stereotype does not accurately capture the motivations and demographics of the modern movement.<sup>7</sup> Tax protestors do share certain characteristics with their militia antecedents; tax protestors are typically “white, politically conservative, evangelical Christian males whose profound dissatisfaction with government policies lead them to reject government as a whole.”<sup>8</sup> However, tax protestors also typically have an above-average education and salary and a history of tax compliance.<sup>9</sup> New recruits usually discover tax protestor legal theories through online communities and are impressed by promoters who “brag about years of success with no repercussions” from the Internal Revenue Service (IRS).<sup>10</sup> However, the leaders of the tax protestor movement do not spread the gospel for free. Admission into the tax protestor ranks often comes at a price, literally, with leaders charging thousands of dollars for their tax advice.<sup>11</sup>

Most tax protestors share a distrust of authority and respect for individualism which leaves them philosophically and emotionally disinclined to “pull together” for collective action or to build hierarchical power structures.<sup>12</sup> As a result, there is a conspicuous lack of national tax protestor organizations to act as liaisons for the movement to attorneys.<sup>13</sup> In fact, several of the attorneys interviewed for this article expressed doubts about tax protestors' abilities to organize<sup>14</sup>

<sup>7</sup> See Letter from J.J. MacNab to Senators Charles E. Grassley, Chairman, and Max Baucus, Ranking Member, United States Senate Committee on Finance (Mar. 15, 2006) (“In the past, tax deniers were generally found in closed groups in isolated communities such as Montana, Idaho, or Texas, but now they thrive in large groups online.”); Telephone Interview with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009) (describing the inaccurate and “pejorative” impressions many people have of tax protestors as people who “live in shacks in Montana”). In 1998, Congress barred the IRS from identifying certain citizens as “tax protestors” to prevent citizens designated as such from being flagged even after they comply with the tax laws. See Cords, *supra* note 3, at 1553.

<sup>8</sup> See John B. Snyder, *Barbarians at the Gate?: The Law of Frivolity as Illuminated by Pro Se Tax Protest Cases*, 54 WAYNE L. REV. 1249, 1271 (2008).

<sup>9</sup> Christopher S. Jackson, Note, *The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar – Whatever His Demands*, 32 GONZ. L. REV. 291, 294 (1996-97).

<sup>10</sup> Letter from J.J. MacNab to Senators Charles E. Grassley, Chairman, and Max Baucus, Ranking Member, United States Senate Committee on Finance (Mar. 15, 2006); see also Snyder, *supra* note 8, at 1271 n.124.

<sup>11</sup> See *U.S. v. Benson*, 561 F.3d 718, 720 (7th Cir. 2009) (defendant sold his tax advice “Package” for \$3,500 per customer); see also Snyder, *supra* note 8, at 1271 n.124.

<sup>12</sup> Telephone Interview with Lowell H. Becraft, Jr., Esq. (Oct. 20, 2009); see also Telephone Interview with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009) (describing working with tax protestors to be “like dealing with the Trotskyites and Marxists”).

<sup>13</sup> As prominent tax protestor Steve Hempfling notes, “right now there’s no national leader” but rather many small groups. Telephone Interview with Steve Hempfling, Free Enterprise Society (Nov. 2, 2009); see also Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009) (“there’s not much of a movement out there . . . the closest . . . was the Ron Paul [followers]”).

<sup>14</sup> See Telephone Interviews with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009) (describing working with tax protestors to be “like herding cats”); William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26,

because the movement's members "are not good networkers, no[r] good coalition builders."<sup>15</sup> Even those attorneys who have advanced tax protestor legal arguments in court share these doubts; Larry Becraft, for example, recalls his initial expectation that the movement's members would "do things in an organized, legal fashion," but now believes such a coordinated effort is "out the window."<sup>16</sup>

The anti-elitism intrinsic to tax protestor ideology creates an uneasy tension between tax protestors and attorneys. Tax protestors are sometimes frustrated by attorneys who they perceive to "generally [not] respect non-attorneys."<sup>17</sup> The relationship between attorneys and the movement is also problematic because tax protestors are often "challenging [attorneys'] belief systems."<sup>18</sup> Thus, to the extent that tax protestors engage attorneys in the movement, it is often in a defensive capacity, such as when attorneys are hired to protect members, rather than in strategizing offensive efforts.<sup>19</sup> Attorneys, in turn, are well-aware of tax protestors' distrust, perceiving the latter to "have no respect for lawyers and legal reasoning in general . . . they are, in some cases, quite intolerant."<sup>20</sup> Even an attorney such as Jeffrey Dickstein, who acknowledges that he has a "reputation" within the movement, feels that its members "don't really listen" to him and are frustrated by his unwillingness to advance some of their legal arguments.<sup>21</sup>

The government's criminal prosecutions of and injunctions against movement leaders have also contributed to the lack of national tax protestor organizations or litigation strategy. As Robert Barnes observes, "people who are the national hub [of the movement] don't want to be identified as such" for fear of prosecution.<sup>22</sup> Such fears of prosecution are manifested in *Benson v. United States*,<sup>23</sup> where three parties who intervened on behalf of the tax protestor defendant concealed their identities for fear of reprisal.<sup>24</sup> In addition, Sheldon Waxman, who represented tax protestors three decades ago, believes that courts' rejection of tax protestors' legal arguments has amplified movement members' distrust of attorneys; because attorneys are less willing to advance their clients' legal theories, many tax protestors are less willing to rely on attorneys and instead chose to represent themselves pro se.<sup>25</sup>

---

2009) (stating that he has "no idea" whether tax protestors will eventually be able to form a unified movement); Lowell H. Becraft, Jr., Esq. (Oct. 20, 2009).

<sup>15</sup> Telephone Interview with Peter Goldberger, Esq., Law Office of Peter Goldberger (Nov. 2, 2009).

<sup>16</sup> Telephone Interview with Lowell H. Becraft, Jr., Esq. (Oct. 20, 2009). For a more detailed discussion of attorneys' cynicism regarding the likelihood of the movement's success, see *infra* text accompanying notes 221-225.

<sup>17</sup> Telephone Interview with Steve Hempfling, Free Enterprise Society (Nov. 2, 2009).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* Hempfling also notes that attorneys were not engaged in the initial planning stages of his organization, The Free Enterprise Society, but that some attorneys are now engaged in planning sessions and seminars. *Id.*

<sup>20</sup> Telephone Interview with Peter Goldberger, Esq., Law Office of Peter Goldberger (Nov. 2, 2009).

<sup>21</sup> Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009) (citing specifically the lack of support within the movement for his fight against injunctions in *Benson* because movement members do not like his legal arguments).

<sup>22</sup> Telephone Interview with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009).

<sup>23</sup> 561 F.3d 718, 720 (7th Cir. 2009).

<sup>24</sup> See 16<sup>th</sup> Amendment – The Sixteenth Amendment Bill Benson Litigation, <http://www.jeffdickstein.com> (last visited Dec. 17, 2009).

<sup>25</sup> Telephone Interview with Sheldon Waxman, Esq., Sheldon Waxman & Assoc. (Nov. 16, 2009).

### III. The State of the Law: The Criminal Defense of Willfulness and Use of Injunctions

*“The only hope defendants have now is for their defense attorney to convince the jury their client was too stupid to understand the law.”*<sup>26</sup>

Scholar Marjorie Kornhauser traces the rise of the modern-day tax protestors to the political shifts in the 1970s and 1980s which resulted in increased public doubt in the legitimacy of government, epitomized by California’s Proposition 13 to limit property taxes.<sup>27</sup> However, the touchstone for tax protestors’ legal efforts dates back to 1894, when the Supreme Court held in that a federal income tax was unconstitutional.<sup>28</sup> Congress responded by passing the Sixteenth Amendment and, in 1916, the Supreme Court upheld the constitutionality of Congress’s renewed efforts to levy an income tax.<sup>29</sup> While criminal prosecution of tax protestors continued intermittently throughout the first half of the century,<sup>30</sup> many of the attorneys interviewed for this article identified the 1970s as the birth of the modern movement.<sup>31</sup> Indeed, since 1979, the number of tax protestor returns filed with the IRS has increased from 7,123 to 152,000 in 2001.<sup>32</sup>

In criminal tax cases, courts have consistently rejected tax protestors’ defenses<sup>33</sup> except one: a lack of willfulness.<sup>34</sup> In the seminal case *Cheek v. United States*, the Supreme Court held that a defendant in a criminal tax case is excused if he can show “ignorance of the law” or that “he had a good-faith belief that he was not violating any of the provisions of the tax laws,” regardless of whether the claimed belief was “objectively reasonable.”<sup>35</sup> However, the Supreme Court qualified its expansive definition of willfulness in *Cheek*, holding that a belief that taxes are *unconstitutional* does “not arise from innocent mistakes caused by the complexity of the Internal Revenue Code” but in fact “reveal[s] full knowledge of the provisions.”<sup>36</sup> The genius of

<sup>26</sup> Devvy Kidd, *Income Tax Activists Reject Bitter Reality*, NEWS WITH VIEWS, May 10, 2007, <http://www.newswithviews.com/Devvy/kidd269.htm>.

<sup>27</sup> See Kornhauser, *supra* note 5, at 901-25.

<sup>28</sup> See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

<sup>29</sup> See *Brushaber v. Union P. R. Co.*, 240 U.S. 1 (1916) (upholding the constitutionality of the income tax provisions of the Tariff Act of 1913); Jackson, *supra* note 9, at 294 (describing the passage of the Sixteenth Amendment).

<sup>30</sup> See, e.g., *United States v. Murdock*, 284 U.S. 141, 146 (1931) (defendant failed to fill out an income tax form because he believed it violated his Fifth Amendment right against self-incrimination).

<sup>31</sup> See, e.g., Telephone Interview with Sheldon Waxman, Esq., Sheldon Waxman & Assoc. (Nov. 16, 2009).

<sup>32</sup> See Cords, *supra* note 3, at 1517-18.

<sup>33</sup> See INTERNAL REVENUE SERV., THE TRUTH ABOUT FRIVOLOUS TAX ARGUMENTS (2009) available at [http://www.irs.gov/pub/irs-utl/friv\\_tax.pdf](http://www.irs.gov/pub/irs-utl/friv_tax.pdf).

<sup>34</sup> See Michael Louis Minns, *A Brief History of Willfulness as It Applies to the Body of American Criminal Tax Law*, 49 S. TEX. L. REV. 395, 429 (2007); see also Telephone Interview with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009) (noting that the “good faith argument [is] the only defense that’s really available” and the “last” option for tax protestors); Jeffrey A. Dickstein, Esq., (Nov. 3, 2009) (“The only real issue you have is willfulness [so you] present it to the jury [in such a way] that they believe [the client] believes it.”); Peter Goldberger, Esq., Law Office of Peter Goldberger (Nov. 2, 2009) (concurring that most tax protestor legal arguments are foreclosed by precedent).

<sup>35</sup> 498 U.S. 192, 202 (1991).

<sup>36</sup> *Cheek v. United States*, 498 U.S. 192, 205 (1991).

*Cheek* is that it discourages a tax protestor defendant from using the court room to proselytize because his assertion that the tax laws are unconstitutional proves his knowledge of these laws, and thus his willfulness.<sup>37</sup> Nonetheless, critics of the *Cheek* standard argue that it encourages many tax protestors to cling to their unreasonable beliefs so as to escape criminal penalties.<sup>38</sup>

Despite courts' universal rejection of their arguments regarding the legality of taxes, the number of tax protestors has grown exponentially,<sup>39</sup> especially through online communities. The government has responded<sup>40</sup> by seeking to enjoin the commercial speech of many of the movement's leaders.<sup>41</sup> Attorneys who regularly represent tax protestors disagree about whether this shift from "nipping at the tail of the snake [to] cutting off the head" stems from the government's victories or failures in prosecuting movement adherents.<sup>42</sup> Regardless, critics of tax protestors hail this selective prosecution of key leaders as "the most effective strategy used in recent years," noting that courts granted injunctions against 135 defendants from 2000 through 2006.<sup>43</sup>

#### IV. Three Types of Attorneys Who Represent Tax Protestors in Criminal Cases and Civil Injunctions

*"I wanted to be a big blue-blood trial lawyer, but the cases didn't present themselves, so I had to take what I could. I became the lawyer for the little guy."*<sup>44</sup>

Unlike movements on both the left and right, the tax protestor movement does not appear to have a unified, national litigation strategy or a national legal organization which directs attorneys on the ground.<sup>45</sup> Instead, most of the movement's major legal battles have been waged by a small cluster of solo practitioners. Indeed, lawyers who specialize in tax protestor cases

<sup>37</sup> See, e.g., *U.S. v. Benson*, 561 F.3d 718, 720 (7th Cir. 2009) (defendant's book argued that the Sixteenth Amendment was never ratified).

<sup>38</sup> J.J. MacNab, an expert on the tax protestor movement, has recommended "to Congress that it define the concept of willfulness so that people who ignore the advice of competent tax professionals in favor of what scam artists tell them cannot claim they seriously believe that the tax laws do not apply to their income." David Cay Johnston, *Wesley Snipes Is Acquitted of Tax Felonies*, N.Y. TIMES, Feb. 1, 2008, available at <http://www.nytimes.com/2008/02/01/business/01cnd-tax.html?pagewanted=print>.

<sup>39</sup> See Cords, *supra* note 3, at 1517-18 (noting growth in tax protestor filings with the IRS by more than twenty-fold from 1979 to 2001).

<sup>40</sup> See Telephone Interview with Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009) (noting that the government went on the "offensive" regarding injunctions "in the last five years").

<sup>41</sup> See, e.g., *United States v. Bell*, 414 F.3d 474, 475, 481 (3d Cir. Pa. 2005); *United States v. Schiff*, 379 F.3d 621, 629 (9th Cir. 2004); *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1106 (9th Cir. 2000); *United States v. Buttorff*, 761 F.2d 1056, 1066-68 (5th Cir. 1985).

<sup>42</sup> Compare Telephone Interview with Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009) (noting that the government has moved on to injunctions because it has already so handily established favorable precedent in criminal cases) with Telephone Interview with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009) (noting that "there had not been a publicly prominent acquittal in 20 years and [then our] firm got three acquittals in five years" and thus the focus on injunctions may stem from a perception by the government that it needed to shift to alternative tactics).

<sup>43</sup> See Letter from J.J. MacNab to Senators Charles E. Grassley, Chairman, and Max Baucus, Ranking Member, United States Senate Committee on Finance (Mar. 15, 2006).

<sup>44</sup> Telephone Interview with Sheldon Waxman, Esq., Sheldon Waxman & Assoc. (Nov. 16, 2009).

<sup>45</sup> For discussion of the internal and external causes inhibiting the formation of a national litigation strategy, see *supra* Part III.

estimate that there are possibly only a dozen such attorneys in the United States.<sup>46</sup> Attorneys attribute the dominance of solo practitioners to the politically explosive nature of these cases, which render them unpalatable to large firms that fear political or judicial backlash.<sup>47</sup> Furthermore, tax protestor cases require a “certain specialized knowledge and sensitivity to the clients,” which the average lawyer may not possess.<sup>48</sup>

While attorneys who represent tax protestors may share certain skills, their biographies vary significantly in terms of their personal and political motivations for this work and the legal arguments which they are willing to advance. This section describes three types of attorneys who specialize in tax protestor cases: the pragmatist; the tactician; and the cause lawyer.<sup>49</sup>

### a. The Pragmatists: Bill Cohan and Michael Minns

*“If an attorney is in the business of protesting with the clients, [he is] not in the business of acquittals.”*<sup>50</sup>

A “pragmatist” is an attorney who focuses his practice on tax protestor issues primarily because this specialty provides a viable business model in which he has expertise.<sup>51</sup> Thus, a pragmatist selects clients and cases based on their ability to pay and the likelihood of acquittal, rather than as part of a strategy to advance the tax protestor movement’s legal or political agenda. While pragmatists do not identify as part of the tax protestor movement, they have personal narratives and hold political views which allow them to sympathize with their “underdog” clients.

#### i. Getting Started: Pragmatists’ Serendipitous Discovery of the Specialty

Both of the pragmatists profiled in this section, Bill Cohan and Michael Minns, came to their practice unexpectedly. Minns first defended tax protestors not in the typical dispute over unpaid taxes, but rather against charges of conspiring to harbor and conceal the fugitive Gordon Kahl, a prominent tax protestor.<sup>52</sup> Minns’s clients quickly became a *cause celebre* within the tax protestor movement and for years afterwards Minns received requests for representation from other tax protestors.<sup>53</sup> Minns originally “had no interest” in expanding his practice in this area,

---

<sup>46</sup> See Telephone Interviews with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009) (estimating that there are only twelve attorneys in the nation who “try these cases day in and day out”); William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009) (noting that “there really aren’t that many lawyers” who concentrate on representing tax protestors); Peter Goldberger, Esq., Law Office of Peter Goldberger (Nov. 2, 2009) (stating that just “a tiny handful of people” work on tax protestor cases).

<sup>47</sup> See, e.g., Telephone Interview with Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009).

<sup>48</sup> Telephone Interview with Peter Goldberger, Esq., Law Office of Peter Goldberger (Nov. 2, 2009).

<sup>49</sup> This article identifies these three categories and allocates attorneys among them based on interviews with these attorneys; however, these attorneys do not necessarily self-identify as belonging to these categories.

<sup>50</sup> Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

<sup>51</sup> See Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009) (noting that his practice is prosperous enough that one out of every ten cases is pro bono).

<sup>52</sup> See *United States v. Udey*, 748 F.2d 1231 (8th Cir. 1984).

<sup>53</sup> Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

but when all his regular clients went bankrupt two years later, Minns faced a choice: “going to work for someone else, going bankrupt, or accepting [the tax protestors’] calls.”<sup>54</sup>

Similarly, Bill Cohan describes his transition from general practice to tax protestor expert as “entirely serendipitous.” A neighbor of Mr. Cohan’s friend was charged with tax evasion in the early 1970s.<sup>55</sup> Mr. Cohan referred the man to a law firm with more tax expertise than he could offer, but remained on the case as second chair to gain experience.<sup>56</sup> He lost his next tax protestor case, but was undeterred, and soon after started winning acquittals and dismissals,<sup>57</sup> eventually building up a formidable track record.<sup>58</sup>

## ii. Pragmatists’ “Outsider” Status Within the Tax Protestor Movement

Pragmatists explicitly disassociate themselves from the tax protestor movement and criticize the movement for its inaccurate characterization of the law. Cohan, for example, has “never been an adherent to the [tax protestor] movement,” and instead sees himself as “just a white collar litigator.”<sup>59</sup> Minns identifies as a “Jewish trial lawyer liberal” rather than a movement member.<sup>60</sup> Minns contrasts himself with the “lawyer who tells the client what he wants to hear,” such as the false promise that the client is not legally required to file taxes.<sup>61</sup> Instead, Minns believes he “has a duty to tell [the client] he’s wrong.”<sup>62</sup> Cohan echoes this disdain for tax protestors’ legal arguments, joking that the tax denier movement is “really the ‘law denier’ movement.”<sup>63</sup>

## iii. Pragmatists’ Political and Personal Views Let Them Sympathize with Their Underdog Clients

Although pragmatists differentiate themselves from the tax protestor movement and its legal arguments, pragmatists nonetheless hold beliefs which allow them to sympathize with “underdog”<sup>64</sup> clients’ battles against an unjust government.

<sup>54</sup> Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

<sup>55</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009)

<sup>56</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009)

<sup>57</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009)

<sup>58</sup> See Williamacohan.com, About Us, <http://www.williamacohan.com/index2.html> (last visited Nov. 15, 2009) (dismissals or acquittals of all or substantially all charges in 49 of 78 cases); Transcript of Testimony of William A. Cohan at 5, *Tulchinsky v. United States*, No. C. 96-99-B (D.N.H. April 26, 1996) available at <http://www.williamacohan.com/section2/taxprosecutionstatistics.pdf> (dismissals or acquittals of all or substantially all charges in 34 of 64 cases).

<sup>59</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009).

<sup>60</sup> Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009).

<sup>64</sup> This article describes tax protestors as “underdogs” because of their unpopular political beliefs and the potential difficulty they may have in recruiting sympathetic legal counsel. See, e.g., Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009) (“I think most lawyers wouldn’t defend somebody who is a tax denier.”).

Pragmatists believe that the tax system itself, and the selective prosecution of defendants,<sup>65</sup> creates political and economic inequality. Cohan, for example, advocates for an alternative tax system that would replace the current income tax with a consumption tax, thereby reducing the vast volume of tax returns. He feels that “the tax code isn’t fair to working people,” but rather reflects the concerns of its creators: “special interest lobbyists.”<sup>66</sup> Given these inequities, Cohan, has “a great deal of sympathy for [his] clients.”<sup>67</sup> Cohan also believes that the “absurd [incomprehensibility] of the internal revenue code” makes it impenetrable to the average filer.<sup>68</sup> Minns is similarly critical of the lack of clarity and the subjectivity of the tax preparation process.<sup>69</sup> Cohan further notes that the federal government has not adequately educated members of the public about their tax obligation, thereby allowing tax protesters’ inaccurate legal arguments to flourish.<sup>70</sup>

These attorneys also believe the aggressive prosecution of tax protestors is symptomatic of the nation’s larger political problems. Cohan is chagrined at the extent to which the United State has become a “police state” and sees the exponential increase in the nation’s prison population to be a result of “more and more conduct . . . being criminalized.”<sup>71</sup> He believes that “the government, specifically the executive branch, has acquired way too much power” and is critical of the “excessive zeal of law enforcement” and the judiciary’s “willingness to tolerate” such zeal.<sup>72</sup> Minns is similarly frustrated with the status quo and the inability of the United State’s two-party system to produce desired reform.<sup>73</sup>

Finally, the “underdog” status of their clients resonates with these attorneys’ personal narrative as rebels. Cohan, for example, thinks that his experience as a conscientious objector to the Vietnam War makes him more willing to “stand up against what [he] perceive[s] to be abuses.”<sup>74</sup> Cohan was galvanized by the My Lai massacre and arrested at the White House in 1971 for “offering [his] services to Richard Nixon as his conscience – because he didn’t have one.”<sup>75</sup> Cohan seems to proudly display his wounds from past skirmishes with the judiciary in his tax protestor cases<sup>76</sup> as further proof of his skepticism of authority. As he explains, such

---

<sup>65</sup> See Robert Schmidt, *Tax Deniers Targeted by U.S. Officials After Wesley Snipes Case*, BLOOMBERG.COM, Feb. 20, 2009, [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a.TD\\_nMkGZI4](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a.TD_nMkGZI4) (last accessed on Nov. 14, 2009) (attributing to Michael Minns the observation that government prosecutions of tax protestors leave unaddressed the greater crimes of corporations that use illegal tax shelters or wealthy people who avoid taxes by sending money overseas).

<sup>66</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

<sup>70</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009) (recognizing that “misleading statements by the IRS” regarding the degree to which taxation relies on voluntary compliance contributes to tax protestors’ beliefs).

<sup>71</sup> *Id.* Cohan illustrates this shift in the judiciary by noting that when he was in law school, “Justice Stevens was a middle-of-the-road Republican – he hasn’t changed, but the rest of the Court has shifted.” *Id.*

<sup>72</sup> *Id.* Cohan illustrates this shift in the judiciary by noting that when he was in law school, “Justice Stevens was a middle-of-the-road Republican – he hasn’t changed, but the rest of the Court has shifted.” *Id.*

<sup>73</sup> Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

<sup>74</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009).

<sup>75</sup> *Id.*

<sup>76</sup> Cohan admits, almost with relish, that he has been “held in contempt a few times [but that] those contempt convictions have all been thrown out.” *Id.*

battle scars are due to “the propensity of judges to want to be revered, not respected – and [Cohan does not] revere them.”

### **b. The Tacticians: Robert Barnes and Peter Goldberger**

*“I don’t have a dog in that [tax protestor] fight, but I do have a dog in the free speech fight.”<sup>77</sup>*

A “tactician” is an attorney whose political beliefs differ from those of his tax protestor clients, but who takes on tax protestors’ cases in part to directly or indirectly advance the attorneys’ own political agenda. For the two attorneys profiled in this section, the role tax protestors play in advancing the attorney’s political goals varies dramatically. Robert Barnes’s political aim is to expand the boundaries of protected free speech, and thus his efforts to minimize the repercussions for tax protestor clients who “speak” through tax filings directly informs his political objective. Peter Goldberger, in contrast, identifies as a “progressive, a leftist, a pacifist [and a] civil libertarian,”<sup>78</sup> and thus views his representation of clients who believe taxes are illegal as a way to supplement his pro bono representation of religious and secular anti-war protestors who use taxation as a vehicle for their moral outrage.

#### **i. Getting Started: Tacticians’ Cultivation of the Specialty as an Outgrowth of Their Support for Other Movements**

Both Barnes and Goldberger describe their representation of tax protestors as an outgrowth of their involvement in other social movements. Goldberger’s interest in this specialty developed as part of his defense of religious or secular pacifists, such as Quakers, Mennonites, and members of the War Tax Resisters league.<sup>79</sup> For Goldberger, “it was not a tax issue, it was an interesting thing [he] could learn . . . [to] keep [his] clients out of trouble.”<sup>80</sup> After he had success with pacifist clients, other kinds of tax protestors began to contact him. Similarly, Barnes’s “first exposure to these ideas was [through] Noam Chomsky [and] the tax protests of the 1960s.”<sup>81</sup> Barnes was involved in civil rights and labor issues as an undergraduate and later worked to elect an African American mayor in his conservative hometown in Tennessee.<sup>82</sup> Barnes’s interest in tax protestors was sparked when he witnessed the government’s poor treatment of them in cases brought to his firm.<sup>83</sup> He quickly concluded that their cases raise exactly the kind of issues about which he is passionate: “protecting freedom of speech [and] the underdog.”<sup>84</sup>

#### **ii. Tacticians’ Views of Tax Protestor Clients and Their Movement Vary According to the Tacticians’ Political Beliefs**

---

<sup>77</sup> Telephone Interview with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009).

<sup>78</sup> Telephone Interview with Peter Goldberger, Esq., Law Office of Peter Goldberger (Nov. 2, 2009).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Telephone Interview with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

Goldberger perceives a difference between pacifists who protest war by refusing to pay taxes and tax protestors who do not pay taxes which they believe are illegal.<sup>85</sup> He cautions against the “assumption” that tax protestors “are being sincere” when they contend that taxes are illegal, in part because he thinks a “*legal* argument is not like believing in a *moral* principle.”<sup>86</sup> In fact, he believes that one “can avoid being prosecuted [for failure to pay taxes] by being transparent, sincere and non-fraudulent,” as exemplified by the typical pacifist client who “meticulously calculate[s] the amount they would have paid the government” in taxes and then gives that sum to charity.<sup>87</sup>

Goldberger says that war tax resisters “are treated very differently, unofficially, than those who” believe taxes themselves are illegal, noting that, for example, pacifists “almost never are prosecuted criminally.”<sup>88</sup> He has observed “that there must be, among the government officials who exercise discretion, some recognition of a difference” between tax protestors who believe taxes are illegal and those who believe taxes violate their moral or religious principles.<sup>89</sup> Goldberger speculates that the government’s different treatment of certain types of tax protestors may stem from a strategic calculation that “it’s bad publicity to pursue people who seem sincere and altruistic,” or perhaps even the government officials’ “admir[ation] or respect [for] religious sincerity.”<sup>90</sup>

In contrast to Goldberger, Barnes “tend[s] not to judge [his] clients” and strives to be “open, pretty tolerant of a . . . wide range of clients.”<sup>91</sup> Barnes has “always been in favor of people having more access to ideas, [which] leads to more justice” and thus he believes he shares with his tax protestor clients the desire “to think without interference by the government.”<sup>92</sup> He sees the uptick in injunctions and the severity of the sentences in these cases as punishment “for nothing more than having odd tax beliefs and telling the government about it.”<sup>93</sup> “Even if their beliefs about taxes are wrong,” he explains, “the government’s [acts] are more wrong.”<sup>94</sup>

Because Barnes approaches his work as a free-speech advocate, he is willing “to advocate for people all across the political spectrum.”<sup>95</sup> In contrast, while Goldberger agrees that “the same principals should protect everybody, even people whose principles [he does] not agree with,” Goldberger recognizes that his political beliefs likely would prevent him from effectively

---

<sup>85</sup> See Telephone Interview with Peter Goldberger, Esq., Law Office of Peter Goldberger (Nov. 2, 2009) (“It’s really different to say ‘I believe in nonviolence’ and to say ‘I believe that Section 861 of the tax code says this.’”).

<sup>86</sup> *Id.* Some of Goldberger’s clients also recognize this difference by referring to themselves as “war tax resisters.”  
*Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* Goldberger, for example, has worked on only one criminal tax case brought against religious pacifists in his 30 years of practice, *U.S. v. McKee*, 506 F.3d 225 (3<sup>rd</sup> Cir. 2007) and he believes that case came about only because his clients were so isolated from society that they were not aware of other pacifists who could counsel them on their legal options. *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Telephone Interview with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

representing certain clients.<sup>96</sup> Unlike Barnes and pragmatists such as Michael Minns, who remain agnostic about their clients' beliefs,<sup>97</sup> Goldberger can imagine that there may be some people for whom he would not be a suitable attorney because he would "probably not be able to satisfy the conflict of interest in [his] mind" between his and their political beliefs.<sup>98</sup>

While Barnes and Goldberger differ in their willingness to judge their clients' moral culpability, both define their career choice more as a calling than a profession and see themselves as rebels within the legal community. Barnes has "always been inclined to take [his] own path."<sup>99</sup> He is an admirer of Ralph Nader<sup>100</sup> and his "icons" growing up were Clarence Darrow and Gerry Spence.<sup>101</sup> Similarly, Goldberger describes himself as "quite an odd ball" at Yale Law School because of his lack of interest in working for a large firm.<sup>102</sup> In explaining his career decisions, Goldberger jokes that he never felt he was given the gift of intelligence "as a sign from God to [get rich] and take advantage of people."<sup>103</sup> Instead, he set up a criminal appellate practice in which he could "compete with the big shots and then undercut their prices."<sup>104</sup>

### c. Cause Lawyers: Larry Becraft, Jeff Dickstein, Donald MacPherson, and Sheldon Waxman

*"I always found I learned more from my clients and paralegals than [from] judges or law school."*<sup>105</sup>

A "cause lawyer" is an attorney who seeks to advance at least some of tax protestors' legal theories regarding the illegality or inapplicability of the tax system, either in the courtroom or through articles,<sup>106</sup> books,<sup>107</sup> or websites.<sup>108</sup> These attorneys have a "reputation" within the tax protestor movement<sup>109</sup> and often are in contact with each other regarding their cases.<sup>110</sup>

<sup>96</sup> Telephone Interview with Peter Goldberger, Esq., Law Office of Peter Goldberger (Nov. 2, 2009).

<sup>97</sup> See Telephone Interviews with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009) (noting that he "tend[s] not to judge [his] clients [and is] open, pretty tolerant of a . . . wide range of clients."); Michael L. Minns, Esq., Minns Law (Oct. 14, 2009) (noting that, while he is a "Jewish, trial lawyer liberal" he is undaunted when a client tells him "this is a Christian country and only Christians live here.").

<sup>98</sup> Telephone Interview with Peter Goldberger, Esq., Law Office of Peter Goldberger (Nov. 2, 2009).

<sup>99</sup> Telephone Interview with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009).

<sup>100</sup> *Id.* Barnes's firm represented Nader in his litigation to get on the ballot in several states in 2004. See Major Cases – Ralph Nader: A "Groundbreaking" Case for Election Rights, <http://www.bernhoflaw.com/ralph-nader.htm> (last visited Dec. 17, 2009).

<sup>101</sup> *Id.*

<sup>102</sup> Telephone Interview with Peter Goldberger, Esq., Law Office of Peter Goldberger (Nov. 2, 2009).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Telephone Interview with Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009).

<sup>106</sup> See, e.g., Lowell Becraft, Jr., *Jurisdiction Questioned*, NEWS WITH VIEWS, June 22, 2004, <http://www.newswithviews.com/Becraft/larry.htm> (last accessed Dec. 12, 2009).

<sup>107</sup> See, e.g., DONALD A. MACPHERSON, TAX FRAUD AND EVASION: THE WAR STORIES (1995).

<sup>108</sup> See, e.g., The Dixieland Law Journal, <http://hiwaay.net/~becraft/> (last visited Dec. 12, 2009) (a site run by Mr. Becraft); 16<sup>th</sup> Amendment – The Sixteenth Amendment Bill Benson Litigation, <http://www.jeffdickstein.com/> (a site run by Mr. Dickstein devoted to his work in *Benson*) (last visited Dec. 12, 2009).

<sup>109</sup> See Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009) (recognizing that he has a reputation in the tax protestor community).

<sup>110</sup> See Telephone Interview with Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009). MacPherson notes that there is "a lot of email chat room" communication within the tax protestor community and

Interestingly, the tax protestor stigma is so great in the legal profession that even some of these attorneys do not identify as “cause lawyers.” In addition, all of the attorneys profiled in this section distinguished their legal arguments from those of “other” lawyers who make “frivolous” claims with no basis in law.

### **i. Getting Started: Cause Lawyers’ Openness to Clients’ Legal Theories Bring Them to the Specialty**

Cause lawyers’ involvement with the tax protestor movement grows out of their openness to the ideas and needs of their clients, colleagues, or friends. Larry Becraft jokes that he became involved in tax protestor litigation because he likes criminal cases, but he does not like representing “real criminals.”<sup>111</sup> He had a general practice and began to work on tax protestor issues when the need arose among his clients.<sup>112</sup> “They had some attractive positions,” Becraft explains, and he was “opposed to [some] things the federal government does . . . and this allow[ed him] to make a living at it.”<sup>113</sup> Jeffrey Dickstein first learned about the movement from a friend who needed representation.<sup>114</sup> Dickstein was an apolitical attorney at a respectable firm, so he tried to find an attorney to assist his friend, only to discover that there “were just about no lawyers” willing to take on tax protestors’ cases.<sup>115</sup> He had stumbled onto “a national law practice out of the blue.”<sup>116</sup> Donald MacPherson similarly describes himself as “a lawyer in search of a practice.”<sup>117</sup> He believes that he did not choose the movement, “it just chose me.”<sup>118</sup>

Sheldon Waxman’s narrative is somewhat different. His journey began when he was an assistant U.S. attorney defending FBI agents in a civil suit for the slaying of Black Panther Fred Hampton.<sup>119</sup> He resigned to avoid becoming involved in an FBI cover up, and “became sort of a lawyer for people that no other lawyer would handle.”<sup>120</sup> He lost his first two tax protestor cases but “got known throughout the protestor community [for being an] aggressive, good kind of lawyer for those kind of cases.”<sup>121</sup> Interestingly, Waxman is the only attorney in this section who did not describe his encounter with the movement as an epiphany and, unlike the three cause lawyers profiled in this section, Waxman ultimately retired from tax protestor cases for two decades because of the negative repercussions on his career.<sup>122</sup>

---

that these online information exchanges were instrumental in his decision to become involved in certain cases, especially in his collaboration with Becraft. *Id.*

<sup>111</sup> Telephone Interview with Lowell H. Becraft, Jr., Esq. (Oct. 20, 2009).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Telephone Interview with Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009).

<sup>118</sup> *Id.*

<sup>119</sup> Telephone Interview with Sheldon Waxman, Esq., Sheldon Waxman & Assoc. (Nov. 16, 2009); *see also* JEFFREY HAAS, THE ASSASSINATION OF FRED HAMPTON: HOW THE FBI AND THE CHICAGO POLICE MURDERED A BLACK PANTHER 360 (2010) (crediting Waxman with resisting the FBI’s cover up of Fred Hampton’s murder).

<sup>120</sup> Telephone Interview with Sheldon Waxman, Esq., Sheldon Waxman & Assoc. (Nov. 16, 2009).

<sup>121</sup> *Id.*

<sup>122</sup> *See infra* text accompanying notes 183-185.

## ii. Cause Lawyers Share Their Tax Protestor Clients' Distrust of Hierarchies and Legal Expertise

MacPherson “went to law school not because [he] liked lawyers but because [he] hated lawyers.” He attributes his initial interest in the tax protestor movement to the fact that he “always hated bullies and liked to root for the underdog”<sup>123</sup> and his “first experience with the IRS [was that] they were acting like bullies.”<sup>124</sup> He is critical of the “the attitude of judges,” having witnessed “a lot of extreme prejudice against” tax protestors that rivals even the treatment of drug dealers.<sup>125</sup> Dickstein believes that the government’s failure to communicate effectively with its constituents has created the proliferation of even invalid tax protestor arguments, noting that the IRS fosters tax protestors’ misinformed perception of the tax code by failing to respond directly and persuasively to their inquiries.<sup>126</sup> Waxman’s empathy for tax protestors is consistent with his identification as a “small ‘L’ libertarian.”<sup>127</sup> Generally, these attorneys see tax protestor cases as a principled struggle, not simply a meal ticket. MacPherson, for example, attributes his enthusiasm to an “*ethical obligation* to represent not only the indigent but the unpopular client”<sup>128</sup> and a visceral reaction: “when you see injustice, you’re motivated to right the wrong.”<sup>129</sup>

## V. The Role of Attorneys within the Movement

*“When you say ‘the movement’ – Jesus Christ, what do you mean?”<sup>130</sup>*

### a. Pragmatists’ and Tacticians’ Perception of Their Role As Attorneys Differs From That of Cause Lawyers

The tax protestor movement lacks a unified legal strategy because of the different motivations of the attorneys who represent its members. Unlike cause lawyers, pragmatists and tacticians do not believe their role as attorneys requires them to consider the impact of their legal strategy for one client on the tax protestor movement as a whole, and thus their goals are simply to win acquittals.

Cause lawyers actively participate in the tax protestor movement and thus their goals as attorneys encompass more than just acquittals for their individual clients. Cause lawyers cultivate a reputation within the movement,<sup>131</sup> write articles<sup>132</sup> and publish books,<sup>133</sup> host

<sup>123</sup> DONALD A. MACPHERSON, *TAX FRAUD AND EVASION: THE WAR STORIES* 3 (1995).

<sup>124</sup> Telephone Interview with Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009).

<sup>125</sup> *Id.*

<sup>126</sup> Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009).

<sup>127</sup> Telephone Interview with Sheldon Waxman, Esq., Sheldon Waxman & Assoc. (Nov. 16, 2009).

<sup>128</sup> DONALD A. MACPHERSON, *TAX FRAUD AND EVASION: THE WAR STORIES* 3 (1995).

<sup>129</sup> Telephone Interview with Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009).

<sup>130</sup> Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

<sup>131</sup> *See* Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009) (recognizing that he has a reputation in the tax protestor community).

<sup>132</sup> *See, e.g.,* Lowell Becraft, Jr., *Jurisdiction Questioned*, NEWS WITH VIEWS, June 22, 2004, <http://www.newswithviews.com/Becraft/larry.htm> (last accessed Dec. 12, 2009).

<sup>133</sup> *See, e.g.,* DONALD A. MACPHERSON, *TAX FRAUD AND EVASION: THE WAR STORIES* (1995).

websites<sup>134</sup> to educate its online community, speak at seminars organized by and for non-attorneys within the movement,<sup>135</sup> and have regular email correspondence with each other.<sup>136</sup> As a result, they are conscious of the impact their cases have on the movement. MacPherson, for example, believes – as does the IRS and critics of tax protestors – that his acquittals in criminal cases “encourage people” in the movement.<sup>137</sup> Because they are attuned to the effects of their work on the movement, cause lawyers also expect a degree of reciprocity from the movement when they take on controversial or high-profile cases.<sup>138</sup>

Pragmatists, in contrast, often adopt what scholar David Binder describes as a “client-centered approach,”<sup>139</sup> meaning that they seek the best outcomes for their individual clients rather than to advance the aims of the tax protestor movement at large. Sometimes the best outcome for a client and for the movement are in conflict; for example, often the best defense to ensure an acquittal is that a client misunderstood the law by relying on fallacious tax protestor legal theories, yet such an argument portrays the client as a dupe and the movement as cabal of charlatans preying upon gullible saps.<sup>140</sup> Yet, given such a choice, pragmatists will recommend their clients use the best defense to win an acquittal.

While pragmatists adopt a client-centered approach in the sense that they prioritize clients above their movement, this does not mean that pragmatists unquestioningly implement their clients’ desires. Rather, pragmatists discourage actions which will damage their clients’ defense, including a client’s desire to use the courts as a forum for their political or legal arguments.<sup>141</sup> Minns draws an analogy between defending against tax violations and drug charges: if the prosecution has “a photo of you with the drugs,” a good lawyer is “not going to put you on the stand to say ‘I have a right to carry marijuana.’”<sup>142</sup> Indeed, Cohen believes that the most challenging part of working with clients is persuading them *not* to testify or request a jury trial; this is particularly difficult because the “people who get into the tax denier movement are [the] ones with enough of an emotional commitment” to the cause that they want to explain their beliefs to others.<sup>143</sup> However, Cohan concedes that while “the lawyer has to do his or her best to counsel the client as to whether to testify . . . ultimately the decision is the client’s,” even if “expressing his political beliefs and advanc[ing] a political agenda” will damage his defense.<sup>144</sup>

---

<sup>134</sup> See, e.g., The Dixieland Law Journal, <http://hiwaay.net/~becraft/> (last visited Dec. 12, 2009) (a site run by Mr. Becraft); 16<sup>th</sup> Amendment – The Sixteenth Amendment Bill Benson Litigation, <http://www.jeffdickstein.com/> (a site run by Mr. Dickstein devoted to his work in *Benson*) (last visited Dec. 12, 2009).

<sup>135</sup> See Telephone Interview with Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009).

<sup>136</sup> See *id.* MacPherson notes that there is “a lot of email chat room” communication within the tax protestor community and that these online information exchanges were instrumental in his decision to become involved in certain cases, especially in his collaboration with Becraft. *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> See Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009) (noting his disappointment that few members of the movement had signed his petition or made donations to support his work in *Benson*).

<sup>139</sup> See DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 4-11 (2d ed. 2004).

<sup>140</sup> For example, the attorneys defending movie star and tax protestor Wesley Snipes won acquittals by calling their client’s theories “kooky,” “crazy” and “dead wrong.” See Johnston, *supra* note 38.

<sup>141</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009). Nonetheless, Cohan notes that he has had successes even despite his client’s testimony regarding their own legal and political beliefs. *Id.*

<sup>142</sup> Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

<sup>143</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009).

<sup>144</sup> *Id.*

Yet even when they accede to clients' desires to air their own beliefs, pragmatists refuse to defend the validity of their clients' legal arguments in court.<sup>145</sup>

Just as pragmatists do not believe their role as an attorney requires them to advance their clients' movement objectives, they also do not assume responsibility for the ways in which they *do* advance the movement, such as by winning high-profile acquittals that inspire other tax protestors. Cohan, for example, believes that "all [he] can do is what is best for [his] client and whatever impact that . . . has, it has."<sup>146</sup> In this way, pragmatists' and cause lawyers' differing perceptions of their roles in the tax protestor movement echo the dynamic between personal injury and cause lawyers observed by scholar Anne Bloom. Personal injury lawyers "come to identify closely with both their clients and the cause at stake, [but] may be slower than traditional cause lawyers to recognize the political dimensions of" their work.<sup>147</sup> Similarly, pragmatists identify with their clients<sup>148</sup> and causes,<sup>149</sup> but, unlike cause lawyers, are less willing to be the conduits for tax protestors' political goals. Additionally, pragmatists' unwillingness to identify themselves as handmaids for the tax protestor movement may stem from a discomfort with the idea that their actions as attorneys may encourage future law-breaking.

Tacticians are similarly chary of being seen as advancing tax protestors' political goals when they do not overlap with the attorney's own political goals. Goldberger, for example, has represented many pacifists for whom an acquittal was perhaps a secondary goal to "making a dramatic protest . . . to them, the courtroom was like a theater."<sup>150</sup> However, Goldberger keeps his tax protestor clients on a much shorter leash; he has had clients "who have advanced . . . legally baseless arguments in the past and [he] make[s] it very clear that [he is] not going to advance those arguments for them."<sup>151</sup> Goldberger explains his refusal to advance tax protestor arguments in two ways. First, he is "not a political organizer" for the tax protestor movement, and second, his professional obligations prevent him from using legal arguments which have been rejected by previous courts.<sup>152</sup>

To the extent that pragmatists and tacticians see their work in courts as serving tax protestors' goals, it is not the goal of changing the tax protestor precedent but rather of minimizing the harm existing law has on an underdog. As Goldberger observes, he is interested in tax protestors "because they are hated and targeted by the government," but this interest does not translate into a desire to advance their cause.<sup>153</sup>

---

<sup>145</sup> See Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

<sup>146</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009). Cohan does acknowledge that this impact can be great, recognizing that tax protestor cases serve are "really significant in galvanizing resolve or awakening public opinion." *Id.*

<sup>147</sup> Anne Bloom, *Taking on Goliath: Why Personal Injury Litigation May Represent the Future of Transnational Cause Lawyering*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA* 96, 107 (Austin Sarat & Stuart A. Scheingold eds. 2001).

<sup>148</sup> See *supra* text accompanying notes 72-76.

<sup>149</sup> See *supra* text accompanying notes 64-72.

<sup>150</sup> Telephone Interview with Peter Goldberger, Esq., Law Office of Peter Goldberger (Nov. 2, 2009).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

**b. Because Pragmatists, Tacticians, and Cause Lawyers Have Different Goals, They Have Competing Views on Their Clients' Ideal Litigation Strategy and the Direction of the Tax Protestor Movement**

Because pragmatists and tacticians doubt the validity of tax protestors' legal theories and prioritize client acquittals over advancing the movement, these attorneys do not support cause lawyers' efforts to develop a national litigation strategy or educate the public. Unsurprisingly, the competing goals of attorneys who regularly represent tax protestors, combined with the dynamics of a small bar, have led to disagreements about litigation tactics.

Cause lawyers for the tax protestor movement, like the attorneys who engaged in "law reform" in the 1960s,<sup>154</sup> have tried to "chip[] away [at] the case law" to cultivate favorable precedent.<sup>155</sup> While MacPherson recognizes that tax protestors' efforts to create a coherent, national litigation strategy have yielded less fruitful precedent than that of other movements, he believes that this failure is because tax protestor law develops primarily through criminal prosecutions, where "the government chooses the forum, the time and the place."<sup>156</sup> Furthermore, while civil rights attorneys who use a "test case" method<sup>157</sup> can select the most endearing clients to advance their agenda, tax protestor attorneys must work with the unsympathetic defendants the government selects for high-profile cases as part of its effort to promote "general deterrence" of tax evasion.<sup>158</sup> The only way for tax protestors to similarly forum shop is to pay their taxes and then sue for a refund – a strategy that is likely unattractive to many tax protestors.<sup>159</sup> However, MacPherson notes that an "offensive" strategy has yielded results in some situations, such as when Robert Schulz, a leader in the tax protestor movement, sued the IRS over the scope of its power to require answers to certain summons.<sup>160</sup>

In contrast, pragmatists such as Cohan think that tax protestors' "solution lies with Congress" because "you don't change the law in court."<sup>161</sup> Minns also has little patience for litigation that seeks to overturn precedent regarding tax protestors' legal theories.<sup>162</sup> Cohan is similarly doubtful about the utility of public education campaigns waged by tax protestors in books and seminars, believing that "the tax denier movement is not going to do anything but get a lot of people in trouble."<sup>163</sup> He draws a clear distinction between his support of advocacy for a reform of taxation policy and the type of advocacy waged by the tax protestor movement: the former is focused on "changing the law . . . not pretending that the law is different than it is."<sup>164</sup>

<sup>154</sup> See JOEL F. HANDLER, ELLEN JANE HOLLINGSWORTH, & HOWARD S. ERLANGER, *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* 26-27 (1978).

<sup>155</sup> Telephone Interview with Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009).

<sup>156</sup> *Id.*

<sup>157</sup> See JOEL F. HANDLER, ELLEN JANE HOLLINGSWORTH, & HOWARD S. ERLANGER, *supra* note 157, at 26-27.

<sup>158</sup> See Johnston, *supra* note 38 (describing the Wesley Snipes trial and noting that often "the Justice Department brings cases against well-known individuals, hoping that widespread news coverage will encourage compliance, a policy known as general deterrence").

<sup>159</sup> See Telephone Interview with Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009).

<sup>160</sup> See *id.* The Second Circuit held that the IRS could not compel a defendant to respond to an IRS summons until a court has issued an order to enforce the summons. *Schulz v. IRS*, 395 F.3d 463, 465 (2d Cir. 2005).

<sup>161</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009).

<sup>162</sup> Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

<sup>163</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009).

<sup>164</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009).

Ultimately, the different goals of cause lawyers, pragmatists, and tacticians not only prevent these attorneys from collaborating to develop a unified litigation strategy, but also contribute to the dysfunction inherent in a small, insular community. All the attorneys interviewed in this article had a deep disdain for a nebulous group of “other” attorneys who were responsible for the stigma and lack of professionalism that clings to the tax protestor specialty. Cohan described these attorneys as having “contributed” to the image of tax protestor lawyers as charlatans because they lead clients “down the primrose path” with arguments that run “contrary to the law.”<sup>165</sup> Dickstein believes that most misinformed tax protestors get their information from lecturers who pedal false promises rather than valid legal arguments.<sup>166</sup> Finally, Minns, whose practice includes representing tax protestors in malpractice suits against their former attorneys, also believes that many lawyers are effectively “stealing” from tax protestors.<sup>167</sup> Given this level of distrust within a small bar, it is unsurprising that some cause lawyers feel that there has been little successful collaboration among attorneys since the movement’s apex in the 1980s.<sup>168</sup>

## **VI. The Motivations of Attorneys Who Represent Tax Protestors**

### **a. Attorneys Who Represent Tax Protestors, Especially Cause Lawyers, Risk Significant Damage to Their Career and Financial Repercussions**

While most attorneys interviewed in this article experienced some challenges stemming from their defense of tax protestors, cause lawyers suffer more than other attorneys from professional backlash, judicial hostility, and government harassment.

There are several formal mechanisms by which courts and bar associations punish attorneys who advance tax protestors’ legal arguments in court, ranging from sanctions for frivolous arguments<sup>169</sup> for as much as \$25,000<sup>170</sup> to disbarment.<sup>171</sup> Tax protestors’ hostility to legal hierarchies and expertise tends to provoke corresponding antipathy from courts and government prosecutors.<sup>172</sup> Dickstein, for example, recalls at least three complaints made

<sup>165</sup> *Id.* Mr. Cohan also criticizes the lawyers who “say there’s no law requiring filing of the income tax,” noting that “I am familiar with that law.”

<sup>166</sup> Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009).

<sup>167</sup> Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

<sup>168</sup> *See* Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009).

<sup>169</sup> *See, e.g.,* *United States v. Patridge*, 507 F.3d 1092, 1097 (7th Cir. 2007) (ordering attorney representing tax protestor to show cause why he should not be fined \$10,000 for “his frivolous arguments and noncompliance with the Rules, and why he should not be suspended from practice until he demonstrates an ability to litigate an appeal competently and responsibly”). Even the Supreme Court has summarily fined attorneys who advance tax protestor legal theories. *See Hyde v. Van Wormer*, 474 U.S. 992 (1985) (denying writ of certiorari to appellant tax protestor and imposing penalties on the attorney who advanced tax protestor legal theories under Supreme Court Rule 49.2 because such arguments are frivolous). In 2007, Congress also empowered “the Internal Revenue Service to impose \$5,000 fines on people who assert tax denier claims not just in court, but also in papers sent to the agency. The law gives tax deniers one opportunity to withdraw the papers after the agency sends them a list of tax denier theories rejected by the courts.” Johnston, *supra* note 38.

<sup>170</sup> *See* 16 U.S.C. § 6673 (permitting tax courts to assess sanctions of up to \$25,000).

<sup>171</sup> *See In re Daly*, 189 N.W.2d 176, 182 (Minn. 1971) (disbarring famous tax protestor attorney and noting that his “persistent and continuing attacks on our national monetary system can hardly be regarded as zealous advocacy or a good-faith effort to test the validity of repeated decisions of courts of record”).

<sup>172</sup> *See* John B. Snyder, *supra* note 8, at 1292.

against him to the state bar and has combatted efforts to exclude him from roughly half the cases where defendants have sought his services.<sup>173</sup> The impact on his professional opportunities has been long-lasting; he notes that even now he has “to fight tooth and nail to represent a client” and jokes that representing tax protestors “pretty much screwed up [his] life.”<sup>174</sup> MacPherson has also encountered several judges who had “an ax to grind” in tax protestor cases, but has made an effort to defuse this hostility by joining the selection panels for Ninth Circuit and trial court judicial appointments.<sup>175</sup> He feels that his service on these panels has resulted in “a different level of respect” from judges, who no longer see him as “that wacko, crazy MacPherson representing tax protestors” but rather as a productive and cooperative member of the legal profession.<sup>176</sup>

While the formal disciplinary measures used by courts and bar associations can be professionally devastating, harassment by government agencies can sometimes be more invasive and thus more disruptive to cause lawyers’ lives. MacPherson, for example, was the subject of IRS surveillance for several years as part of an IRS initiative to identify the leaders in the tax protest movement.<sup>177</sup> IRS agents anonymously attended several conferences at which MacPherson was a speaker, took notes on his speeches, and bought tapes of these speeches from the conferences’ sponsoring organizations.<sup>178</sup> The IRS maintained notes and tapes in a “Tax Protest Project File” and, although the surveillance did not reveal any illegal conduct by MacPherson, distributed materials in this file to IRS offices, the Department of Justice, and third parties, including defendants and counsel in a criminal trial.<sup>179</sup> Steve Hempfling, a leader in the tax protestor movement, believes that such monitoring is a common deterrent to attorneys, noting that the lawyers who “effectively” represent movement members against the government often encounter “tax [problems] themselves.”<sup>180</sup>

Sometimes the backlash is so personally disturbing that it deters an attorney from representing tax protestor clients. In the 1970s, “notorious tax protestor” Paul Bell hired Waxman to defend him in a grand jury indictment, which Waxman describes as his “first lesson about [the] power” marshaled against tax protestors.<sup>181</sup> The Justice Department subpoenaed Waxman’s records of the cost of his services to Bell and the Ninth Circuit upheld the contempt charge against Waxman for refusing to comply with the subpoena.<sup>182</sup> When Waxman’s delivery of the documents was delayed, a SWAT team entered Waxman’s house, put a gun to his head and took him “in chains to the Fresno county jail.”<sup>183</sup> After a night in jail, he was brought before the judge and explained the delay, but “recognizing that it was an unfair fight” Waxman “quit doing tax cases” for two decades.<sup>184</sup> As Waxman notes, “when they break your door down, and

---

<sup>173</sup> Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009).

<sup>174</sup> *Id.*

<sup>175</sup> Telephone Interview with Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009).

<sup>176</sup> *Id.*

<sup>177</sup> See *MacPherson v. IRS*, 803 F.2d 479, 480 (9th Cir. 1986).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> See Telephone Interview with Steve Hempfling, Free Enterprise Society (Nov. 2, 2009).

<sup>181</sup> Telephone Interview with Sheldon Waxman, Esq., Sheldon Waxman & Assoc. (Nov. 16, 2009).

<sup>182</sup> See *In Re Grand Jury Witness (Salas and Waxman)*, 695 F. 2d 359, 363 (9th Cir. 1982).

<sup>183</sup> Telephone Interview with Sheldon Waxman, Esq., Sheldon Waxman & Assoc. (Nov. 16, 2009).

<sup>184</sup> *Id.*

come in with a SWAT team, and put a gun up against your head, it's sort of a life lesson . . . at my age, I'm not looking for any more trouble."<sup>185</sup>

In addition to the kind of anxiety this treatment can induce, Dickstein notes that there are significant financial consequences to representing tax protestors.<sup>186</sup> He believes there is “no money” in this specialty because “when [clients] take on the IRS, then the IRS takes all [their] money, [and] *then* they come to [him for] help.”<sup>187</sup> Dickstein feels that the personal and professional damage inflicted on attorneys who represent tax protestors has deterred some lawyers from developing a tax protestor specialty; of the three or four attorneys he has nurtured in his career, none have “lasted more than two or three years.”<sup>188</sup>

Pragmatists endure some of these challenges, especially initial hostility from the judiciary, but not to the same degree as cause lawyers. Cohan, for example, cheerfully acknowledges that he “get[s] a fair amount of hostility from the judiciary.”<sup>189</sup> Cohan admits, almost with relish, that he has been “held in contempt a few times [but that] those contempt convictions have all been thrown out.”<sup>190</sup> He also recalls a tax protestor case where the opposing party filed eleven motions for sanctions against him, motions which would have bankrupted him but were rejected.<sup>191</sup> Minns has encountered similar hostility from the prosecution; in one trial, the government’s attorney displayed Minns’s own tax return on the table.<sup>192</sup> But while Dickstein and MacPherson attribute the hostility of judges and prosecution to an antipathy for tax protestors specifically, pragmatists believe this hostility is not unique to tax protestors. Cohan thinks that “anyone who handles criminal cases” encounters hostility from the bench because judges tend to assume that most criminal defendants are guilty.<sup>193</sup> Similarly, Minns thinks that attorneys who represent tax protestors “don’t face any more retaliation than with any other underdog” client.<sup>194</sup>

Tacticians appear to face even less hostility or professional backlash, most likely because their practice is not limited to tax protestor cases and thus they are not perceived as advancing the movement. Goldberger, for example, notes that he has “been opposing the government for decades [and] . . . nobody’s come after” him. He jokes that either he is “ineffective and harmless” or the prosecution simply grasps “that [he is] meticulously fair . . . and always friendly.”<sup>195</sup> Goldberger does not feel he encounters hostility from the judiciary due to the stigma of tax protestor clients because, while “judges may be surprised” that his briefs are not the typical “political rhetoric” advanced by tax protestor defendants, they respect “high quality

---

<sup>185</sup> *Id.*

<sup>186</sup> Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009).

<sup>190</sup> *Id.* Cohan notes, however, that he has “been in front of hundreds of judges; only a handful have given me a hard time.” *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009). Minns wryly recalls that he signed a copy of his book, which the prosecutor displayed next to Minns’ tax return, during opening argument and that his client was acquitted. *Id.*

<sup>193</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009).

<sup>194</sup> Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

<sup>195</sup> Telephone Interview with Peter Goldberger, Esq., Law Office of Peter Goldberger (Nov. 2, 2009).

legal work” and his “work speaks for itself.”<sup>196</sup> Similarly, although Barnes notes that he was audited within a month of representing his first tax protestor, he has not suffered other forms of harassment.<sup>197</sup>

### **b. Attorneys Who Represent Tax Protestors May Gain Professional Recognition and Personal Satisfaction**

Given the significant risks to their professional and personal lives, one might wonder why attorneys, especially those without an ideological commitment to their clients, would specialize in tax protestor cases. However, many of the attorneys interviewed for this article were able to identify some attractive qualities of this specialty, including veneration within the movement, personal gratification, a sense historical importance, and even mainstream recognition and national prominence.

Ironically, the very markers used by the legal profession to express its negative opinion of an attorney, such as sanctions or disbarment, carry cachet within a movement which believes legal hierarchies have chilled the diffusion of novel legal arguments.<sup>198</sup> Thus an attorney who carefully cultivates an “outsider” image may be more successful at attracting tax protestor clients. Cohan, for example, displays his battle scars<sup>199</sup> with pride, noting that “you’re going to become something of a pariah if you’re good at” representing tax protestors.<sup>200</sup> Citations for contempt, motions for sanctions, and hostility from the bench are just expected collateral damage “if you point out the inconsistency and unfairness in the internal revenue code.”<sup>201</sup> However, Dickstein feels that such respect from movement members does not translate into personal satisfaction, noting that he has not found many colleagues within the tax protestor movement.<sup>202</sup>

In addition, tax protestor cases fulfill the personal narrative shared by every attorney interviewed for this article – that of the rebel-litigator battling improbable odds and a governmental Goliath with infinite resources. Several attorneys explicitly analogized their representation of tax protestors to that of civil rights activists in a previous era. MacPherson, for example, likens his position to that of “a civil rights attorney in Mississippi,”<sup>203</sup> Barnes compares his work to “being a civil rights lawyer in the 1930s,”<sup>204</sup> and Dickstein credits the book *Rights On Trial*, which chronicled the work of a civil libertarian and civil rights attorney, as an inspiration.<sup>205</sup> Despite these attorneys’ varying backgrounds – interviewees included both a

---

<sup>196</sup> *Id.*

<sup>197</sup> Telephone Interview with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009).

<sup>198</sup> As scholar John Snyder observes, tax protestors do not see a fine for a frivolous argument as “a career-damaging mark of shame; it is, if anything, a badge of courage in the fight against the judicial and governmental enemy.” Snyder, *supra* note 8, at 1287.

<sup>199</sup> Cohan has been held in contempt by judges, which have been overturned on appeal, and had motions for sanctions filed against him but rejected. See Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009).

<sup>203</sup> Telephone Interview with Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009).

<sup>204</sup> Telephone Interview with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009).

<sup>205</sup> Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009).

Vietnam veteran<sup>206</sup> and conscientious objectors,<sup>207</sup> both Christians<sup>208</sup> and Jews,<sup>209</sup> and attorneys with law offices scattered across the country<sup>210</sup> – they share a sense of themselves as outsiders both professionally and politically. For example, attorneys were more likely to identify with the Libertarian,<sup>211</sup> Green,<sup>212</sup> or Progressive<sup>213</sup> arms of the political spectrum. This outsider status is perhaps also reinforced by their experience becoming lawyers; several attorneys described their interest in the law as stemming from a desire to change it, rather than simply to make a living through it, and this sense of a “calling” may enable them to identify with “underdog” clients.<sup>214</sup>

Finally, given America’s fondness for the mythic rebel-lawyer, attorneys who win the rare tax protestor acquittal can gain mainstream national attention. Becraft, for example, has appeared on national television to discuss his victory for Vernice Kuglin, a legend in the tax protestor movement for being acquitted by a jury on six counts of tax evasion.<sup>215</sup> In addition to public recognition, attorneys have opportunities to gain professional prestige. Cohan, for example, has litigated an issue arising out of a tax protestor case before the Supreme Court<sup>216</sup> and Becraft has appeared in several circuit courts to advance tax protestors legal theories.<sup>217</sup> Barnes has been admitted to practice in five Circuit courts and in several federal districts in several states, as well as appearing pro hoc vice in federal courts across the country.<sup>218</sup> MacPherson best captures the opportunity tax protestor cases pose to attorneys as a choice

---

<sup>206</sup> MacPherson served in Vietnam. DONALD A. MACPHERSON, *TAX FRAUD AND EVASION: THE WAR STORIES* 1 (1995).

<sup>207</sup> Cohan and Goldberger were conscientious objectors during Vietnam. *See* Telephone Interviews with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009); Peter Goldberger, Esq., Law Office of Peter Goldberger (Nov. 2, 2009).

<sup>208</sup> MacPherson identifies as a Christian. DONALD A. MACPHERSON, *TAX FRAUD AND EVASION: THE WAR STORIES* 95 (1995).

<sup>209</sup> Minns identifies as a Jew. Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

<sup>210</sup> Barnes and Cohan are located in California, Goldberger in Pennsylvania, Dickstein in Wisconsin, Minns in Houston, and MacPherson in Arizona. *See* <http://www.martindale.com> (last visited Dec. 14, 2009).

<sup>211</sup> Waxman has run for office as a Libertarian and Minns identifies with both the Libertarian and Green parties. *See* Telephone Interviews with Sheldon Waxman, Esq., Sheldon Waxman & Assoc. (Nov. 16, 2009); Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

<sup>212</sup> Barnes supported Nader’s bids for the Presidency and Minns identifies with both the Libertarian and Green parties. *See* Telephone Interview with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009); Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

<sup>213</sup> Goldberger identifies as a Progressive. Telephone Interview with Peter Goldberger, Esq., Law Office of Peter Goldberger (Nov. 2, 2009).

<sup>214</sup> Indeed, MacPherson seems to relish his underdog status, proudly noting that he did not earn more than \$12,000 annually before graduating from law school. *See* DONALD A. MACPHERSON, *TAX FRAUD AND EVASION: THE WAR STORIES* 3 (1995).

<sup>215</sup> Partial, edited transcript of *The Big Story With John Gibson* (Fox News television broadcast Aug. 12, 2003), available at <http://www.foxnews.com/story/0,2933,94630,00.html> (interview with Larry Becraft and his client, Vernice Kuglin)

<sup>216</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009); *see also* <http://www.williamacohan.com/section2/taxprosecutionstatistics.pdf>, <http://www.martindale.com/William-A-Cohan/4029877-lawyer.htm>.

<sup>217</sup> *See, e.g.,* United States v. Stahl, 792 F.2d 1438 (9th Cir. 1986); United States v. Ward, 833 F.2d 1538, 1539 (11th Cir. 1987) (rejecting Becraft’s argument that the federal income tax did not apply to his client because it applied only to residents of the District of Columbia and federal territories); United States v. Sitka, 845 F.2d 43 (2d Cir. 1988) (rejecting Becraft’s argument that that the Sixteenth Amendment was not properly ratified).

<sup>218</sup> Our Team – Robert E. Barnes, <http://www.bernhoflaw.com/barnes.htm> (last visited Nov. 16, 2009).

between the routine and the challenging: he “could take a DUI case or [he] could take a federal case.”<sup>219</sup> Unsurprisingly, he chose the latter.

**c. Does the Ineffectiveness of Cause Lawyer’s Litigation Strategy to Convince Courts to Adopt Tax Protestors’ Legal Theories Belie the Sincerity of These Attorneys’ or Their Clients’ Beliefs?**

*“[Tax protestors] would rather be right than win.”*<sup>220</sup>

All the cause lawyers interviewed for this article expressed a profound pessimism about the likelihood that litigation will result in tax protestors’ legal theories being accepted by the courts. Becraft, for example, is saddened that opportunities to establish favorable precedent have passed. He believes “there was a good legal argument” but that the less refined arguments of pro-se litigants have resulted in negative precedent.<sup>221</sup> Dickstein recalls that, in the 1980s, three or four attorneys and some paralegals would “get together and share ideas and strategies,” but that such collaboration is no longer possible.<sup>222</sup> Waxman echoes this sentiment, recalling that a few attorneys were “willing to take on the IRS” in the 1980s but that a national litigation strategy “is not an option anymore.”<sup>223</sup>

Indeed, it would be hard to imagine a litigation strategy which could be politically palatable. MacPherson believes that tax protestors’ legal arguments, “no matter how legally correct or logical, will never be adopted by the federal courts on *any* level.”<sup>224</sup> He believes that the financial implications of such a decision are too far-reaching and that no “federal judge is going to shut down the tax system over night.” Indeed, MacPherson distinguishes the tax protestor movement from other movements for unpopular social causes that have garnered more favorable precedent for the very reason that these other movements do not “impact[] . . . the public fisc.” Although Dickstein would “like to think we’re not wasting our time,” he echoes MacPherson’s concern that the movement will likely respond to the latest injunctions sought by government “the same as they’ve responded to every defeat . . . [by] doing the same thing and expect[ing] a different result.”<sup>225</sup>

Given this disconnect between cause lawyers’ work and their cynicism about whether a litigation strategy will advance the movement, one might question the motivations of these attorneys or their clients. Such doubts reflect a “long-standing and probably irresolvable debate in the tax enforcement community regarding how seriously tax protestors take their own arguments.”<sup>226</sup> Many critics assert that tax protestors are motivated solely by “greedy self-interest.”<sup>227</sup> Tax protestor expert Genet J.J. McNabb, for example, cites this self-interest as the

<sup>219</sup> Telephone Interview with Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009).

<sup>220</sup> Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009).

<sup>221</sup> Telephone Interview with Lowell H. Becraft, Jr., Esq. (Oct. 20, 2009).

<sup>222</sup> Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009).

<sup>223</sup> Telephone Interview with Sheldon Waxman, Esq., Sheldon Waxman & Assoc. (Nov. 16, 2009).

<sup>224</sup> Telephone Interview with Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009).

<sup>225</sup> Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009).

<sup>226</sup> See Snyder, *supra* note 8, at 1273 n. 132.

<sup>227</sup> See Transcript of Public Announcement of the Creation of the National Tax Defier Initiative by General Nathan J. Hochman, Assistant Attorney (Apr. 8, 2008), available at <http://www.justice.gov/tax/txdv08275.htm>.

distinction between modern-day tax protestors and the anti-war activists of previous decades who refused to pay taxes.<sup>228</sup> The latter engaged in “civil disobedience” and did so “with an understanding of the consequences . . . [such as] prison.”<sup>229</sup> Tax protestors, however, “want the benefits of withholding funds from government (personal enrichment, punishing government programs they don’t like) without any of the negative consequences.”<sup>230</sup>

Their defenders argue that tax protestors are sincere but perhaps poor tacticians. Dickstein, for example, attributes their failure to adopt new tactics and replace failed ones to the fact that tax protestors would “rather be right than win.”<sup>231</sup> Dickstein’s believes that people generally – not just movement members – “are blinded and limited by the reality they create” and that new ideas often prompt people to cling more fervently to the reality they know. MacPherson adopts a more charitable view of tax protestors as “well-meaning but naïve” about their ability to persuade courts to recognize their legal arguments. A similar explanation may be that “crooks” and “con artists” frequently prey upon the “idealists” within the movement<sup>232</sup> by pedaling unsupportable legal theories to the less savvy.<sup>233</sup> Tax protestors’ misguided reliance on these “for-profit theorists” would certainly explain the “seeming contradiction” of the tax protestor movement that it simultaneously espouses the “rejection of an overreaching central government” but “pursue[s] these theories in the courts and administrative agencies of the central government.”<sup>234</sup>

Even if the tax protestor movement was not peopled by “hard-headed” individualists, it is not clear that there is a more productive alternative to litigation available to tax protestors. Almost all the attorneys interviewed for this article – even the pragmatists who suggested that tax protestors seek redress from Congress<sup>235</sup> – were deeply skeptical about the extent to which the legislative branch would facilitate tax protestors’ goals.<sup>236</sup> Cause lawyers are particularly cynical about Congress’s willingness to legislate tax protestors’ legal theories. MacPherson notes, for example, that the efforts of movement leader Robert Schulz to petition Congress likely earned Schulz a criminal investigation.<sup>237</sup>

---

<sup>228</sup> Letter from J.J. MacNab to Senators Charles E. Grassley, Chairman, and Max Baucus, Ranking Member, United States Senate Committee on Finance (Mar. 15, 2006).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009).

<sup>232</sup> See Schmidt, *supra* note 65 (“Michael Minns, an attorney in Houston who has represented defendants in tax cases, said tax deniers tend to fall into two categories: ‘con artists’ or ‘crooks’ who market the bogus strategies, and ‘idealists’ who believe the schemes are valid.”).

<sup>233</sup> See, e.g., United States v. Bell, 414 F.3d 474, 475, 481 (3d Cir. Pa. 2005); United States v. Schiff, 379 F.3d 621, 629 (9th Cir. 2004); United States v. Estate Pres. Servs., 202 F.3d 1093, 1106 (9th Cir. 2000); United States v. Buttorff, 761 F.2d 1056, 1066-68 (5th Cir. 1985).

<sup>234</sup> Francis X. Sullivan, Comment, *The ‘Usurping Octopus of Jurisdictional/Authority’: The Legal Theories of the Sovereign Citizen Movement*, 1999 WIS. L. REV. 785, 795 (1999).

<sup>235</sup> Williamacohan.com, About Us, <http://www.williamacohan.com/index2.html> (last visited Nov. 15, 2009) (

<sup>236</sup> See Telephone Interviews with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009) (noting that the “tax code isn’t fair to working people,” but rather reflects the concerns of its creators – “a bunch of special interest lobbyists”); Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009) (noting that we have “the best Congress money can buy”).

<sup>237</sup> Donald W. MacPherson, Esq., The MacPherson Group, P.C. (Oct. 26, 2009).

Given that there is “no avenue left in the judicial system, nor in the legislative system, nor in the executive” to advance tax protestors’ goals,<sup>238</sup> the movement has increasingly engaged in public education rather than political change. As movement leader Steve Hempfling recognizes, taxation is both “a legal issue and partly a political issue” and thus tax protestors’ efforts must be addressed both “to the people as well as the courts.”<sup>239</sup> Toward this end, Peymon Mottahedeh, a non-lawyer, founded the Freedom Law School in Orange County.<sup>240</sup>

The government has shrewdly responded with injunctions to limit the tax protestors’ outreach.<sup>241</sup> Yet even in these legal battles, which would seem to appeal to free speech advocates, tax protestors have had difficulty finding allies. Barnes thinks two factors dissuade the free speech activists from partnering with the tax protestor movement: first, many of the donors to such groups do not “want to step into a political minefield” and second, some activists have pejorative stereotypes of tax protestors.<sup>242</sup> Given that the free speech movement is not known for being finicky about its posterchildren, free speech advocates’ unwillingness to engage in the these injunction battles suggest that tax protestors are so marginalized that their only hope for coalition building is to become more mainstream. Indeed, toward this end, tax protestor leaders have made efforts to collaborate with groups seeking to reduce taxes, most recently through the summer 2009 tea party protests.<sup>243</sup> However, purists within the movement criticize such “scams” because they do not help the public “understand the law as it’s written.”<sup>244</sup> Essentially, these critics view any compromise that attracts more mainstream support to the movement as a concession that tax protestors’ legal theories are incorrect.

In short, tax protestors and their cause lawyers suffer from a Cassandra complex; they have been blessed with an epiphany regarding the illegality of taxes, but are cursed by an inability to persuade others of their insights. Tax protestors perceive the power structures that control their lives to be so omnipotent and inflexible that any effort to challenge this “impossible system”<sup>245</sup> results in martyrdom. While this is certainly a self-serving narrative because it obviates the need to develop effective tactics, it also seems rooted in reality. Because tax protestor ideology is so extreme and taxation is so crucial to governance, it is difficult to imagine a how an executive or legal branch could function if it accepted tax protestors’ legal theories. Furthermore, tax protestors are an unpopular minority, a kind of plaintiff that has more often found relief in the courts than from legislative representatives who owe their seats to either a majority of votes or dollars. Tax protestors’ fixation on the courts as a site of change is therefore understandable even to pragmatists such as Cohan because courts “are the last line of defense” against unresponsive executive and legislative branches.<sup>246</sup>

---

<sup>238</sup> Telephone Interview with Sheldon Waxman, Esq., Sheldon Waxman & Assoc. (Nov. 16, 2009).

<sup>239</sup> Telephone Interview with Steve Hempfling, Free Enterprise Society (Nov. 2, 2009).

<sup>240</sup> See Freedom Law School's (FLS) Roots and Philosophy, <http://www.livefreenow.org> (last visited Dec. 17, 2009).

<sup>241</sup> See, e.g., *United States v. Bell*, 414 F.3d 474, 475, 481 (3d Cir. Pa. 2005); *United States v. Schiff*, 379 F.3d 621, 629 (9th Cir. 2004); *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1106 (9th Cir. 2000); *United States v. Buttorff*, 761 F.2d 1056, 1066-68 (5th Cir. 1985).

<sup>242</sup> Telephone Interview with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009).

<sup>243</sup> Telephone Interview with William Steve Hempfling, Free Enterprise Society (Nov. 2, 2009).

<sup>244</sup> Devvy Kidd, *We Can't End the Income Tax One Prison Sentence at a Time*, NEWS WITH VIEWS, Oct. 14, 2009, <http://www.newswithviews.com/Devy/kidd474.htm>.

<sup>245</sup> Telephone Interview with Sheldon Waxman, Esq., Sheldon Waxman & Assoc. (Nov. 16, 2009).

<sup>246</sup> See Telephone Interviews with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009).

In fact, the near certainty of failure – the IRS achieves a conviction in roughly nine out of every ten criminal tax cases<sup>247</sup> – may make cause lawyers more willing to litigate doomed tax protestors arguments. If chances of acquittal are slim, tax protestors and their lawyers may be more open to using dubious legal arguments. In addition, Minns’s admonishment that “if a lawyer can’t beat the statistics . . . he should quit”<sup>248</sup> takes on a new meaning given the wild improbability of victory. Many of the lawyers interviewed for this article cited their relatively stellar track record to justify their continued work in this specialty. Cohan, for example, has achieved dismissals or acquittals of all or substantially all charges in more than half his criminal tax cases.<sup>249</sup> Given the odds, an attorney in this specialty could congratulate himself for having a great impact if he wins even a quarter of his cases. Furthermore, an attorney may continue to attract clients despite some losses, so long as he becomes “known throughout the protestor community [for being an] aggressive, good kind of lawyer for those kind of cases.”<sup>250</sup>

Ultimately, given the apparent futility of efforts by tax protestors or cause lawyers to advance the movement, perhaps tactical acumen is not the best gauge for the sincerity of their beliefs. Instead, one might apply the same calculus to determine the sincerity of cause lawyers as J.J. MacNab applies to determine the sincerity of their clients.<sup>251</sup> Are cause lawyers enjoying a “benefit,” such as professional recognition, “without any of the negative consequences,” such as sanctions or harassment by the IRS?

While the answer to that question certainly varies by attorney, it seems that cause lawyers fare comparatively worse for their principled representation of tax protestors than pragmatists or tacticians. For example, while pragmatist Cohan considers himself “living proof that you can be a vigorous opponent and flourish,”<sup>252</sup> cause lawyer Dickstein feels that the tax protestor movement has offered him neither camaraderie, prestige, nor financial security.<sup>253</sup> Furthermore, the potential rewards that tax protestor cases offer appear equally accessible to all three types of lawyers, but cause lawyers seem to disproportionately suffer the negative professional and

---

<sup>247</sup> The IRS reported a 91.4% conviction rate on criminal investigation cases for fiscal year 2001 through December 31, 2006. See INTERNAL REVENUE SERV., U.S. DEP’T OF THE TREASURY, REDUCING THE FEDERAL TAX GAP 33 (2007) available at [http://www.irs.ustreas.gov/pub/irs-news/tax\\_gap\\_report\\_final\\_080207\\_linked.pdf](http://www.irs.ustreas.gov/pub/irs-news/tax_gap_report_final_080207_linked.pdf). In fiscal years 2006, 2007, 2008 and 2009, the IRS conviction rate for adjudicated criminal cases was, respectively, 91.5%, 90.2%, 92.3%, and 87.2%. See U.S. GOV’T ACCOUNTABILITY OFFICE, FINANCIAL AUDIT: IRS’S FISCAL YEARS 2009 AND 2008 FINANCIAL STATEMENTS 9, 21, 25 (2009) available at <http://www.gao.gov/new.items/d10176.pdf>. While these conviction rates likely include defendants other than tax protestors, the IRS had a similar conviction rate within its Questionable Refund Program, which identifies fraudulent returns to stop payment of fraudulent refunds and thus is more likely to include tax protestors; in fiscal year 2009, this Program has a conviction rate of 86.6% and an incarceration rate of 78.8%. See *id.* at 9.

<sup>248</sup> Telephone Interview with Michael L. Minns, Esq., Minns Law (Oct. 14, 2009).

<sup>249</sup> See Williamacohan.com, About Us, <http://www.williamacohan.com/index2.html> (last visited Nov. 15, 2009) (dismissals or acquittals of all or substantially all charges in 49 of 78 cases); Transcript of Testimony of William A. Cohan at 5, *Tulchinsky v. United States*, No. C. 96-99-B (D.N.H. April 26, 1996) available at <http://www.williamacohan.com/section2/taxprosecutionstatistics.pdf> (dismissals or acquittals of all or substantially all charges in 34 of 64 cases).

<sup>250</sup> Telephone Interview with Sheldon Waxman, Esq., Sheldon Waxman & Assoc. (Nov. 16, 2009).

<sup>251</sup> See *supra* text accompanying note 236.

<sup>252</sup> Telephone Interview with William A. Cohan, Esq., William A. Cohan, P.C. (Oct. 26, 2009).

<sup>253</sup> See Telephone Interview with Jeffrey A. Dickstein, Esq., (Nov. 3, 2009).

personal consequences that accompany this specialty. Such sacrifices would seem to indicate either sincerity or masochism.

## VII. The Role of Attorneys in the Future: The Decline of the Cause Lawyer

*“In the beginning I thought I could win, but they taught me otherwise.”*<sup>254</sup>

The lack of valid legal arguments other than willfulness in criminal cases, and the government’s focus on enjoining tax protester speech, may result in pragmatists and tacticians eclipsing cause lawyers within the movement.

### a. The Injunctions Against Tax Protestors’ Speech May Allow Tacticians to Eclipse Cause Lawyers

The government has shrewdly targeted movement leaders’ commercial speech, which is entitled to less protection, by seeking injunctions against those leaders who sell tax protester legal theories.<sup>255</sup> These cases are an excellent public relations weapon because they cast the defendants as swindlers who mislead equally reprehensible customers by promising “something [the seller] does not possess – the golden ticket of tax evasion without consequences.”<sup>256</sup> These decisions do not address tax protesters’ legal arguments directly, but rather attack them collaterally using a free speech framework which engages neither the expertise nor political goals of cause lawyers. It therefore seems that tacticians, specifically free speech advocates such as Barnes, might be in a better position to helm these injunction cases, perhaps eventually supplanting cause lawyers. Alternatively, as Barnes predicts, the government’s efforts to enjoin tax protester speech may simply “force the movement to go underground.”<sup>257</sup> While Barnes believes that “there will always be a role for lawyers because they help people navigate the legal system,”<sup>258</sup> cause lawyers would likely be significantly marginalized in a movement which functioned entirely outside the law.

### b. The Reduction of Criminal Defenses Renders Cause Lawyers Either Ineffective or Redundant

As the number of valid legal arguments shrinks, it is likely that fewer attorneys will advance tax protesters’ legal theories. Those cause lawyers who continue to advance the movement’s arguments will suffer sanctions, disbarment, and judicial hostility. Most disastrously, these attorneys will lose cases, which in turn may discourage potential clients who would prefer to hire an attorney with a successful track record. Those cause lawyers who acquiesce to the law and cease to advance tax protester arguments will simply become indistinguishable from pragmatists.

<sup>254</sup> Telephone Interview with Sheldon Waxman, Esq., Sheldon Waxman & Assoc. (Nov. 16, 2009).

<sup>255</sup> See, e.g., *United States v. Bell*, 414 F.3d 474, 475, 481 (3d Cir. Pa. 2005); *United States v. Schiff*, 379 F.3d 621, 629 (9th Cir. 2004); *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1106 (9th Cir. 2000); *United States v. Buttorff*, 761 F.2d 1056, 1066-68 (5th Cir. 1985).

<sup>256</sup> *U.S. v. Benson*, 561 F.3d 718, 724 (7th Cir. 2009).

<sup>257</sup> Telephone Interview with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009).

<sup>258</sup> *Id.*

Because of their indifference to the tax protestor movement's success or failure, pragmatists and tacticians may be in a better position than cause lawyers to weather the government's aggressive prosecution of tax protestors. As scholar Anne Bloom has observed regarding personal injury attorneys, "fee-for-service lawyers tend[] to display greater resilience and stamina for . . . litigation than the more traditional cause lawyers who start[] out with a greater level of commitment to the cause."<sup>259</sup> Bloom attributes this resilience to personal injury attorneys' "resources advantages,"<sup>260</sup> advantages which pragmatists and tacticians also seem to share over cause lawyers. Tacticians such as Barnes, for example, deliberately seek out a "balance of cases" to meet monthly revenue goals.<sup>261</sup> In contrast, attorneys such as Dickstein, who believes that there is "no money" in tax protestor cases, may have fewer resources because they may take cases that advance the movement, sometimes at the expense of their own finances.

Even those cause lawyers who may be undeterred by sanctions or unhampered by financial limitations may leave the movement due to the powerful demoralizing affect of the state of the law. The willfulness defense is an inadequate tool to advance the tax protestor movement because it only tests the *sincerity* of the defendant's beliefs, not the legal *validity* of those beliefs, and thus does not challenge courts to adopt tax protestors' theories. Devvy Kidd, a prominent tax protestor, summarizes the shortcoming of the willfulness defense as follows: the "only hope defendants have now is for their defense attorney to convince the jury their client was too stupid to understand the law."<sup>262</sup> Kidd notes that this demoralizing defense has caused at least one attorney to "quit practicing."<sup>263</sup> As Becraft observes, one "can't ignore the legal landscape," so "when the courts make a decision, you either live with it or try to change it." Given that the law has become ossified to the point where courts reject tax protestor legal theories perfunctorily without even addressing their merits,<sup>264</sup> it is not clear how a cause lawyer can even engage courts' attention in order to persuade them to overturn precedent.

## VIII. Conclusion

Since its birth in the 1970s, the modern tax protestor movement has been able to attract a few adherents among the general populace but neither judicial nor legislative support. While tax protestors have primarily sought validation of their legal theories in the courts, perhaps due to naïveté or a calculated recognition that their views are too politically untenable for the legislative branch, they have failed to create a unified litigation strategy. This failure is due to both internal weaknesses – the movement's antipathy to authority generally and distrust of attorneys specifically – and the government's successes in establishing favorable precedent and selectively

---

<sup>259</sup> Bloom, *supra* note 147, at 110 (citing conclusions from study in Ronen Shamir & Sara Chinski, *Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in the Israeli Courts*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 227 (Austin Sarat & Stuart Scheingold eds. 1998)).

<sup>260</sup> *Id.*

<sup>261</sup> Telephone Interview with Robert E. Barnes, Esq., The Bernhoft Law Firm, S.C. (Oct. 27, 2009).

<sup>262</sup> Kidd, *supra* note 26.

<sup>263</sup> *Id.*

<sup>264</sup> *See, e.g.,* *Coleman v. Commissioner*, 791 F.2d 68, 72 (7th Cir. 1986) (Easterbrook, J.) (noting that defendant tax protestor's arguments "have been raised and rejected so often that this circuit now handles almost all similar cases by unpublished orders" and thus defendants "who wish to express displeasure with taxes must choose other forums").

enjoining movement leaders' commercial speech. The repercussions of the movements' failures have been felt most harshly by its cause lawyers, who appear to disproportionately suffer the negative professional and personal consequences of representing tax protestors without also disproportionately enjoying the benefits. Indeed, as the movement's ability to influence the legal landscape continues to ebb, cause lawyers' future role in the movement will likely diminish.