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Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation

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INDETERMINACY, COMPLEXITY, AND FAIRNESS: JUSTIFYING RULE SIMPLIFICATION IN THE LAW OF TAXATION

John A. Miller*

INTRODUCTION	2
I. DRAWING SOME CONNECTIONS BETWEEN TAX COMPLEXITY, FAIRNESS AND THE ASSUMPTION OF LAW'S DETERMINACY	5
II. DEFINING TERMS	9
A. <i>What Is Legal Indeterminacy?</i>	10
B. <i>What Is Tax Complexity?</i>	12
III. WHAT DO THOSE PERSONS MAKING AND USING TAX LAW BELIEVE IN?	13
A. <i>The Rule Maker and the Planner</i>	13
B. <i>The Social Context Approach to Rule Making</i>	16
C. <i>The Elaboration Approach to Rule Making</i>	17
D. <i>The Two Approaches in Contrast</i>	20
E. <i>The Moral Consequences of the Elaboration Approach</i>	21
IV. TO WHAT EXTENT IS TAX LAW INDETERMINATE?	24
A. <i>The Empirical Evidence</i>	24
B. <i>The Easy Tax Case</i>	28
C. <i>Problems with Language</i>	34
1. <i>The Indeterminacy of Language</i>	34
2. <i>Language and the Form-Substance Dichotomy</i> ...	37
3. <i>The Use of Highly Specific Language</i>	40
4. <i>The Use of Mathematical Language</i>	42
D. <i>The Role of Judicial Interpretation</i>	44
E. <i>Structural Aspects of the Indeterminacy-Determinacy Dichotomy</i>	50
1. <i>Tax Law as a Closed and Complete System and the Nature of Rules</i>	50

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2. <i>The Valuation Problem</i>	57
3. <i>The Game Analogy</i>	59
F. <i>The Predictability of the Law</i>	63
V. THE PROPER ROLE OF RULES TO ACHIEVE FAIRNESS AND CERTAINTY.....	69
A. <i>Finding the Point of Balance Between Fairness and Certainty</i>	69
B. <i>Legal Realism Revisited</i>	70
C. <i>The Meaning of Law and the Role of Judgment</i>	74
D. <i>Conscious Creativity</i>	76
CONCLUSION.....	77

INTRODUCTION

In tax we love rules. By and large, those of us who live in the tax world are old-fashioned formalists who believe in the value of rules and who believe that rules work.¹ This Article considers whether in tax our passion for rules has led us astray by causing us to adopt rules that are overly elaborate, detailed, and specific. In addressing this question, this Article proceeds from the assumption that the proliferation of elaborate rules in federal tax law has reached a point of extremely burdensome complexity. No extensive effort is made here to prove this truth, and hopefully the reader requires none. Instead the focus here is upon a pair of crucial justifications—fairness and certainty—for the elaborate nature of tax rules.

This Article addresses the appropriateness of elaborate tax rules, that is, rules that are long, detailed, specific, and interconnected, by reference to the debate among jurisprudential scholars concerning the determinacy of law. It gives special attention to the works of Professors Anthony D'Amato,² Kent Greenawalt,³ Ken Kress,⁴ and Frederick Schauer⁵ by placing their ideas concerning legal indeterminacy

1. "At the heart of the word 'formalism,' in many of its numerous uses, lies the concept of decisionmaking according to *rule*." Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

2. In particular, I will use Anthony D'Amato's article entitled *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148 (1990).

3. Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1 (1990). More recently, Professor Greenawalt has published a book where he sets out at greater length his views on the indeterminacy question. KENT GREENAWALT, *LAW AND OBJECTIVITY* (1992).

4. In particular, I will draw upon Ken Kress' article entitled *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989).

5. Particular attention will be paid to Frederick Schauer's article entitled *Formalism*, *supra* note 1. More recently, Professor Schauer has written a book bearing on the topic of legal indeterminacy. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991)

Justifying Simplification in Tax Law

into the context of tax law. Professor D'Amato asserts that law is entirely indeterminate.⁶ Professor Greenawalt believes that "many legal questions have determinate answers."⁷ Professor Kress believes that "the indeterminacy of the law is no more than moderate."⁸ Professor Schauer argues that highly determinate rule systems are possible.⁹

The debate over law's determinacy has been characterized as the central issue in modern legal scholarship.¹⁰ Whether or not this is so, this debate sheds light on the relationship between rules and fairness.¹¹ Among other things, the indeterminacy debate demonstrates that in an important sense the proper role of rules in our tax system is a question of philosophy rather than of tax theory. The vast proliferation of rules in the law of federal taxation rests upon the belief that elaborate rules can render tax law both fair and certain. The unspoken assumptions are that rules determine outcomes in a mechanical fashion and that fairness can be produced by such a process. The indeterminacy debate offers insights about how rules work that may cause us to rethink our views of the value of elaborate rules to achieve fairness.

Recently there have been some signs that the tide is beginning to turn against the use of elaborately detailed and specific rules in the area of tax law. Former Internal Revenue Service Commissioner Fred T. Goldberg, Jr., who was confirmed for the post of Assistant Secretary for Tax Policy in early 1992, has a long record of supporting various forms of simplification.¹² He has declared that simplification is

6. D'Amato, *supra* note 2, at 170.

7. Greenawalt, *supra* note 3, at 86. Elsewhere in the same article he states his thesis as: "many legal questions have determinate answers that 1) would be arrived at by virtually all those with an understanding of the legal system and 2) are unopposed by powerful arguments, consonant with the premises of the system, for contrary results." *Id.* at 29.

8. Kress, *supra* note 4, at 283.

9. Schauer, *supra* note 1, at 520-38.

10. D'Amato, *supra* note 2, at 148.

11. This reason for considering law's determinacy is rather different from those more commonly offered for considering the question. For example, one reason proffered in other contexts for considering law's determinacy derives from the argument that the "legitimacy" of legal decisions depends upon judges applying the law rather than making the law. *See* Kress, *supra* note 4, at 285. If a decision makes law rather than applies it, it can derive no moral authority from the law itself. *See id.* at 287. Kress is critical of the view that adjudications derive their legitimacy from the legitimacy of legislative rules. *Id.* at 288-89. He contends that whether one has an obligation to obey the law is not *directly* tied to whether law is determinate. *Id.* at 290. Like Kress, Greenawalt is also critical of the idea that the legitimacy of courts depends on determinacy. He points out that somebody must resolve legal disputes even if law is indeterminate and suggests that the courts are better suited for this task than any other organ of government. Greenawalt, *supra* note 3, at 37-38.

12. *See* Rita Zeidner, *Goldberg Confirmed for Treasury Tax Policy Post*, 54 TAX NOTES 505 (1992) ("Goldberg promised to maintain his commitment to tax simplification while at Treasury.

“the most important tax policy issue of the 1990s.”¹³ There is some evidence that under his direction a real effort is being made to turn away from detailed rules.¹⁴ It is too early to say if these signs represent a long term trend toward more general rules or merely a momentary pause in the rush toward technical gridlock. There are, after all, tremendous forces at work in our society that foster the promulgation of detailed and elaborate rules in our tax system.¹⁵ This Article is intended to bolster the trend toward general rules.

Part I of this Article begins setting the stage for a discussion of the determinacy or indeterminacy of tax rules by describing our tax system's reliance upon elaborate rules to achieve fairness and by acknowledging the implicit assumption of law's determinacy that underlies that reliance upon elaborate rules. Part II of this Article is devoted to refining our understanding of what is meant by the term “legal indeterminacy” and by considering the varying aspects of tax complexity. Part III examines the moral structure of tax law as seen through the eyes of tax professionals (especially those who write statutes and regulations). The purpose of this part is to describe two different approaches to rule making and to provide an understanding of the beliefs that foster those different approaches. Part IV addresses the question of whether (and to what extent) tax law is indeterminate. It does this by reference to various attacks upon and defenses of law's determinacy that have been offered in other contexts. Because I conclude that tax determinacy is a reality, this part of the Article also considers *how* rules are determinate. Part V offers some general conclusions concerning the proper role of rules in achieving acceptable and administrable levels of fairness and certainty in tax law.

‘We’re killing people out there,’ he said. ‘We have got to make [simplification] a priority.’” (brackets in original); see also Brian R. Brown, *Practitioners Highlight Problems with AMT Book Income Regulations*, 36 TAX NOTES 937, 939 (1987); Sean Ford, *The Week in Review*, 44 TAX NOTES 1302 (1989); Tim Gray, *W & M Panel Not Enthusiastic over Service's Taxpayer's Rights Proposals*, 52 TAX NOTES 1558 (1991); Rita Zeidner & Catharine Hubbard, *Let Your Microchips Do It: Service Reviews Computer Agenda*, 53 TAX NOTES 638 (1991); Rita Zeidner, *Goldberg Condemns Strong-Arm Tactics*, 53 TAX NOTES 773 (1991).

13. Bennett Minton, *Goldberg Urges Compromise on Simplification*, 53 TAX NOTES 148 (1991).

14. See Joanna Richardson et al., *New Passive Loss 'Activity' Regs Get Good Reviews*, 55 TAX NOTES 1024 (1992); see also part II.C. In a recent memorandum to the Internal Revenue Service (IRS) personnel responsible for regulation drafting, Secretary Goldberg wrote: “General principles are often better than detailed rules. All too often, detailed rules result in the worst of both worlds—they suffocate the many taxpayers who try to do what's right, while providing a road map for the few with larceny in their hearts.” Memorandum from Fred Goldberg et al. to All Employees of the Office of Chief Counsel, All Employees of the Office of Tax Policy, and All Assistants to the Commissioner (May 1, 1992) (on file with the *Washington Law Review*).

15. See part I.

Justifying Simplification in Tax Law

Three themes arise from the various matters considered in this Article. First, to the extent any rule is determinate, that determinacy arises from the way in which the rule restricts our ability to make choices, including fair choices, in individual cases. Put differently, “rules achieve their ‘ruleness’ precisely by . . . screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account.”¹⁶ This means that the aspect of law that renders it certain is also potentially a bar to individual justice. For this reason, the simultaneous effort to achieve both fairness and certainty through great elaboration of the rules of taxation is inherently contradictory and yields a never ending spiral of complexity. This does not mean, however, that relatively determinate law cannot be fair, but that fairness cannot be achieved mechanically through the use of unbending rules. Instead, fair rules often must leave some room for human judgment in their application. A second theme developed by this Article is that elaborative complexity contributes to the practical indeterminacy of tax law by rendering the law beyond the ken of those persons who are supposed to apply it. As a consequence, even theoretically sound and determinate rules lose their vitality in our present “serbonian bog”¹⁷ of rules. A final theme of this Article is that tax law is a system of rules that depends on constant and creative adaptation to meet changing circumstances. As such we should give emphasis to the tax system’s flexibility as well as to its completeness. Taken together, these themes argue for an approach toward tax rule making that is less concerned with details and more concerned with establishing fair general principles.

I. DRAWING SOME CONNECTIONS BETWEEN TAX COMPLEXITY, FAIRNESS AND THE ASSUMPTION OF LAW’S DETERMINACY

United States tax law is one of the most complicated bodies of law to be found in this country, and, perhaps, in any country.¹⁸ There is much discussion concerning the need for simplification of tax law,

16. Schauer, *supra* note 1, at 510.

17. See Charles S. Whitman, III, *Draining the Serbonian Bog: A New Approach to Corporate Separations Under the 1954 Code*, 81 HARV. L. REV. 1194 (1968) (Whitman’s concern was the confusing morass of rules embedded in and around code section 355). The serbonian bog was a marshy area in northern Egypt which during ancient times was reputed to have swallowed whole armies.

18. Professor Richard Doernberg has made a similar claim concerning complexity and the federal income tax. He asserts that the U.S. has “the most complex income tax laws in the history of civilization.” Richard L. Doernberg, *The Market for Tax Reform: Public Pain for Private Gain*, 41 TAX NOTES 965 (1988).

though some commentators question whether simplification is practical.¹⁹ Complexity is sometimes justified on the grounds that simplification will reduce fairness.²⁰ This principle may be stated affirmatively as holding that tax complexity is a necessary byproduct of fairly addressing the full sweep of tax questions arising in today's complex world.²¹ For example, the nondiscrimination rules applicable

19. See Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267, 1268 (citing further authorities on this issue); see also *The Tax Analysts Roundtable on Tax Simplification*, 53 TAX NOTES 969 (1991). The article is followed by a bibliography of *Tax Notes* articles on tax simplification issues. *Id.* at 981. The *Tax Law Review* recently devoted an entire issue to the problem. See 45 TAX L. REV. 1 (1989); see also Gordon D. Henderson, *Controlling Hyperlexis—The Most Important “Law and . . .”*, 43 TAX LAW. 177 (1989).

20. See McCaffery, *supra* note 19, at 1279–91 (McCaffery does not endorse this view himself but provides a useful catalogue of some who do.). One might expect this view to be particularly favored by tax administrators because it is their regulations that stand out as generating the most complexity. IRS Chief Counsel Nelson was reported to have taken the position that the goals of simplicity and fairness often conflict. See *Commissioner's Advisory Group's June Meeting Minutes Discuss Penalties, Recruiting and Tax Administration*, 41 TAX NOTES 167 (1988). At a time when he served as Assistant Secretary of the Treasury for Tax Policy, Stanley Surrey wrote, “Equity calls for looking at all the circumstances that might bear on the fairness of the amount of tax, while the essence of simplicity is to ignore some facts.” Stanley S. Surrey & Gerard M. Brannon, *Simplification and Equity as Goals of Tax Policy*, 9 WM. & MARY L. REV. 915, 916 (1968). But the belief that simplicity and fairness are antithetical is not confined to those in government. Professor Karla Simon recently wrote, “it has become generally accepted that the goals of fairness, simplicity, and efficiency frequently may conflict, which results in a need to choose among unpopular alternatives.” Karla W. Simon, *Tax Simplification and Justice*, 36 TAX NOTES 93 (1987). Some academics are apt to be more circumspect in their pronouncements concerning the connection between fairness and complexity, but, even so, one often encounters the implication that complexity is an unavoidable aspect of good law. “Our complex world creates complex transactions which create complex tax issues which lead to complex statutes.” Marjorie E. Kornhauser, *The Rhetoric of the Anti-progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 475 (1987). “The failure to achieve increased simplicity [in the 1986 Act] results from at least two factors. First, simplicity frequently competes with the other two objectives of fairness and efficiency.” Pamela B. Gann, *What Has Happened to the Tax Legislative Process?*, 86 MICH. L. REV. 1196, 1206 (1988). “[S]ome business activities are inherently complex and proper taxation of those activities may require similarly complex statutes” Michael B. Lang, *Dividends Essentially Equivalent to Redemptions: The Taxation of Bootstrap Stock Acquisitions*, 41 TAX L. REV. 309, 355 (1986). The difficulty of establishing a true measure of income is often cited as a reason for complexity. Recently, for example, Professor Joseph Isenbergh wrote, “[t]he closer an income tax comes to reaching economic income, the more complex it must be.” Joseph Isenbergh, *The End of Income Taxation*, 45 TAX L. REV. 283, 315 (1990). In a similar vein, Professor Victor Thuronyi suggests that “[p]art of the reason for the complexity of the Code is that complex business and financial transactions require complicated tax rules if income is to be measured accurately.” Victor Thuronyi, *Tax Reform for 1989 and Beyond*, 42 TAX NOTES 981, 982 (1989). One view even goes so far as to suggest that complexity has an *in terrorem* effect that may enhance overall fairness. See Charles Davenport, *Are PALs Our Friends? AALS Conferees Dissect Passive Activity Regulations*, 46 TAX NOTES 256, 257 (1990).

21. A prominent supporter of this view was Stanley S. Surrey. See Stanley S. Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 LAW & CONTEMP. PROBS. 673, 697–702 (1969).

Justifying Simplification in Tax Law

to private retirement plans were originally enacted “in an attempt to prevent pension plans’ abusive targeting of benefits for top management at the expense of lower-paid employees.”²² This was the beginning of “a long march to complexity” in the private pension field.²³

It is not clear that all those persons who believe that fair tax laws are necessarily complex, also believe that this complexity should be made manifest by promulgation of elaborate rules. After all, even a complex thought can sometimes be stated briefly. The elegant turn of phrase has as much a place in law as in literature. Indeed, some of our most admired and complex legal documents such as the Declaration of Independence and the Constitution are notably brief. Thus, it is not surprising that the attempted use of elaborative complexity to achieve fairness in tax law has been debated.²⁴ Nevertheless, belief in great elaboration of the rules as a source of fairness has held a prominent place in the modern tax scheme for at least the past few decades. This is particularly evident in many of the regulations issued by the Treasury during most of that period.²⁵

22. Bruce Wolk, *Nondiscrimination in Contributions and Benefits: The New Regulations*, 25 GA. L. REV. 71 (1990).

23. *Id.* at 73.

24. See Martin J. McMahon, Jr., *Reflections on the Regulations Process: “Do the Regulations Have To Be Complex” or “Is Hyperlexis the Manna of the Tax Bar?”*, 51 TAX NOTES 1441 (1991); Henderson, *supra* note 19; McCaffery, *supra* note 19, at 1284–91. Professor McCaffery offers a useful synthesis of the various points that have been made against the use of complexity to achieve fairness. These include: the difficulty of calculating what constitutes an equitable result, the practical difficulty of achieving such results even when we can identify them, and the problem of interactive inequities that may arise from a group of equitable rules. McCaffery, *supra* note 19, at 1284–87. McCaffery also argues that complexity favors the “knowing” taxpayer over the “unknowing” taxpayer and the “dishonest” taxpayer over the “honest” taxpayer. *Id.* at 1289–91. He asserts that complexity encourages taxpayers to be dishonest and discourages good performance by tax enforcers. *Id.* at 1291–92. McCaffery’s article extends well beyond the matter of the use of complexity to achieve fairness. He seeks to address the complexity issue from a variety of perspectives including the use of complexity to achieve efficiency, politics as a source of complexity, and complexity as rhetoric. *Id.* at 1298–1312. Professor McMahon’s article reads something like an internal dialogue on the question of regulatory complexity. He tentatively concludes that much of the complexity is inevitable, but that it could be better managed through “sympathetic” drafting. McMahon, *supra* this note, at 1444. For instance, he suggests that the general purposes and principles of each set of regulations should be more clearly set out in a readily identifiable format. *Id.*

25. The present tax system owes much to the influence of former Assistant Secretary for Tax Policy and Harvard law professor, Stanley S. Surrey. See *In Memoriam: Stanley S. Surrey*, 98 HARV. L. REV. 328–50 (1984) (tributes by Erwin N. Griswold, William D. Andrews, Richard A. Musgrave, Donald C. Lubick, Paul R. McDaniel, and Bernard Wolfman). Surrey, who held his treasury post from 1961 to 1969, advocated the use of regulations to manage the details of tax law. He believed that complexity was inevitable and that Congress should adopt general statutes and should delegate to the Treasury the authority “to amplify the statute through Regulations with details to whatever depth is determined to be necessary for effective operation of the statute in the particular area.” Surrey, *supra* note 21, at 703. His view was that the regulations should

Today, the income tax regulations alone are perhaps ten thousand double-columned pages in length.²⁶ The Treasury regulations set out in painstaking detail the tax treatment of various transactions in a multiplicity of circumstances.²⁷ They have helped to produce layer upon layer of technical complexity in U.S. tax law in the name of certainty and fairness.

There are many other causes of tax complexity,²³ but the assumption that complexity as embodied by elaborate rules is a product of

be authoritative and detailed. *Id.* Surrey believed that the Treasury could be trusted to produce regulations of reasonable fairness and certainty. He acknowledged that interpretative issues would still arise under the regulations for which resort to the courts would serve as the taxpayer's protection. But he also believed that in the meantime, "[t]he importance of the issue for the future can be eliminated through prospective change in the Regulations, so that interpretative doubts need not cloud the future as they do today. Thus, over-all certainty is provided, while fairness in the application of Regulations to past transactions is also maintained." *Id.* at 705. Despite his advocacy of management of the intricacies of tax law through detailed regulations, one cannot help but wonder whether Surrey would approve the degree of detail addressed by the modern tax regulations. In any event, it should also be noted that the belief in "minute articulation" either by statute or regulations has long held a place in tax history. See Whitman, *supra* note 17, at 1198-1202 (describing the development of the corporate reorganization rules in the 1920s). We can hardly blame Surrey alone for a condition that has been building almost from the very inception of the income tax.

26. This is only a rough estimate gained from an examination of the five volumes of regulations reprinted by Commerce Clearing House in paperback. These volumes are not consecutively paginated making a precise count difficult.

27. In this regard, in addition to the regulations concerning nondiscrimination, the regulations concerning the time value of money, passive losses, partnership liabilities, and special allocations spring instantly to my mind. I do not doubt that those readers with other areas of interest could readily supplement this list.

28. See McCaffery, *supra* note 19, at 1273-79 (setting out the "static" and "dynamic" sources of tax complexity); see also Edward A. Zelinsky, *Another Look at Tax Law Simplicity*, 47 TAX NOTES 1225, 1227-28 (1990). Besides the search for fairness, Professor Zelinsky attributes tax complexity to the introduction of "totally new statutory concepts rather than the incremental use of existing ideas," and the adoption of statutory compromises. *Id.* at 1228. In a similar vein Professor Victor Thuronyi has suggested that "in many cases complexity is the result of legislative compromise or the desire to give preferential treatment to particular groups." Thuronyi, *supra* note 20, at 982. Another tax commentator has suggested complexity arises from the vested interest of tax professionals in such complexity. See Michelle J. White, *Why Are Taxes So Complex and Who Benefits?*, 47 TAX NOTES 341 (1990). One person has written that regulation projects present an economic incentive to the draftsmen to create complexity in order to insure a market for their future services in complying with those regulations. Schuyler M. Moore, *Tie the Hands of Those That Bind*, 47 TAX NOTES 330 (1990). For a response to Mr. Moore, see Thomas D. Fuller, *IRS Regulation Drafters Do Not Have Economic Motive*, 47 TAX NOTES 474 (1990). Still other articles have sought to tie tax complexity to the economic interests of Congressmen who participate in the tax legislative process. In these articles the tax legislative process is seen as a contract arrangement in which legislators sell tax benefits to lobbyists. See Richard L. Doernberg & Fred S. McChesney, *Doing Good or Doing Well?: Congress and the Tax Reform Act of 1986*, 62 N.Y.U. L. REV. 891 (1987); Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Declining Durability of Tax Reform*, 71 MINN. L. REV. 913 (1987).

fairness is an especially troublesome one because it can serve as a moral justification for the continuation of that complexity into the indefinite future. After all, how can we actively pursue tax simplification if to do so will render the law unfair?

The belief that complicated rules enhance fairness proceeds from the assumption that tax rules determine outcomes in cases. However, the question of legal determinacy has been a subject of controversy for decades²⁹ and continues as a topic of furious debate for legal scholars.³⁰ To the extent law is indeterminate, it cannot insure fairness because it is not the law that decides the outcome.³¹ To the extent law is determinate there may still be no guarantee of fairness if it can only be determinate by being arbitrary. Those who opt for what I call the elaboration approach³² toward tax rule making apparently believe they have discovered a safe passage between the devil of arbitrariness and the deep blue sea of indeterminacy.

II. DEFINING TERMS

To offer a definition is to step into a trap. This is because we can only define words with words. Thus, if we define one word we may

29. See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* 104–47 (1936); H.L.A. HART, *THE CONCEPT OF LAW* ch. VII (1961); KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1960); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

30. See, e.g., Drucilla L. Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135 (1988); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Steve Fuller, *Playing Without a Full Deck: Scientific Realism and the Cognitive Limits of Legal Theory*, 97 YALE L.J. 549 (1988); Frederic R. Kellogg, *Legal Scholarship in the Temple of Doom: Pragmatism's Response to Critical Legal Studies*, 65 TUL. L. REV. 15 (1990); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Robert J. Lipkin, *Indeterminacy, Justification and Truth in Constitutional Theory*, 60 FORDHAM L. REVIEW 595 (1992); David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1 (1992); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987); John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986); Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990); D'Amato, *supra* note 2; Greenawalt, *supra* note 3; Kress, *supra* note 4; Schauer, *supra* note 1. For what amounts to a symposium on the topic, see *Symposium on Law and Philosophy*, 85 NW. U. L. REV. 113–89 (1990). For an even more recent collection of articles on the related topic of the relationship between rules and the rule of law, see 14 HARV. J.L. & PUB. POL'Y 615–852 (1991). There has been a great deal written on this topic, and I do not offer here a complete catalogue. As the reader will see, the topic is a big one and its limits are ill-defined. Often the matter of legal indeterminacy is a beginning point for development of some other theme such as the belief that law is politics, that law is power, or the negation of those views.

31. See part II.A. Of course, if law is indeterminate it should not prevent fairness either.

32. See part III.C.

feel obliged to define others. Once we begin defining we may be unable to stop without some sense that our stopping is an arbitrary act. If our stopping is an arbitrary act, how can we be telling the whole truth? One reply is to say that we never tell the whole truth because not every shade of truth can be captured in words. In a sense, the inability of words to capture the whole truth is what legal indeterminacy is about.

A. *What Is Legal Indeterminacy?*

There are at least two categories of legal indeterminacy as it will be addressed in this article: practical indeterminacy and theoretical indeterminacy. Practical indeterminacy³³ involves the recognition that the application of law to facts is a sufficiently complex enterprise to allow some "play" in the outcome. Thus, for instance, the decisionmaker in a case, by design or through error, may sculpt, characterize, or shade the facts in such a way as to bring the case within the apparent operation of one rule of law rather than another. This may be regarded as a weak form of indeterminacy since the indeterminacy is the product of human frailty and corruptibility rather than the lack of a single theoretically correct legal answer. Practical indeterminacy is simply the recognition of the power of judges to create different outcomes by the manner in which they frame the issues and find or omit the facts.

Theoretical indeterminacy is a stronger view of legal indeterminacy. This form of indeterminacy does not derive simply from human frailty or corruptibility but from the difficulties inherent in the use of language and in the intervention of human perception between law and reality. It may be defined as the theory that legal questions have more than a single right answer.³⁴ At first blush this seems like an innocu-

33. I use this term rather than "pragmatic" in order to avoid confusion with D'Amato's phrase "pragmatic indeterminacy." Although D'Amato calls his theory of indeterminacy pragmatic, it seems that he considers the law theoretically, as well as practically, indeterminate. D'Amato applies the word pragmatic to his view of indeterminacy because, he contends, his theory does not depend on an absolute claim that words have no determinate core meanings. "[I]t is sufficient . . . that there can be no determinate evidence that one person's 'core meaning' for a given word is the same as another person's, or that one person's 'core meaning' in a given context does not vary from that same person's 'core meaning' in a different context." D'Amato, *supra* note 2, at 179 n.104. Solum employs the phrase "practical indeterminacy" to refer to the "flexibility" inherent in the application of legal doctrine. Solum, *supra* note 30, at 495. This sense of the phrase is similar to that offered here, the difference being that I use the phrase "practical indeterminacy" to refer to indeterminacy arising from mistake or deliberate distortion by the decision maker.

34. Kress, *supra* note 4, at 283 ("Law is indeterminate to the extent that legal questions lack single right answers. In adjudication, law is indeterminate to the extent that authoritative legal materials and methods permit multiple outcomes to lawsuits."); *cf.* Singer, *supra* note 30, at 14 ("A legal theory or set of rules is completely determinate if it is comprehensive, consistent, directive and self-revising. Any doctrine or set of rules that fails to satisfy any one of these

ous enough statement. Anyone who has spent some time in the litigation trenches is aware that good arguments can always be made on both sides of a case.³⁵ But that is not what is meant by this view. This theory of legal indeterminacy holds that the law does not mandate a single outcome in any given case. This means a case decided by a judge, for instance, could be *rightly* decided for either party within the confines of the law. Taken to extreme, the belief in theoretical indeterminacy would lead one to conclude that law never determines outcomes in cases.³⁶ A certain tension exists between practical and theoretical indeterminacy that should be noted at the outset. This tension stems from the possibility that as law is rendered more theoretically determinate it may become more practically indeterminate due to the level of expertise required to apply the law correctly. For instance, the tax regulations may specify the treatment of a distribution from a retirement account in a theoretically determinate fashion but the intricacy of those regulations may be such that one not well versed in that area of law could not find the answer. Had the law been less intricate, it is possible that the answer might have been more easily discoverable at the expense of being less certain in its application to the particular case because of the generality of the language employed. This element of tension between practical and theoretical indeterminacy is, I believe, a recurring issue in tax law.

requirements is indeterminate because it does not fully constrain our choices.”); *see also* Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 Nw. U. L. REV. 134, 138 (1990). Kress treats what I call theoretical indeterminacy as being divisible into epistemic indeterminacy and metaphysical indeterminacy. “Epistemic indeterminacy [speaks to] whether the law *can be known*.” *Id.* “Metaphysical indeterminacy speaks to whether *there is law*.” *Id.* Greenawalt takes the view that a legal rule provides a determinate answer if “virtually any intelligent person familiar with the legal system would conclude, after careful study, that the law provides that answer.” Greenawalt, *supra* note 3, at 3. He adds, as a further criterion of a determinate answer, that there must be “no powerful argument consonant with the broad premises of a legal system” supporting a contrary answer. *Id.* at 3, 85. From a more radical perspective, any attempt to define indeterminacy is doomed to failure because the meanings of words are themselves indeterminate. D’Amato, *supra* note 2, at 161–62. “To ‘define’ a concept is to specify its meaning; the true Indeterminist attacks the notion that words can have definably specific, bounded meanings. In particular, the word ‘indeterminate’ cannot have a specific, bounded meaning.” *Id.* at 162 n.36. By way of illustration of D’Amato’s point, one could contrast Kress’ view of indeterminacy with that expressed by Professor Drucilla Cornell. “By indeterminacy, I mean to indicate the ‘truth’ that without the fusion of meaning and being in Absolute Knowledge there can be no end of the interpretive process in a definitive grasp of the truth of the actual.” Cornell, *supra* note 30, at 1144 n.27.

35. I should state for the record that I served as a litigator for about five years. Doubtless my experiences in that field have influenced the views I am now propounding.

36. *See* Anthony D’Amato, *Can Any Legal Theory Constrain Any Judicial Decision?*, 43 U. MIAMI L. REV. 513 (1989).

B. *What Is Tax Complexity?*

Tax complexity has many faces.³⁷ It is a subject that may be examined from many perspectives, including those of the taxpayer, the government, the return preparer, the planner, and the scholar.³⁸ Any attempt to characterize or categorize tax complexity is likely to be fundamentally arbitrary. In particular, the various divisions of complexity one might derive are likely to overlap and interrelate in a fashion that renders separate treatment difficult and of limited value. Nevertheless, this Article will consider tax complexity as being composed of two types: elaborative complexity and judgmental complexity.

Elaborative complexity relates to the level of information and education that must be absorbed in order to begin to decide a tax question. Thus, the length and detail of tax rules, along with their interconnectedness, are directly related to their elaborative complexity. The problems associated with elaborative complexity are a function of human frailty. When there are more rules to know than we can readily assimilate, the law is complex in a very practical sense. This is true even though the individual rules themselves are relatively simple. It is useful to appreciate that elaborative complexity contributes to practical indeterminacy because it creates opportunities for taking wrong turns.

Judgmental complexity refers to the intellectual, moral, and philosophical burdens a tax question may pose for one who has mastered the rules. When should a transaction be taxed according to its substance rather than its form? When should several transactions occurring in sequence be taxed according to their end result? Is a certain transaction a realization event? What is the true economic nature of a certain transaction? These are but a sampling of the judgmentally complex questions that may be posed by quite ordinary economic events. Most often judgmental complexity arises because more than one rule or principle may apply to a given taxable event, and those potentially applicable principles are in conflict. Resolving the conflict calls for a fine sense of judgment even of one who well understands all

37. One writer has described three categories of tax complexity: technical complexity, structural complexity, and compliance complexity. McCaffery, *supra* note 19, at 1270-72. Technical complexity refers to "the pure intellectual difficulty of ascertaining the meaning of tax law." *Id.* at 1271. Structural complexity concerns the ability to skirt the law by careful planning. *Id.* Compliance complexity refers to the difficulty of keeping sufficient records to satisfy the law. *Id.* at 1272. For another view of complexity, see Kent W. Smith, *Will the Real Noncompliance Please Stand Up? Complexity and the Measurement of Noncompliance*, AMERICAN BAR FOUNDATION WORKING PAPER No. 8908 (1988).

38. McCaffery, *supra* note 19, at 1272.

of the potentially applicable rules. Just as elaborative complexity correlates with practical indeterminacy, judgmental complexity correlates with theoretical indeterminacy. The more judgmentally complex a legal question is, the more theoretically indeterminate is its answer.

Elaborative and judgmental complexity do not describe mutually exclusive areas of law. There is no reason why they could not be found together. In fact, it seems probable that they will often occur together because as the law becomes more elaborate more opportunities for interpretive ambiguity are likely to arise. Even so, as a rule of thumb we may posit that those persons responsible for the elaborative complexity of tax rules justify their approach on the grounds that detailed rules render the law more theoretically certain. Thus, the use of elaborative complexity is intended to reduce judgmental complexity.

III. WHAT DO THOSE PERSONS MAKING AND USING TAX LAW BELIEVE IN?

A. *The Rule Maker and the Planner*

The yin and yang of tax thought are embodied in two hypothetical individuals, the rule maker and the planner.³⁹ The rule maker seeks symmetry and wholeness in the law. The planner seeks certainty and narrow truth.

The taxation process in which both the rule maker and the planner participate begins with the making of the rule imposing the tax. The planner responds with a variety of maneuvers ranging from compliance to open challenge. Usually, the planner's preferred course of action is to devise a strategy that deflects the force of the rule without questioning its legitimacy. In other words, the planner tries to get outside the rule. But in so doing the planner will seek to allow the taxpayer to persist in the economic substance of the activity that is the intended target of the tax.⁴⁰

The moral perspectives of the two sides are distinctly different. To the rule maker, the chief moral precept of any tax (no matter what its

39. In the discussion that follows, this division is highly idealized and extremely simplistic. These two "individuals" represent but two aspects of the tax psyche. I ask the reader's indulgence on the ground that some narrowing of focus is essential to the present enterprise.

40. This effort to skirt the law and the response it draws from the rule maker is the chief systemic cause of complexity. See McCaffery, *supra* note 19, at 1275-76. This "dynamic" complexity may be viewed as an inevitable cyclical phenomena of tax law. When the level of complexity reaches the point when it is no longer tolerable, it is time for volcanic upheaval in the form of a tax reform act that so radically alters the legal landscape as to render much of the previous gamesmanship irrelevant. *Id.* at 1277-79.

substantive character and no matter what political choices Congress may make with respect to its reach) is that it should apply uniformly to all cases that are economically similar.⁴¹ This is a central criterion of what Professor Lon Fuller might have called “the internal morality” of tax law.⁴² Thus, to take a simple case, an income tax should apply to all compensation for labor (assuming Congress chooses to tax compensation for labor) whether that compensation is received in the form of cash, services, or property.⁴³ The central fairness or unfairness of the tax is measured by whether it reaches past the form to the substance of the transaction or other taxable event.⁴⁴

To the planner, on the other hand, the central moral principle of taxation is that the taxpayer is entitled to structure his affairs so as to pay no more tax than the law requires.⁴⁵ The amount of tax one owes, when seen from this perspective, is a technical question deserving of a technical answer. The moral sense of this idea is difficult to state clearly. I think it proceeds from a belief that although the government has the power to take the taxpayer’s property, it has no intrinsic right to a set amount of his property. Thus, it is only entitled to what it can get and no more.⁴⁶ In this game of catch-as-catch-can, the taxpayer is

41. See JOSEPH M. DODGE, *THE LOGIC OF TAX* ch. 2 (1989). As Professor Dodge discusses, tax fairness has several aspects. For example, Dodge views the ability to pay as a “core idea of substantive tax fairness.” *Id.* at 85.

42. See LON L. FULLER, *THE MORALITY OF LAW* 38–44, 46–91 (1964). Fuller delineates eight elements of law’s internal morality. These include: (1) the creation of general rules, (2) making them public, (3) making them prospective in their application (usually), (4) making the rules clear, (5) avoiding contradictions in the rules, (6) avoiding rules that cannot be complied with, (7) stability of rules, and (8) congruence between theory and practice. *Id.* The tax principle of treating all cases according to their economic substance has a similar, quasi-procedural aspect. One can justify this principle on two main grounds. First, it strikes us as fair in the sense that like cases are treated alike. Second, it fosters economic neutrality in the tax system which, in turn, fosters economic efficiency in the market. See DAVID F. BRADFORD, *BLUEPRINTS FOR BASIC TAX REFORM* 46 (2d ed. 1984) [hereinafter *BLUEPRINTS*]; DAVID F. BRADFORD, *UNTANGLING THE INCOME TAX* 178–79 (1986).

43. See Treas. Reg. § 1.61-2(d) (1991).

44. See, e.g., *Wolder v. Commissioner*, 493 F.2d 608 (2d Cir. 1974) (transaction in the form of a bequest held to be taxable as compensation).

45. The words of Judge Learned Hand in his opinion in *Helvering v. Gregory*, 69 F.2d 809 (2d Cir. 1934), *aff’d*, 293 U.S. 465 (1935), have almost become scripture on this point. He wrote, “[a]ny one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes.” *Id.* at 810.

46. This view may be seen to proceed from a skeptical view of government and of law: a view of government as a necessary evil and of law as its necessary tool in the efforts of humankind to live together in security. “[I]t is the *sense* of their weakness and imperfection that *keeps* mankind together; that demonstrates the necessity of this union; and therefore is the solid and natural foundation, as well as the cement of *society*” JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT* 132 (London, Oxford Univ. Press 1891).

not obliged to roll over and play dead. The government has the power, and the taxpayer has his wits. To deny the taxpayer the right to use his wits (or more likely the wits of the tax planner) to avoid the tax would, in the taxpayer's mind, further skew the odds in the government's favor in what is already an uneven contest.⁴⁷

While the rule maker exalts substance over form⁴⁸ as the embodiment of fairness, the planner tends to equate tax fairness with certainty.⁴⁹ This is because he must be reasonably certain what the law is before he can begin to determine whether and how the effect of the law can be avoided.⁵⁰ Moreover, one can argue that it is a citizen's fundamental right in a system of laws to be forewarned of the law's requirements.⁵¹ In any event, it is part of the planner's task to draw from the rule maker her precise position on any particular point of interpretation. Like anyone else, the planner may decry the complexity of the law, yet he is driven by his task to ask questions and to seek binding commitments from the rule maker on specific matters. Every answer he obtains, whether it be by statute, regulation, or ruling, adds to the elaborative complexity of the law.⁵²

The differing versions of tax fairness just described do not always clash head on. However, they frequently serve as justifications for differing interpretations of the law.⁵³ The rule maker's vision of fairness takes an inherently broader view of what constitutes "law" than the planner's vision of fairness. At least this has been true in the past. As will be discussed, the elaboration approach to rule making, recently in

47. The unevenness of the contest results, of course, from the rule maker's ability to make and change the rules.

48. For the moment, I am disregarding the conceptual difficulties inherent in the substance versus form dichotomy. However, I do address them elsewhere in this article. See part IV.C.

49. It is worth noting that in the real world of tax litigation, neither the government nor the taxpayer are as consistent in their positions as this idealized description implies. Both sides are sufficiently opportunistic to dip into the other's bag of tricks as the situation warrants. See, e.g., *McDonald's Restaurants of Ill., Inc. v. Commissioner*, 688 F.2d 520 (7th Cir. 1982) (government argued form and taxpayer argued substance).

50. Sometimes it is advantageous to come within the scope of a rule (e.g., a safe harbor). In such cases the same principle applies.

51. See Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 615-16 (1991) (describing John Locke's conception of the rule of law).

52. This is particularly true since private letter rulings began to be published. I suppose that strictly speaking, rulings by the Service are not law; however, they are often treated as such. In the corporate reorganizations area, for instance, a favorable advance ruling from the Service is practically a *sine qua non* for the completion of any deal.

53. See, e.g., *Arrowsmith v. Commissioner*, 344 U.S. 6 (1952) (compare the majority opinion of Justice Black with the dissenting opinions of Justice Jackson and Justice Douglas).

vogue, narrows the meaning of "law" in a highly important fashion that tends to accept the view of fairness taken by the planner.

B. The Social Context Approach to Rule Making

The rule maker can anticipate that the planner will seek to get outside the rule imposing the tax, and may choose between two very different strategies to prevent avoidance of the tax. The first approach is to write the rule in broad terms so as to cast a net around all economically similar activities no matter the form in which they are carried out. This is called the social context approach because it asks those who apply the law to look beyond the rule itself for its proper application and to focus instead on the social justice of taxing particular transactions in particular fashions. The social context approach asks that laws be applied in light of their purposes, and, consequently, regards law itself as something more than duly promulgated written rules. It is an approach that is thoroughly consonant with the internal morality of tax law as viewed from the rule maker's perspective.

An early example of the social context approach is the Code's treatment of the concept of "income." Nowhere is the word "income" defined in the Code.⁵⁴ Instead the Code focuses on differentiating "gross" income from "taxable" income. Gross income is "all income from whatever source derived."⁵⁵ Taxable income is "gross income minus the deductions allowed by this chapter."⁵⁶ So what is income? The answer is established in three main ways. First, a non-exclusive list of examples of gross income is set out in the Code.⁵⁷ Second, the question is left to the courts.⁵⁸ As might be expected the courts have not always arrived at results that were acceptable to Congress. Moreover, there are always pressures to alter the operation of the law with respect to one item or another. Thus, the third way involves the occasional return by Congress to the scene of its earlier act. Over time, a series of provisions have grown up stating that some items such as

54. Or even in the regulations, for that matter. However, the regulations under § 61 are showing the same signs of proliferation noted elsewhere. *See, e.g.*, Treas. Reg. § 1.61-21 (1992) (taxation of fringe benefits).

55. I.R.C. § 61(a) (West 1992).

56. *Id.* § 63(a).

57. *Id.* § 61(a)(1)-(15).

58. Two of the more notable cases attempting to define income are *Eisner v. Macomber*, 252 U.S. 189, 207 (1920) (Income is that "derived from capital, from labor, or from both combined, provided it be understood to include profit or gain through a sale or conversion of capital assets . . ."), and *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955) (Items of income are "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.").

alimony, prizes, scholarships, and personal injury recoveries either are or are not includable in gross income.⁵⁹ The result is a moderately complex, moderately stable, and moderately clear set of rules that the average informed citizen could understand in principle (though he may not agree with them). The concept of income in tax law remains somewhat indeterminate, and, it has been suggested, this is necessary if we wish to be fair in our treatment of individual cases.⁶⁰

C. The Elaboration Approach to Rule Making

In contrast to the social context approach, the modern trend in rule making has been to set out the circumstances where the tax applies in minute detail. This is called the elaboration approach because it looks to the rules themselves for their proper application by specifying all the circumstances in which they apply. In its most elevated form, this approach is distinguished not only by the length of the rules but by their intricate interdependence. Often such rules cannot be applied by simply finding the single rule applicable to a given case. Instead, one must master all of the rules in order to apply any one of them, because only mastery of all the rules will provide the answer to which rules apply.

The elaborate architecture of these modern rules is due in part to their development by a handful of people over a limited time span. The rules are constructed as one might construct a house whose owner is eagerly awaiting occupancy. That is, the tendency is to assign specialized craftsmen to their various tasks and have them work to completion of an entire edifice of reason. The incrementalism characteristic of the social context approach is avoided to the extent such avoidance is practically possible. Because these rule makers are specialists they can make their rules quite elaborate while maintaining some degree of internal coherence. The goal of the rule makers is to anticipate all likely questions in advance of their arising. In this way, the elaboration approach seeks to adhere to the rule maker's broad conception of fairness while also being consonant with the planner's desire for certainty because it focuses on technical differentiation, completeness, and specificity.

The elaboration approach is aptly illustrated by the passive activity loss rules of section 469⁶¹ and, more specifically, by the regulations

59. See I.R.C. §§ 71–135 (West 1992).

60. See Victor Thuronyi, *The Concept of Income*, 46 TAX L. REV. 45, 47–48, 104–05 (1990). “If income is ultimately based on fairness, as I think it should be, and implicitly has been in tax policy analysis, then we must live with the indeterminacy of the concept . . .” *Id.* at 105.

61. I.R.C. § 469 (West 1992).

under it. Fortuitously, an exemplary demonstration of both the elaboration approach and of the recent efforts to turn away from that approach are provided by the temporary regulations defining the word "activity" for purposes of applying the passive loss rules.⁶² In general, the passive loss rules are intended to combat the use of abusive tax shelters⁶³ by denying taxpayers the ability to deduct losses from "passive" activities against income earned in non-passive activities. (The distinction between passive and non-passive activities is the subject of its own set of rules.⁶⁴) The definition of "activity" is crucial to the operation of this elaborate provision because the aggregation or non-aggregation of various "undertakings"⁶⁵ into a single activity could work to the taxpayer's detriment or in his favor. For example, suppose a taxpayer has two investment undertakings one of which generates income and the other of which generates losses. If the two undertakings can be grouped together as either a passive activity or as a non-passive activity, the income from the one can be offset for tax purposes by the losses from the other. On the other hand, if the loss undertaking is classified as a passive activity while the income undertaking is classified as a non-passive activity, the income will be taxable without any offset. Thus the efficacy of the passive loss rules depends in part upon a definition of "activity" that prevents the taxpayer from aggregating undertakings as he chooses.⁶⁶

When the Treasury began the task of defining "activity" it had a general definition already at hand. "Congress indicated that an 'activity' is intended to refer to the integrated and interrelated economic operations that, on the basis of all the facts and circumstances, are the appropriate unit for the measurement of gain or loss."⁶⁷ Apparently

62. See Temp. Treas. Reg. § 1.469-4T (1989).

63. An abusive tax shelter may be described as when a taxpayer purposely seeks to generate deductions in excess of income from an activity in order to protect from taxation the income from another activity. Tax shelters frequently depend on large depreciation deductions for their efficacy. Thus, in attacking passive activities, Congress may be seen as having avoided tackling the problem of unrealistic depreciation deductions permitted by the tax law. For an interesting treatment of the passive loss rules by allegory, see Daniel S. Goldberg, *The Kingdom of Pal: A Parable of Tax Shelters and the Passive Activity Loss Rules*, 51 TAX NOTES 225 (1991).

64. The activity is passive with respect to any given individual if the individual does not "materially participate" in the activity. I.R.C. § 469(c)(1), (h) (West 1992); see also Temp. Treas. Reg. § 1.469-5T (1991) (where "material participation" is defined).

65. This is a term utilized by the regulations to describe a subpart of an activity. See Temp. Treas. Reg. § 1.469-4T(a)(3) (1991).

66. See Robert J. Peroni, *A Policy Critique of the Section 469 Passive Loss Rules*, 62 S. CAL. L. REV. 1, 42-44 (1988).

67. American Bar Association Section of Taxation Task Force on Passive Losses, *Preamble to the Comments on Activity Regs*, 44 TAX NOTES 1277, 1278 (1989) [hereinafter ABA Report] (citing S. REP. NO. 313, 99th Cong., 2d Sess. 713, 759 (1986)).

this definition, and ones like it, were viewed as too uncertain of application. Moreover, the Treasury's task was also complicated by the fact that neither a narrow nor a broad definition of "activity" would have been universally optimal regardless of whether viewed from the government's perspective or from the taxpayer's perspective.⁶⁸ In other words, sometimes a broad definition favors the government and sometimes a broad definition favors the taxpayer. The same is true of a narrow definition.

The solution chosen by the Treasury in the temporary regulations was an intricate building block approach. "Operations" were combined into "undertakings" and "undertakings" were combined into "activities."⁶⁹ Depending on a variety of factors, separate undertakings could be separate activities or more than one undertaking might be aggregated into a single activity.⁷⁰ In some cases aggregation was elective.⁷¹ Moreover, the regulations contained a number of facts and circumstances tests and rebuttable presumptions.⁷² Thus, even though the temporary regulations defining the single word "activity" were some 100 typed pages in length,⁷³ they were not entirely mechanical in operation even when taken on their own terms. In addition, despite their flexibility (indeterminacy?), the regulations were also attacked for their arbitrariness.⁷⁴ A third criticism leveled at the activity regulations was that they were so complex that even accountants and lawyers found them "exceedingly difficult" to apply.⁷⁵ Stated another way, the elaborative complexity of the rules rendered them practically indeterminate.

In response to the criticisms leveled against the temporary regulations, the Service has recently issued a proposed regulation defining "activity" in a fashion that is intended to be easier to apply than the

68. See David H. Evalul & Todd Wallace, *Passive Activity Losses: Definition of Activity*, 44 TAX NOTES 1257, 1258-59 (1989). In general, a taxpayer with trade or business losses will prefer a broad definition of "activity" so that the losses can be offset by income from other activities. *Id.* However, in the sale context taxpayers might prefer a narrow definition of "activity" because sale of a passive activity releases suspended losses for use against non-passive income. *Id.*

69. *Id.* at 1261.

70. *Id.* at 1261-62.

71. *Id.* at 1262.

72. *Id.*

73. ABA Report, *supra* note 67, at 1278. See Temp. Treas. Reg. § 1.469-4T (1991).

74. "[I]n an attempt to provide certainty, the regulations can lead to unfair results that do not reflect economic reality." ABA Report, *supra* note 67, at 1278-79.

75. *Id.* The ABA report sets out 21 steps involved in the application of the regulations.

approach taken in the temporary regulations.⁷⁶ In this particular case, the government seems to be giving up on the elaboration approach. Instead of continuing with the intricate system of building blocks contained in the temporary regulations, the proposed regulation adopts a facts and circumstances test in combination with a few supporting rules.⁷⁷ This harkens back to the social context approach. Such concrete actions as these give some indication that Secretary Goldberg's commitment to simplification is having an effect. The initial reception from the tax bar to this change of direction has been positive.⁷⁸ It will be interesting to see whether this return to the social context approach can maintain its momentum as efforts are made to simplify such inherently difficult areas as tax arbitrage,⁷⁹ original issue discount,⁸⁰ and partnership special allocations.⁸¹

D. *The Two Approaches in Contrast*

Each approach to rule making has its advantages and disadvantages. The social context approach can be brief and easily understood in outline, but it depends on a strong enforcement system and the willingness of judges to apply the law so as to treat matters that are similar in substance in the same way even if they are dissimilar in form. The social context approach is also incremental and evolutionary. Thus, it is subject to uncertainty and tends to encourage litigation. Because many of the judges upon which it depends are not tax specialists, the social context approach removes much authority over the sound administration of the tax system from the tax elite. It might be suggested that the social context approach lends itself to uninformed judicial meddling⁸² and taxpayer abuse. Alternatively, one might

76. Robert Manning & Christopher Bergin, *Proposed Passive Loss Regs Try Again to Define "Activity,"* 55 TAX NOTES 885 (1992); see Prop. Treas. Reg. § 1.469-4, 57 Fed. Reg. 20802 (1992).

77. Prop. Treas. Reg. § 1.469-4, 57 Fed. Reg. 20802 (1992).

78. See Richardson et al., *supra* note 14 (reporting that the proposed regulation received a favorable reception at the ABA tax section annual meeting held in Washington, D.C. the week following its issuance).

79. Cf. Treas. Reg. §§ 1.148-0T-10T (1991).

80. Cf. Prop. Treas. Reg. §§ 1.1271-1 to 1.1275-5, 51 Fed. Reg. 23431 (1986).

81. Cf. Treas. Reg. § 1.704-1 (1991); Temp. Treas. Reg. § 1.704-1T (1991). It's possible a two track approach will develop. In the areas where only an elite few taxpayers are concerned, elaborative complexity may continue. In areas affecting a great many taxpayers, less detailed rules may be promulgated. There is some discussion of such a two track system in the literature. See, e.g., John W. Lee, *The Art of Regulation Drafting: Structured Discretionary Justice Under Section 355*, 44 TAX NOTES 1029, 1031 nn.17-18 (1989).

82. The nonspecialist judiciary is often considered an impediment to sound tax policy. For example, Professor James Eustice has called the Supreme Court a "loose cannon on a rolling

characterize it as populist and as tending to inject an element of common sense into tax law.

The elaboration approach, in contrast, seems to take away from judges the discretion to make bad decisions. However, its success depends upon the ability of the rule maker to be extremely foresighted in anticipating all the variations in form that an economically similar legal event might take (or be shaped to take by a clever planner). For this reason the modern rules are often long, detailed, highly interwoven, and seek to address all possible contingencies. Viewed in a positive light, this approach uses great and fairminded elaboration to reduce the law to a series of mechanical rules whose application requires little or no human discretion in order to arrive at an outcome that treats all cases according to their substance.⁸³ From this reductionist perspective, the elaborative complexity of tax law is justified by its certain and uniform fairness when applied by one who has mastered it. Of course, mastery of the rules is rendered extremely difficult by their complexity and, thus, only an elite few will do so. This in itself would strike many as unfair.⁸⁴ But the deterministic fairness of the rules in the hands of one who has mastered them is seen (by those making the rules) to outweigh the unfairness proceeding from their complexity.⁸⁵ This rule-minded account of the operation of tax law seeks to make the law a precise and exacting tool for coordinating human activity.

E. The Moral Consequences of the Elaboration Approach

A side effect of the elaboration approach is to render the maneuvers of the planner less vulnerable to a contextual substance over form

deck" in the field of tax. James S. Eustice, *Tax Complexity and the Tax Practitioner*, 45 TAX L. REV. 7, 15 n.22 (1989).

83. One of the adaptations of practitioners, especially accountants, to this phenomena is the widespread use of flow charts. These devices are designed to lead one through a complex maze of regulations by answering yes or no questions. See, e.g., C. Ellen MacNeil et al., *Revenue Procedure 92-20: Flowchart and Comparison of Transition Rules*, 54 TAX NOTES 1413 (1992); Becky Solether & Steve Coleman, *Flowcharts for Section 469*, 44 TAX NOTES 1254 (1989). In the latter article, three flowcharts presented in two printed pages purport to lead one through the since withdrawn regulations defining what constitutes an "activity" under the passive loss rules. In the same edition of *Tax Notes* there is a twenty-five page article that does something similar. See Evaul & Wallace, *supra* note 68, at 1257. The regulations themselves were over forty pages of double columns of fine print. See CCH INCOME TAX REGULATIONS § 1.469-4T (1991). If you were a harried tax professional in the midst of the filing season, which of these three sources would you be inclined to rely upon?

84. See, e.g., Surrey & Brannon, *supra* note 20, at 921.

85. For example, the preamble of the since withdrawn activity regulations took the position that "the potential for unfair results is outweighed by the 'certainty' of the results under the regulations." ABA Report, *supra* note 67, at 1279.

argument by the rule maker. Since the rule maker has chosen to detail her precise position, arguably she is obliged to live by her own rules to the letter. Moreover, it seems likely that courts will incline toward greater literalism in their interpretations of the rules in the face of such detailed analysis.⁸⁶ Thus, the elaboration approach to tax law is, in a sense, a capitulation to the moral perspective of the planner. The length and specificity of the rules is an implicit concession that the rules are everything; the rules are the whole law. If the literal language of a rule does not fit a transaction, that transaction is outside its application.

If rules can be simultaneously determinate and fair, perhaps this capitulation to the planner's perspective is not a problem. If it is possible to achieve fair outcomes in a mechanical fashion, then literalism is not a hindrance to a sound tax system. On the other hand, if the elaboration approach overestimates or misunderstands the determinacy of rules and the connections between rules and fair outcomes, serious problems arise. Thus, for example, the elaboration approach to rule making may rob the law of its ethical spirit. The ethical dimension of law comes into the elaboration approach in the creation of the rule, if it comes in at all. Questions of fairness are addressed when the rule is drafted. The detailed nature of the rule as drafted denies the necessity for an ethical perspective in its application because the decision maker has no discretion in applying the rule. If elaborate rules are indeterminate, however, the quest for justice may become lost in a thicket of rules from which no moral compass can guide us. On the other hand, if the rules are determinate but unfair, literalism may cause rigid enforcement of the legal rules in every situation without regard to individual circumstances and equities. "[L]aw might become a procrustean tyrant."⁸⁷ How can the elaboration account of law embraced

86. Professor McMahon also suggests that the courts may be becoming more literal in their interpretation of the tax law. See McMahon, *supra* note 24, at 1443. However, he sees this literalism as a cause of tax complexity rather than a response to it. *Id.* He argues that "[s]ome lengthy regulations have been spawned by judicial decisions that did not adequately guard the fisc." *Id.* In support of this proposition he cites a court of claims decision. My response is that judges who are not tax specialists (such as claims court judges) must find the present elaborative complexity overwhelming. In the face of such complexity, how is a ncnspecialist judge to gain the perspective on a case to allow anything other than a literal approach to the law? In addition, when the regulations give the appearance of addressing all contingencies, a judge is implicitly instructed that his discretion to construe the law in a non-literal fashion is limited.

87. See Steven D. Smith, *Reductionism in Legal Thought*, 91 COLUM. L. REV. 68, 84 (1991). Professor Smith provides some interesting ideas that bear upon the elaboration approach to rule making so prevalent in tax law. Smith argues that law performs multiple functions, and that, often, those persons writing about, applying, or creating the law tend to reduce the law to the single function most relevant to their instant enterprise. *Id.* at 68-75. He divides reductionism

by modern tax law drafters evade this criticism? If it does so, it is only by being so elaborative as to adequately address all or nearly all possible “individual circumstances and equities.” In short, once we embrace elaborate rules as the primary approach to tax law, we condemn ourselves to increasingly elaborate systems of rules in order to escape the charge of arbitrariness. This in itself may be sufficient basis for seeking a less literal-minded approach to tax law. But even if we appear to escape arbitrariness by great elaboration, our efforts may still be wasted. If tax law, no matter how elaborate, is still indeterminate, then the elaboration approach will not only fail to achieve its aim, it also may engender great harm because its intricate structure will render it particularly vulnerable to abuse, confusion, and misunderstanding. Thus, if we are to choose rightly in deciding how far we should rely on elaborate rules to achieve fairness, we must be concerned with the nature and extent of tax law’s indeterminacy.

into three functional accounts of law: the dispute resolution account, the coordinative account, and the meliorative account. *Id.* The dispute resolution account focuses upon the function of law as a mechanism for “the authoritative resolution of disputes.” *Id.* at 69. The coordinative account of law focuses upon the function of law in “the coordination of human interaction.” *Id.* at 72. The meliorative account of the law focuses on the law as a vehicle for positive social change. *Id.* at 74. Of the three forms of reductionism described by Smith, the coordinative account correlates most closely with the philosophy embodied in modern tax law. This approach defines law “as the ‘enterprise of subjecting human conduct to the governance of rules.’” *Id.* at 73 (quoting LON L. FULLER, *THE MORALITY OF LAW* 96 (rev. ed. 1969)). Smith asserts that the three accounts of law are both complementary and conflicting. *Id.* at 76. The potential for conflict arises because the ultimate goals of the three accounts may differ. For example, the most “rhetorically persuasive resolution” to a dispute may not comport with the applicable rule of law. “The longstanding tension between ‘law’ and ‘equity’ is one manifestation of that conflict.” *Id.* at 77. When the accounts conflict, we are forced to choose. Smith suggests that “the most obvious way to avoid or resolve conflicts is to determine that one vision is primary and the others are subordinate.” *Id.* For example,

one might assert that the meliorative vision of law is fundamental: The purpose of law is to achieve the best and most just social order that is practically attainable. By this view, the coordination and dispute resolution accounts do not describe *independent* functions of law; rather, the adoption of rules regulating human interaction and the resolution of disputes are simply means used by the law to achieve its objective of attaining, and maintaining, a just social order.

Id. at 77–78. No matter which vision we embrace as primary, we are on the path of reductionism. *Id.* at 80–81. Smith asserts that reductionism tends to lead to a distortion of legal understanding. *Id.* at 81. In Smith’s words, “a reductionist depiction of law, regardless of which form the particular reductionism takes, will distort legal understanding by presenting one perspective as if it were the whole picture.” *Id.* at 84. Of particular interest, for present purposes, is his view of the distortions resulting from establishing the primacy of law’s coordinative function because this is the form of reductionism that best characterizes modern tax law. Relying on the realists, Karl Llewellyn and Jerome Frank, Smith contends that the coordinative account in its concern for formal rules neglects “other vital features and functions of law.” *Id.* at 83. Although Smith is vague as to what these vital features and functions are, he appears to believe that the coordinative account of law tends to overestimate the determinacy of rules and that in so doing the image of law it conveys is incomplete. *Id.* at 83–84.

IV. TO WHAT EXTENT IS TAX LAW INDETERMINATE?

The degree of indeterminacy of any particular area of law, such as tax, may be no different than the degree of indeterminacy of law generally. The jurisprudential scholars whose works are discussed here often seem to assume this. Based on reasons that will be developed during the course of this next part, I doubt that all areas of law are equally determinate or indeterminate. Nonetheless, the various claims and arguments addressed in the coming sections received their initial development in other legal contexts.⁸⁸ Much of the determinacy debate is connected with the critical legal studies movement and with its critics.⁸⁹ This connection is of no particular concern in the present context. This Article is not about law as power or law as politics nor is it concerned with the refutation of those ideas. It is about the strengths and failings of rules.

A beginning point for discussion of tax law's indeterminacy is the empirical data concerning levels of taxpayer compliance.

A. *The Empirical Evidence*

If we can show as a matter of fact that the vast majority of taxpayers pay their taxes in amounts that roughly correspond to what the government believes it is owed by them, does this prove that tax law is largely determinate? As discussed later, some commentators contend that the determinacy of law is proven by the many cases that do not require litigation.⁹⁰ The indeterminist response is to argue that the mere fact that most taxpayers do not end up before the tax court really tells us nothing.⁹¹ Perhaps most returns just reflect one person's vision of what he should pay.⁹² Perhaps enforcement is too lax. Perhaps most audited cases do not go to trial because the amount in controversy makes litigation not cost effective.

88. A benefit of making these arguments in a specific legal context is that the people who are obliged to employ the law in that specific context are better able to judge the merits of the arguments. A secondary benefit is that for many such persons there is an exposure to useful philosophical outlooks that they would otherwise be inclined to ignore or, at least, to undervalue. Chiefly, however, the utility of making our points about legal indeterminacy in the context of tax law is that we have the helpful focus provided by the main problem sought to be addressed: the matter of tax complexity.

89. See authorities cited *supra* note 30.

90. See *infra* part IV.B.

91. D'Amato, *supra* note 2, at 166.

92. Will Rogers has been attributed with saying "[t]he income tax has made more liars out of the American people than golf has. Even when you make a tax form out on the level, you don't know when it's through if you are a crook or a martyr." See B.C. Forbes, *Thoughts on the Business Life*, FORBES, July 10, 1989, at 144.

Justifying Simplification in Tax Law

There exists empirical evidence concerning income tax return accuracy that may shed some light on this subject. Although the Service audits fewer than one percent of all returns,⁹³ it has long had a program aimed at determining the rate of taxpayer compliance with the tax laws.⁹⁴ This program, the Taxpayer Compliance Measurement Program (TCMP), uses audits of random statistical samples of filed returns as its basic approach.⁹⁵ The focus of this analysis is underreporting of income.⁹⁶ A recent analysis of some⁹⁷ of the data collected by TCMP indicates that, on average, Americans who file returns pay about nine percent less in taxes than they should each year.⁹⁸ An earlier report by the American Bar Association Commission on Taxpayer Compliance (Commission report) indicates that the overall “tax gap” from legitimate economic activities equals nineteen percent of all taxes owed.⁹⁹ According to the Service this tax gap amounted to \$100 billion in 1986.¹⁰⁰ The generally accepted causes of noncompliance are tax cheating and mistakes.¹⁰¹ The Commission report singles out the fraying moral fabric of our society as a chief cause of noncompliance.¹⁰² In addressing the question of indeterminacy that same report said:

[t]he vast majority of tax matters can readily and unambiguously be classified as compliant or noncompliant. The issues that are still uncertain may be a major focus of tax practitioners’ activity, but the number

93. See Tim Gray & Ian K. Loudon, *IRS Giving Better Phone Advice—To Those Who Can Get Through*, 46 TAX NOTES 1495, 1496 (1990). The rate of audits has been declining for several years. *Id.*

94. Susan B. Long & David Burnham, *The Numbers Game: Changes in Tax Compliance During the Last 25 Years?*, 46 TAX NOTES 1177, 1179 (1990).

95. *Id.*

96. *Id.* at 1180. Of course, overreporting of income could be proof of indeterminacy as well.

97. The government is stingy with TCMP information because it fears such information could be used to figure out “the discriminant function” (DIF). The DIF is used to sort returns as part of the effort to detect tax evasion. The Service’s reasoning, apparently, is that if one could figure out the DIF, one could figure out how to evade taxes without getting caught. See J. Andrew Hoerner, *IRS to Perform Statistical Analyses of TCMP Data for Private Researchers*, 45 TAX NOTES 1054 (1989).

98. Long & Burnham, *supra* note 94, at 1180 tbl. 1. I am greatly simplifying what the article actually says. The article’s focus was the issue of whether the rate of compliance is changing over time. Its conclusion on this point was that the data was unclear but that, in general, compliance levels had not changed much over the previous 20 years. *Id.* at 1184–85.

99. American Bar Association Commission on Taxpayer Compliance, *Report and Recommendations on Taxpayer Compliance*, 41 TAX LAW. 329 (1988) [hereinafter Commission Report]. The tax gap may be defined as the difference between the taxes actually paid and the taxes that are owed. See *id.* at 329–30.

100. *Id.* at 334.

101. *Id.* at 330.

102. *Id.* at 336.

of these issues, and their importance relative to the size of the tax gap, is probably relatively small.¹⁰³

Thus, although the potential for indeterminacy has been recognized in some quarters,¹⁰⁴ the basic stance of the empirical approach is that tax law is determinate.

Despite reflecting a firm belief in tax determinacy, the Commission report also notes that "about one third of taxpayers do not take deductions they believe they deserve" in part because they are unsure whether they are truly entitled to them.¹⁰⁵ Elsewhere the report states "tax laws are often ambiguous, so there is more uncertainty about what is required for compliance."¹⁰⁶ The report assumes that these are problems of education rather than of genuine uncertainty in the law.¹⁰⁷

Another empirical approach to the problem of compliance, perhaps more connected to tax indeterminacy, is to consider the competence of tax professionals to resolve tax questions. For the past few years *Money* magazine has sought to test the abilities of professional return preparers and IRS personnel to give accurate tax advice.¹⁰⁸ Recently, in testing the return preparers, it gave the same tax return preparation assignment to fifty different tax professionals.¹⁰⁹ As it turned out, no two of the preparers came up with the same tax liability figure.¹¹⁰ According to the people who created the assignment, the bottom line should have been \$12,308.¹¹¹ The answers ranged from \$9,809 to \$21,216.¹¹² The analysis of the competence of government employees to provide correct tax advice reflected a similar lack of consensus. The test of IRS personnel consisted of a phone survey where the callers asked typical tax questions. *Money* found that in a recent year the

103. *Id.* at 339.

104. *See, e.g.,* Smith, *supra* note 37, at 1 ("Complexity . . . affects the determination of the incidence and extent of noncompliance and may in many cases make the measurement of noncompliance indeterminate.")

105. Commission Report, *supra* note 99, at 345. Other reasons given were "ignorance or forgetfulness, insufficient records, perceptions that the deduction was too trivial or complicated and fear of audits." *Id.*

106. *Id.* at 352.

107. *Id.* at 368-83.

108. Denise M. Topolnicki, *The Pros Flub Our Third Annual Tcx-Return Test*, MONEY, March 1990, at 90.

109. *Id.*

110. *Id.*

111. *Id.* The hypothetical assumed a family of four with annual income of \$132,000. *Id.* The range of issues included in the hypothetical were somewhat more complicated than that found in a typical return, "but the problems weren't unusual." *Id.* at 91-92.

112. *Id.*

Justifying Simplification in Tax Law

Service personnel gave erroneous tax advice twenty-eight percent of the time.¹¹³ This was a big improvement over prior years.¹¹⁴

This information concerning tax professionals is not particularly reassuring. Moreover, the question naturally arises, how do we reconcile this result with the apparently good compliance rate for the general population? One explanation might be that tax law is more determinate for the common tax issues arising among the general populace than for the tax issues likely to be confronted by tax professionals. This view probably has some merit. However, if one accepts this interpretation, one may be in the position of accepting that elaborative complexity contributes to indeterminacy (either practical or theoretical or both) rather than legal certainty. Tax professionals, after all, are the ones who are most likely to directly confront those areas of the tax law that are characterized by elaborate rules. If complexity increases indeterminacy, that would seem to undermine the assumption that elaborative complexity can simultaneously make the law fair and certain.¹¹⁵

It seems likely an indeterminist would argue that the difficulty with relying on empirical data to determine the degree of indeterminacy in tax law is that the reliability of the data rests on the assumption that the law is determinate in the first place. The data purports to measure the number of errors by taxpayers and tax professionals, but it can only do so if a single right answer exists against which to measure the actions of the taxpayers and tax professionals. Thus, any effort to determine the degree of tax indeterminacy by reference to empirical data runs into tautological difficulties. Nonetheless, the fact that the federal income tax produces about eighty percent of the income that those who administer it believe it should produce can be viewed as

113. Denise M. Topolnicki et al., *Surprise! The IRS Gets More Helpful*, MONEY, March 1990, at 97.

114. *Id.* In the two previous years the error rate had been nearly 50% in 1988 and over 40% in 1989. *Id.*

115. Another interpretation would be to suggest that the high degree of compliance is a function of the fact that most people simply fill out their tax returns according to the directions accompanying the forms. The forms "channel" the taxpayer through the taxing scheme in a way that tends to reduce or disregard legal uncertainties. I hardly need to add that in general the forms are designed to foster and support the Service's interpretation of the law. Thus, the high degree of compliance may not be proof of a high degree of determinacy in the tax law. Instead, it may be symptomatic of the way in which the government is able to stack the deck through the mechanism of the tax forms. This view might also explain why tax professionals have a harder time "complying" with the law than the general public. The professionals are more likely than the general public to work from the raw materials (statutes, regulations, cases, rulings, and the like) in arriving at their judgments about the law. Under this circumstance, the indeterminacy of the law is more likely to reveal itself in the form of a lack of consensus about its application.

evidence that tax law is generally determinate, especially if we accept that much of the tax gap is the result of deliberate underpayment of taxes. Perhaps we can say that the empirical evidence establishes a prima facie case of generalized determinacy in the federal income tax.

B. *The Easy Tax Case*

Another way to examine tax indeterminacy that is closely related to the empirical approach is to consider the extent to which the easy case is the prevalent type of tax case. Those who believe law is largely determinate contend that there are many easy cases.¹¹⁶ They say the only thing that prevents this fact from being readily apparent is that lawyers from their earliest training tend to focus on the hard cases.¹¹⁷ In this context, the hard cases include all litigated cases.¹¹⁸ Lawyers never see most of the easy cases because they are never litigated. Kress contends that all of the hundreds of minor acts one may engage in during the course of a single day illustrate the law's determinacy.¹¹⁹ Thus, when one brushes one's teeth, according to Kress, one has engaged in an act with determinate legal consequences. A radical indeterminist response to this suggestion might include pointing out that one who brushes her teeth with cocaine has engaged in an act with indeterminate legal consequences. Of course such an argument has an absurd quality. But it is illustrative of the dangers inherent in hypothetical cases, minor though they may appear to be. Perhaps a more serious response is to inquire whether the fact that one engages in an act of *no* legal consequence such as brushing one's teeth with pepsodent is ever proof of law's determinacy. I would suggest that the fact that I can hang my hat on a peg near the entrance to my office door does not prove that a statute prohibiting me from hanging my hat on a fire alarm is determinate. Proofs of law's determinacy, in order to be persuasive, should involve circumstances of probable legal consequences.¹²⁰ Thus, for instance, proof of the determinacy of tax

116. Kress, *supra* note 4, at 296-97; Solum, *supra* note 30, at 471-72; see also Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985). Schauer concludes there are no easy cases at any level where a case is contested, but that easy cases still abound. *Id.* at 411.

117. See, e.g., Solum, *supra* note 30, at 496.

118. Schauer, *supra* note 116, at 411.

119. *Id.* Solum echoes this view. See Solum, *supra* note 30, at 471-72.

120. Greenawalt says that any estimate of the extent of determinacy in the law "[t]o be useful . . . should encompass only acts that are, or plausibly might be, within the domain of particular legal standards." Greenawalt, *supra* note 3, at 37. Schauer seems to suggest that law's determinacy should be tested by reference to its application to a "legal event." Schauer, *supra* note 116, at 413. He defines a "legal event" as any "divergence between the behavior that would have occurred but for the law and the behavior that occurred because of the law." *Id.* In contrast to this view, Solum argues that matters of no legal consequences, even if they are not

law should involve financial transactions or events within the contemplation of one of our taxing schemes.¹²¹

To a tax professional, the thought that tax law is pervasively indeterminate may seem an utterly alien point of view. We assume that there are a great many “easy” cases that the law adequately addresses so that there is no uncertainty about the outcome. For example, when those of us who teach tax law attempt to teach our students a “right” answer to a particular question, we often do so by resorting to examples which, to all appearances, have only one proper legal resolution.¹²² Consider the case of an exchange of property with a basis¹²³ of \$100 for other property worth \$500. Code section 61(a)(3) tells us that gain from such an exchange is included in gross income and section 1001 tells us that we measure that gain by deducting our basis from our amount realized¹²⁴ and that we must recognize that gain.¹²⁵ There is absolutely no problem with our saying in very precise terms exactly what the tax treatment of that exchange of property should be.

“cases,” are still proof of law’s determinacy. “[T]he reason that easiest cases are not ‘cases’ at all is that law’s relative determinacy does not permit us to make a ‘case’ out of them.” Solum, *supra* note 30, at 495.

121. By the same token, though the tax treatment of an inter vivos gift may offer some evidence of the determinacy or indeterminacy of the gift tax, it is only very general proof of the determinacy or indeterminacy of the income tax. It should be apparent that I approach this matter from the perspective that tax indeterminacy may be greater or less than other areas of legal indeterminacy. That is not the approach of others who are writing about legal indeterminacy. Generally, they seem to extend their views of legal indeterminacy (or determinacy) to all areas of law with equal conviction. I do not fully agree with them on this point. Moreover, I am distrustful of being any more general than my immediate topic requires. Thus, though I am aware that much of my discussion has general application to the topic of legal indeterminacy, I am unwilling to press that point. It seems to me that I am being far too general in my remarks as it is.

122. Our casebooks are full of problems to which there is only one right answer. This is not to suggest that casebook authors do not sometimes deliberately offer problems designed to illustrate the law’s uncertainty. The norm, however, is to use examples which one of my former professors called “baby problems.” Such problems are deliberately structured to lead the student to the correct answer in order to illustrate the workings of a provision or set of provisions. Often several variations on the basic fact pattern will be offered in order to show how the law treats similar but different circumstances. A superior example of such a casebook is also the most popular basic income tax casebook in use. See JAMES J. FREELAND ET AL., *FUNDAMENTALS OF FEDERAL INCOME TAXATION* (7th ed. 1991).

123. Generally, one’s basis in a purchased asset is one’s cost. I.R.C. § 1012 (West 1992). If one receives property from another as an inter vivos gift, the donee usually takes the donor’s basis. *Id.* § 1015(a). For purposes of measuring a loss on a subsequent sale by the donee, the donee will use the lesser of the donor’s basis or the date of gift fair market value of the property. *Id.* Property received by bequest or inheritance from a decedent has a date of death fair market value basis. *Id.* § 1014(a).

124. “Amount realized” is defined by the Code to mean “the sum of any money received plus the fair market value of the property (other than money) received.” *Id.* § 1001(b).

125. There may be a characterization question as well. For the moment, I will disregard it.

Right? Wrong, says the indeterminist. In the second week of teaching Tax I, we may tell our students that the right answer is that the taxpayer must report \$400 of gross income, but in the thirteenth week of the course we may use the same example to illustrate the non-recognition consequences of a like kind exchange under section 1031 or a transfer incident to a divorce under section 1041. All we need do is select our facts according to our pedagogical objective. The obvious riposte is to assert that they really are not the same case. But the indeterminist would simply reply,

Of course they aren't the same case because two cases are *never* precisely alike. That is one reason why law is indeterminate. In a world of infinite variety, no law can specify a single right outcome to any given case because no future case is an exact match for the lawmaker's paradigm case.

The extreme indeterminacy advocate contends that the ability to select facts, to choose the law, to interpret the law, or to argue policy in any given case is always sufficient to allow the judge to arrive at an outcome favorable to any party he chooses and still decide the case within the confines of the law.¹²⁶ In short, there are no "easy" cases.¹²⁷ If the law does not constrain the judge's decision, if there are no easy cases, then the law is indeterminate.

In tax, we might respond that the Treasury regulations contain thousands of "examples" designed to show us the "right" answer in a wide range of tax cases. Are not all, or at least most, of those examples easy cases? The radical indeterminist says they are not because they are not real cases. Instead they are tautologies.¹²⁸ The facts in those examples are constructed and stated in such a manner that the answer is usually foreordained.¹²⁹ Like the earlier example of an exchange of property with a basis of \$100 for property worth \$500, the facts are stated in a very selective manner to achieve their heuristic purpose. Thus, even if the facts in a "real" case duplicate the facts set out in one of these teaching aids, the real case will also include other facts that distinguish it from the hypothetical one. This means that even if Treasury regulation examples offer "right" answers, they still do not represent easy cases because they are not cases at all. They are

126. D'Amato, *supra* note 2, at 156.

127. *Id.* at 161-71; see also Anthony D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Underage President*, 84 NW. U. L. REV. 250 (1989).

128. See D'Amato, *supra* note 2, at 169.

129. I say "usually" because some of those examples and problems may not lead to a single answer either through error or design.

convenient fictions¹³⁰ constructed to provide an analogical basis for predicting the outcome in real cases, but they do not determine outcomes in real cases.¹³¹ Moreover, even if we could find a case identical to one described in the regulations, one might still argue that the regulation itself is invalid or inapplicable because of the operation of the Constitution, a statute, or another regulation.

Despite the indeterminist's skepticism, the easy tax case is not readily dismissed. The empirical data discussed earlier may be seen as evidence of the pervasiveness of easy cases. It will be recalled that one study indicates that those persons filing income tax returns pay approximately ninety percent of the income taxes the Service says they should pay. The easy case also has a common sense appeal. When a person records his \$50,000 salary on line one of his income tax return, arguably he does so because the law is clear and determinate on the point that earnings are included in gross income.¹³² It could be said that the same is true of interest income,¹³³ dividends,¹³⁴ and the various other items of gross income listed in section 61¹³⁵ and that are required to be recorded on various lines of the tax return. Similarly, when one who itemizes his deductions lists \$8,000 of home mortgage interest on schedule A, it may be said that he does so because the law is clear that home mortgage interest is deductible in arriving at taxable income.¹³⁶ The same could be said for the other items normally deducted by an individual who itemizes his deductions such as state income and property taxes,¹³⁷ and charitable contributions.¹³⁸ The list could go on and on. In the vast majority of cases, we might say, an

130. I use the term in a broader sense than the meaning usually attributed to the phrase "legal fiction." I mean simply to say that these hypothetical examples and problems have been reduced to an essence that describes reality but does not precisely capture it. Thus, they serve as metaphors not mirrors. This use of the term "fiction" is exemplified by the work of the German philosopher Hans Vaihinger in his masterwork, *The Philosophy of 'As If'* (1924). Lon L. Fuller drew upon this work for his own contribution to our understanding of legal fictions in a series of articles first published in the early 1930s and later collected. LON L. FULLER, *LEGAL FICTIONS* (1967). Fuller defined the legal fiction as a false assumption deemed to be true for a limited purpose in the law. *Id.* at 7-10. Like Vaihinger, he considered the legal fiction to be an analogical device. For a detailed treatment of Fuller's work and the use of the legal fiction in tax law, see John A. Miller, *Liars Should Have Good Memories: Legal Fictions and the Tax Code*, 64 U. COLO. L. REV. (forthcoming 1993).

131. See D'Amato, *supra* note 2, at 182.

132. See I.R.C. § 61(a)(1) (West 1992).

133. *Id.* § 61(a)(4).

134. *Id.* § 61(a)(7).

135. *Id.* § 61.

136. *Id.* § 163(a); see *id.* §§ 163(h)(1), (3).

137. *Id.* § 164.

138. *Id.* § 170.

honest, competent person who has kept adequate records will arrive at the one legally correct result on her tax return. If this is so, then tax law is determinate in a theoretical sense and, probably,¹³⁹ in a practical sense.

The anecdotal or easy case approach to proving law's determinacy is compelling, but the ingenious proponent of the opposing view can always suggest a new approach to the facts or the law which might cast doubt on the validity of the proof offered.¹⁴⁰ The element of tautological reasoning in the easy case approach is instantly revealed when one changes or adds a fact to the facts given.¹⁴¹ For instance, the \$50,000 of compensation may be in the form of corporate stock of the employer that may or may not be current income depending on various other facts and on the application of various rules.¹⁴² The \$8,000 of home mortgage interest may not be deductible because it derives from a second mortgage that arguably causes our indebtedness to exceed the fair market value of our home.¹⁴³ Thus, though the prevalence of the easy case seems intuitively obvious, it is difficult to actually describe even a single irrefutably easy case.¹⁴⁴ I confess that in my own experience as a practitioner, I can recall no easy cases.¹⁴⁵ I can recall cases not worth litigating, but that is another matter. I tend to the view that if you add a few zeros to the amount in controversy

139. Assuming most taxpayers are honest, competent and keep adequate records.

140. As an example, see *infra* note 286 (discussing Greenawalt's game analogy).

141. Solum argues that the fact that indeterminists are obliged to change the facts in order to convert an apparently easy case into a hard one is itself proof of the existence of easy cases. Solum, *supra* note 30, at 472.

142. See I.R.C. § 83 (West 1992).

143. See *id.* § 163(h)(3)(C).

144. Certainly D'Amato would urge this. See D'Amato, *supra* note 2, at 156.

145. I speak here of cases I encountered in my role as a litigator. Thus, those cases arguably were self-selecting as hard cases. Perhaps if they had been easy, I would never have seen them. I did encounter a case once which I would have thought easy had I not been shown otherwise by an intransigent judge. It was a state sales tax case involving sales of home delivered pizzas. The taxability of those sales depended upon whether or not pizzas were "meals" within the meaning of the taxing statute. If the pizzas were meals they were subject to sales tax. If the pizzas were not meals, they were not subject to sales tax. I came in on the case on the side of the taxing authority when it reached the state court of appeals. It had been tried before the state tax board where a very skimpy record was made. The tax board ruled pizzas were meals. The first appeal was to a state circuit court where the judge reversed on the authority of a 1943 California case holding that hamburgers were not meals. At the court of appeals, I argued that the court should take judicial notice of the fact that pizzas were composed of all the basic food groups and of the fact that people treat pizzas as meals. The court accepted this argument and reinstated the tax board's decision. The state supreme court declined to hear the case. Thus, an apparently simple, and, I would have thought, obvious case was litigated at four levels of adjudication with one of those tribunals adopting a position contrary to what I would have thought plausible. Was this nevertheless an easy case? For the reader who is inclined to think I have made this up, see *Department of Revenue v. To Your Door Pizza, Inc.*, 670 S.W.2d 482 (Ky. Ct. App. 1983).

Justifying Simplification in Tax Law

even an apparently easy case will become a hard one. However, such a transformation may be more the product of practical, rather than theoretical, indeterminacy.

It has been argued that a further proof of the preponderance of easy cases is illustrated by the lawyer acting as a planner.¹⁴⁶ This is an example close to a tax practitioner's heart. When we draw up a Qualified Terminal Interest Property (QTIP) trust provision for a will designed to meet the requirements of the estate tax marital deduction,¹⁴⁷ an agreement for a tax free incorporation under section 351, or a partnership agreement with special allocations intended to pass section 704(b) muster, we are treating the law as though it is determinate. At least some of us may feel reasonably certain that the QTIP we have drawn will entitle our client's estate to the marital deduction if the executor so elects. We may be confident that the incorporation as we have planned it will not result in gain recognition for our client, and that the special allocations of the partnership have "substantial economic effect." It would be difficult, however, for any of us to absolutely guarantee that nothing will go awry. After all, even if the present law is clear, the Service could issue new regulations and give them retroactive effect.¹⁴⁸ To the extent we rely on past cases we run the risk of a court overruling past precedents. Additionally, some crucial fact may have been omitted or misrepresented to us by our client.¹⁴⁹ Moreover, there are various judicial doctrines, code provisions, and administrative policies with wide ranging applications that might be brought to bear at some future date even though at present it does not appear they apply.¹⁵⁰

In the end, the easy case is persuasive but equivocal proof of tax law's determinacy. On the one hand, we may argue that common

146. Schauer, *supra* note 116, at 412-13.

147. See I.R.C. § 2056(b)(7) (West 1992).

148. Section 7805(b) authorizes the Secretary of the Treasury to issue regulations having retroactive effect. Congress is not above retroactive hanky panky either as witnessed by the retroactive repeal of § 2036(c) and the first generation skipping transfer tax. See I.R.C. § 2036(c) (West 1992) (repealed 1990). The retroactive repeal of a statute can act to penalize the good planner and his client while those persons who disregarded or were ignorant of the law go merrily along.

149. Maybe, for instance, the QTIP client is not really married to the person named as the life beneficiary of the trust. Of course, part of what the planner does is attempt to verify all the relevant facts. Moreover, factual uncertainty may not be considered by some as proof of law's theoretical indeterminacy. See Greenawalt, *supra* note 3, at 42-45.

150. I am thinking here of such things as the assignment of income doctrine, the step transaction doctrine and other substance over form doctrines, Code section 482 and other anti-abuse provisions. See Joshua D. Rosenberg, *Tax Avoidance and Income Measurement*, 87 MICH. L. REV. 365, 384-431 (1988).

sense dictates that easy cases must be possible and that the empirical evidence indicates they are prevalent. We might well say of the indeterminist that there are "none so blind as those who will not see." On the other hand, it is difficult to describe an easy case in such a way that it cannot be turned into a hard case by some slight twist of the facts. So for the time being, it is appropriate to withhold judgment while we consider some of the "proofs" that have been offered of law's indeterminacy. In considering those proofs it will be useful to illustrate them with examples drawn from the tax context.

C. *Problems with Language*

1. *The Indeterminacy of Language*

The difficulty of understanding rules simply by reference to the dictionary meanings of words employed within them has several aspects. One of those aspects is the indeterminacy of language itself. D'Amato argues that words are without clearly defined and generally accepted core meanings, and that as a consequence the application of a rule of law to any given case is always uncertain.¹⁵¹ In contrast, Greenawalt suggests that "shared understandings" of rules ordinarily constrain the decisions of judges¹⁵² and that the same principle applies to the meanings of words.¹⁵³ Schauer argues that "some number of linguistic conventions, or rules of language, are known and shared by all people having competence in the English language."¹⁵⁴

That language communicates something is an inescapable conclusion. Even without the benefit of a particular context or the benefit of knowing the identity of the speaker, we gain more meaning from a sentence spoken in English than we would from a series of wordless sounds. Though the meaning of any given word may change over time, still at any given moment in time any word will have some meaning that is widely accepted as inherent in that word.¹⁵⁵ How much acontextual meaning words carry is difficult to say. However, when we add a compensating context to a word, phrase, or sentence, the amount of meaning communicated increases. The extent to which the

151. D'Amato, *supra* note 2, at 162, 171-79.

152. Greenawalt, *supra* note 3, at 49-50.

153. *Id.* Elsewhere he says "lest we be overcome by skepticism, we need to revert to the idea that language is communal, that those who share a common language and culture will often understand that the meaning of sentences in context includes some things and excludes others." *Id.* at 66-67.

154. Schauer, *supra* note 1, at 526.

155. Schauer discusses this matter at some length, but I will not recapitulate his arguments here. But if you are inclined to doubt my modest claims about the ability of language to convey shared meaning, see *id.* at 520-29.

meaning communicated is the same for all hearers is subject to question. Thus, for instance, the sentence “gross income means all income from whatever source derived” would mean something to any person fluent in English, but it would mean more if he knew that the sentence was part of the income tax code. Whether he would understand by that sentence in that context that gains from sales of property are includable in gross income might remain in doubt. On the other hand, if our hearer is a tax lawyer we would certainly expect him to know that gains from sales of property constitute gross income. Thus, a sense of context when combined with shared understanding leads to more definitely accepted meanings.

Although language communicates meaning, it often does so in such a way as to leave room for disagreement about what is communicated. A longstanding example of the phenomena of indeterminacy in tax legalese is the phrase in section 162 limiting business expense deductions to “ordinary and necessary” expenses.¹⁵⁶ After more than half a century, *Welch v. Helvering* remains the most important general explanation of the meaning of the word “ordinary.” There the Supreme Court wrote:

Here, indeed, as so often in other branches of law, the decisive distinctions are those of degree and not of kind. One struggles in vain for any verbal formula that will supply a ready touchstone. *The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle.*¹⁵⁷

Here we have explicit recognition of the uncertain meaning of a key statutory word. Indeed, the Court went even further by acknowledging that the apparent rule was no rule at all in the deterministic sense. In saying that “life in all its fullness must supply the answer” the Court was, in effect, conceding the contextual, perceptual and judg-

156. The word “expense” is itself ambiguous. In particular, drawing the line between expenses and capital expenditures is often a subject of some controversy. See BORIS I. BITTKER & MARTIN J. McMAHON, JR., FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 10.6 (1988). See also DODGE, *supra* note 41, at 164–65. Moreover, § 162 also provides that salary expenses must be “reasonable,” another word of uncertain meaning. See, e.g., *Harolds Club v. Commissioner*, 340 F.2d 861 (9th Cir. 1965). A further point of confusion in § 162 lies in its allowance for deduction of travelling expenses while away from “home” on business. The meaning of “home” is a matter of debate. Some courts, applying the plain meaning rule, assert that home refers to the taxpayer’s principal residence. See, e.g., *Rosenspan v. United States*, 438 F.2d 905 (2d Cir.), *cert. denied*, 404 U.S. 864 (1971). The Service contends that “home” means the taxpayer’s principal place of business. See Rev. Rul. 75-432, 1975-2 C.B. 60. More recently, the Service has argued that a taxpayer may have more than one tax home at the same time. At least one court has interpreted the use of the word “home” in § 162 to mean that a taxpayer can have only one tax home at a time. See *Andrews v. Commissioner*, 931 F.2d 132 (1st Cir. 1991).

157. *Welch v. Helvering*, 290 U.S. 111, 114 (1933) (emphasis added).

mental qualities inherent in applying rules to reality. But, granting the initial indeterminacy of the word "ordinary," can we not say that over the years the cases and regulations interpreting that word have fleshed out its meaning in the tax context?¹⁵⁸ Perhaps more importantly, can we not say that there are many specific expenses we can imagine which are indisputably "ordinary?" For instance, can we not now say with certainty that the purchase of pencils and paper by an accounting firm for use in its business is an "ordinary" business expense under any plausible definition of the word?¹⁵⁹

There is another point we might make in favor of the definiteness of tax language. We might contend that the tax world is its own place¹⁶⁰ with its own "communal understandings." Unlike the words "ordinary and necessary," many of the words and phrases we use and the concepts we embrace have little in the way of everyday usage. This may mean that these bits of arcane phraseology have more definite and discrete tax meanings by virtue of containing fewer inherent and inherited meanings. The probity of this argument is difficult to gauge. Phrases such as "capital asset" or "depreciation recapture" have rather definite meanings in the world of tax. But this does not establish that we all understand those words to mean the same thing in all contexts; misunderstandings and disagreements will still occur.¹⁶¹

158. The § 162 regulations in my 1992 CCH edition of the income tax regulations run over 22 pages. CCH INCOME TAX REGULATIONS § 162 (1991). Of course not all of those regulations are concerned solely with defining the words "ordinary and necessary."

159. Greenawalt says that even a document using very broad language, such as the Constitution, gives determinate answers to specific questions such as whether an eighteen year old English rock star can permissibly serve as President of the United States. Greenawalt, *supra* note 3, at 70. Greenawalt says:

[T]he same legal standard may function in at least five ways: providing a determinate answer to certain legal questions, providing the basis for interpretation and application in borderline instances, contributing to a more general view of a document or legal system that influences legal judgments outside the sphere of the standard's own arguable coverage, contributing to an understanding of the society in which we live, and serving as one of many guides to citizens' treatment of their fellows.

Id. The point made in the text is analogous. Even a vaguely worded statute may provide an answer to a specific question that is aimed at the statute's middle ground meaning. In short, in deciding whether and to what extent a statute offers determinate legal answers, one must consider the possible range of questions.

160. This brings to mind the words spoken by Satan in *Paradise Lost*:

The mind is its own place, and
in itself
Can make a Heav'n of Hell, a Hell
of Heav'n.

JOHN MILTON, *PARADISE LOST* 13 (Merrit Y. Hughes ed., Macmillan Publishing 1962) (1674).

161. Professor Lawrence Zelenak suggests that we should be more receptive to non-literal interpretations in areas of tax law where the persons most interested in the subject matter of the statute are tax specialists rather than the general public. Lawrence Zelenak, *Thinking About*

When we have positive economic incentives for reading rules differently, it is likely we will seek out those different readings.

2. *Language and the Form-Substance Dichotomy*

One reason language seems indefinite is that the transactions it describes are indefinite. To return to the estate tax for a somewhat extended illustration, consider the use of a recapitalization¹⁶² to effectuate an estate freeze prior to the enactment of short-lived¹⁶³ section 2036(c) and new chapter 14. The typical estate freeze recapitalization worked something like this: A closely held corporation with only one existing class of stock might reshuffle its capital structure by the issuance of two new classes in substitution for the preexisting stock. The new classes of stock consist of one class of preferred stock and one class of common stock. The preferred stock has a liquidation preference equal to the current fair market value of the business. Thus, if the business were liquidated tomorrow, the preferred shareholders would take everything and the common shareholders would take nothing. The preferred shares also have a dividend preference equal to the current income stream of the business. Thus, the common shareholders will derive no economic benefit from the business either currently or in the future unless the business grows. This type of recapitalization could “freeze” the value of the taxable estate of a taxpayer because the taxpayer would keep the preferred stock but give away the common stock.¹⁶⁴ If the business appreciated in value, that appreciation was reflected in the value of the common stock rather than the preferred. This device was popular for several reasons. First, it allowed the taxpayer to avoid some of the estate tax consequences of his wealth while retaining control of and the income from his business. Second, it encouraged the recipients of the common stock, often the taxpayer’s children, to take an active interest in the business so as to

Nonliteral Interpretations of the Internal Revenue Code, 64 N.C. L. REV. 623, 664–65 (1986). If this is so, then our arcane words may actually be less certain of meaning than more ordinary phrases.

162. “Recapitalization” is a fairly arcane sort of word that we might expect to be well understood in the world of business and law. Yet when the Supreme Court was confronted with the question of what constitutes a recapitalization, the best it could offer was the pleasantly obscure definition, a “reshuffling of a capital structure within the framework of an existing corporation.” *Helvering v. Southwest Consol. Corp.*, 315 U.S. 194, 202 (1942).

163. Perhaps I should call it “no-lived” because it was repealed retroactively to the date of its enactment. *See* Revenue Reconciliation Act of 1990, Pub. L. No. 101-508, § 11601, 104 Stat. 1388-400 (striking out former 26 U.S.C. § 2036(c) and redesignating subsection (d) as (c)). This is an illustration of tax indeterminacy at its most ebullient.

164. The gift of the common stock would be currently taxable, but arguably the common stock has little present value. Thus, the gift would generate little or no gift tax liability.

enhance the value of their growth interest. Third, the transfer of the common stock at a point in time when it had little current value served to minimize the gift tax consequences of the gift.¹⁶⁵

The Service sought to attack such recapitalizations by contending that section 2036(a) applied to them.¹⁶⁶ In general, that section draws into the gross estate property given away during life when the grantor has retained a beneficial life interest in the gifted property. Section 2036(a) provides in pertinent part:

The value of the gross estate shall include the value of all property . . . of which the decedent has at any time made a [gratuitous] transfer . . . under which he has retained for his life . . . the possession or enjoyment of, or the right to the income from, the property"¹⁶⁷

A recapitalization like the one just described in which a person gives away common stock while retaining preferred stock has a certain resemblance to a gift of a remainder while retaining a life estate. In particular, one might say that although both classes of stock are technically present interests in property, in reality the common stock has only a future value that is directly tied to the same enterprise as is represented by the preferred stock.¹⁶⁸ However, the Service's litigative efforts to curb the estate freeze failed because the tax court judged that the resemblance between an estate freeze and a transfer of a remainder while retaining a life estate was insufficient to come within the terms of section 2036(a).¹⁶⁹ In the court's view, the common stock was free-standing property in which the donor retained no interest.¹⁷⁰ Who was right, the court or the Service? In retrospect we might all wish the Service had prevailed so that we might have been spared the legislative boondoggle that ensued.

In a sense, the debate between the Service and the court dissolved into the question of whether the transaction should be characterized according to its form or its substance. In form two distinct present interests are created in an estate freeze while in substance it may appear that a division between present and future interests has occurred. The form versus substance problem is a recurring issue in

165. For a brief discussion of the nature of an estate freeze and for citations to more detailed treatments, see RICHARD B. STEPHENS ET AL., *FEDERAL ESTATE AND GIFT TAXATION* ¶ 4.08[9][b] (6th ed. 1991).

166. See, e.g., *Estate of Boykin v. Commissioner*, 53 T.C.M. (CCH) 345 (1987).

167. I.R.C. § 2036(a) (West 1992).

168. In contradistinction one might point out that unlike the life estate, the preferred stock is not extinguished by the death of its holder.

169. See *Boykin*, 53 T.C.M. at 349.

170. *Id.* at 348-49.

tax law, and no determinative formula can be stated that accurately explains in advance when a transaction will be taxed according to its form and when it will be taxed according to its substance.¹⁷¹

Part of the uncertainty of substance over form analysis is the difficulty that arises in distinguishing the form of a transaction from its substance.¹⁷² Sometimes, it seems, the form is the substance. Consider, for example, the case of *Estate of Stranahan v. Commissioner*.¹⁷³ There a taxpayer, in need of some income to offset a large interest deduction, sold future dividends in the amount of \$122,820 to his son for \$115,000.¹⁷⁴ The “purchase” price was apparently arrived at by discounting anticipated dividends to their present value.¹⁷⁵ The taxpayer took the position that the sale of future income produced current income under assignment of income principles.¹⁷⁶ The Service took the position that the payment from the son was merely a loan secured by the dividends.¹⁷⁷ The tax court sided with the Service in finding a loan.¹⁷⁸ According to the tax court, the creation of the purchase price by discounting the future income to its present worth was clear evidence that the substance of the transaction was an interest bearing loan.¹⁷⁹ The Sixth Circuit Court of Appeals, in reversing, concluded that the transaction was properly characterized as a sale because the form of the transaction was a sale and because there was no evidence to indicate a sham transaction.¹⁸⁰ The court suggested it was also a sale in substance because the economic risk that no dividends would be paid was now borne by the son.¹⁸¹ Under this analysis form dictated substance. Suppose that the transaction had been structured as a non-recourse loan by son to father with the future dividends as the only security against father’s default. In such a case the son

171. See Rosenberg, *supra* note 150, at 417–39 (reviewing many substance versus form cases).

172. *Id.*; see also Joseph Isenbergh, *Musings on Form and Substance in Taxation*, 49 U. CHI. L. REV. 859, 879 (1982). For recent analyses of some aspects of the form versus substance issue in various tax contexts, see Karen B. Brown, *Applying Circular Reasoning to Linear Transactions: Substance over Form Theory in U.S. and U.K. Tax Law*, 15 HASTINGS INT’L & COMP. L. REV. 169 (1992); Robert Thornton Smith, *Substance and Form: A Taxpayer’s Right to Assert the Priority of Substance*, 44 TAX LAW. 137 (1990); Stephen G. Utz, *Partnership Taxation in Transition: Of Form, Substance, and Economic Risk*, 43 TAX LAW. 693 (1990).

173. 472 F.2d 867 (6th Cir. 1973).

174. *Id.* at 868.

175. *Id.* at 869 n.5.

176. *Id.* at 868. This principle is well established. See *Commissioner v. P.G. Lake, Inc.*, 356 U.S. 260 (1958).

177. *Stranahan*, 472 F.2d at 869.

178. *Id.* at 868.

179. *Id.*

180. *Id.* at 871.

181. *Id.* at 869, 871.

would also bear the risk of loss. Could either the father or the Service have successfully argued that in substance the transaction was a sale and should be treated as such for tax purposes? If not, then once again the form has dictated the substance. But if this were always the case, there would be no difference between form and substance in all bona fide transactions; the form-substance dichotomy would be largely chimerical.¹⁸²

Even when we can clearly distinguish substance from form, there remain competing pressures to honor both form and substance. Arguably, honoring the forms of transactions makes the law more predictable. Predictability is highly prized because it fosters stability and a sense of security. Not incidentally, it also opens the way for the planner to work his magic. Thus, on the other hand, it may be argued that taxing transactions according to their economic substance fosters fairness, and discourages manipulation of the form to obtain an advantage. Thus, the choice between taxing according to form or according to substance (if the two are seen as different) is a matter for judgment.

3. *The Use of Highly Specific Language*

A determinist might dismiss the foregoing examples by saying that of course there is some ambiguity and uncertainty inherent in our use of language but that nearly all such ambiguity can be overcome by the use of highly specific definitions. However, this seems doubtful since we can only define words by the use of more words. The more words we define, the more words we are obliged to define, ad infinitum. In the end, even with all our specific rules and definitions we may still find that some uncertainties remain. Another problem that also arises as our web of meaning becomes more elaborate is the possibility that we will make a mistake because the rules are so complicated.

Consider, for instance, the regulations interpreting section 704(b). This subsection of the Code provides that a partner's "distributive share"¹⁸³ of the partnership's income or loss shall be determined in accordance with "the partner's interest in the partnership."¹⁸⁴ Implicitly, the provision accepts that generally the partner's share will be

182. Professor Isenbergh argues that "[w]hen we are dealing with statutory terms of art, the form-substance dichotomy is a false one. 'Substance' can only be derived from forms created by the statute itself." Isenbergh, *supra* note 172, at 879. He argues that a very literal approach to interpretation of taxing statutes is the best policy for courts and taxpayers alike. *Id.*

183. The term "distributive share" is itself a good example of the confusing use of language because § 704(b) does not contemplate any actual distribution. Those are addressed elsewhere in the Code. See WILLIAM S. MCKEE ET AL., FEDERAL TAXATION OF PARTNERS AND PARTNERSHIPS ¶ 10.01 (2d ed. 1990).

184. I.R.C. § 704(b) (1992).

determined by the partnership agreement.¹⁸⁵ However, it provides further that allocations of income or loss (special allocations) under the agreement that lack “substantial economic effect,” will not be honored.¹⁸⁶ The regulations interpreting this brief provision stretch on for many pages. Those regulations concerning the meaning of just those three words, “substantial economic effect,” are quite intricate.¹⁸⁷ In defining that phrase, the regulations find it necessary to establish in some detail the primary rules of accounting applicable to partnerships.¹⁸⁸ The object of this intricacy is to force partners to share the tax attributes of their enterprise in a fashion that accords with their shares of its economic attributes.¹⁸⁹ In short, the regulations seek to prevent the transfer of tax attributes between partners when such transfers have as their sole purpose tax avoidance.¹⁹⁰ Though the regulations attempt to be very precise in the treatment of various allocations, including the use of dozens of detailed examples,¹⁹¹ they also state that they are *not conclusive* as to a partner’s distributive share for tax purposes because of the potential conflict between the regulations and other rules and doctrines.¹⁹² Thus, in the end, the regulations themselves say they may not be determinate.¹⁹³ Moreover, where the regulations are most determinate, they are most arbitrary.¹⁹⁴

Of more importance, perhaps, than the regulations’ admitted indeterminacy is the indeterminacy implicit in their complexity. Even if greater specificity contributes to greater theoretical determinacy, it

185. See *id.* § 704(a) for an explicit statement of this rule.

186. *Id.* § 704(b)(2).

187. See Treas. Reg. § 1.704-1(b)(2) (1991). For relatively comprehensive discussions of the § 704(b) regulations, see Michael J. Close & Dan A. Kusnetz, *The Final Section 704(b) Regulations: Special Allocations Reach New Heights of Complexity*, 40 TAX LAW. 307 (1987); Lawrence Lokken, *Partnership Allocations*, 41 TAX. L. REV. 545 (1986).

188. See Treas. Reg. § 1.704-1(b)(2)(iv) (1991).

189. MCKEE ET AL., *supra* note 183, ¶ 10.02[1].

190. The complexity of the regulations stems from the attempt to carry out the policy of preventing tax avoidance in an economically realistic way without unduly hampering the flexibility of the partnership as an economic enterprise. Complexity in the tax law might have been reduced by reducing the complexity of the partnership by, for instance, prohibiting special allocations in the first place. But this would achieve neutrality through intrusion rather than through a mirror effect. See Mark P. Gergen, *Reforming Subchapter K: Special Allocations*, 46 TAX L. REV. 1, 11–19, 43 (1990) (advocating abolition of special allocations and instead placing partnerships on a share system like subchapter S corporations).

191. See Treas. Reg. § 1.704-1(b)(5) (1991).

192. *Id.* § 1.704-1(b)(1)(iii); see Lokken, *supra* note 187, at 621.

193. Indeed, at least one expert argues that the regulations are most certain when they are unfair and, where they attempt to be fair, they are vague. See Gergen, *supra* note 190, at 3 (arguing that special allocations should be abolished).

194. For example, the regulations set up absolute presumptions that are taxpayer favorable and that tend to undermine the overall intent of § 704(b). See *id.* at 15–17.

may simultaneously contribute to greater practical indeterminacy.¹⁹⁵ Possibly there are some who feel that the section 704(b) regulations are clear and certain in their application. Certainly, they are very specific in many respects. However, at least one expert has concluded that "the rules on special allocations do not and cannot fulfill their intended objective."¹⁹⁶ Moreover, the complexity of these regulations is such that most nonexperts would find them nearly incomprehensible.¹⁹⁷ Thus, whatever theoretical certainty the regulations may bring to the law is blunted by the probable inability of most persons (including judges) to apply them accurately. The specificity of the regulations accentuates these problems in some cases because that specificity is directly tied to many factual questions and to the need for detailed records concerning capital accounts¹⁹⁸ and the like. This means even those who can interpret the rules properly may be hampered by a lack of information vital to their application, and much of that information might not have been vital except for the specificity of the regulations themselves.

When the problems sought to be addressed are as intransigent as those addressed by section 704(b), it seems that the utility of great specificity has its limits. Mechanical determinacy is beyond our reach either because the topic is too slippery or because our rules are too complicated. In either event, if we are committed to achieving certainty, our final recourse may be the mathematical rule.

4. *The Use of Mathematical Language*

Mathematical rules abound in tax law. As just implied, they are often employed even in those lengthy regulations that so characterize

195. Professor Bittker has described this as an enforcement problem. See Boris I. Bittker, *Tax Reform and Tax Simplification*, 29 U. MIAMI L. REV. 1, 6 (1974).

196. Gergen, *supra* note 190, at 28.

197. I would include myself in this category for much of each year. I do not work with these regulations with any frequency, but every Spring I teach them. (Are you laughing at me? Go ahead.) When I teach them, I usually feel I have a moderate comprehension of them by the time I finish. Within a couple of months, however, this conviction fades (along with my recollections of their many details). Concerning the § 704(b) regulations, Professor Lokken concludes: "The new regulations under section 704(b) are a creation of prodigious complexity The complexity . . . makes the regulations essentially impenetrable to all but those with the time, talent, and determination to become thoroughly prepared experts on the subject." Lokken, *supra* note 187, at 621. Close and Kusnetz also conclude that the regulations remove § 704(b) "from the average taxpayer's understanding." Close & Kusnetz, *supra* note 187, at 336.

198. A partner's capital account reflects his equity interest in the partnership in a way that is analogous to the way stock reflects a shareholder's equity interest in a corporation. See MCKEE ET AL., *supra* note 183, ¶ 6.05. A partnership may have more than one set of capital account books because § 704(b) capital accounts may not coincide with its financial accounting books. *Id.*

the elaboration approach to rule making.¹⁹⁹ Usually they operate by reducing the law to a mathematical limitation such as by setting a specific dollar limit on a deduction or exclusion or by using a set percentage to a similar end,²⁰⁰ but they can function in a wide variety of contexts. These rules are examples of the subordination of fairness to certainty and administrative ease.²⁰¹ For example, consider the mileage rule for determining who is entitled to deduct moving expenses.²⁰² The rule provides that one's new job must be thirty-five miles farther from one's former place of residence than one's old job in order to take the deduction.²⁰³ We can readily imagine circumstances in which an added twenty miles on one person's commute would render that commute more arduous than the addition of thirty-five miles to another person's commute. Suppose, for instance, the first person's commute is through the most heavily travelled portion of Los Angeles County, while the other person's commute is on a four lane highway in an uncongested portion of northern Florida. The allowance of a moving expense deduction to the Florida resident but not to the California resident seems patently unfair.²⁰⁴

The unfairness of mathematical rules is not always so evident, but their essential feature is the failure to distinguish between individual circumstances in their application in a way that is more pronounced than other rules. In short, the mathematical rule is overtly arbitrary. This overt arbitrariness accounts for its relative determinacy. It also supports the idea that there is a correlation between arbitrariness and determinacy. The widespread use of the mathematical rule in tax law is probably the strongest point in favor of the contention that tax law is more determinate than law generally.

199. See, e.g., the regulations defining material participation for purposes of the passive activity loss rules; Temp. Treas. Reg. § 1.469-5T(a)(1) (1991) (500 hours participation during year constitutes material participation).

200. See, e.g., I.R.C. §§ 1, 63(c), 71(f), 79(a)(1), 101(b)(2)(A), 121(b)(1), 152(d), 170(b)(1)(A)–(D), 179(b)(1)–(2), 217(b)(3), 274(n)(1), 469(i)(2)–(3) (West 1992). For a lengthy list of mathematical rules, see Richard Malamud, *Testing the Code*, 54 TAX NOTES 1289 (1992).

201. Surrey & Brannon provide a helpful discussion of the principles involved in choosing to utilize a mathematical rule. Surrey & Brannon, *supra* note 20, at 916–19. They explain, in the context of the standard deduction, that the crude fairness of mathematical rules may cost less than the added expense associated with finer distinctions. *Id.*

202. I.R.C. § 217(c)(1) (West 1992).

203. *Id.*

204. Admittedly, some arguments can be made in support of the rule's fairness. First, we can say it applies equally to everyone. Second, we can say that the Californian could have planned her move so as to come within the ambit of the rule, so it was her own choice not to satisfy it. But in terms of the internal morality of tax law it is unfair because it taxes events that are similar in substance differently based on a matter of form.

Arbitrariness, to the extent it achieves determinacy, may be seen to do so at the sacrifice of legitimacy. According to Singer, “[i]nstitutions and doctrines are legitimate if they accurately embody or express the good.”²⁰⁵ What does this mean in the context of tax law? It seems to me that it refers both to the fairness of treating like cases alike and to the fairness of providing individual justice. Mathematical rules may treat like cases alike but only on the basis of a narrow measure of likeness. For this reason individual fairness may be significantly lacking under a mathematical rule. Thus, heavy reliance on mathematical rules is likely to undermine the legitimacy of tax law.

Tax language and, more generally, the English language communicate shared meanings to those of us who employ them. These shared meanings allow us to employ language to constrain decisionmakers’ choices in tax cases. However, language always poses problems for the administration of the tax laws no matter how one attempts to use it. If we use broad terms, the statute is ambiguous on its face. Even if we use terms of art, they still may contain different nuances of meaning for different persons. If we use elaborate definitions we can become so bogged down in detail as to lose all track of where we are going. And, if we use mathematical rules, we lose ground in the effort to be fair. As Rosanne Rosannadanna used to say, “it just goes to show if it isn’t one thing it’s another. There’s always something.” How important this “something” is will vary from case to case. But we may reasonably conclude that at least a significant minority of indeterminate cases are likely to arise in a tax system that eschews comprehensive arbitrariness.

D. The Role of Judicial Interpretation

Whatever approach we choose toward the drafting of rules, the final arbiters of their meanings are the judges. Any discussion of the role of judges in the indeterminacy debate tends to mingle concepts of practical indeterminacy and theoretical indeterminacy. The law may be practically indeterminate because the judge fails to understand it, or to apply it correctly, or because the judge misunderstands or deliberately distorts the facts. The law may be theoretically indeterminate because it supports more than a single outcome and the judge must choose between right outcomes.²⁰⁶

205. Singer, *supra* note 30, at 26 n.78.

206. With respect to both practical and theoretical indeterminacy in tax law, a recent statistical analysis offers some suggestive information. Researchers found by reviewing all regular tax court decisions for a five year period that seven tax court judges were biased in favor of taxpayers, nine were biased in favor of the IRS, and six other judges were described as neutral.

Interacting with the forces of indeterminacy is the interpretive perspective the judge brings to her role.²⁰⁷ But just how interpretive perspective effects law's theoretical determinacy is open to debate. It is tempting to assume that law is more theoretically determinate when interpreted literally rather than in a purposive fashion.²⁰⁸ This is because, as discussed later, rules, if they do anything, block out factors from consideration by the decisionmaker in reaching her decision. Rules are likely to block out more factors from consideration when applied literally than when applied so as to effectuate some perceived or assumed underlying reason for the rule's existence. This is because any formulation of the rule's purpose is likely to be more general and less canonical than the rule itself.²⁰⁹ However, it is possible to believe

See B. Anthony Billings et al., *Are U.S. Tax Court Decisions Subject to the Bias of the Judge?*, 55 TAX NOTES 1259, 1263-65 (June 1, 1992). The study examined the decisions for the 1980-85 period. It should be added with haste that even those seven judges found to have a pro-taxpayer bias still decided in the favor of the Internal Revenue Service (IRS) from forty to fifty-nine per cent of the time, and only two of the pro-taxpayer judges decided for the IRS less than half the time. *Id.* at 1265, tbl. 5. The judges who were deemed neutral decided in the Service's favor around sixty-five per cent of the time. *Id.* Judges who were deemed pro-IRS decided in the Service's favor roughly seventy to seventy-five per cent of the time. *Id.* Unfortunately, the study tells us little about why these differences exist. The researchers merely say:

the Tax Court may not be fully accomplishing its function as the unbiased arbiter of the federal income tax laws. Several factors may account for differences among the judges. These factors include the background or attitudinal disposition of the judge. In addition, Tax Court judges are selected from various sources including the IRS and tax practice. Quite possibly, pro-IRS judges are those selected from within the IRS and pro-taxpayer judges are those selected from tax practice. We did not, however, test for this possibility because of incomplete data.

Id. at 1263-64. The existence of the differences described in the article suggests that the tax law sometimes means different things to different people. Whether those differences of meaning result from errors or other indicators of practical indeterminacy or from theoretical indeterminacy is not known.

207. A further complexity is the interpretive perspective one may bring to reading the judge's opinion in the case. For instance, in recent years legal scholars have offered a variety of perspectives drawn from nonlegal sources for interpreting judicial opinions. *See* Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining The Assumptions of Interdisciplinary Scholarship*, 41 DUKE L.J. 191, 192-95, 244-71 (1991). Professor Collier downgrades the importance of this scholarship on the grounds that "[h]umanistic-style theorizing, which takes judicial opinions as its underlying basis, is . . . limited by the inherently modest and rapidly dwindling claims that the work-product of the judiciary can make on our intellect." *Id.* at 271. It is not my purpose to go so far afield in search of new and confusing perspectives because it is my conclusion that they are plentiful enough close at hand.

208. As Solum points out, doctrine could be viewed as determinate while we continue to argue about whether that determinate doctrine is justified. On the other hand, "if (as is often the case) the justification for a rule is used to guide its application, indeterminacy of justification will lead to greater indeterminacy of legal outcomes." Solum, *supra* note 30, at 467.

209. Schauer expresses a similar idea this way: "[t]he language in which a rule is written and the purpose behind that rule can diverge precisely because that purpose is plastic in a way that literal language is not." Schauer, *supra* note 1, at 532. He goes on to argue that the lack of a single canonical formulation of purpose allows it to be stated at various levels of abstraction that

in a non-literal interpretive perspective while still holding to the view that law is largely determinate. In part this is because one's interpretive perspective is intimately connected with one's view of what constitutes law. One may concede that "black letter law" is often indeterminate and yet argue that law as a whole is predominantly determinate because there is more to law than written rules.²¹⁰ From this perspective, principles of interpretation and theory are part of the fabric of law, and when their application yields a single correct legal outcome the law is determinate.²¹¹ A likely indeterminist response to this contention is to argue that principles of theory and interpretation are as indeterminate as black letter law, because just like black letter law, principles of theory and interpretation gain their expression through language. As already discussed, indeterminists believe that language is indeterminate.²¹²

Belief in law's determinacy need not be based on a narrow or literal perspective of what constitutes law. A determinist does not necessarily endorse specificity in rule drafting as a primary source of legal determinacy. Instead, he may argue that a broadly worded rule may be determinate because of the way in which sound principles of legal reasoning can require the rule be interpreted in a given context.²¹³ In this fashion a determinist reconciles determinacy with fairness while avoiding arbitrariness.

Contrary to this view, the elaboration approach to tax rule making seems to accept the indeterminist's view that theory and principles of interpretation are insufficient to render tax law determinate. But rather than accepting, therefore, that fair law is inherently indeterminate or that determinate law is inherently arbitrary, the elaboration approach seeks to escape indeterminacy and unfairness through greater and greater specificity in the black letter law. This approach to the drafting of rules seeks to circumvent the entire issue of interpretive perspective by using specificity to render it irrelevant.²¹⁴ But interpre-

permits an infinite regress so that in the end "[t]he view that rules should be interpreted to allow their purposes to trump their language in fact collapses the distinction between a rule and a reason, and thus loses the very concept of a rule." *Id.* at 534.

210. Kress argues that even if black letter law is indeterminate, still the law may be made determinate by the application of "nonrule standards." Kress, *supra* note 4, at 320-22.

211. See Barnett, *supra* note 51, at 619 (describing Ronald M. Dworkin's analysis from *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967)).

212. See *supra* note 151 and accompanying text.

213. Both Greenawalt and Kress share this view though they explain their positions differently. See *supra* note 159; *infra* note 226.

214. Another approach might be to mandate a single interpretive perspective, then perhaps we could make the written words of the law more or less determinate as we choose. Greenawalt believes that our legal system does impose an interpretational perspective on judges, but he is

Justifying Simplification in Tax Law

tive perspective is not so easily avoided because even the plainest of rules must be applied with at least a modest sense of its context and purpose in order to be applied well.²¹⁵ Once this camel has its nose under the tent there's no telling where it may end up.

Non-literal judicial interpretations are commonplace in the law of taxation.²¹⁶ Consider, for instance, the judicial approach to reading section 368(a)(1)(A). This provision defines what is known to tax lawyers as the "A reorganization" as "a statutory merger or consolidation."²¹⁷ Classification of the merger of two corporations as an A reorganization has dramatically different tax consequences from those that would flow from treating the merger as not constituting an A reorganization. An A reorganization is largely or totally tax free. A failed A reorganization is taxed at the corporate and shareholder levels like a liquidation.²¹⁸ Through case law it has become well established that a valid statutory merger is not an A reorganization if the shareholders of the merged corporation do not maintain sufficient "con-

rather vague as to its terms. Greenawalt, *supra* note 3, at 83–85. This leaves aside for the present the question of whether we want the law to be more determinate than it is. We may wish to embrace indeterminacy as the means to greater justice rather than as an obstacle.

215. This was part of Professor Fuller's response to Professor Hart's distinction between core meanings and penumbral meanings of words. See Fuller, *supra* note 29, at 661–69. Hart it will be recalled contended that "general words" have a "core of settled meaning." Hart, *supra* note 29, at 607. Such a word "must have some standard instance in which no doubts are felt about its application." *Id.* "[B]ut there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out." *Id.* To illustrate his ideas, Hart used the example of a rule which forbids the taking of a "vehicle" into a public park. He asserted that this rule obviously applied to automobiles, but questioned whether it applied to bicycles and roller skates. *Id.* Professor Fuller challenged whether even so simple a rule could be applied in all cases without some mindfulness of its purpose. He asked,

[w]hat would Professor Hart say if some local patriots wanted to mount on a pedestal in the park a truck used in World War II, while other citizens, regarding the proposed memorial as an eyesore, support their stand by the 'no vehicle' rule? Does this truck, in perfect working order, fall within the core or the penumbra?

Fuller, *supra* note 29, at 663. Schauer argues that Fuller "fail[s] to distinguish the possibility and existence of meaning from the *best* or *fullest* meaning that might be gleaned from a given communicative context." Schauer, *supra* note 1, at 526. In other words, Schauer contends that the truck clearly falls within the core and would be excluded from the park by a literal reading of the rule. But he recognizes that use of the rule in this fashion may be inappropriate in this context. I agree with both points and conclude from them that some sort of purposive analysis is always appropriate in the application of rules.

216. See Zelenak, *supra* note 161, at 624 (noting that in the preceding four years the U.S. Supreme Court had decided at least three tax cases by adopting a non-literal interpretation of the Code). "[T]he Supreme Court has explicitly and repeatedly stated that it is sometimes appropriate to interpret statutes in a manner inconsistent with their literal language." *Id.* at 631.

217. I.R.C. § 368(a)(1)(A) (West 1992).

218. See generally BORIS I. BITTKER & JAMES S. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶¶ 11.01-11, 14.30-36 (1987).

tinuity of interest" in the successor enterprise.²¹⁹ The continuity of interest requirement is neither expressly nor implicitly a part of the statutory language. The requirement is a purely judicial creation which finds its justification in an analysis of the underlying purpose of the reorganization rules.²²⁰ Thus the rule is given a meaning that has no apparent basis in the language employed in it. This illustrates that even the most simple and direct sort of rule may leave room for judicial interpretation in its application. The judge's interpretive approach can range from a focus on social justice or legislative intent to the most literal possible interpretation of the statutory language.²²¹ No matter which approach the judge chooses, she is exercising judgment based on something more than the words of the rule itself.²²²

The degree of theoretical indeterminacy of any particular rule may be impacted by the judge's interpretive perspective, but the nature and direction of that impact is difficult to gauge. One conclusion we can offer is that the more broadly we conceive the judge's interpretive role in applying the law to a particular case, the less determinate the words of the statute standing alone become. But whether law itself is rendered more indeterminate is unclear. Moreover, even supposing we felt that broad interpretive approaches by courts contribute to indeterminacy and should be curtailed, how could this be done? One approach might be to enact rules of construction such as, "the tax laws shall be construed with no regard for their underlying purposes." While there are a great many tax specific rules of construction,²²³ this particular one seems an unlikely candidate for immortality since it nearly disavows the goal of fairness.

As noted earlier in this Article, many of the recent tax regulations seem to be shaped around a fear and distrust of unembellished general rules and the assumed indeterminacy (or judicial discretion?) they gen-

219. See, e.g., *Southwest Natural Gas Co. v. Commissioner*, 189 F.2d 332 (5th Cir.), cert. denied, 342 U.S. 860 (1951).

220. *Id.* at 334.

221. See Greenawalt, *supra* note 3, at 46-48, 73-75.

222. Even if the judge chooses to be literal in her approach to the statute, has she not chosen an interpretive perspective? We might also wonder what it really means to have a literal approach. Some approaches are more literal than others. Professor Zelenak argues that even when one adopts what he calls a "meaning" standard of statutory construction (i.e. we look to the statutory language alone for its meaning) as opposed to an "intent" standard, non-literal interpretations of the Code are still supportable because the language must be understood in terms of the context in which it appears. "Even under a meaning-based theory of statutory interpretation, the context in which the particular words to be interpreted appear may be so powerful as to indicate that the words must be given a meaning that, taken literally, they will not bear." Zelenak, *supra* note 161, at 637.

223. See SUTHERLAND STATUTORY CONSTRUCTION ch. 66 (4th ed. 1974 & Supp. 1986).

erate.²²⁴ The question is, can more elaborate and specific provisions render the law significantly less indeterminate or vulnerable to interpretation? Given that interpretive perspective is difficult to control and to predict, an optimistic view is not easily sustained. However, as discussed earlier,²²⁵ it is probably correct to say that elaborate rules encourage a literal approach to their construction since their complexity implies completeness. Assuming that a literal approach to interpretation can somehow be pressed upon judges, the question then becomes whether a literal approach to interpreting tax rules is desirable. For my part, I am inclined to think that sometimes a literal approach is desirable and sometimes it is not. It depends on the case. Thus, I accept that the black letter rules do not *and should not*, by themselves, encapsulate the tax law. Our interpretation of tax rules is informed by context, by reason, by general principles and by history. If we want to apply our rules fairly we must allow that the black letter rules by themselves are often indeterminate even if the law in a broader sense is not indeterminate.²²⁶ If this is so, then the rule-minded approach to lawmaking embodied in the current tax code and regulations is destined to fail to achieve its goal of a coordination Shangri-La²²⁷ because no matter how many rules we write we cannot eliminate the need for human judgment in their application.²²⁸

224. See *supra* part III.C.

225. See *supra* part III.E.

226. Kress seems not to disagree with this view. He says: “[i]f it were true that law encompassed only black-letter rules, there might well be radical indeterminacy. The use, however, of nonrule standards in legal argument substantially reduces indeterminacy.” Kress, *supra* note 4, at 322. By “nonrule standards” he means legal directives which are cast in forms that “require discretionary policy judgments in their application.” *Id.* at 308.

227. This view is consonant with Professor Zelenak’s conclusions about the matter of non-literal interpretations of the tax code. He wrote:

The Internal Revenue Code constantly generates problems of nonliteral interpretation, yet the courts have failed to develop a consistent approach to such problems The signals from the Supreme Court are hopelessly confused [T]here is no formula that will reveal whether, in a particular case, a court should adopt a literal or a contextual interpretation of the statute.

Zelenak, *supra* note 161, at 674–75. He goes on to conclude that non-literal interpretations are sometimes justified and sometimes not. What to do in any given case is a matter of judgment. *Id.* at 675.

228. This is an idea that traces its roots at least as far back as Aristotle. In distinguishing equity as a kind of justice, he said:

[T]he equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absolute statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, viz. that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite the rule is also indefinite

*E. Structural Aspects of the Indeterminacy-Determinacy Dichotomy**1. Tax Law as a Closed and Complete System and the Nature of Rules*

One way to counter some of the doubts concerning tax law's determinacy raised by the discussion of language and interpretive perspective is to assert that rules can function as a closed system. This connects with a belief, common among tax professionals, that tax law is more precise than other areas of law. Thus, whether or not we concede that other areas of law suffer from a high degree of indeterminacy, we may still believe that tax law is largely determinate. Surely those thousands of pages of code sections and regulations that we all study so assiduously must mean something.²²⁹ In short, we may be inclined to believe that the fuzziness inherent in other areas of law results from a lack of effort on the part of those who write and make those laws or from some fundamental imprecision in the particular subject area. We may think that tax law by its nature lends itself to precision²³⁰ and that the length and detail of the tax law acts as a bulwark against indeterminacy.

The short response to such an assertion is to argue that just the opposite is true; the precision of tax law is more chimerical than real. Although the bottom line is expressed in dollars, the means by which the bottom line is derived is, like any other area of law, through the application of rules to actual events. The more rules we have to draw upon, the more arguments we can construct in favor of one result or another.²³¹ The more elaborate we make the law, the more opportunities the judge has for finding something in it to support the result he chooses. Thus, the more law we write, the more indeterminate it becomes.

ARISTOTLE, *Nicomachean Ethics*, in 2 THE COMPLETE WORKS OF ARISTOTLE 1796 (Princeton Univ. Press 1984).

229. Tax professionals may be a self-selected group of legal determinists. How could anyone without a natural bent toward rule mindedness be a tax lawyer?

230. The essential focus of civil tax law, at least, always employs United States currency as its measuring device. This is a relatively precise concept as compared with, say, the concept of proximate cause in tort law.

231. See D'Amato, *supra* note 2, at 177-78. Former Stanford Law School Dean, Bayless Manning, contrasted the tax code with the United States Constitution and concluded that although they took opposite approaches to the law—microscopic versus telescopic—they both achieved the same end: “[p]ervasive ambiguity and unending litigation.” Bayless Manning, *Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on Section 385*, 36 TAX LAW. 9, 12 (1982). Dean Manning's work was brought to my attention by the writing of Gordon D. Henderson. See Henderson, *supra* note 19. By “hyperlexis” both Manning and Gordon were referring to what they perceived as a regrettable tendency to overelaborate the law. See Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977).

A tax formalist response might be that this argument overlooks that tax law, unlike other areas of law, is more like a closed, logical, and complete system of thought. A formalist would argue that the rules we devise proceed from higher rules in a clear and orderly progression. Logically, then, the more rules we devise, the more fully determinate the law becomes as every conceivable combination of relevant circumstances is addressed proceeding from the general to the specific.²³² For instance, the gratuitous transfer taxes²³³ may be regarded as a closed and complete system²³⁴ founded on a limited number of central principles from which all other rules are derived.²³⁵ Those central principles might include: all gratuitous transfers of wealth should be taxed at the same rate no matter the form of the gift, and all property should be taxed at least once each generation. Of course other principles can be conceived of as well. The estate tax²³⁶ may be seen as an application of those central principles to gratuitous transfers at death. One rule establishes the paradigm case for the estate tax, that is, property owned at death which the decedent is able to pass on to others is subject to the estate tax.²³⁷ Other rules embellish this rule by adding that property in which the decedent had an interest similar to ownership is also subject to taxation in the decedent's estate as if he had owned it at death.²³⁸ The regulations flesh out in more detail the sorts of property interests that are similar enough to ownership to justify

232. Kress suggests that a multiplicity of rules does not necessarily lead to increased conflict between rules as long as the rules are confined to mutually exclusive areas. Kress, *supra* note 4, at 309 n.104. Conversely, he suggests that having fewer rules of broader scope may lead to more frequent conflicts. *Id.* at n.105. I should note that Kress does not consider himself a legal formalist. Instead, he argues for a theory of law that envisions "a middle ground between formalism and radical indeterminacy." *Id.* at 329. If I take the liberty of describing views propounded by Kress as being "formalistic," I mean this only in a relative sense, and I do not intend to use the term pejoratively.

233. I include here the estate tax, the gift tax, and the generation skipping transfer taxes.

234. Schauer distinguishes between closed systems and complete systems by defining a closed system as one "whose operations require recourse only to the norms of the system and to accepted linguistic and observational skills." Schauer, *supra* note 1, at 535. A complete system addresses all possible questions arising within the system. *Id.* at 536. A closed and complete legal system, consequently, is one which is capable of resolving all questions arising within it solely by reference to the pre-existing rules of that system.

235. There has been a good deal written about making the transfer taxes even more structurally unified and coherent. See, e.g., Harry L. Gutman, *A Comment on the ABA Tax Section Task Force Report on Transfer Tax Restructuring*, 41 TAX LAW. 653 (1988); Edward C. Halbach Jr., *An Accessions Tax*, 23 REAL PROP. PROB. & TR. J. 211 (1988); American Bar Association Section of Taxation Task Force on Transfer Tax Restructuring, *ABA Report on Transfer Tax Restructuring*, 41 TAX LAW. 395 (1988).

236. I.R.C. §§ 2001–2056A (West 1992).

237. See *id.* § 2033.

238. See *id.* §§ 2034–44.

treating the decedent as if he owned the property at death. The result is a descending spiral of greater and greater specificity until all uncertainty has been removed.

There are a number of objections that can be made to the proposition that tax law represents a closed, logical, and complete system. The most obvious argument is to contend that possible factual variations are so numerous that the rules cannot anticipate them all. Therefore, even if the system is closed, it is still incomplete. The income tax seems particularly susceptible to this objection.²³⁹ Another line of attack is to assert by analogy to certain mathematical theorems that tax law and all other systems of rules are inherently incomplete and subject to self-contradiction.²⁴⁰ A simple example of this line of attack is provided by the possibility that the existing rules, even if they are determinate as presently written, can be revised retro-

239. See *supra* note 20.

240. See, e.g., John M. Rogers & Robert E. Molzon, *Some Lessons About the Law from Self-referential Problems in Mathematics*, 90 MICH. L. REV. 992 (1992). Professors Rogers and Molzon analogize legal systems to axiomatic systems of mathematics and, by extending that analogy, argue that Kurt Godel's Incompleteness Theorem has implications for legal systems similar to its implications for mathematical systems. *Id.* Godel "proved that if a number theory system's set of axioms is complex enough to include simple arithmetic, then there are true statements within the system that cannot be reached using the axioms and rules of the system. In other words, he proved that such systems have formally undecidable propositions." *Id.* at 993. The incompleteness of such systems arises from the capacity for paradox that lies in the capacity for self-reference. But to understand this statement one must understand the distinction between formal language and metalanguage. *Id.* at 994. In the legal context, formal language is made up of the substantive rules of law and metalanguage is composed of the rules for creating and changing the formal rules. *Id.* at 1002. A simple example of the way in which formal language and metalanguage can operate to confuse even an apparently coherent system is provided by a hypothetical corporation's articles of incorporation. Suppose that the articles provide that only approval by two-thirds of the shareholders can authorize an increase in the salaries of the directors. Suppose further that the articles have provision for their own amendment by approval of a simple majority of the shareholders. A question that might arise in such circumstances is whether a simple majority could amend the articles by changing the required shareholder approval for director's raises from two-thirds to a simple majority. If so, then a simple majority could approve director's raises despite the rule requiring two-thirds shareholder approval for such raises by the intermediate step of such amendment. In this example, the interaction between metalanguage and formal language has undermined the determinacy of the formal language. But the incompleteness of a legal system capable of self-reference goes beyond such confusions between formal language and metalanguage. It also relates, for example, to problems of self-reference at the metalanguage level alone. Suppose, for example, Congress were to enact a new code section and include in it a provision stating that "this section shall not be subject to congressional amendment." Can the current Congress prohibit statutory enactments by a future Congress? Put differently, can the metalanguage restrict the metalanguage by self-reference? The answer cannot be found within the metalanguage itself. But perhaps we can refer to some higher language (meta-metalanguage?) to resolve our question. The extent of indeterminacy established by these problems of self-reference is debatable. Rogers and Molzon seem to believe that these problems do not threaten the overall integrity of the legal system. *Id.* at 1016-21.

actively.²⁴¹ Any system of rules that is capable of self-reference is capable of self-distortion. As already discussed, another way to challenge the closed system theory is to argue that since tax law gains its expression through language, the meanings of tax rules are inherently uncertain because words lack clear determinate meanings.²⁴² The related argument, also addressed earlier, is to contend legal indeterminacy arises because people have different perspectives concerning the degree of latitude the decisionmaker may take in interpreting the rules.²⁴³ These last two arguments, as we have seen, present very real challenges to tax law's determinacy.

From a structural perspective, the problem of completeness is common to all legal systems. Typically this problem is addressed by the use of deliberate generality in the norms employed.²⁴⁴ The vagueness of such norms permits interpretation of them by reference to contextual matters occurring outside the legal system. For this reason, the more vague the norms employed, the less closed the system becomes. "Thus, legal systems often reject closedness because they must deal with a large array of problems presented by a complex and fluid world."²⁴⁵ In tax, this correlates with the social context approach to rule making which employs broadly worded rules whose precise meaning is worked out in various contexts as cases arise. But, as discussed earlier, the elaboration approach that now characterizes so many tax rules rejects vagueness in favor of specificity.²⁴⁶ Thus, it seeks to maintain the system as a closed one. It also seeks completeness through great elaboration. Under this approach completeness arises, if it arises, through specific anticipation of all possible factual variations of legal consequence prior to their arising.

It seems doubtful that the tax rule makers can, in fact, anticipate the future as fully as the elaboration approach requires in order to be complete. Many transactions and other events of tax consequence are easily shaped by astute planners. Property can be carved up into many oddly shaped pieces and then passed from hand to hand in the most circuitous fashion.²⁴⁷ The variations seem almost endless. To fairly address in advance all those variations each with its own specific rule

241. See I.R.C. § 7805(b) (West 1992).

242. See *supra* part IV.C.

243. See *supra* part IV.D.

244. Schauer, *supra* note 1, at 536.

245. *Id.*

246. See *supra* part III.C.

247. Consider, for example, estate freezes, those mechanisms for transferring value out of one's potential estate while avoiding estate and gift taxes. There were over one dozen general formats for estate freezes and many possible variations within those formats. See Byrle M.

seems both hopeless and perhaps even ridiculous. But even more importantly, the effort to achieve completeness through elaborate specificity misses a major point of having rules in the first place; rules, if they do anything, cut back on the factors that the decisionmaker is permitted to consider in rendering a decision.²⁴⁸ Rules are *supposed* to be arbitrary.

Rules restrict the discretion of the decisionmaker by limiting the facts she may consider and by delineating her choices of action in any given case. Thus, there is an element of arbitrariness inherent in the very concept of a rule. Schauer asserts,

[r]ules *block* consideration of the full array of reasons that bear upon a particular decision in two different ways. First, they exclude from consideration reasons that might have been available had the decisionmaker not been constrained by a rule. Second, the rule itself becomes a reason for action, or a reason for decision.²⁴⁹

If Schauer is correct on these points, then rules work by reducing the decisionmaker's ability to be completely fair in any given case. By their very nature rules are incongruent with the apparent goal of specific preplanned fairness adopted by the elaboration approach because "a rule-bound decisionmaker, precluded from taking into account certain features of the present case, can never do better but can do worse than a decisionmaker seeking the optimal result for a case through a rule-free decision."²⁵⁰

It is the inherent insensitivity of rules to factors that might otherwise be relevant in reaching a fair decision that lend them their rule-ness, that give them their determinacy. Thus, there is a certain irony in seeking to escape arbitrariness through ever greater elaboration of the written rules. Consider this irony in the context of the passive activity loss rules contained in section 469²⁵¹ and in its accompanying regulations. Section 469 divides tax losses into two categories and treats one of those categories of losses, passive losses, as inferior to the other.²⁵² It distinguishes between these two categories on the basis of a single factor, the degree of participation of the person claiming the loss in the activity generating the loss.²⁵³ The purpose in drawing this

Abbin, *The Value Capping Cafeteria—Selecting the Appropriate Freeze Technique*, 15 U. MIAMI INST. ON EST. PLAN. §§ 2000-15 (1981).

248. Schauer, *supra* note 1, at 536.

249. *Id.* at 537.

250. *Id.* at 542.

251. I.R.C. § 469 (West 1992).

252. *Id.* § 469(a)(1), (c).

253. *Id.* § 469(c), (h).

distinction was to put an end to tax shelters. These shelters were thought to be generating tax losses that were not real economic losses. In short, the passive activity loss rules rested on an analogy between passive losses and unrealized losses. It has been amply demonstrated by others that, as a whole, the passive loss category is both underinclusive and overinclusive of the types of losses that were the intended target of the provision.²⁵⁴ Nonetheless, that is how the general rule does its job; it looks at one factor to the exclusion of other factors, and on the basis of that one factor it makes a determination about how a particular loss is treated. What could be more arbitrary? Does it make sense in such a context to write hundreds of pages of additional rules in an effort to make this arbitrary rule operate fairly? Strangely enough, the answer is both yes and no.

Just because rules contain an element of inherent arbitrariness does not mean that some rules are not more fair than others. The rules expounding upon section 469 can to some extent alleviate or exacerbate the unfairnesses that will come about under the main rule's operation. Thus, exceptions to the main rule²⁵⁵ may relieve some of the unfairness of the main rule by rendering it less overinclusive. But the distinctions drawn by the subsidiary rules will often have the same arbitrary quality as the main rule.²⁵⁶ To the extent the modifying rules are not arbitrary they are likely to be vague, such as by making reference to some sort of facts and circumstances test.²⁵⁷ In this way, each new rule can introduce new elements into our understanding of the main rule that make it more fair or less fair, more arbitrary or more uncertain in its operation. The subsidiary rules can only operate to counter the arbitrariness of the main rule without loss of overall determinacy by employing equally arbitrary exceptions. The alternative is to employ exceptions that are more vaguely worded than the main rule thereby rendering the main rule less certain of meaning and more open to decisionmaker discretion. No matter how many rules we write we cannot escape this conundrum of either increasing arbitrariness to maintain determinacy or increasing vagueness to permit discretion.

254. See, e.g., Michael A. Oberst, *The Passive Activity Provisions—A Tax Policy Bloop*, 40 U. FLA. L. REV. 641 (1988); Peroni, *supra* note 66.

255. See, e.g., I.R.C. § 469(i) (West 1992) (limited exception for middle income persons who own rental real estate).

256. *Id.* (exception limits losses allowed to \$25,000 with a further limit based on income; exception is only available to owners who "actively participate" and who are not limited partners; other limitations also apply).

257. See, e.g., Temp. Treas. Reg. § 1.469-5T(a)(7) (1991) (material participation determined by reference to "all the facts and circumstances").

The essential arbitrariness of rules is what makes it so tempting to write more and more of them. Being bright and imaginative beings, it is only natural that we can see ways in which each new, inherently arbitrary, rule we write might be embellished upon to render it more fair. If our only job was to write rules in a single narrow area of tax law, we could readily spin out our rule-writing task indefinitely as new permutations and possibilities are made known to us. But if we do this, what happens when the person who is obliged to apply the rules is not the one who wrote them? With the increasing complexity of the rules comes the increasing possibility of mistaken application.

Why do we have rules if they are inherently arbitrary? There are other values besides fairness important to legal systems. Among those values is the fostering of predictability and stability.²⁵⁸ To see rules in this light is to recognize that to some extent fairness and certainty in tax law are antithetical concepts; the presence of one denies space for the other. The elaboration approach is blind to the intrinsic conflict between the goals of fairness and certainty. It is also blind to the problem of error that is introduced by elaborate rule systems.

The social context approach, on the other hand, is more accepting of the conflict between fairness and certainty and seeks a point of balance between these competing values. Under this approach, the rule is written to permit the decisionmaker some discretion in its application so that individual cases can be treated fairly while still restricting that discretion in order to give the public some advance notice of the tax consequences of their intended actions.

The view of tax as a closed system has a certain emotional appeal because it offers the hope for coherence and certainty. There is no doubt that the tax system often pays specific obeisance to the closed and complete system ideal. For example, the estate and gift taxes are partially integrated through the adoption of the unified credit²⁵⁹ and the unified rate structure.²⁶⁰ However, even if we accept that there is a strong resemblance between those tax schemes and a closed logical

258. Schauer, *supra* note 1, at 539–40.

259. I.R.C. §§ 2010, 2505 (West 1992). These two provisions allow for a \$192,800 credit for the first \$600,000 a person may make. The credit may be used during life or at death but it may be used only once. See STEPHENS ET AL., *supra* note 165, ¶ 3.02. The credit, however, does not apply to the generation skipping transfer tax (GST). But each transferor has a \$1,000,000 exemption from the GST. I.R.C. § 2631 (West 1992).

260. See I.R.C. §§ 2001(b)–(c), 2502(a) (1992). The same rate schedule is used for both taxes. Just as importantly, the tax on each gratuitously transferred piece of property is computed with reference to all prior gratuitous transfers so that the aggregate tax paid on all gratuitous transfers will be the same without regard to when the transfers occurred. See STEPHENS ET AL., *supra* note 165, ¶ 2.01.

system, we must admit that ambiguity and uncertainty is a persistent problem within that system as it interacts with the world of real people and their property. An obvious problem is that of valuation of property subject to the tax.

2. *The Valuation Problem*

The valuation problem is epistemological at its foundation. Though we may reasonably believe that the external world we call reality truly exists, we are dependent upon our senses for the proof of this belief. Thus, the beliefs about reality of any individual are necessarily arrived at independently from the beliefs about reality of any other individual. Though we have reason to believe that these independent perceptions of reality are similar, we also have reason to believe that these perceptions are not identical. Just as an object viewed under different circumstances of light and perspective will appear similar but different to the same individual, so too may the same object viewed in identical circumstances by different individuals appear similar but not identical to those individuals.²⁶¹ In tax we usually can skirt the subjective aspects of valuation because the transactions or events at issue may involve cash or property for which there is an established market. But often, especially in the context of the transfer taxes, the indeterminate aspects of value cannot be avoided without resort to arbitrariness.²⁶²

A fascinating case illustrating some of the inherent problems of property valuation and displaying some of the tax planner's legerdemain is *Estate of Harrison*.²⁶³ In *Estate of Harrison*, the tax court was asked to place a value on a decedent's limited partnership interest.²⁶⁴ The partnership was formed shortly before the decedent's death and consisted of three partners, the decedent, and his two sons.²⁶⁵ The decedent contributed property worth approximately \$60,000,000 (all of the dollar figures in the case were stipulated) to the partnership and took back a seventy-seven percent limited partnership interest and a

261. This line of reasoning is described with compelling simplicity in BERTRAND RUSSELL, *THE PROBLEMS OF PHILOSOPHY* (Hackett ed., 1912).

262. We have recently seen a whole new chapter of rules concerning valuation of interests added to the gratuitous transfer rules. See I.R.C. §§ 2701–2704 (West 1992). It remains to be seen how much fairness and certainty they will bring to the law. For some preliminary discussions of these rules and the regulations interpreting them, see Lloyd Leva Plaine & Pam H. Schneider, *Proposed Valuation Regulations Provide Workable Exceptions for Transfers in Trust*, 75 J. TAX'N 142 (1991); Pam H. Schneider & Lloyd Leva Plaine, *Proposed Valuation Regulations Flesh Out Operation of the Subtraction Method*, 75 J. TAX'N 82 (1991). Any reader who considers them closely is likely to be struck with how arbitrary they are in their main features.

263. 52 T.C.M. (CCH) 1306 (1987).

264. *Id.* at 1307.

265. *Id.*

one percent general partnership interest.²⁶⁶ The two sons each contributed property worth approximately \$8,000,000 and took back eleven percent general partnership interests.²⁶⁷ A crucial fact was that only general partners had the right to dissolve the partnership.²⁶⁸ Moreover, the right to dissolve the partnership terminated with the general partner's death.²⁶⁹ Following the decedent's death, his estate took the position that the limited partnership interest was worth \$33,000,000.²⁷⁰ This sum was approximately \$26,500,000 less than the admitted value of the interest while the decedent was living.²⁷¹ The difference in value was attributable to the fact that the limited partnership interest was no longer coupled with the right to force a dissolution of the partnership since the decedent's general partnership interest no longer carried that right.²⁷² Thus, an interest that was claimed to be worth nearly \$60,000,000 the moment before the decedent's death was said to be worth little more than half that figure the instant after the decedent's death.²⁷³ The tax court agreed with the estate because the evidence was uncontroverted that the right to dissolve the partnership was essential to the original value of the limited partnership interest.²⁷⁴ This is understandable. Having one's assets in a limited partnership with no right of dissolution is a bit like having money in a vault for which one lacks the combination. But where did the \$26,000,000 of disappearing value go? It might be thought that it passed to the sons because the aggregate value of the partnership had not been altered. However, the Service had stipulated that the values of the sons' general partnership interests were unchanged,²⁷⁵ and in a sense they were. If either of the sons had exercised his right to dissolve the partnership, all he would have been entitled to for his eleven percent general partnership interest was the \$8,000,000 he had originally contributed. But, assuming the sons inherited the father's limited partnership interest, a dissolution would also cause them to receive \$60,000,000 of assets attributable to that interest. The

266. *Id.*

267. *Id.*

268. *Id.* at 1308.

269. *Id.*

270. *Id.*

271. *See id.* at 1307.

272. *Id.* at 1308.

273. *Id.*

274. *Id.* at 1310. In a sense, the court had no choice because the Service apparently stipulated that if the dissolution right were disregarded the limited partnership interest was only worth \$33,000,000. *Id.* at 1309.

275. *Id.* at 1308-09.

\$26,000,000 had vanished without a trace, and yet it was where it had always been.²⁷⁶

Estate of Harrison appears to some extent to have been a case the Service lost by its stipulations before an unimaginative court.²⁷⁷ But it also illustrates how slippery the question of value can be. Even if the tax system is viewed as a closed one, there are still gaps in the fences.

3. *The Game Analogy*

If the closed system theory of tax is, by itself, inadequate to prove that tax law is largely determinate, it still contributes to our understanding of how tax law works.²⁷⁸ A useful comparison to illustrate both the strengths and weaknesses of the closed system theory may be drawn from another area of human activity that is often artificial and close ended. I speak of the world of games. Consider, for instance,

276. Before attempting to replicate the result in *Estate of Harrison*, one should review recently enacted I.R.C. § 2704. This provision is intended to close the door on such results.

277. I once attended a conference at the University of Montana where S. Stacy Eastland, one of the taxpayer's attorneys in *Estate of Harrison*, spoke about this case. S. Stacey Eastland, Address at the 36th Annual University of Montana School of Law Tax Institute (Nov. 12, 1988). He said that one of the strategies they had employed was to hire all the available reputable appraisers of the type of property in question before the government could hire them. *Id.* Thus, the government may have felt compelled to enter into the stipulations by virtue of being unable to counter the valuation opinions of the taxpayer's experts.

278. Kress approaches the closed system issue from a different perspective than I have employed. He argues that the indeterminist view of law as a "patchwork quilt" does not prove law's indeterminacy. Kress, *supra* note 4, at 303–05. Kress describes the "patchwork quilt" as proceeding from the view that "[d]octrinal materials . . . are the contingent and unstable compromise of ideological struggle among competing social groups and visions." *Id.* at 303. Thus, law is incoherent and contradictory because the forces that produce it are in constant conflict. Kress attempts to deflect this argument for indeterminacy by urging that the contradictory motives of legal actors are not themselves law, and, consequently, "it is not clear why law should be inconsistent simply because some of its motivations are." *Id.* He goes on to borrow from Ronald Dworkin the view that "legal theory attempts to impose order over doctrine, not to discover order in the forces that created it." *Id.* at 304 (citing RONALD M. DWORKIN, *LAW'S EMPIRE* 273 (1986)). In essence, Kress argues that a coherent theory of the law is possible even if we accept that actual motivations of legal actors are incoherent. Thus, he concludes that the "patchwork quilt" view of the law does not prove law is indeterminate. *Id.* at 304–05. This analysis may be seen as failing to offer any compelling reason for caring whether a coherent legal theory is possible. It also veers dangerously close to the view expressed by Singer that "[t]heory expresses our values; it does not create or determine them." Singer, *supra* note 30, at 60. If theory is an after the fact ideational construct rather than a formative force, what is its relevance to the legal system? Theory that neither guides nor explains has the appearance of a useless exercise in sophistry unless we accept Singer's more modest role for theory as simply a means of expression. *See id.* at 63. Kress appears to have recognized the potential for this criticism, because he sought to develop the notion that legal theories can render the law coherent by disregarding some of its contradictory elements. As an example of this he offers the natural law theory that "endorses as legal principles those principles that form part of the best explanation and justification of settled law." Kress, *supra* note 4, at 305 (citing RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* 81–130 (1978)).

that favorite source of analogy, the game of baseball.²⁷⁹ Though there may be degrees of "playing baseball" ranging from the sandlot variety to the major league variety, all those degrees share certain things in common: players, rules, and a playing field.²⁸⁰ Without these things there is no game. The rules make the game and seem to determine how it is won or lost. The rules themselves, however, are often indeterminate, though the degree of indeterminacy is difficult to quantify.²⁸¹

For example, let us say that we are playing "official" baseball. This means we have a regulation size playing field, a written set of rules and appropriately designated officials to enforce the rules. In such a setting, we are as close to a closed system of rules as any taxing scheme. Yet consider how many different ways the rules by themselves fail to be determinative. First, there is the matter of calling the pitches. Though the rules may define what is a ball and what is a strike, it is still the role of the umpire to make the calls. His calls depend on his understanding of the rules and upon his perception of the ball as it crosses the plate.²⁸² Thus, the rules are not determinate of balls and strikes, the umpire is.²⁸³

One might reply that though the umpire calls a pitch a ball, the pitch may still be a strike in another, more objective, sense. The umpire may simply have made the wrong call. This is to say, one may argue that under the rules there was only one "right" call, but the umpire simply failed to make it. If there is only one right call, then in a theoretical sense the rules of the game are determinate even if in a practical sense they are indeterminate. But though the pitch of the ball was an objective fact, does the status of that pitch as a ball or a strike exist independently of the umpire's call?²⁸⁴ Could the pitch have been close enough to the line between ball and strike to have rightly been called either a ball or a strike? Could the definitions of

279. See, e.g., Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987); Winter, *supra* note 30.

280. There may, of course, be great variety in the rules and playing fields being utilized and the degree of sanctity with which the rules are regarded. Moreover, without further specification, those three traits do not distinguish the game of baseball from other games such as the game of football that also employ players, rules and a playing field.

281. Perhaps a radical indeterminist would have no difficulty in classifying the rules of games as totally indeterminate. But for reasons I discuss later, I do not embrace this view. See *infra* notes 286-92 and accompanying text.

282. The rules also depend on his willingness to call the game by the rules.

283. There is another potentially intervening factor, the batter. If he hits the ball, additional rules must be applied.

284. For an interesting treatment of the relationship of factual uncertainties and legal determinacy, see Greenawalt, *supra* note 3, at 42-45.

ball and strike be sufficiently broad to allow some pitches to be rightly called either a ball or a strike?²⁸⁵

If we answer “no” to the first question or “yes” to the second or third, we must concede some degree of theoretical indeterminacy even in so basic a part of the game as the calling of the pitches. This same theoretical indeterminacy is apparent throughout the game because the application of the rules depends on the judgments of the officials. Was the ball fair or foul? Was the ball caught before it hit the ground? Was the runner safe or out?

One should be careful not to overstate the degree of indeterminacy in the rules of games.²⁸⁶ Such rules can have a strongly determinate character as will be discussed in a moment. But at this point I wish to stress that though the rules may tell us what results flow from a determination of fair or foul, of caught or dropped, or of safe or out, the judgment of the official always intervenes between the rule and the outcome. That judgment always depends on the official’s understanding of the meaning of the rules and upon her perception of the actual

285. It is widely recognized, I believe, that different umpires have different strike zones. D’Amato would suggest that different umpires may attribute different core meanings to the word “strike.” Pitchers and batters can probably tolerate this reasonably well as long as each umpire is consistent in calling the pitches according to his own definition of “strike.” Greenawalt, citing the *New York Times*, gives anecdotal evidence that the strike zone in the major leagues has shrunk in recent years. *Id.* at 25. He uses this as an example of the way that shifts in the meanings of words over time can alter the effects of rules.

286. Greenawalt resorts to analogy to games to demonstrate that law can be determinate. *Id.* at 26–28. His example involves the rule often followed in half-court, informal basketball that a member of the defensive team must “take the ball back” behind the foul line before going on offense (i.e., before taking a shot). *Id.* at 26. He contends that when a defensive player takes a shot in front of the foul line or from the corner without first taking the ball back, the rule is clearly determinate. The shot, if successful, will not count. This example is subject to several objections which I discuss in other contexts. In particular, the example is tautological because the facts have been arranged to force a single answer. With apologies to those who find sport analogies tiresome, allow me to elaborate by suggesting some variations on the facts as set out by Greenawalt. Suppose that player A on the red team rebounds a missed white team shot but before she can take the ball back player X on the white team steals the ball back. Must X take the ball back before taking a shot? If A can steal the ball back from X before X shoots, must A still take the ball back behind the foul line before taking a shot herself? The answer becomes more doubtful; the rule is less clear. Or suppose A rebounds a missed shot by white team, dribbles almost to the free throw line, takes a jump shot, and lands behind the free throw line. Do we measure whether A was behind the line by reference to where she jumped from, where she landed, or where she released the shot? Doubtless there are other scenarios one could imagine where the rules seem indeterminate. This sort of nitpicking does not deflect the main force of Greenawalt’s example because one can still argue that in the great majority of cases the rule is determinate and that over time additional rules will develop to address all the possible factual variations that may arise. But when we see how complex the application of even an apparently simple rule can be, it serves to warn us against casual allegiance to determinism.

event as well as her willingness to abide by those meanings and perceptions.²⁸⁷

But there is something more deterministic about the rules of games (and about tax law, by analogy) than thus far admitted. This deterministic aspect of games is that the rules *are an inseparable and definitional part of the game*.²⁸⁸ The rules of the game call the game into being and give it a sense of direction. Some of the rules seem utterly deterministic, such as those that tell us the proper distances between the base pads.²⁸⁹ The rules serve to distinguish one game from another. They are what allow the game to begin and to end. They do not always determine the outcome but they build a fence around the potential outcomes by directing the actions of the participants and by forming the choices from among which the officials may choose.²⁹⁰ Thus, for instance, the baseball rules tell us that the umpire must call the pitch either a ball or a strike, and the rules tell us the consequence of each of those calls. The umpire makes the call based on his reading of the rules and based on his perception of the pitch, but his choices are limited,²⁹¹ and the consequences of his choices are clear. In such circumstances must not we concede that the rules possess some significant degree of determinacy? I think we must. Indeed, our concession may be even greater than that described if our particular game involves few perceptual difficulties.²⁹² I also believe that we must concede some significant degree of determinacy for the rules of tax law.

The rules of tax also define the game. They tell us whether we are dealing with the income tax game or the estate tax game. They tell us the difference between the two. That difference matters in a very

287. This is true whether or not the rule expressly embraces discretion as a component of the rule. One might argue that the indeterminacy arising from the umpire's discretion can be avoided by amending the rule to define "strike" as a pitch that, "in the judgment of the umpire," crosses the plate in the strike zone. Thus, the argument would go, whatever call the umpire makes, it is the rule that determines the outcome because it is the rule that gives the umpire's call the status of law. However, I believe that such an approach is lacking in depth. Whether or not the rule expressly countenances the umpire's discretion, that discretion still exists in the same measure. If discretion equates with indeterminacy, then either version of the rule is equally indeterminate.

288. See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 24-27 (1955).

289. But note the connection between determinacy and arbitrariness.

290. This narrowing of choices has been called "underdeterminacy." See Solum, *supra* note 30, at 473-76.

291. Even in this simple example I am oversimplifying. The umpire could also call a "balk" on the pitch, or he could void the pitch on the grounds that time had been called before the pitch, or he could say the batter "tipped" the ball. Doubtless there are other choices he could make that one more knowledgeable about baseball than I could point out.

292. Consider the game of chess, for example. Does the judging official of a chess match face the same problems of perception as a baseball umpire or a tennis linesperson?

deterministic sense. For instance, after it is determined that we have \$50,000 of taxable income in our possession (perhaps an issue where the law is indeterminate), the amount of tax we are obliged to pay is determined quite mechanically by the applicable income tax rate schedule.²⁹³ Application of the estate tax rate schedule would produce a very different and plainly wrong answer.²⁹⁴ Thus, though we may say that there is no single right legal answer to the amount of our final tax liability, we still may say with certainty that the applicable law makes a difference concerning the outcome and that the difference it makes is in some respects the only legally correct application of the law.

The analogy between the rules of games and the rules of tax law yields mixed results. It serves to remind us of the perceptual and linguistic frailties inherent in any legal system. It also illustrates the dependency of any legal system on the existence of rules. In short, it illustrates that there is a dynamic and unyielding tension between law's determinacy and its indeterminacy. This, in turn, suggests that there is always some degree of indeterminacy in law that no amount of specificity can eradicate.

F. *The Predictability of the Law*

Even a radical indeterminist accepts that there is something predictable about the law.²⁹⁵ Law works in society to prevent chaos. The proof of this is that people believe that law is predictable and act accordingly.²⁹⁶ But how can it be predictable without being determinate?²⁹⁷ One reason for predictability,²⁹⁸ says the indeterminist, is

293. See I.R.C. § 1 (West 1992).

294. See *id.* § 2001(c).

295. See D'Amato, *supra* note 2, at 180. D'Amato calls this the Non-Anarchic Postulate. *Id.*; see also Singer, *supra* note 30, at 19.

296. D'Amato, *supra* note 2, at 181. "Our evidence for popular belief in judicial predictability is the care people take to structure their transactions by taking into account the risk of having them upset by challenges in court. If the risk were wholly unspecifiable, people would not make plans in light of what courts might decide." *Id.*

297. Professor Greenawalt, who is certainly not a radical indeterminist, agrees that law can be predictable without necessarily being determinate. Greenawalt, *supra* note 3, at 35. However, Professor Kress appears to consider the predictability of case outcomes as evidence of law's determinacy. See Kress, *supra* note 4, at 324–25.

298. There are more ways than one to explain the predictability of legal outcomes without conceding the determinacy of the legal rules. These explanations relate to the legal culture judges and lawyers share. For instance, judges may share a common ideology that, if understood, will make their decisions predictable. In some respects judges are politicians whose politics are reflected in their decisions. For more on this sort of explanation of legal predictability, see Singer, *supra* note 30, at 19–25.

that outcomes in cases are arrived at by analogy.²⁹⁹ The determinist might argue that this is a back door admission of law's determinacy,³⁰⁰ or at the least, that law is only underdeterminate.³⁰¹ However, the indeterminist says this is not the case because analogies are indefinite and open ended.

The analogical function of law is the indeterminist's refuge from the threat of chaos inherent in the idea of legal indeterminacy.³⁰² Even if the rules of law do not force a specific outcome in a specific case, they provide a useful framework by which we arrive at outcomes through analogy. This analogical function of law is readily discernible with respect to case law. In deciding whether the ruling in a particular case is applicable to our case, we compare our facts to the facts of an earlier case. If the facts are sufficiently similar we judge that the earlier case establishes a rule of law that is applicable to our case. Thus, to find the controlling rule of law in our case, we must find the case most analogically similar to our own. This search inevitably involves the application of judgment. Moreover, the application of judgment will also involve some of the factors contributing to indeterminacy already discussed such as interpretive perspective and the indeterminacy of language.

A critic of this approach to legal reasoning takes the view that any theory of legal reasoning must encompass much more than this. Kress asserts that "any theory of legal reasoning must have a method for determining which general propositions of law are permissible premises in legal argument and in adjudication."³⁰³ Moreover, he contends that "a theory of legal reasoning must determine which

299. D'Amato, *supra* note 2, at 182. According to D'Amato our ability to analogize is "prior to our ability to learn a language." *Id.* But if we are applying a statute or a regulation to a particular situation, in a sense we must begin with words (i.e., the words of the statute).

300. Kress points out that there are a variety of other explanations that have been offered to explain the predictability of legal outcomes in an indeterminate legal system. Kress, *supra* note 4, at 326-27. These explanations rely on the influence of such factors as "social context, legal culture, institutional roles, convention, or the ideology of the decision maker." *Id.* at 326 (citing Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 21-25 (1984)). In Kress' view these factors inducing predictability may be regarded as elements of "a richer theory of legal reasoning than formalist doctrinal deduction." *Id.* at 327. It follows from this conclusion that these factors are part of the fabric of the law. This means, in turn, that, if they are determinate of legal outcomes, the law is itself determinate.

301. Solum distinguishes between "indeterminacy" and "underdeterminacy." He uses indeterminacy to refer to circumstances where the legal rules place no limits on the outcome ("unbound" decisions) and underdeterminacy to refer to circumstances where the rules limit the possible outcomes but do not force a single result ("rule-guided" decisions). Solum, *supra* note 30, at 473.

302. D'Amato, *supra* note 2, at 182-86.

303. Kress, *supra* note 4, at 320-21.

inferences from the legitimate premises are authorized.”³⁰⁴ And, finally, he contends “a theory of legal reasoning must provide for the prospect of conflicting legal standards.”³⁰⁵ Thus, in Kress’ view the role of analogy in the operation of law is subordinate to matters of greater theoretical concern.³⁰⁶

But the indeterminist is not concerned with theory so much as with practice. In practice, he contends, legal reasoning is based on analogy.³⁰⁷ Reasoning by analogy is prevented from being determinate because such reasoning is inherently judgmental, probabilistic, and perceptual.³⁰⁸ To illustrate, case A resulted in outcome X. Case B resembles case A, thus it should also result in outcome X. But case C resulted in outcome Y and case B also resembles case C. Perhaps case B should result in outcome Y rather than outcome X. The answer depends on which case B most closely resembles on the most legally relevant and most morally significant facts.³⁰⁹ Determinations of simi-

304. *Id.* at 321.

305. *Id.* Kress has been criticized on the grounds of having failed to provide such principles. See Robert J. Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811, 839–40 (1990).

306. Of course, others have questioned whether legal reasoning consists of anything unique to the law. See, e.g., Singer, *supra* note 30, at 65:

When judges decide cases, they should do what we all do when we face a moral decision. We identify a limited set of alternatives; we predict the most likely consequences of following different courses of action; we articulate the values that are important in the context of the decision and the ways in which they conflict with each other; we see what relevant people (judges, scholars) have said about similar issues; we talk with our friends; we drink enormous amounts of coffee; we choose what to do. There is nothing mysterious about any of this.

307. “Reasoning by analogy is said to be the basic way we ‘think like a lawyer.’” D’Amato, *supra* note 2, at 184 (citing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 86–93 (1990); J. M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669, 1671 (1990)).

308. *Id.*

309. Kress engages in a much more elaborate discussion of the role of precedent in the determinacy versus indeterminacy debate. Kress, *supra* note 4, at 297–301. His analysis, in turn, initially derives from Karl Llewellyn’s work, most notably *The Bramble Bush*. Llewellyn sought to establish law’s indeterminacy by showing that past precedents do not control future cases since generally there are at least two contradictory precedents that can apply to a given case. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1960). Kress says that Llewellyn “understates the apparent power of precedential techniques to generate inconsistent rules and outcomes.” Kress, *supra* note 4, at 299. Kress then goes on to illustrate that by reconstructing rules taken from cases into “an entirely novel statement of the rule” we can generate new outcomes and still lay claim to having followed precedent as long as our reconstructed rule “justifies the outcome in all the precedent cases.” *Id.* At this point, Kress seeks to curtail the apparent case for indeterminacy established by his “precedential technique” analysis by showing that there are significant limits upon the application of precedential technique. His chief argument for the position that precedential technique does not produce legal indeterminacy is that both Llewellyn’s precedential technique and the reconstructive technique still must be “restricted to relevant or morally justifiable legal categories.” *Id.* at 301. The weakness of this position lies in the indeterminate meanings of the words “relevant” and

larity and dissimilarity call for judgments that most persons might agree upon but which all persons would never agree upon. Determinations of relevancy and morality raise the same problem.

It may be supposed that our perceptions of similarities are themselves similar but not identical because they are filtered through the prisms of our own experiences and faculties of perception. Moreover, our understanding of language is similar but not identical to the understanding of others. Thus, when we read a statute or listen to a witness, we understand the words that are read or heard in a similar but not identical manner. In sum, there is some probability that another person (the judge) will agree³¹⁰ with our assessment of the relative similarities between case B and cases A and C, but there is no certainty that this will be so. The cases help us frame and argue the question before the court. They do not decide the outcome, the judge does. No matter how the judge decides the case, some of us may think her decision is right and some of us may think her decision is wrong. So says the indeterminist.

Sometimes we may conclude that no case is sufficiently like our own to provide clear precedent. Even in this circumstance (perhaps even especially in this circumstance), a resolution of the case will rest on analogy. But now the analogy will involve a more consciously abstract quality because the absence of clear precedent grants us greater apparent authority to make law rather than find it.³¹¹ This abstract form of analogy involves seeking the essence of our case.³¹²

"morally justifiable." It is arguable that Kress is seeking to assume away the indeterminacy inherent in the precedential technique. Certainly this is one argument that D'Amato would make.

For a detailed treatment of precedent in the constitutional law context, see Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991).

310. Or be persuaded to agree. An element of practical indeterminacy inherent in any legal system is the varying quality of legal advocacy from lawyer to lawyer. For example, in a complex tax case before a federal district judge not well versed in tax law, the judge is to some extent at the mercy of the lawyers to present their respective sides of the case adequately. If the lawyers do a bad job of educating the judge, even a good judge may make a mistake. I think this problem is especially acute in tax law because there is so little about tax law that is intuitive or commonsensical.

311. I use the phrase "apparent authority" because an indeterminist would argue that the judge always makes law. Thus, in indeterminist thought, the judge has equal authority to achieve justice in all cases. It seems to me, however, that it is when there is no clear precedent (Who is to judge this? The judge, of course.) that our system most clearly accepts as an un concealed principle that the judge must make law. In such cases the judge must make law because she is required to decide the case. Even here, of course, one may argue that the judge must be guided by broad principles of law relating to such things as fairness and equity.

312. Of course, we are always forced to decide the level of abstraction appropriate to the particular case. Kress alludes to this problem and, citing several authorities, describes it as the

By this I mean we must find those central facts that somehow show us what the case is finally about.³¹³ We must do the same thing with the possible precedent cases. In this way we can arrive through analogy at a policy decision as to what the law should be in our present case. This process of concentrating the cases into their essences in order to reach an ideal abstract analogy is highly judgmental and, thus, it is highly indeterminate. It is also, quite significantly from a tax perspective, one way in which we apply statutes and regulations to cases.

A statute differs from a rule of law stated in a case in that the rule in a statute has no overtly recognized specific factual context.³¹⁴ No matter how specifically the statute is drawn, it is still an abstraction because it is not situated in a real historical event. But when we apply the statute to a given case, we necessarily must consider facts in the case that are not addressed by the statute.³¹⁵ Do those facts take us out of the statute or should we disregard those facts? That is a matter of judgment. We can arrive at that judgment by reducing the case to its essence and then comparing that essence to the paradigm case described in the statute. Thus, in a sense the process of applying statutes to cases is like the process of applying cases to cases when there is no obvious precedent. The difference is that the statute has already been subjected to an effort to reduce the law to its abstract essence.

There is another, rather different, way to apply statutes to cases while still relying upon analogy. In addition to reducing our case to its essence, we may try to put flesh on the bones of the statute. Resort to legislative history is a common method of doing this,³¹⁶ especially in the tax field where statutes change so often and case law develops so slowly. Often the legislative committee reports tell us what problem

“problem of determining the appropriate level of generality of the ratio decidendi.” Kress, *supra* note 4, at 299 n.57.

313. I do not mean to say that any one case is only about one thing. A case can address many issues. Moreover, the essence of a case can change with the context in which it is being considered.

314. Statutes do have legislative histories, and I discuss that fact below. See *infra* note 316 and accompanying text. Another distinction that has been drawn between rules found in cases and rules found in statutes is the lack of a single canonical formulation of rules found in cases. Greenawalt, *supra* note 3, at 80. The importance of this distinction for the determinacy debate depends, it seems to me, upon the degree of sanctity one accords to the literal meaning of the words employed in the statute. Thus, one who believes statutes should be applied according to their underlying purposes may feel no more constrained by a statute than by a case rule.

315. The converse may be true as well. The statute may contemplate the existence of facts not found in our specific case.

316. For a recent analysis and criticism of the use of legislative history in statutory construction, see W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992) (criticizing the view that law is legislative intent and arguing against reliance on legislative history to interpret statutes).

was sought to be addressed by the statute or what policy was sought to be forwarded. By considering whether our case involves that problem or policy, we may conclude that either our case is different or like the paradigm case addressed by the statute.

Another way to put flesh on the bones of a statute is to consider the cases that antedate it. Any particular statute may be the codification of the rule of law enunciated in an earlier case.³¹⁷ Or it may overrule a specific case.³¹⁸ If we know that this is so, we may be able to get a better idea of what sort of real world context the statute is intended to address by examining that earlier case. When this is so we are back to the process of comparing cases to cases in search of the best analogy.

All of this discussion of the analogical approach to legal reasoning makes it sound mechanical and perfunctory. In practice it may be both or neither. It is a mere form. Like a dance, it is best judged in the context of a performance. Whether we are moved or persuaded is ultimately determined by the skill and passion of its interpreter. Like law itself, a legal argument is an imaginative enterprise. Are the boundaries of human imagination determinate? But, recognizing its imaginative aspect, the analogical function of the law relied upon by the indeterminist to explain law's predictability does not fully explain the role that law plays in shaping decisions and outcomes. This stems from its failure to adequately capture the artificial and creational nature of legal schemes.

As noted in the discussion of the game analogy, the enactment of a law creates something that did not exist before.³¹⁹ This is true of all laws, but it is particularly true of tax laws. Many laws may address some preexisting condition or event within society and may codify some already existing moral imperative within society. However, tax laws tend not to fall into that category. For example, the income tax has no counterpart in reality antedating its enactment in the same sense that a murder statute may be antedated by the act of killing someone and the societal disapproval that act may engender. The tax statute brings the governmental taking into existence, but the murder statute does not bring the act of killing into existence. But it is true that the government could seize the property of its citizens without the enactment of an income tax. So the distinction must be conceded as

317. Compare *General Util. & Operating Co. v. Helvering*, 296 U.S. 200 (1935) with the pre-1986 version of I.R.C. § 336.

318. Compare *United States v. Davis*, 370 U.S. 65 (1962) with I.R.C. § 1041 (West 1992); compare *Helvering v. Bruun*, 309 U.S. 461 (1940) with I.R.C. § 109 (West 1992).

319. See Rawls, *supra* note 288, at 24–29. Rawls calls this “the practice conception” of rules because “rules are pictured as defining a practice.” *Id.* at 24.

one of degree rather than of kind. Still, there is something more artificial and, thus, more creational, about an income tax statute than a murder statute. This stems from the fact that we have less real world context to bring to our consideration of the tax law and to the relative lack of moral content in an income tax scheme.³²⁰

This creational function of the tax law may not make tax law fully determinate, but it forces the decision maker along certain lines of thought. It poses the central questions, and it delineates the possible range of answers. This is so even if we suppose for the sake of argument that tax law is significantly indeterminate. A belief in the partial indeterminacy of tax law does not render the Code unnecessary or irrelevant. Revenues must be raised so that the government may perform its vital and not-so-vital functions.³²¹ The manner in which those revenues should be raised is not intuitive. Without some form of statutory guidance any revenue raising scheme would surely be even more chaotic and unmanageable than the present one. The law builds fences around possible beginnings and endings. Though the tax law shadows economic reality, it also creates its own reality, economic and otherwise.

V. THE PROPER ROLE OF RULES TO ACHIEVE FAIRNESS AND CERTAINTY

A. *Finding the Point of Balance Between Fairness and Certainty*

The tangle of facts, ideas, and theories discussed in part IV does not lend itself to a single conclusion about the connection between tax complexity, tax indeterminacy, and tax fairness. On a practical level, the tax system seems to operate rather determinately. But the precise connection between the systemic outcomes and the nature of the rules we adopt is difficult to trace. It appears certain that rules shape the outcomes, but does it follow that the more rules we have the more precisely we can shape the outcomes? And, more importantly, does it follow that we can prescribe by rule that future outcomes are fair? It

320. I hasten to note that I do not contend that an income tax is an amoral law. The basic justification of enacting an income tax in preference to some other tax such as a sales tax is likely to have moral dimensions (i.e., the supporters of an income tax are likely to think it fairer than a sales tax). See BLUEPRINTS, *supra* note 42, at 35–39. However, if no income tax existed, most of us would not suggest that the citizenry has a moral obligation to pay an income tax anyway. On the other hand, if there were no murder statutes on the books, most of us would still contend that the citizenry has a moral obligation to refrain from killing others.

321. Inscribed over the entrance to the Internal Revenue Service offices in Washington, D.C. are these words of Justice Holmes: “Taxes are what we pay for a civilized society.” See *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927). His point is one that, possibly, even a radical indeterminist would not debate.

often seems that the more determinate rules are, the more prescient we must be if the rules are going to be fair. As long as predicting the future remains an art rather than a science, the drafting of rules must proceed with cautious generality. This injunction gains force when we consider the practical indeterminacy that great elaborative complexity may introduce into a legal system.

To the extent any rule is determinate, that determinacy arises from the way in which the rule restricts our ability to make choices, including fair choices, in individual cases. This means that the aspect of law that renders it certain is also potentially a bar to individual justice. For this reason, the simultaneous effort to achieve both fairness and certainty through great elaboration of the rules of taxation is inherently contradictory. This does not mean that relatively determinate law cannot be fair, but that fairness cannot be achieved mechanically through the use of unbending rules. Instead, often fair rules must leave some room for human judgment in their application.

B. *Legal Realism Revisited*

“Let us end all this confusion by adopting a code. Let us once and for all by statute enact a carefully prepared body of rules sufficiently complete to settle all future controversies.”³²² So begins chapter XVII of Jerome Frank’s *Law and the Modern Mind*. In the pages following, Frank gives a historical rundown of the failure of codes to create clarity and certainty in law. For Frank, the dynamic nature of human society necessitated a dynamic system of law.³²³ He believed code law, like all law, must be “adaptive.”³²⁴ For this reason he warned against “the ‘technicalism’ . . . engendered by code-making [that] creates the false theory that all cases must find their solution in the literal language of the statutes and rules worked out by analogy therewith.”³²⁵

For the tax planner, innovation is the watchword. If tax law is to function fairly by taxing economically similar transactions in a similar fashion, it must remain adaptive to the planner’s innovations. In areas of commercial activity where the planner is free to invent new transactional devices,

comprehensiveness becomes a futile struggle for foresight. The best that can be done is a masterful job in providing for last year’s deals. How the

322. FRANK, *supra* note 29, at 186.

323. *Id.* at 189–91.

324. *Id.* at 189.

325. *Id.* at 190–91.

Justifying Simplification in Tax Law

rules might apply to next year's deals can be no more than a guess. Not even the greatest grand master announces his game plan in advance if his opponent retains the ability to improvise.³²⁶

The desire for legal certainty is understandable, but certainty can easily become a false shibboleth. Though it has avoided such Holmesian pronouncements as “[c]ertainty generally is illusion, and repose is not the destiny of man,”³²⁷ still this Article has noted the improbability of obtaining absolute legal certainty through elaboration of rules. Perhaps the futility of using rules to achieve certainty is as simple as the recognition that “[u]nderstanding rules requires grasping the distinction between the general and the particular.”³²⁸ Moreover, even if absolute certainty were possible, it is not a desirable or necessary element of law. The uncertainty of law is but one aspect of the flexibility it must possess in order to do justice (and to show mercy?) over a wide range of circumstances.³²⁹ As illustrated by mathematical rules, tax law is most determinate when it is most arbitrary. Though the correlation between determinacy and arbitrariness is not absolute, it is suffi-

326. Lawrence Lokken, *New Rules Bifurcating Contingent Debt—A Good Start*, 51 TAX NOTES 495, 504 (1991). Professor Lokken describes three approaches to regulation drafting: “the common law approach,” “the rough-cut approach,” and the “200 page outpouring.” *Id.* The common law approach sets forth general principles illustrated by examples and leaves it to the courts to flesh things out. The rough cut approach is more specific and more arbitrary. The 200-page outpouring prescribes in detail how every conceivable circumstance will be addressed. In general Professor Lokken appears to prefer the common law approach, though he feels “200 page outpourings have their place. If there are a finite number of cases to which a principle might apply (or even a finite number of important cases), Treasury has an obligation to say what the rules are for these cases.” *Id.* With respect to contingent obligations, his specific topic, he concluded:

[A]s with assignment of income devices 60 and more years ago, innovation is the name of the game. The law must be flexible enough so that the IRS and the courts can meet innovation on its own ground. A policy should be set in advance, but the application of the policy should be as open-ended as the imaginations of investment bankers.

Id.

327. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

328. Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 645, 647 (1991).

329. Frank believed that the “demand for exactness and predictability in law is incapable of satisfaction because a greater degree of legal finality is sought than is procurable, desirable or necessary.” FRANK, *supra* note 29, at 11. He saw the search for certainty as rooted “in a yearning for something unreal.” *Id.* He described the widespread belief that law can be certain as the “basic legal myth.” *Id.* at 12. Frank saw the effort to render law “mechanistic” as a serious error proceeding from belief in the basic legal myth. *Id.* at 118–19. “Life rebels against all efforts at legal over-simplification. New cases ever continue to present novel aspects. To do justice . . . abstract preestablished rules have to be adapted and adjusted, the static formulas made alive.” *Id.* at 120.

However, it must be recognized that if we grant that a legal system must be partly indeterminate in order to be fair, we expose ourselves to the claim of creating paradox rather than coherence in our legal theories. *See, e.g.,* Singer, *supra* note 30, at 44–45.

ciently apparent that we should be cautious in pursuing determinacy too closely. Uncertainty has its own "repose" that comes of taking a balanced view of the interaction between law and human judgment. This repose of uncertainty rests upon a sense of confidence that good rules applied fairly lead to just results even though we cannot precisely state where the rules leave off and their application begins in achieving those results.

Taking even a moderate view of legal indeterminacy such as that just expressed,³³⁰ we may wonder whether we have reached a point of diminishing returns in the tax law. Mathematical rules aside, perhaps the most deterministic aspect of the present tax law is that its complexity tends to silence debate outside the circle of those elite few who have some conception of what it says. How can anyone not a partnership tax lawyer herself develop even a modest conception of an area of law such as that addressed by the section 704(b) regulations? The answer is that she cannot without an inordinate expenditure of time and effort. Should we be satisfied to leave these types of matters in the hands of some high priesthood of tax lawyers? I think not.³³¹ If the operation of law is chiefly analogical, the function of law is still justice. Justice is an indefinable value that we think we know when we see

330. Or we could accept Greenawalt's view that law can be determinate under certain circumstances. He concluded:

The application or nonapplication of an authoritative rule or broader standard can be determinate if:

(1) that outcome is indicated by the literal meaning of the standard and no serious reason for different treatment appears in (a) other relevant authoritative standards, (b) the relevant purposes of those involved in the system of which the standard is a part, or (c) the understandings of those who adopted the standard, those who now apply it, or those who are now subject to it; or

(2) despite the absence of a relevant literal meaning, the import of other standards and/or the relevant understandings of those involved in the system of which the standard is a part plainly indicate a result, and no serious relevant reason appears to the contrary.

Greenawalt, *supra* note 3, at 85-86.

331. This may be considered a matter central to law's internal morality. For instance, Fuller argued that clarity is an essential element of good law. FULLER, *supra* note 42, at 39, 43, 63-65. He also recognized that sometimes clarity can only be attained "at the cost of those systematic elements in a legal system that shape its rules into a coherent whole . . ." *Id.* at 45. Fuller concluded that this potential conflict between clarity and comprehensiveness must be resolved through a balancing of interests. "In every human pursuit we shall always encounter the problem of balance at some point as we traverse the long road that leads from the abyss of total failure to the heights of human excellence." *Id.* at 45-46. Professor Eitker once wrote, "if a provision of the Code cannot be understood by a good law student with a grounding in taxation, there should be an irrebuttable presumption that it needs to be re-written." Bittker, *supra* note 195, at 13.

it.³³² Too great a specificity in the law obscures the search for justice by seeming to make the law more deterministic than it is or should be.³³³ It encourages a literal approach to judicial decision making that fosters a greater proliferation of rules to account for the mistakes and inadequacies such literalism will inevitably engender.³³⁴

We need to guard against black letter fever. Who has not, on occasion, read an opinion containing words to the effect that “I know that this result is unfair but the law ties my hands in this matter.”³³⁵ In such cases the degree of specificity in the law has convinced the judge that black letter law rather than human judgment determines the outcome. If we believe that black letter law is not (or should not be) always so narrowly determinate perhaps we should write the law in a way that more clearly embraces the view that the object of the process is the application of judgment to achieve justice. In so doing it seems likely that the law could be less elaborately written and more generally accessible. This does not mean that the answer to a given tax question will become easy because the question may remain theoretically complex. Instead, in such a system the focus is upon achieving balance

332. See Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 397–98 (1985). I would like to say something about justice that sounds less flippant. However, that would be another article. Almost at random I recently came across Hans Kelsen’s effort to define justice. One portion in particular caught my eye, though I am at a loss to explain why unless it is because it is so oblique.

Justice is primarily a possible, but not a necessary, quality of a social order regulating the mutual relations of men. Only secondarily it is a virtue of man, since a man is just, if his behavior conforms to the norms of a social order supposed to be just. But what does it really mean to say that a social order is just? It means that this order regulates the behavior of men in a way satisfactory to all men, that is to say, so that all men find their happiness in it. The longing for justice is men’s eternal longing for happiness. It is happiness that man cannot find alone, as an isolated individual, and hence seeks in society. Justice is social happiness. It is happiness guaranteed by a social order. In this sense Plato, identifying justice with happiness, maintains that only a just man is happy, and an unjust man unhappy.

The statement that justice is happiness is evidently not a final answer; it is only shifting the question. For, now, we must ask: What is happiness?

HANS KELSEN, WHAT IS JUSTICE?: JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE 1–2 (1957).

333. Kress points out that arguably “justice not only permits, but indeed requires moderate indeterminacy” in order to insure the flexibility required to achieve equity in individual cases. Kress, *supra* note 4, at 293.

334. See McMahan, *supra* note 24, at 1447. One may readily decry this mind numbing effect of complexity. Zelenak argues that complexity may justify non-literal interpretations of the tax law by adding meaningful context. Zelenak, *supra* note 161, at 661. If this is so, then in an exquisite bit of irony the condition that calls into being the need for refined judgment also tends to preclude its exercise.

335. I encountered a number of cases of this sort while researching an article on the interaction between state community property law and the federal income tax. See John A. Miller, *Federal Income Taxation and Community Property Law: The Case for Divorce*, 44 Sw. L.J. 1087, 1111–15 (1990).

between specificity in the law and the repose of discretion in the decisionmaker.³³⁶

C. *The Meaning of Law and the Role of Judgment*

The extent to which we view the law as indeterminate is often directly connected to our understanding of what constitutes "the law." If law includes the social context in which a legal outcome is formed, it may be viewed as more determinate than if it is viewed as merely the written rules properly enacted by a legislative body.³³⁷ This point may seem contradictory because one might suppose that the more mechanical we make the law the more determinate it becomes. Indeed much of the current product of Congress and the Treasury seems based on this mechanical view of legal determinacy. However, as already discussed, the fallacy in the mechanical approach to making the law determinate is that the role of human judgment cannot be eliminated.³³⁸ This is particularly true when we are concerned that the law should be fair as well as certain.³³⁹ The more elaborate the legislative scheme, the more effort it takes to simply arrive at the point of judgment because the judgment cannot be accurately formed until the words of the relevant statutes and regulations have been sifted. Though the process of arriving at the point of judgment may have been greatly complicated by the rules, it cannot be avoided or forestalled by those rules. Judgment must still be passed. Thus, the elaboration approach to rule making may actually be more indeterminate in a given case than the social context approach because it arrives at the point of judgment in a more circuitous fashion.³⁴⁰ The uncertain

336. This approach is consonant with the way in which Frederick Schauer claims our legal system largely operates. Schauer argues that rules are often determinate of outcomes in specific cases. This is so because judges treat rules as presumptively controlling. Schauer also asserts that judges are willing to allow the presumptive control of a rule to be overcome in any particular case by a showing that a compelling moral, political or social reason justifies another result. Schauer calls this "presumptive positivism." See Schauer, *supra* note 328, at 665-79.

337. See Kress, *supra* note 4, at 322-28.

338. See *supra* part IV.D.

339. I think it is significant that Kress, who contends law is largely determinate, accepts this view. He says:

Like classical mathematics, law may be ontologically determinate, even if there is no explicit metatheory that 'tells us precisely' what the law is. Unlike mathematical arguments, however, legal arguments do require judgment in the assessment of their validity. (Why else do they call those people in the black robes 'judges?') The exercise of judgment, as Aristotle, Kant, and Wittgenstein clearly saw, cannot be fully characterized in an explicit metatheory."

Kress, *supra* note 4, at 332 (citation omitted).

340. Kress expresses a similar idea this way:

effects of elaborate rules warn us to exercise restraint over our tendency to seek “a rule for every conceivable set of circumstances.”³⁴¹

An immediate response to the foregoing might be that all the rules presently on the books were promulgated for some purpose; to criticize the mountain of rules is of no use in deciding which rules to do away with. This is true. The present day complexity was arrived at incrementally, and any decrease in complexity would also have to be achieved incrementally and usually with some care. To arbitrarily repeal all of the Code after section 1001 would strike no one as reasonable. There is no substitute for good judgment.³⁴² But that is the point, is it not? Judgment is needed to decide cases fairly, not rules alone.³⁴³ Even cases that are not litigated are decided by judgments—the judgments of practitioners, administrators, and taxpayers.³⁴⁴

One might argue that a reduction in the specificity of tax rules would be an invitation to taxpayer abuse. Assuming there is some truth in this line of reasoning, the solution probably best lies in the area of sanctions against those who are ultimately found guilty of such abusive conduct. Rather than making the rules so complicated that even the honest taxpayer is likely to misapply them, we should keep

At some point, the ability to apply rules must rest on some capacity other than mastering rules. This ability, which Kant called judgment (*mutterwitz*—literally, ‘motherwit’ or ‘native smarts’), is a knack for determining whether something falls within the scope of a rule. Once one recognizes the necessity of this separate faculty of judgment, principles of theoretical simplicity and elegance provide strong reasons for not positing any rules beyond [the] first level.

Id. at 333 (citation omitted).

341. Bittker, *supra* note 195, at 11. Professor Bittker makes this point while admitting that it goes against his natural tendencies. He goes on to say, “I regret that the best I can offer by way of prescription is a more self-conscious recognition of our passion for intricate detail and an acknowledgement that elaborate formulations are useless if they cannot be effectively enforced.”

Id.

342. Smith, in setting forth what he calls “The NonReductionist Alternative” says, “[t]he nonreductionist position seems much like that of the ethical philosopher who, when asked how charitable or honest or humble a person should be, always answers: ‘Enough, but not too much.’” Smith, *supra* note 87, at 86.

343. “For all their necessity, rules are in the end only ‘guidelines or rules of thumb,’ or ‘perspicuous descriptive summaries of good judgments;’ they should not be regarded as ‘ultimate authorities against which the correctness of particular decisions is to be assessed.’” *Id.* at 90 (quoting in part from MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 299 (1986)); see also Schauer, *supra* note 328, at 679–83.

344. As Schauer observes, “[t]o the extent that clients follow the opinions or advice of lawyers, lawyers themselves are part of the lawmaking process.” Schauer, *supra* note 116, at 412 n.38. Similarly, Greenawalt notes that the discretionary non-invocation of legal rules by one charged with enforcing the rules can be seen as evidence of legal indeterminacy. Greenawalt, *supra* note 3, at 51. When an auditor fails to challenge a questionable position taken by a taxpayer on a return, the auditor has passed a final judgment.

them more generally worded and then severely sanction the more flagrant abuser. The sanction would oblige those who would like to avoid the rule to obtain a high degree of certainty that they have done so before acting against the strictures of the rule.³⁴⁵

D. *Conscious Creativity*

For me the question of the extent of tax law's determinacy has an indeterminate answer.³⁴⁶ For present purposes it is sufficient to recognize two aspects of law's determinacy. First, to the extent it exists, legal determinacy often is a function of law's arbitrariness. Second, in many cases law's determinacy is not fully realized in the words of statutes or regulations by themselves but lies in our ability to interpret those rules intelligently and with fairness. Thus, a fair tax system is not necessarily a function of great elaboration of the rules.

What, then, should we be doing with our tax code and regulations if we want them to be fair and reasonably certain? As should be clear from what has been said already, there are no formulaic answers. A beginning point would be to "acknowledge the irreducible variety of law and the consequent need for practical judgment. '[R]epeated acts of human judgment at every level of the system . . . [are an] ineluctable necessity.'"³⁴⁷ If we can acknowledge the essential role of human judgment in the application of tax laws, we can accept some retreat from the immense elaboration we now find in the law. We can accept

345. See Schauer, *supra* note 328, at 693-94. This approach is one already embraced in the tax law to some extent. See, e.g., I.R.C. §§ 6662-6663 (West 1992).

346. However, I believe that there is at least a significant minority of cases in which tax law is indeterminate in the broader philosophical sense in which legal indeterminacy was defined at the beginning of this article. I leave the question open just how much further tax indeterminacy extends beyond that significant minority. I confess that I am unwilling, and perhaps unable, to pursue the question any further at this time. I have yet to fully consider many of the other authorities whose writings bear upon the subject. These works are numerous. For instance, D'Amato in a single lengthy footnote lists "[t]he philosophical studies that have helped me the most" in overcoming the view that words have determinate meanings. D'Amato, *supra* note 2, at 151-53, 153 n.16. Those studies include the works of Jeremy Bentham, John Dewey, William James, C.S. Pierce, W.V. Quine, Bertrand Russell, Alfred Whitehead, Ludwig Wittgenstein, John Austin, and Rudolf Carnap, as well as the work of a number of more contemporary philosophers. In addition, many critical legal scholars have written on topics directly or indirectly concerned with the indeterminacy debate. See Kress, *supra* note 4, at 302 n.67, for a partial list. I hope it will not sound defensive if I add that as one employed to teach tax I am well occupied maintaining a modicum of competence in that field. Part of my reluctance to take an absolute position on this issue is that while I believe in the power of reason, I do not trust our use of reason. Reason is a tool of advocacy, but the objects of advocacy are not always reasonable. We employ reason to argue for positions we believe in, but the source of our belief is not always in reason. The line between dispassionate reason and self-serving rhetoric is not easily drawn.

347. Smith, *supra* note 87, at 105 (quoting in part from LON L. FULLER, ANATOMY OF THE LAW 39 (1968)).

the role of litigation in making law. We can accept a structure for tax law that, while facially more ambiguous, is less prone to the need for constant tinkering and perpetual regulatory elaboration. In the end such a system would also be complex, but only because the functions of tax law are complex and not because we are engaged in a fruitless search for absolute certainty. We could accept that the practice of tax law must always entail “a degree of conscious creativity.”³⁴⁸

This view of tax law does not challenge the necessity for an extensive set of tax rules,³⁴⁹ but it grants the freedom to simplify without conceding that the law is less fair as a consequence. If the outcomes in cases will frequently rest on the judgment of a taxpayer, practitioner or judge, why obscure that fact by burdening the decision maker with more rules than he can absorb? If analogy is at the core of legal reasoning, should not our focus be the construction of clear and fair paradigms to serve as the objects of analogy?

CONCLUSION

One may be torn between two thoughts when it comes to deciding the question of the tax law’s indeterminacy. On the one hand, it defies most of our training and undermines our belief in the importance of law to accept that it may be pervasively indeterminate. Moreover, a belief in pervasive indeterminacy seems to defy the empirical evidence and common sense. Surely, if the mind of a human being can comprehend an event, it can make up a rule specifying what legal consequences will flow from that event. Further, most of us have a sense of the predictability of the law in the areas of tax law in which we are reasonably expert (though the areas of our expertise may be shrinking as the law expands). Those of us who have filled out our own tax return at one time or another could not but have felt a certain, perhaps fatal, sense of the law’s determinacy.

On the other hand, there are many able tax lawyers who labor under a sense of uncertainty. If we have practiced law, we have seen the power of reason and rhetoric to shape the law and to change it. We have felt the confusion that comes with an overabundance of rules. We have experienced the tendency of legal experts to phrase predictions of legal outcomes in terms of probabilities instead of certainties. We have seen the role that “interpretation” of facts and language

348. *Id.* at 108.

349. Schauer has developed the idea that a legal system can exist without rules, but does not seriously propose that an ideal system should do so. See Schauer, *supra* note 328, at 651–57, 679–91.

plays in legal decisionmaking. And I, for one, have seen the moral and philosophical dead end that an overly devout belief in the determinacy of black letter law can produce in otherwise worthy students of law.

The indeterminacy debate involves (but is not encapsulated by) a definitional struggle. Those who find the law determinate sometimes argue that the indeterminists take too narrow a view of what constitutes "law" and of what constitutes proper "legal reasoning." From this perspective, law is seen as largely determinate because of the existence of guiding principles extending beyond the admittedly indeterminate black letter law. The indeterminist counterargues that the same principles that render the black letter law indeterminate apply in any other realm law may occupy. Thus, to the indeterminist, law, no matter how we define it, is indeterminate. The interesting point for present purposes, however, is that not even the determinists seem to suggest that law can be made simultaneously fair and certain through mere elaboration of the written rules of law. Indeed, if there is consensus on no other point, there is agreement that the application of law to life to achieve a just result cannot be satisfied by resort to formulas. Laws are general; justice is specific. No degree of elaboration in the written rules of tax law is adequate to fully explain or determine law's *fair* operation. For this reason, complex statutes and regulations by themselves cannot guarantee fairness.

If this is so, then much of modern tax law should be judged to have failed of its apparent purpose. The challenge, then, is to make tax law a coherent and rational system that adequately addresses the complex transactions of the modern world without resort to reductionism. We can begin by accepting that the artificial complexity of elaborate rules provides no escape from the real complexities of tax law—the complexities that can only be resolved through the exercise of human judgment.