

## TAX INTERPRETATION, PLANNING, AND AVOIDANCE: SOME LINGUISTIC ANALYSIS

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I.	INTRODUCTION .....	34
	I.1. General Introduction .....	34
	I.2. A Comment for Economists.....	37
II.	LEGAL AND LINGUISTIC CONCEPTS .....	38
	II.1. Signifier, Signified, Concept, and Referent .....	38
	II.2. Legal Term and its Signified – Rule of Law, Authority, or Communication.....	41
	II.3. Terminology of This Paper .....	48
III.	TAX BASE.....	49
IV.	VAGUENESS OF APPLIED TAX LAW .....	50
	IV.1. Semantic Extension, Indeterminacy – Cores, Penumbras and Vagueness.....	50
	IV.2. Semantics – Accuracy in Taxation is Affected by Semantic Extensions, Synonymy, and Vagueness of Application.....	52
	IV.3. Tax Avoidance – Legitimacy and Hindsight Advantage .....	54
	IV.4. Penumbras Are a Problem for Abstract Law, Theory, and Interpretation .....	57
	IV.5. Pragmatics and Unclear Application of Legal Terms .....	59
	IV.6. Semantics and Analytical Indeterminacy (Choice of Analysis).....	61
V.	WHO WANTS VAGUE APPLICATION OF LANGUAGE? .....	62
	V.1. A Public Perspective Calls for Clarity .....	62

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V.2. Rational Taxpayers May Prefer Indeterminacy and Vague Application .....	62
VI. ACCELERATED EVOLUTION OF TAX TERMS.....	65
VI.1. Control of Tax-Terms: Authorities, Practitioners, or Taxpayers?.....	65
VI.2. Evidence of the Struggle for Control .....	68
VI.3. Being (Mis)Understood and Accelerated Evolution of Tax Terms .....	69
VI.4. Rationally Directed Language Evolution – And Good New Tax Rules.....	71
VI.5. Taxing by Special Tax Terms or by General Legal Terms .....	72
VII. CONVERGENCE RESULTS .....	74
VII.1. Civil Ban on Tax Avoidance – Some Difficulties ....	74
VII.2. Sociolinguistic Exclusion and Public Language Inhibition of Avoidance .....	76
VIII. CONCLUSION .....	78

## I. INTRODUCTION

### *I.1. General Introduction*

This paper considers legal tax avoidance or planning through the use, manipulation or interpretation of legal concepts (legal terms) resulting in reduced tax liability.<sup>1</sup> Legal terms can be used for tax

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1. Joel Slemrod & Shlomo Yitzhaki, *Tax Avoidance, Evasion, and Administration*, in 3 HANDBOOK OF PUB. ECON. 1423, 1428 (2002); Joel Slemrod, *A General Model of the Behavioral Response to Taxation*, 8 INT'L TAX AND PUB. FIN. 119, 119 (2001); MICHAEL BROOKS & JOHN HEAD, *TAX AVOIDANCE AND THE RULE OF LAW* 71 (Graeme S. Cooper ed., 1997); see, e.g., David A. Weisbach, *Line Drawing, Doctrine, and Efficiency in the Tax Law*, 84 CORNELL L. REV. 1627, 1629 (1999); NABIL OROW, *GENERAL ANTI-AVOIDANCE RULES: A COMPARATIVE INTERNATIONAL ANALYSIS* 329 (2000); JAMES KIRKBRIDE & ABIMBOLA A. OLOWOFOYEKU, *THE LAW AND THEORY OF INCOME TAX* 339-40 (2002). For other kinds and definitions of tax avoidance and planning, see Graeme S. Cooper, *TAX AVOIDANCE AND THE RULE OF LAW* 24-36 (Graeme S. Cooper ed., 1997); OROW, *supra*, at 2-12, 18-45; VICTOR THURONYI, *COMPARATIVE TAX LAW* 150, 152-53, 155-56, 178 (2003); DAVID GLIKSBERG, *THE BOUNDARIES OF TAX PLANNING* 27 (1990); ARYE LAPIDOTH, *EVASION AND AVOIDANCE OF INCOME TAX: A COMPARATIVE STUDY OF ENGLISH LAW AND ISRAELI LAW* 131-47 (1966); George Cooper, *The Taming of the Shrewd: Identifying and Controlling Income Tax Avoidance*, 85 COLUM. L. REV. 657, 659 (1985); Joshua D. Rosenberg, *Tax Avoidance and Income Measurement*, 87 MICH. L. REV. 365, 369, 440-43, 445-47 (1988); David A. Weisbach, *Costs of Departures From Formalism: Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 880-81 (1999); David A. Weisbach, *Corporate Tax Avoidance* 2, 8-9 (The U. of Chicago Law Sch. John M. Olin Program in Law & Economics, Working Paper No. 202, 2004), available at [http://www.law.uchicago.edu/Lawecon/WkngPprs\\_201-25/202-daw-avoidance.pdf](http://www.law.uchicago.edu/Lawecon/WkngPprs_201-25/202-daw-avoidance.pdf).

avoidance if they change tax liability. Tax impact may be generated by legal terms defined under tax law such as “income” and “business expenses” or by general law terms naming different incorporation forms and various property and contract rights.

Tax practitioners may note that “it is important not to let the tax tail wag the commercial dog,”<sup>2</sup> – not to let tax avoidance considerations interfere with economic decision-making. The extent to which jurists can reduce taxes without interfering with economic activities represents a gap between legal terms and actual economic activity. This gap may be a source of difficulty for the interpretation and application of tax law, as shown through the economic substance doctrine.<sup>3</sup> This gap is manifested in the economic, rather than legal, definition of tax avoidance. Economic tax avoidance, as implied by the definitions of “excess burden” and “efficiency,” occurs when an individual or firm (hereinafter “person”) changes consumption or production decisions in response to taxation.<sup>4</sup> Given the juristic goal of not affecting the economic reality and the contradicting economic definition, we note that this gap creates a theoretical problem.

Continental linguistic and semantic theory, which this paper examines,<sup>5</sup> has developed tools to help us analyze such gaps between legal terms and the real application of language. It uses the trichotomy of signifier, signified and referent. To this trichotomy we will add an integrative approach to the notion of “concepts,” used by Depecker, Rico and others.<sup>6</sup> The resulting four-faceted distinction roughly correlates to juristic thoughts about language, legal terms and positive reality. This distinction will be used throughout the paper, first to offer a new variation on the definition of the tax-base concept.

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2. 1 TOLLEY’S TAX PLANNING 1 (1992).

3. OROW, *supra* note 1, at 329; Joseph Bankman, *The Economic Substance Doctrine*, 74 S. CAL. L. REV. 5, 7-12 (2000); Daniel N. Shaviro, *Economic Substance, Corporate Tax Shelters, and the Compaq Case*, 88 TAX NOTES 221, 231-39 (2000); David Hariton, *Sorting out the Tangle of Economic Substance*, 52 TAX LAW 235, 236-241 (1999); GLIKSBERG, *supra* note 1, at 4; Alexandra M. Walsh, *Formally Legal, Probably Wrong: Corporate Tax Shelters, Practical Reason and the New Textualism*, 53 STAN. L. REV. 1541, 1544 (2001).

4. Slemrod & Yitzhaki, *supra* note 1, at 1428; ALAN J. AUERBACH & JAMES R. HINES JR., 3 HANDBOOK OF PUB. ECON. 1347, 1348-89 (2002).

5. For different views of semantics, reference and linguistics, see, for example, GEOFFREY LEECH, *SEMANTICS: THE STUDY OF MEANING* (1974); Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 168-69 (1981).

6. Loïc Depecker, *Saussure et le concept*, BULLETIN DE LA SOCIETE DE LINGUISTIQUE DE PARIS 53 (2003); Christophe Rico, *La Langue, «jardin clos, source scellée»*, *Saussure et le Cours de Linguistique Générale, Cent Ans Après*, 14 ACTA PHILOSOPHICA I 35, 44-48 (2005) (It.); Christophe Rico, *Le Signe «domaine fermé»: Saussure et le Cours de Linguistique Générale, Cent Ans Après*, 144 REVUE DE POETIQUE 387, 390 (2005) (Fr.).

Linguistic theory has also shown that every language and every word with a semantic function analyzes and “covers” different aspects of reality and is affected by context, ambiguity,<sup>7</sup> and partial synonymy.<sup>8</sup> We will relate this theory – and its application for language usage (speech, or *parole* in French) – to Hart’s theory of the “open texture” of law and legal vagueness<sup>9</sup> and will use it to explain some facets of tax avoidance, anti-avoidance rules and interpretation. Notably, we will explain the paradox of the too-accurate tax rules.<sup>10</sup>

This paper will claim that tax terms show the characteristics of an anti-communicative language with accelerated evolution.<sup>11</sup> This is to say tax law creates a domain in which legislators and interpreters face both an ever-changing language and legal terms that are constantly moving toward meaning extension and ambiguity<sup>12</sup> (or polysemy).<sup>13</sup> The semantic application and extension of tax terms are in constant dispute. This is because taxpayers have a persistent interest in using language inaccurately and in miscommunicating (in a civil way – criminal law will not be discussed here) their economic activities and wealth to tax authorities and courts. Under this analysis, the usual force of formal and authoritative “definitions” of legal terms is weaker for tax law.<sup>14</sup> Behind this weakening stands the linguistic claim that language evolution, and for our purposes semantic evolution, is in the hands of the

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7. For ambiguity, see LEECH, *supra* note 5, at 67-69, 78-79.

8. For a definition of “synonymy,” see IRÈNE TAMBA-MECZ, LA SÉMANTIQUE 79-85 (1988) (Fr.) (“*Synonymie*. – Dans l’usage courant, on appelle synonymes, des mots de forme différente mais de sens identique ou semblable et de même statut morphosyntaxique). See also OSWALD DUCROT & JEAN-MARIE SCHAEFFER, NOUVEAU DICTIONNAIRE ENCYCLOPÉDIQUE DES SCIENCES DU LANGAGE 398 (1995).

9. H.L.A. HART, THE CONCEPT OF LAW 124-36 (2d ed. Oxford Univ. Press 1994).

10. For different claims against the “too-exact” legal language, see LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 188 (1993).

11. For a contradicting claim, according to which legal terms suffer the same amount of application problems as regular words, see SOLAN, *supra* note 10, at 132.

12. For a contradicting conclusion about the *low* amount of ambiguous terms in law in general (opposing our conclusion about tax-law), see BERNARD S. JACKSON, SEMIOTICS AND LEGAL THEORY 41-42 (1985) (reporting the results of J. L. SOURIOUX AND P. LARET, LE LANGAGE DU DROIT (1976)). For some demonstrations of ambiguity in law, see Glanville Williams, *Language and The Law – II*, 61 LAW QUARTERLY REV. 179, 179-81 (1946).

13. DUCROT & SCHAEFFER, *supra* note 8, at 399. OSWALD DUCROT & TZVETAN TODOROV, ENCYCLOPÉDIC DICTIONNAIRE OF THE SCIENCES OF LANGUAGE 236-37 (1979) (“[W]e shall speak of polysemy rather than ambiguity when relatively general laws allow passage from one meaning to another and allow us to foresee the variation.”).

14. YON MALEY, LANGUAGE AND THE LAW 22-23 (John Gibbons ed., 1994). For an account of the mix of English and legal language in statutes, see DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 10-29 (1963).

speaking masses. Indeed, one person can use language wrongly,<sup>15</sup> but a continuous and persistent “misuse” is not a misuse, but rather language evolution.<sup>16</sup> The existence of this accelerated evolution gives linguistic tools many descriptive and analytic capabilities for the analysis of tax law.

Tax law places much emphasis on legal terms and institutions used by taxpayers.<sup>17</sup> These legal terms are not identical to economic concepts. Due to this difference, the use of these terms entails an act of “translation” between law and economics, a translation that opens the door to avoidance opportunities<sup>18</sup> and entails anti-avoidance doctrine.<sup>19</sup> This paper claims that the economic perspective on reality may miss some of the relevant phenomena.

The paper touches upon and helps explain the concepts and phenomena of the tax base, the audit, tax complexity and accuracy, tax interpretation and reinterpretation, tax avoidance, distributive effects of tax avoidance, legitimacy of tax avoidance, taxation through general versus tax-specific legal terms, and more. It joins juristic analyses of dynamic tax law and research to the effects of tax avoidance on tax law.<sup>20</sup> The new theory and results it posits come largely from linguistic analysis.

## *1.2. A Comment for Economists*

Semantics and microeconomics are based on different perspectives of reality. For semantics, there is one reality, but it has many descriptions.<sup>21</sup> For microeconomics, agents can choose between alternative real courses of action, and the description is not important.

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15. FERDINAND DE SAUSSURE, *COURS DE LINGUISTIQUE GENERALE* 36, 104-08 (Édition Payot 1969) (Fr.). This book is a printed edition, by professors Charles Bally and Albert Sechehaye, of lectures given by de Saussure in the years 1907-1911.

16. *Id.* at 108-13.

17. See, for example, different income-tax-rules applied to different types of corporations and to natural persons (e.g. I.R.C. § 112). The economic substance doctrine mentioned above, and its likes, are the exceptions that prove the rule.

18. For the claim that tax avoidance “results from the difficulty of giving legal expression to economic concepts,” see J. FELDMAN & J. A. KAY, *THE ECONOMIC APPROACH TO LAW* 320 (Paul Burrows & Cento G. Veljanovski eds., 1981).

19. *E.g.*, the “business purpose doctrine” of *Gregory v. Helvering*, 293 U.S. 465, 469 (1935).

20. Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 WIS. L. REV. 1267, 1275-79 (1990).

21. One can learn this from Whorf’s idea that the lexicon of each language analyzes reality differently. *Infra* Part IV.6 (“Semantics and Analytical Indeterminacy (Choice of Analysis)”). One can also learn this from the claim that one “notion” (or “concept”) can be embedded into different signifieds in different languages, or within the same language. Rico, *supra* note 6, at 46-48.

Semantics concentrates on the subject's choice of descriptions (of states of the world and events), while microeconomics concentrates on his choice of behavior.

The semantic perspective fits the jurist model of tax planning that does not interfere with economic activity but rather with its legal description. The microeconomic reduction entails the definition of tax avoidance as the effect of taxes on behavior. Each of these two perspectives may be useful for the study of tax-law avoidance and interpretation in different situations. This is the case if taxpayers react to taxation by changing the description of their activities, as well as their actual activities, in order to minimize taxation. Using both perspectives, one notices that the two types of reactions may reinforce each other. For example, when semantic extension and vagueness enable taxpayers to avoid taxes, they may just rename actions they would have taken anyway (renaming that results in distributive effects). Even so, they may not be satisfied; taxpayers may also increase activities describable under such vagueness, thus creating economic inefficiencies.

The academic or policy utility of each perspective depends on the general effects and the frequency of each avoidance technique. Keep in mind that each perspective focuses our attention on specific things and disregards others. An occasional switch may improve our understanding of reality.

## II. LEGAL AND LINGUISTIC CONCEPTS

### *II.1. Signifier, Signified, Concept, and Referent*

Saussure (*Cours de Linguistique Générale – CLG*) divided the term “sign” into “signifier” and “signified.”<sup>22</sup> Linguists who claimed they followed Saussure felt compelled to introduce the “referent” into the definition of the sign.<sup>23</sup> Saussurian linguistics<sup>24</sup> explains these notions as follows: a “signifier” is an acoustic image<sup>25</sup> (that may be represented by a mark on paper or screen);<sup>26</sup> a “signified” is the reduction of a

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22. SAUSSURE, *supra* note 15, at 99.

23. See TAMBA-MECZ, *supra* note 8, at 70-74. For the definition of the concept “sign,” see also DUCROT & SCHAEFFER, *supra* note 8, at 216. For a short comparison of some North American and European approaches to the “referent” concept, see JACKSON, *supra* note 12, at 14-17.

24. For that approach and others, see DUCROT & SCHAEFFER, *supra* note 8, at 302-06; TAMBA-MECZ, *supra* note 8, at 71-73.

25. For problems related to the definition of “linguistic units” and for use of words as inaccurate proxies, see SAUSSURE, *supra* note 15, at 26, 148, 158.

26. For an approach that finds the uttered word central and the written word as means towards

concept (or notion) into a specific language, or more accurately, a semiotization of a notion in a specific language (here we follow Depecker and Rico);<sup>27</sup> a “referent” is what is pointed at by a sign: it may be a specific real-world phenomenon, an abstract reality or entity, a legal right, or a fictional reality.<sup>28</sup>

For example, when we hear the signifier “pillow,” our mind is led to conjure the signified “pillow,” which belongs to the English language. Based on the context, this signified will “refer” to pillows in general or to a specific pillow, such as one located in the house of one of this paper’s authors.

In using the trichotomy of signifier, signified and referent, this paper takes into account its properties and difficulties. When we hear the word “pillow” we can identify the signifier rather accurately, according to our knowledge of the English language.

There are certain problems with the terms “referent” and “concept.” When the word “pillow” refers to that specific pillow in the author’s home, it is uncommunicative for anyone who has not been to the author’s home. This first problem also affects taxation, since we would like to levy taxes according to specific states of reality.

The second problem is more complex. Take the following two examples: the concept “pillow” is a psychological phenomenon that may not completely correspond with the way this notion has been semiotized as a signified in different languages. Taking Rico’s example,<sup>29</sup> the signified of “pillow” in French (“*oreiller*”) is related to “ear” (“*oreille*”). In Arabic, however, a pillow (“*mikhadda*”) is related to “cheek” (“*khadd*”). One can see that the French signified and the Arabic signified, while semitizing the same concept, have different linguistic values: each word relates differently to other words in its respective language (see more for linguistic value in Part IV.2, hereinafter).

For a second and more abstract demonstration, compare the signified of “policy” in English to the signified of “*politique*” in French, in relation to the notion of “policy.” In English, the signified of “policy” contrasts with the signified of “politics,” stressing the difference

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it, see *id.*, at 45, 58.

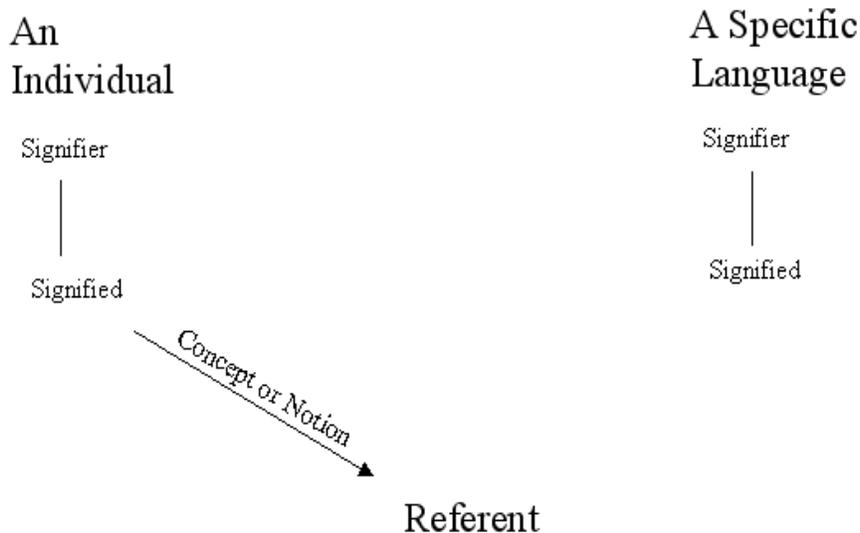
27. For discussion and critique of this approach, see Depecker, *supra* note 6, at 71-100; Rico, *supra* note 6, at 44-48, and references.

28. Rico, *supra* note 6, at 47. For a different distinction between referential discourse (as in the application of law) and legislative discourse (as in the creation of law), see A. J. GREIMAS, *SÉMIOLOGIE ET SCIENCE SOCIALES* 83-85, 103-05 (Editions du Seuil 1976).

29. Rico, *supra* note 6, at 46-48.

between the two notions. In French, things are different. Indeed, the French word “*politique*” means “policy” in English, but “*politique*” also means “politics.”<sup>30</sup> The unique French signified emphasizes the closeness between the two concepts. The difference of linguistic values between the signifieds of “policy” and “*politique*” is not due only to ambiguity. Even when the intention of a French speaker is clear, the signified is different since it does not express the same contrast that its English counterpart expresses.

The relations between these four theoretical terms can be presented by a figure:



This figure represents the indirect and complex relationship between a language as an objective social phenomenon and its understanding and use by an individual. Consider the classic idiom: “A word can only refer through a concept.”<sup>31</sup>

30. Susan R. Ackerman, *Triangulating the Administrative State*, 78 CAL. L. REV. 1415, 1417 (1990).

31. “Vox significat mediantibus conceptis.” See Rico, *supra* note 6, at 47. C. K. OGDEN & I. A. RICHARDS, *THE MEANING OF MEANING: A STUDY OF THE INFLUENCE OF LANGUAGE UPON THOUGHT AND OF THE SCIENCE OF SYMBOLISM* 11-12 (W. Terrence Gordon, ed., 1966). For a somewhat similar claim, see Adrian A.S. Zuckerman, *Law, Fact or Justice?*, 66 B.U.L. REV. 487,

## *II.2. Legal Term and its Signified – Rule of Law, Authority, or Communication*

The narrow version<sup>32</sup> of the “rule of law” principle inhibits – to the degree to which it is effective – authorities’ ability to subject taxpayers to pure notions or concepts. They must use signifiers and signifieds – i.e., words – but they do not have to rely on literalism.<sup>33</sup> This claim is reinforced when lawmakers, including courts, try to express themselves through clear language. It is again reinforced when law appliers, again including courts, pay at least some regard to the relevant legal texts, including statutes and previous verdicts. Later on, we shall try to appease some rules-skeptic theories and base our argument on communication rather than the rule of law.

The result proposed here – which will stay crude and tentative for some paragraphs – is that the more effectively<sup>34</sup> we apply the rule of law, the more it compels authorities to use legal terms that imply not notions, but concepts embedded in the language of authoritative written sources – like legislation, verdicts and regulations. Since the definition of “a signified” is “a concept embedded in language,” and since writing is a representation of words, the result can be paraphrased: legal terms in the legal-positivistic sense (some of which are called, by jurists, “legal concepts”) are words implying signifieds. For example, according to our theory, the legal term “business expenses,” as used by United States federal income tax law, implies a signified. This signified is a notion embedded in the language of those familiar with that law.<sup>35</sup> To legal terms and their signifieds we can apply the sociolinguistic insights about jargons and sociolects, which are variations of languages and are derived from common professional interaction and knowledge, as well as from

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491 (1986).

32. See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 11 (1985); Margaret Jane Radin, *Reconsidering The Rule of Law*, 69 B.U.L. REV. 781, 783-87 (1989).

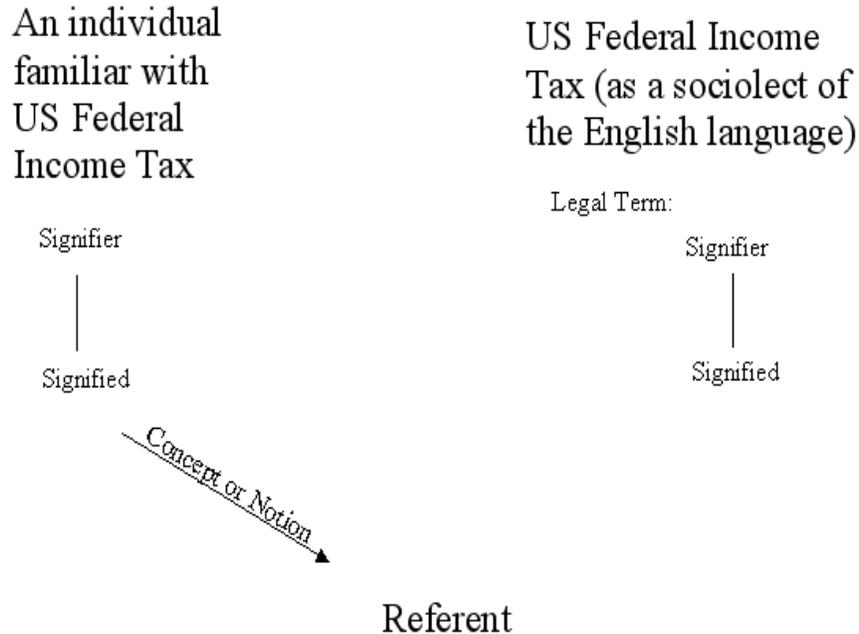
33. We reject “literalist,” “plain meaning,” or “textualist” theories of interpretation. For some discussion of this issue, see Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C.L. REV. 623, 629-30 (1986); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 340-45, 354-56 (1990); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626-28 (1990). For the dichotomy between literal and non-literal uses of language in relation to some theories of meaning, see Brenda Danet, *Language in the Legal Process*, 14 LAW & SOC’Y REV. 445, 455-57 (1980) [hereinafter Danet, *Language and Process*]. For an earlier note implying this controversy, see Williams, *supra* note 12, at 191-92.

34. It is the same for us if ineffectiveness is due to impossibility, incapacity or to lack of will.

35. For a somewhat resembling claim, see John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 WASH. L. REV. 1, 35 (1993).

social segregation<sup>36</sup> (hereinafter “sociolects”). In addition, according to legal positivism the meaning of any legal term is derived from the legal texts, rules, principles and theory that relate to it<sup>37</sup> (see some reservations later on).<sup>38</sup>

We can present all these arguments with a figure:



In all of this we join efforts aimed at blurring or overcoming the

36. For some more discussion and references, see *infra* Part VII.2 (“Sociolinguistic Exclusion and Public Language Inhibition of Avoidance”).

37. For meaning of legal-terms as derived from the current and substantive law, see MELLINKOFF, *supra* note 14, at 392-93. For the role of the legal system in the definition of legal terms, see H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 THE LAW QUARTERLY REVIEW 37, 49, 58 (1954). For that and for derivation from the social context of the law, see Peter Goodrich, *The Role of Linguistics in Legal Analysis*, 47 MODERN LAW REVIEW 523, 524, 530-32 (1984) (discussing Hart, *supra*). For an extremely narrow view of such positivism, attributed to Kelsen, see PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS 39-40, 60-62, 128 (1987). For an analysis of the effect of judicial precedents on the meaning (and lack of precision) of legal-terms, see MELLINKOFF, *supra* note 14, at 374-83. For the claim that “responsibility for law language is fixed upon the profession,” see *id.*, at 454. For claims, about the impact of intertextuality and legal-principles on the meaning of terms, see MALEY, *supra* note 14, at 25-26. See also WORDS AND PHRASES (Thomson Canada Ltd. 1993).

38. For rule-skepticism, see shortly hereinafter. For speakers control of language, which also opposes the views of legal positivism, see *infra* Part VI.1 (“Control of Tax-Terms: Authorities, Practitioners or Taxpayers?”).

distinction between “textual” (or literal) and “substantive” rules of legal interpretation.<sup>39</sup> For us a “substantive” interpretation, i.e. an interpretation using current values and policy considerations, is part of the legal sociolect. It is so if a practitioner can reasonably estimate that under the circumstances of his client,<sup>40</sup> a statute will be read in an irregular way, so as not to interfere with such “substantive” considerations.

This may also help us understand the possible contribution of linguistic expertise to the interpretation of legal texts. Linguists can explain the signifieds of terms (and of legal terms) as non-jurists understand them. On occasion – and especially when the law<sup>41</sup> must or should be understood by laypersons<sup>42</sup> – expert linguistic testimony can

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39. For a statement of the distinction and for such efforts, see GOODRICH, *supra* note 37, at 43-45, 56-60, 78, 110-11, 114-15, 122, 204. See also RONALD DWORKIN, *LAW'S EMPIRE* 350-54 (1986); William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1986-1987); Miller, *supra* note 35, at 48.

40. For an acknowledgment of “context” as an interpretive tool, for the changing and flexible meaning of words, and for claims about conflicts that arise between a tax code and regular language, see Zelenak, *supra* note 33, at 637-51. For some theory about interpretation and context, see Eskridge & Frickey, *supra* note 33, at 340-45, 354-56.

41. Please note that linguists can give expert opinions not only on the meaning of law, but also on the meaning of oral or written evidence. *E.g.*, GEORGIA M. GREEN, *LANGUAGE IN THE JUDICIAL PROCESS* 247 (Judith N. Levi & Anne Graffam Walker eds., 1990).

42. For the claim that a basis of law (consensus) is contradicted by its language and practice, which both restrict its access to the legal elite, see GOODRICH, *supra* note 37, at 7. For examples of laws demanding use of plain-language, for general arguments about the necessity of such language and of lay-intelligible legal sources and communication, for comprehension measures and for bibliography on these subjects, see Robert W. Benson, *The End of Legalese: The Game Is Over*, 13 N.Y.U. Rev. L. & Soc. Change 519, 531-57 (1985) (mentioning, among other circumstances, taxpayers reactions to the language of tax-forms – referring on page 534 to findings by Siegel & Gale Inc., IRS TAX FORMS SIMPLIFICATION PROJECT INTERIM PROGRESS REPORT 63 (1980); see also note 265 and text on page 566). See Benson *supra*, at 572-573 for a list of legal rules mandating the use of plain language. For rules and circumstances in which lay-intelligibility is necessary, related to criminal law, to injunctions and to jury instructions, see Mary Jane Morrison, *Excursions Into the Nature of Legal Language*, 37 CLEV. ST. L. REV. 271, 281-85 (1989). For re-writing a law so laypersons understand it better, and for an empirical examination of the effort, see Britt-Louise Gunnarsson, *Functional Comprehensibility of Legislative Texts: Experiments with a Swedish Act of Parliament*, 4 TEXT 71, 78 (1984) (discussing the audience – lay or professional – to which a statute is aimed). For the plain legal language movement, see Brenda Danet, *Language and the Law: An Overview of Fifteen Years of Research*, in HANDBOOK OF LANGUAGE AND SOCIAL PSYCHOLOGY 537, 538-41 (Howard Giles & W. Peter Robinson eds., 1990) [hereinafter Danet, *Language and Law*]. For a critique of legal language and its incomprehensibility to laypersons, and for possible reform, see Danet, *Language and Process*, *supra* note 33, at 464-68, 484-90, 547-48. For use of ordinary language in law, see Giorgio Lazzaro, *Law and Ordinary Language*, in LAW AND LANGUAGE – THE ITALIAN ANALYTICAL SCHOOL 175 (Anna Pintore & Mario Jori eds., 1997). For a regular-language meaning to the term “accident” according to Canadian insurance law, see WORDS AND PHRASES, *supra* note 37, at 1-76. See also SOLAN, *supra* note 10, at 119, 130-31, 135-38. For a brief discussion of the prospects of implementing changes to legal language, from a year-

be of much use.<sup>43</sup> On other occasions<sup>44</sup> it may hinder the use of legal terms in ways that reflect the divergence of a legal sociolect from the related general language.<sup>45</sup>

A side effect of the claim that legal terms imply signifieds is that this subjects the former (legal terms), by a significant measure, to linguistic processes influencing the latter (signifieds).

Please note that, somewhat like Caton and Morrison,<sup>46</sup> we refuse to define a distinct “language of the law”; we claim only the existence of

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1982 perspective, see Veda R. Charrow et al., *Characteristics and Functions of Legal Language*, in *SUBLANGUAGE: STUDIES OF LANGUAGE IN RESTRICTED SEMANTIC DOMAINS* 175, 186-88 (Richard Kittredge & John Lehrberger eds., 1982). For discussion of such prospects for improvement, from a 1985 perspective, see Brenda Danet, *Legal Discourse*, 1 *HANDBOOK OF DISCOURSE ANALYSIS: DISCIPLINES OF DISCOURSE* 273, 287-88 (1985) [hereinafter Danet, *Legal Discourse*]. For a claim about law in general, a claim that opposes a measure in the text above, see Morrison, *supra* note 42, at 320. For a claim that legal sources should be construed according to regular language, see Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 *HARV. L. REV.* 417, 419 (1899). For a short comment about situations in which laymen have to understand the law, and the negative effects of unintelligibility, see MELLINKOFF, *supra* note 14, at 453.

43. Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 *YALE L.J.* 1561, 1562 (1994). For a judicial response, see generally *Staples v. United States*, 511 U.S. 600, 600 (1994); *United States v. Granderson*, 511 U.S. 39, 39 (1994). For judicial disregard, see generally *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 249 (1994); Gary S. Lawson, *Linguistics and Legal Epistemology: Why the Law Pays Less Attention to Linguists Than It Should*, 73 *WASH. U. L. Q.* 995, 995-96 (1995) (stating the law is subject to proof just like fact). We do not agree. For a judicial rejection of such expert testimony, which seems erroneous, see *Proceedings of the Law and Linguistics Conference*, 73 *WASH. U. L. Q.* 800, 924 (1995) (citing the statements of Professor Chuck Fillmore). For a contradictory claim, according to which courts do not need linguistic expertise in order to understand language because they know the general language, see Morrison, *supra* note 42, at 330-31. Interestingly, a page later, and in a slightly different context, the author raises the possibility that her “ear for ordinary English . . . may have been bent by the law's view.” This argument shows that legal experts, including courts, may need the help of linguistic expertise in order to distinguish regular from legal meaning of a term. *Id.* at 332.

44. For a claim that “[m]any parts of the Code are consulted only by specialists” (“the Code” refers to the U.S. Federal Internal Revenue Code), see Zelenak, *supra* note 33, at 664-65 (“The more complex a statute, the more likely it is to be addressed to specialists in the statutory subject matter, rather than to the general public”). Zelenak attributes this idea to Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 *COLUM. L. REV.* 527, 536 (1947). For some discussion about the various “audiences” of law, see JACKSON, *supra* note 12, at 284-87.

45. For a very clear illustration of this divergence, related to the interpretation of the First Amendment to the U.S. Constitution, see Frederick Schauer, *Speech and “Speech” - Obscenity and “Obscenity”: An Exercise in the Interpretation of Constitutional Language*, 67 *GEO. L. J.* 899, 905-07, 909-10 (1987). Interestingly, one can find in a dictionary the following example: “To the lay mind the language of a lawyer seems to be full of jargon.” *OXFORD ADVANCED LEARNERS DICTIONARY OF CURRENT ENGLISH* 485 (6th ed. 2000) (defining “lay” (definition number six)).

46. *PHILOSOPHY AND ORDINARY LANGUAGE* vii-xi (Charles E. Caton ed., U. of Ill. Press 1963). For some analysis of *PHILOSOPHY AND ORDINARY LANGUAGE*, *supra*, related to the said issue, and for a well-founded claim that the law is part of the English language, see Morrison, *supra* note 42, at 276, 286-90, 298-303.

legal sociolects (or technolects).<sup>47</sup> This is so because the difference between a legal sociolect and its related general language is not as wide as the difference between languages. Linguists may not even make note of their refusal to count “English-Legalese” among the languages of the world.<sup>48</sup> Opinions of linguistics-oriented academics who do note the question may diverge,<sup>49</sup> and we join the refusing side for the following reasons. The sociolect related to the U.S. federal income tax is not as different from general English as French is; lay English speakers may easily, but not accurately,<sup>50</sup> understand “taxpayer” but not “contribuable.”<sup>51</sup> This does not imply that every legal term or combination of legal terms is recognized by laymen.<sup>52</sup> It just implies an extensive resemblance. This claim implies that even lay speakers of English have a significant understanding of their countries’ legal sociolects, because these are only variations of the general language. Here we do not try to contradict the “language of the law” literature; we are only noticing different definitions of the term “language.”<sup>53</sup>

Until now the main claim of this sub-chapter – that legal terms imply specific signifieds – has been tentative. Let us now refine and affirm it.

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47. For a claim that legal terms are not technical, but rather more distinctive uses of regular language, see Morrison, *supra* note 42, at 290, 300-36.

48. *E.g.*, DAVID CRYSTAL, *THE CAMBRIDGE ENCYCLOPEDIA OF LANGUAGE* 286-87 (2d ed., Cambridge Univ. Press 1997).

49. For discussion of this conceptual question, for some references to differing opinions, and for application onto law of the concepts “language,” “dialect,” “register,” and “diglossia,” see Danet, *Language and Process*, *supra* note 33, at 470-74. For some brief comments about the question, restricted to legal English, and for the additional concept of “sublanguage,” see Danet, *Legal Discourse*, *supra* note 42, at 275, 277-78. For some discussion of whether a “language of the law” exists and for a claim that the law is part of the general English language, see Morrison, *supra* note 42, at 275. For the definition of a legal-English-language as a “professional sublanguage” and “a variety of English,” see Charrow et al., *supra* note 42, at 175. For law as a “dual semiotic system” within natural languages, and for attributing this claim to A. J. Greimas, see JACKSON, *supra* note 12, at 12-13.

50. Morrison, *supra* note 42, at 317.

51. Which is the French word for “taxpayer.”

52. For a discussion of some parts of the legal “language” which are unintelligible for the laymen, see MELLINKOFF, *supra* note 14, at 419-23, 429-36.

53. Today jurists use mostly sociolects (or technolects). In some eras and places, versions of foreign languages were and are used for law. For current and past states of the language of law in some specific geographic areas, see MELLINKOFF, *supra* note 14, at 419-36; N. Love, *Correctness and Norms*, in *CONCISE ENCYCLOPEDIA OF PRAGMATICS* 179, 183-85 (Jacob L. Mey ed., 1998); Lawrence M. Friedman, *Law and its Language*, 33 *GEO. WASH. L. REV.* 563, 563 (1964); Benson, *supra* note 42; YON MALEY, *supra* note 14, at 11; Kent Greenawalt, *The “Language of Law” and “More Probable Than Not”: Some Brief Thoughts*, 73 *WASH. U. L. Q.* 989, 989 (1995); SOLAN, *supra* note 10. For a comment about variations of “legal English” used in India, see V. K. Bhatia, *Language of the Law*, 20 *LANGUAGE TEACHING* 227, 232 (1987).

From the perspective of language evolution and legal authority, signifieds implied by legal terms and tax terms cannot be characterized as typical. We shall see later on<sup>54</sup> that the semantic control of tax terms is shared by taxpayers and authorities. We shall see that authorities have a bigger role in the shaping of legal signifieds, as compared to their influence on signifieds in regular language.

This refinement, and the “authoritarian” aspect of legal-terms and their implied signifieds, help to free our arguments from too heavy a dependency on the rule of law principle and on legal positivism. It implies that authoritative applications of legal rules that contradict or are unrelated to the language of the relevant legal source<sup>55</sup> can be considered an abrupt (authority-induced) evolution or change of legal-signifieds. It is especially so when a community of specialists track and learn such changes.<sup>56</sup> This evolution does not have to be predictable; it can be arbitrary or motivated by extra-legal considerations, as is usually (or sometimes) the case in language evolution.<sup>57</sup>

Moreover, perhaps we can make our claims more acceptable to supporters of non-positivistic, rules-critical or rules-skeptic theories.<sup>58</sup>

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54. *Infra* Part VI.1 (“Control of Tax-Terms: Authorities, Practitioners or Taxpayers?”).

55. For when a tax-law is interpreted in a non-literal way, see Zelenak, *supra* note 33. For when a court decides that a law prohibiting the shedding of blood on the streets does not apply to such medical acts, see Zelenak, *supra* note 33, at 632, (citing *U.S. v. Kirby*, 74 U.S. 482, 487 (1868)); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 31 (1982). For when a court calls a “bicycle” a “carriage,” see MALEY, *supra* note 14, at 30-31. For when we surprisingly lose our linguistic expertise, see SOLAN, *supra* note 10, at 59-63, (under the heading “Why Judges Do Not Make Good Linguists”). For a distinction between linguistic and non-linguistic (i.e., “substantive”) rules of interpretation, see SOLAN, *supra* note 10, at 65-67, 76.

56. The new meaning changes the definition of the interpreted legal term. For an implicitly supportive idea, see Zelenak, *supra* note 33, at 664-65, which states:

A court should be somewhat more willing to adopt a contextual interpretation that is difficult or impossible to reconcile with the literal language of a statute when the statute is addressed to an audience of specialists, rather than to the public at large. This is true whether the standard of interpretation is based on intent or meaning . . . Specialists would be more likely than a general audience to understand the statutory context as a possible basis for nonliteral or unusual interpretations of the statutory language. Moreover, once such an interpretation has been judicially or administratively propounded, specialists are more likely than members of the general public to know of the interpretation.

*Id.*

57. PETER WUNDERLI, *PRINCIPES DE DIACHRONIE* 35, 113 (1990) (quoting R. ENGLER & FERDINAND DE SAUSSURE, *COURS DE LINGUISTIQUE GENERALE, EDITION CRITIQUE* (par R.E., tome I, Wiesbaden 1968)); C. Rico, *Synchronie et diachronie: enjeu d'une dichotomie*, *REVUE BIBLIQUE, CENT HUITIEME ANNEE*, 228, 242-46 (J Gabalda & Cie Editeurs 2001) (Fr.) (discussing the approach of GUSTAVE GUILLAUME, in *LANGAGE ET SCIENCE DU LANGAGE* (1964)); Rico, *supra* note 6.

58. *E.g.*, Anthony D'Amato, *Pragmatic Indeterminacy*, 85 *NW. U. L. REV.* 148, 150 (1990);

We can reduce the basis of our claims from the existence of the rule of law to one of its components, communication.<sup>59</sup> This is a component which may be acceptable to at least one rules-skeptic academic.<sup>60</sup> Behind the arguments presented in the coming paragraph is the insight that law and its application – like language and “*parole*” (i.e. speech or use of language) respectively – can function to a significant extent in spite of exceptions, ambiguity, inaccuracies, vagueness, different definitions by different persons, new applications (“*jamais dit*”), and variations.<sup>61</sup>

So, a legal term can be analyzed from the point of view of its signified – even if we question the validity of the rule of law – if those in power wish to communicate among themselves or with their subjects. Generally, the most effective mode of communication is language, and language entails signifieds.

Thus, our claims can be useful even to someone who questions the validity of the narrow rule of law principle – so long as he thinks authorities (legal, social, patriarchal, etc.) use communication. Such

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Carl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950); Radin, *supra* note 32, at 797-801; Ahilan T. Arulanantham, *Breaking the Rules?: Wittgenstein and Legal Realism*, 107 YALE L.J. 1853, 1856 (1998); Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065, 1068-71 (1993); Mark Hager, *Against Liberal Ideology*, 37 AM. U.L. REV. 1051, 1051-063 (1988) (reviewing MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987)). For a positivists' view on rule skepticism, see HART, *supra* note 9, at 136-41. For a related analysis of the debate between legal positivism and Ronald Dworkin see Scott J. Shapiro, *On Hart's Way Out*, in HART'S POSTSCRIPT 149, 158-64 (Jules Coleman ed., 2001). This Hart-Dworkin debate is not really problematic for the thesis of our paper because both claim that the law can pre-determine (i.e. communicate) its orders significantly, be it through rules or standards. For such an analysis of Dworkin, and some critique of predictability (i.e. of communication) under Dworkin, see Radin, *supra* note 32, at 804-06.

59. Radin, *supra* note 32, at 785-86. For some more discussion of positivism and communication, see JACKSON, *supra* note 12, at 126-30, 148-66. For use of language to communicate tax rules, see Miller, *supra* note 35, at 44.

60. See Anthony D'Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?* 75 VA. L. REV. 561, 564-65, 602 (1989) (noting, though, at 597, that he agrees with the claim that unprovability can be extended to “linguistic demonstrations”). See also D'AMATO, *supra* note 58, at 151, n.12. For some predictability, which is implicitly necessary for effective communication, see D'Amato, *supra* note 58, at 184-86.

61. JACKSON, *supra* note 12, at 11-12 (comparing wrongly-formed but nevertheless performing language uses and legal applications of rules); Cunningham, *supra* note 43, at 1567-568, 1610; Love, *supra* note 53 (especially at the beginning); Ruth Kempson, *Pragmatics: Language and Communication*, in THE HANDBOOK OF LINGUISTICS 394-95 (Mark Aronoff & Janie Rees-Miller eds., 2001); MAURICE PERGNIER, LES FONDEMENTS SOCIOLINGUISTIQUE DE LA TRADUCTION 362, 473 (Diffusion Librairie Honore Champion 2d ed. 1980); ANDRÉ MARTINET, ÉLÉMENTS DE LINGUISTIQUE GÉNÉRALE 148-50, 179-81 (1970). For a jurist's perspective on linguistic precision, made through a comparison between general language and legal language, see MELLINKOFF, *supra* note 14, at. 393-98.

communication does not have to take place only between legislators and subjects. It can be between legislators and courts, between parties to a contract, between courts and administration, between government and parliament, etc. This communication is not restricted to legal rules. It can express interests, values, standards or political power and can make use of any term. This communication is not restricted to public authorities, and it can relate to authorities created via private law institutions like property, contracts, and corporation charters. The sum total of our claim is that as long as authorities communicate, legal terms, or whatever terms they use, imply significeds.

An additional problem we may face is related to the dishonest application of legal terms. We do not mean the dishonest application of tax terms by taxpayers. This is covered by criminal law, which is not the subject of this paper. We are referring to dishonest rhetoric by authorities, like courts. “The notion that judges articulate one set of reasons for their decisions while actually deciding cases on other grounds is not a new one.”<sup>62</sup> Dishonesty is a problem that is not restricted to courts or law; it is a problem for anyone who tries to communicate. If one<sup>63</sup> can read between the lines, one may be able to perceive the real, hidden reasons for a decision. When one cannot – and this can happen to the cleverest of lawyers – one is deceived.

### *II.3. Terminology of This Paper*

For the sake of precision we will use the linguistic definition of the terms “signifier,” “signified” and “referent.” The expression “legal term,” and more particularly “tax term,” will be used to describe “legal concepts” (in the juridical sense) that imply specific significeds in legal sociolects – significeds that are determined or influenced by legal theory and knowledge. The term “notion” will denote a concept as a thought.

For example, consider the following statement: “The notion of ‘income’ is different from the signified of the legal term ‘income.’” Based on our terminology, this statement claims that our conception of income (be it economic or legal) cannot be the same as the legal signified we call “income.”

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62. SOLAN, *supra* note 10, at 176. See also CALABRESI, *supra* note 55, at 172-81 and David L. Shapiro, *In Defense of Judicial Candor*, 100 HAR. L. REV. 731, 737 (1987).

63. If everybody can read between the lines, we change our language and regain our lost honesty.

### III. TAX BASE

The four-faceted distinction mentioned in the previous part of this paper explains some of the difficulties authorities face while trying to identify the tax base.<sup>64</sup> Since authorities bear costs while imposing taxes,<sup>65</sup> they try to avoid these costs by skipping – most of the time – the difficult passage from abstract legal terms to referents related to a specific taxpayer. Usually they do not observe economic activity as it is; they work with written communication about this activity (i.e., tax reports, tax records, documentation, receipts and bank records).<sup>66</sup> And so, although taxes are supposed to be levied based on economic activity, they are levied in fact mostly on the basis of written communication (this may exclude, to some degree, customs).<sup>67</sup> The use of communication about reality as a substitute for observation increases the importance of linguistic analysis.

In addition, the communication that authorities usually receive is partial, indirect, and retrospective. These authorities usually wait till the end of a tax period (a year, a month, etc.), and then ask only for written reports drafted especially to communicate with them. Only sometimes do they ask for reports of communications between the taxpayer and third parties such as business partners, employees, debtors or banks.

For example, a taxpayer may submit his annual tax return to a tax authority, declaring taxable bottom lines and his estimated tax liability.<sup>68</sup> This is a form of indirect and retrospective communication about his economic activity. If the authority chooses, it may audit him.<sup>69</sup> This audit may be via a short physical visit, a meeting or a mail exchange. A physical audit occurs when an authority sends someone to check if indeed the taxpayer is doing things suggested by the communication, if indeed he runs the business declared in his return. These physical audits

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64. See *supra* Part I.1 (“General Introduction”).

65. Joel Slemrod & Shlomo Yitzhaki, *The Cost of Taxation and the Marginal Efficiency Cost of Funds*, 43 Int'l Monetary Fund Staff Papers 172, 179-80 (1996).

66. MERTENS, *THE LAW OF FEDERAL INCOME TAXATION* 6, 113 (Edward J. Smith ed., West 2000). See also *CORPORATE, PARTNERSHIP, ESTATE, AND GIFT TAXATION* 3-5 (James W. Pratt & William N. Kulsrud eds., McGraw Hill 1997) [hereinafter *CORPORATE TAXATION*]. For some rules of information reporting, see THURONYI, *supra* note 1, at 210-11. For comparative-international perspective, see HUGH J. AULT & BRIAN J. ARNOLD, *COMPARATIVE INCOME TAXATION: A STRUCTURAL ANALYSIS* 14 (2004).

67. Customs are subject to unusually intensive physical scrutiny, so this part of the paper may be less applicable to them.

68. See Danshera Cords, *Tax Protestors and Penalties: Ensuring Perceived Fairness and Mitigating Systemic Costs*, 2005 B.Y.U. L. REV. 1515, 1543-544 (2005).

69. *Id.*

only show if one or two visits can disprove the hypothesis that the taxpayer is economically active in the ways he claims to be. They do not reveal his year-long activities or his gains, and if an authority was to try to levy taxes solely on the basis of these audits, without taking any documents into account, revenues would be very small.

So, these physical audits are only a secondary means. The first is a review of the taxpayer's records and documentation, including receipts and bank records. This is a review of communication between the taxpayer and the authority, and between the taxpayer and third parties. An audit may omit physical encounters entirely, and be conducted by mail or at the authority's offices. In the end, authorities tax mostly based on observed communication rather than observed physical activity (here was our modification to the definition of the "tax base"). It is hoped that this communication provides a sufficient representation of (the bottom lines of) economic activity. If we want to find out the degree to which this is true, we have to study the gap between this communication and reality.

To the extent that tax collection is based on communication, it encounters one of the basic linguistics truths: language always changes (it is "*un devenir permanent*").<sup>70</sup> When we add this to the argument that communication is the basis for taxation, we contradict – to the extent that this argument is true – an implied assumption of economic theory. This assumption is that taxes are levied on economic activity according to rules set by lawmakers. Indeed, to an important measure this assumption is true, but taxes are also subject to an ever changing language machine. This machine and the implications it holds for taxes are the subjects of our research.

#### IV. VAGUENESS OF APPLIED TAX LAW

##### *IV.1. Semantic Extension, Indeterminacy – Cores, Penumbra and Vagueness*

Hart's legal positivism says, under the title "open texture of law,"<sup>71</sup> that every legal term has a clear core and a vague penumbra. When we forbid "vehicles" from entering the park, it is clear this includes cars

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70. WUNDERLI, *supra* note 57, at 139-40.

71. HART, *supra* note 9, at 124-36.

(part of the core of the term “vehicle”), and unclear whether this includes bicycles and toy scooters (part of the penumbra).<sup>72</sup>

Some aspects of semantics, which may be considered the study of meaning,<sup>73</sup> relate strongly to non-linguistic phenomena: it is “open” to the world.<sup>74</sup> This quality is most apparent when non-linguists – like tax jurists – use definitions of legal tax terms and apply or interpret tax law. Since anyone involved in the field of taxation has to deal extensively with definitions and their application and interpretation, semantic theory may prove useful.<sup>75</sup>

One should note some similar terms the two disciplines use. According to Ducrot and Schaeffer,<sup>76</sup> the term “semantic extension” describes expressions with abstract meanings that may refer to many different things (like “vehicle”). They explain that the term “indeterminacy” (according to them, it is called “vagueness” by English philosophers), relates to expressions whose range of application is unresolved.

We can now start to expand (or contradict) Hart’s argument.<sup>77</sup>

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72. *Id.* at 126-29; BRIAN BIX, LAW LANGUAGE AND LEGAL DETERMINACY 10-11 (1993) (crediting these ideas, on page 10, to Friedrich Waismann, “Verifiability,” *Proceedings of the Aristotelian Society*, 19 SUPPLEMENTARY VOLUME 119-50 (1945)); Williams, *supra* note 12, at 181-95 (noting that sometimes law converts continuous reality into binary results, and that sometimes continuous results are preferable). See also Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661-69 (1958). For a critique of the existence of “cores”, related to semantics, see GOODRICH, *supra* note 37, at 58-60. For some discussion of Hart’s theory, and for related references to Greimas, Jakobson and others, see JACKSON, *supra* note 12, at 43-46 and 148-66. For further comments on Goodrich in relation to legal positivism and realism and to ideology, see also JACKSON, *supra* note 12, at 10-11. For a more general treatment of vagueness, and for critique of Hart and Fuller, see Moore, *supra* note 5, at 193-200, 273-77 and 286-94. See also LEECH, *supra* note 5, at 84-85; Christian Zapf & Eben Moglen, *Linguistic Indeterminacy and the Rule of Law: On the Perils of Misunderstanding Wittgenstein*, 84 GEO. L. J. 485, 489 (1996). For another example of “bicycle” and “carriage,” see MALEY, *supra* note 14, at 30-31; WILLIAMS, *supra* note 12, at 189 (giving examples of the bicycle and carriage example in Burrows’s WORDS AND PHRASES). For some more discussion of Hart’s theory, and some references to philosophers and others who treat this subject, see SOLAN, *supra* note 10, at 96-98; Radin, *supra* note 32, at 794. For a linguist’s perspective, including empirical method, see Cunningham, *supra* note 43, at p. 1585-1625. See also KURT BALDINGER, SEMANTIC THEORY: TOWARDS A MODERN SEMANTICS 42-43 (Roger Wright ed., 1980) (claiming that for the law, the limits of a term are more important than its core). For some critique, see D’Amato, *supra* note 58, at p. 171-79, 595-602. See also Miller, *supra* note 35, at 34-37.

73. TAMBA-MECZ, *supra* note 8, at 7.

74. *Id.* at 12, 20, 22.

75. This may be so despite the tendency of some linguists to restrict their theory to “daily languages,” (e.g., TAMBA-MECZ, *supra* note 8, at 36), and to avoid linguistic analysis of scientific theories.

76. DUCROT & SCHAEFFER, *supra* note 8, at 339.

77. HART, *supra* note 9.

First, using the notion of synonymy, we find that the cores of different tax terms can partially overlap.<sup>78</sup> For example, “wages” and “business losses” can both be core descriptions of the same item, like when an owner of a losing corporation is also an employee, and he pays himself real, justified market-value wages that directly cause these losses. Second, B. L. Whorf claims that ideas (and to our understanding, also signifieds) are interconnected and that their penumbras partially overlap.<sup>79</sup> For example, housing an employee may be a benefit to him or a demand made by his employer – but it may also be a mixture of the two. Moreover, it may be one of many possible mixtures of the two, varying according to the degree of each component. When it is clearly the former, it is a taxed benefit (or payment in kind); when it is clearly the latter, it is an untaxed “duty toward work.”<sup>80</sup> Cases in between, for which it both benefits the employee to some degree and is weakly demanded of him, may lie in the penumbras of both legal terms (depending on the particulars of the relevant law). Such overlaps can also occur between a core and a penumbra, or between multiple cores and penumbras.

#### *IV.2. Semantics – Accuracy in Taxation is Affected by Semantic Extensions, Synonymy, and Vagueness of Application*

We can now start the process of tying together the claim of the previous chapter (about the tax-base)<sup>81</sup> and of the previous sub-chapter (about semantic extension and indeterminacy).<sup>82</sup> The linguistic theory this paper applies claims that legal terms imply signifieds of the legal sociolect. A signified is defined negatively by its differences from other signifieds (Saussure calls it “*valeur*,” i.e., linguistic “value”). That is, every word (or other linguistic unit)<sup>83</sup> is defined by its differences from and relations to other words in the linguistic system to which it belongs.<sup>84</sup> For our purposes it implies that tax law has to use distinct –

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78. For somewhat similar results, related to polysemy, see GOODRICH, *supra* note 37, at 58-60.

79. BENJAMIN LEE WHORF, LANGUAGE, THOUGHT AND REALITY 35-39 (John B. Carroll ed., 1964).

80. *E.g.*, I.R.C. §119.

81. *Supra* Part III (“Tax Base”).

82. *Supra* Part IV.1 (“Semantic Extension, Indeterminacy - Cores, Penumbras, and Vagueness”).

83. SAUSSURE, *supra* note 15, at 146-49.

84. *Id.* at 159-62, 166-69; TAMBA-MECZ, *supra* note 8, at 21-22; Depecker, *supra* note 6, at 55-63; GOODRICH, *supra* note 37, at 25, 73-74 (noting a distinction between semantic extension and intension). For description and critique, including a cited critique by Ricœur (LA MÉTAPHORE VIVE

but related – legal terms in order to communicate its orders. It implies that overlapping penumbras are an unavoidable part of the way meaning appears in language – this is how meaning is created – and therefore tax legislators and interpreters cannot avoid it.

Distinctions come from the application of different tax rules and results to the different legal terms<sup>85</sup> related to various referents. On the one hand, to the measure that authorities want to tax all economic income or wealth, tax terms must semantically cover all activities, situations and events that create or constitute them.<sup>86</sup> “Covering” means “not letting any activity, event or state of affairs avoid description” and is achieved by legal terms whose penumbras touch each other. Since penumbras are vague, “touch” in fact means “overlap.”<sup>87</sup> In other words, partial synonymy of tax terms is an inescapable side effect of covering reality that provides avoidance opportunities and creates interpretation difficulties. This paper argues that taxpayers overuse vagueness and even enhance it by modifying language, making these difficulties and avoidance opportunities significant.

One can illuminate this theory with an example. Let us consider how the following terms have both distinct and shared semantic content: “work,” “wage,” “dividend,” “donation,” “gift,” “sale,” and “interest.” “Work” and “wage” may overlap, for example, when an employer pays for employee expenses like a cab ride for business and pleasure purposes.<sup>88</sup> “Wage” and “dividend” may overlap, for example, when a company pays its owner a salary vaguely related in size to undistributed profits.<sup>89</sup> “Dividend” may overlap “donation” when a corporation owner wishes to donate money but does so through the company he controls.<sup>90</sup> “Donation” may overlap with “gift” when someone donates to an

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(1975)), see Rico, *supra* note 6, at 387, 390, 401-05.

85. For example, under federal income tax, partnerships are taxed differently than other corporations.

86. For semantic covering of a legally regulated activity, see MALEY, *supra* note 14, at 22; JACKSON, *supra* note 12, at 39-41. For ambiguities in language defining income, see HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 50-51 (1938). See also BORIS I. BITTKER, ET AL, A COMPREHENSIVE INCOME TAX BASE? A DEBATE (1968).

87. The above text is a bit optimistic. Legal terms may have core-to-penumbra overlap or even core-to-core overlap when an activity is clearly covered by the cores of two different terms. E.g., a personal “gift” may be an essential “business expense.”

88. This example is related to I.R.C. § 162 (business expenses) and § 61 (defining “gross income”).

89. For a somewhat similar issue, under the heading “constructive distributions,” see CORPORATE TAXATION, *supra* note 66, at 18-20.

90. For a mix of this example and the next one, see CORPORATE TAXATION, *supra* note 66, at 3-21.

organization whose activities benefit his relative.<sup>91</sup> “Gift” may overlap with “sale” when a firm supplies goods or services for prices that are lower than market value.<sup>92</sup> “Sale” may overlap with “interest” when a firm gives its creditor preferential treatment in business deals not connected to the loan. These examples ordered the seven legal terms in a file, with each one partially overlapping the next, but things are not as restricted: we can demonstrate connections between any pair of them.

This semantic phenomenon relates to the complexity and indeterminacy discussions about tax law.<sup>93</sup> This paper claims that adding more terms to a legal system has the side effect of increasing vagueness, partial synonymy of terms (and ambiguity) and interpretation difficulties. For many fields of law, adding more specific terms to promote rational arrangements and justice is more effective than it is in tax law.<sup>94</sup> In other fields of law, the side effects of vagueness and partial legal synonymy do not undermine the main objective. As we argue in this paper, taxpayers’ negative reactions increase vagueness and synonymy, undermining the main objective of tax laws. We shall see later on<sup>95</sup> that taxpayers tend to “misuse” penumbras and even enlarge them. If these additional claims are indeed correct, we can arrive at results reminding us of D’Amato’s and encounter the following tax-law paradox: the more accurate tax terms there are, the more indeterminacy and vagueness are created.<sup>96</sup> If for general law, simple and general terms cause indeterminacy and vagueness, and finely tuned terms bring predictability, it is not so for tax law. In tax law, both simplicity and intricacy bring indeterminacy, so moderation is the key.

### *IV.3. Tax Avoidance – Legitimacy and Hindsight Advantage*

The first result of legal-term overlap and partial synonymy is that

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91. *Id.*

92. *E.g.*, non “arm’s length” deals. OROW, *supra* note 1, at 282-84.

93. One can find much literature on this subject. *See, e.g.*, Miller, *supra* note 35; McCaffery, *supra* note 20; Sidney Roberts et al., *A Report on Complexity and the Income Tax*, 27 TAX L. REV. 325, 331-34 (1972); Laurence N. Woodworth, *Tax Simplification and the Tax Reform Act of 1969*, 34 LAW & CONTEMP. PROBS. 711, 711 (1969).

94. *See* David J. Gerber, *U.S. Anti-Trust Law and the Convergence of Competition Laws*, 50 AM. J. COMP. L. 263, 277 (2002).

95. In Parts IV.3 (“Tax Avoidance – Legitimacy and Hindsight Advantage”), V.2 (“Rational Taxpayers May Prefer Indeterminacy and Vague Application”), VI (“Accelerated Evolution of Tax Terms”), and VII.2 (“Sociolinguistic Exclusion and Public Language Inhibition of Avoidance”).

96. For more thoughts on the subject of highly specific tax-law, see Miller, *supra* note 35, at 40, 50-52, 69-70, 74-76 (pointing to resulting complexities, comprehension difficulties and use of discretion. Miller also equates determinacy with arbitrariness). For different claims against the “too-exact” legal language, see SOLAN, *supra* note 10, at 118.

when an activity is covered by two (or more) terms at once, taxpayers have both motivation and legitimacy to use the term that reduces their tax burden (see another treatment of legitimacy, later on).<sup>97</sup> This result is implied by the legitimacy of tax planning.<sup>98</sup> Taxpayers are not obliged to conduct their business in the most expensive way tax-wise.<sup>99</sup> For example, when tax law levies different tax rates on corporations as opposed to individuals, and some persons can achieve their economic goals under the core or penumbra of both terms, they are allowed to use the term that minimizes their tax burden. This point is reinforced by another significant advantage taxpayers have. As others have already noted,<sup>100</sup> in terms of setting laws and regulations, taxpayers have hindsight while authorities have to prophesize. Taxpayers know the text of the law, and can choose or manipulate terms in response.

A note for economists: this result seems to contradict the claim that, under some conditions, the party that moves first has the advantage.<sup>101</sup> The difference may be caused by the dysfunctional aspects of tax rules and tax terms discussed in this paper. The ability to manipulate legal terms is the ability to change the rules of the game. The economic claim does not deal with such a capacity.

The linguistic analysis of the previous subchapters<sup>102</sup> shows that legal term overlap is common and prescribes some ways – for both taxpayers and authorities – to look for such overlaps. Starting with a specific tax term that describes his activity, a taxpayer can study other terms with less expensive tax results. If he finds that another term applies to his activity, a simple renaming may reduce his tax burden. But in this easy case the taxpayer should mind the possible application of the first term (i.e., of its signified) as well. Authorities may perform the same procedure in reverse and not agree to the new name. A taxpayer may improve his position by altering his activity a bit, drawing it away from the core of the term (i.e., of the signified) with more expensive results and toward the core of the other term.<sup>103</sup> This

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97. In Part VII.1 (“Civil Ban on Linguistic Tax Avoidance – Some Difficulties”).

98. E.g., OROW, *supra* note 1, at 250-53; *Gregory v. Helvering*, 293 U.S. 465, 469 (1935) (“The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.”).

99. *Gregory*, 293 U.S. at 469.

100. See Miller, *supra* note 35, at 70-71 (referring to Lawrence Lokken, *New Rules Bifurcating Contingent Debt: A Good Start*, 51 TAX NOTES 495, 504 (1991)).

101. Stackelberg’s market leadership model.

102. *Supra* Parts IV.1 and IV.2.

103. For the idea that individuals can “modify their activity so that it falls in the cracks between existing rules or comes more ambiguously within any given rule . . . ,” see Anthony D’Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1, 5, 18-19, 32-33 (1983).

algorithm of tax avoidance confuses the early distinction between economic and legal tax avoidances,<sup>104</sup> and is based on the fact that taxpayers are not obliged to respect the different theoretical reductions considered by this paper.<sup>105</sup>

Later on<sup>106</sup> we shall see that taxpayers' persistent interests can even modify the semantic content of words and legal terms (contrary to jurists' beliefs), thus increasing their avoidance even more actively.

The resulting phenomenon is omnipresent. Let us start with two examples. Positive law has special rules that deal with the renaming of "expensive hobbies" as "losing businesses"<sup>107</sup> (hobby farmers and the like). Those rules are necessary since a taxpayer who succeeds with such a renaming will pay for the activity out of his gross income rather than his net income. This approach of positive law sees a hobby as a discreet activity that can usually be recognized and separated from business activities. A more sophisticated approach of positive law is the legal treatment of "business travel and entertainment expenses."<sup>108</sup> A taxpayer who wants to meet an out-of-town friend can take a day off and bear his traveling expenses, or he can visit his friend while traveling on business and let authorities help finance the visit through reduced taxation. Taxpayers tend to abuse this term, and tax law has many rules aimed at preventing such abuse.<sup>109</sup>

Abstracting from the last two examples, and according to semantics, we may see that pleasurable activities – of many kinds – can be covered under light-tax terms like "work" and "expenses." Social activities, pastimes, idleness and personal spending do not only come in identifiable units, and not only on the periphery of business – they can also tint any activity and any tax term. In the widest possible sense, any reduction of taxes due to a pleasurable activity may be – to a measure – tax avoidance achieved via semantic extension (for the difference between economic tax avoidance and tax avoidance by use of legal terms, see the introduction).

This result, which affects the evolution of words' meaning, is reinforced by the theory of tax incidence (mentioned further on).<sup>110</sup> The

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104. See *supra* Introduction.

105. See *supra* Part I.2 ("A Comment for Economists").

106. See *infra* Part VI ("Accelerated Evolution of Tax Terms").

107. AULT & ARNOLD., *supra* note 66, at 218-21; LAPIDOTH, *supra* note 1, at 133.

108. Lawrence Zelenak, *The Income Tax and Costs of Earning a Living*, 56 TAX L. REV. 39, 63 (2002).

109. E.g., MERTENS, *supra* note 66, Vol. 6, § 25D.02.

110. See *infra* Part V.2 ("Rational Taxpayers May Prefer Indeterminacy and Vague Application").

combination ensures that rational parties to any transaction (for example, employer and employee) will gain from any tax avoidance achieved by language use.

This example implies that tax avoidance, by means of language, is a regressive phenomenon – the higher the income, the wider the possibilities to deduct expenses (this is not a general conclusion; it relates only to the last result). This result supports the case for progressive taxation.

#### *IV.4. Penumbras Are a Problem for Abstract Law, Theory, and Interpretation*

The results, up to now, touch a more general issue. Abstract law and theory have a problem dealing with the indeterminacy of language and the vagueness of its application. We theorize mostly by using core meanings and simple examples. For us, and after Simons, “income” is first and foremost an increase in wealth<sup>111</sup> (often related to transactions) – it is not the real-world cloud of vaguely delimited events that can be described through many synonymous or ambiguous signifieds. It is like the difference between litigating a complicated case in a trial court and reading its verdict in an appellate court. Most facts, arguments, causes of action, choices, and manipulations available to the parties, their lawyers, the jury, and the judge cannot be learned just by reading the verdict.<sup>112</sup>

The accuracy-synonymy paradox that undermines the application of positivistic philosophy<sup>113</sup> points to another academic problem. Unlike many other fields, for tax law the more intricate and sophisticated an interpretive theory is, the more likely it is to become inaccurate. The more it explains existing and used legal terms, the more likely it is to become – over time – wrong.

This difficulty implies that, if not careful, we will start thinking that

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111. SIMONS, *supra* note 86, at 50-51.

112. Usually, a client arrives with a story of many details, and the lawyer can locate many pieces of facts that correlate imperfectly to various causes of action. The lawyer chooses the facts he finds “relevant” and omits many others, creating his client’s “legal causes” and omitting some other – less plausible causes. The other party’s lawyer does the same and between them, many facts and possible arguments do not even reach court. Next, the trial court or jury “decides” the facts, omitting many more and consequently invalidating some legal causes. The appellate court does more of the same, and the end result is a short verdict – short compared to the volume of evidence, protocol, and argument materials laid before the courts. For some comments about law school teaching of facts, see D’Amato, *supra* note 58, at 187 n.136.

113. *Supra* Part IV.2 (“Semantics – Accuracy in Taxation is Affected by Semantic Extensions, Synonymy and Vagueness of Application”).

“vague use of language is an abuse of law.” We will claim that everything is clear or could be clear, like our abstract understanding of law. We will accuse tax lawyers and taxpayers of opportunism and socially irresponsible activities; legislators of negligence in drafting laws; tax authorities of lacking talent and resources; and courts and academics of incompetence.<sup>114</sup> Indeed, all these accusations may be true to an extent due to reasons unrelated to language. But the linguistic analysis shows that a measure of these accusations is wrong. Mellinkoff<sup>115</sup> argued that legal language, excluding its “terms of art” and their likes, is inaccurate. We move one step further, include “terms of art,” and claim that these accusations are wrong to the extent that penumbras are unavoidable linguistic features of words in general, and unavoidable and highly significant features of tax terms in particular. Legislators, courts, authorities and interpreters cannot avoid them, and taxpayers cannot avoid acting by them.

Later on we shall see that tax avoidance, by means of language, relates to social exclusion.<sup>116</sup> This is connected to the motivation of both taxpayers and practitioners to maintain a low profile in reaction to anti-avoidance measures.<sup>117</sup> This motivation is based on the fact that publicity helps authorities tackle avoidance (even when it is not criminal – this paper deals only with civil law). For the academy, this implies that studying tax avoidance and interpretation is better when carried out alongside practice. Unlike other fields, up-to-date tax avoidance and interpretation are difficult to learn from “concentrated” and “refined” secondary sources.<sup>118</sup>

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114. For such accusations, see Roberts et al., *supra* note 93, p. 331-32, 334-48, 352, 359, 361, 367-68, 371, 374. See also Miller, *supra* note 35, at 20, 26-27. For such and more claims, related to general-law (and not only tax-law), see Benson, *supra* note 42, at 569-71 (discussing the shortcomings of legal language, and count – as sources to the persistent nature of “legalese,” “inertia, incompetence, status, power, cost, and risk’); see also Sheldon D. Pollack, *Tax Reform: The 1980's In Perspective*, 46 TAX L. REV. 489, 536 (1991) (identifying “the real source of the complexity of the Code: the statutes, regulations and administrative policies aimed at curbing tax avoidance.”).

115. MELLINKOFF, *supra* note 14, at 387-93.

116. See Part VII.2 (“Sociolinguistic Exclusion and Public Language Inhibition of Avoidance”).

117. See Mark P. Gergen, *The Logic of Deterrence: Corporate Tax Shelters*, 55 TAX L. REV. 255, 261-62 (2002).

118. For the claim that evidence for “tax avoidance . . . is not readily available in law books, because the better the tax-avoidance lawyer, the less likely the scheme will be contested by the government,” see D’Amato, *supra* note 60, at 584.

#### *IV.5. Pragmatics and Unclear Application of Legal Terms*

Added to the previously discussed complexities of tax-law application is the fact that context is a key element in communication. An out-of-context word or sentence (which can represent a term of tax law, like “expenses”) is therefore prone to ambiguity. Usually, when we want others to understand us, we have to be aware of context, and we have to use – on top of words and sentences – references to past acts of communication and events, gestures and even physical motions like pointing. The reason for this is both positive and negative. On the positive side, the reason is that most abstract words and sentences, including tax terms, have a vague delimitation.<sup>119</sup> On the negative side, the reason is that they lack many meaning-creating mechanisms and thus hold little content. Meaning comes from a combination of factors: the lexical content of words, grammar, referenced reality, logic, pragmatic context, and intonation.<sup>120</sup> All these imply that unlike regular daily communication, tax terms (like “expenses”) have indeterminate and vague semantic content. This result occurs despite legislative efforts aimed at clarity.<sup>121</sup> For example, good partners to any economic activity can communicate like friends. They can use single words and short sentences to communicate ideas and facts that a listener would find hard to understand or recognize. Legislators and authorities are not on such close terms with taxpayers. Legislators and tax authorities do not have the will or the resources to learn the daily details of taxpayers’ businesses and jobs. Taxpayers do not invite authorities to learn the details of their projects and actions – they report only what they must or what helps reduce their tax burden. They do not reveal their thoughts to authorities. Lack of familiarity hinders communication, and reduces the communicative efficacy of any text (either to or from authorities) and reduces our ability to achieve correct interpretation or application.

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119. TAMBA-MECZ, *supra* note 8, at 50.

120. Moore, *supra* note 5, at 183-187; TAMBA-MECZ, *supra* note 8, at 50, 110; SAUSSURE, *supra* note 15, at 150-51; WHORF, *supra* note 79, at 258-60. For an economic approach to pragmatics, see ARIEL RUBINSTEIN, *Strategic Considerations in Pragmatics*, in *ECONOMICS AND LANGUAGE* 37 (2000). For a more modest version of pragmatics, see LEECH, *supra* note 5, at 67-68 and 319-41. Legislative texts have additional problems, not usually present in regular language, see *supra* note 42 about the plain language movement, and see also V. K. Bhatia, *Syntactic Discontinuity in Legislative Writing and its Implications for Academic Legal Purposes*, in *READING FOR PROFESSIONAL PURPOSES: STUDIES AND PRACTICE IN NATIVE AND FOREIGN LANGUAGES* 90 (K. Pugh & J. M. Ulijn eds., 1984).

121. For the contradicting opinion, that modern legislation is very clear because it employs an exact and specialized vocabulary, which is drafted carefully and explicitly, see MALEY, *supra* note 14, at 22-23. For more references to this issue, see Bhatia, *supra* note 53, at 230-31.

Taken out of context, most words are ambiguous. They are made of some alternative cores that interchange according to the situation where they are used. They also consist of penumbras of a similar nature.<sup>122</sup> Take as an example the different references and tax results possible within the term “expenses.”<sup>123</sup> Signifiers and signifieds are relatively rigid and fixed parts of language, while reference is designated in many alternative ways according to context.<sup>124</sup> These results, parts of which are already noted by L. Fuller,<sup>125</sup> contradict the stable-core claim of legal positivism:<sup>126</sup> rather, tax terms are not clear in themselves and cores are unstable.

Another claim by Hart seems to contradict this – or to be contradicted by linguistic pragmatism. In this claim, Hart says a rule is clearer than a concrete action demonstrating it.<sup>127</sup> He says that when a parent tells his child “when in church, behave so” and demonstrates, the child may not be sure which parts of the demonstrations are part of the rule (is taking off my hat with the right hand part of the rule?). This claim does not contradict the pragmatic-linguistic approach, according to which an abstract rule is less clear than a concrete use of language. Hart treats a particular event as a means aimed at defining an abstract rule.<sup>128</sup> Pragmatists, however, study the communicative efficacy of a particular use of language in a particular context.<sup>129</sup> A third comparison was made by Solan,<sup>130</sup> who contrasted the capacity to understand language with the capacity to preset definitive rules.

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122. See *supra* Part IV.1 (“Semantic Extension, Indeterminacy – Cores, Penumbras and Vagueness”).

123. For how many different tax and economic meanings can we use the word “expenses”? Let us try: “Wage expenses”/“in-shop meals expenses”/“training expenses”/“office expenses”/“capital business expenses”/“expenses on non arm's-length transactions”/“carry over expenses”/“tax expenses”/“public expenses”/“medical expenses”/“alternative economic expenses”/“insignificant expenses”/“criminally reported private expenses.” For a related argument, defining words according to context, see Glanville Williams, *Language and The Law: III*, 61 LAW QUARTERLY REV. 293, 301-302 (1946) (“Words change in meaning according to the word to which they are being opposed . . .”).

124. See TAMBA-MECZ, *supra* note 8, at 32-33, 50-51.

125. Fuller, *supra* note 72, at 664-665 (stating that the phrase, “All improvements must be promptly reported to,” taken out of context can have many different “core” meanings. For some discussion and references, see BIX, *supra* note 72, at 30-31.

126. See *supra* Part IV.1 (“Semantic Extension, Indeterminacy – Cores, Penumbras and Vagueness”).

127. HART, *supra* note 9, at 125-26.

128. *Id.*

129. See Kempson, *supra* note 61, at 394-95.

130. SOLAN, *supra* note 10, at 15-16, 20-23.

#### IV.6. *Semantics and Analytical Indeterminacy (Choice of Analysis)*

Whorf argued that the lexemes (i.e. lexical morphemes) of each language reflect a specific analysis of reality.<sup>131</sup> Moreover, each language may create an analysis different from that of another language.<sup>132</sup> He demonstrated this by showing the differences between words like “time” and “space” in English and Hopi.<sup>133</sup> Simpler examples may be found for different definitions of colors or in finer distinctions in one language versus another<sup>134</sup> (see the “policy”-”*politique*” comparison discussed earlier). Applying this idea to interdisciplinary research,<sup>135</sup> we find, for example, that a legal distinction between capital gains and interest that a legislator created<sup>136</sup> may not exist for economists.<sup>137</sup> That is to say, the legislator and microeconomic theory describe reality differently. This example implies that taxpayers can avoid taxes by choosing between two identical economic *activities* that have different tax results.<sup>138</sup> It contributes to the explanation of the gap discussed in the introduction of this paper.<sup>139</sup> It also shows that whenever an authority analyzes reality incorrectly, tax avoidance is possible: combined with authorities’ informational disadvantages – disadvantages that may lead to wrong analyses – the problem may seem significant.

Most acts of communication, including those between taxpayers and authorities, use reductions. For example, a year’s worth of business activities is summarized for tax authorities on relatively short (relative to the activity described) forms, comprised mostly of numbers. Tax authorities have inferior access to the particulars and facts of the business, and may find disproving these numbers very difficult. More generally, if an action (or transaction) has facets that can be semantically related to more than one tax term, and if the taxpayer chooses a reduction that substantiates the term taxed less, authorities will find it

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131. WHORF, *supra* note 79, at 57.

132. *Id.* at 57-64, 158, 213-15, 234-37, 243; J. P. VINAY AND J. DARBELNET, *STYLISTIQUE COMPAREE DU FRANÇAIS ET DE L’ANGLAIS* 261-65 (Éditions Beauchemin Itée 1977) (1964). For a radical description of the said claim, and for some references, see LEECH, *supra* note 5, at 26-27.

133. WHORF, *supra* note 79, at 158-59.

134. VINAY & DARBELNET, *supra* note 132, at 261-65; LEECH, *supra* note 5, at 24-26.

135. For the abstract idea of applying these ideas onto variations of “technical sub-languages,” see WHORF, *supra* note 79, at 247.

136. *E.g.*, compare I.R.C. § 61(a)(4) with § 1222.

137. Joseph E. Stiglitz, *The General Theory of Tax Avoidance*, 38 NATIONAL TAX JOURNAL 325, 328 (1985).

138. FELDMAN & KAY, *supra* note 18.

139. *Supra* Part I (“Introduction”).

difficult even to be aware of the alternative tax result.<sup>140</sup> Since, as mentioned before,<sup>141</sup> taxpayers know the rules of law in advance, they can plan their actions to achieve both their economic goals and the desired tax reductions.

## V. WHO WANTS VAGUE APPLICATION OF LANGUAGE?

### *V.1. A Public Perspective Calls for Clarity*

Indeterminacy and vagueness of application are issues for general law.<sup>142</sup> They were discussed in the previous chapter of this paper in relation to tax law, and in our opinion, they should be a major issue for it.<sup>143</sup> From the public perspective, they are a negative phenomenon in tax law.<sup>144</sup> They hinder its proper function, they are sources of avoidance and they cause interpretation difficulties, disputes, and litigation.

### *V.2. Rational Taxpayers May Prefer Indeterminacy and Vague Application*

For private individuals and under economic-egoistic rationality, indeterminate tax law and vague application can be a positive thing. It may seem that honest taxpayers should prefer clear legal/tax terms<sup>145</sup>

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140. For a more concrete argument to this end, see Zelenak, *supra* note 33, at 646 (“The taxpayer in this situation will tend to give itself the benefit of the doubt, reporting a loss as ordinary and a gain as capital. If the taxpayer reports a gain as capital, it will be difficult for the Service to discover whether the *Corn Products* doctrine should apply because gain realized on the sale of corporate stock is ordinarily treated as capital gain.”).

141. See *supra* Part IV.3 (“Tax Avoidance – Legitimacy and Hindsight Advantage”).

142. E.g., Moore, *supra* note 5, at 193-200; HART, *supra* note 9, at 124-36. For the contradicting claim that vagueness is useful, and for the claim that it is inescapable, see George C. Christie, *Vagueness & Legal Language*, 48 MINN. L. REV. 885, 885 (1964). For more support for vagueness, ambiguity and indeterminacy, see Charrow et al., *supra* note 42, at 182-83 and JACKSON, *supra* note 12, at 276-82, 292.

143. For an implied treatment of these issues, in tax law, see Weisbach, *supra* note 1. For contra-linguistic interpretation of tax law, see John F. Coverdale, *Text as Limit: A Plea for a Decent Respect for the Tax Code*, 71 TUL. L. REV. 1501, 1506-514 (1997). Reading a text with disregard to its linguistic meaning can be considered as increasing its indeterminacy for any subsequent reading (and reader). For vagueness as a disqualifying quality of tax regulations, see Lynn Lu, *Flunking the Methodology Test: A Flawed Tax-Exemption Standard for Educational Organizations that Advocate a Particular Position or Viewpoint*, 29 N.Y.U. REV. L. & SOC. CHANGE 377, 423 (2004).

144. Miller, *supra* note 35.

145. It is also implied by their possible interest in the rule of law. See *supra* Part II.2 (“Legal Term and its Signified – Rule of Law, Authority, or Communication”).

that entail clear rules.<sup>146</sup> We would like to just pay our taxes and concentrate our efforts on real and productive activities. But, because of rationality, asymmetric information, and the ease of tax avoidance access even for non-sophisticated taxpayers (due to tax incidence, which will be discussed shortly), vague application of the law may create private benefits. It may be convenient and useful for all rational taxpayers.

Vagueness in application of tax law is handy for taxpayers, because it creates a persistent opportunity for underpayment of taxes. Let us see why: having indeterminate rules implies that we do not know exactly what the outcome of the application will be, or which rules should be applied to a specific case. It implies that small pieces of information may influence legal results significantly. Indeterminacy may turn the balance toward those with information advantages. These persons can create a bias by selectively emphasizing (and even introducing) small pieces of information that tip the balance toward the legal term that entails more favorable results.

Taxpayers have a significant and persistent information advantage over tax authorities. Authorities lack the resources to examine most economic activity physically or mentally.<sup>147</sup> When a firm produces and an individual works or consumes, tax authorities are almost never there to watch. On the rare occasions that they are, they have problems understanding what is being done and how much it is worth. Asymmetrically, each taxpayer has a lot of information about his own activities. The combination of persistent asymmetrical information and the indeterminacy of tax rules may result in the persistent underpayment of taxes. (In our discussion of sociolects to follow, we will add to this the linguistic mechanisms that enable individuals to create even more opportunities for vagueness).

Here we have shown that an individual taxpayer may profit from indeterminacy and vague application of tax law. This result is also true for groups of individuals that participate in a common transaction. This fact is important to note. It implies that vagueness, and the ensuing tax avoidance, do not create conflicts of interest between taxpayers. It implies that taxpayers tend to collaborate against authorities, and will not cooperate with them. This result is important also because it shows how unsophisticated taxpayers can indirectly enjoy the fruits of sophisticated tax avoidance performed by others.

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146. For such a claim, see Miller, *supra* note 35, at 15.

147. Maaser Kesafim, *The Development of Tax Law*, 8 FLA. TAX REV. 153, 199 (2007).

Now, let us explain how individuals involved in a group transaction may all profit from vagueness and the ensuing tax avoidance. The explanation is found in the economic theory of tax incidence.<sup>148</sup> According to this theory, and for most cases, any tax saving is shared by all parties to a transaction. To understand this we have to pool all profits from a transaction and note that each party expects (ex ante) to have at least some positive profit – otherwise he would not agree to participate.<sup>149</sup> Division of profit – including any marginal gains – depends on the relative bargaining powers of the parties. When no one has all the power, any increase or decrease in the profit pool is likely to be shared by all participants to some extent. So, if any of the participants saves on taxes, the increased profits are likely to be distributed among all of them. This holds – under the said economic theory – no matter which one has saved taxes in the legal sense.

For example, if an employer can pay his employee in two different legal manners, and under one of them the employee's tax burden is lower, the employer will find it profitable to reduce his employee's taxes. The increased profits will not stay solely in the hands of the employee, but rather will be shared with the employer, perhaps via a partial decrease in the before-tax salary. The profit can be shared in a nonmonetary fashion as well, such as the employer winning the services of this employee from another employer who cannot offer the tax savings.

Experience tells us that something handy, useful and persistent will become widespread. In our case, it implies that many taxpayers will benefit from vague tax rules. It also tells us that if those taxpayers have a choice in the matter, they will choose more vagueness rather than less.

Implied in the previous paragraphs one can find two different definitions (or kinds) of tax avoidance.<sup>150</sup> One, which is the subject of this paper, deals with the reduction of taxes associated with an activity or situation. The other refers to situations in which taxes on an activity are not reduced, but only change legal bearer. This kind of "avoidance" has to do more with prices paid by one participant to another and less with tax avoidance. If authorities receive the same total amount of taxes

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148. See generally JOSEPH E. STIGLITZ, *Tax Incidence*, in *ECONOMICS OF THE PUBLIC SECTOR* 482 (3d ed. W.W. Norton 2000). For a historic view, see R. A. Musgrave, *A Brief History of Fiscal Doctrine*, in *HANDBOOK OF PUBLIC ECONOMICS* 28-44 (Alan J. Auerbach & Martin Feldstein eds., Elsevier 1985).

149. ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 1-2, 4 (1979).

150. *Supra* Part IV.3 ("Tax Avoidance- Legitimacy and Hindsight Advantage").

and the burden is only shifted from one participant to another, this shift is the economic equivalent of a change of prices.

## VI. ACCELERATED EVOLUTION OF TAX TERMS

### *VI.1. Control of Tax-Terms: Authorities, Practitioners, or Taxpayers?*

After studying, in previous chapters, how tax terms are statically applied and used, let us now turn to study their control and evolution. For jurists and for linguists who study general law, it seems evident that legislators have significant control over the definitions of legal terms – after all, they have the legal power to define these terms<sup>151</sup> (see, for example, the list of definitions that begins many statutes). This power is complemented by both judicial interpretation and application,<sup>152</sup> and by the authoritative making of bylaws, interpretation guidelines and application policies. To this aim, tax law has the additional power of recharacterization and reconstruction doctrines, which allow authorities and courts to rename activities.<sup>153</sup> The existence of these rules and the emphasis they receive in tax law hint that a control dispute is present and that authoritative control of definitions is contested.<sup>154</sup>

In previous chapters, we showed that this “law-in-control”

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151. “The traditional notion of law as rules cannot readily accommodate the idea that the contours of the law may shift through no legislative or official act but merely through social change.” Radin, *supra* note 32, at 809. The context of this citation is Radin’s interpretation of Wittgenstein’s approach to rules as social practices. It is interesting to note that according to Radin, social influence on rules is contradicting the “rule of law.” Our thesis reinforces her claim by analyzing a specific field of law (tax-law), for which this control is significant and disruptive. For a linguist’s acceptance of authoritative legal definition-power, regarding it as a difference between the historical processes affecting legal-languages and those affecting ordinary ones, see Charrow, et al., *supra* note 42, at 179, 184-86. See also Alice Davison, *Linguistic Analysis and the Law, in LANGUAGE USE AND THE USES OF LANGUAGE* 235 (Roger W. Shuy & Anna Shnukal eds., 1980). For the claim that anything left out of legal-sources does not exist for the “legal discourse,” see GREIMAS, *supra* note 28, at 89-90. For some discussion of Greimas and Landowski’s ideas on this point, and some references and discussion of “the autonomy of the legal lexicon,” see JACKSON, *supra* note 12, at 33-35, 46-50, 306-08 (concluding that legal lexemes are more definable than their ordinary language counterparts). For Jackson’s association of this defining-authority of legislators with legal positivism, and for dismissal of the claim that natural-language can impose itself onto legal-language, see *id.* at 124-25, 160-61. For more ideas about the control of definitions, see Walter Probert, *Words Consciousness: Law and The Control of Language*, 23 CASE W. RES. L. REV. 374, 383-87 (1972).

152. For the claim that courts have the power to define terms, even for the general language, see Morrison, *supra* note 42, at 333-34.

153. OROW, *supra* note 1, at 163-81, 329-48.

154. For somewhat similar claims, which deny the dichotomy between rule givers and rule followers, see Radin, *supra* note 32, at 814.

perspective is not as evident as it seems. The legislator's defining power is limited to reductions that miss much meaning. The applicative powers of courts and administrative tax authorities are subject to vague application of language, synonymy, and faulty information, all of which facilitate avoidance.

In this chapter, we show that private tax practitioners and taxpayers put pressure on tax terms to change their semantic contents, and that this pressure is continuous, unusually high, and leads to exceptionally rapid changes in tax language. Applying the principles of economic rationality, we can predict the direction of such changes and show how they facilitate tax avoidance. Legislative, judicial, and administrative reactions to the accelerated evolution of tax terms are also considered. We base our claims on the linguistic perspective,<sup>155</sup> which contradicts the jurist perception that lawmakers and courts dictate the language of the law.

From a linguistic point of view, it seems evident that natural-language is first and foremost under the control of the speakers.<sup>156</sup> In the realm of communication, a word acquires the meaning perceived by both the speaker and listener<sup>157</sup> (it may be almost acceptable for some branches of private law).<sup>158</sup> This conversational momentary-supremacy affects language in general over the long term, so abstract meanings of

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155. Explained in the following text.

156. WUNDERLI, *supra* note 57, at 19 (quoting R. ENGLER, FERDINAND DE SAUSSURE, COURS DE LINGUISTIQUE GENERALE, EDITION CRITIQUE par R.E., tome I, Wiesbaden (1968)). For an interdisciplinary law-and-linguistics analysis, to the same end, see Goodrich, *supra* note 37, at 529. Language is sometimes analyzed critically as means of control and power, e.g., GOODRICH, *supra* note 37, at 78-79, 86-87, 97-98, 138-42, 150-51, 156-57, 171-76, 179-80, 186-87, 191, 193. For the claim that a text is both created and interpreted under the ever changing conventions of communities, see STANLEY FISH, IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES 14-17 (1980). For a philosophical approach, considering law to be subjected to language, see JACKSON, *supra* note 12, at 25 (quoting M. Villey, "Préface," *symposium on 'Le Langage du droit'*, 19 ARCHIVES DE PHILOSOPHIE DU DROIT 1-5).

157. SAUSSURE, *supra* note 15, at 27-30. See also GOODRICH, *supra* note 37, at 153-54 ("[T]he concept of the subject, if taken seriously or literally, implies a myriad and chaotic world of unique and free linguistic agents, all equally possessed of the power to join the anarchy of speech. Within such a problematic, the defining characteristic of meaning (as opposed to linguistic value) will be that it cannot be systematized to any greater degree than can the notional uses of freedom . . . .").

158. Aharon Barak, *The Interpretation of Contracts*, in INTERPRETATION IN LAW 74 (2001) (the following is translated from Hebrew by one of the authors of this paper: "No reason exists to prevent contracting parties from creating their own language. They can use 'horse' for 'dog' and 'dog' for 'horse.'"). For such an example in different context, see BIX, *supra* note 72, at 21-22. Glanville Williams, *Language and The Law—IV*, 61 LAW QUARTERLY REVIEW 383, 392 (1946) (stating "[I]n the case of wills and contracts, evidence is admissible, within certain limits, to show that words were used in a special meaning that is not their ordinary one.").

words gradually change according to the general public's usage.<sup>159</sup> On the other hand, history shows that authority can sometimes affect linguistic stability or change – especially by means of compulsory education, or lack thereof.<sup>160</sup>

Goodrich already applied such a linguistic approach to law, arguing against the “autonomy of law.”<sup>161</sup> He also argued for multiplicity of meaning and of meaning creating mechanisms in legal discourse.<sup>162</sup> The application of these to our research is ambiguous in three ways that help point to the conclusion of this sub-chapter. First, administrators, judges, and even legislators “speak” tax terms – maybe not as much as the multitudes of private-sector taxpayers, accountants and lawyers – but they still hold authority and their speech has much weight. Second, we can conclude that the speakers of tax terms are practicing lawyers and accountants. When they work for administrators or legislators, they take part in the authoritarian efforts. When active in the private sector, they have professional and economic obligations to their taxpaying clients. These obligations transform them into language agents who try to use and modify tax language to their clients' advantage.

The third aspect of this ambiguity implies that we have to modify our earlier claim, the claim that legal terms – and implicitly tax terms – belong to the sociolect of the law.<sup>163</sup> This claim implied that laypersons are ignorant about the meaning of this language and may even need translation.<sup>164</sup> But, as Morrison reminds us, laypersons are both the

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159. William Bright, *Social Factors in Language Change*, in THE HANDBOOK OF SOCIO-LINGUISTICS 81, 83 (Florian Coulmas ed., 1997). For a radical version of this claim, in which the applicability of public conventions to the meaning of signifiers is in the hands of each and every speaker, see Paul F. Campos, *Reflections on the Intersection of Law and Linguistics: This is Not a Sentence*, 73 WASH. U. L. Q. 971, 977-78 (1995).

160. Love, *supra* note 53, at 182-86. For social causes of linguistic change (mostly phonetic and not semantic change), see WILLIAM LABOV, PRINCIPLES OF LINGUISTIC CHANGE: Volume 2: Social Factors (2001). For a short discussion of this claim, in relation to phonetic and grammatical changes (but not semantic ones), see SAUSSURE, *supra* note 15, at 206-07.

161. GOODRICH, *supra* note 37, at 533-34 (claiming that such linguistic insights contradict, in most cases, Hart's theory). For related arguments about "the autonomy of the legal lexicon" and for the claim that the authoritative qualities of legal language do not "exclude the possibility of substantial historical influence from ordinary to legal language . . . [and may even pose as] . . . an argument against the principle of autonomy," see JACKSON, *supra* note 12, at 46-50.

162. GOODRICH, *supra* note 37, at 187.

163. *Supra* Part II.2 (“Legal Term and its Signified – Rule of Law, Authority or Communication”).

164. For the claim that “tax lawyers act as interpreters of legal language between the government and the taxpayer,” see Friedman, *supra* note 53, at 571. For some harsh critique of the function of lawyers as translators, see SOLAN, *supra* note 10, at 121. For an argument against the need for translation (and for lay understanding of the law), see Morrison, *supra* note 42, at 285-86.

customers of lawyers and accountants, and – indirectly – lawmakers.<sup>165</sup> Laypersons who pay heavy taxes on a regular basis are motivated to involve their lawyers and accountants significantly in their regular economic activities. These professionals do not only “translate” the law, but help their clients apply and even use relevant tax terms. The laypersons are motivated to elect legislative representatives who use the language they understand – e.g. general English – and legislate in English. So, these laypersons take an active role in the tax-language community by both “speaking” (i.e. using) tax terms based on professional advice or knowledge and by sending those who sympathize with them to draft laws in their language. Taxpayers gain some control over tax terms via these direct and indirect methods. The economic theory of tax incidence<sup>166</sup> indicates that these informed taxpayers may earn the sympathy and cooperation of others who share the economic savings connected to tax planning and avoidance (e.g., employer and employees).

The conclusion for now is that for matters of tax law, private sector professionals and laypersons (taxpayers) have a strong incentive to “speak” tax terms and take part in controlling them.

## *VI.2. Evidence of the Struggle for Control*

In the last subchapter,<sup>167</sup> we saw that the construction of some legal doctrines aimed at enhancing authoritative control over tax terms indicates that a control struggle exists. More evidence of this can be found in § 25 of Mertens’ treaties of U.S. federal income tax law.<sup>168</sup>

Section 25 deals with the term “business expenses.”<sup>169</sup> Taxpayers seek to expand the meaning of this term because it reduces tax burden.<sup>170</sup> Authorities seek to confine it to its dimensions as prescribed by the legislator, who bases his decision upon political, social, and economic considerations.

In Mertens § 25.02, under the heading “case-by-case analysis,” we first learn of the existence of an “inordinate amount of litigation on the deductibility of business expenses; much of that litigation has not been productive of new principles or learning.” This litigation shows the

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165. Morrison, *supra* note 42, at 319-20.

166. See *supra* Part V.2 (“Rational Taxpayers May Prefer Indeterminacy and Vague Application”).

167. *Supra* Part VI.1 (“Control of Tax-Terms: Authorities, Practitioners, or Taxpayers?”).

168. MERTENS, *supra* note 66, Vol. 6, § 25.

169. *Id.*

170. *E.g.*, I.R.C. § 162.

weakness of legal definitional authority. It shows that taxpayers often find it worthwhile to bear the expenses of litigation over the semantic contents of a term and to test repeatedly its limits and penumbra. Economically speaking, “worthwhile” indicates positive expected value from the litigation, meaning a high probability of success. The claim that no new principles are produced shows that taxpayers can constantly present new cases over given terms. “Throughout the litigation is heard the constantly reiterated judicial warning that each case must be determined on its own special facts,” Mertens adds. This last point shows that the legislator cannot properly uphold his defining powers in face of ever-continuing popular semantic pressure.

Sections 25.12 and 25.15 provide an almost formal acknowledgment of the struggle. One of the conditions for tax recognition of an expense is its “ordinary” nature. “Ordinary” may be understood as an economic fact, but it can also be interpreted as a reference to language. For example, “customs and practices and form of speech prevailing in the business world of a taxpayer usually furnish reliable guides in determining whether the particular expense is ordinary in that business.”<sup>171</sup> This struggle has results: “Payment of an expense may be ordinary at one time and not at another time.”<sup>172</sup> We can learn also that the distinctions relating to the “ordinary” quality of expenses are of degrees, and not of kinds.<sup>173</sup> These doctrinal points are indications of taxpayer control, which can gradually change the semantic contents of tax legal terms, as is claimed in the coming paragraphs.

### *VI.3. Being (Mis)Understood and Accelerated Evolution of Tax Terms*

This paper’s thesis that rational taxpayers may favor vague language use does not correlate with motivations in normal language. For example, if we can express ourselves in this paper either with the core of one signified or the penumbra of another, we choose the first, so long as we are aware of these options. We do so because we want to be understood,<sup>174</sup> and cores are clearer than penumbras.<sup>175</sup> Our individual

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171. MERTENS, *supra* note 66, Vol. 6 § 25.15 (under the heading “Customary to Trade or Business”).

172. *Id.* at § 25.13.

173. *Id.*

174. TAMBA-MECZ, *supra* note 8, at 18-19 (citing M. BRÉAL, *ESSAI DE SÉMANTIQUE* 314 (1897)). See also PERGNIER, *supra* note 61, at 366-67.

175. See RICHARD VON MISES, *POSITIVISM: A STUDY IN HUMAN UNDERSTANDING* 38 (1951).

desires here are similar to those of many others, and the desire to be understood influences the evolution of language.<sup>176</sup>

When we use language in our capacity as taxpayers, we use tax terms with cheaper tax consequences more than ones with expensive consequences. This implies that we avoid – when we can – the semantic cores of undesirable tax terms, and we almost always avoid their penumbras. On the other hand, we use both the semantic cores and penumbras of tax terms that lead to lower taxes as much as we can. Language is affected by such use. In the short run, language is almost unchangeable – one can use it incorrectly but cannot change it.<sup>177</sup> In the long run, the signifieds of tax terms are gradually decided by usage<sup>178</sup> (“long run” varies in length).<sup>179</sup> The continuous use of a term to describe a specific meaning brings this meaning into the term’s core. Conversely, lack of use can move a meaning from core to penumbra and from penumbra to oblivion.<sup>180</sup> One implication of this theory is that tax terms are under continuous and unusually high pressure to change their meaning and may be more dynamic than many other word groups.<sup>181</sup>

Please note that we are dealing with semantic changes rather than phonetic or graphic (including spelling) changes.<sup>182</sup> Semantic changes can happen independently from other kinds of change, and they are affected less by the change-inhibiting qualities of written language<sup>183</sup> and written law.<sup>184</sup>

Since changes in meaning stemming from taxpayer influence on language are aimed at reducing the tax burden,<sup>185</sup> and since tax authorities seek to collect taxes, the authorities have to react to such

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176. TAMBA-MECZ, *supra* note 8, at 18-19 (citing M. BREAL, *ESSAI DE SEMANTIQUE* 107 (1897)); LABOV, *supra* note 160, at xv.

177. SAUSSURE, *supra* note 15, at 36, 104-08.

178. SAUSSURE, *supra* note 15, at 108-13. Words may change meanings in a sudden manner, through mechanisms such as metaphors and the creation of new ambiguities. See Rico, *supra* note 6, at 55-56 (citing P. RICCEUR, *LA MÉTAPHORE VIVE* (1975)). See also Rico, *supra* note 6, at 391.

179. SAUSSURE, *supra* note 15, at 193.

180. WUNDERLI, *supra* note 57, at 19, 47 (quoting R. ENGLER & FERDINAND DE SAUSSURE, *COURS DE LINGUISTIQUE GÉNÉRALE*, EDITION CRITIQUE par R.E., tome I, Wiesbaden 1968.); See Bright, *supra* note 159, at 81, 83.

181. For the existence of varying change-paces, see generally SAUSSURE, *supra* note 15, at 193.

182. For long-run semantic changes (and for changes in the legal consequences of legal terms), see MELLINKOFF, *supra* note 14, at 325-45.

183. For the general inhibiting effect of written language, see SAUSSURE, *supra* note 15, at 193-94. As we saw earlier, tax-law relies heavily on written language. *Supra* Part III (“Tax Base”).

184. For a claim about a “freezing” effect of written law, see MALEY, *supra* note 14, at 21-22.

185. For our earlier discussion of the “business expenses” tax-term, see *supra* Part VI.2 (“Evidence of the Struggle for Control”).

changes. One possible reaction available to tax authorities is using their defining powers against such changes to constantly reenact tax rules and subrules (they can also change tax rates and the tax base). Another possible reaction is holding a continual administrative ad-hoc interpretive review or judicial review to combat such changes. That is, rapid changes to the signifieds of legal tax terms that stem from taxpayer behavior entail frequent redefinition or intensive interpretative review of these terms by authorities. This also justifies the use of purposive interpretation of tax law.<sup>186</sup>

This special dynamic quality of the signifieds of tax terms gives reason to characterize them as an accelerated part of language. This characterization has a general implication for us: it implies that some linguistic insights may be more significant when applied to signifieds related to tax law than when applied to language in general.

#### *VI.4. Rationally Directed Language Evolution – And Good New Tax Rules*

Our results solve abstractly the problem of random<sup>187</sup> – or semi-random<sup>188</sup> – language evolution in the tax field.<sup>189</sup> Economic rationality<sup>190</sup> gives taxpayers a consistent and predictable incentive to avoid tax terms that lead to more taxes, so one can predict that the signifieds of such tax terms will grow thinner over time. Conversely, the signifieds of tax terms desirable to taxpayers will grow semantically wider. Thus, the signified of “wages” is expected to erode whenever it “touches” the signified of “business expenses.”

Continuing with an example from IV.2 and in accordance with the incidence theory,<sup>191</sup> some employers may find it rational to define their employees’ duties widely – both in terms of hours and activities – in order to include things employees would have done anyway in their spare time. These employers can then report any expenses related to these “duties” as regular business expenses and not as wages. The

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186. Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677, 680 (1996); Vern Krishna, *Purposive Interpretation as a Weapon Against Tax Avoidance*, 8 CAN. CURR. TAX 9, 9 (1997).

187. WUNDERLI, *supra* note 57, at 35 (quoting ENGLER & SAUSSURE, *supra* note 57).

188. *Id.* at 113; Rico, *supra* note 57, at 242-46 (discussing the approach of GUSTAVE GUILLAUME, *LANGAGE ET SCIENCE DU LANGAGE* (Presses de l'Université Laval 1964)).

189. For more and different kinds of language motivation, see Rico, *supra* note 6.

190. For a different use of economic rationality to predict language evolution, see RUBINSTEIN, *supra* note 120.

191. See *supra* Part V.2 (“Rational Taxpayers May Prefer Indeterminacy and Vague Application”).

benefit accrued to the employees will not be taxed, and the employers will pay higher salaries while saving on taxes.

Under this example – which seems to be the case on many occasions – the signifieds of the words “work,” “job” and “expenses” stretch, and the signifieds of the words “wage,” “benefits” and “hobby” shrink. Under the general claim<sup>192</sup> of this chapter, we can argue that the slogan “a good tax is an old tax” does service to the interests of individuals and disservice to the public.<sup>193</sup>

#### *VI.5. Taxing by Special Tax Terms or by General Legal Terms*

Taxes can be levied by legal terms created especially for this purpose, or by terms with additional functions.<sup>194</sup> For example, the legal term “personal holding company”<sup>195</sup> was created for tax purposes; the term “corporation” has multiple uses. The previous parts of this paper imply a theoretical result related to these two alternatives. This result is that the signifieds of tax-specific legal terms are expected to change more rapidly than the signifieds of legal terms used for both tax and non-tax purposes. Taxpayers use and need the legal term “corporation” for many non-tax purposes, such as limiting liability, distributing risk and trading stocks. All these uses influence and maintain the term’s meaning and downplay the effect of changes stemming from tax considerations. On the other hand, taxpayers do not seek to use the tax term “personal holding company” and the increased taxes entailed by its application,<sup>196</sup> so there are no personal interests that prevent them from using any legitimate tool to avoid it. This implies that nothing hinders the shrinking effects of avoidance for the signified of this tax-specific legal term. Please note that tax-specific legal terms, like “charitable organization,”<sup>197</sup> may have positive consequences. In that case, nothing short of authorities’ defining powers will slow their growth.

Thus, the signifieds of legal terms created by tax authorities and used only for communicating with them are expected to suffer much

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192. For an even more general claim about the deterioration of certainty in law (and not only in tax law), see D’Amato, *supra* note 103, at 5, 18-19, 32-33.

193. For other fields of law, for which language is not subjected to such anti-communicative mechanisms, proven formulae may be both publicly and privately useful. For such an opinion, see Charrow et al., *supra* note 42, at 187. For some contradicting and critical comments on the use of legal-forms, see MELLINKOFF, *supra* note 14, at 277-82.

194. Paul L. Caron, *Tax Myopia, Or Mamas Don’t Let Your Babies Grow Up To Be Tax Lawyers*, 13 VA. TAX REV. 517, 537-44 (1994); GLIKSBERG, *supra* note 1, at 9-10.

195. I.R.C. § 542.

196. CORPORATE TAXATION, *supra* note 66, at 17-18.

197. *E.g.*, I.R.C. § 501(c)(3).

abuse.<sup>198</sup> When these legal terms cause higher tax liability, taxpayers will avoid them regularly and may eventually drain them of content, especially when they relate to activities unobserved by authorities. When these legal terms bring tax benefits, taxpayers will stretch their limits, making them ever wider.

Similarly, when non-tax legal terms are used for taxation, they become deformed over time and thus decreasingly useful for their field of origin. Shrinking or stretching occurs according to tax considerations, which at the same time damages their non-tax usefulness. That is, tax avoidance can negatively influence non-tax activities and fields of law. This disadvantage is both private and public because of the possible positive welfare effects of non-tax activities that use these legal terms. For example, the legal term “corporation” is economically useful,<sup>199</sup> and using it in order to levy taxes interferes with its primary function. So, the less important it is to raise taxes, relative to other activities, the more raising taxes should be based on tax-specific legal terms in order to not interfere with other, more important activities. This thesis may support the existing double standard, subject to criticism, for the reports of publicly-traded corporations.<sup>200</sup> In this case, separate reports must be (read: are allowed to be) issued to stock traders and tax authorities. This separation protects the very important functions of the stock market – which requires credible information<sup>201</sup> – from the negative effects of tax-law avoidance.

From tax authorities’ perspective, tax-specific legal terms become less clear and less useful faster than general legal terms with tax consequences. This is the other part of the disadvantage of the accelerated evolution of the signifieds of legal terms used for non-tax purposes. So, the more important the tax is, the more it should be based on more stable signifieds implied by general legal terms, which support the application and interpretation of tax law.

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198. For a contrary claim that tax-specific terms are clearer than regular-language terms used for taxation, see Miller, *supra* note 35, at 36, 37 (arguing that economic incentives may influence our reading of tax terms).

199. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 410-11 (A2003).

200. Mitchell L. Engler, *Corporate Tax Shelters and Narrowing the Book/Tax “Gaap”* 2001 COLUM. BUS. L. REV. 539, 541-42.

201. For that and for some critique, see POSNER, *supra* note 199, at 457-58.

## VII. CONVERGENCE RESULTS

*VII.1. Civil Ban on Tax Avoidance – Some Difficulties*

We saw earlier<sup>202</sup> that in order to “cover” reality, legal tax terms must be partially synonymous – they must overlap – and so some legitimate tax avoidance must exist. We have seen also that language evolution can augment such avoidance.<sup>203</sup> The purpose of this subchapter is to ask, to what extent should we civilly delegitimize such avoidance practices? (This paper does not deal with criminal tax law, nor does it deal with criminal misrepresentations or nondisclosure of information).<sup>204</sup>

The theoretical point is that any such prohibition must be based on overlapping and extendible legal terms. In order to prohibit a set of language-related activities that we cannot clearly define (because they use synonymy and language change), we must use semantically extendible legal terms. These will be extended, after the fact, to cover avoidances.

Our discretionary anti-avoidance tools are the recharacterization,<sup>205</sup> reconstruction,<sup>206</sup> economic substance,<sup>207</sup> and business purpose<sup>208</sup> doctrines; general anti-avoidance rules<sup>209</sup> and interpretation<sup>210</sup> and reinterpretation of legal terms when they slip away from reality (or when taxpayers use other terms that avoid them). These may take effect when authorities think – sometimes together with courts – that something incorrect or unfair was done and that wrong legal terms were used (taxpayers who deviate too much from regular language usage may even find themselves under criminal evasion sanctions). When this happens, we subject taxpayers to the civil risk of disputed tax returns,<sup>211</sup> civil penalties,<sup>212</sup> and, of course, the higher taxes they tried or happened to

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202. *Supra* Part IV.2 (“Semantics – Accuracy in Taxation is Affected by Semantic Extensions, Synonymy, and Vagueness of Application”).

203. *Supra* Part VI (“Accelerated Evolution of Tax Terms”).

204. For an explanation of the civil penalty structure for taxes, see THURONYI, *supra* note 1, at 221-22.

205. *E.g.*, OROW, *supra* note 1, at 329-48.

206. *Id.* at 163-81.

207. *See* references, *supra* note 3.

208. *E.g.*, Gregory v. Helvering, 293 U.S. 465, 469 (1935).

209. *E.g.*, OROW, *supra* note 1.

210. OROW, *supra* note 1, chapter 9; Krishna, *supra* note 186.

211. *E.g.*, I.R.C. § 6212.

212. *E.g.*, I.R.C. § 6662 (imposing a 20% penalty). *See also* THURONYI, *supra* note 1, at 221-22.

avoid. The distinction drawn here between “tried” and “happened” is due to difficulties that prevent us and those taxpayers from knowing in advance whether their use of legal terms will be considered avoidance afterward. Moreover, if indeed taxpayers change consistently the meaning of tax-terms in their favor and modify their behavior into the penumbra of tax-terms with cheaper tax results, these judicial and regulatory anti-avoidance doctrines must be biased. Not biased by error, as Zelenak argued about non-literal interpretation,<sup>213</sup> but biased by general tendency. If the general tendency is taxpayers’ reliance on the ever evolving language of the law (and on “the rule of law” which relies on that language), then the corrective doctrines – in order to function – must constantly act against the language and rule of law and in favor of the government. This opposition between the government and the courts on one side and the rule of law on the other must be constantly tamed, since the rule of law is a major principle of an enlightened democracy. This opposition explains some of the problems we face when using anti-avoidance methods of interpretation and tax-rules.

Under these anti-avoidance rules, and to the measure they are indeterminate, each taxpayer can “buy” lower risk levels by avoiding cheaper legal terms in favor of those that lead to more expensive results and paying higher taxes (tax authorities do not sanction over-payment). It seems that while “setting” the terms of this social deal, we should note that our anti-avoidance rules suffer the same dubious qualities as the behavior we are fighting. If we consider the use of ever-changing and overlapping legal terms for the sake of avoidance as wrong, we may under the same measure consider the use of ever-changing and difficult-to-predict prohibitions by authorities, i.e., prohibitions that contradict to a certain degree (again) the rule of law.<sup>214</sup> Mild enforcement of indeterminate rules is less prone to injustice than harsh enforcement.

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213. For the claimed existence of pro-government judicial bias, in relation to non-literal tax-code interpretation, see Zelenak, *supra* note 33, at 666-73. Zelenak claimed that courts tend to deviate from the language of the tax-code if the deviation is for the government. If a deviation is against the government, the courts tend to stick to the language. Zelenak based this conclusion on a handful of cases. Zelenak mentioned as outdated the contradictory doctrine of strict tax-law interpretation favoring taxpayers. Please note that Zelenak does not acknowledge a general tendency of tax law to evolve in ways that favor tax-payers, according to the “treacherous language” argument of our paper. Rather, Zelenak seems to find symmetry, both as an equitable end and as an empirical truth.

214. See OROW, *supra* note 1, at 246-50.

## VII.2. Sociolinguistic Exclusion and Public Language Inhibition of Avoidance

Language diverges between different groups within the society that uses it.<sup>215</sup> These divergences are called dialects, professional jargons, and slang, and may all be considered facets of a general linguistic phenomenon (hereinafter “sociolect”). One motivation behind such divergence is exclusion: slang, for instance, may exclude others, including parents, members of different interest groups or cops<sup>216</sup> (exclusion implies selective inclusion).<sup>217</sup> This act of exclusion is facilitated by the arbitrary quality of signs.<sup>218</sup> Arbitrary signs imply that individuals who regularly interact among themselves can create a small number of private or modified signs that diverge from the general language. For example, they can associate an utterance or a mark (e.g., “business expenses”) with a referent that is not customarily associated with it. As long as they share this association, it is functional for them. If this unusual association spreads, it may take hold in a sociolect. Moreover, this is a social, grassroots phenomenon largely outside the control of legislators.<sup>219</sup>

We can reinterpret the previous claims of this paper about indeterminacy, language evolution, and vagueness of application in relation to the sociolinguistic exclusion of tax authorities. This reinterpretation indicates that linguistic tax avoidance may be inhibited by circumstances that oblige taxpayers to use public language. This language is relatively homogenized, and may be well understood by authorities. Under these obligations, a taxpayer has less exclusion-avoidance opportunities than otherwise. In addition, and continuing the argument from Part III of this paper, the use of such language for one’s own needs makes the taxpayer’s “tax base” more susceptible to observation by authorities.

Such needs may include the following:

1. The taxpayer may need publicity or cooperation with the public for his economic activities;

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215. PERGNIER, *supra* note 61, at 381-86; GOODRICH, *supra* note 37, at 175-76. For legal “terms of art” and for legal argot, see MELLINKOFF, *supra* note 14, at 16-19.

216. PIERRE GUIRAUD, L’ARGOT 5-8 (Presses Universitaires de France 1958); MELLINKOFF, *supra* note 14, at 18.

217. For inclusion in the legal professional group as motivation for professional jargon, see Friedman, *supra* note 53, at 566-68.

218. WUNDERLI, *supra* note 57, at 18-19 (distinguishing between unstable spoken language (parole), and stable written language).

219. *Id.* (quoting ENGLER & SAUSSURE, *supra* note 57).

2. The taxpayer may need state help, like contract enforcement by courts.

A taxpayer may need to be understood by unfamiliar business partners or investors with whom he shares only the prevailing public language. He may be obliged economically, for instance by competitive pressures: he may be trying to convince customers or would-be partners that working with him is better for them than working with his competitors. He may be obliged legally: for example, the “plain English disclosure rules” demands that information released about publicly traded corporations is understandable by the general trading public,<sup>220</sup> and thus these corporations must use public language. On the other hand, a taxpayer may be conducting business with his regular business partners, with whom he shares particular information not available to authorities. Together, they do not have to use public language.<sup>221</sup>

A taxpayer needs state help if he does not trust his business partners and believes he is at risk of them breaching a contract, or the like. On such occasions he may want to use a language understood by courts, foreseeing a possible appeal for their help. On the other hand, he may conduct business through real transactions, which do not need future enforcement;<sup>222</sup> through transactions that overcome opportunistic motivations;<sup>223</sup> or just by working with trustworthy partners.<sup>224</sup> To the extent this is possible, public language is not necessary.

As a result of this, public corporations that deal with many parties, including employees, suppliers and customers, can be taxed under more accurate (and paradoxically more vague)<sup>225</sup> legal terms than small businesses. This is so because of their need to use public – and so, clearer – language. This result comes from “vagueness” considerations. Other considerations, like such corporations’ ability to use tax-

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220. Kenneth B. Firtel, *Plain English: A Reappraisal of the Intended Audience of Disclosure Under the Securities Act of 1933*, 72 S. CAL. L. REV. 851, 878-79 (1999).

221. Long term suppliers, clients, business-partners, and family may form “relational contracts” that arrive to high levels of acquaintance. The extreme case would be “transacting” with oneself, and indeed “income” from privately-used assets (like a home) is usually left untaxed. J. Slemrod, *Optimal Taxation and Optimal Tax Systems*, 4 J. OF ECONOMIC PERSPECTIVES 157, 173 (1990).

222. KRONMAN & POSNER, *supra* note 149, at 3-4.

223. See DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 505.06 (1990) (explaining how a person can mathematically overcome opportunistic behavior).

224. The ultimate example of trustworthy partners is the taxpayer himself. This may help to explain the fact that governments do not tend to tax “profits” made by individually held and used capital assets like a home. Slemrod, *supra* note 221, at 173.

225. See *supra* Part IV.2 (“Semantics – Accuracy in Taxation is Affected by Semantic Extensions, Synonymy, and Vagueness of Application”).

complexity for avoidance, may lead to different results. If vagueness-avoidance is the result of fuzzy reality and indeterminate rules, then complexity-avoidance can be compared to a chess game: the rules are very clear, but the taxpayer who can plan five moves ahead will beat authorities who can plan only four moves ahead. Public corporations can hire skilled tax advisors who place them many moves ahead (this kind of planning is not the subject of this paper).

### VIII. CONCLUSION

This paper showed that contrary to other fields of law, constancy of legal texts does not bring clarity or stability of meaning to tax law.<sup>226</sup> Indeed, the graphic signs that comprise the legislative, administrative and judicial rules may be stable, but their semantic contents are constantly changed and abused. This result is augmented by the fact, claimed in Chapter III of this paper, that the “tax base” is not exclusively economic, but also linguistic. Tax policy makers and administrators face a treacherous language<sup>227</sup> with negative mechanisms, each of which leads separately to vagueness, synonymy and ambiguity. This result explains also the unusual difficulties tax practitioners and jurists encounter when trying to read and understand tax law sources – and the doubly large difficulties taxpayers face.<sup>228</sup> It explains and justifies the

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226. For the opposing claim, see MALEY, *supra* note 14, at 21-22, 28 (stating, “Despite the care, or the best intentions, of their drafters, sections written for certainty can become just as uncertain as those written for flexibility. Every case of statutory interpretation which comes before a court is an instance of uncertainty: it may be ambiguous, vague, absurd, or in conflict with other rules.”).

227. For discussion and critique of “precision” in legal language, see MELLINKOFF, *supra* note 14, at 290-398.

228. Weisbach, *supra* note 1; Roberts et al., *supra* note 93; Bethany K. Dumas, *Book Review*, 52 TENN. L. REV. 351, 352-53 (1985) (reviewing RICHARD A. WESTIN, LEXICON OF TAX TERMINOLOGY (1985)). For a passing remark about a minus 15 score of the Internal Revenue Code in a readability test (i.e., more difficult than “very difficult”), see Uriel Procaccia, *Readable Insurance Policies: Judicial Regulation and Interpretation*, 14 ISR. LAW REV. 74, 77 (1979). These difficulties have additional reasons that are good for all fields of law - for an interdisciplinary positivistic perspective, see Danet, *Language and the Law*, *supra* note 42, at 539-40; Danet, *Language and Process*, *supra* note 33, at 541-46 (discussing possible reasons for the unusual qualities of legal language). For a critical perspective, see GOODRICH, *supra* note 37, at 205-06. After quoting the definition of “income” from the GERMAN MANUAL OF FISCAL LAW, Baldinger writes: “I am perfectly happy if you understand none of that, because I cannot understand it in German either.” *Supra*, note 72, at 45. For the claim that laypersons’ difficulties in understanding tax law is due to their lacking knowledge about the tax-language-system, see JACKSON, *supra* note 12, at 47-48 (quoting Baldinger).

need for continuing authoritative and judicial interpretation, creative application, and reinterpretation in tax law.<sup>229</sup>

This paper not only explained many problems of tax law and its application, but also showed that they are, and can be, subject to some remedies. So let us retrieve some of its positive and remedial policy implications: moderation in accuracy is a desirable end for tax law because it reduces the implications of the accuracy-synonymy paradox (see IV.2), pragmatic indeterminacy (IV.5) and its related theoretical problems (IV.4 and IV.6); tax avoidance, by means of language, is regressive and should be compensated for by progressive taxation (IV.3); the choice between taxing via non-tax legal terminology or via tax terms is significant, and should be made according to the relative importance of the non-tax and tax activities (VI.6); tax legal terms change meaning in ways that facilitate avoidance, such that constant updating of legislation, regulations and judicial doctrine is a justifiable necessity for tax law (VI); the legitimacy of general anti-avoidance rules and their likes (including interpretive doctrines with similar ends) is comparable to the legitimacy of tax avoidance (VII.1); and public corporations can be taxed under more accurate legal terms than other taxpayers (VII.2).

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229. Achievable through the generous use of interpretative doctrines like “non-literal,” “purpose,” “intent,” “economic substance,” “policy,” and the authority to “recharacterize” tax events. See references to such doctrines throughout this paper. For a contradicting opinion, see Coverdale, *supra* note 143; D’Amato, *supra* note 60, at 581-83 (reversing his arguments soon after).