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CROSS-FERTILIZING THE TAX CLASSROOM

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CROSS-FERTILIZING THE TAX CLASSROOM

Mark J. Cowan^{*} and *Joshua Cutler*^{**}

I. INTRODUCTION

Taxation, embedded in both the legal and accounting professions, is taught in law schools and business schools.¹ Courses in the former develop the skills of future attorneys, some of whom will specialize in taxation.² Courses in the latter develop the skills of future Certified Public Accountants (CPAs), many of whom will specialize in taxation.³ Tax lawyers, among other activities, engage in tax structuring, document drafting, and litigation.

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¹ The study of taxation is also important in other disciplines, like public administration and economics. Teaching in such disciplines raises distinct issues, which are beyond our scope.

² Most law students will go into non-tax positions after becoming licensed. But future lawyers can benefit from learning something about tax law. Tax law touches so many aspects of life that tax issues are likely to arise in many areas of legal practice—like real estate, divorce, contract, and tort law. Thus, all lawyers can benefit from knowing enough to identify when they are dealing with an important tax issue that warrants consulting a colleague who is a tax expert.

³ Although when most people think of a CPA, they think of a tax expert, accounting students pursue a variety of careers after graduation. If an accounting graduate is hired by a large or mid-sized CPA firm, they likely start off working the audit or tax departments. Those hired by smaller CPA firms likely are hired to do tax or tax-related work. (Audit work, which involves examining and opining on financial statements, requires some scale, and thus many smaller firms do not do audits.) Businesses, governments, and nonprofits hire accountants as employees for a variety of duties—like financial statement preparation, SEC reporting, cost accounting, internal auditing, and in-house tax compliance and planning. Thus, while many accounting students do go into tax, most go into other subfields of accounting. Tax law touches so many aspects of life that tax issues are likely to arise in many areas of accounting—like SEC reporting, financial statement preparation, and even auditing. Thus, all CPAs can benefit from knowing enough to identify when they are dealing with an important tax issue that warrants consulting a colleague who is a tax expert.

CPAs who specialize in tax, among other activities, engage in tax compliance. Beyond those distinctions, the skills required of both professionals often overlap. Both lawyers and CPAs, for example, do tax research, tax planning, and represent clients on audits. And both professionals often work together to serve mutual clients. Despite the blending of the two professions in tax practice, law school tax courses and business school tax courses often differ from one another in teaching methods and content.⁴ The differences are understandable because each school is teaching tax within, and in accord with, a broader professional curriculum. And that curriculum looks much different in legal education than in accounting education.⁵

Despite the different approaches, or perhaps because of them, there is much that tax teachers in both schools can learn from one another. Unfortunately, law professors and accounting professors who teach tax travel in different professional circles and rarely compare notes.⁶ The purpose of this Article is to begin to bridge the tax law professor/tax accounting professor gap by suggesting ways that law school teaching approaches can be used in the accounting classroom and vice versa. The task is made easier because great work is being done by dedicated tax teachers in both schools.⁷

⁴ Some graduate tax programs may be notable exceptions. For example, at Denver University's Sturm College of Law, accountants working towards a Master's of Taxation and lawyers working towards a Tax LLM take substantially the same courses. See <https://www.law.du.edu/academics/programs-degrees/degrees-taxation#> (last visited Apr. 5, 2022).

⁵ See *infra* Part III.A.

⁶ Accounting professors who teach tax, for example, normally join the American Taxation Association (ATA). The ATA, which sponsors teaching sessions at conferences, is a section of the American Accounting Association—a professional organization for accounting faculty. See *Membership in the American Accounting Association*, AM. ACCT. ASS'N, <https://aaahq.org/Sections-Regions> (last visited Mar. 6, 2022). Law professors teaching tax normally do not participate in the ATA. See also *infra* note 10.

⁷ Tax teachers in law schools and business schools should feel a kinship. No one in either school understands what we do. Non-tax colleagues sometimes think tax is either a bunch of arbitrary rules or simply a matter of taking income times the tax rate. (The explanation for these views is simple: jealousy.) Not only are we often misunderstood, we are sometimes isolated. Some law schools and accounting programs have only one or two full-time tax professors. See Stephanie McMahon, *Teaching Tax Through Film: It's Not as Crazy as it Sounds*, 19 PITT. TAX REV. 183 (2022) (indicating that Professor McMahon is the only tax professor at Cincinnati Law). All tax professors, whether teaching at law schools or business schools, need to stick together for mutual support.

Simplifying greatly, law school courses tend to emphasize arguing ambiguous legal issues from various perspectives (an advocacy mindset) and accounting courses tend to emphasize knowing and following clear, objective rules (a compliance mindset). But both future lawyers and future CPAs should be comfortable working with both subjective standards and objective rules (and must know *when* standards or rules govern a particular issue). Because the tax law is made up of both subjective standards and objective rules⁸ and is taught in both law schools and business schools, tax courses are ideal places to expose law students to more objective rules and accounting students to more subjective standards.

Law students could benefit, for example, from more exposure to the bright-line rules and compliance issues that are taught in business schools. This exposure would not be designed to turn them into tax preparers, but rather to help them better engage in tax planning or litigation. Accounting students could benefit, for example, from more exposure to ambiguous areas of the tax law, where standards sometimes govern. This exposure would not be designed to turn them into legal experts, but rather to help them develop critical thinking skills and avoid myopia.

Our suggestions for cross-fertilizing the tax classroom are modest; wholesale tax course redesign is not warranted in either law schools or business schools. Instead, we suggest that tax professors in law schools be aware of, and consider including, some exercises or content borrowed from business schools and that tax professors in business schools be aware of, and consider including, some exercises or content borrowed from law schools. The education of future tax attorneys and CPAs will be enhanced by the effort.⁹

⁸ See Alice G. Abreu & Richard K. Greenstein, *The Rule of Law as a Law of Standards: Interpreting the Internal Revenue Code*, 64 DUKE L.J. ONLINE 54, 55 (2015). We put to the side arguments over whether certain provisions of the law are best classified as rules or standards. See generally *id.*

⁹ Although our suggestions are modest, we admit there are cultural barriers to implementing them. Law school tax professors may hear whispers that they are teaching “those tax return classes.” Although such aspersions are untrue, they may make the professors pause before adding more compliance topics to their courses. Likewise, business school tax professors may hear whispers they are making students read “archaic” legal materials, which some consider out of fashion in a curriculum driven by more “exciting” topics like big data. Such attitudes may make the professors pause before adding more legal/subjective topics to their courses. But the cultural barriers are not insuperable. Indeed, we have overcome them at Boise State. Also, since we are not suggesting curricular or course description changes, you don’t need

The suggestions we make in this Article are informed by our unique perspective. We have been students in both business schools and law schools and we both teach tax law courses in a business school.¹⁰ Most of our students at Boise State University are undergraduate accounting majors or graduate students in our Master of Science in Accountancy, Taxation (MSAT) program. But we also teach law students enrolled in our concurrent JD/MSAT program offered in partnership with the University of Idaho College of Law.¹¹ Teaching both accounting students who lack a strong law background and law students who lack a strong accounting background has prompted us to use a mix of business school and law school teaching approaches. Our suggestions thus reflect our experience in the classroom.¹²

This Article is organized as follows. Part II reviews the overlap between tax lawyers and tax accountants in practice. Part III discusses the differing approaches that law schools and business schools take in teaching tax law. Part IV then suggests ways that tax courses in law schools can borrow teaching approaches from business schools and vice versa. Part V concludes.

II. THE OVERLAPPING WORK OF TAX LAWYERS AND TAX ACCOUNTANTS

Tax practice is unique in that lawyers and accountants often perform similar functions. This situation was once the source of dispute between the

permission to introduce some new ways of doing things in your course. You can just, if you'd like, go ahead and do it. And you needn't tell anyone.

¹⁰ We say we are “unique” because tenure-track professors with JDs teaching tax in business schools, like us, are becoming rarer. Although the JD is considered a terminal degree for business school accreditation purposes, many business schools that focus on empirical research (as more are) seek to hire candidates with PhDs in accounting to teach tax. Many such PhDs bring a wealth of practice experience to the classroom, but their graduate training was primarily in scholarly research techniques, rather than legal issues. In contrast, most tax courses in law schools are taught by JDs—many of whom have little background in accounting.

¹¹ Throughout the article, we will sometimes say “At Boise State, we. . . .” When we do so, we mean that at least one professor in our department does the activity described. Stating our practices in this way avoids having to identify specific professors or include voluminous disclaimers.

¹² See *infra* Part IV. When we say “classroom,” we mean both the physical and the virtual classroom. Many of our tax courses are taught both in-person and online. We do not address issues that are unique to online courses. For more, see Margaret Ryznar, *Lessons from Teaching Tax Online*, 19 PITT. TAX. REV. 295 (2022).

two professions but is now a broadly-accepted fact.¹³ In 1981, a joint conference of lawyers and CPAs issued a statement declaring: “Frequently, the legal and accounting phases [of tax practice] are so interrelated, interdependent and overlapping that they are difficult to distinguish. Particularly this is true in the field of income taxation where questions of law and accounting are often inextricably intertwined.”¹⁴ In particular, both accountants and lawyers engage in tax research, tax planning, and representing taxpayer clients before the IRS. These functions may require an accountant to engage deeply with primary legal authorities and a tax lawyer to grapple with complex, technical accounting rules.¹⁵ Consider a CPA who must analyze some combination of statutes, administrative authority, and judicial opinions to determine whether a tax position would be sustained on its merits in court;¹⁶ or a lawyer who must understand inventory accounting rules.¹⁷

Likewise, accountants and lawyers in tax practice face a similar ethical environment. Tax accountants can have ethical duties and dilemmas quite different from their colleagues in non-tax practices (especially CPAs who are external auditors) and quite similar to those of tax lawyers. Accountants practicing as external auditors face ethical dilemmas because they are paid by the audited client, but they serve stakeholders like creditors and stockholders, which could require revealing things that displease the paying client. The external auditor’s duty is to discover and communicate the truth about the firm, in spite of any contrary financial pressures. Thus, it can be said that the accounting profession’s role in society is to produce truthfulness

¹³ ROBY B. SAWYERS & STEVEN L. GILL, FEDERAL TAX RESEARCH 34–36 (12th ed. 2021); *see also* Kip Dellinger, *Avoiding Malpractice in Tax Engagements*, 170 TAX NOTES FED. 767, 768 (2021) (“[I]t has generally long been recognized that a CPA may advise clients on matters of federal tax law (tacitly acknowledged by the permission granted to practice before Treasury in section 330 and under the regulations in Circular 230)”).

¹⁴ *Lawyers and Certified Public Accountants: A Study of Interprofessional Relations: Statements on Practice in the Field of Federal Income Taxation and Estate Planning*, 36 TAX LAW. 25, 33 (1982).

¹⁵ In fact, in the early years of the U.S. income tax, lawyers tended to avoid tax work due to the accounting issues involved. *See* SAWYERS & GILL, *supra* note 13, at 34.

¹⁶ *See, e.g.*, Treas. Reg. § 1.6662-4(d) (2003).

¹⁷ *See, e.g., id.* § 1.471-1 (as amended in 2021); *id.* § 1.471-2 (as amended in 1973).

and trust, especially with respect to the market economy.¹⁸ In contrast, a tax accountant is primarily serving the client who pays her, with an obligation to achieve the most favorable tax result under the law. In this capacity, a tax accountant could even be an advocate for the client in an adversarial proceeding before the IRS. Yet the tax accountant must balance this advocacy with a duty to the integrity of the tax system. These dueling obligations are captured in the American Institute of CPAs (AICPA) professional responsibility standards for tax practitioners:

In addition to a duty to the taxpayer, a member has a duty to the tax system. However, it is well established that the taxpayer has no obligation to pay more taxes than are legally owed, and a member has a duty to the taxpayer to assist in achieving that result.¹⁹

The legal profession's role in society is to produce justice.²⁰ A lawyer has strong duties to the client who pays her, acting as an advocate to achieve the best legal result for the client, emphasizing the facts and law most favorable to the client, and with no general obligation to reveal negative facts about the client. However, the above-quoted AICPA statement on dueling duties to both the client and the tax system could apply equally well to a tax lawyer. In essence, both tax lawyers and tax accountants find themselves in a hybrid role where they are called upon to produce both justice and trust, a delicate balance of competing pressures and duties.

Even in situations where a lawyer's and a CPA's functions are distinct, the two professionals must often work together in serving clients.²¹ Indeed, clients are often insisting that their attorneys and CPAs work side by side in structuring mergers and acquisitions.²² A team approach makes sense because "tax planning ideally considers all taxes, all parties, and all costs,

¹⁸ MICHAEL PAKALUK & MARK CHEFFERS, ACCOUNTING ETHICS . . . AND THE NEAR COLLAPSE OF THE WORLD'S FINANCIAL SYSTEM 196 (2011).

¹⁹ ASS'N OF INT'L CERTIFIED PRO. ACCTS., STATEMENTS ON STANDARDS FOR TAX SERVICES 7 (2018).

²⁰ PAKALUK & CHEFFERS, *supra* note 18.

²¹ Danielle Higgins Green & Stanley Veliotis, *Law vs. Accounting Firms: Competing Over Three Decades of Change*, 173 TAX NOTES FED. 13, 15 (2021).

²² *Id.*

when ‘all costs’ include financial reporting implications.’²³ Tax planning in deal structuring and execution are often stressful, hurried affairs. The more lawyers and CPAs can appreciate each other’s language, motivations, concerns, and perspective prior to working together in the heat of a deal, the better.²⁴ This process of mutual understanding should start early, in the classroom.

III. CONTRASTING APPROACHES TO TAX EDUCATION

Given the overlap between the practices of CPAs and tax lawyers, it might be supposed that both receive similar educations. In some ways this is true. Overall, however, the education of tax accountants and tax lawyers is quite different, both in method and content. To better understand the contrasting ways that tax is taught in law schools and business schools, we must consider the context of tax courses within each school’s overall curriculum. Thus, in Part A we review the context of tax courses in law schools and business schools. In Part B, we then compare how business schools and law schools approach tax courses themselves. In Part C, we discuss the implications of these different approaches.

A. Tax Course Environment

Taxation is best learned in the context of the broader disciplines of law or accounting.²⁵ Although tax is often an important part of the curriculum at law schools and business schools, in neither school does the curriculum revolve around tax.

²³ *Id.* at 20.

²⁴ Lawyers and CPAs, of course, work together in other, less time-sensitive client matters. Even then, advanced mutual understanding is optimal. A CPA, for example, might represent a client on audit, and then (if the audit is not settled), a tax attorney might represent the client in court. The CPA and the attorney must work together to understand the issues, gather the appropriate evidence, and craft the best possible argument on behalf of their mutual client.

²⁵ Based on our experience, those who learn “taxation” on a standalone basis via experience at a tax preparation firm or in an enrolled agent exam preparation course can sometimes struggle with the tax world beyond compliance. It is harder to see the big picture, navigate primary authority, and think creatively and critically about tax issues when tax is learned as a series of forms and rules apart from the broader perspective offered by law or accounting academic programs.

Legal education often emphasizes hard cases and theory,²⁶ while accounting education often emphasizes practice and rules. Accounting education is often geared towards helping students obtain employment and pass the CPA exam, while legal education aims to teach students how to “think like a lawyer.”²⁷ The following further reviews how tax courses fit within the broader curriculum at each school.

1. Legal Education and Tax

Law students come from a variety of backgrounds, seek a legal education for a variety of reasons, and ultimately pursue a variety of careers both within and outside of the legal profession. Juris Doctor programs are three-year (if a student is full time) graduate programs.²⁸ The first-year curriculum is regimented, with students at most schools taking required courses like contracts, torts, property, civil procedure, criminal law, constitutional law, and legal research and writing.²⁹ Several of these courses are taught using the “case method,” in which students learn by reading court opinions illustrating the common law and engaging in analysis and answering questions in class via the Socratic method.³⁰ The focus in such courses is often on ambiguous concepts and theory, perhaps supplemented by some statutory analysis,³¹ in which students learn to “think like a lawyer.” Law students quickly learn to embrace ambiguity and to look at issues from a variety of perspectives. The first-year courses are thus transformative—often impacting the way students study other topics during the remainder of their legal education.³²

²⁶ See, e.g., Peter T. Hoffman, *Teaching Theory Versus Practice: Are We Training Lawyers or Plumbers?*, 2012 MICH. ST. L. REV. 625, 625–28. Theory is defined as “teaching law students to engage in doctrinal analysis or learning to ‘think like a lawyer.’” *Id.* at 627.

²⁷ See, e.g., *id.* at 627; Anne-Marie Slaughter, *On Thinking Like a Lawyer*, HARV. LAW TODAY (May 2002).

²⁸ JON M. GARON, LAW PROFESSOR’S DESK REFERENCE: A HANDBOOK FOR WORK AND LIFE IN THE LEGAL ACADEMY 12 (2021).

²⁹ *Id.* at 12–13.

³⁰ *Id.* at 13.

³¹ See *id.*

³² See *id.* at 15 (noting that “students often complain if individual faculty members try to introduce alternative models” to the Socratic method).

The second and third years of law school are more flexible, in that students are free to take courses of interest.³³ Depending on a law school's course offerings, students may take several tax courses—or perhaps none at all.³⁴ Because taxes are not tested on most state bar exams,³⁵ students presumably enroll in tax courses to better prepare them for their (tax or non-tax) legal careers.³⁶

2. Accounting Education and Tax

Accounting students come from a variety of backgrounds, seek an accounting education for a variety of reasons, and ultimately pursue a variety of careers both within and outside of the accounting profession. Students are often drawn to (or encouraged by parents or mentors to study) accounting for its objectivity, its importance as “the language of business,” its many entry-level opportunities, and the doors it can open to other careers in the business world. The study of accounting is primarily an undergraduate endeavor, although many students go on to a graduate program in accounting or taxation to earn the additional academic credits needed to become licensed as CPAs.³⁷ In the university system academic accounting departments (or schools) are normally housed within business schools (or colleges).

³³ *See id.* A small number of courses may be required after the first year. For example, the ABA accreditation standards require students to take a professional responsibility course after their first year. *Id.* at 15–16.

³⁴ A course in federal taxation is rarely required, but often recommended. *See id.* at 15. Law schools vary in their tax course offerings. *See* McMahon, *supra* note 7, at 189–91 (surveying the variety of tax courses offered at several law schools).

³⁵ *See* McMahon, *supra* note 7, at 187–88.

³⁶ *See supra* note 2.

³⁷ The standard number of academic credits required for CPA licensure is 150 credits. *See Closing the Gap: How to Meet the 150 Hour Requirement*, THIS WAY TO CPA, <https://www.thiswayto CPA.com/education/articles/choosing-well/closing-gap-how-meet-150-hour-requirement/> (last visited Oct. 4, 2021). The required content of those credits can vary by state. *Id.* If the standard undergraduate degree is 120 credits, this means the aspiring CPA must earn an additional thirty credits. *Id.* Some earn the additional credits at the undergraduate level by double majoring or taking electives. *See id.* Because it helps them prepare for both the CPA exam and their careers, we generally advise students to attain the additional thirty credits by earning a graduate degree in accounting or taxation—which normally takes about a year and requires thirty credits. *See Education*, THIS WAY TO CPA, <https://www.thiswayto CPA.com/education/> (last visited Apr. 6, 2022). Many states allow CPA candidates to take the CPA exam after completing their undergraduate degrees, but prior to earning the required 150 credits needed for actual

Like the first year of law school and unlike the second and third years of law school, the undergraduate accounting curriculum is standardized. Most courses are required and there is little opportunity to take electives. The curriculum is centered on financial accounting, which focuses on the four primary financial statements (the income statement, the balance sheet, the statement of retained earnings, and the statement of cash flows)³⁸ that businesses prepare in accordance with Generally Accepted Accounting Principles (GAAP) and issue to investors. Students generally take three or four financial accounting courses (at the introductory, intermediate, and advanced levels), two cost/managerial courses (focusing on budgets and analyses that aid management decision-making), one accounting systems/data analytics course, one audit/assurance course (focusing on CPAs as external auditors, who opine on whether a business has complied with GAAP), and one tax course.³⁹

The focus on financial accounting may seem odd, given that the CPAs are viewed as tax experts by the general public and CPAs have a monopoly over the auditing of financial statements. But all CPAs must understand financial accounting. CPA auditors must understand what they are auditing. And tax CPAs need to understand what is going on in the financial statements in order to make proper book/tax adjustments to arrive at taxable income. The financial accounting and tax accounting worlds intersect and interact in various ways, and it is hard to be literate in one but not the other.⁴⁰

At the graduate level, there is more flexibility in course offerings.⁴¹ If students are interested in taxation, they can enroll in a graduate program that

licensure. *See* State & Territorial Requirements, THIS WAY TO CPA, <https://www.thiswaytocpa.com/licensure/state-requirements/> (last visited Apr. 6, 2022).

³⁸ DONALD E. KIESO ET AL., INTERMEDIATE ACCOUNTING 85 (15th ed. 2013).

³⁹ Requirements vary by accounting program but are fairly close to this standard. Some accounting programs may offer a second undergraduate tax course (normally on business entities).

⁴⁰ *See generally, e.g.*, Mark J. Cowan, *A GAAP Critic's Guide to Corporate Income Taxes*, 66 TAX LAW. 209 (2012) (analyzing the interrelationships between financial accounting and the tax law).

⁴¹ Boise State's MSAT, for example, requires that all students take Corporate Tax, Partnership Tax, and Tax and Accounting Research. Beyond those requirements, students can pick from a variety of other tax and accounting courses to complete their degrees.

focuses on taxation—like the MSAT.⁴² Such programs are similar to LLM programs in taxation, except they are available to graduates of accountancy programs rather than graduates of law programs.

Unlike law students, accounting students are universally required to take at least one tax course. Unlike the bar exam, the CPA exam heavily covers tax topics.⁴³ The coverage of tax on the CPA exam elevates the importance of studying tax but also limits the perceived ways of teaching tax courses. Some accounting professors may feel pressure to cover as many CPA exam topics as possible, perhaps leaving less time for teaching analytical skills that would help students throughout their careers.⁴⁴

Undergraduate accounting textbooks look much different from law school casebooks.⁴⁵ Accounting textbooks are often colorful and feature many pictures, graphics, sidebars, news items, examples, homework problems, and cross-references to CPA exam topics. By emphasizing bright-line rules, calculations, structured linear processes (like the steps in the accounting cycle), flowcharts, templates for accounting reports (which must be prepared “in good form”), and clear right or wrong answers, the textbooks can leave students with the impression that accounting is a series of complex, rigid recipes.⁴⁶ This “cookbook” approach to accounting education is justified in many places in the accounting curriculum. Financial accounting, in particular, has numerous inviolable rules. Debits must equal credits. Assets must equal liabilities plus owners’ equity. A balance sheet must be headed,

⁴² The tax graduate degrees offered by business schools go by a variety of other names, like Master of Taxation (MT) or Master of Business Taxation (MBT).

⁴³ As of this writing, the CPA exam is being revised (effective in 2024) to include three core parts (one of which covers tax) and a fourth part in a specialized area that the candidate selects (one of the options is an exam part on advanced tax topics). *CPA Evolution*, NAT’L ASS’N OF STATE BDS. OF ACCT., <https://www.evolutionofcpa.org/> (last visited Oct. 2, 2021).

⁴⁴ Accounting professors are provided with a model curriculum, which suggests time allotments for covering specific topics. ASS’N OF INT’L CERTIFIED PROF. ACCTS. & NAT’L ASS’N OF STATE BDS. OF ACCT., CPA EVOLUTION MODEL CURRICULUM 3 (2021), <https://thiswayto CPA.com/collectedmedia/files/cpa-evolution-model-curriculum.pdf>. At Boise State, we have tried to resist, where feasible, the CPA exam-centric approach by focusing on career-spanning skills—with CPA exam performance being a byproduct of those efforts.

⁴⁵ We explore the differences between law and accounting textbooks in taxation specifically in more detail at *infra* Part III.B.

⁴⁶ No association with “cooking the books” intended.

dated, and formatted in a prescribed way. But the cookbook approach can encourage memorization over understanding. Students can become myopic, viewing their jobs as applying a clear rule to a transaction without much thought. In this learning environment, students could be forgiven for thinking that there is always an objective, correct answer to every problem.

3. Only a Minority Get Both an Accounting and a Legal Education

Since law school is a graduate program in the United States, it requires students to first complete a bachelor's degree in any major. It is conceivable that most tax lawyers could have majored in accounting, meaning that there is actually little practical difference between the education received by tax accountants and lawyers. An examination of tax lawyer biographies at large law firms indicates that this is emphatically not the case.⁴⁷ As Table 1 demonstrates, only fifteen percent of sampled tax attorneys list accounting as their college major. The number expands to seventeen percent if we include attorneys receiving degrees in international tax outside of the United States. While eleven percent of the sample do not list any major, even the unlikely assumption that all of those majored in accounting would only increase the proportion with accounting degrees between twenty-six to twenty-nine percent. Of the tax lawyers who majored in accounting, only two list any accounting practice experience prior to entering law school, with five more where data is unavailable. Sixteen of the sampled attorneys who did not major in accounting did go on to earn an LLM in taxation. Overall, we can clearly see that the vast majority of tax lawyers did not receive a traditional accounting education. And no investigation is needed to say that the vast majority of tax accountants did not receive a legal education.

⁴⁷ The authors visited the websites of two large national law firms and used their directories to isolate the attorneys listed as tax practitioners. We then extracted the biographical data from the directory listings for one hundred tax attorneys and attempted to supplement using LinkedIn when data was missing.

Table 1
Tax Lawyer Education

	Accounting Degree?	LLM?	Accounting Degree <u>or</u> LLM	Tax or Accounting Practice Prior to Law School
Yes	15	17	31	2
No	74	83	60	72
Not able to tell	11	0	9	26

Other Popular Majors

Major	Number of Tax Lawyers
Economics	13
Business	10
Finance	10
Law (Europe)	8
Mathematics	6
Philosophy	5
Political Science	5
History	4

Table 1 presents the results of a survey of the biographical information available online for a sample of 100 tax attorneys at large law firms.

Having both an accounting education and a legal education has its benefits.⁴⁸ As should be obvious from even a cursory look at practice,

⁴⁸ For example, those who have had the opportunity to study tax accounting in a business school and tax law in a law school benefit by appreciating “the black-and-white nature of accounting verses the myriad ways of interpreting tax laws.” MARY THERESA VASQUEZ & ANTHONY HEAD, FROM THE TEXAS COTTON FIELDS TO THE UNITED STATES TAX COURT: THE LIFE JOURNEY OF JUAN F. VASQUEZ 45 (2021) (noting the topic of conversations between future Judge Vasquez and a law school classmate—who were both CPAs and were both taking tax law courses). Vasquez earned his undergraduate degree in accounting and started his career as an auditor at CPA firm Lybrand, Ross Bros. & Montgomery. *See id.* at 39–41. When doing a rotation in the firm’s tax practice, a supervisor suggested Vasquez consider law school. Vasquez had impressed his supervisor by reporting that an expense was not deductible for the reason given in the file, but that he believed it was deductible under another provision of the tax law. *Id.* at 42. A less important, and archaic benefit might be that JD/CPAs are sometimes viewed as “a mother-in-law’s dream.” Herbert N. Beller, 2021 *Erwin N. Griswold Lecture Before the American College of Tax Counsel: Tax Lawyers as Teachers—A Precious Commodity*, 74 TAX LAW. 611, 612 (2021).

however, a legal education is not a prerequisite to being a good tax accountant and an accounting education is not a prerequisite to being a good tax attorney. Still, when legal education selectively borrows from accounting education and vice versa, the education and perspective of the vast majority of tax accountants and tax lawyers who did not earn both degrees can be enhanced and expanded.

B. Law School vs. Business School Approaches to Tax

Law students come to their first tax course inculcated to studying complex, often subjective standards and processes.⁴⁹ A law school tax course can be taught via the case method like other core law courses or with exposure to both objective rules and subjective standards.⁵⁰ The former, the default approach, would be the path of least resistance because it would conform to both the way the casebooks are written and student expectations. The latter would help law students work with bright-line, objective rules. But law students sometimes struggle and complain when confronted with problems with a clear answer. The struggle is worth it. A tax course can help law students see, contrary to the impression they may have developed in their first year, that there are some inviolable rules and that not every legal issue is open to argument. It can take effort to challenge law students to get as comfortable as accounting students with objective standards.⁵¹

Undergraduate accounting students come to their first tax course inculcated to studying complex, but unambiguous rules and processes.⁵² A business school tax course can be taught in a cookbook fashion like other core accounting courses or with exposure to both objective rules and subjective standards.⁵³ The former, the default approach, would be the path

⁴⁹ See *supra* Part III.A.1.

⁵⁰ Obviously, these are not the only two choices. Creative law teachers use a variety of approaches. To focus on the difference between tax courses in law schools and business schools, we will limit our discussion to these two approaches.

⁵¹ See *infra* Part IV.A.

⁵² See *supra* Part III.A.2.

⁵³ Obviously, these are not the only two choices. Creative accounting teachers use a variety of approaches. To focus on the difference between tax courses in law schools and business schools, we will limit our discussion to these two approaches.

of least resistance because it would conform to both the way the textbooks are written and student expectations. The latter would help accounting students work with subjectivity and ambiguity. But accounting students sometimes struggle and complain when confronted with problems with no clear answer.⁵⁴ The struggle is worth it. A tax course can help accounting students see, contrary to the impression they may have developed in their prior courses, that there are some subjective standards and that not every accounting issue can be decided by inviolable rules. It can take effort to challenge accounting students to get as comfortable as law students with subjective standards.⁵⁵

To better understand the difference between the education of the typical tax lawyer and tax accountant, it is instructive to contrast how law school casebooks and accounting textbooks present the same topics.⁵⁶ Consider the highly subjective and oft-litigated distinction between a trade or business, where expenses are deductible,⁵⁷ and a hobby, where deductions are disallowed.⁵⁸ In one popular accounting textbook, the chapter dealing with deductions makes a cursory statement that hobby expenses are non-deductible, with a footnote defining hobbies as “revenue-generating

⁵⁴ As any accounting professor who has tried to have a class discussion on a theoretical or ambiguous topic can tell you, students do not react well. They may participate in the discussion or listen politely, but usually with their pens poised at their notebooks or their fingers ready at their keyboards to record “the answer.” When an answer is not forthcoming, bewilderment ensues and someone inevitably asks, “So what’s the answer?” (Sometimes the appropriate instructor reply is “I don’t know the answer, that’s why I was asking you all.”) The students, based on their prior courses, thought they were discussing how to follow a recipe and expected the instructor to eventually unveil the finished, frosted cake that results. They did not realize they were being challenged to think through a messy situation with no clear answer. This bewilderment is not the sort of thing one would expect to see in a discussion in a law school tax course.

⁵⁵ See *infra* Part IV.B.

⁵⁶ We limit our discussion to widely-used casebooks and textbooks published by commercial publishers. But note that there are exciting developments involving open access casebooks and textbooks. See, e.g., DEBORAH A. GEIER, U.S. FEDERAL INCOME TAXATION OF INDIVIDUALS 2022 (9th ed. 2022) (open-source textbook on taxation available at <https://www.cali.org/books/us-federal-income-taxation-individuals> (last visited Apr. 6, 2022)).

⁵⁷ I.R.C. § 162.

⁵⁸ I.R.C. § 183.

activities for primarily personal enjoyment rather than profit.”⁵⁹ The footnote then adds that “[t]he IRS considers a list of factors . . . in determining whether an activity is a hobby or for profit.”⁶⁰ However, only four of the nine factors are specifically listed.⁶¹ The chapter on business income and expenses also makes one brief mention of the business/hobby distinction, stating that “[w]hen an activity does not meet the ‘for profit’ requirement, it is treated as a ‘hobby’ which is an activity motivated by personal objectives.”⁶² The final mention of the business/hobby distinction comes in a chapter dealing with S Corporations, where a footnote indicates that such entities are “subject to the hobby loss rules.”⁶³ Notably, none of these references indicates that the line between hobbies and businesses is often highly subjective and ambiguous, and the subject of much litigation. An accounting student may likely get the impression that there is a clear rule separating hobbies and businesses, and the tax accountant will simply be able to follow the rule to place activities in the proper category.

In contrast, in a popular law school casebook on federal income taxation, the treatment of the topic is significantly longer and quite different.⁶⁴ After giving a brief introduction to the topic and noting that hobby losses are non-deductible, the casebook immediately presents a tricky hobby loss case, *Plunkett v. Commissioner*, where the taxpayer, an architect and homebuilder, is also engaged in mud-racing and truck-pulling competitions.⁶⁵ The mud racing is held to be a hobby not engaged in for profit, but the truck-pulling is held to be a trade or business.⁶⁶ Highlighting the ambiguity and subjectivity of the area, the court acknowledges that some

⁵⁹ BRIAN C. SPILKER ET AL., MCGRAW-HILL’S TAXATION OF INDIVIDUALS AND BUSINESS ENTITIES 6-22, 6-22 n.39 (11th ed. 2020).

⁶⁰ *Id.*

⁶¹ See Treas. Reg. § 1.183-2(b) (1972) (listing nine factors).

⁶² SPILKER ET AL., *supra* note 59, at 9-2.

⁶³ *Id.* at 22-13 n.28.

⁶⁴ See MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 378 (6th ed. 2009).

⁶⁵ 47 T.C.M. (CCH) 1439, 1984 T.C.M. (RIA) ¶ 84,170 (1984).

⁶⁶ *Id.* at 1443.

of the factors in the regulations⁶⁷ weigh against the taxpayer with respect to his truck-pulling activity, but nevertheless finds the truck-pulling expenses are still fully deductible.⁶⁸

Following the *Plunkett* case, the casebook has a note discussing the fine distinction between the proper standard to be applied, “objective of making a profit,” versus the improper reasonable “expectation of a profit.”⁶⁹ Next, another note states, “What may be a profit-seeking activity for one taxpayer may not be for another.”⁷⁰ This statement is amply supported by references to several cases: two cases dealing with taxpayers who are both engaged in aircraft leasing activities, but which nevertheless had opposite outcomes;⁷¹ a case where a taxpayer didn’t have a profit motive in later years despite having one in earlier years for the same activity;⁷² and two cases involving dentists engaged in agricultural activities outside their practice, again with opposite outcomes.⁷³ Finally, there is another note, as well as a separate section, discussing the use of the hobby loss rules as a weapon against tax shelters.⁷⁴

A law student exposed to this material might reasonably conclude that the rules are so ambiguous, subjective, or even arbitrary that when in doubt, the taxpayer should simply take the more beneficial position. Or, a law student might infer that given the similar cases that resulted in opposite outcomes, the successful taxpayers may simply have had lawyers who were smarter and made better arguments than those of the unsuccessful taxpayers.

Examining the treatment of another topic, expenditures against public policy and lobbying expenses, reveals similar differences. The accounting

⁶⁷ Treas. Reg. § 1.183-2(b) (1972).

⁶⁸ *Plunkett*, 47 T.C.M. (CCH) at 1443–44.

⁶⁹ GRAETZ & SCHENK, *supra* note 64, at 382.

⁷⁰ *Id.* at 383.

⁷¹ *Id.* (citing *Cornfeld v. Comm’r*, 797 F.2d 1049 (D.C. Cir. 1986) and *Worley v. Comm’r*, 39 T.C.M. (CCH) 1090, 1980 T.C.M. (RIA) ¶ 80,051 (1980)).

⁷² *Id.* (citing *Kartrude v. Comm’r*, 925 F.2d 1379 (11th Cir. 1991)).

⁷³ *Id.* (discussing *Zdun v. Comm’r*, 76 T.C.M. (CCH) 278, 1998 T.C.M. (RIA) ¶ 98,296 (1998), *aff’d per curiam* 229 F.3d 1161 (9th Cir. 2000) and *Morley v. Comm’r*, 76 T.C.M. (CCH) 363, 1998 T.C.M. (RIA) ¶ 98,312 (1998)).

⁷⁴ *Id.* at 383, 412.

textbook contains brief statements that convey a rule. The text states that ordinary and necessary expenses of carrying on a trade or business are deductible, while fines, penalties, bribes, or illegal kickbacks are not.⁷⁵ The textbook cites *Commissioner v. Sullivan*,⁷⁶ without discussion, as authority for the proposition that ordinary and necessary expenses of operating an illegal business are deductible, while fines, penalties, bribes, or illegal kickbacks are not deductible.⁷⁷ A footnote also states the rule that a nondisclosure agreement will make settlements, payouts, or attorney fees related to sexual harassment or abuse non-deductible.⁷⁸ Another footnote states special rules relating to the business of selling illegal drugs.⁷⁹ For political contributions and lobbying expenditures, one sentence is given stating the rule that such expenses are mostly non-deductible, with a phrase speculating as to the reasons for the rule.⁸⁰ Again, the accounting text implies that the distinction between deductible and non-deductible expenses in these areas is straightforward, and it is the job of the accountant to simply place expenses in the proper category.

The law school casebook takes an opposite approach, ignoring easy applications of the rule and focusing on hard cases. No rule is stated upfront, and the text⁸¹ immediately dives into a case that predates important amendments to the relevant provisions of the tax code, *Commissioner v. Tellier*, where the Supreme Court allowed the deduction of legal fees from the taxpayer's unsuccessful defense against criminal prosecution for securities fraud and mail fraud.⁸² This case is followed by a note discussing *Sullivan*, also cited in the accounting text, but here the case is further discussed, revealing that the expenses of carrying on the illegal gambling business were held deductible, despite the fact that the mere payment of such

⁷⁵ SPILKER ET AL., *supra* note 59, at 9-5. A footnote further elaborates that fines or penalties must be levied by a government to be non-deductible. *Id.* at 9-5 n.8.

⁷⁶ 356 U.S. 27 (1958).

⁷⁷ SPILKER ET AL., *supra* note 59, at 9-5.

⁷⁸ *Id.* at 9-5 n.9.

⁷⁹ *Id.* at 9-5 n.10.

⁸⁰ *See id.* at 9-6.

⁸¹ GRAETZ & SCHENK, *supra* note 64, at 246-48.

⁸² *Comm'r v. Tellier*, 383 U.S. 687, 688-89 (1966).

expenses was also illegal under state law.⁸³ Further, *Sullivan* is paired with *Tank Truck Rentals v. Commissioner*,⁸⁴ where expenses that seem much more legitimate are nevertheless held to be non-deductible.⁸⁵

After the discussion of these cases, the current statutory rules are finally presented.⁸⁶ There is also discussion of the uncertainty surrounding payments to third parties, the common law public policy exception and the considerable confusion related to this exception in the 6th Circuit, as well as how the general common law public policy limitation is still applied to other code sections.⁸⁷ Finally, there is a note describing the treatment of illegal drug trafficking expenses and asking if this policy is justified, and if it makes sense to treat drug traffickers different from other businesses.⁸⁸

With respect to lobbying expenses, the casebook goes well beyond the accounting text's one-sentence statement of a rule. First, the history of judicial and statutory limits is discussed, including the creation of the exception allowing deduction of expenses for lobbying local officials.⁸⁹ The casebook also discusses potential first amendment concerns with these restrictions.⁹⁰ Then, the casebook notes that businesses may deduct institutional or goodwill advertising, but not advertising "to influence the public on particular issues of legislative significance," discussing how this distinction will not always be easy to determine, with examples showing how the line is often blurry.⁹¹ Once again, the casebook presentation is likely to create the impression in a law student that the law is dynamic, uncertain, and malleable.

⁸³ GRAETZ & SCHENK, *supra* note 64, at 249.

⁸⁴ 356 U.S. 30 (1958).

⁸⁵ GRAETZ & SCHENK, *supra* note 64, at 248–49.

⁸⁶ *Id.* at 249.

⁸⁷ *Id.* at 250–51.

⁸⁸ *Id.* at 252.

⁸⁹ *Id.* at 252–53.

⁹⁰ *Id.* at 253.

⁹¹ *Id.* at 253–54.

C. Implications of the Distinct Educational Approaches

The distinct methods of legal and accounting education should logically lead to distinct styles of cognition and behavior. For lawyers, as we have seen, the idea of “thinking like a lawyer” is prevalent.⁹² Despite its prevalence, the phrase has no settled meaning.⁹³ Notably, however, many of the meanings given to “thinking like a lawyer” relate to the uncertainty and ambiguity we saw expressed in the way a law school casebook presented tax topics. As an example, for one commentator, “Thinking like a lawyer also means that you can make arguments on any side of any question” as well as “understanding that words can have myriad meanings and can often be manipulated.”⁹⁴ Likewise, it has been noted that, although unintentionally, the use of the “Socratic Method sometimes leaves students believing that thinking like a lawyer means avoiding straight answers and promoting ambiguity.”⁹⁵ Another source conceives of “thinking like a lawyer” to include “embracing ambiguity, and thinking creatively to resolve issues.”⁹⁶

Although one rarely speaks of “thinking like an accountant,” research has shown that accountants indeed tend to have a particular cognitive style.⁹⁷ This style “is concerned with detail, careful about rules and procedures, orderly, precise, facts-oriented . . . good at observing and ordering, filing and recalling, and sequencing and categorizing”⁹⁸ as well as a tendency to be logical, practical, and decisive in attitude.⁹⁹ However, the research also shows that there is a strong tendency for those with these personality

⁹² See *supra* Part III.A.1.

⁹³ See Cheryl B. Preston et al., *Teaching “Thinking Like a Lawyer”: Metacognition and Law Students*, 2014 BYU L. REV. 1053, 1054 n.1. (collecting and citing various differing definitions of “thinking like a lawyer”).

⁹⁴ Slaughter, *supra* note 27.

⁹⁵ Preston et al., *supra* note 93, at 1054.

⁹⁶ Michelle M. Harner, *The Value of “Thinking Like a Lawyer,”* 70 MD. L. REV. 390, 392 (2011).

⁹⁷ See Stacy E. Kovar et al., *Personality Preferences of Accounting Students: A Longitudinal Case Study*, 21 J. ACCT. EDUC. 75 (2003).

⁹⁸ *Id.* at 79 (citing George R. Frisbie, *Cognitive Styles: An Alternative to Keirse’s Temperaments*, 16 J. PSYCH. TYPE 13, 18 (1988)).

⁹⁹ Patrick Wheeler, *The Myers–Briggs Type Indicator and Applications to Accounting Education and Research*, 16 ISSUES ACCT. EDUC. 125, 128 tbl.1, 143 (2001).

characteristics to self-select into the accounting profession, even if they did not major in accounting, and therefore, it is difficult to distinguish the effect of accounting education itself.¹⁰⁰ Along with the aforementioned personality traits of accountants, some have also identified traits that accountants entering the profession tend to lack, including the ability to solve unstructured problems, the ability to manage change, interpersonal relationship skills, and oral and written communication skills.¹⁰¹ One particularly critical assessment has argued that the focus of accounting students on securing employment, and the “highly procedural and technical exercises that dominate most of their accounting training” have contributed to making accounting graduates “docile and compliant.”¹⁰²

The different behavioral and cognitive traits exhibited by tax lawyers and tax accountants could have implications in practice. For tax lawyers, we have seen that education is heavily weighted towards the case method, focusing on difficult cases that might have been decided either way, with little time spent teaching the basics. Tax lawyers will learn to see both sides of the issue and to understand that the law is often dynamic, uncertain, and malleable, where the hard work or clever arguments of attorneys can change the outcome. These are important lessons because they are true. However, a potential danger arises from the relative underweighting of knowledge about basic compliance, or of the rule-based methodology of the accountant. A tax lawyer may encounter trouble when they incorrectly perceive a situation to be one where the law is fluid or indeterminate such that their skill can engineer a beneficial outcome for their client, when in fact there is a fixed rule that prescribes a different outcome. That is, there is danger when the situation calls for a compliance mindset rather than an advocacy mindset.

¹⁰⁰ Paul Andon et al., *Personality Preferences of Accounting and Non-Accounting Graduates Seeking to Enter the Accounting Profession*, 21 CRITICAL PERSPS. ACCT. 253, 255–56 (2010) (study of Australian accountants indicating that “accounting and non-accounting graduates seeking to enter the accounting profession are likely to share similar personality preferences”).

¹⁰¹ Carel Wolk & Loren A. Nikolai, *Personality Types of Accounting Students and Faculty: Comparisons and Implications*, 15 J. ACCT. EDUC. 1, 2 (1997) (citing MANAGING PARTNERS OF THE BIG EIGHT ACCOUNTING FIRMS, PERSPECTIVES ON EDUCATION: CAPABILITIES FOR SUCCESS IN THE ACCOUNTING PROFESSION (1989)).

¹⁰² Tony Tinker & Athina Koutsoumadi, *A Mind is a Wonderful Thing to Waste: “Think Like a Commodity,” Become a CPA*, 10 ACCT., AUDITING & ACCOUNTABILITY J. 454, 454, 461–62 (1997).

One simple example of the danger of this lack of emphasis on basic rules and compliance can ironically be seen in malpractice claims against CPAs. A large proportion of such claims involve allegations that tax returns were filed late.¹⁰³ But while the claims are against the CPA, it is often revealed that an attorney was the cause of the late filing.¹⁰⁴

Consider also the recent taxpayer loss in the important transfer-pricing dispute in *Coca-Cola v. Commissioner*.¹⁰⁵ The lawyers for the taxpayer, Coca-Cola, argued that they were allowed to choose among several different transfer pricing methods, including the “profit split” method they selected, which gave them the best tax result.¹⁰⁶ However, the court found that the applicable regulations required the selection of the one “best” method, which in this case was the Comparable Profits Method (CPM).¹⁰⁷ This result may potentially cost Coca-Cola up to an additional \$12 billion in taxes.¹⁰⁸ In other words, Coca-Cola’s tax lawyers acted as if the law was malleable enough for them to manufacture a superior result for their client, when in fact, the court determined they should have taken a compliance approach, applying the one correct method dictated by the rules.

In contrast to a tax lawyer, a tax accountant’s rule-based training will make her more likely to see situations as having one correct answer dictated by proper application of the rules to the facts. Thus, accountants are likely to encounter trouble when a situation presents ambiguity or multiple alternatives—calling for an advocacy rather than a compliance mindset. For example, one of the most frequent sources of malpractice claims against CPAs in recent years is advice related to choosing between traditional and Roth IRAs or Roth IRA conversions.¹⁰⁹ Such decisions cannot be answered in a merely rule-based fashion, but instead require projections about the

¹⁰³ William Donnelly et al., *Top 10 Tax Claims*, 187 J. ACCT. 57, 58 (1999).

¹⁰⁴ *Id.* at 57–58.

¹⁰⁵ 155 T.C. 145 (2020).

¹⁰⁶ *Id.* at 152.

¹⁰⁷ *Id.* at 213, 219–21.

¹⁰⁸ Ryan Finley, *Coca-Cola’s U.S. Transfer Pricing Dispute May Cost \$12 Billion*, 170 TAX NOTES FED. 1178, 1179 (2021). The amount represents only tax liability and interest, as Coca-Cola was able to avoid penalties due to a 1996 closing agreement with the IRS. *Id.*

¹⁰⁹ Donnelly et al., *supra* note 103, at 58–59.

future, including the fact that important parts of the law, such as tax rates, may change. CPAs have also tended to face claims that they failed to establish retirement plans during years when this would have been optimal.¹¹⁰ Again, this is not a compliance task that requires application of a rule but instead involves proactive planning about an uncertain future.

Another example can be seen in malpractice claims against CPAs for late filings. Although we noted that claims against CPAs for late filings are often the fault of third-party attorneys, CPAs are rarely able to prove that the attorneys are liable, because they failed to keep sufficient documentation to prove the attorneys' culpability.¹¹¹ This demonstrates that CPAs can fail to think about potential conflict and the role of litigation, as well as a need to be more forward-looking in general, planning for undefined risks and contingencies.

IV. SUGGESTIONS FOR CROSS-FERTILIZATION

As we have seen, tax courses in law schools tend to focus on subjective, ambiguous rules and foster an advocacy mindset, and tax courses in business schools tend to focus on objective, unambiguous rules and foster a compliance mindset. But we have also seen that both foci and both mindsets are important to both CPAs and tax attorneys. Thus, there is much to be gained from using some accounting teaching techniques in the law school classroom to supplement the advocacy mindset with a compliance mindset and from using some law school teaching techniques in the accounting classroom to supplement the compliance mindset with an advocacy mindset. Notice we say "supplement" rather than "supplant." Our suggestions are modest; wholesale changes to courses or curriculum are not needed or desirable. Instead, we encourage law professors to introduce some objective problems and compliance issues into their tax courses and accounting professors to introduce some subjective standards into their tax courses. Although this sounds straightforward, it will require professors to purposefully supplement the default ways of teaching tax derived from the surrounding curriculum and textbooks used in each school.

¹¹⁰ *Id.* at 58.

¹¹¹ *Id.* at 57.

In Part A, we look at ways that tax courses in law schools might add some objective, compliance-related activities. In Part B we look at ways that tax courses in accounting programs might add some subjective, advocacy-related activities.¹¹² The suggestions we make are just that—suggestions. They have worked in our classrooms, but may not be appropriate everywhere.¹¹³

A. Introducing the Compliance Mindset in Law School

1. Embrace the Certainty and the Numbers

There are many ways that tax teachers can supplement the traditional case method with exposure to the complex, but clear, rules that animate much of the tax law. Sometimes, applying these rules requires calculations. While some law students aren't as comfortable with numbers as accounting students, the "math" (really arithmetic) involved is not complex. Inflicting some numerical pain is worth it to help students see that there are some tax questions that have only one correct answer—an answer that often must be quantified.

We need not belabor the point, because many tax law professors already use the "problem method," in which students apply complex, but unambiguous statutes and regulations to a set of facts.¹¹⁴ Many tax casebooks are available that not only cover the relevant cases and theory but also include problem sets.¹¹⁵ A tax professor who wants to use the problem method need

¹¹² Many seasoned professors in both schools likely already use several, if not all, of the activities we suggest. We make these suggestions for new tax teachers and experienced tax teachers who are looking to change their approaches.

¹¹³ We have attended many teaching seminars and read many teaching articles that claim to have solved, in conflicting ways, the mystery of how to teach. The message seems to be that "no matter how you teach, you're doing it wrong." Cf. *The Simpsons: You Kent Always Say What You Want* (Fox television broadcast May 20, 2007) (featuring a sign in front of the "Springfield Dental Complex" reading, "No matter how you brush, you're doing it wrong."). We don't want readers to feel that way. The reality is that none of us have figured it out; we just do our best to keep improving.

¹¹⁴ Sarah B. Lawsky, *Teaching Algorithms and Algorithms for Teaching*, 24 FLA. TAX REV. 587, 589–91 (2021) (explaining the use of the problem method in law school tax courses).

¹¹⁵ E.g., DANIEL L. SIMMONS ET AL., FEDERAL INCOME TAXATION (8th ed. 2020); STEPHEN SCHWARZ ET AL., FUNDAMENTALS OF PARTNERSHIP TAXATION: CASES AND MATERIALS (11th ed. 2019); STEPHEN SCHWARZ ET AL., FUNDAMENTALS OF CORPORATE TAXATION: CASES AND MATERIALS (10th

only select a casebook that includes appropriate problems and commit to assigning them and reviewing them in class. The problem method is closer to the way that tax is taught in business schools, although business schools often drill down into the unambiguous rules even further.

Law professors sometimes go beyond the problem method in creative ways.¹¹⁶ Professor Sarah Lawsky, for example, developed a website to apply the “algorithm” method, which challenges students with a “series of unambiguous problems to guide students through the statute and regulations.”¹¹⁷ The algorithm method is akin to digital services offered by undergraduate tax textbooks, which generate objective questions for students to complete for practice or homework points.¹¹⁸ Law school casebook publishers are starting to offer similar services.¹¹⁹

2. Show that Not Everything is Up for Debate

While problems in tax courses can help students see that there are objective answers to many questions, additional discussion may be required when bright-line rules appear unfair. A good example is the related party rules. Whether a taxpayer is subject to the special rules that apply to related-party transactions is determined using bright-line, mechanical tests based on family relationships or ownership stakes.¹²⁰ Transactions between siblings, for example, are subject to the related party rules.¹²¹ Like all bright-line tests, the definition of a related party is both under- and over-inclusive. At Boise State, we illustrate this phenomenon by asking the students whether two

ed. 2019); JAMES J. FISHMAN ET AL., *TAXATION OF NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* (5th ed. 2021).

¹¹⁶ See, e.g., Ryznar, *supra* note 12, at app. A (showing sample objective quiz questions used in a tax course).

¹¹⁷ Lawsky, *supra* note 114, at 590.

¹¹⁸ Examples include McGraw-Hill Connect and CengageBrain, which “plug-in” to learning management systems like Canvas or Blackboard. See, e.g., *McGraw Hill Connect*, MCGRAW HILL, <https://www.mheducation.com/highered/connect> (last visited Mar. 17, 2022); *WebAssign*, CENGAGE, <https://www.cengage.com/student> (last visited Mar. 17, 2022).

¹¹⁹ See, e.g., *CasebookPlus*, WEST ACAD., <http://faculty-casebookplus.com/> (last visited Feb. 8, 2022).

¹²⁰ See I.R.C. § 267.

¹²¹ See *id.* § 267(c)(4).

sisters who hated each other would still be subject to the related party rules. The answer, of course, is yes.¹²² We then ask whether two best friends who are like sisters would be subject to the related party rules. The answer, of course, is no. Accounting students tend to understand this right away since they are comfortable with rules even if the rules sometimes produce unfair results.¹²³

Law students could benefit from similar discussions. Law students, with a developed advocacy mindset, are more likely to want to view the related party definition as a standard and argue that the facts and circumstances of the dueling sisters and the best friends warrant accommodation. Showing the students that not everything in the tax law is up for debate can help them identify when it is acceptable to make arguments and when a bright-line rule settles the issue.¹²⁴

3. Use Tax Return Examples

In business school tax courses, students are often required to prepare tax returns by hand or by using software.¹²⁵ Actually preparing the returns is instructive, not only because many CPAs will become tax preparers, but also because seeing how the rules and concepts discussed in class flow through the forms reinforces those rules and concepts.

In the law school classroom, we most assuredly do *not* recommend that students prepare tax returns. While doing so may have its benefits, it would be overkill for future professionals who are unlikely to be engaged in tax preparation.¹²⁶ We do recommend, however, that law students be given sample completed tax returns for reference. In the basic federal income tax

¹²² See, e.g., Alex Raskolnikov, *The Cost of Norms: Tax Effects of Tacit Understandings*, 74 U. CHI. L. REV. 601, 640–41 (2007) (“[R]elatives are taxed as if they always act as loyal and loving family members, whether they do so or not.”).

¹²³ As a side benefit, accounting students can see how competing policy goals, here fairness and administrative convenience, sometimes conflict.

¹²⁴ We don’t mean to suggest that these discussions are not already occurring. In fact, we assume they are in many classrooms. But, since the importance of these discussions is not always obvious from casebooks, teachers need to deliberately plan to have these discussions.

¹²⁵ In the undergraduate tax course, students prepare Form 1040. In advanced courses, students may prepare, for example, Forms 1065, 1120, or 1120S.

¹²⁶ See also *supra* note 9.

course, for example, we recommend that students be given a sample Form 1040 for a fictitious taxpayer.¹²⁷

Although tax lawyers generally do not prepare returns, they often use filed tax returns as inputs in the planning or litigation processes. Knowing a little about how the forms look, flow, and reflect the tax law would thus be instructive. A tax return can also tell a lawyer a lot about a client (or perhaps an adversary).

At Boise State, we provide our undergraduate tax students with a sample tax return prepared by the professor. The sample Form 1040 is for a (fictitious) young married couple, where both spouses are CPAs. One spouse is self-employed and the other works as an employee. They own a rental property, itemize deductions, and have one child. Our hope is that students will identify with the taxpayers, since they may be reporting similar numbers and activities on their tax returns in the near future. On the first day of class, we ask students to identify what they know about the couple from looking at the tax return. The students can readily identify a lot: that the couple has a child, owns a rental property, has a house with a mortgage, gives money to charity, etc. About a week later, we have the students complete, outside of class, an open-book quiz on the sample return, which forces them to see how the numbers flow and how the various schedules interact. Then, throughout the semester, after we've covered a rule, we'll point out where the rule is operationalized on the form. For example, when we cover the self-employment tax,¹²⁸ we take the students through the various forms involved on the sample return: Schedule C (business income) to Schedule SE (calculating the self-employment tax) to Schedule 1 (showing the income tax deduction for one-half of the self-employment tax) to Form 1040 (where the self-employment tax liability is added to the couple's income tax liability). Having an example readily at hand when explaining these rules is invaluable in reinforcing the rules and making them less abstract.¹²⁹

¹²⁷ I.R.S. Form 1040, U.S. Individual Income Tax Return (2021).

¹²⁸ I.R.C. § 1401.

¹²⁹ Although the self-employment tax might be viewed as a "CPA" issue, we do think law students should have some exposure to it. In helping clients set up businesses (like single-member limited liability companies), lawyers must advise clients that, in many cases, their profits will be subject not only to income tax but also self-employment tax. Knowing the impact of the tax will help clients better set the prices they

We suggest law school tax professors prepare (or have a teaching assistant prepare) a sample Form 1040 that reflects transactions and activities that the professor plans to discuss in class. The professor can then use the return as an example like we do, or use it less or more depending upon the learning objectives of the course. A tax return can help illustrate how abstract concepts play out in the real world of practice. For example, a tax return can help students see the important (for tax planning purposes) concept of adjusted gross income (AGI)¹³⁰ and the difference between above the line (“for AGI”) deductions and below the line (standard or itemized “from” AGI) deductions.¹³¹ The latter are usually easy to identify on the forms but the former are sometimes buried in schedules like Schedule C (business expenses) and Schedule E (expenses related to rental properties).

In advanced courses, tax forms might be less useful.¹³² Still, we recommend that students be provided sample returns for the entities being covered. A Form 1065,¹³³ for example, can help partnership tax students visualize the difference between separately stated (Schedule K) and non-separately stated (page 1) income.¹³⁴

4. Connect to the Financial Statements

We recommend that law students get at least some exposure, ideally in an entities or corporate tax course, to how taxes interact with GAAP.¹³⁵ Although the tax law states that the starting point for calculating taxable

will charge customers. A sample tax return could be an efficient way to expose law students to the tax. The students need not know all the details of the tax’s calculation.

¹³⁰ See I.R.C. § 62.

¹³¹ See *id.* § 63.

¹³² Unlike basic federal (individual income) tax courses, partnership and corporate tax courses involve transactions (e.g., forming, liquidating, or merging corporations or partnerships) that don’t directly impact the income and deductions reported on an entity’s tax return. For this reason, at Boise State, we don’t provide sample returns in advanced courses. We do, however, have students *prepare* returns (like Forms 1065 and 1120) in the advanced courses. Although law students should not be asked to actually prepare returns, we suggest (for what it is worth; we know entity operations is only a small part of most courses) that they be provided with examples of returns in the advanced courses.

¹³³ I.R.S. Form 1065, U.S. Return of Partnership Income (2021).

¹³⁴ See I.R.C. §§ 702(a), 703(a).

¹³⁵ For more details, see generally Cowan, *supra* note 40.

income is the taxpayer's book income,¹³⁶ tax lawyers do not need to know the intricacies of GAAP. But they should have some exposure to how book income interacts with taxable income and how tax planning affects a taxpayer's financial statements.

Tax students are often told that a business (legally!) keeps two sets of books: one for GAAP and one for tax. This implies that a tax professional need only extract the "tax books" from the client's system and report them on the tax return. Of course, this is an oversimplification. Most businesses keep one set of books—for GAAP—and then make adjustments to GAAP income based on the tax law to arrive at taxable income.¹³⁷ At Boise State, we spend a lot of time in our corporate tax course applying this process. Students are provided the details of book income and must adjust line items of income and expense based on the tax law to arrive at amounts that need to be reported on Form 1120.¹³⁸ Students then must complete a Schedule M-1 (or M-3) to reconcile book income to taxable income.

Law students don't need to know how to prepare a Form 1120 or how to reconcile book to taxable income. *But they should be aware that calculating taxable income for a corporation is largely an exercise of reconciling book income to taxable income* rather than an exercise of calculating taxable income from scratch. Lawyers must understand this concept when advising on transactions and doing tax planning. Their advice might result in a large difference between GAAP earnings and taxable income; a large difference that will be obvious to the government from a casual glance at Form 1120. The difference may well be appropriate, but all concerned must know that the difference will be salient and potentially invite scrutiny. No great effort is needed here. Simply reviewing a sample Form 1120 (ideally with some large book-tax differences on Schedule M-1) can help law students see the importance of how taxable income is determined, reported, and connected to GAAP income.

¹³⁶ I.R.C. § 446(a) ("Taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books.").

¹³⁷ I.R.C. § 63.

¹³⁸ I.R.S. Form 1120, U.S. Corporation Income Tax Return (2022).

As noted earlier, lawyers and CPAs need to pay attention to the costs of tax planning, which includes the impact on a client's financial statements.¹³⁹ Tax planning is often presented as a time value of money exercise: all else being equal, defer income and accelerate deductions where possible—all while watching the marginal tax rate. While true, this approach won't necessarily work when doing tax planning for publicly-traded companies.

Tax is a major expense on the GAAP financial statements. Executives at large corporations are under pressure to keep GAAP income high—or at least in line with stock analyst expectations. They can do so by generating more sales or by cutting expenses. But every dollar of new sales or expense savings only drops about seventy-nine cents¹⁴⁰ to the bottom line after the tax expense is considered. In contrast, every dollar of tax expense saved drops one dollar to the bottom line. In the notes to its financial statements, the company must reconcile the statutory tax rate (currently twenty-one percent in the U.S.)¹⁴¹ to its “effective tax rate.” The effective tax rate (ETR) in this context is calculated by taking tax expense on the GAAP income statement divided by pre-tax GAAP income. ETR provides a salient performance metric that can be compared across time and against competitors.

The impact of tax expense on the GAAP bottom line and the salience of the ETR put pressure on executives to reduce tax expense on the GAAP income statement (and the ETR). But doing so is not easy. Under GAAP rules, the tax expense can only be lowered by permanent reductions in tax liability.¹⁴² The impact of traditional tax planning, like taking accelerated depreciation or shifting income to a future year, may reduce a company's tax liability on the tax return in the current year, but it won't reduce tax expense on the GAAP financial statements. Depreciation is a good example. In the early years of an asset's life, accelerated depreciation¹⁴³ generally results in depreciation on the financial statements being lower than the depreciation

¹³⁹ See *supra* note 23 and accompanying text.

¹⁴⁰ Using the current corporate tax rate of twenty-one percent. See I.R.C. § 11(b).

¹⁴¹ *Id.*

¹⁴² The convoluted accounting rules discussed here come from FIN. ACCT. STANDARDS BD., NO. 2019-12, ACCOUNTING STANDARDS UPDATE: INCOME TAXES (TOPIC 740): SIMPLIFYING THE ACCOUNTING FOR INCOME TAXES (2019).

¹⁴³ See I.R.C. § 168.

deducted on the tax return. While this reduces the current taxes due, taxable income will be higher than book income in the future when the book-tax depreciation difference reverses (later in the asset's life). Over the life of the entity, book depreciation and tax depreciation will equal. Thus, GAAP does not allow reductions in tax expense from temporary book-tax differences like depreciation. In contrast, items that are in book income but will never be reported in taxable income (so-called "permanent" items), like tax-exempt interest or income earned overseas in a lower-tax jurisdiction, will reduce the GAAP tax expense and be a reconciling item reducing the ETR. A law student need not know the convoluted details.¹⁴⁴ But a lawyer should understand that large corporate clients will, all else being equal, be motivated to do tax planning that reduces GAAP tax expense and the ETR and may not be as motivated to spend resources on tax planning that merely shifts income to the future and does neither.¹⁴⁵ An advocacy-minded tax lawyer can find it frustrating to do tax planning for a corporation when the compliance-based GAAP rules make the planning less lucrative.

Having law students appreciate that, when it comes to GAAP-reporting entities, not all tax planning is created equal, should not require much effort. Simply taking a few minutes to point out the impact of the ETR on client motivations and perhaps showing a tax footnote taken from a company's financial statements should be all that is needed.¹⁴⁶ The small effort is worth it. Law students will come away from their corporate tax course knowing some of the lingo and appreciate some of the non-law issues that arise in tax practice.

¹⁴⁴ Even CPAs don't like dealing with these rules! When a large accounting firm is auditing a company's books, the auditors will often try to get the tax department to review the tax items on the GAAP financial statements since the items are labeled "tax." The tax department says the items are on the GAAP books and thus are the responsibility of the audit department. In reality, both departments must get involved and share responsibility when reviewing the tax items on an audit client's financial statements.

¹⁴⁵ Shifting income to the future is still valuable, of course, in that it reduces taxes currently due and thus increases cash flow. But it is not as attractive as permanent tax savings that reduce the ETR.

¹⁴⁶ Examples can be found in annual reports posted to company websites. *See, e.g.*, Alphabet, Inc., 2021 Annual Report (Form 10-K) 81-94 (Note 14), <https://abc.xyz/investor/> (last visited Apr. 6, 2022).

B. Introducing the Advocacy Mindset in Accounting Programs

While the suggestions we make for accounting programs apply to both undergraduate and graduate tax courses, most relate to the introductory federal income tax course, which is required for all undergraduate accounting students. As a rules-based course, it could use a strong dose of advocacy mindset. We also offer some suggestions drawn from the graduate curriculum, specifically the partnership tax course. For the most part, however, graduate tax courses in accounting programs are already taught much like law school courses. They generally use casebooks—the same ones used in law schools¹⁴⁷—instead of undergraduate-like textbooks. Further, accounting students in graduate tax courses routinely engage with primary authority like the Internal Revenue Code, Regulations, and court opinions just as they would if taking a similar course in law school.

1. Assign and Discuss Edited Court Opinions

A good way to get accounting students to appreciate the more subjective or ambiguous areas of the tax law and to develop an advocacy mindset is to do what the law schools do: have the students read edited court opinions and then discuss them in class. While tax casebooks are good sources of ideas, relevant cases can also be found by searching Westlaw or Checkpoint.¹⁴⁸ Cases should be used in areas of the tax law where standards prevail, there is a mix of rules and standards, or the application of what appears to be a simple rule becomes difficult in practice. Opinions should be edited to focus on the core tax issues and any non-tax legalese should be explained or removed. There is no need for CPAs to know procedural backgrounds or evidentiary issues, for example. While we could give many examples of the use of court opinions, we look at one: the tax treatment of ordinary and necessary business expenses.

¹⁴⁷ At Boise State, for example, our graduate tax courses use several of the casebooks listed at *supra* note 115.

¹⁴⁸ Another good source of ideas is Professor Bryan Camp's "Lesson from the Tax Court" column appearing most Mondays on TaxProf Blog. Each post includes a discussion of a recent case (or sometimes a classic case) and the lessons it can teach. *See, e.g.*, Bryan Camp, *Lessons from the Tax Court: The Many Rooms of Tax Court Power*, TAXPROF BLOG (Oct. 4, 2021), https://taxprof.typepad.com/taxprof_blog/2021/10/lesson-from-the-tax-court-the-many-rooms-of-tax-court-power.html.

Undergraduate tax textbooks usually note that ordinary and necessary business expenses¹⁴⁹ are deductible and personal expenses are not.¹⁵⁰ But the textbooks do not generally explain how ambiguous the business-personal line can be in many real-world cases. In contrast, tax law casebooks spotlight the ambiguity by using edited court opinions.

Based on the latest available data, disputes over ordinary and necessary business expenses are the second most litigated tax issue.¹⁵¹ The definition of an ordinary and necessary business expense is subjective and based on the taxpayer's particular facts and circumstances. As Justice Cardozo famously put it: "The standard set up by the statute [to define "ordinary and necessary"] 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."¹⁵² A riddle like this is an ideal opportunity to show accounting students the advocacy mindset.

At Boise State, we have undergraduate students read edited versions of two U.S. Tax Court opinions: *Sanitary Farms Dairy, Inc. v. Commissioner*¹⁵³ and *Jenkins v. Commissioner*.¹⁵⁴ In *Sanitary Farms*, the court allowed a dairy farm to deduct, as business expenses, the costs of its owners' African safari.¹⁵⁵ Although the cost of the safari appeared at first glance to be a personal expense (for a vacation), the facts and circumstances showed that it was a carefully orchestrated advertising campaign for the dairy.¹⁵⁶ As the court noted:

The cost of a big game hunt in Africa does not sound like an ordinary and necessary expense of a dairy business in Erie, Pennsylvania, but the evidence in

¹⁴⁹ I.R.C. § 162(a).

¹⁵⁰ See, e.g., KEVIN E. MURPHY ET AL., CONCEPTS IN FEDERAL TAXATION 5-15 to 5-18 (29th ed. 2022).

¹⁵¹ NAT'L TAXPAYER ADVOC., ANNUAL REPORT TO CONGRESS 184 (2021).

¹⁵² *Welch v. Helvering*, 290 U.S. 111, 115 (1933). In response, one commentator said, "Did anyone ever write an emptier sentence?" BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE 11 (2d ed. 2002). Of course, Cardozo was simply saying that the Court was interpreting a standard rather than a rule.

¹⁵³ 25 T.C. 463 (1955).

¹⁵⁴ 47 T.C.M. (CCH) 238, 1983 T.C.M. (RIA) ¶ 83,667 (1983).

¹⁵⁵ *Sanitary Farms*, 25 T.C. at 466.

¹⁵⁶ *Sanitary Farms*, 25 T.C. at 467–68.

this case shows clearly that it was and was so intended. It provided extremely good advertising at a relatively low cost. The planning of the trip, the departure, news of the progress of the hunt, the return of the hunters, and the presentation and naming of the live animals was reported free by the newspapers as news, to the advantage of the Dairy which was recognized throughout as the sponsor.¹⁵⁷

In *Jenkins*, the court allowed country singer Conway Twitty to deduct payments he made to investors to reimburse them for losses they incurred on their investments in his restaurant chain.¹⁵⁸ Although a taxpayer normally can't deduct expenses incurred by others (here, the investors), the court allowed him to deduct the payments as ordinary and necessary business expenses of his business as a country music performer.¹⁵⁹ Twitty introduced evidence that a country singer's success is tied to his reputation.¹⁶⁰ To maintain a good reputation, and to continue selling records, he had to make his investors whole.

Both cases have colorful facts that engage students.¹⁶¹ More importantly, the opinions show compliance-oriented accounting students that there are places in the tax law where an advocacy mindset is appropriate. The cases spark interesting class discussions showing that, while the cost of safaris and reimbursing investors is generally not deductible, they were deductible under the facts and circumstances of the dairy and Conway Twitty. To achieve these favorable results, the taxpayers' representatives had to employ an advocacy mindset to convince the court that the expenses met the subjective standard for ordinary and necessary business expenses.

After discussing the two cases, we quickly pivot to *Smith v. Commissioner*,¹⁶² which appeals to accounting students' compliance mindset and shows there are limits to the advocacy mindset in the business deduction

¹⁵⁷ *Sanitary Farms*, 25 T.C. at 467 (internal citation omitted).

¹⁵⁸ *Jenkins*, 47 T.C.M. (CCH) at 247.

¹⁵⁹ *Id.* at 246–47.

¹⁶⁰ *Id.* at 244–47.

¹⁶¹ *Jenkins* even includes a footnote with an “Ode to Conway Twitty,” in verse. *Jenkins*, 47 T.C.M. (CCH) at 247 n.14. The IRS responded in turn with a non-acquiescence, in verse. *Jenkins v. Comm’r*, 47 T.C.M. (CCH) 238, 1983 T.C.M. (RIA) ¶ 83,667 (1983), *action on dec.*, 1984-022 (Mar. 22, 1984).

¹⁶² 40 B.T.A. 1038 (1939).

arena. *Smith* involved a tax bill for a whopping \$23.62.¹⁶³ The taxpayers in *Smith* wanted to deduct the cost of childcare.¹⁶⁴ Even though childcare is normally a personal expense, the taxpayers argued that they needed to pay for childcare to enable both spouses to work outside the home.¹⁶⁵ Thus, childcare, in their view, was an ordinary and necessary business expense that enabled them to earn taxable income.¹⁶⁶ The opinion noted that personal expenses could sometimes become deductible business expenses under the standard,¹⁶⁷ but that the line had to be drawn somewhere and sometimes expenses are so inherently personal that they should never be deductible as business expenses.¹⁶⁸ Thus, the taxpayers were not allowed to deduct their childcare costs. Underlying the opinion was the issue of whether the expenses were incurred because the couple had children (a personal expense) or because they worked (a business expense). Obviously, if the court had used the normal, subjective standard to allow a deduction, it would have opened the possibility of deducting personal meals, clothing, housing, and gym memberships just because they helped the taxpayer to work.¹⁶⁹

Reading and discussing *Sanitary Farms*, *Jenkins*, and *Smith* shows accounting students the importance of knowing when subjective tests apply (allowing for an advocacy mindset to argue a taxpayer's unique facts and circumstances) and when objective tests apply (not allowing for an advocacy mindset; a bright-line rule decides the case and the taxpayer's unique facts and circumstances are irrelevant.). It is important for tax advisors to know where they are in the law (subjective land or objective land) and to act

¹⁶³ *Id.* at 1038. The opinion is also notable for some surprising (to modern eyes) lines like, "We are told that the working wife is a new phenomenon." *Id.* at 1039. It was 1939 after all.

¹⁶⁴ *Id.*

¹⁶⁵ *See id.* at 1038–39.

¹⁶⁶ *See id.*

¹⁶⁷ *Id.* at 1039. As was later shown, for example, in *Sanitary Farms Dairy, Inc. v. Comm'r*, 25 T.C. 463 (1955) and *Jenkins v. Comm'r*, 47 T.C.M. (CCH) 238, 1983 T.C.M. (RIA) ¶ 83,667 (1983).

¹⁶⁸ *Smith*, 40 B.T.A. at 1039–40.

¹⁶⁹ As a side benefit, these cases expose accounting students to an issue that law students grapple with all the time: to decide whether a proposed argument is sound (like in *Sanitary Farms*, 25 T.C. 463 (1955) and *Jenkins v. Comm'r*, 47 T.C.M. (CCH) 238, 1983 T.C.M. (RIA) ¶ 83,667 (1983)) or proves too much (as in *Smith v. Comm'r*, 40 B.T.A. 1038 (1939))—and could lead to absurd results in other cases.

accordingly (with an advocacy mindset or a compliance mindset). Law students generally study *Sanitary Farms*, *Jenkins*, and *Smith* (or similar cases) to learn this important lesson. Accounting students should have the opportunity to take a break from their cookbooks and learn this important lesson as well. But the accounting professor must purposefully decide to deviate from the default, rules-based approach to do so.

2. Send Them to the Code

Beyond court opinions, accounting professors should also have students engage with other primary authorities like the Internal Revenue Code. Without guidance, accounting students can fall into the trap of learning the law from secondary sources, like textbooks or Checkpoint Explanations (or worse, Google searches). They must be encouraged to read, learn from, and apply primary authorities.¹⁷⁰

At Boise State, our undergraduate tax course primarily uses a standard (cookbook-like) textbook, supplemented, as noted above, by some selected court opinions and other materials. But we do try to ease students into working with the Internal Revenue Code in small doses. We do this in two ways.

First, we occasionally have students read the text of Code sections that are fairly easy to grasp. For example, when covering capital gains and losses, it is helpful to discuss the text of § 1221, and go through, line by line, the upside-down definition of a capital asset.¹⁷¹ We try to do this at other times during the semester when the topic and Code section at issue make it feasible.

Second, when covering employee fringe benefits, we do an in-class, group exercise where students answer a series of questions using only the text of § 132.¹⁷² Students might be asked, for example, whether a hotel employee qualifies for one of the § 132 exclusions under various fact patterns. Students help each other parse the section's language to answer the

¹⁷⁰ As a reminder, this happens as a matter of course in graduate tax courses. Our focus here is on the undergraduate tax course, where primary authorities are not always used.

¹⁷¹ I.R.C. § 1221(a).

¹⁷² *Id.* § 132. The questions were adapted from an exercise long used by Professor Richard Pomp, one of the best teachers of tax law in the legal academy. Pomp would guide students through the problems, showing what parts of the statute applied and where alternative arguments were possible. At Boise State, we changed some of the problems, added new ones, and use the exercise exclusively in-class rather than as homework—to better meet the needs of accounting students.

questions. They learn to see how tax statutes are generally written, where the exceptions and definitions are likely to be found, and how to apply the text to the questions. Because the students are working in groups, the instructor is circulating to guide them, and the whole affair is time-limited, the stress on the students is minimized.

3. Show You Can Still be Safe Outside of a Safe Harbor

Since accounting students like rules, they tend to view anything that remotely looks like a rule as a rule. The compliance mindset can run into trouble when dealing with safe harbors. To give just one example, accounting students often struggle in graduate partnership tax courses in understanding how to apply Revenue Procedure 93-27, which “provides guidance on the [tax] treatment of” a taxpayer who receives a profits interest in a partnership in exchange for services.¹⁷³ It provides that, with three exceptions (the income of the partnership is certain, the partner disposes of their interest “within two years of receipt,” or the “interest is a limited partnership interest in a ‘publicly-traded partnership’”), “the Internal Revenue Service will not treat the receipt” of a profits interest as a taxable event to either “the partner or the partnership.”¹⁷⁴ Accounting students view this revenue procedure the same way they view the Internal Revenue Code—as a lawgiver. Students often think that if their client is within one of the three listed exceptions, then the receipt of the profits interest is per se taxable. The professor needs to explain that the revenue procedure is a safe harbor, which the IRS announced to explain how it interprets an ambiguous area of the law. Meet the safe harbor and the IRS will not bother you (they said so!). Fail it and the IRS may bother you (at least they haven’t promised not to bother you), but that doesn’t mean the profits interest is taxable. Accounting students have a hard time understanding that if their client falls outside of the safe harbor, then the general standards governing profits interests apply. One can sail away from the safe harbor and still be safe.

For example, if a client receives a profits interest in exchange for managing a commercial building, and then sells her partnership interest within a year, she will fall outside of the safe harbor (because she sold her

¹⁷³ Rev. Proc. 93-27, 1993-2 C.B. 343.

¹⁷⁴ *Id.* at § 4.

interest within two years).¹⁷⁵ But falling outside the safe harbor does not automatically mean that her receipt of the profits interest was taxable. Instead, we are kicked back to a facts and circumstances standard. The client could argue (assuming it is true) that when she received the profits interest its value was uncertain, that she worked hard to lease up the building (making her interest valuable), and then she sold her interest to move on to another challenge. If she can show that the value of the profits interest accrued after she received it, then she is not taxable on receipt of the interest (despite falling outside of the safe harbor), only upon its sale. Accounting students have a hard time grasping this because it requires an advocacy mindset. With their compliance mindset, they view guidance like Revenue Procedure 93-27 as presenting a rule: meet it and you won't be taxed; don't meet it and you'll be taxed. It takes some discussion to get them to see that being in the safe harbor is ideal, but being outside of it is not fatal.¹⁷⁶

Law students are more comfortable applying various types of guidance. Because accounting students struggle, we suggest that teachers take every possible opportunity (regardless of the course) to discuss safe harbors, and what they really mean. Opportunities are legion.¹⁷⁷

4. Introduce and Reinforce Judicial Doctrines

Although accounting students are comfortable with objective rules and have a compliance mindset, they like to think of ways to get around the rules. What the accounting students fail to appreciate, at first, is that there are ambiguous, overlapping doctrines in the law that try to prevent the abuse of

¹⁷⁵ *Id.* at § 4.02(2).

¹⁷⁶ Given the time and opportunity, a tax teacher could take this one step further—by adding a discussion of what Professor Susan Morse has dubbed “sure shipwrecks.” Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. 1385, 1387 (2016). A safe harbor provides a rule, which if met provides a favorable answer and if violated defaults to a standard. *Id.* A sure shipwreck provides a rule, which if it applies provides an unfavorable answer regardless of how a standard would settle the issue. *Id.* As discussed earlier, for example, the deductibility of ordinary and necessary business expenses is judged under a standard. *See supra* Part IV.B.1. Yet, even if an expense meets the standard it might run into a sure shipwreck like the rule that disallows entertainment expenses—regardless of their connection to a business. *See* I.R.C. § 274(a)(1)(A).

¹⁷⁷ Another example from partnership tax is the substantial economic effect safe harbor. *See* Treas. Reg. § 1.704-1(b)(2) (1960).

objective tests. Instead, accounting students believe if they just change some insignificant facts, they can get on the favorable side of a bright-line test.

To understand this phenomenon, let's return to the related party rules.¹⁷⁸ When learning that a taxpayer cannot recognize a loss on the sale of an investment to her brother, an undergraduate student will inevitably ask, "What if she sold the investment to a friend (an unrelated party), and then the friend quickly sold it to the taxpayer's brother?" Students think they are being clever, of course. After all, either you fall within the definition of a related party or you don't. Questions like these provide the opportunity to introduce doctrines like substance over form.¹⁷⁹ In form, the investment was sold to an unrelated party, meaning the related party rules do not apply. In substance, the investment was sold to the taxpayer's brother with the intervention of the friend being an unnecessary step that will be disregarded by the tax law. This (hopefully) leads to more questions—like "What if the friend held the investment for, say, a year and then sold it to the taxpayer's brother?" Questions like this open the door to discussing risk—specifically whether the friend would really agree to assume the risk of ownership for a year and, if they did, whether that would make the form have substance.¹⁸⁰

Doctrines like substance over form are discussed in undergraduate tax textbooks,¹⁸¹ but the accounting professor must deliberately reinforce the concept every time a student tries to argue that there is an easy, risk-free way around a bright-line test.

5. Show Them the Legal Documents

Accounting students have about as much affection for thick legal documents as law students have for tax returns. We have previously argued that law students should have some exposure to tax returns.¹⁸² To ensure horizontal equity, we suggest that accounting students should, on occasion, work with legal documents. Providing students with partnership agreements

¹⁷⁸ I.R.C. § 267. We discussed the related party rules as an example for law students of an area of the law that is not up for debate. *See supra* Part IV.A.2.

¹⁷⁹ *See Gregory v. Helvering*, 293 U.S. 465 (1935).

¹⁸⁰ Accounting students must accept that the use of the substance over form doctrine is uncertain. But they should know it exists and potentially could prevent "too clever" workarounds to clear rules.

¹⁸¹ *See, e.g., MURPHY ET AL., supra* note 150, at 2-11.

¹⁸² *See supra* Part IV.A.3.

(like operating agreements for limited liability companies) in a graduate partnership tax course, for example, would be instructive.

Although CPAs will not be preparing partnership agreements, they will need to consult them when advising a partnership on tax matters or preparing a Form 1065. CPAs will use partnership agreements as inputs in their tax planning work (just as lawyers use tax returns as inputs in their tax planning work).

A CPA may need to consult a partnership agreement to determine how income is to be allocated, whether the partnership allows § 754 elections, how the partnership will account for book-tax differences under § 704(c),¹⁸³ and whether the partnership allocations comply with the substantial economic effect safe harbors,¹⁸⁴ among other matters.

At Boise State, we have students review real-world partnership agreements (taken from public SEC filings) in groups during class and have them find the relevant operating and tax provisions. Each group reviews a different partnership agreement and then shares their findings with the class. By limiting the time of the discussion and making it an in-class exercise, we make the process less stressful for the students.¹⁸⁵

V. CONCLUSION

The tax law uses rules and standards. In general, law students are more comfortable with standards and their education tends to foster an advocacy mindset, while accounting students are more comfortable with rules and their education tends to foster a compliance mindset. Yet both tax lawyers and tax accountants must be able to work with both rules and standards and be able to identify whether an area of the tax law requires a compliance mindset or an advocacy mindset. To help students acquire these skills, law professors can borrow techniques from accounting professors and vice versa.

We have suggested some ways that law professors might help law students become more comfortable with objective rules and see when a

¹⁸³ Treas. Reg. § 1.704-3 (1993).

¹⁸⁴ Treas. Reg. § 1.704-1(b)(2) (1960).

¹⁸⁵ For more on the benefits of in-class activities like this, see Heather M. Field, *How the Pandemic Flipped My Perspective on Flipping the Tax Law Classroom*, 19 PITT. TAX REV. 267 (2022).

compliance mindset is needed and some ways that accounting professors might help accounting students become more comfortable with subjective standards and see when an advocacy mindset is needed. Our suggestions are modest and do not require any fundamental changes to the good work already being done in law school and business school tax courses. But the changes we suggest do require tax teachers in both schools to, at times, deliberately overcome the default teaching approaches pre-packaged in their school's textbooks and surrounding curriculum. Cross-fertilizing the tax classroom by introducing a dose of accounting education to law students and a dose of legal education to accounting students is worth the effort. Tax lawyers and CPAs will emerge more well-rounded and better equipped to work with one another and their clients. Tax education, and the tax profession, will be the better for it.

