BOOK REVIEW

FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS AND THE TAX TRAINED LAWYER OF TODAY AND TOMORROW

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I

The title of this review reflects the intention of the author to review Federal Income Taxation of Corporations and Shareholders,¹ by Professors Bittker and Eustice, not only for its own intrinsic worth, but also as a starting point for a discussion of the past, present and possible future training of law students in federal income taxation. After a discussion of the book's content, therefore, the comment will focus on its historical antecedents as a course book, describe the present state of federal income tax course offerings and attempt to shed light on the possible forms which training in federal income taxation may take in the decades ahead.

II

The work of two master craftsmen, this second edition of Federal Income Taxation of Corporations and Shareholders, has the same basic format and coverage as its predecessor, authored by Professor Bittker alone and published in 1959.² It is in essence an incisive descriptive analysis of the federal income tax law embraced within subchapter C of the Internal Revenue Code, an area of tax law which has few equals in complexity and importance for the law student and the practitioner. While the present volume, like its predecessor, is not encyclopaedic, its depth is substantial; it provides history, critique, and rationale where this is needed for understanding and clarity. The new edition has been increased in size (from 417 to 739 pages), an increase which is attributable in large part to more intensive treatment of some areas of the law and to new legislative and judicial developments.

The book opens with a brief history of the imposition of the income tax on corporations; an analysis of the significance of the separate treatment of the corporation as a taxpayer with respect to

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distributed and undistributed income; an identification of the problems which such a separation has generated; finally, a brief description of those corporations (such as regulated investment companies, banks, insurance companies, cooperatives, exempt organizations) which are subject to special tax treatment and with which the volume does not otherwise deal. The next chapter explores the problem of identifying a "corporation" for federal income tax purposes and the special problems of corporate income and deductions. This chapter has been expanded since the first edition to take into account the emergence in the early 1960's of the Professional Corporation Acts. The authors present the background of these state laws, promoted by the organized professions for the federal tax benefits which enure to them and which constitute but one stage of a running battle between the professionals and the Revenue Service. Although the authors do point out that the 1965 retaliatory amendments to the regulations make it almost impossible for most professional service groups to qualify as associations (and hence as corporations) for tax purposes, the writers go no further in dispelling the present confusion than to suggest that the regulations as amended may "not weigh very heavily when the courts come to cope with the flood of litigated cases that can be anticipated." (P. 38.)

The next two chapters (Transfers to a Corporation and Capital Structure) provide the student and practitioner with the technical guides needed in handling tax-free transfers of property to a corporation and in tax-planning the capital structure of a corporate enterprise. These two chapters demonstrate particularly well the utilitarian nature of the volume. The student or practitioner struggling with a problem such as the incorporation of a going business is brought face to face with the necessity of exercising extreme care in order to avoid heavy and unnecessary tax burdens. Potential tax traps are "red-flagged" in such a way as to make the reader aware that the steps which must be taken are not always dictated by the form books. The authors treat both the purpose and theory of section 351 in some detail, in an attempt to convey a sense of where courts may draw the line against abuse, a matter of no small importance to the lawyer in planning his client's affairs.

Chapter 5 covers the distribution problems (cash, in-kind dividends and stock dividends) of the corporation as a going concern, an area in which there have been few significant developments since publication of the first edition. Hence the treatment here is basically unchanged. The next chapters, however, have been considerably expanded. Accumulated earnings and undistributed income are treated in Chapter 6, which includes a twenty-four page discussion of the establishment of the Controlled Foreign Corporation in 1964. Also included is additional material on the Accumulated Earnings Tax, reflecting the step-up in tempo of the Revenue Service's enforcement
policy during the past several years, as well as increased corporate prosperity. Chapter 6 also includes a rewriting of the sections dealing with the Personal Holding Company tax, completely recast by Congress in 1964.

The growing case law under section 302 of the Code (Stock Redemptions) has led to similar expansion of coverage in Chapter 7 (Stock Redemptions and Partial Liquidation). Worth special mention as being particularly helpful to the tax planner is the discussion of section 302 "bootstrap" transactions, the use of corporate assets to effect a buy-out of a corporate business or a shift in control. Here the student or practitioner struggling with a problem, such as the drafting or amendment of a buy-sell agreement, is aided by a survey of what can and cannot be done safely as well as an indication of the potential traps to be avoided.

Section 306 of the Code has been subject to little judicial interpretation, and its treatment in Chapter 8 (Preferred Stock Bail-Outs) is expanded only minimally.

The treatment of complete liquidations in Chapter 9 is another matter. Section 331 of the Code (granting capital treatment to shareholders on stock redemptions in liquidation) and section 337 (granting tax-free treatment on the sale of corporate assets in complete liquidation) provide the tax planner with two of his major tools in this area. The increased treatment of these problems here reflects the constant struggle to define the proper scope of these statutory provisions, and this area promises to remain a major battleground in the years to come. This chapter also covers one-month liquidations under section 333 of the Code and tax-free liquidations of subsidiaries under section 332.

Chapter 10, dealing with collapsible corporations, includes an excellent summary of the extremely complex relief measures of section 341(e), and the new relief-consent provision of section 341(f), added in 1964. Chapter 11 (Corporate Divisions) also has been expanded to include a full discussion of the demise of the two-business rule of the regulations, brought about by the Coady and Maret cases. This is yet another area of subchapter C that remains shrouded in fog, especially for the corporation operating a "single business" which desires to spin-off some of its functions into separate corporate form. Although the Service has acquiesced in the invalidation of the two-business requirement, new regulations promised in 1964 have yet to be issued and guides or criteria as to what functions may be subject to a tax-free separation under section 355 are currently lacking. Here, also, the authors point out the dangers from other Code provisions available to the Commissioner as a check on bail-outs or other

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2 United States v. Maret, 325 F.2d 28 (5th Cir. 1963); Commissioner v. Coady, 289 F.2d 490 (6th Cir. 1961).
abuses in the utilization of section 355, including the device limitation of section 355 itself and sections 446(b) and 482 of the Code.

Probably the most extensive changes in the second edition of the book are contained in Chapters 12 and 13. The treatment of corporate reorganizations in Chapter 12 has been increased from 44 to 104 pages, attributable in part to judicial developments such as refinements in the reincorporation area. Even more extensive in coverage is the detailed treatment in Chapter 13 of the problem of the survival of tax attributes as a result of corporate acquisitions. This highly litigious area was treated in the first edition in twenty-one pages of the general chapter on the corporate income tax; it is here the subject of a completely new chapter which devotes 106 pages to the limitations of Code sections 269, 382, 482, 1551, and the Libson Shops doctrine on the utilization of loss carryovers and other tax attributes. Extremely helpful in the analysis of particular fact patterns in this troublesome area is a table provided by the authors of eight basic acquisitive transactions indicating the possible application of the abovementioned Code provisions and the Libson Shops doctrine. This table, which is based on both the Code provisions and on administrative and judicial interpretations, not only treats the eight basic stock and asset acquisitive transactions in terms of the acquisition transactions themselves, but also provides in some instances a breakdown based on subsequent transactions. For example, the acquisition of the stock of a gain corporation by a loss corporation in a "B" reorganization is charted in terms of the use of a consolidated return by the two companies, a section 332 tax-free liquidation of the subsidiary and a "downstream" merger of the parent corporation into the subsidiary. In this manner, the tax planner is provided with a broad view of possible alternative routes. Contributing to the expanded coverage of this chapter is the treatment of the 1964 multiple-corporation provisions and an analysis of the new Consolidated Return Regulations which were in proposed form at the time of publication.

Subchapter S of the Code, a product of the 1958 Revenue Act, was in its infancy when the 1959 edition of this book first appeared. The additional fifteen pages devoted to this third alternative form of doing business associatively for tax purposes reflects the considerable activity in this area since that time. However, the subchapter S technique of by-passing the corporate tax and taxing corporate earnings directly to the owners deserves more consideration from a policy viewpoint than is given here as a possible solution to such difficult problems as the extra taxation imposed on corporate dividends and the avoidance of individual income tax through corporate accumulations.

III

The person who would master the material in Bittker and Eustice must be prepared to devote more than just a little time and effort to what is really “tough” tax law. This is not a book which the hurried student can digest during his lunch hour or on an ad hoc basis as the spirit moves him. Yet, as law will likely be practiced in the second half of the twentieth century, it is just this type of material which the modern lawyer must know and understand if he is adequately to discharge his responsibilities to his clients.

The detailed treatment of subchapter C of the Internal Revenue Code, its problems and the study required for its mastery, present a sharp contrast to the courses on federal income taxation in the law school curriculum of the early 1920's. The concern of Bittker and Eustice with problems, Code and Regulations, as described above, is quite a different educational process and experience from that provided by the early course books, with their focus on “leading cases,” constitutional limitations and “basic principles.”

Federal income taxation as a law school course started in the early 1920's as part of a general course in taxation. Commencing in the mid-1920's, federal taxation was divorced in some schools from state and local taxation. This separation process continued during the 1930's and is now complete. The last course-book designed for a general survey course in taxation was published in 1952 and, to the best of my knowledge, taxation is no longer taught on such a broad survey basis.

The next major curricular change was primarily a post-war movement and was three-fold in nature: (1) expansion of the time devoted to federal taxation from two or three credit hours to four or five credit hours; (2) the separation of federal income taxation (normally three credit hours) from federal estate and gift taxation (two credit hours); (3) the shifting of these courses to the second year so that elective advanced courses could be offered in the third year.

By the early 1950's perhaps 50 per cent of the law schools offered separate basic survey courses in federal income taxation and in federal estate and gift taxation, as well as one or more advanced

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6 R. Brown, Cases and Other Materials on the Law of Taxation (1952). This coursebook perhaps reveals the nature of the early courses on taxation and the extent of the treatment of income taxation. Of some 750 pages in the volume, 221 pages or 30 per cent (mostly United States Supreme Court decisions) are devoted to income (and excess profits) taxes; the balance of the volume (70 per cent) covers the Nature and Purposes of Taxation, Property and Excise Taxes in General, The Property Tax, Estate, Succession and Gift Taxes, Other Excise Taxes, Methods of Collecting Taxes and Remedies of Taxpayers for Illegal Taxation. See Caplin, Book Review, 6 J. Legal Ed. 273 (1953).
courses or seminars in income taxation and estate planning. Early post-war curricular studies revealed a growing awareness on the part of most law school faculties of the permeating character of federal taxation in the transactions normally encountered by the general practitioner: an awareness that the will, the trust, the divorce settlement, the sale of a business—the everyday work of the general practitioner—could hardly be concluded without considering tax consequences.  

Facilitating this trend, which promised to provide adequate training in federal income taxation at the LL.B. level, was the appearance in 1950 and 1951 of two comprehensive course books, Surrey and Warren, *Federal Income Taxation: Cases and Materials,*\(^8\) and the precursor of Bittker's *Federal Income, Estate and Gift Taxation.*这些 published collections, together with works by Dean Griswold,\(^9\) and Professors Bruton and Bradley,\(^10\) provided adequate materials for both basic and advanced income tax courses. This was especially the case with the monumental Surrey and Warren volume, which devoted some 1300 pages to federal income taxation.

Therefore, the perspective of the early 1950's for adequate training in income taxation at the LL.B. level was a hopeful one; there was every indication that the continuation of past trends would see the day when an LL.B. graduate would be sufficiently trained—with perhaps ten credits of federal income taxation\(^12\)—to satisfy the basic needs of the general practitioner. Further, in an attempt to make up past deficiencies in formal training, the early continuing education programs of the American Law Institute-American Bar Association Committee and some state bar programs were devoted in large measure to basic courses and institutes in taxation, and a number of metropolitan law schools opened graduate programs offering LL.M. degrees in taxation after an additional full year of tax study.

IV

To what extent has the hopeful promise of the early 1950's been realized during the past decade and a half? A random selection of

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7E.g., the tax program of the University of Virginia School of Law in 1952, strongly supported by its alumni, consisted of five courses and seminars totaling fifteen semester hours. Caplin, Book Review, 6 J. LEGAL ED. 273, 277 (1953).


12As early as 1949 it was suggested that ten hours in taxation (Federal Income Taxation, 4 credits; Estate and Gift Taxation, 2 credits; Federal Tax Practice, 2 credits; and, State and Local Taxation, 2 credits) was the basic minimum needed to provide an adequate tax background for general practice. Miller, *A Tax Program for the Undergraduate Law School,* 1 J. LEGAL ED. 573 (1949).
twenty law school bulletins \textsuperscript{18} for the 1966-1968 school years reveals that most of the schools offer both a basic three- or four-credit survey course in federal income taxation (which is required in half of the schools) and an elective two- or three-credit advanced course in the income taxation of corporations (which in half of these schools includes the treatment of partnerships and in two schools also includes trusts and estates). However, in seven of these twenty schools,\textsuperscript{14} the income taxation of trusts and estates has been integrated with the separate course in federal estate and gift taxation. In two schools, federal income taxation is still wedded to estate and gift taxation.\textsuperscript{15} Only five schools do not provide advanced courses in corporate taxation.\textsuperscript{16}

This profile of income tax courses would not be complete without some indication of the changes that have been taking place in teaching method. Three casebooks have been available for use in the basic course: Bittker, \textit{Federal Income, Estate and Gift Taxation},\textsuperscript{17} Griswold, \textit{Cases on Federal Taxation},\textsuperscript{18} and Surrey and Warren, \textit{Federal Income Taxation, Cases and Materials}.\textsuperscript{19} A fourth casebook, Rice, \textit{Problems and Materials in Federal Income Taxation},\textsuperscript{20} was published late in 1967 and presumably will see a substantial adoption. Only the Rice book is designed for the problem method of teaching, but with or without special casebooks, it is clear that the problem method is utilized in the basic income tax course to a substantial extent, perhaps to a greater extent than in any other basic course in the curriculum.\textsuperscript{21}

\textsuperscript{18} Alabama, Arizona, Arkansas, Boston University, California-Berkeley, California Western, Chicago, Cincinnati, Columbia, Cornell, Dickinson, Duke, Emory, Georgetown, Miami, Santa Clara, Southern Methodist, Washington (St. Louis), Western Reserve, and Yale. Seven schools in this group offer graduate programs in taxation which are apparently open to undergraduate students. The analysis here does not embrace such offerings.

\textsuperscript{14} California-Berkeley, Chicago, Cincinnati, Columbia, Duke, Miami, and Yale.

\textsuperscript{15} Alabama in a four credit required course, and California Western in a six-hour required course.

\textsuperscript{16} Alabama, Arizona, Arkansas, California Western, and Santa Clara.

\textsuperscript{17} B. Bittker, \textit{Federal Income, Estate and Gift Taxation} (3d ed. 1964).


\textsuperscript{21} A recent survey indicates that an analysis of the nature and extent of the use of problems in law school teaching is a rather complex matter. However, in broad outline it would appear that the problem method is used most frequently in the tax courses, followed by commercial law and then by corporations. \textit{Report of the Committee on Teaching Methods, 1966 Proceedings of Ass'n Am. Law Schools}, pt. 1, at 198. I would guess that my own experience in teaching the basic course during the past fifteen years is typical. When I taught a basic three-hour survey course in federal taxation for the first time in 1950, I do not recall assigning any problems. By 1966 I was using six mimeographed problems in a basic four-hour course in federal income taxation; these problems utilized some 15 per cent of classroom time. For the future I intend to use more problems, perhaps utilizing more than 75 per cent of class time, in a four-hour basic individual income tax course.
It is also clear that a more extensive use of problems is made in the advanced income tax courses and seminars on business organizations, and a fair guess is that the problem method is a fixed part of the profile of these courses.22

Those schools not offering a survey course do offer courses which may be characterized as dealing with the income tax problems of individuals other than as partners, shareholders and grantors or beneficiaries of trusts or estates. In terms of usual course coverage and case book organization, this means a course devoted to a consideration of gross income, deductions, accounting problems, income splitting and capital gains and losses.

Since only a small percentage of law students elect advanced tax courses, the dilemma of the tax teacher in selecting either a survey course or an individual course at the basic level is apparent. An individual course will result in the majority of law students being exposed to only a portion of the tax problems they will face in practice, and these will not include the important areas dealing with trusts, partnerships and corporations. One effort to meet this problem is recorded in the description of the basic course in the Duke University Bulletin:23

An introduction to federal taxation for those interested in that subject and a terminal course for those who are not but seek the minimum knowledge necessary to identify a tax problem. A detailed study of the basic concepts of the income tax is followed by a survey of some specialized tax areas, such as the income tax treatment of estates and trusts, partnerships, corporations, corporate distributions and adjustments and the federal estate and gift taxes.

The teachers who have turned the basic course into an individual income tax course apparently have not regarded the lack of coverage of the business organization material as a serious deficiency, presumably because this additional coverage is available in advanced courses. However, in such a school, when course points are being counted, non-tax faculty members sometimes may react in shocked horror when it is realized that a student will be required to take federal tax courses

22 Professor Bernard Wolfman emphasizes the planning and counseling arts through the use of problems and what he terms the “generalized assignment.” Wolfman, A Seminar in Counseling—Tax Conscious Planning of Corporate Transactions, 16 J. Legal Ed. 181 (1963). In my own case, I have taught a two-hour seminar in Corporate Tax Problems since 1958, using Professor Bittker’s text, Income Taxation of Corporations and Shareholders, and my own mimeographed problems. These problems have been revised three times and now consists of ten problems which follow the same four shareholders and corporation through selection of a business entity, formation, bailout, sale, division and reorganization. For the future, I plan the same type of approach in a three-hour seminar on taxation of business organizations.

totaling as much as ten credits in order to be provided with a full
coverage of federal taxation.\textsuperscript{24}

A final development during the past fifteen years with respect to
the advanced courses is the emergence of Business Planning as a recog-
nized item in the curriculum. For example, Columbia offers both a
three-hour course in corporations and partnerships in the context of
business planning with both tax and non-tax materials, and an alterna-
tive two-hour seminar in corporate tax problems. At Western Reserve
the advanced course is a four-hour course in Business Planning.\textsuperscript{25}
The course or seminar in business planning is developing in the image
of estate planning, and normally integrates taxation with materials
from business organizations. This development, which is discussed
in more detail below, has been made possible by such works as Bittker
and Eustice; with such material, the teacher experimenting in this
area can be assured that his students can move with as much ease as
the complexities of subchapter C permit into the planning phases and
can consider alternative courses of action, which provides essential
training in the development of the planning skill.\textsuperscript{26}

This brief survey of the past and present of the income tax offer-
ings in the law school curricula has led me to the following conclu-
sions. First, substantial changes have taken place in the amount of
time, the content and the method of teaching federal income taxation
during the past forty years. One change has been a series of divisions
which first separated federal taxation from state and local taxation
(a process which is now complete) and then federal income taxation
from estate and gift taxation, a process well on the way toward
completion. A third separation process is also well underway, divid-
ing the teaching of individual income taxation from that of the taxa-
tion of business enterprises and the income taxation of trusts and
estates. The former is still being treated separately as an advanced
course, but with experimentation and innovation looking toward inte-
gration in business planning courses and seminars; and the income
taxation of trusts and estates is experiencing a similar movement along
with federal estate and gift taxation toward integration with estate
planning.

Second, as a result of the latter separation processes, the basic
course—whether of a survey or individual nature—has been shifted

\textsuperscript{24} For example, at Miami, for the 1967-1968 year (not recorded in the Bulletin)
a student is required to take a four credit course in personal income taxation in the
second year, and may elect Taxation of Business Organization (three credits) and
Taxation of Trusts and Estates (three credits) in the third year.

\textsuperscript{25} The three-hour seminar on Taxation of Business Organizations at Miami
is a prerequisite to a two-hour Business Planning Workshop which emphasizes
drafting and preparation of documents, and the three-hour seminar on Taxation of
Trusts and Estates is a prerequisite to an Estate Planning Workshop. Taking
either sequence satisfies third-year seminar and workshop requirements.

\textsuperscript{26} The only published materials to date for this functional package is D.
HERWITZ, BUSINESS PLANNING: MATERIALS ON THE PLANNING OF CORPORATE
TRANSACTIONS (1966).
to the second year in order to permit the offering of proliferating advanced courses and seminars in the third year.

Third, the method of teaching has and is undergoing a marked change, from an early emphasis on teaching basic principles and doctrine through the study of cases to an emphasis on Code, Regulations and case law, and finally to an emerging and innovative use of problems which focus attention on planning. These changes in method, which are less discernible and less capable of articulation than are the separation processes noted above, reflect an effort to provide much needed training in skills other than case analysis and synthesis, the traditional thrust of the curriculum. The skills aimed at include those of analysis of statutes, regulations, legislative history and planning, which in some instances includes a consideration of relevant non-tax legal doctrine and devices.

Fourth, on an overall basis, the study of tax doctrine in the law schools by no means has kept pace with the increased complexity of federal income tax law and the extent to which it has permeated transactions in the work-a-day world of the general practitioner. Assuming that the average law student is exposed to a three- or four-hour course (survey or individual) in income taxation, it is inconceivable that the two or three hundred hours of work demanded by such a course are sufficient to instill the insights required for the identification of the more important tax problems or to provide the knowledge needed to perform such common tasks of the lawyer as drawing a will or trust, drafting a partnership or shareholder buy-sell agreement, negotiating a marital property settlement, forming or liquidating a partnership or corporation or advising an investor on the tax consequences of his year-end security switches. Nor is there any indication that the gap is being filled by the non-tax portion of the curriculum. With rare exceptions, non-tax teachers do not treat relevant income tax problems in their courses. In short, only a handful of LL.B. or J.D. graduates from each class, students who have arranged their schedules under the elective system so as to include ten to fourteen credits of federal taxation (assuming their schools even provide this opportunity), can be regarded as equipped in income taxation for the general practice of law and the handling of many every-day, run-of-the-mill legal tasks.

Fifth, up to the present there has been no formalization of the training of the law student for his role as a public servant in taxation, except insofar as his more general training equips him for this task. It is undoubtedly true, depending on the interest and inclination of the particular instructor, that many of the policy considerations relevant

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27 For an analysis and rejection of distributing tax law to other courses, see Lowndes, Problems in Teaching Tax Law: Tax Law Encountered in Other Fields of Law, 13 J. LEGAL Ed. 481 (1961).
to various taxing measures are brought to the attention of the tax student. But it is a fair guess that even here the dialogue does not embrace a consideration of non-legal data relevant to policy formulation. Nor has there been sustained productive research by tax teachers in relevant economic and political doctrine which could serve as course materials in this respect.

V

The preceding discussion suggests that there are at least two major interrelated problem areas facing curriculum planners with respect to federal income taxation: (1) the means of accommodating the curriculum to technical training in the subject which is sufficient to provide the general practitioner with the knowledge and insights needed to discharge his obligation to his clients; (2) the delineation and implementation in the curriculum of the role of the tax-trained lawyer in tax policy formulation.

The obstacles that must be overcome in the first of these problem areas are many and varied. Undoubtedly, one major hurdle is a skepticism on the part of non-tax faculty members that federal income taxation is as all-pervasive in the general practice of the law as it is made out to be. When this is the case, the tax teacher faces a problem for which there is no ready-made remedy. If he is a practitioner who has few contacts with his colleagues or an assistant professor without tenure, the opportunities for carrying on an effective campaign may be few indeed. Further, even under the best of political conditions, he is faced with the fact that few law teachers regard federal income taxation as lending itself to the same type of fundamental doctrinal or conceptual training as that provided by the contracts, torts, property and procedure courses which are basic first year fare in all law schools.

The broad question which this author would ask with respect to the apparent sacredness of the traditional first year courses, is precisely why these courses are still needed as an introduction to the study of law. What is their relevance to the development of the skills and knowledge needed by the practicing lawyer for today and tomorrow? Why is a perusal of the concept of possession in the form of chasing Pierson's (or Post's) fox up-hill and down-dale any more fundamental than an examination of the concept of constructive receipt of a cash basis taxpayer? Why is the doctrine of consideration more relevant and deserving of more time than that available for a consideration of the rules governing the allowance of a federal income deduction for travel and entertainment expense? Why is knowing how to convey a conditional or determinable fee more important to a practicing lawyer than knowing how to form a corporation tax-free under section 351 of the Internal Revenue Code?

An attempt should be made to answer such questions and, as a very minimum, law faculties owe it to themselves to make a re-evaluation of
the time allocated to knowledge and skills acquired by the first year student in the traditional courses. The complaint is often heard that first year training normally leaves the law student so case-hardened that progress with his training in the analysis of statutes and regulations, a training which has major relevance in modern law practice, borders on the impossible. I know of no logical reason why room could not be made in the first year for statutory courses covering, for example, individual income taxation or portions of the Uniform Commercial Code.28

A further obstacle to opening up the curriculum to more required work in federal income taxation is the feeling on the part of some faculty members that taxation is a specialty, with courses to be offered for the student who wishes to concentrate in the subject under the elective system. Perhaps contributing to such a feeling is the growing network of graduate programs in taxation which may be viewed as evidence that the three year LL.B. or J.D. program cannot be accommodated to anything other than a survey course and a smattering of advanced electives. In any event, it is not easy to understand why ten hours in taxation, for example, constitutes a specialty while the allocation of equal and even more time to commercial law (contracts, sales, bills and notes, creditor’s remedies), property (personal property estates, conveyances, trusts, wills) or procedure simply constitutes a foundation for a general law practice.

The tax teacher who suggests that ten units is a fair allocation for basic training in federal taxation will undoubtedly be met with a list of other areas of the law where additional training is also desirable. In fact, both legal and related non-legal knowledge has expanded so rapidly in the past half century that a proper perspective as to what should be included or excluded from the three years of formal training is not easy to maintain.29 But I would gather that law faculties as a whole regard, and will continue to regard, the primary mission of the law school as that of providing basic training in the doctrine, skills and attitudes which will enable graduates to build on their law school training in a meaningful way, while still serving their clients and the public. As a minimum, this should mean training sufficient to do adequately after graduation what general practitioners are doing today and are likely to be asked to do tomorrow. In this sense, a first-things-first approach would seem to command a priority for most-likely-to-be-encountered areas of knowledge. Tested in this manner, federal income taxation stands on a parity with contracts, torts, property, procedure, business organizations and other admitted basics.

Notwithstanding the logic of the plea for more time for federal income taxation, the question remains: what is the prognosis for this

28 My colleague, Dean Kelso, has also raised this question. Kelso, Curricular Reform for Law School Needs of the Future, 21 U. MIAMI L. REV. 526, 528 (1967).
29 See Prosser, The Ten Year Curriculum, 6 J. LEGAL ED. 149 (1953).
needed reform in the years ahead? Based on present trends at the
basic level of the curriculum in the first and second years of instruc-
tion where the courses are required, it is difficult to be optimistic. I
cannot see an appreciable increase in graduates equipped by their
LL.B. or J.D. training to handle run-of-the-mill income tax problems
arising out of the transactions they are otherwise trained to handle
by the other segments of the curriculum.30 I cannot see the con-
tracts, property, domestic relations or business organization teachers
giving up any of the time allocated to their subjects in order to permit
an expansion of the time allocated to federal income taxation; nor can
I see them training themselves sufficiently in taxation to enable them
to properly integrate tax materials with their own subject matter. Even
where tax teachers are teaching in other fields, integration is not likely
because of the inclination to utilize additional time for
document related to the principal subject. Nor do I see any widespread
use of a "utility infielder" type of tax teacher who would be prepared
to do the necessary integrating in the non-tax courses. While law
teachers may not be unwilling to replace the wine in their old bottles,
as events unfold they seem to want to do this themselves.31

At the second level of instruction, in the third year of the LL.B.
program where the election system predominates, there is reason to
believe that more law students actually will be exposed to more inten-
sive training in taxation, especially in the critical areas pertaining
to the family and to business enterprise. While it is too much to
expect law faculties to require that all students be prepared in these
areas, two overlapping developments provide some hope that advanced
training in the income taxation of trusts and estates, partnerships and
corporations will not only be made available but actually will be elected
by a growing number of students.

The first of these is the so-called concentration movement.32 This
development, which is in an incipient stage, would permit, and pre-

30 As a by-product of this prognosis, I do not see a change in the present ratio
of seven accountants to one lawyer practicing before the Treasury; I do not see
a change in the present public image of the accountant as the tax expert. Further,
notwithstanding formal certification of lawyers as tax experts as contemplated by
the American Bar Association, as litigable tax problems increase in number and
as tax procedure before the Treasury becomes more sophisticated, it will be the
accountant rather than the lawyer who will still be rendering most of the repres-
sentational services.

31 While this may be rank heresy, if bar examiners were to announce that the
bar examination treatment of business organizations, property, wills and trusts would
include a coverage of relevant federal income tax problems, I dare say that the
solution to the curriculum problem posed herein would be forthcoming without too
much delay.

32 The scope and emphasis varies. At Yale the core of concentration is an
election of a Senior Studies Program carrying six to eight credits, where the
emphasis is on research and writing "in a setting of seminar or advanced courses."
Yale Law School Bulletin 29, 42-46 (Aug. 1966). See also Goldstein, Educa-
tional Planning at Yale, 21 U. Miami L. Rev. 520 (1967). At Emory, each student
must complete an area of "special interest" which consists of three required courses
sumably in some areas would require, a consideration of relevant tax problems as they arise in particular areas of concentration.

The second, a more advanced development, is the path being followed by the business planning courses and seminars. Here, materials from income taxation, especially partnerships and corporations, are being integrated in a planning context with materials from corporate law, insurance and other non-tax areas. The form these courses and seminars are taking, and whether or not they are preceded by a required course in taxation of business organizations, is less important than the substance of the training and the fact that a second major planning front, in addition to estate planning, has been opened up. Also, the broadening of related and more refined business areas may be on the horizon; such courses as international business planning and real estate and urban development lend themselves to a similar in-depth functional treatment. All of this suggests that it may be only a question of time before they too will be providing still further opportunities for meaningful integration of tax and non-tax materials. If so, the outlook is bright that most LL.B. and J.D. graduates will be exposed in the decades ahead to a type of badly needed skill training which will embrace tax doctrine in the contexts in which the doctrine functions.

Herein, of course, lies the relevancy of such materials as Bittker and Eustice, and the recent published materials of Professor Herwitz, which will provide the practical means for the spread of this type of training to all schools. It is worth observing here that the utility of law school training in the use of highly technical rules, such as those embedded in subchapter C of the Code, has sometimes been questioned because of their limited usefulness in practice, especially those rules which are susceptible to frequent change. This argument misses the mark. The development of a transmissible skill which involves the use of highly technical rules is not beyond the reach or purpose of basic law school training. Thus, in this respect, Bittker and Eustice and kindred works which have appeared, serve a purpose that has been largely neglected in legal education.

Perhaps what I am talking about is a latter-day implementation of the so-called functional movement, or at least one facet of it. It has another side: the integration into law school curricula of relevant non-legal materials for the training of the law student for his role as a policymaker.34

VI

Twenty-five years ago, on the eve of the termination of World War II, Professors Lasswell and McDougal issued a call for a

33 D. Herwitz, supra note 26.
34 For an analysis of estate planning in the context of the so-called functional approach, see Chommie, What Progress in the Functional Approach in Law School Curricula?, 8 J. LEGAL ED. 472 (1956).
reorientation of law school curricula in order to meet the social need for training policy-makers at all levels of the world community. A year ago Professor McDougal, as President of the Association of American Law Schools, led a revival of interest in policy science through the Association's deliberative processes which brought fresh thinking to this broad-gauged theory of legal education. The formal manifestations of this revival were revealed in Professor McDougal's presidential message, a Round Table of the Whole, a Round Table and Report of the Curriculum Committee and the Reports of the Committees on Teaching Methods and on Research.

From these reviews and elsewhere it is clear that policy science as an operational theory for curriculum planning has captured the imagination of a large segment of the law teaching fraternity. Its broad base of appeal may be attributable not only to its logical foundation, the social need to provide trained policy-makers, but to its ability to accommodate a wide spectrum of thinking on law in general and on the mission of the law school in particular. However, while policy science does not seem to do violence to legal theory, seeking as it does the clarification of values in a democratic order, Professor McDougal also sees arising out of policy science an "emerging theory about law" that seeks:

[F]irst, clearly to distinguish the observational standpoint of the scholar from that of the more active participant in processes of decision; secondly, to achieve a focus of inquiry which comprehensively and economically locates the processes of authoritative decision, to which lawyers are specialized, in the larger community processes in which they occur; and, finally, to encourage, and specify procedures for, the systematic, disciplined, and contextual performance of the whole range of intellectual tasks indispensable to rational policy choice and implementation.

This emerging theory of law seems to posit and accept the historical notion that the lawyer occupies a unique position in policy-

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37 Lasswell, Marden, Wirtz, Hollomon & Schachter, Professional Education in the Public Interest, id. at 129.


40 Legal Education For a Free Society: Our Collective Responsibility, supra note 36, at 42.
making. This thinking may still dominate in legal education notwithstanding the emergence of other professional groups in our pluralistic society who are in command of essential knowledge not possessed, or capable of effective use, by lawyers; professional groups who play an equal, if not more important, role in many policy-making processes. In income taxation, for example, accountants probably overshadow lawyers in the decisional process at the administrative level, and the same is true with respect to economists at many levels of policy-making in state and local taxation and federal income taxation. In any event, it seems clear that policy training in taxation is not for the law school alone, although its role here is a critical one.

A still further base for acceptance of the idea of training for policy-making may lie in the acknowledgment that the "intellectual tasks performed by the policy-maker do not differ in kind from the tasks performed by the practicing lawyer, but only in emphasis and scope." Thus, the traditionalist in legal education, notwithstanding calls for a re-evaluation of curriculum organizing principles and for other changes, may continue on his way with courses limited to legal doctrine, secure in his belief that he is making a substantial contribution to the training of policy-makers for the world of tomorrow, finding no need to explore or to experiment with the use of relevant non-legal materials, to participate in providing his students with the tools of modern scientific methods or to provide them with attitudes

41 Oscar Schachter, Director of Research, United Nations Institute For Training and Research, has observed in speaking of lawyers working in international organizations:

"Lawyers, by and large, are not in the intellectual vanguard; they do not seem to be particularly well equipped with new approaches and techniques relevant to the world I have described. At best, they are the present day classicists, skilled in verbal analysis, in structured argumentation, in close reading of documents... For the most part, their emphasis is on words, on abstractions, on a highly limited slice of the real world. They prefer to operate in a tidy world of abstractions, to take their facts in restricted predigested doses and to keep their distance from the new techniques and concepts of economics, social science, management and the like... I would concede that the American Lawyers are somewhat less traditional than those of most other countries. But would you not agree that the great bulk of law school graduates, in this country as elsewhere, manifest an intellectual provincialism that hardly qualifies them to deal with the kind of world I have referred to?"

Round Table of the Whole, supra note 37, at 159.

In a tax reform context the late Louis Eisenstein has suggested:

[The tax bar does not bring any special wisdom to the problem of dispensations. Neither the issues nor the solutions lie within its peculiar intellectual province. What unusual insight can the tax bar contribute to such matters as percentage depletion or the credit for dividends? On such questions, as well as others, the tax lawyers can hardly purport to speak as experts, for the questions involved are issues in economic and political policy."


42 Miller, Revising The Torts Course, 21 U. MIAMI L. Rev. 558, 561 (1967).


44 Schachter, supra note 37, at 160.
and skills to enable them to transmit new knowledge effectively to the public. For such teachers, policy science is simply a description of present day legal educational processes.

It may be that it is this sameness-in-kind of intellectual tasks performed by the practicing lawyer and the policy maker that lies at the heart of the difficulty in implementing the changes often called for by the most ardent proponents of policy science. Such calls underscore the fact that policy science remains largely at the theoretical level in legal education today, and that, at best, we are only on the threshold of its implementation. A decade ago I suggested that policy training in federal taxation would be promoted by making available to teachers and students a collection of relevant non-legal materials. I also suggested that progress in policy training in this respect promises to be evolutionary in nature and based on existing curriculum categories, rather than on changes brought about by the faculty group process. While I am now less certain of the usefulness of a collection of non-legal materials for use in teaching taxation, I see no reason to anticipate that changes in this area in the decades ahead will proceed on any different premise. I find myself in agreement with Professor Gelhorn who has pointed out that changes in the past were not brought about by faculty political processes, but "were produced by the internal combustion of the professor in charge of the course, who, consulting his own notions of what was timely or, at any rate, what interested him, went ahead and changed the curriculum." 47

The question remains: what are the prospects of change being effected in this area in the decades ahead by the "internal combustion" of the professor in charge of the tax courses? Given the need for lawyers attuned to the public need for information on the policy issues of federal income taxation, and skilled in the handling and relating of relevant knowledge from other disciplines and in modern scientific methods, is there any hope at all that tax teachers will be making a more significant contribution in this respect in the decades ahead? Is there any hope that as new wine is poured into the old bottles—a continuing process in federal taxation—it will contain a significant portion of the economic and political factors that bear on the formulation of federal income tax policy?

Measured by the progress that has been made in the past in this area, there is no reason to believe that much progress will be made in the decades ahead. Apart from a scattering of tax policy seminars, there is little evidence that a concentrated effort has been made to

43 Wirtz, supra note 37, at 150.
provide training in the tax courses in the handling of materials other
than the Code, Regulations and cases, the traditional materials of tax
document and tax planning. The tax teacher struggling for a broader
recognition for his subject and trying to cope with a dynamic tax rule-
making process may feel that it is asking too much to expect him to
set himself to the arduous task of learning not only the concepts,
document and means of communication of the accountant, economist and
political scientist, but also the means of communicating these unfamiliar
matters to his students. To do so is to ask him not only to work
effectively as a teacher in the discipline in which he has been trained,
but also to retool himself as a not-too-well defined type of policy trainer.
Can an adequate response reasonably be expected? It is submitted
that more than a dedication to legal education and a faith in policy
science will be required to call forth, on any wide-spread basis, tax
teachers effectively trained for this purpose.

Whether this task could be accomplished by formal subsidized
graduate training, I do not know. In any event, I am not aware of
any concentrated or organized effort to provide graduate school train-
ing for future law teachers in the socio-economic skills which apparently
are needed for teaching and research in policy science.

On the other hand, the logic of providing training for policy-
making in private and public affairs remains unassailable, and I am
convinced that some tax teachers will continue the search for ways
and means. The outlook with respect to the interrelated tasks of
teaching and research may not be hopeless. The tax teacher in many
schools has sufficient elbow room within the confines of eight to ten
credit hours of federal taxation to begin to think in terms of quality.
In so doing he may find that much material, including the annual
outpourings of Congress, the courts and the Revenue Service may
be handled in some measure by programmed instruction or by text
assignments, for which works such as Bittker and Eustice are ad-
mirably suited. It is, of course, self-evident that the technical rules
must be covered and learned in some manner. Policy training designed
to lead to reformulation of legal rules would be a shallow thing indeed
without a working knowledge of the rules which are being questioned.
For the purpose of examining the subchapter C rules in an operational

48 See, e.g., Llewellyn, The Work of Law Schools In Relation to Scholarship,
49 But see Report of the Joint Committee on Political Science and Adminis-
trative Law, 1966 PROCEEDINGS ASS'N AM. LAW SCHOOLS, pt. 1, at 163, 164, where
it is recorded that the "Association is considering the sponsorship of a proposal by Professor Joel Grossman of the University of Wisconsin to offer a summer
program to train second and third year law students in the methods of interdisciplinary
research." See also the summer program of Social Science Methods in Legal Edu-
cation Institute (SSMILE) which is co-sponsored by the Association of American
Law Schools and the Law and Society Association. This program provided a four
week training in 1967 at the University of Denver College of Law in socio-legal
methodology to a limited number of law teachers and will be repeated in 1968 for
eighteen teachers.
context, I know of no source where they are expounded so succinctly than in Bittker and Eustice. With such a work available, a consideration of the relevant economic and political data or factors with respect to reform proposals may be subject to analysis shorn of abstractions.

As regards a *modus operandi*, it may be discovered that, as the problem method is further developed, it will be found a useful means by which relevant policy material may be integrated with tax doctrine.

Finally—and this may well constitute the key to sustained and substantial progress—in his search for useable materials, the tax teacher may discover that the materials he wants will have to be produced by himself. If this discovery leads to research efforts, difficult as they may be,\(^5\) to move beyond the confines of present tax law and into the realm of what tax law ought to be in terms of all relevant values in a democratic society, the future of tax training in law school curricula is indeed a future with promise for the community interest in fiscal affairs.\(^6\)


\(^6\) Professor Bittker, in a critique of a variety of federal income tax reform proposals, has posed the problem here with respect to loopholes, preferences and concessions, concluding that the challenge of tax reform is such "that we cannot avoid an examination of each one on its merits in a discouragingly inconclusive process..." Bittker, A "Comprehensive Tax Base" As A Goal of Income Tax Reform, 80 Harv. L. Rev. 925, 982 (1967).