View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Kentucky

Kentucky Law Journal

Volume 51 | Issue 2 Article 1

1962

The Gray Fleece of the Crimson Catt: A Primer of Tax Nonsense

John Batt
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Taxation-Federal Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Batt, John (1962) "The Gray Fleece of the Crimson Catt: A Primer of Tax Nonsense," *Kentucky Law Journal*: Vol. 51 : Iss. 2 , Article 1.
Available at: https://uknowledge.uky.edu/klj/vol51/iss2/1

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

The Gray Fleece of the Crimson Catt: A Primer of Tax Nonsense

By JOHN BATT*

I. NONSENSE AND INNOCENSE

Nonsense is an important thing. It is all around us; a stanza from "Jabberwocky" by Lewis Carroll illustrates:

> *Twas brillig, and the slithy toves*
> *Did gyre and gimble in the wabe:*
> *All mimsy were the borogroves,*
> *And the mome raths outgabe.*[1]

Now this is poetry and a special sample, and its meaning is apparent—it is nonsense. This we know, and nonsense we can expect from Lewis Carroll, poets of "The Absurd," "New Wave" writers, Dali, and certain psychotics. But affairs of government and money are not nonsense it seems—but seems is not certainly so.

This paper is about seeming not being certainly so. I describe what I label the nonsense of federal taxation, that is, certain of those notions related to federal taxation that are factually absurd. Despite their absurd natures these ideas are widely held by the public, and by a fat cluster of those who are masters of the legal science. To condemn all those who hold these notions is pompous error, for they receive these notions as parts of a pre-structured political credo. Being busy men, they must live on faith in many matters, and, of course, the words of the Wise are often overwhelming. I suggest that these bits of buncombe have the longevity of robust viruses only because the offer to examine fable alongside of fact is seldom made. I make this invitation. My ultimate purpose is to show that this nonsense helps to preserve tax privileges for a very few but very powerful special interest groups at the expense of over 90% of our tax-

---

* Professor of Law, University of Kentucky.

[1] Carroll, Alice in Wonderland 133 (Pocket Book ed. 1951).

payers. This nonsense also prevents the allocation of American wealth to projects vital to the protection and progress of our nation. Comparing fact with fable in this instance is a practical task—it tells who pays.[2]

II. DISTRIBUTION OF WEALTH AND INCOME

Primary nonsense is nonsense that is more senseless than other nonsense; it is bold and brassy We deal first with a piece of primary nonsense.

A current American idea is that in our country there has been a major redistribution of wealth and income.[3] The poor grow richer and the rich grow poorer. Attached to this idea is the belief that progressive federal taxation has worked in collaboration with other events to bring about this change.[4] Two major cults have bombarded the public with the news of the change in the dished-out shares of our economic pie. Each cult, however, preaches a different creed.

First, there are pleasant apologists who puff the praises of the new people's capitalism where egalitarianism reigns. Second, there are stern patriarchs (David Reisman would call them inner-directed souls) who rue the ruin of the "American Way of Life," this way of life being characterized for them by the components of the agrarian myth.[5] They argue that yeoman integrity, frontier individualism, the characteristics of thrift, common morality, and all things beautiful and true have been destroyed or are in jeopardy of destruction because of this unnatural change in our way of life. It is these advocates of the strength of the strong and the victory of the fit who stress the part of federal taxation in altering the distribution of wealth and income. The pleasant apologists while pulpiting the wonders

---

[2] This nonsense perpetuates old tax loopholes and aids in the legislation of new privileges. Randolph Paul, an outstanding writer on taxation, has stated that loopholes mean little until one s gross income is a great deal over $25,000 a year. R. Paul, Taxation in the United States 678 (1954). For added information on tax provisions for special interests see Cary, *Pressure Groups and the Revenue Code*, 68 Harv. L. Rev. 745 (1955).

[3] Popular periodicals and business sources make this point with a frequency akin to that of the exhaling aspect of the human breathing cycle.

[4] Technological progress, specialization of functions, effective distribution arrangements, government regulation of monopoly power, the rise of the "corporate conscience" etc. are a sample of the "other factors."

[5] Hofstader, The Age of Reform 23 (Vintage ed. 1960).

of change speak softly about taxation for they apparently approve of things as they are. As astute reformers, it may be that they prefer the silent dog-paddle to the more splashingly energetic but noisier and thus less politically effective crawl stroke.

We examine briefly the styles of talk of the apologists and patriachs, and then move on to an analysis of words positioned next to facts.

For the apologists: John Galbraith tells of the "affluent society" and David Lilienthal finds, "the physical benefits of our society distributed widely to almost everyone, with scant regard to status, class, or the origin of the individual"[6] David Reisman and Adolf A. Berle, Jr. have also helped to support the current illusion. Along with a number of journalists, these men have been the balladiers of the pleasant society—a society where all class lines melt and Harlan County, Kentucky, comes to Park Avenue.

On the other side of the barricade stand our stern patriarchs: the defenders of the "American Way of Life" They are generally displeased with the new state of the nation, especially with the state of federal income taxation, and from frequency of outcry, tell us that the income tax has put us on the "road to serfdom"[7] and that the tax has manacled us to "Big Brother."[8] And if we are not on the road, or manacled to Big Brother, we are fighting in the gutters of cities—because the tax has kindled a Marxian "class war."[9] If we are in none of the painful postures just mentioned, we have certainly lost our "natural rights," and "private property" has been sold for a mess of pablum. When it comes to comment from this quarter, the following is the calmest statement available:

> The graduated tax is a confiscatory tax. Its effect, and to a large extent, its aim, is to bring down all men to a common level.[10]

Now, no one can doubt that a progressive tax is a class tax. Our progressive tax came out of conflict between populist

[6] Lilienthal, Big Business: A New Era 202 (1953).
[7] This thesis is propounded in Chodorov, The Income Tax: Root of All Evil (1954).
[8] *Ibid.*
[9] Pettengill, *The History of a Prophecy: Class War and the Income Tax*, 473 A.B.A.J. 39 (1953).
[10] Goldwater, Conscience of a Conservative 64 (Victor ed. 1961).

elements and industrial control factions.[11] The theory of progressive taxation is that the rich should pay more than the poor. Theoretically, the concept of ability to pay controls. However, I am not concerned with the theory; I think we need to know what has actually happened. Do the terms used by the pleasant apologists and the stern patriarchs relate to the facts of our economic life? Our axial question is: to what extent has there been a redistribution of wealth and income in the United States? For if there has been none, neither blame nor praise can be placed on the federal taxing process.

Those people who most loudly publicize the change in the distribution pattern of wealth suggest one basic indicator as establishing the truth of their claim. This indicator is the wide public dispersion of stock-ownership. I consider this element of proof.

From many megaphones we hear it proclaimed that the people of America own the productive assets of our society. Stock-ownership by The Mass has supposedly brought on a peaceful "socialization of the means of production."[12] With support from even non-partisan cheering sections, is it strange that American Big Business speaks of the new socialism with pride? Roger Blough, chairman of the board of U. S. Steel, has told us of the new rule with calm dignity. General Electric, with just a word in about better things for better living, tells us the same.[13] Standard Oil trots out Karl Marx to make the point. Propaganda makes strange comrades. In a recent pamphlet, Standard says: "Karl Marx's prophecy has been realized. . . ." It is so that the "people own the tools of production. . . ."[14]

The fact is that "people's capitalism" is an illusion. The data on stock ownership follows. In 1927, 4-6 million individuals owned stock. Our population was then 119 million; this means that 3.4-5% of the population had an ownership share in United

[11] For the history of progressive taxation in the United States see A. Paul, Conservative Crisis and The Rule of Law 185 (1960); R. Paul, *op. cit. supra* note 2, at 714.

[12] R. Ross & van den Hoag, The Fabric of Society: An Introduction to the Social Sciences 393 (1957).

[13] A random run through a month's output of either the Wall Street Journal or The New York Times will add DuPont, AT & T, and many others to the list of adherents to the General Electric theory.

[14] Undated pamphlet, in the author's files, published by the Standard Oil Co.

States corporations.[15] By 1937 we had 8-9 million individual stockholders and a population of 129 million.[16] Thus 6-7% of our population owned stock. But in 1958, only 5.1% of our population owned stock or only 8,630,000 people out of 168 million.[17] Gregory Kolko of Harvard University has said that in 1959 there was a rise in stock ownership and that in that year 7% of all Americans owned stock.[18] I would estimate that since the early 1962 market slide, we are below the 1959 figure. Even if we accept Kolko's figure, we see that there is a heavy concentration of ownership within a small part of our population.[19] No great change has come about since the late 1920's.

Concentration of ownership is even heavier than the above figures show Robert Lampman, chairman of the Economics Department of the University of Wisconsin, is the author of a recent myth-mashing study [20] This 1962 work, brought out under the seal of the impartial National Bureau of Economic Research, shows that within the small minority owning stock, a still smaller group owns the bulk of these shares. Lampman finds that 1% of the adult population in the United States owns 76% of all corporate stock.[21] In 1922, this 1% owned only 61.5%.[22] Ownership is more concentrated now than it was in the days of the Old Order. But even this 1% must be considered as having an even more elite nucleus within its membership. Dividend plums go, in the main, to a limited elite of 1/10 of 1%. I know of no recent calculation of the percentage of dividends received by this elite; however, a 1949 figure is interesting.[23] One hundred sixty-five thousand people received 42% of all corporate dividends

---

[15] Berle & Means, The Modern Corporation and Private Property 374 (1932).

[16] Senate Temporary National Economic Committee, *The Distribution of Ownership in the 200 Largest Nonfinancial Corporations*, Monograph No. 29, 76th Cong., 3d Sess. 168 (1940) [hereinafter referred to as T.N.E.C. Monograph No. 29].

[17] President's Economic Report 112 (Jan. 1957).

[18] Kolko, Wealth and Power in America 51 (1962).

[19] Every major study of stock ownership done since the 1930's has demonstrated the existence of this heavy concentration of ownership to be fact. *E.g.*, Kimmel, Share Ownership in the United States (1952); T.N.E.C. Monograph No. 29; Survey Research Center, Stock Ownership Among American Families (Dec. 1960).

[20] Lampman, The Share of Top Wealth-Holders in National Wealth (1962).

[21] *Id.* at 209.

[22] *Ibid.*

[23] See Mills, The Power Elite 121 (Oxford ed. 1959). Mill's figures are based on the United States Statistics of Income for 1949.

in that year, and the minimum income of these people was $30,000. Only 13% of all 1949 corporate dividends went to people with incomes of less than $5,000.

Deeper analysis indicated with emphasis the disparity between the fact of stock-ownership and the claim. It may be more graphic to view the matter in another way The following table shows ownership by occupation. This table is taken from J. A. Livingston s "The American Stockholder", Livingston's table is based on a Brookings Institute Study[24]

Occupation Group	*% of Occupation Group Owning Stock*
Executives	44.8%
Supervisors	19.4
Professional Persons	12.8
Salesmen (a)	11.2
Merchants	10.6
Clerical Workers	7.6
Farmers	6.8
Skilled Workers—Foremen	4.4
Public Service Workers	3.4
Semi-skilled Workers	1.4
Unskilled	0.2
Members of Armed Forces (b)	1.1
Retired, Dependents	0.1
Housewives—Nonemployed	6.0
Nonemployed Adults	1.3
Student and Pre-school Age	0.2

(a) For manufacturers and wholesalers
(b) Living in households

Stock-ownership is the norm only in the executive class, and it is a rarity among low status groups. The 1955 Consumer Finance Survey by the U S. Government affirms this assertion and substantially supports the conclusions of the Brookings Institute study[25] This U S. Government study was keyed to spending units, a spending unit being a family or an unmarried individual—the one man family Allocating spending units to job groups, the study found that only 3% of all the units in the unskilled worker group owned any stock. Five hundred to one thousand dollars was the median amount owned by

[24] J. Livingston, The American Stockholder 32 (1958).
[25] Federal Reserve System, *Federal Reserve Bulletin*, Supp. XLI, at 622 Table 19 (June 1955).

the 3%, and on the basis of current dividend payments, they would average about $50 a year in dividend receipts, or about 3 days pay The above sums and percentages also applied to skilled and semi-skilled groups. Only 9% of the units in the clerical and sales groups held stock and the median holding was $1000. This study also concluded that wage earners owned only 0.3% of all stock and in dollar value their holdings were worth $750,000,000. *In 1956, the Mellon and Rockefeller families each owned stock valued at over $3,000,000,000.*[26] *The Duponts alone owned stock worth more than $4,000,000,000.*[27] Taking the Duponts alone, we see that the value of their stock is 5 times the value of the stock owned by all wage earners.

By the measure of stock-ownership, it is clear that there has been no real redistribution of wealth. Other measures push us to the same conclusion. The Lampman study shows that 1% of the adult population holds 26% of *all* personal wealth.[28] This 1% owns almost all of the state and local government bonds and between 10% and 30% of all other varieties of personal wealth.[29] In 1949, this 1% held 20.8% of the personal wealth, and, by 1956, their share had increased by 5.2% to 26%.[30] In 1933, this group held 28.3% of the personal wealth.[31] There has not been much change despite the often bemoaned Roosevelt "revolution."

In addition, there is empirical proof that:

> A radically unequal distribution of income has been characteristic of the American social structure since at least 1910, and despite minor year-to-year fluctuations no significant trend toward income equalization has appeared.[32]

This is the conclusion reached by Professor Gregory Kolko of Harvard University in his recently released study Kolko treated "the nation's population as an aggregate of families and unat-

[26] See Perlo, The Empire of High Finance 45, Table I (1957), on the holdings of these families. For further confirmation see LVI Fortune Magazine 77 (Nov. 1957). To see that things are about the same as they were in 1937 see T.N.E.C. Monograph 29, at 116 Table 6.

[27] *Ibid.*

[28] Lampman, *op. cit. supra* note 20, at 192.

[29] *Id.* at 23-24.

[30] *Id.* at 24.

[31] *Ibid.*

[32] Kolko, *op. cit. supra* note 18, at 13. Kolko's data is based on material contained in the files of the Board of Governors of the United States Federal Reserve System and on material furnished by the National Industrial Conference Board.

tached individuals ranked according to the size of their income." This aggregate was divided into ten groups with each group made up of the same number of families and unattached individuals. Each group is called an income tenth. Kolko applied this procedure to all years from 1910-1959. He finds the income share of the top richest tenth to be in 1959 only a little less than it was in 1910. The only important gains in income were made by the second and third richest income tenth; all other tenths kept about the same share with one exception. The two poorest tenths actually had a *smaller* share of income in 1959 than they did in 1910.[33]

Leon Keyserling, former chairman of the President's Council of Economic Advisors, in a recent pamphlet, *Poverty and Deprivation in the United States*,[34] fills out the picture of the affluent society a little more. Keyserling finds that 77,000,000 Americans are living in states of poverty or economic deprivation. As a norm of income, Keyserling posits $4,000; this sum is the minimum needed to decently support a multiple person family Keyserling's standard of $4,000 is much more realistic than the minimum figure of $1,000 that John Galbraith speaks of in the "Affluent Society" when he tells us that poverty is an "afterthought" in America. The National Bureau of Labor Statistics supports Keyserling's minimum as being correct and also his position on the extent of poverty and deprivation in America.[35]

Bureau of Labor Statistics for 1959 showed that in 20 large cities, the average income required to meet the basic standard of living was $6,084 (before taxes) for a family of 4.[36] 55.6% of all incomes in the United States fall below this figure.[37] This proves nothing directly as to the state of poverty, but does show that most Americans are not living the regal life bleated about by academics who know nothing of America's New Wilderness. Although real incomes have increased and the standard of living is better for many people, there *are* great distances between income classes and in America there are a great number of truly poor people.

[33] This information in this paragraph comes from Kolko, *op. cit. supra* note 18, at 14.
[34] Published by Conference on Economic Progress, Washington, D.C. (1962).
[35] See Kolko, *op cit. supra* note 18, at 158 n.15.
[36] Kolko, *op. cit. supra* note 18, at 158 n.15.
[37] *Ibid.*

The charge that federal taxation has been an important factor in altering the distribution of wealth in America is absolutely false. This is a simple affair of logic. Since there has been no real change in the pattern of distribution of wealth, or that of income, federal taxation could not have been of any importance. In sum: the progressive tax class war has been a very tepid revolution, its only heat derived from the motion of violently agitated symbols and signs. Where there is much heat, there is often no light.

We step now to our second dragon. It is sibling to the distribution of wealth matter.

III. THE FOLK MYTH OF PROGRESSION

A major myth propounded by the critics of the "leveled society" is that we have a heavily progressive income tax. We do not. Our "confiscatory tax" is unreasonable only in print. The expanding rate which appears to mushroom like some gangrenous gas from 20% to 91% is misleading. Randolph Paul once said that, "The bark of our individual income tax is worse than its bite."[38] Trite is true. Congressional concern with the welfare of specific interests has crumbled the progressive rate and the bracket bricks have plunked heavily on the heads of the middle and lower income groups.

Professor Richard Musgrave, a Johns Hopkins University economist working with "Statistics of Individual Income" for 1956, provides us with several interesting insights.[39] Income-splitting by married persons, long-term capital gains treatment, percentage depletion, and other varieties of Congress-legislated avoidance have abraded the progressive rate until a mighty mount is now a knoll. Musgrave shows that individuals with incomes over $1,000,000 pay an actual tax on gross income of only 24%.[40] Individuals with incomes between $50,000 and $100,000 pay an actual tax on a gross income of 28%.[41] On incomes between $20,000 and $25,000 the actual tax paid is

---

[38] *Erosion of the Tax Base and Rate Structure,* 11 Tax L. Rev. 203, 204 (1956).

[39] See Musgrave, *How Progressive Is the Income Tax,* House Comm. on Ways and Means, 86th Cong., 1st Sess., Tax Revision Compendium: Compendium of Papers on Broadening the Tax Base, vol. 3, at 2223 (Comm. Print 1959) [Hereinafter referred to as Tax Revision Compendium].

[40] Id. at 2226, Table 2, plan 3, col. 1.

[41] *Ibid.*

23%, only 1% less than those earning over a million pay[42] Compare these actual tax-paid percentages with the average scheduled rates.

Musgrave's work refutes the current sophism of those who see the progressive rate as the carcinoma of the age. He verifies what the Harvard Business Study found to be fact in 1953.

> By far the most striking and significant (feature of our tax system) is the large excess of theoretical over actual rates. [43]

A tax that began as a class tax has been refined into a mass levy Two years before Pearl Harbor only about 4,000,000 people paid income taxes.[44] Today 46,000,000 individuals' ransoms the general coffers fill.[45] 1960 was a year in which these 46,000,000 taxpayers paid up $41,000,000,000.[46] The flat rate of 20% brought in 86% of this amount; only 14% came from the pathetically unprogressive "progressive" rates.[47] The "assault on capital" is a myth. But, like the songs our mothers taught us, this melody of progression is very hard to forget.

Having marked down with emphasis the vaporous quality of the argument that we have a progressive income tax, we move on to specific areas relevant to our information on progressivity My aim in lightly autopsying the several subjects discussed in the pages that follow is twofold. First, to show what special tax treatments have led to the undoing of progression; second, to examine other items of verbal nonsense as they relate to the specific topics.

A. *Two Hearts, One Love—Joint Return*

Polygamists benefit from income splitting no more than monogamists. Morally, this may be as things should be. However, to argue that three wives cost more than one and should entitle one to unusual tax relief fits readily into the rationale of those who defend the cutting of income into two taxable parts. But then, rationale in this territory has never sounded as convincing as Mark Antony in oration. Yet, if a battery of pollsters

---

[42] *Ibid.*
[43] Butters, Thompson & Bollinger, Investments by Individuals 85 (1953).
[44] Eisenstein, The Ideologies of Taxation 56 (1961).
[45] *Ibid.*
[46] *Ibid.*
[47] *Ibid.*

were to interview the man-behind-the Daily Mirror and most behind-the New York Times, they would learn that income-splitting, along with the $600 exemptions, make up the only moral aspects of our tax law Everyman smiles on income splitting, but, to twist the words in Antony's mouth, "Good friends, sweet friends, let me stir you up. "[48]

Senate debate on the 1948 tax bill which brought us this angel for Everyman is a good point of anabasis. Senator Kerr celebrated the split-income provision's benevolence by arguing that it was legally available to all married men and women.[49] This he said was enough. Senator Humphrey thought this, "something like the equality of which Anatole France spoke, when he said that the rich and the poor alike can sleep under a bridge."[50] What exactly did Senator Humphrey mean? Hadn't this congressional angel put the residents of the common law states on a par with the people of community property states? There is usually a "yes" at this point, all make proper bows and a roar of thanks voted. But as usual—in this absurd world—seems is not certainly so.

A brief review of pertinent legal history will make it clear that although the easy answer is accurate, it also serves as felicitous mist for other inequalities. The community property system had its roots in Continental concepts of law and naturally worked its way into the law of states such as California, Texas, Louisiana, and those others with a Continental heritage. Eventually, this natural development came to work some unnatural results in terms of taxation. Prior to the 1948 income-splitting provision, common law state husbands and community property husbands earning equal incomes had very different tax bills. Assume in 1947 both earned $30,000 in income. The husband in the common law state paid $11,970 in federal income tax, while the community property state husband paid only $8,541. The difference was the result of the buffering of progression by the community property concept. The married man in the common law state paid at the progressive rate on an income of $30,000. In the community property state, the $30,000 income was split into two $15,000 units—one unit was considered the

[48] Shakespeare, Julius Caesar 60 (Pocket Book ed. 1958).
[49] R. Paul, *op. cit. supra* note 2, at 612.
[50] *Ibid.*

husband's; the other, the wife's. This was so, as each spouse under community property theory is held to be the one-half owner of income received. The sum of the taxes on these two $15,000 units was less than the tax on the single sum of $30,000. The United States Supreme Court recognized the community property wife's separate ownership, although, in fact, a community property husband had approximately the same degree of suzerainty over the property as a common law husband.[51]

Inequality created a mazy problem for inequality was beginning and end. Non-community property states began to pass laws so that their residents would receive the preferred tax treatment, and, not to be outdone, artful practitioners devised ways by which income could be split between husband and wife. All gambits added up to a loss in revenue and to major administrative and enforcement migraines for the Treasury Congressional action in the form of the income-splitting provision prevented the migraines, but cost the United States several billion dollars in revenue. As for the equity in the provision—it was highly selective; the Treasury estimated that only 22% of all taxpayers benefited from the income-split.[52] Of all benefits from the split, 97½% went to people with 1947 incomes of over $5000.[53] It was admitted in the Senate debate of 1947 that real benefits began at an income of $10,000.[54] In 1957 the situation was about the same: 70% of joint returns filed received no benefit from income splitting.[55]

In 1942, the Treasury, following President Roosevelt's lead, had tried to dam up this revenue loss. The Treasury had planned a system of mandatory joint returns. Income of husbands and wives living together would have been required to be reported on one return and the tax computed on a single income. This proposal had support in the House Ways and Means Committee, or, at least, there was a great deal of opposition to community property privilege. But strange are the ways of House Committees. Randolph Paul has said that a proposal contrary to the interest of the community property states was

---

[51] Poe v. Seaborn, 282 U.S. 101 (1930).
[52] Blough, The Federal Taxing Process 320 (1952).
[53] *Ibid.*
[54] R. Paul, *op. cit. supra* note 2, at 612.
[55] Kolko, *op. cit supra* note 18, at 36.

about to be adopted, but "the community property states arranged a deal to vote in favor of a 45% corporate rate if those favoring the rate would vote against the community property proposal. The Community property privilege remained undisturbed."[56] Politics prevailed. This was a perfect way out. Community property married people were happy; they had what they had had. The married in common law states were also pleased for now they had equal justice under the law Yet, as always, justice was not perfect. But what can one expect of a blind woman in a night-gown? And so income-splitting was born and Orpheus descends.

Income-splitting, courtesan that she is, is maintained by public ignorance and by specious theory building. Critics of proposals for reform analagous to the 1942 Treasury position argue in this way·

> it seems appropriate to say quite bluntly that it is hard to imagine a more inequitable, immoral and antisocial tax proposal. Its adoption would have imposed an annual progressive tax on the maintenance of the legal state of marriage.[57]

The quoted authority relates that in England joint returns are required, and the income as a single unit is taxed according to the progressive rate. Our authority says that one often hears that so-and-so can not be married because of the tax, and this is bad as these people are always "pleasant and respectable." Then leaping all logical middles, our authority concludes that if the reform were brought off in the United States, some states would grant a divorce on the ground that sound family fiscal management was impaired by the tax law This argument I place with those others that belong in the catacombs of jocular jurisprudence. At the time when the mandatory joint return was being debated in Congress, those ambling along similar paths of thought argued that a joint return would destroy a woman's new-won individual rights or would wreck the marriage relationship. This appeal to unreason, however, gains adherents. But this variety of analysis does not bring within our ken the facts that are relevant to the question of an equitable provision. The Brandeis method of arithmetic is much more useful.

---

[56] R. Paul, Taxation in the United States 302 (1954).
[57] Smith, Tax Reform 44 (1961).

When one cedes the hope of the 1942 Treasury suggestion becoming law and with it bringing maximum revenues, he turns to other matters in hope of giving an equitable basis in income splitting. Splitting is premised on the assumed fact that equal incomes are not of the same value in different hands. Extra responsibilities may shrink the true value of one's income. Thus, single taxpayers are not treated in the same manner as married taxpayers. This is so even though a brother supports a younger brother and spends as much on the boy as he would on a wife. But there are even stranger things in this house of mad mirrors. For instance, single persons and married persons with incomes under $2,000 pay the same tax.[58] If you earn under $2,000, your wife does not cost you anything. This is astounding information! Would our previously cited authority suggest that this inequality contributes to the immorality of the poor? Do they philander rather than marry, as a wife won't help their tax position? Even allowing for some extra costs for the spouse, the single taxpayer can make a rocky argument against the equity of the present arrangement. On an income of $15,000, a single person pays $4,730, while a married couple pays $3,620.[59] At $24,000, the single taxpayer pays $9,560; the married couple pays $6,800.[60] At $30,000, the single taxpayers pays $13,220; the married couple, $9,460.[61] At $100,000, the single taxpayer pays $67,320; the married couple, $53,640.[62] I can suggest that the incongruity revealed above has no empirical justification. Income-splitting, when melded with progression, yields surrealism. We move on to Dada.

Mystics who continue to support income-splitting ignore the existence of the single taxpayer and press like Gunga Din to the shrine. Their shrine is equality among married taxpayers. Recall Senator Kerr's statement that income-splitting is available to all married taxpayers? This is so but it is not to the point. We need to know how available it is to different taxpayers. For how compare the poor man's pennies to the rich man's green bills?

Having a wife when one's income is under $2,000 means

---

[58] Pichman, *Income Splitting*, Tax Revision Compendium, vol. 1, at 477.
[59] *Ibid.*
[60] *Ibid.*
[61] *Ibid.*
[62] *Ibid.*

nothing in terms of one's tax position—you save nothing. You are treated as a single person, your incomes are equal, and the law says you have no more responsibilities. At $5,000, a married couple saves $80.[63] At $10,000, the couple saves $440.[64] At $20,000, $1,980 is saved by the couple. At $30,000, the couple keeps $3,760.[65] And at $200,000, the couple keeps $22,180.[66] So, at $2,000, the darling wife is tax-wise worth $0, but at $200,000, she is worth $22,180.

Giddy as the sometime fortunes of the stock market are these climbs in wife value. Shaw might have quipped of constancy and punned it to constancy of value and surely humor would be a proper Freudian response to these embarrassing facts. How Congress divined the values is beyond all but the seers. How much a wife costs may have been answered in Reno, but I think the Congress has hardly slept on the matter. But I can say that the bulk of the benefits of this provision do go to those married couples with high incomes. This benefit costs over $4,000,000,000 a year in tax revenue.[67] Again, we see that the supporting theories for this *de facto* preference are but a bastioning of the status quo.

B. *The Virtues and the Graces and the Capital Gains*

Income splitting is surrounded by no trou-de-loup of ideology; it lives rather by its aura of equity—a cross on the breast of the White Knight. But when we enter the world of incentive, we see apology is again with us. In this symphony of pure noise, we are searching for the chords of clarity The aim is to test the legitimacy of the claims of those who receive preferential treatment. We begin with a look at capital gains, move to the domain of the oil depletion allowance and finish up in the executive suite. This is something of a select tour of the many circles of the subdivision of preference.

The concept of capital gains is in many metaphysical ways linked to the "American Way of Life." The almost mystic emanation from the Excalibur of capital gains is part of our

---

63 *Ibid.*
64 *Ibid.*
65 *Ibid.*
66 *Ibid.*
67 *Ibid.*

defense against the dragons: "Foreign Agression," "Domestic Depression," and the destruction of "Small Business." Special consideration of capital gains is "incentive" for the great American "risk taker" who must be induced to invest in bold frontier enterprises, especially those of small business. He must be rewarded for saving the rest of us from economic ruin. A low capital gains tax insures that our risk-taker is not "locked into" any dried-out apricot such as IBM, GM or U S. Steel. He must be free to move his money, to bet on some new enterprise, or to support young enterprisers of vision. If the tax is so high that the risk-taker will lose more because of taxes if he liquidates his "seasoned securities" than he can make in a new venture, he will stand pat. If we place a normal tax on these venturers, we will be "killing the golden-egg geese." This is the theosophy

There are valid reasons why certain types of income from investments deserve special treatment. A gain might actually accrue over a long period of time; it would be unfair to tax the gain in one year at a progressive rate. This I do not debate. But, our current law with its scant holding period of six months—which theoretically separates speculators from investors—patently exists for other reasons. It is not concerned with true long-term gains. A new capital gains code could be developed and be made to follow a line of economic reason, but I do not attempt to construct one here. I am concerned with abuse and rationale.

First, identification—it is pertinent to know who profits from the capital gains concession. Earlier, we examined the degree of concentration of stock ownership in this country We saw that 76% of all corporate stock is owned by 1% of the adult population. This fact, plus other information, indicates the persons who receive the major benefits from capital gains treatment. Four-fifths of all capital gains are realized from the sale of securities,[68] and this means that this 1% holding 76% of the stock receives a nice share of the income taxed at a maximum of 25%.

The receivers of capital gains income are readily culled from the ruck. In 1956, 218 taxpayers filed returns showing incomes of $1,000,000 or more.[69] Of these 218, 81% reported capital gains

[68] H. Grover, *Taxation of Capital Gains*, Tax Revision Compendium, vol. 2, at 1193, 1194.

[69] Henke, *Taxes from the Workers Viewpoint*, Tax Revision Compendium, vol. 1, at 119, 137

income. The exclusion of this income from full taxation meant an average tax saving of $1,453,442 for *each* of these taxpayers.[70] Taxpayers with incomes ranging from $50,000-$600,000 also profit heavily from the preference.[71] More than 60% of the returns in this income range showed capital gains income.[72] The average saving per taxpayer was $8,000.[73] As the incomes fall into the lower brackets of affluency, the savings fall off and fewer of the returns report capital gains. Of all returns with incomes of $10,000-$15,000, only 17% reported capital gains and the average tax savings was only $191.[74] At $5,000-$7,000, 4.2% of the returns show capital gains and a saving of $128;[75] and of the returns with incomes of under $3,000, only 2.4% show capital gains the average saving being $81.[76] Providing a concrete case: We see that a worker with a $3,000 income may save a little over a week's pay, while a man with a $1,000,000 incomes saves as much as 500 men earning $3,000 a year actually earn in a year.

Two to three billion dollars in revenue is lost by the royal road of capital gains. Yet, that might be a reasonable price to put down if the benefits of sharp investment in fact "trickled" down to the rest of our population. The apologetes of the ideology of beneficial trickle-down pledge that this two or three billion is well spent and is in fact our Maginot Line standing against the ogres of the economic cycle. Persuasion can be a petty art. And I think it is in this instance—for what the apologetes ask for is wine as well as bread. Their plea is to insecurity; it is made from interest, not altruism, and it is, in sum, a strategy that is a wobbling animated canard. In fact, most capital gains are not taxed at all and in fact there is no evidence to support the risk-taking thesis. The capital gains class does not give to anyone by way of trickle-down. This elite is not locked in—*the others are frozen out.*

Capital gains can be passed on from generation to generation and avoid income taxes. All one need do is sit tight and ride a market boom. Fortunes made of solid (I use this term relatively)

---

70 *Ibid.*
71 *Ibid.*
72 *Ibid.*
73 *Ibid.*
74 *Ibid.*
75 *Ibid.*
76 *Ibid.*

stocks in one of the corporations that make up the various oligopolies, or stock in a successful close corporation can increase in value, pass at death, and never see the federal income tax. Between 1949 and 1955, Wall Street's fat years, stocks on the New York Stock Exchange appreciated over $100,000,000,000 in value.[77] The securities listed on The Exchange were ½ of all securities owned in the United States.[78] The 1956 Statistics of Income show that in the 1949-1955 period, individuals reported only $30,000,000,000 in net capital gains.[79] Corporations reported $9,000,000,000 in net capital gain in this period.[80] *All capital gains reported from all sources were only 40% of the actual gain of stocks on the New York Stock Exchange.* Considering other securities, and gain connected with other property, it could be reasonably estimated that only 1/5 of all capital gains sees the schedules of a tax return.[81] The above facts are fine incentive for any potential risk-taker to stay locked in; no tax is even better than a little tax. Investors are not stuck with an investment—they choose to stay with it.

Assuming some investors do want to shift allegiance, a capital gains tax does not block a move. The Harvard Business Study of 1953 stated that:

> In particular, our data conspicuously fail to provide empirical support for the charge that the capital gains tax impairs the transfer of capital from seasoned securities to new ventures of any significant scale.[82]

Hundreds of active investors were interviewed in the Harvard Study Only one said that "the capital gains taxes keep me from selling some of my holdings and reinvesting in new growing enterprises."[83]

This study is significant evidence and supports my general contention, but it is comparatively conservative. In "Power Without Property,"[84] Adolph A. Berle, Jr., says that, "the habits of the (individual) investor are chiefly fixed in a direction quite opposite

---

[77] Grover, *op. cit. supra* note 68, at 1194.
[78] *Ibid.*
[79] *Ibid.*
[80] *Ibid.*
[81] *Ibid.*
[82] Butters, Thompson & Bollinger, *op. cit. supra* note 43, at 346.
[83] *Ibid.*
[84] Berle, Power Without Property (1959).

to venture capital."[85] Our top 1% which owns that 76% of our stock is a conservative group; this group's financial advisors are conservative. The loyalty of all of these people is to our established economic institutions. This by itself is significant, but when one sees what is happening in the security market, the apologetes sound even more fatuous. Common stock issues have fallen off greatly In 1960 and 1961, less than $5,000,000,000 worth of new stocks were sold.[86] Most of what was sold was marketed by public utilities and communications companies.[87] Major industrial corporations are doing very little business in the securities market. And, as any freshman economic student knows, small business is virtually barred from the major exchanges and, to put it bluntly, is on its way to becoming non-existent.

In the decade 1947-1959, 60% of all capital used for the expansion of our industrial facility came from internal sources —from company reserves and retained earnings.[88] 20% came from bank credit and another 20% from "outside sources."[89] The United States Department of Commerce indicates that the ratios are presently about the same.[90] Clearly, individual risk-takers do not generate the money dynamic that our corporations use to expand, and we all know that bank credit comes from banks. How much risk-taking by individuals goes on? Who are "outside sources"? Are they individuals? If they are, this 20% might be significant. But, alas, they are not individuals. Insurance companies, pension trusts, and mutual funds are the "outside sources." Our little man is hardly there and he is surely not very significant. Individual investors may invest in "outside sources," but these "outside sources" are not going into risk ventures that help "small business." Their money is not going into portfolios that throw money into bold young enterprises. These "outside interests" are notoriously cautious.

We dramatize the role of the rugged individual man in our society; we build myths about him. Every Jack London against the wind of the Wild. It is fine story telling, but a fantasy that

[85] *Id.* at 34.

[86] Berle, *Modern Functions of the Corporate System,* 62 Colum. L. Rev. 433, 440 (1962).

[87] *Ibid.*

[88] Berle, Power Without Property 42 (1959).

[89] *Ibid.*

[90] Berle, *supra* note 86, at 443, 440.

can result in great inequity and in ultimate injury to our society Individual investors do not take chances. They prefer to stay locked in—and, in truth, who needs them? Our risk-taker is not there. He should not be rewarded for his non-existence.

C. *Oil, Oil Everywhere*

The red ribbon of risk flames among all ideologies built upon the dogma of incentive. The dogma of depletion[91] is no exception, but there are special characteristics of this matter that are especially interesting. Let us probe.

Of all industries, none is so politically entrenched as oil. Oil has friends in both major parties; thus, it is always a Congressional favorite. Our oil depletion allowance is testimony to this truth. Oil has out-ployed steel, aluminum, and other major industries and has the benefits of an unusual tax advantage. Oil depletion is an interesting study as this grace costs us billions in tax revenue and has a well-developed mythology Further, oil depletion deserves special analysis as it is the herb from which issues other evils. Other mineral industries have pointed to oil and in the name of equity claimed a depletion allowance. And they have not even had to build up a rationale. So go the wonders of the tax world.

The mythology of oil depletion consists of two basic tenets: First, the oil business is a very risky enterprise for the independents who are supposedly at the heart of the industry; and second, it is a main line of our national security For these reasons, there should be a special "incentive" for people in this business. To what extent are these tenets truths, half-truths, or just slogans? This mythology (whatever it is worth) is the justification for a statutory depletion allowance of 27½% of gross income.[92] A fictitious illustration will show exactly what this allowance means to an oil producer.[93] Apogee Oil Company spends $1,000,000 for exploration expenses in 1962. Assume that of all holes drilled, only 2 prove productive. The cost of an unproductive exploration and drilling is $600,000 and the cost of two

[91] For the history of the depletion allowance see R. Paul, Taxation for Prosperity 304-07 (1947).

[92] The allowance, however, can never be more than 50% of taxable income.

[93] My illustration is based on an example developed by Professor John A. Menge, *The Role of Taxation in Providing for Depletion of Mineral Reserves*, Tax Revision Compendium, vol. 1, at 967.

productive wells is $400,000. The $600,000 spent for unproductive exploration can be written off as a business expense for 1962. This is a current expense. The $400,000 spent to provide the two productive wells would probably be written off over a ten year period at $40,000 a year and the cost would be recouped at the end of the ten years. Relate these facts to a year's financial picture for Apogee. Assume that Apogee in 1962 earns $1,000,000 in income. From this Apogee can subtract the $600,000 spent on the drilling of the unproductive holes and $40,000 in depreciation related to the two productive wells. This depreciation amount can be taken every year for the next ten years. Also assume that Apogee has expenses of $200,000 related to sales and office costs. Thus, deductions total $840,000 for the year; they are subtracted from a gross income of $1,000,000, and we see that the taxable income is $160,000. At this point, the depletion allowance comes into operation. It is stated as 27½% of gross income but is limited to 50% of taxable income. 27½% of gross income would be $275,000. However, taxable income is only $160,000 and 50% is $80,000. Assume the average productive rate of the two wells is twenty years—the income from the wells would be 20 x $160,000. $3,200,000 would be the total income over this period time, but only $1,600,000 would be taxable. Every year, $80,000 would go tax free and over 20 years that would mean $1.600,000 would not be taxed. This is a ghost cost benefit; it has nothing to do with true costs. The current cost of $600,000 was deducted in 1962, and the $400,000 that is related to the expense in bringing in the productive wells is depreciated over a 10 year period. The depletion allowance plus actual depreciation permits Apogee to, in effect, write off a $400,000 cost at the amount of $2,000,000. This is a sum five times the actual cost of bringing into being the two productive wells. This hypothetical example is akin to what is done by actual oil companies. Every business would be happy to write off all costs several times, but only oil and a few mineral industries are given this advantage.

Oil apologists suggest that "only one exploratory well in nine finds a new field."[94] This quest for oil is a perilous business and "to deny this liberal depletion to the wildcatter and the

[94] This is a statement made by a Humble Oil Co. spokesman in Tax Revision Compendium, vol. 1, at 988.

pioneer simply destroys the historic figure in our economic development and enthrones the Rockefellers and the Mellons."[95] This appeal to pity has little pith in it; rather it is propaganda of a rank kind. It has little to do with the facts; it is another appeal to the salvation of the shade of the little man who is hardly there. All evidence points to the conclusion that the large oil companies take the bulk of the depletion allowances. Corporations "account for 90% of the depletion allowance ..."[96] and in 1954, the last year for which this data is available, 70% of the depletion allowances went to corporations with assets in excess of $1,000,000.[97] The righteous are not always the worthy. Strange things are surely done neath the oily sun by the men who moil for oil; and all in the name of One Rig Sam, the lonely drillin man.

The question of risk must still be considered. 1958 figures in the Oil and Gas Journal, an industry organ, show the risk incident to exploration for oil.[98] The 40 largest oil companies submitted data on successful as opposed to unsuccessful drilling. *The worst record for any company was 96 dry wells and 105 productive wells.* This certainly is not the one of nine or ten the industry talks about. Looking at the records of the five largest oil companies, we see a story of certain success. None of the five companies dropped below a ratio of two successful wells to one unsuccessful well. The number one company had 287 productive wells to only 100 dry; the number two company came in with 1,301 productive wells and had only 239 dry wells. Benefactors of the oil depletion allowance, that is, the large oil companies, are taking no more risks than other American businessmen. Yet, they remain preferred participants in our process of production.

Our second element in the dogma of depletion relates to national defense. Oil is the mainline of our defense, say the oilmen. This is a gross overstatement. It is no more important than steel, aluminum, other metals, electronic equipment, etc., and, of course, not nearly as important as nuclear material. Emphasis on oil has led to a great misallocation of capital. Much

[95] Quoted in Eisenstein, *op. cit. supra* note 44, at 131.
[96] *Ibid.*
[97] *Ibid.*
[98] Menge, *op. cit. supra* note 93, at 975.

of the money put into oil and the great profits ploughed back into it could be better put to use in other ways. Our space program, highway development, defense projects, and other priority items could more effectively use this money than the oil people use it. Oil reserves are at a national high point. We have tariffed foreign oil out of our market to maintain a price that is satisfactory to the industry And yet more money is being pumped into oil and the industry is expanding internally with its profits.

Senator William Proxmire in 1959 presented a comprehensive tax picture of the oil industry[99] Senator Proxmire's statement is heavily documented by reference to Treasury statistics. In 1954, the effective tax rate for corporations was 48%, but the largest 24 oil companies paid only an effective rate of 24%.[100] Humble Oil, a petrol giant, paid only an effective rate of 16.3%.[101] Its net income before taxes was $174.8 million, but it paid only $28.5 million in taxes.[102] Tidewater Oil with a $38,000,000 income paid only $3.5 million in taxes or an effective rate of less than 10%.[103] A few wealthy single operators have made huge profits out of the depletion dispensation; for example, one operator from 1943 to 1947 had a net income of 14.3 million dollars. His tax bill for these years was only $80,000.[104]

There is no incentive for oil money to move into new ventures of significance. Too much can be had by staying put. It is very questionable whether or not we should subsidize an industry that is on the wane. It is even more questionable to do this when tax revenue which justly could be collected, could be spent for projects related to our future, not our past. Oil is no longer the lamp of the world. It is just another light.

D. *The Executive Suite*

It is more blessed to receive than to give. This is an accepted premise in our materialistic culture, where a man's strength is often measured in horsepower and his intelligence by his ability to speak with reassuring resonance in soft syllables to child

99 105 Cong. Rec. 8775 (1959).
100 See charts and information, 105 Cong. Rec. 8786 (1959).
101 *Ibid.*
102 *Ibid.*
103 *Ibid.*
104 *Id.* at 8776.

minds. Measures of worth are in line with guiding principle of the culture. Ours is a culture of facades, manipulations and ploys. Role playing, ascending, and power accumulation are for us prominent values.

Fundamental forms of doing business influence the human being's social existence as much as they provide for economic existence, and the modern corporation has done much to alter the attitudes and styles of life of most Americans. Lines of power in our society are in the main plugged into the giant corporations. They are the dynamos of the new day for—directly and indirectly—they mold and remold our complex culture. From clothing to coffee break, the corporations and their people set the style of life. Mass media communications have permitted their tastes and folklore to permeate as deeply as the coves and valleys where Elizabethan English is only warm-dead. Most literate people recognize this as a truism; further, they know that the giant corporations with millions or billions of dollars worth of assets are stronger politically and economically than many of the political states of the world. It is clear that they are monolithic bureaucratic states; yet, this common knowledge is not used with profit when a man thinks of problems on a close tangent to this common knowing.

Thorstein Veblen once spoke of the intellectual revolution of the standard gauge.[105] Veblen believed that modern technology which emphasizes precision measurement, careful analysis of physical cause and effect, and the skeptical attitude toward "established" truths would bring on a change in the thinking of 20th century man. Industrial man would see through the myths that vested interests constructed to support them against the challenges of emerging social groups. This robust skepticism, he thought, would lead to a society founded upon realistic as opposed to anthropomorphic thinking. Man would find truth in facts; he would experiment and he would reject the unverified. Veblen's belief is still only a hope. Although we have mastered machines, formulae and forces, we still lapse into primitive ways of thinking. Faiths and false hopes run our lives at the same time that we tame nature with science. In some ways we are culturally retarded. At times we are magicians of what George Orwell

[105] Veblen, The Theory of Business Enterprise ch. IX (Mentor Ed. 1958).

called double think, that is, the ability to hold in the mind simultaneously two inconsistent propositions. And while holding these two inconsistent propositions we are apparently free from the anxiety that their inconsistency should generate. We do not realize that they are at war. I argue that much of our thinking about the managers of the corporate bureaucracies is of the double think type. This failure of thought has made it easy for certain corporate managers to maintain a preferred position in terms of taxation. It also permits them to break the vertebrae of proposed tax reforms. To give a concrete quality to this thesis I first pose a particular tax problem: the restricted stock option.

A corporation may give an employee the option to purchase the corporation's stock at 95% of the market value of the stock at the time of option. This option right may be granted so that the option will survive for several years; the hope is that the market value of the stock will increase. And from early in the 1950's that is what major stocks did. This option permits the employee (who almost always turns out to be a manager) to sit tight and watch the market move. If the market goes down, he does not exercise the option; but if it goes up, he exercises the option. After the stock has gone up in value the optionee may exercise his option, but at this point he is not held to have any taxable income. An illustration will make this clear. In 1957 "A" was granted an option on 500 shares at 95% of market value; the current market value was $100 per share. The market value of the stock goes up to $200 by 1960. At this point "A" exercises his option; of course, he only pays $95 for each share of stock. When he exercises the option he is by law held not to have taxable income, although he makes a bargain buy, in fact, making $105. At this point he is free to sell his shares on the open market and receive the full market price. If he does he will pay taxes at the ordinary scheduled rates. But if he holds the stock for 6 months and then sells he pays a tax at the capital gains rate. This short 6 month holding period has turned the stock option into a sweet device for compensating executives by saving them the pain of normal taxation. It is a perfect mechanism as long as the Big Board is lusty and strong and the Big Board has been that way for most of the 1950's and the 1960's.

The executives of major corporations are well compensated by way of salary In 1958 the median income for the highest paid was almost $74,000.[106] Some of the highest paid receive huge salaries.[107] For example: in 1956 Bethlehem Steel paid Eugene Grace $809,000; in the same year General Motors paid Harlow Curtice $573,000, and in 1954 DuPont paid Crawford Greenwalt $501,293. Compare these with the President of the United States who receives $100,000 and U S. Supreme Court Justices who are paid $35,000. But it is not by salary that the top executives become millionaires. U.S. News & World Report shows that the stock option has much to do with the making of the millionaire. In 1955 that magazine stated that, "In the past 5 years these options have produced a whole new crop of millionaires."[108]

Stock options have truly been bonanza for many top executives. In 1955 the Wall St. Journal reported that CBS president Frank Stanton had made $4,500,000 by the stock option avenue.[109] General Dynamics executives have made nice fortunes this way; for instance, the late John Jay Hopkins.[110] In 1956 Mr. Hopkins exercised old options which had been granted at $14.05 per share; at the time he exercised his options the market price was $40.71. His profit was about $1,190,000 and taxed at the capital gains rate. These are but a few examples pulled from the ranks of the many By 1957, 77% of all manufacturing corporations listed on the N.Y. Stock Exchange and the American Stock Exchange had option plans.[111] Only 13 of the largest 100 industrial corporations did not have option plans. Large blocks of stock are being continually reserved for executives' option plans. As of 1960 Inland Steel had assigned 11% of its outstanding voting stock to option plans.[112] In 1960 the Ford Motor Co. set aside 6.7% of its stock for option plans.[113]

This new method of compensation is naturally supported by a developed rationale. As usual the rationale is nonsense in the glow of current facts. The defenders of the stock option see it

---

[106] *1,700 Top Executives*, Fortune, Nov. 1959, p. 138.
[107] J. Livingston, The American Stockholder 222-23 (1958).
[108] Quoted by Kolko, Wealth and Power in America 42 (1962).
[109] J. Livingston, *op. cit supra* note 107, at 228.
[110] *Ibid.*
[111] Kolko, *op. cit. supra* note 108, at 66.
[112] *Ibid.*
[113] *Ibid.*

as a necessity grounded upon sound economic policy Risk free options and a capital gains rate tax galvanize managers to labor long and hard, to burn the midnight fluorescent bulbs, and to keep the American economy free, dynamic, and progressive. Salaries which are taxed at progressive rates are a poor way of compensating executives. Stock options help to solve the compensation problem, but they are not just compensation; they give the executive an ownership share in his company He will have a proprietary interest which will force him to be concerned with the long term development of the company He will be no dasher after short run profits at the expense of growth and stability The growth and the stability of individual economic entities are, of course, fundaments in the preserving of our national economy [The crowbar in this demerol dream is the six month holding period. A man who can sell his stock after 6 months and only pay taxes at the capital gains rate is not going to look beyond current pleasure.] This concern with growth is convenient camouflage, for the law as it stands mocks the argument that options link the managers to the business institutions. This part of the mythology is as vapid as the usual rationales of preference.

It is worth noting that this concern for economic growth has meant nothing for companies that are not listed in the social registers of business. By this I mean that unless a corporation s stock is listed on a major stock exchange, the men who are the key personnel of the entity have no chance of profiting from options. This is so as it is impossible to determine the value of stock that is not widely held and often traded. The Treasury will not attempt to place a value on such stock. Thus, only Big Business personnel can profit from the stock option device.

To insure a solid understanding of our subject we next examine certain of the facts about option practice. Bluntly put, there is almost no control of option practice. Corporate insiders rule in the land of the blind. Stockholder objection is a gelded whisper. Diffusion of stock ownership, geographical separation of stockholders and the control center of the corporation, stockholder ignorance, management control of proxy, and management ownership and voting strength all engulf the challenges of the impotent. Officers and directors work in unison or officers merely

handle the whole affair, for the trend is to have boards of directors composed largely of top managers. In some corporations the board is composed entirely of managers. No matter who sits at the director's table, the board is usually friendly to the managers. Managers have in most instances been able to do as they please. The story of one major company depicts the possibilities of power. Management proposed an option; it was granted. Just a few years later they asked the stockholders for a new option. When asked by stockholders what had happened to the stock granted under the old option, the managers blithely replied that they had sold it. The stockholders voted for a new option plan.

Sometimes things are arranged so that stockholders are not even asked to voice an opinion. Between 1956 and 1958 Aluminum Company of America stock dropped from $120 a share to $70 a share. A "fairy godmother" committee, the company's six highest paid officers and directors, cancelled options granted to 300 key employees. The option price had been $117.25 and 193,000 shares had been set aside for the optionees. This committee set up a new option program; the new option price on these shares was $68.50. The stockholders of the company lost $50 a share during this period, but the executives were perfectly protected.[114]

It is perfectly possible in this gingerbread world to have your fortunes go up even when the market goes down. And when the market turns to run the other way things are even brighter.

Sifting our information further we find that these things characterize the usual option plan. It is discriminatory; it does not benefit "employees" nearly as much as managers and directors; it is not aimed at management having a stake in the business —rather, it is an accommodation for the avoidance of taxes; there is no risk, and it is almost within the complete control of the heads of the particular corporate state.

Despite having received this information I believe that many people would still retort that, "Well, they do deserve it anyway; they are special." This means that The Managers are the epitome of what the American Ideal is. They have made room at the top

---

[114] This incident is related in Schlesinger, *Selected Problems in the Use of Restricted Stock Options*, 36 Taxes 709, 730 (1959).

for themselves; they have won in the competitive dash. They have displayed the strength of the strong. This is Horatio Alger gone corporate. This unusual degree of unsophistication I feel exists along with the knowledge that we are a bureaucratic society where yes-manning and posing as articles of value mean much more than personal worth and the dignity attached to it. People understand this as a general thesis, but fail to apply to specific cases that are related to a general philosophy that they hold. This is what I mean when I say that we are the victims of double-think.

Let us compare the great American executive in flesh and flannel to this legend. The popular press has widely circulated the success tales of poor bovs who have risen to lead some economic giant. It is these tales that provide ideological justification for executive privileges. If a man has hand-combated his way up the knoll of success, he deserves special treatment—he is king of the hill. It is definitely in America that cream rises to the top.

The fact is that the top executives are not "country boys who have made good in the city They are not immigrants. They are urban, Protestant Americans born into families of the upper and upper-middle classes. Their fathers were mainly entrepreneurs, 57% are sons of businessmen; 47% of professional men; 15% of farmers. Only 12% are sons of wage workers or lower white-collar employees. For at least two generations now, the families of the top executives of the big American corporations have, as a group, been far removed from wage work and the lower white-collar ranks."[115]

Every study of the executives of the large corporations support Mills s conclusions.[116] Professor Mabel Newcomer,[117] filling out Mills's view, tells that these top-executives have been provided elite college educations and have been given the benefits of important social contacts. Professor Newcomer tosses out the interesting aside that lawyers are no longer an important element among the top-executive group. Their training is too specialized

[115] Mills, The Power Elite 127 (Oxford ed. 1959).

[116] See, *e.g.*, F W Taussig & C. S. Joslyn, American Business Leaders (1932); Mabel Newcomer, The Big Business Executive (1955); Roy Lewis & Rosemary Stewart, The Managers (1961).

[117] M. Newcomer, *op. cit. supra* note 116, at 65-82.

and they have had little practice in personnel management; further, they seem incapable of the broad view that is required of executives.

Clearly Horatio has not climbed the greasy pole. Instead, Oliver has succeeded, as might have been expected. It is clear that our tax preferences do not provide a pot of golden oatmeal for babies who achieve what every good boy has a chance to win. The managerial elite is not made up of Tom Sawyers in executive suites, or even Cash McCalls or Robert Youngs. The American executive not only is not a poor boy who won; he is something less than a plunging, fighting dervish of courage and brain. In fact, he possesses few of the great American virtues—virtues that I sincerely admire.

Here is the manager's picture. The image is conditioned by the environment and the environment is bureaucratic. For the corporation like the army and government meets the social science definition of bureaucracy; also the reality test affirms this social science view The essential elements of a bureaucratic institution are a division of functions, an administrative hierarchy and a professionalized managerial group. The managers of the modern corporate giant are high-level bureaucrats. They move in a world of formalized status and are acutely conscious of the approved codes of behavior.

In this universe the conservation of investment and the maintenance of market position take precedence over technical innovation. The size of the investment at stake makes these men cautious and conservative; they are careful about their eggs and baskets. This might certainly be one of the reasons our economy has been growing at a sluggish rate. The word "entrepreneur" with its connotation of caution to the clouds cannot be used to describe them. Individual responsibility and personal decision-making is not their mana; instead they prefer group action. Conferences, committees, boards and agencies are their stable units of work. Collectivism might be an apt adjective for this mode of doing business. Group action makes the group the paramount organ and this tends to enforce an already strong urge toward conformity Everyone must fit: dress, manner of speech, leisure and attitudes all become stereotyped.[118] It is a

[118] See W H. Whyte, Jr., The Organization Man (1956).

world where there can be no haggard hag of a wife in the family cellar.

Robert A. Gordon in a Brookings Institute Study[119] has been very blunt in his appraisal. He says the new captains are less creative, restless and dynamic than the old tycoons. The analogy might be that the old bold sluggers were the fathers of their business, but the current crop of leaders are children of their monster mothers. They do not give life to the corporation; they are sustained by it. In his study of price-fixing in the electrical industry,[120] John Fuller, a newspaper writer, describes the GE executives as group goslings. And sociologist Seymour Lipset[121] finds that in general persons intent on business success are not creative persons. Their preoccupation is with money, status and security Moreover, these top managers certainly can lay little claim to intellectual interests. Many who recently played a most active role in our national government could claim to be familiar with little more than mysteries, western and texts on management. And in 1954, *Fortune* admitted that:

> The majority of top executives almost never read drama, great fiction, the philosophers, the poets. Those who do venture into this area are looked upon by their colleagues with mingled awe and incredulity.[122]

No one can doubt that executives work hard. Several reliable studies have documented their heavy schedules.[123] Yet, they are not what they and their publicists would have us believe them to be.

The theory is that parts of our tax structure are designed to subsidize those persons who demonstrate the virtues of individualism and daring. This is a romantic philosophy, but I do not believe it a bad one. However, we are in fact paying for the maintenance of a myth when we subsidize a corporate elite. There is nothing to indicate that they are superior to the thousands of scientists, physicians, lawyers, professors, teachers, artists, individual enterprisers, etc., who also contribute vital skills and

---

[119] See W H. Whyte, Jr., Business Leadership in the Large Corporation (1945).

[120] John G. Fuller, The Gentlemen Conspirators (Black Cat ed. 1962).

[121] Lipset, Political Man 326 (1960).

[122] *Why Don't Businessmen Read Books?* Fortune, May 1954, p. 115.

[123] For a good discussion on their work patterns see Hession, Miller & Stoddart, The Dynamics of the American Economy 136-40 (1956).

abilities to our way of living. There is not even any evidence to show that men with the characteristics of our executives are those best fit to control the fate of our economy They are just men and in ability inferior to many other Americans.

IV END COMMENT: THE CODDLED AND THE COZENED

[T]here lay the tomahawk by the savage's side, as if it were a hatchet-faced baby. " Moby Dick.

The ideas that I have named nonsense, those fiscal fairy stories told with singing tongue and furious jaw, are in nub nothing but manufactured mirages. Still they do signify much, for their very being and their mass adoption by the true believers, the public, is as revealing as a Rorschach. Despite our nation's democratic rumblings, the vulgar burping of privilege is audible. Loud language fails to cover the civic blunder. Sadly, society does as nonsense is, but the crass sound of privilege is heard by the "third ear."

This gross burping is an infallible omen of the presence of a coddled elite in our society In addition (and, as usual) the opposite of the coddled is in being—there are also the cozened. They pay for the privilege of maintaining queen bees. Elites will always exist, life being melded of genetic and social elements, but, as I see it, there should be a functional basis for the supporting of elites. Further, any elite group should receive rewards of money, prestige, and privilege on a scale relative to the function performed. Nothing should be granted them on the gauze-like ground of metaphysical claim; eliters should not take solely because they perform a peculiar, awe-evoking ritual.

Re-running the past pages of this article in the movie of the mind, the varieties of tax preference are seen as rewards for elite claims which are propped up by the bastion of illusion. Behind the illusion, however, there is a support of substance. There is power. Not naked fist power; not the fire power of states of murder; instead, a perfumed power dolled up in the velvet of finesse. This power is an amalgam of influence, associations, and the other subtler forces of a mannered society Taxation, of necessity, must be a matter of power. It is so doomed as it concerns men, money and politics. Our task is to see that power is distributed equitably so that there is social balance.

But currently, taxation is but a game in which operating elites ply the corridors of Congress using well-known, as well as secret, techniques of persuasion. It is a game in which power ploys wear the velvet veil of finesse and "kiss deadly" the public interest. But this is not just an affair of Congress. In this game there are rationalizers who dispense to the public patterns of signs and symbols. These patterns appear as slogans and sayings and become part of the treasured folklore of the times. In these messages to the people, freedom, democracy, initiative, individualism, the American Way of Life and other similar words become key terms essential to mass manipulation. In this process of "education" there is usually much that is hot and little that is illuminating. Fulmination is the smoke grenade of obfuscation.

When these manipulated toddler tales are mixed with the esotericism of the Internal Revenue Code, the manipulators have exactly what is needed—a shimmering blackness, a space curve of infinite ignorance. In the atmosphere of this air-raid of absurdity man takes all on faith. Belief is easily adduced—it is simply a case of Pavlovian conditioning. He that has no better can do no better. Repetition of the patterns of signs and symbols rivets the mind and holds it to faith in perverted forms that finally become bright bridges across imaginary canyons. In this world of night, all is possible, much is probable.

My suggestion is that we depart from this departure from a democratic theme. There is only one way in which we can achieve a situation in accord with the creed we voice. Politics must be used to kill the great "grotesques" that politics has created. Certain politicians must bring the realities of taxation to the people. What I suggest is a platform based on simple equity and this would seem to be an approach of pith. Mainly, reform depends upon a campaign in which accurate facts and figures are dispensed. The American people are not stupid but they are intellectually underfed. A public fattened on facts might soon be ready to vote into Congress some men free of the lariats of the loopholers.