

## A Guide to Teaching Tax Law from an International Perspective

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### **Abstract**

*The effective teaching of tax law from an international perspective relates in part to conveying the applicable method of legal interpretation under the tax laws. At an introductory level, the teaching of tax law should further be designed to instill awareness that tax law is often indeterminate in practice. At a more advanced level (e.g., LL.M.) various methods of legal interpretation should be developed, particularly the methodology of the Vienna Convention on the Law of Treaties, which represents a fundamental aspect of international tax practice.*

### **I. Introduction.**

A major factor in the effective teaching of law from an international perspective relates to conveying the applicable method of legal interpretation under the tax laws.<sup>1</sup> Most notably, an entirely different legal methodology is currently applied as between the United States in comparison to Continental Europe,<sup>2</sup> and such methodological difference may be most pronounced in the area of tax law.<sup>3</sup> Within the discipline of tax law, the difference in legal methodology is particularly acute with regard to tax treaty interpretation.<sup>4</sup> To illustrate the importance of this issue to tax law imagine a situation where a sophisticated taxpayer “manufactures” a set of facts designed to meet the technical requirements of the a tax statute or treaty, but which at least ostensibly does not comply with the apparent purpose of the law.<sup>5</sup> In that case, the methodology of legal interpretation will determine whether formal compliance with the underlying statute creates a presumption of legal compliance or is merely the starting point for legal analysis.

The relative merits and challenges of teaching the tax law as related to a particular interpretative method of the Internal Revenue Code is the subject of current debate.<sup>6</sup> For example, the issue may delineate *legal* education in taxation from *accounting* education in taxation.

<sup>1</sup>See: Karl Llewellyn, *The Bramble Bush: Some Lectures on Law and Its Study* (New York, Columbia Univ. 1930); Hans Kelsen, *The Pure Theory of Law* (Oxford: 2<sup>nd</sup> ed., 2005); Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard Univ. Press: 1977); see also: Michael Potács, *Legal Theory* (Vienna: Kluwer, 2015) (Bogenschneider, tr.) (“The understanding of design rules as theories of language use (i.e. the interpretation of positive laws) is important as an aspect of the scientific character of legal doctrine.”).

<sup>2</sup>Malgosia Fitzmaurice, *Book Review: Treaty Interpretation*, 20 EUROPEAN J. INT'L LAW 919, 953 citing Myers McDougal, et al., *The Interpretation of Agreements and World Public Order* (West Haven: Yale Univ. Press, 1967) (“Gardiner also addresses the theory of interpretation adopted by the New Haven School, which is dramatically different from the rules of the 1969 VCLT because it promotes a policy oriented approach.”).

<sup>3</sup>John Prebble, *Ectopia, Tax Law and International Taxation*, [1997] BRITISH TAX REVIEW 383; John Prebble, *Why is Tax Law Incomprehensible?* [1994] BRITISH TAX REVIEW 380; see also: Bret N. Bogenschneider, *Wittgenstein on Why Tax Law is Comprehensible*, and [2015] BRITISH TAX REVIEW 252.

<sup>4</sup>See: Allison Christians, *Case Study Research and International Tax Theory*, 55 ST. LOUIS U. L.J. 331, 332 (2010) (“International income tax law, just like domestic tax law and law in general, evolves through political, economic, and social contexts that are complex, multifaceted, dynamic, and difficult to study systematically. Perhaps as a result, the underlying theories of international income taxation have been static-and unsatisfactory-since they first emerged in the early twentieth century.”).

<sup>5</sup>See: Bret N. Bogenschneider, *Manufactured Factual Indeterminacy and the Globalization of Tax Jurisprudence*, 4:2 UNIVERSITY COLLEGE LONDON JOURNAL OF LAW & JURISPRUDENCE 250(2015).

<sup>6</sup>Michael A. Oberst, *Teaching Tax Law: Developing Analytical Skills*, 46 J. LEGAL EDUC. 79 (1996) (“The basic tax course is among the few courses that lend themselves to developing the ability to analyze statutes and regulations. I believe that this, in fact, is the best use of the basic tax course.”).

The approach of teaching tax law as exclusively a form of statutory interpretation has simplistic appeal particularly if tax law is the only mandatory course in the law curriculum that involves statutory interpretation.<sup>7</sup> But, analysis of the Internal Revenue Code is absolutely not the exclusive concern of the tax lawyer in the actual practice of tax law. And, this is particularly true in the United States given its pragmatic legal traditions. The role of the tax lawyer is accordingly much more than just reading the Internal Revenue Code.

In terms of its relative importance to business, the issue of the legal methodology to be applied in *international taxation* is extraordinarily significant, and on par with “state and local” taxation.<sup>8</sup> From the perspective of each of the Member States of the European Union (where the individual nations of the EU are taken as analogous to the states of the United States), the subject of “international taxation” actually encompasses what a U.S. tax attorney would consider to be both “state and local taxation” and “international taxation”. Given its importance to *domestic* business activity, state and local taxation was previously raised as a matter deserving of attention in the U.S. law school curriculum.<sup>9</sup> The same is also true of the methodology of international taxation, in particular, since both practice areas typically form specialty fields within large U.S. law firms. As alluded to above, the difference in legal methodology relate to the more formalized legal analysis applied in interpretation pursuant to the Vienna Convention on the Law of Treaties taken in contrast to the pragmatic legal tradition of the United States. However, amongst law review publications in the United States the Vienna Convention is most often cited with regard to non-tax related international treaties.<sup>10</sup> This represents perhaps an unfortunate side-effect of the de-emphasis of the topic of taxation amongst U.S. law reviews.<sup>11</sup> Nonetheless, as a matter of everyday legal practice,<sup>12</sup> the very formal legal interpretation of tax treaties is far more ubiquitous than other areas of treaty application.<sup>12</sup> For U.S. multinationals and expatriates tax treaty interpretation is a major practical concern and this issue is routinely encountered by U.S. tax lawyers in private practice. In international tax practice apart from the United States, such as in Europe, tax interpretation often represents the *primary* activity of the international lawyer.

This article will proceed in the following fashion: First, background on the legal methodology of tax law will be provided to orient the issue with regard to the teaching of international tax law. Second, the role of tax vocabulary as a matter of legal education is explored in detail. Third, the psychology of learning with respect to tax law is considered. Fourth, the different types of tax lawyers are considered with respect to tax law instruction particularly with respect to the growing influence of accounting firms to the practice of tax law.

## ***II. Background on the Legal Methodology of Tax Law.***

If the methodology of tax law is more than merely the reading of the Internal Revenue Code, then this aspect of tax law ought to be evident in the actual practice of tax law. Several factors indicate this is indeed the case.

<sup>7</sup>See generally: John C. Chommie, *Federal Income Taxation of Corporations and Shareholders and the Tax Trained Lawyer of Today and Tomorrow*, and 116 U. PA. L. REV. 358, 369 (1967) (“The complaint is often heard that first year training normally leaves the law student so case-hardened that progress with his training in the analysis of statutes and regulations, a training which has major relevance in modern law practice, borders on the impossible. I know of no logical reason why room could not be made in the first year for statutory courses covering, for example, individual income taxation or portions of the Uniform Commercial Code.”).

<sup>8</sup>See: Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists and the Role of the Legal Academy*, 83 CORNELL L. REV. 365, 386 (1998) (“The challenge is simply this: the issues confronting tax policy have increasingly focused on issues to which the traditional model has little, if anything, to say. Traditional tax scholarship emphasizes the domestic federal income tax. Tax practitioners—especially those at large, sophisticated law firms—are increasingly concerned with international and foreign tax issues, about which Haig-Simons provides little, if any, guidance. State and local tax issues, which have traditionally attracted little scholarly interest, have likewise become more prominent in practice.”).

<sup>9</sup>David Brunori, *Teaching State and Local Tax: Law Schools Still Not Getting It*, STATE TAX NOTES 729 (June 2, 2008) (“The results are not what I expected. Right now, 80 of the 195 ABA-accredited law schools regularly offer at least one course in state and local taxation.”).

<sup>10</sup>Art. 31, 32; Vienna Convention on the Law of Treaties (May 23, 1969); see also: Klaus Vogel, *Double Tax Treaties and Their Interpretation*, 4 INT'L TAX & BUS. LAW 1 (1986);

<sup>11</sup>William J. Turnier, *Tax (and lots of other) Scholars Need Not Apply: The Changing Venue for Scholarship*, 50 J. LEGAL EDUC. 189, 190-1 (“The virtual abandonment by the major law reviews of taxation as a topic for scholarly discourse has also had the result that the tax specialty process and other law reviews have assumed roles of increasing importance for legal educators”).

<sup>12</sup>See: Michael Lang, *Introduction to the Law of Double Taxation Conventions*, (Linde/IBFD, 2<sup>nd</sup> ed., 2013).

First, the practice of tax law is akin the Bramble Bush as first described by Karl Llewellyn.<sup>13</sup> That is, the application of the law is dependent on the particular facts at bar. The jurisprudence of what has been referred to as “legal realism” reflects in part this Bramble Bush theory.<sup>14</sup> As applied to legal adjudication – to which the tax practitioner engaged in tax planning must also determination the facts. These concepts of legal methodology form the basis of the practice of tax law in the United States *even irrespective of whether the tax practitioner is aware of the underlying theory.*<sup>15</sup> But, certainly, the volition of why a tax attorney interprets law in a certain way will occasionally be extremely helpful in the practice of law – at minimum, to avoid unnecessary “detours”, or occasionally to find “shortcuts” that are only visible to someone who actually “knows” what she is doing from a jurisprudential perspective.<sup>16</sup>

In Continental Europe, Kelsen’s *Pure Theory of Law* forms the basis for legal methodology of tax law as law applied in its “pure” form.<sup>17</sup> Although the legal methodology in the U.S. is more pragmatic, the U.S.-trained lawyer must be cognizant of the potential for an alternative legal methodology.<sup>18</sup> Of course, the initial instinct of a pragmatic lawyer will be to reject formalist legal interpretation, as it will also be the instinct of a formal lawyer to reject pragmatic legal reasoning. Thus, the U.S. attorney must also be cognizant that the foreign lawyer may be inclined to reject the pragmatic U.S. approach to legal reasoning entirely and some explanation may be required.

With regard to tax law in particular, an additional point is that the Internal Revenue Service, in *actual* fact, chooses to enforce certain tax laws but not others. For example, the Accumulated Earnings Tax is currently not enforced against large corporations.<sup>19</sup> Yet, the technical provisions of the Earned Income Tax Credit are very strictly enforced against low-income taxpayers.<sup>20</sup> Such elements of practical knowledge are fundamental to nearly every practicing tax lawyer in the United States and are *not* found in the text of the Code or Treasury regulations. This is also true in international tax practice. For example, advance tax rulings may be obtained from various jurisdictions such as Luxembourg, Ireland and Belgium, that may cause the written and codified tax laws not to apply as a practical matter to large corporate taxpayers.

This practice is currently the subject of a “State Aid” investigation by the European Commission.<sup>21</sup> Hence, to serve as a tax advisor to a large corporation one must be aware of the existence of the Bramble Bush. The tensions between the U.S. versus the European legal methodology are most evident with regard to tax treaty interpretation insofar as it relates to the tax planning activities of U.S. multinationals.<sup>22</sup>

<sup>13</sup>Karl Llewellyn, *Some Realism about Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

<sup>14</sup>See: Anders Walker, *Bramble Bush Revisited: Llewellyn, The Great Depression and the First Law School Crisis*, 1929-1939, 64 J. LEGAL EDUC. 145 (2014); Diane Ring, *The Promise of International Tax Scholarship and its Implications for Research Design, Theory, and Methodology*, 55 ST. LOUIS U. L.J. 307, 308 (2010) (“At its core, this work was a challenge to positivism that pervaded twentieth century research. This critique was less troubling to legal scholars because law had already come to terms with a related challenge through the rise of legal realism in the 1920s and 1930s.”).

<sup>15</sup>James Donato, *Dworkin and Subjectivity in Legal Interpretation*, 40 STAN. L. REV. 1517, 1530 (1988); Louis E. Wolcher, *Ronald Dworkin’s Right Answers Thesis Through the Lens of Wittgenstein*, 29 RUTGERS L.J. 43, 49 (1997) (citations omitted).

<sup>16</sup>See: Heather M. Field, *Experiential Learning in a Lecture Class: Exposing Students to the Skill of Giving Useful Tax Advice*, 9 Pitt. TAX REV. 43, 55 (“Exposure to law-in-action is particularly beneficial in fields where much of the practice is planning-focused rather than litigation-focused. Much of law school is taught in the context of litigation, looking at situations after they occur. Legal research and writing classes overwhelmingly focus students’ attention on litigation.”).

<sup>17</sup>Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44 (1941); see also: Edwin Patterson, *Hans Kelsen and His Pure Theory of Law*, 40 CAL. L. REV. 5 (1952).

<sup>18</sup>James Maxeiner, *Thinking Like a Lawyer Abroad: Putting Justice into Legal Reasoning*, 11 WASH. U. GLOBAL STUD. L. REV. 55 (2012) citing Frederick Schauer, *Thinking like a Lawyer: a New Introduction to Legal Reasoning* (Cambridge: Harvard Univ. Press, 2012).

<sup>19</sup>A *Proposal for Equal Enforcement of the AET*, 147 TAX NOTES 931 (May 25, 2015).

<sup>20</sup>See: Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007).

<sup>21</sup>European Commission (2014) 7156 (Luxembourg alleged aid to Amazon); EC (2014) 3626 (Netherlands alleged aid to Starbucks; European Commission (2014) 3606 (Ireland alleged aid to Apple); European Commission (2014) 3627 (Luxembourg alleged aid to FFT); see generally: Wolfgang Schön, *Taxation and State Aid Law in the European Union*, 36 COMMON MARKET LAW REV. 911 (1999).

<sup>22</sup>See: Avi-Yonah, R., and Panayi, C. HJI, “Rethinking Treaty Shopping: Lessons for the European Union” in Lang, M. et al., “Tax Treaties: Building Bridges between Law and Economics”, Chapter II, Treaty Shopping and Avoidance of Abuse, IBFD (2010).

The United States simply went its own way with regard to tax treaty drafting after its defeat at the Vienna Convention.<sup>23</sup> The U.S. Model Tax Treaty yet incorporates a “Limitation on Benefits” provision which (in theory) limits the availability of favorable tax treaty benefits where a multinational has gone “treaty shopping”. This LOB provision is not a feature of tax treaties of or between European nations, for example. And, such multinational “treaty shopping” indeed can lead to the potential for “double non-taxation” of multinational firms, particularly by application of the favorable European tax treaty network. For example, a U.S. multinational might form a Luxembourg subsidiary and then apply the tax treaty of Luxembourg (as opposed to the United States) for intercompany transactions to avoid or defer taxation. In tax terminology, this is sometimes referred to as a “triangular” structure.<sup>24</sup> Various European nations are very much aware of this potential and seek to capitalize on it by creating a treaty network that may be intentionally exploited by U.S. multinationals to obtain double non-taxation or permanent deferral of earnings. All of this practical knowledge hinges on a basic understanding of legal methodology.

One possible explanation for the lack of attention given to differences in legal methodology between the United States and other jurisdictions is simply that the differences are not well understood. In Europe, for example, an open hostility toward U.S. legal methodology is illustrated by the oft usage of the word “normative” when used to describe the U.S. legal approach to tax law. This stems from the nomenclature applied by Hans Kelsen in the *Pure Theory of Law*.<sup>25</sup> Kelsen’s work formed the jurisprudential framework for tax treaty interpretation. The usage of the word “normative” is very strange to the U.S. tax attorney because in the United States all legal rulings of courts, even the Supreme Court, are referred to as “opinions”. However, when the European attorney uses the term “normative” in discourse with a U.S. attorney that implies that legal “interpretive” methodology is amiss. A recent European publication cited the practice of U.S. tax law as merely applied “sociology”, for example.<sup>26</sup>

### **III. on the Role of Vocabulary in the Learning of Tax Law.**

A further debate now centers on the role of linguistic theory to legal interpretation of the tax law.<sup>27</sup> The issue may be summarized simply as whether tax law should be written to correspond directly to business events or whether tax law should be drafted to incorporate anti-abuse rules, sometimes referred to as GAARs (general anti-abuse rule).<sup>28</sup> The general presumption is that the private sector may always be “one step ahead” of the statutory drafters, and accordingly, an anti-abuse rule provides a means to prevent abusive tax planning. On the other hand, there is an idea that anti-abuse rules represent an abuse of the “rule of law”.<sup>29</sup> In U.S. terminology, the idea of the reference to “rule of law” reflects something akin to the idea of equal protection of the law.

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<sup>23</sup>See: Fitzmaurice *supra* Note 2; J. Peter Pham, *The Perils of “Consensus”: Hans Kelsen and the Legal Philosophy of the United Nations*, 14 IND. INT'L & COMP. L. REV. 553 (2004).

<sup>24</sup>Romero J.S. Tavares, *The “Active Trade or Business” Exception of the Limitation on Benefits Clause in “Base Erosion and Profit Shifting: The Proposals to Revise the OECD Model Convention”*, IBFD Publication (eds., Lang, M., et al.) (2015).

<sup>25</sup>See: Alexander Somek, *Kelsen Lives*, 18EUR. J. INT'L L. 409 (2007); Francois Rigaux, *Hans Kelsen on International Law*, EUR. J. INT'L LAW 9 (1998).

<sup>26</sup>Fitzmaurice at 954 (“The New Haven School of interpretation provoked very strong comments from other international ‘classical’ lawyers, such as Sir G. Fitzmaurice who stated: This, of course, however excellent is not law but sociology; and although the aim is said to be ‘in support of search for the genuine shared expectations of the parties’ it would in many cases have – and is perhaps subconsciously designed to have – quite a different affect, namely, in the guise of interpretation, to substitute the will of the adjudicator for that of the parties”).

<sup>27</sup>Stephen B. Cohen, *Words! Words! Words!: Teaching the Language of Tax*, 55 J. LEGAL EDUC. 600 (2005) (“Perhaps the most confusing term in tax law is “capital” with a multiplicity of different and sometimes contradictory meanings.”); Ulf Linderfalk, *Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making*, 26 EUR. J. INT'L L. 169 (2015).

<sup>28</sup>Judith Freedman, *Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle*, [2004] BRITISH TAX REVIEW 332.

<sup>29</sup>Rebecca Prebble & John Prebble, *The General Anti-Avoidance Rule and the Rule of Law*, cited in Prebble, “Ectopia, Formalism, and Anti-Avoidance Rules in Income Tax Law” in “Prescriptive Formality and Normative Rationality in Modern Legal Systems”(Krawietz, MacCormick & Wright eds.) (Berlin: Duncker and Humblot, 1994), 367.

In general tax law necessarily encompasses its own “heuristics” – or terminology for the actual practice of tax professionals.<sup>30</sup> Tax linguistics is thus entirely appropriate and necessary for the tax lawyer in the practice of law. The learning and actual usage of special tax words reflects an understanding of the Code. The Code is not written with only simple terms that can always be understood by a layperson. Thus, an understanding of the Code is achieved only when one can correctly speak using its terminology. An example is the word: OID (“original issue discount”).<sup>31</sup> The phrase “OID” has a special meaning for tax lawyers and accountants. To practice tax law one must really know the meaning of “OID” and be able to use that term in practice. For example, it is not correct simply to say “discounted bond” where the word “OID” should be applied. And, this distinguishes the tax lawyer from the corporate lawyer in actual legal practice. Hence, the learning of tax law is not so much a matter of statutory reading as it is learning a new language.<sup>32</sup>

This debate influences directly the form of legal education.<sup>33</sup> If tax linguistics are central to the practice of law then law students must learn to “speak the language” of taxation.<sup>34</sup> Notably, the practice of tax law truly feels like learning a foreign language because “fluency” in tax law usually requires many years of training.<sup>35</sup> Hence, in the teaching of tax law the professor may want to present tax vocabulary words at the beginning of each class in order to build the overall vocabulary of the student of tax law, in the same manner as one goes about learning a foreign language. In this formal approach, education in the tax law might mimic the best practices for teaching a foreign language.

#### **IV. on the Psychology of Learning the Tax Law.**

Many law students find the first exposure to taxation to be quite tedious.<sup>36</sup> Indeed, the ability to focus for many hours on a statutory provision is an acquired skill. Accordingly, the prior literature in the field of tax education describing the proper method of teaching tax law as based on “force-feeding” of active learning might not be effective depending on the psychology or general motivation of the student to learn tax law.<sup>37</sup>

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<sup>30</sup>See: Christians at 349; Bogenschneider at 255 (“[T]ax law is just as comprehensible as it ought to be. For those that speak the language, it provides the basis for legal actions. However, for those that do not speak the language, tax law may appear incomprehensible, and frustratingly so.”).

<sup>31</sup>*Id.* at 252 (“If a lawyer sat next to you during a presentation in a corporate boardroom in London and whispered: “OID”, you might be somewhat puzzled as to the lawyer’s meaning. But this group of letters is simply an abbreviation for the idiom: Original Issue Discount, and refers to the particular tax treatment of a bond which is issued below par value.”).

<sup>32</sup>*Id.* at 255 (“Thus, when tax lawyers seem to speak ad nauseum about OID, this may seem at first to be a foreign language, and that is exactly because such tax terminology is a foreign language at first exposure.”).

<sup>33</sup>See: Cohen at 601 (“In the basic tax course, this variety of everyday meanings and usages usually does not pose a special problem. Students encountering the word capital in expressions like “capital expenditure” and “capital gain” understand that it is an adjective and does not mean an asset related to the death penalty or of chief importance or excellent quality.”).

<sup>34</sup>Scott Schumacher, *Learning to Write in Code the Value of Using Legal Writing Exercises to Teach Tax Law*, 4 PITT. TAX REV. 103 (2007) (“Moreover, it must be recognized that good legal writing is difficult. Law, and in particular highly-developed specialties like tax law, is incredibly complex, with numerous defined terms. Lawyers are required to explain that complex area of the law to people who for the most part are not familiar with the subject (i.e., non-lawyers). And they are required to explain that subject ideally without the jargon that is the staple of their profession. Being able to speak and write, and to do it well, without the crutch of the jargon, is not something that engineers or computer experts are routinely asked to do.”).

<sup>35</sup>See: Martin D. Ginsburg, *Teaching Tax Law after Tax Reform*, 65 WASH. L. REV. 595 (“Those of you attended law school at least a decade ago may suspect learning new tax law must be as unsettling as learning new math. There is truth to it, but much remains familiar.”).

<sup>36</sup>John A. Bogdanski & Samuel A. Donaldson, *Teaching Tax and Other Tedious Topics*, 17:2 PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING 102 (Winter. 2009) (“When the topic at hand is tedious or technical, a key component of caring is knowing the audience, and striving to put oneself in the position of a student approaching the material for the first time.”).

<sup>37</sup>See: Oberst at 85-7 (“Because of my you’ve-got-to-know-what-you-don’t-know rule, some students, usually the ones who are resisting any firsthand involvement with the Code and the regulations, do not make office visits. It is true that you can’t force some horses to drink water.... Perhaps these students lack the particular mental skills essential to this task. It is only for this small group, the ones who really try but still fail, that I have sympathy.”).

If we are to take into account the psychological aspects of learning, as Professor Burgess suggests we ought, then the teaching tax law seems the perfect place to start.<sup>38</sup> As a preliminary matter, the actual reading of the provisions of the Code can and must occur as part of the legal education process. But, any law professor will get more reading of the Code from her students by making such a “tedious” activity one component of a broader training on the more enjoyable aspects of tax law, particularly involving the application of the Code to a particular real-life situations.<sup>39</sup> And, ideally, a tax professor might cause her students to focus on the interpretation of a statutory provision without actually realizing the task is tedious with a variety of means actually designed to be engaging. This engagement approach may pay even more potential dividends to all of the students with varying goals and career objectives.<sup>40</sup> And, that is what will attract the best students to the study of tax law.<sup>41</sup>

As a further matter of psychology in the teaching of tax law, any sort of “force-feeding” approach to the learning of tax law removes any beauty from teaching law and turns the task into tedium.<sup>42</sup> Notably, the same issue of the best methodology for instruction in the tax law is an ongoing struggle in China,<sup>43</sup> Brazil,<sup>44</sup> Ethiopia,<sup>45</sup> Australia<sup>46</sup> and Europe.<sup>47</sup> Of course, the United States is the world leader in legal education and this has *not* been achieved by “force-feeding” the students. It would represent an extraordinary error in a proffered switch to some other instructive approach to teaching tax law in the United States.<sup>48</sup> Of course, not every law student will practice in the area of tax law.<sup>49</sup>

## **V. On the Phenomenology of the Tax Lawyer.**

In the context of teaching tax law it is important to remember the tax lawyer appears in many different forms. To take a few obvious examples, there is first the business tax lawyer who engages in matters of tax planning for the future and serves primarily as an advisor.

<sup>38</sup>Hillary Burgess, *The Challenges of “Innovative” Teaching*, THE LAW TEACHER (Spring, 2011) (“To find more comprehensive sources of pedagogical theory, a law professor must look beyond the legal academy to education research, educational psychology, cognitive psychology, and neuroscience.”).

<sup>39</sup>See, e.g.: Paul L. Caron, *Back to the Future: Teaching Law through Stories*, 71 U. CIN. L. REV. 405, 408 (2002) (“Tax Stories tells the stories behind the ten leading United States Supreme Court federal income tax cases, exploring the historical contexts of these cases and the role they continue to play in our current tax law.”); Ajay K. Mehrotra, *Teaching Tax Stories*, 55 J. LEGAL EDUC. 116 (2005); Carolyn Jones, *Mapping Tax Narratives*, 73 TUL. L. REV. 653 (1998).

<sup>40</sup>See generally: Linda Galler, *Why Do Law Students Want to Become Tax Lawyers?* 68:2 TAX LAWYER 305.

<sup>41</sup>See generally: George Yin, *Simulating the Tax Legislative Process in the Classroom*, 47 J. LEGAL EDUC. 104 (1997).

<sup>42</sup>See: Rong Jiang, *Research on Teaching Reform of the “Tax Law” Course*, 109 APPLIED MECH. & MAT. 428 (2012) (discussing reform of the teaching of tax law in mainland China) (“At present, the ‘tax law’ course is mostly the one-way force-feeding teaching method with teachers as the center, and there is basically no effective communication and interaction between the teachers and students.”).

<sup>43</sup>See: Jiang at 429.

<sup>44</sup>This reference is based on conversations by the author with Brazilian-national doctoral candidates in international business taxation at the Vienna University of Economics and Business holding the LL.B. degree from a Brazilian university and familiar with the legal education system of Brazil for tax law.

<sup>45</sup>Kinfe Micheal Yilma, *Teaching and Writing Tax Law in Ethiopia: Exhibit B for Low Scholarly Productivity*, 6 MIZAN LAW REV. 1 (2012).

<sup>46</sup>Jennifer Butler & Kristy Richardson, *Teaching Taxation Law: Rethinking Aids for Delivery*, Australasian Law Teachers Association, 61<sup>st</sup> Annual ALTA Refereed Conference Papers at 4 (2006) (“Being involved in the teaching of taxation law for the last five years I have experienced the rapid progression from teaching tax law based on textbooks and hard-copy loose leaf services to an activity that is more usually conducted in front of a computer.”).

<sup>47</sup>Adriano Di Pietro, *Teaching Tax Law in Europe*, EDUCATION & LAW REV., vol. 9 (2013); Paul Kenny, Innovations in Teaching Tax Law to International Business Students, Global Business and Technology Association Conference Paper (October 2012) available at SSRN: <http://ssrn.com/abstract=2340841> (“Face to face teaching for international business students that involves complex language rich topics such as taxation law at Australian universities poses real challenges given the language and cultural differences.”).

<sup>48</sup>See, e.g.: Christian A. Johnson & Mary Grossman, *The Tax Law Clinic: Loyola Chicago’s Decade of Experience*, 50 J. LEGAL EDUC. 376 (2000).

<sup>49</sup>Reginald Mombrun, *Curriculum and Teaching in America’s Law Schools: Why Federal Income Tax Courses are More Relevant than Ever*, 17 EDUC. & L.J. 105, 130 (“Unfortunately, many students do not fully reach the next step in the progression-the ability to read and interpret the law themselves. I am talking her about statutes. We are at a point where there may be a statute that covers just about every legal problem that the lawyer encounters.”). The reader should note this claim is not correct in application to the tax law.

There is also the tax litigator who focuses on the defense of tax audits or trial litigation. Third, there is the estate tax lawyer who deals with wealthy individuals and accordant matters. More applicable to this article, there is the international tax lawyer who handles cross-border issues typically for multinational business, including the application of foreign tax laws. Other permutations of tax lawyer are also possible. The fundamental point is that the practice of tax law is often highly specialized.

But, strikingly, not only is tax law highly *specialized*, it is also *generalized*. That is, tax law is a major sub-component of many other areas of law.<sup>50</sup> Again, to provide a few obvious examples, any general litigator presumably must be aware of the tax treatment of different types of potential damage awards. Similarly, a real estate lawyer must understand the basics of property tax depreciation and basis. A corporate lawyer must understand the basics of the tax treatment of goodwill and transactions costs. And, so on. A case could be made that taxation ought to be a more fundamental aspect of law instruction in general if the goal were to train a lawyer qua generalist. In fact, the compartmentalization of legal instruction might actually be the cause of the observed tax specialization because demand is created in the legal market for tax law specialists exactly because other lawyers are not inclined to practice as generalists. Thus, to tinker with the method of instruction for tax law, and to potentially demote the field merely to technical interpretation raises questions about the approach to legal instruction generally.

The fact that other legal disciplines are taught independently indicates that legal instruction manifests as an intensive survey of the various specialized disciplines of law at least in the first year of the juris doctorate program in the United States. Thus, the basic tax course might also rightly be viewed as a survey of the practice of tax law. In that case, tax law ought not to be considered merely an opportunity to “force-feed” statutory interpretation. Hence, the basic course in taxation might rightfully include a significant element of tax policy.

#### a. Tax Lawyers in Accounting Firms.

Many tax lawyers are now also employed within major accounting firms. It is beyond any reasonable question these tax attorneys are engaged in the practice of tax law within these accounting firms, and the legality and ethics of which is open to major question. And, the reverse is also true in that many tax lawyers perform tax compliance functions in the actual preparation of tax returns that would be more traditionally performed by a tax accountant.<sup>51</sup> However, such tax preparation by an attorney is by all means ethical and legal since tax preparation does not require any formalized training or certifications at the present time. The theory of legal education must take into account such pragmatic concerns. Of course, at some point in the future it may be found that the practice of tax law by lawyers in accounting firms (under the supervision of accountants) was not a good idea— perhaps following some future high-profile problem involving an erroneous interpretation of tax law by an accounting firm. But, the fundamental issue here relates to the legal methodology of tax law for tax lawyers engaged in the traditional practice of law.

The difference between a tax lawyer and tax accountant is averred to be the following: A tax *lawyer* ought to be most concerned with very difficult interpretations of tax law and precedent to which the potential legal outcome is subject to major doubt. If we are merely engaged in determining whether alimony is deductible then an accountant ought to be able to interpret the law. Hence, to the extent the prior discussion focused exclusively on the determination of one “correct” interpretation of the Code by the law student this is to confuse the instruction of a tax lawyer versus the instruction of a tax accountant. In the masters in science of taxation (MST) programs it is tax accountants who require this advanced form of tax instruction. The best law schools ought to teach legal methods of interpretation. And, as it happens, such excellent legal judgement is precisely what distinguishes the U.S. tax lawyer from his foreign counterparts, and has led in part to the dominance and preeminence of U.S. tax law on the international scene (apart from tax treaty interpretation).<sup>52</sup>

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<sup>50</sup>Leah Witcher Jackson, *Integrating Tax Issues and Practical Transactional Planning in a Law School Curriculum*, INSTITUTE FOR LAW TEACHING AND LEARNING SUMMER CONFERENCE (June 23-4, 2009) available [atlawteaching.org/conferences/2009/handouts/2c-WhyTaxRules.pdf](http://atlawteaching.org/conferences/2009/handouts/2c-WhyTaxRules.pdf).

<sup>51</sup>See: Mombrun at 123 (“Naturally, the practitioner would like to turn over lawyer training (or as much of it as possible) to law schools. With the proliferation of skills programs, the practitioners have succeeded to a certain extent. Unfortunately, the reality is that nothing can replace the actual practice of law.”).

<sup>52</sup>See: Livingston at 372 (“Although lawyers have been on the defensive against economists and other nonlegal experts, there are signs of an incipient counterattack. Anthony Kronman, dean of arguably the nation’s most prestigious law school, has argued passionately for the reassertion of ‘practical wisdom’ as a lawyerly virtue, and (implicitly) for a scholarship less

## VI. Conclusion

In the effective teaching of international tax law the student should be at least made aware of the existence of differences in legal methodology around the world. This may foster sensitivity necessary for an international practice in tax law, and an openness to receive a “foreign” approach to legal interpretation. And, at the same time, the student of tax law must be aware that the pragmatic legal methodology so fundamental to the practice of tax law in the United States is in many circles openly scorned and not considered the practice of law at all. Hence, in the actual giving of legal advice on matters of U.S. taxation to the foreign client the U.S.-trained tax lawyer may need to be sensitive to other methods of legal interpretation. In other words, any international tax lawyer must simply be self-aware of his own training in legal methodology.

Furthermore, the identification of a presumptively “correct” reading of a complex statutory provision, such as those often found in the Internal Revenue Code and Treasury regulations of is to be generally encouraged as a necessary element to the practice of tax law. However, from the perspective of international taxation one must be concerned not just with identifying the “correct” reading of a statutory provision, but also distinguishing as between potentially two or more competing visions of true or “correct” interpretation of *exactly* the same legal provision. Notably, any student of tax law who believes there is *only* one way to interpret a tax statute would not be equipped to advise a client on most matters of international tax law apart from tax treaties.

To provide some recommendations to the design of a general law school curriculum, the basic tax course in the juris doctor program should be a survey course for the tax law designed to introduce the student to different potential practice areas in the field. In addition, an exposure to the U.S. methodology for statutory interpretation (via the Treasury regulations) should be provided. However, this might be made part of an actual example within a tax narrative.<sup>53</sup> The level of abstraction in international tax should also be reduced, for example, by using a country-name in a diagram rather than boxes and circles labeled simply: “x” or “y”. And, the teaching of tax law should be approached similarly to the learning of a foreign language where special tax words are treated as new “vocabulary” words. Hence, the tax professor would be cognizant that the usage of these words is on par with speaking in a foreign language.<sup>54</sup>

In summary, the existence and importance of international “tax treaties” should be noted as the primary element of the practice of tax law outside the United States. However, the introduction to formal methods of European legal interpretation should be tempered with a reminder that even statutory interpretation may be *indeterminate* in application.<sup>55</sup> Accordingly, an advanced tax (or LLM) course in international taxation should include a more detailed tax treaty or foreign law component with a comprehensive exploration of the potential differences in legal methodology between jurisdictions, particularly the methodological differences as between the United States and Continental Europe.

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dependent on external forms.”) Citing Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* at 354-64 (1993).

<sup>53</sup>See: Arturo López Torres, *Maccrate goes to Law School: An Annotated Bibliography of Methods for Teaching Lawyering Skills in the Classroom*, 77 NEB. L. REV. 132 (1998).

<sup>54</sup>See generally: Paul L. Caron, *Tax Myopia, or Mamas Don’t Let Your Babies Grow up to be Tax Lawyers*, 13 VA. TAX REV. 517 (1994).

<sup>55</sup>See: Potács *supra* Note 1 (“An assumption of legal positivism represented here however is based on the assumption of an objective meaning content of legislation. This assumption does not exclude the possibility that the objective meaning of legislation is vague or indeterminate.”).