

Rules vs. Standards

Author : Alice Abreu & Richard Greenstein

Date : June 7, 2018

Sarah Lawsky, *A Logic for Statutes* (**Fla. Tax Rev.**, forthcoming), available at [SSRN](#).

Professor [Sarah Lawsky](#) (Northwestern) has written a fascinating and thought-provoking essay on the logic of statutory interpretation—specifically as it applies to the Internal Revenue Code. Notwithstanding a long tradition of scholarship addressing the interpretation of legislative texts in general, careful attention to interpretation of the Code has received comparatively little attention. An important reason for this, as we have argued in previously published articles, has been the tendency to frame Code provisions as rules and to apply them deductively to the facts of particular cases. Such a practice pushes in the direction of a more-or-less mechanical interpretation of the Code, which in turn makes questions regarding statutory interpretation seem fairly uninteresting. Professor Lawsky's essay engages directly and critically with this practice.

Professor Lawsky argues that while the application of statutes involves “rule-based reasoning,” it is “not best understood as merely deductive.” Rather, the proper logical model for understanding statutory reasoning is what Professor Lawsky calls “default logic.” She argues that application of the Internal Revenue Code does not proceed as the direct, deductive application of an individual statutory provision to a set of facts; rather, the structure of the Code comprises two different orders of rules: (1) “default rules” (if-then rules) and (2) priority rules (rules that establish the “relationship between” and the “relative priority of” the default rules). As an example, Professor Lawsky applies this more complex rule structure to Section 163(h) of the Code (which permits a deduction for home mortgage interest), and argues that default logic “more accurately reflects rule-based legal reasoning as actually practiced by lawyers, judges, and legislative drafters.”

What has prompted us to comment on Professor Lawsky's forthcoming article is its conception of statutes, generally, and tax statutes, particularly, as rules. Professor Lawsky understands her project of developing a “logic for statutes” as explicating “rule-based reasoning,” and her proposed model for statutory reasoning is one that applies multiple orders of rules. But as we have claimed in our own work, a complex statute, including the Internal Revenue Code, cannot be reduced to rules.¹

To see where Professor Lawsky's approach differs from ours, consider that her analysis explicitly “examines the structure of rule-based reasoning after ambiguities [in the statutory rule] are resolved and the meaning of the rule's terms established.” As we see it, to by-pass engagement with the ambiguities of a statutory text is to neglect the very issues that form the core of statutory interpretation. As Karl Llewellyn, whom Professor Lawsky appropriately cites, famously argued, a statutory text is intrinsically susceptible to different constructions, and applying the text requires choices among those different constructions. These choices, we have argued, require taking into account a variety of often competing values. In the context of interpreting the Code, they include tax values, values having to do with the significance of statutes, and broader social values. And it is precisely because these values are multiple and heterogeneous that statutory provisions appear “ambiguous.” In short, ambiguities in statutes cannot be “resolved,” much less assumed away, without making decisions about which values will be advanced. Indeed, this swirl of relevant values renders the very rules on which Professor Lawsky's approach depends—the default rules and the priority rules—ambiguous; that is, determination of just what the default and priority rules are requires the choices Llewellyn pointed to.

Moreover, when we sort through the complex of values relevant to interpreting tax statutes, it turns out that many provisions in the Internal Revenue Code are best interpreted not as rules at all, but as standards. As we have argued,

for example, determining whether catching a record-breaking homerun baseball or receiving a haircut from one's spouse constitutes "gross income" under section 61(a) of the Code requires that all relevant facts and circumstances be taken into account. That is, the definition of income is a standard, and the application of standards cannot be subsumed within Professor Lawson's model of default and priority rules. That model simply will not tell us whether this or that accession to wealth counts as gross income under the Code.

Interpreting section 61(a) as a standard enables judgments about what is and is not income. However, those judgments (like all judgments involving the application of standards) are necessarily contestable and provisional, turning on debate over what facts and circumstances are relevant—the opposite of conclusions arrived at through deductive reasoning. In this sense we agree with Professor Lawsky about the inadequacy of a simple deductive model of statutory reasoning. Where we differ is in the reason for the inadequacy. Professor Lawsky believes that statutory reasoning requires complexifying the deductive model by adding priority rules to resolve conflicts among the default rules. We believe that what appear to be conflicts among statutory rules are often better understood as the indeterminacy that occurs when standards are applied to new facts and circumstances.

Our particular disagreements notwithstanding, Professor Lawsky's analysis of statutory reasoning in the context of tax law is an important contribution to this undertheorized concern for practitioners and scholars. From our different perspectives we share the objective of showing that the application of the Internal Revenue Code is a more complex enterprise than has been traditionally thought. Her objection that statutory interpretation is "taken as simple in legal scholarship" seems to us a correct worry, especially when applied to tax analysis. Professor Lawsky's essay vigorously engages with that mistaken view, and in so doing, pushes forward the development of this critical issue in tax jurisprudence.

1. See Alice G. Abreu & Richard K. Greenstein, [The Rule of Law as a Law of Standards: Interpreting the Internal Revenue Code](#), 64 *Duke L.J. Online* 53 (2015); Alice G. Abreu & Richard K. Greenstein, [It's Not a Rule: A Better Way to Understand the Definition of Income](#), 13 *Fla. Tax Rev.* 101 (2012); Alice G. Abreu & Richard K. Greenstein, [Defining Income](#), 11 *Fla. Tax Rev.* 295 (2011). [?]

Cite as: Alice Abreu & Richard Greenstein, *Rules vs. Standards*, JOTWELL (June 7, 2018) (reviewing Sarah Lawsky, *A Logic for Statutes* (*Fla. Tax Rev.*, forthcoming), available at SSRN), <https://tax.jotwell.com/rules-vs-standards/>.