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Book Reviews

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STUDIES IN FEDERAL TAXATION (THIRD SERIES). By Randolph E. Paul. Cambridge: Harvard University Press, 1940. Pp. xvii, 539.

Mr. Randolph E. Paul's *Studies in Federal Taxation, Third Series*, is another worthy contribution to the slowly growing body of income tax literature, much of which has been written by the same author. In the present writing on this highly technical and vexatious subject, one finds five treatises, each dealing with a separate topic, delving into several especially confounding aspects of the federal income tax statutes, income tax regulations and court decisions relevant thereto. In style similar to his two previous compilations of studies, (*Studies in Federal Taxation, 1937*, and *Selected Studies in Federal Taxation, 1938*) he has maintained the high quality of scholarly ability expected of this author. He has not only examined and analyzed the Congressional enactments, administrative rules and court's decisions applicable to the problem under consideration, but wherever possible he points out the trend likely to follow thereupon. Further he suggests remedies to alleviate and cure existing defects in the present revenue act, germane to the matter under discussion.

Reorganizations

A study of the statutory provisions, regulations and judicial decisions upon the subject of reorganizations under the federal income tax laws is presented as the first problem under investigation.

A statement of the "general considerations affecting the reorganization provisions," and a resumé of "the early case law on corporate reorganizations," before reorganization provisions were part of the revenue acts introduces an historical discussion of the topic. In the author's words "it would be a masterpiece of understatement to call the net result of the early cases[1] far from satisfactory," (p. 18) but the importance of these cases is recognized to the degree "that they present a picture of what would be the law upon the subject of reorganizations" if the internal revenue acts continued to be reenacted without exemption provisions (p. 10). A discussion of the development of statutory reorganization provisions, first appearing in the 1918 Act down through the current provisions of the Internal Revenue Code, as amended by the 1939 Act, follows. Attention is focused upon the changes in the reorganization provisions of the 1924 Act,—the first to treat comprehensively the matter of reorganizations, and "the nucleus of all later acts,"—which in contrast to previous revenue acts, which were quite general in their terms concerning corporate reorganizations and gave the Treasury Department extremely broad dis-

1. United States v. Phellis, 257 U. S. 156 (1921); Rockefeller v. United States, 257 U. S. 176 (1921); Marr v. United States, 268 U. S. 536 (1925); Cullinan v. Walker, 262 U. S. 134 (1923); Weiss v. Stearn, 265 U. S. 242 (1924).

cretion in the treatment of reorganization situations, was more minutely articulated. Irrespective of the highly articulated and carefully drafted provisions of the 1924 Act,[2] it "proved all too soon to be a delusion" (p. 37), when it met the practical test of tax events. Thus, due to this was effected a contraction of the reorganization provisions in the 1934 Act. Mr. Paul then presents a practical and interesting elaboration of the existing reorganization provisions[3] and the accompanying sections[4] enacted to prevent a stepped-up basis where gain has not been recognized upon a reorganization. This definitive analysis is rather tedious to follow, but the reward is a quite thorough understanding of these provisions of the Act. Each type of reorganization defined under Section 112 (g) (1) and "a party to a reorganization," Section 112 (g) (2) are studied in detail. The author states that the definition of "recapitalization" as a type of reorganization is practically meaningless. There is a paucity of court cases and only a few board cases on the subject. The Treasury has made a few rulings on the term, but the several examples presented in the regulations[5] "do not expressly include many examples of common reorganizations" (p. 80). Mr. Paul puts it bluntly that "the simple fact is that nobody knows today what is meant by the term recapitalization" (p. 80).

An extensive critical examination of the "contribution of the courts to reorganization tax law," is presented in the last half of this study (p. 89). Thought provoking comments are made in the discussion of the continuity of interest theory, the rule in the *Gregory*[6] case and the *Hendler*[7] doctrine.

The continuity of interest doctrine points to the conclusion that two elements are necessary to enable the deferment of the tax under tax free reorganization exemptions. They are the need to acquire and retain a "substantial stake," or a "proprietary interest" in the successor corporation,[8] and the stock or securities received must be those of a corporation a "party to the reorganization."[9]

The author's contention that it must have been the legislative intent to sanction as within the reorganization provisions any customary normal business transaction is sound. Where an orthodox business motive exists the reorganization exemption should be recognized. Reorganizations involving parent and subsidiary corporations, wherein the parent company exchanges its shares of stock for the assets of another business entity, and subsequently transfer the acquired assets to a wholly owned

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2. I. R. C. 203 (b)-203 (h) inc.
3. I. R. C. 112 (g), (I), (2).
4. I. R. C. §§ 112 (b) (2); 112 (b) (3); 112 (b) (4); 112 (c) (I) (2); 112 (d) (I) (2); 112 (e); 112 (h); 112 (i); 112 (k); 113 (a) (6) (7) (12).
5. Reg. 103 § 19. 112 (g)-2.
6. Gregory v. Helvering, 69 F. (2d) 809 (C. C. A. 2nd, 1934), *aff'd*, 293 U. S. 465 (1935).
7. United States v. Hendler, 303 U. S. 546 (1938), *rehearing denied*, 304 U. S. 588 (1938).
8. LeTulle v. Schofield, 308 U. S. 415 (1940), *rehearing denied* January 29, 1940.
9. For construction of statutory clause "a party to the reorganization," see Groman v. Commissioner, 302 U. S. 82 (1937); Helvering v. Bashford, 302 U. S. 454 (1938).

subsidiary,[10] among others, are such transactions.[11] However, the "decided trend toward strict adherence to the vague *Groman-Bashford* doctrine" (p. 119), no longer permits the recognition of such transactions as a type of reorganization thereunder.[12] The conclusion following therefrom is that transactions involving reorganizations must be looked at *in toto.* Unless there exists both a continuity of interest having at least the semblance of a proprietary interest, and the fact that all corporations in the transaction are parties to the reorganization the transaction is looked upon as a sale. An identifiable event having occurred, there can be no further deferment and a tax has been incurred. In so far as this is the state of affairs, the author suggests that "the sensible course for the government may be a legislative reversal of the *Groman-Bashford* doctrine in the Hendler-1939 Act manner" (p. 121).

In contrast to the ordinary business reorganizations there are those transactions illustrated by *Gregory v. Helvering.*[13] Though the former fail to gain recognition under the Act, the latter transactions irrespective of the literal conformity to the provisions of the Act, likewise fail of recognition. The plan[14] in the *Gregory* case "obviously was a plain unadorned tax avoidance device" (p. 122). The supposititious reorganization wholly lacked the apparently necessary element of "transfer made in pursuance of a plan of reorganization of corporate business."[15] Irrespective of the technical aspects of reorganization transactions, *i.e.,* whether or not they have a "business or corporate purpose" or are "required by business exigencies," etc., counterfeit reorganizations cannot be allowed.[16] These the *Gregory* case has quite effectively stopped.

In the examination of the Hendler doctrine[17] the discussion relates principally to the meaning of the language of Section 112d of the 1928 Act, providing for the taxation upon a tax free reorganization "of other property or money" or "boot." Due to the elaborate provisions of the 1939 Act, designed to overule the effect of this decision, in the words of the author, makes it "since the 1939 Act[18] a slain dragon" (p. 135). Thereafter follows a discussion of the amendments made by the Revenue Act of 1939, pertaining to the assumption of liabilities by a party to the

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10. This type of transaction really amounts to an interdepartmental transfer —this, even though a separate legal entity, the subsidiary corporation, exists.

11. See Anheuser-Busch, Inc., 40 B. T. A. 1100 (1939), affirmed in Anheuser-Busch v. Helvering, 115 F. (2d) 662 (1940).

12. I. R. C. 112 (g) (I) (2).

13. See note 6, *supra.*

14. "The whole undertaking though conducted according to the terms of subdivision (B) was in fact an elaborate and devious form of conveyance masquerading as a reorganization and nothing else." Sutherland, J., in Gregory v. Helvering, 293 U. S. 465, 470 (1935).

15. Gregory v. Helvering, 293 U. S. 465, 469 (1935).

16. Judge Learned Hand, in Gregory v. Helvering, 69 F. (2d) 809, 810 (C. C. A. 2nd, 1934) said, "To dodge shareholders' taxes is not one of the transactions contemplated as corporate reorganizations."

17. United States v. Hendler, 303 U. S. 564 (1938), *rehearing denied,* 304 U. S. 588 (1938).

18. I. R. C. § 112R, added by 1939 Act § 213a.

reorganization, and "the effect of reorganizations upon earnings or profits." Attention is given to the effect of the provisions of the Chandler Act[19] applicable to "bankruptcy reorganizations." Through the special provisions in the Bankruptcy Act, the reorganizations thereunder have been held exempt from taxation on the theory that in the typical bondholder reorganization[20] the creditors may be treated as the proprietors assuming the equities of the shareholders that have vanished.

The concluding section of this study refers to the "machinery provided for dealing with the uncertainty inherent in the reorganization situation, mainly, the provision for closing agreements.[21] The author believes that "a liberal policy of entering into closing agreements in reasonable cases may help to extricate us from the confusion which now clouds the entire subject of reorganizations" (p. 163).

Mr. Paul's conclusion is that the reorganization provision needs substantial revision. The revision should neither be in the direction of extreme simplicity, nor on the other hand in the direction of "confusing multiplicity." The middle pathway of intelligent compromise is the road he suggests be taken.

Revocable Trusts and the Income Tax[22]

The second study in the series is a discussion of the general statutory scheme for the taxation of the income of revocable trusts. The constant problem of who and when to tax is present. Which shall it be; the grantor of the trust, the trustee, or the beneficiary, whatever the latter's category may be, who is to be taxed? An analysis and construction of Sections 166 and 167, with the affect thereon of Section 22a, upon short term trusts envisages the portent of these sections. To determine who shall bear the tax on the trust income, the test of dominion and control coupled with continued benefit is applied. The question resolves itself into "does the settler still retain virtual dominion over the trust?" (p. 217).

Consideration is given first to the purpose and affect of Sections 161 through 164 of the Internal Revenue Code, the general statutory scheme for the taxation of trusts, and the necessity for special provisions in case of revocable trusts (Section 166) and trust income for the benefit of the grantor (Section 167). A thorough analysis of the application of Sections 166, 167, and 22a follows. Thereunder is considered extensively the rules applicable within the tenets of Section 166, wherein the grantor retains dominion over the *corpus* of the trust. The important and far-reaching case of *Helvering v. Clifford*[23] is necessarily dominant throughout the discussion of this matter and especially with view to its effect upon short term trusts.

In further discussion relative to taxability of short term trusts, the author, using the case of *Helvering v. Wood*,[24] points out the tax liability of the grantor

19. Bankruptcy Act 1938, §§ 268, 270.
20. Commissioner v. Kitselman, 89 F. (2d) 458 (1937), *cert. denied*, 302 U. S. 709 (1937).
21. I. R. C. § 3760, Reg. 103 Appendix, ¶¶ 46-47, p. 708.
22. The latter part of this study dealing with *Alimony Trusts* appeared originally in (1939) 53 HARV. L. REV. 1.
23. Helvering v. Clifford, 304 U. S. 331 (1940).
24. Helvering v. Wood, 304 U. S. 344 (1940).

where there exists, "a power to revest," as distinct from a "reversionary interest."

Taxability of trust income devoted to the benefit of the grantor entails a discussion of Section 167 of the Internal Revenue Code with reference to funded insurance trusts. The test of "possibility of devotion" of the income to benefit of the grantor, and the disregard of schemes of subterfuge, by piercing the trust entity veil (analogous to piercing the corporate veil in disregarding the corporate entity) result in taxation of the trust income to the grantor.

The latter portion of this study treats with the taxability of alimony trusts and trusts for the benefits of wives and children. The renowned case of *Douglas v. Willicuts* resounds throughout this discussion. The "continuing obligation" tests; ehe effect of local law; and the probable limiting effect of the *Fitch*,[25] *Leonard*,[26] and *Fuller*[27] cases upon the application of the *Douglas* case are carefully considered.

To bring order out of chaos, Mr. Paul suggests statutory changes be made to clarify the perplexing situation resulting as the aftermath of the *Clifford, Gould*[28] and *Douglas*[29] cases. Provisions similar to those under the English Finance Act of 1922,[30] regarding the treatment of income temporarily paid over to a child, might be adopted. As an alternative, a cure for the effect of *Gould v. Gould*,[31] *Douglas v. Willicuts*,[32] and possible projection of its unwholesome principles, would be to label alimony settlements as taxable gifts by express provision of the gift tax law, and the repudiation of the aforesaid cases.[33] Not only would such a solution aid in alleviation of the uncertainty present in the alimony situations, but also make for uniformity whereby, due to the difference in local law, discrimination may now result.

Mr. Paul fears that even with the advent of Section 22a as an aid to Sections 166 and 167 of the Internal Revenue Code, the Treasury will yet fail to collect tax on trust income to the extent of the "mostest" from the "mostest." There should be little apprehension on this score, *post Helvering v. Clifford* and the test of the taxability of the income to the grantor being based on the factor of dominion over property rather than upon ownership alone. Mr. Paul is adamant that statutory correction is necessary, and though one is confronted with the dilemma whether it be overly-articulate or over-generalized and thus more flexible, the legislation should be such as to prevent "astute avoiders to escape their just share of the burden." (p. 295).

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25. Helvering v. Fitch, 304 U. S. 149 (1940).
26. Helvering v. Leonard, 310 U. S. 80 (1940), *rev'g*, 105 F. (2d) 900 (1939).
27. Helvering v. Fuller, 310 U. S. 69 (1940), *aff'g*, 105 F. (2d) 903 (1939).
28. Gould v. Gould, 245 U. S. 151 (1917).
29. Douglas v. Willicuts, 296 U. S. 1 (1933).
30. Finance Act § 20.
31. See note 28, *supra*.
32. See note 29, *supra*.
33. It may be noted that the Senate Committee considering the Revenue Act before it, embodies the taxing of alimony to the wife and permits it to be deducted by the husband. Prentice-Hall, Inc., *What's Happening*, Sept. 2, 1941, § 1, p. 2.

Federal Income Tax Problems of Mortgagors and Mortgagees[34]

In the words of the author, "this study presents an analysis of the problems which face the mortgagor and mortgagee today under the Federal Income Tax" (p. 297).

Mr. Paul discussed the multifarious income tax problems which arise in connection with foreclosure proceedings, abandonments, contract transfers, compromises, voluntary deeds and other legal proceedings whereby the mortgagee succeeds to the mortgaged property. The mortgagees' and mortgagors' tax problems arising out of the aforesaid transactions, which necessarily require determination of the taxability of income, or deductions by way of bad debts, ordinary loss or capital gain, are carefully and clearly examined. An extensive summary to show the confusion in the authorities and "hodge-podge of conflicting rules for the guidance," (p. 346), of the interested parties is presented.

To avoid the complexities in these situations the author suggests either the passage of a statute to the effect that the acquisition by mortgagees through foreclosure or otherwise be treated as an exchange, *i.e.* a substitution of the property for the debt, thus not giving rise to either bad debt deductions, gain or loss; or the promulgation of a rule allowing a bad debt deduction at the time of acquisition, only to the extent of the difference between the debt basis and fair market value, presuming the latter to be the bid price. The latter suggestion appeals as the most practical and realistic. It would treat the transaction closed and establish the market value or bid price at the date of acquisition of the property by the mortgagee, as the new basis for future transactions.

Life Insurance, Annuities and the Income Tax

The fourth study in this series delves into many of the situations concerning life insurance and annuities under the income tax[35] and estate tax laws. The gist of the discussion centers upon the statutes and decisions embodying the problems of life insurance proceeds as exempt income,[36] the deductibility of life insurance premiums,[37] the taxability of funded insurance trusts,[38] annuities,[39] and interest on proceeds of insurance contracts.

Among other matters, Mr. Paul concludes that life insurance proceeds paid to corporations although now not taxed[40] are constitutionally taxable income. This in turn gives rise to the treatment of such proceeds as dividends in the hands of a stockholder. Here again the author suggests their taxability to the recipient stockholder.

The provoking problem of the taxation of proceeds of insurance contracts fol-

34. This study appeared originally in (1939) 48 YALE L. J. 1315. George S. Allan collaborated in the writing of this material.
35. I. R. A. 22 (b) (1) (2).
36. I. R. A. 22 (b) (1).
37. I. R. A. 24 (a) 4.
38. I. R. A. 167 (a) (3).
39. I. R. A. 22 (b) (2).
40. Reg. 103 Section 19.22 (b) (1)-I.

lowing a transfer of life insurance contracts to a transferee for a valuable consideration is treated in connection with the *Hacker*[41] case. An interesting and illuminating discussion of the distinction between life insurance, annuity and investment contracts is presented. The *Keller*[42] and *Le Gierse*[43] cases (estate tax cases)[44] furnish the basis for this discussion. Mr. Paul's intimation that the combination contracts therein involved are not insurance, but rather annuity or investment contracts, has been so answered by the Supreme Court.[45] Properly the Court looks to the substance and not form in determining whether the contract is one of life insurance, or an annuity.

It is Mr. Paul's conclusion that "tax pressures are twisting out of shape the underlying social function of life insurance" (p. 418). It is true that the basic function of life insurance is to provide security for dependents and although other purposes have been recognized for the institution of life insurance, the basic function is still uppermost. That it may be used by some occasionally as a medium to relieve themselves of the burden of taxation is not catastrophic. Even today, though not to the same degree as in the past, life insurance may enable a legitimate escape (not an avoidance) from taxes. The opportunity afforded thereby doesn't necessarily "accomplish an inequitable distribution of the tax burden."

Use and Abuse of Tax Regulations in Statutory Construction

The last essay[46] in this series entitled the "use and abuse of tax regulations in statutory construction," is a trenchant criticism of the reenactment rule.[47] This is a fiction to the effect that Congress or a legislature, by reenacting a statute in the same form, after an administrative construction, impliedly approves and incorporates the existing rules and regulations thereunder.

The analysis of this aspect of the *Reynolds* case shows the unreality of the rule, and leads one to agree with the author's remark that, "no person could honestly claim that the doctrine of approval by reenactment has any solid factual foundation" (p. 429). The author grants the occasional accomplishment of a desirable result by the use of the rule, but asserts that "there is special need for a scrutiny of the consequences of the rule and the limits of its application" (p. 431).

From a reading of the principal cases analyzed, it appears that the courts in construing a statute do not treat the regulations as conclusive, even though they have weathered several reenactments. Generally the regulations are merely treated as weighty evidence and not the sole criterion of the court's construction.

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41. 36 B. T. A. 659 (1937).
42. Keller v. Commissioner of International Revenue, 113 F. (2d) 833, *aff'd*, 61 S. Ct. 651 (March 3, 1941).
43. Helvering v. Le Gierse, 110 F. (2d) 734 (1940), *rev'd*, 61 S. Ct. 646 (1940).
44. I. R. A. 1926, § 302 (g).
45. See note 42, *supra*.
46. This study appeared in (1940) 49 YALE LAW J. 660.
47. The reenactment rule might be likened to a doctrine of *'stare decisis,'* appliable to administrative and departmental rules and regulations.

The balance of the essay consists of a discussion of the *Reynolds*,[48] *Wilshire*,[49] and *Hallock*[50] cases.

The *Reynolds* case decided the question whether a regulation impliedly sanctioned by successive reenactments, subsequently amended and thereafter it too indorsed, prospectively at least by subsequent reenactments of the statute, could be retroactively affected. It was the conclusion of the court that the first regulation by reenactment of the statute was elevated to the plane of positive law and "the Commissioner had no power retroactively to change the earlier regulations" (p. 441). Mr. Paul points out that to conclude that the *Reynolds* case forecloses the application of any other rule of construction is fallacious. Soon thereafter the Supreme Court decided the *Wilshire* case wherein was questioned the power of the commissioner to issue regulations for the future contrary to existing regulations impliedly sanctioned by reenactment. It was decided the commissioner had such power.

Shortly followed the decision in the *Hallock* case, whereby was afforded the opportunity to determine whether a judicial construction of a regulation is approved by subsequent reenactment of the statute; also, whether a regulation amended to conform to a judicial construction of a statute, the latter thereafter reenacted, precludes redetermination of the statutory construction by the court. The conclusion drawn concerning these queries is that in neither situation will the reenactment rule be rigidly applied. Any assumption of a rigid application of the statutory reenactment rule that might have been infused by wholesale reliance upon the decision in the *Reynolds* case was further weakened.

Strict application of the statutory reenactment rule would result in the destruction of the administrative effectiveness necessary in the execution of the tax laws. "Any doctrine analogous to estoppel or *stare decisis* as applied to administrative interpretations would defeat their very purpose" (p. 446). The author comments "it is perhaps fortunate that so unrealistic a doctrine has been relegated to a less important role" (p. 465).

To alleviate the difficulty prompted by this topic the author makes two suggestions. First, that the Supreme Court be required to grant review to any Circuit Court of Appeals, or Court of Claims, decisions contrary to a treasury regulation (p. 467). Second, that "to ease the axe of retroactivity," some competent agency such as the Board of Tax Appeals pass upon the reasonableness and validity of any retrospective amendment to the regulations (p. 468).

The latter suggestion would result in a procedure somewhat analogous to the procuration of declaratory judgments. Since the Board of Tax Appeals is classified as an administrative body and such function is properly within its jurisdiction, the effect would be to override its principal function, that of *quasi* judicial review. Though this practice may accelerate the disposition of tax problems, it would

48. Helvering v. Reynolds Tobacco Co., 306 U. S. 110 (1939), *aff'g*, 97 F. (29) 302 (1938) which reversed 35 B. T. A. 949.

49. Helvering v. Wilshire Oil Co., 308 U. S. 90 (1939), *rehearing denied*, 308 U. S. 638 (1939), *rev'g*, 95 F. (2d) 971 (1938).

50. Helvering v. Hallock, 309 U. S. 106 (1940).

not entirely obviate the problem here under discussion. Of the two proposals made, the first appears more salutary.

Undoubtedly the reenactment rule is more idealistic than real. Nevertheless, some construction of the effect of the application of the administrative regulations is necessary. What should be the policy? Would it be wise to arbitrarily disregard totally the regulations? On the other hand, should a present existing regulation be construed as having both retroactive as well as prospective effect? Should a newly promulgated regulation be treated differently than one of long standing? These among other factors enter the picture. Perhaps the statutory reenactment rule is the most salutary, just and equitable construction to observe. After all, taxpayers are guided by the departmental rules and regulations. They compute their returns in conformity with these administrative interpretations. Barring arbitrary, unreasonable and wholly inconsistent or erroneous interpretative provisions, is it extraordinary that the taxpayer and Treasury should contend that periodic reiteration of the rules and regulations gives them sanction? Fairness suggests the answer should be in the negative. Neither does this infer that rules or regulations cannot be contested by either the taxpayer or the Commissioner, nor that the latter lose all opportunity to change, alter and amend rules, prospectively at least.

Throughout the studies, one finds the author's constant exhortation that not all is as well as could be with the tax laws. That, it is essential and necessary by legislation and administrative process to correct the abuses and remedy the evils that therein exist. In the author's words, "we need not fear experiment so much as paralysis. Experiment may not win but inaction will surely lose." Perhaps Congress in the Revenue Act now before it, will treat kindly the suggestions so earnestly made by Mr. Paul.

The text material is presented in 468 pages of readable type. Thereafter follows a twenty-nine page list of Board of Tax Appeals and Court decisions cited throughout the studies, an extensive bibliography of authorities on the matters of Federal Tax Law discussed, and an especially well-prepared index. Any law library is incomplete without this book. Like its companion volumes, it can be of much use and aid not only to lawyers, but to the tax accountant and financial adviser as well.

University of Kansas Law School LESLIE T. TUPY

FREE SPEECH IN THE UNITED STATES. By Zechariah Chafee, Jr. Cambridge: Harvard University Press, 1941. Pp. xii, 634.

In the preface Professor Chafee has written, "When war begins, all thinking stops." Certainly much of his material supports that statement (which is, of course, not the thesis of his book). Even as I compose this review, the United States has passed from a condition of neutrality to one of belligerence, and the importance and need of this book has increased many fold. It is not yet too late to call for sober reason, but the time is growing short.

The greater part of the work is not here presented for the first time. About a

third of it was published in 1920 under the title, *Freedom of Speech.*[1] That material has been re-considered but not altered as to conclusion, and as to it the impact of subsequent events has been recognized only in footnotes. Other chapters were drawn from *The Inquiring Mind*[2] and from the author's contributions to encyclopedias and symposia. In general, the approach is new. The whole has been fused together and additional material added so as to present a well-rounded and up-to-date consideration of every phase of the general problem. He writes of a legal problem,[3] with the authority and technique of an acknowledged legal master, but he addresses himself to lawyers and laymen alike. I do not at the moment recall another book which contains so much solid and practically useful legal analysis and discussion of precedent and which at the same time must be so readable by and informative to the layman. The book bespeaks the author, who is a learned and tolerant scholar, long known for his exhaustive research; a careful lawyer, independent in thought and meticulous in analysis; a widely cultured gentleman, a witty and fluent writer, a substantial and earnest American, whose views may not be dismissed as those of one alien to our tradition or irresponsible in worldly affairs.

Professor Chafee recognizes, as even a more superficial thinker must, that absolute freedom of speech is not possible in the modern world; he denies that because the matter of drawing the line then becomes relative, the question is not vital to our civilization. The test he suggests is a liberal one, namely, is there any "clear and present danger" of illegal conduct to be apprehended from the speech or writing?[4] He goes beyond the defense of a mere theoretical exposition or justification of an unpopular policy; he would exonerate from criminal liability positive recommendation that existing law be disregarded or violated, so long as the language merely "tends" to produce disrespect for law and does not reasonably suggest, in the light of the circumstances in which they were uttered, that a specific violation of law may be expected. Decrying special statutes against utterances, he would rely primarily on the criminal law of "attempt" and "accessory" to the substantive crime counseled. Not every reader will agree with that standard, and in his preface the author obligingly cites sources from which such critics may draw argument and authority, but it can hardly be denied that he presents a sorry picture of the administration of the bill of rights, whose anniversary we recently celebrated, under any other test.

Because I agree with the author, and because I believe this book presents the problems involved more readably, forcibly, and fairly than any "crib" which I might prepare of it, I shall neither belabor nor summarize its argument. It begins with a theoretical consideration of the right of free speech and press at common

1. New York: Harcourt, Brace and Company. Now out of print.
2. New York: Harcourt, Brace and Company. 1928.
3. He does not encroach upon Gilbert Seldes and the other historians of economic suppression of free speech.
4. The "clear and present danger" formula has recently received new sanction in the much publicized "contempt of court" case of Bridges v. California, 62 S. Ct. 190 (1941).

law and under the United States Constitution and proceeds chronologically to consider the prosecutions of the last war—both those instituted during the hostilities and after—the post-war sedition laws, the deportation laws and cases, the legislative purges of its own members, the criminal syndicalism, "red flag salute" and "undesirable citizen" cases, newspaper gag laws, taxes on knowledge and peddlers, freedom of assembly, and the current statutes against sedition. He concludes with a theoretical discussion of peace-time curbs on free thought and speech. There is a useful appendix of bibliography and statutes.

Freedom of Speech was published in 1920 with purpose, in part, at least, of furnishing to defense lawyers material not otherwise available. Professor Chafee thinks the necessary material is now available through other sources and this book is less brief-like in style. But few lawyers defending a reckless writer would not benefit by its philosophy and analysis. More important, few administrators would not benefit from reading it in a time when their wisdom and discretion must be sorely tried.

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