Saturday Review,[10] challenges Snow's interpretation of the qualities and contributions of the two British scientists, and the debate over the validity of the cautionary tale is continued in a subsequent issue of the magazine.[11] Conceivably, these assorted adjustments, not wholly devoid of subtlety, will conjure the world that Snow professes to see out of existence.

But I doubt it.

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THE IDEOLOGIES OF TAXATION. By Louis Eisenstein. New York: Ronald Press, 1961. Pp. 263. $5.00.

THOSE who have been fascinated or intrigued by the writings of Thurman Arnold during the past several decades should welcome this book about federal taxation by Louis Eisenstein. It is of the same genre as the works of Arnold. Thus, in broad terms, it charges that most discussions about the policies of federal taxation are "ideologies" designed to conceal from public view the "real issues" and, by implication at least, that only a chosen few fully understand this and are aware of these issues. As Arnold in *The Folklore of Capitalism* explained how "creeds" and "ideals" of institutions are shaped and influenced by social "needs," so Eisenstein in his book traces out how the "ideologies" of taxation serve the practical needs of those who hold them.

In the early part of his book Eisenstein appears to speak forthrightly about the nature of these practical needs. "Our taxes," he says, "reflect a continuing struggle among contending interests for the privilege of paying the least."[1] Only a few sentences later he seems to plunge more deeply into that eternally beguiling sea which is cynicism when he says, "Tax legislation commonly derives from private pressures exerted for selfish ends."[2] Those with common economic concerns become "groups" and "interests" (terms which the author regards as less candid but more flexible and versatile than such old-fashioned designations as "factions" or "classes") which seek to have the tax law serve their "fiscal aspirations."[3] To achieve this end it is necessary for these groups to develop theories which will convince others that the group's "fiscal aspirations" serve the needs of all. These theories become ideologies which to be effective must not only serve selfish ends but also, asserts Eisenstein in his tough-minded way, "convey a vital sense of some immutable principle that rises majestically above partisan preferences."[4] Thus, it seems fair to say that

10. March 4, 1961, p. 49.
11. April 1, 1961, p. 45.

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1. Pp. 3, 4.
2. P. 4.
3. P. 7.
4. P. 12.

the author appears to regard ideologies as instruments of political warfare fashioned to deceive opposing groups and interests and to win battles.

As Eisenstein sees it there are three primary ideologies in the area of federal taxation—that of ability to pay, barriers and deterrents, and equity. The first holds that a just tax is one based upon ability to pay, this being properly determined by reference to the entire income of the taxpayer irrespective of its source, and assessed at progressive rates. The second states that the survival of our form of capitalism depends upon a structure and rate of taxation which do not destroy either the incentive to work and invest or the sources of new capital. The third is that those who are similarly situated should be similarly taxed and its corollary that those who are dissimilarly situated should not be similarly taxed. This book asserts, with biting wit and a keen sense of irony, that many who hold these ideologies use them either timidly to conceal some "disreputable" thoughts or crudely to justify patently selfish ends, that the ideology of barriers and deterrents is not supported by the facts, and that the ideology of equity serves to obscure the essential problem which is whether the distinctions made by the tax law between taxpayers reflect "a difference in circumstances which justifies a difference in treatment."[5]

The charge of timid concealment is primarily directed at the adherents of the ideology of ability to pay with whom Eisenstein has substantial sympathy. He points out that these ideologists, although deeply committed to the belief that a progressive income, estate and gift tax is necessary to reduce economic inequality, nonetheless frequently assert that their views spring instead from a desire to be neutral as between competing groups and interests. In addition, he observes that when Congress has departed from the course marked out by the ideology of ability to pay at least some of these departures have been approved by the most doctrinaire of these ideologists. To Eisenstein the explanation for this lack of candor and grudging, sometimes almost covert, approval of congressional departures is, first, the emotional comfort which the ideology provides to its adherents and, second, the fear that explicit recognition of the purpose of progressive taxation will lead to a rejection of this end by the people. This reason does not persuade Eisenstein. He admonishes these ideologists to assert openly their goal of reduced inequality and to "do battle on the questions of policy"[6] which arise when Congress is requested to alter the meaning of ability to pay because of such circumstances as the inability to earn more income,[7] the martital status of the income recipient,[8] the variations in the cost of living of taxpayers who receive equal incomes,[9] the need to save to provide for future

5. P. 160.
6. P. 56.
7. This was the circumstance which helped produce the additional $600 exemption for those over 65 and certain provisions of the retirement income credit. Pp. 38-40.
8. This is reflected in the income splitting provisions of the Revenue Act of 1948. P. 43.
9. Eisenstein suggests this as a possible justification for the special exemption for the blind and the deduction for working wives and widowers for expenses incurred in the care of children under 12. P. 42.

needs,[10] the social desirability of certain expenditures of the taxpayer,[11] and the form in which the income producing activity is conducted.[12]

To me it is apparent that there is both some truth in this analysis and wisdom in the admonition. However, this book does less justice to these ideologists of ability to pay than they deserve. Particularly is this true of Surrey and Cary, two who receive fairly harsh treatment in this volume. My understanding of these ideologists is that they want an estate, gift and income tax which primarily pursues the goal of reduced inequality through rate progression and which is not encumbered by a host of provisions designed to meliorate the economic and social position of many diversely situated taxpayers. To them taxable income should be, roughly speaking, economic gains reduced by the expenses more or less directly incurred in the process of their realization. They do not object to the pursuit by government of social and economic goals of many sorts; they simply prefer that these be accomplished by means other than the tax laws.

Nonetheless, it is proper to ask these ideologists of abiltiy to state the reasons for this preference. While Eisenstein does not put the question directly, his insistence that they justify departures from their creed [13] plainly requires a statement of these reasons. This is a significant accomplishment because such ideologists often appear to view their preference as expressing a self-evident proposition. In fact it is by no means clear that Congress should be asked to forego the use of tax law in its day to day business of responding to the wants of the people. Because I believe that institutions, including the tax law, have their effectiveness diminished by what can be called a "purposive overload" and that it is possible to develop a climate of opinion which recognizes this, I share the preference of the ideologists of ability to pay. Eisenstein, however, is quite right in putting us on the defensive.

Having put us there by his challenge to "do battle on the questions of policy,"[14] he should offer assistance in this task. This he does not do. Perhaps he does not because he believes his assertion that tax legislation only derives from private pressures exerted for selfish ends. So viewed, tax policy is simply another name for cant and rhetoric. But in that event why the challenge, and if policy is but the clothing of selfishness, what can be gained by its examination? This raises the issue which haunted me as I read this book. Is Eisenstein, whom I have never met, an adventurer without scruples engaged in fashioning his own ideological weapons to vanquish those who stand in his way, or is he a social reformer filled with righteous indignation writing this book to promote his view of the good life?

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10. This possibly would justify an earned income credit. P. 49.

11. Charitable gifts are deductible because of this circumstance.

12. The corporation can be an effective means of avoidance of the full impact of progression. Pp. 52, 53.

13. See p. 55.

14. P. 56.

Believing as I do that Edmund N. Cahn was right when he said, "Justice and power . . . are both deeply real to law, and both are finite,"[15] and that the will of the stronger is not the ultimate reality of society, it is impossible for me to escape the feeling that Eisenstein is essentially a social reformer. And I believe further that, if I am right about this, he does himself a grave injustice in emphasizing so heavily selfishness of political power. Had he described his view of the good life, those of us challenged to consider policy issues would have been able to draw him into the discussion. As it is, he sits apart, describes the ways of tax ideologists with cynical detachment, and concludes the volume with the observation that improvement of the tax law depends upon the election of Congressmen who will not yield to the wrong people.[16]

This estimate of Eisenstein's objectives was not reached without difficulty. How, my thoughts ran, can one who regards selfishness as the quintessence of tax law regard human society in a significantly different way? And if society is so viewed, is there any basis for assuming that the viewer can be seriously interested in social reforms except insofar as they result in selfish gain? Because these questions deeply troubled me I drew much comfort from the instances in this book where the many layers of urbane wit, sophistication, wryness and general disenchantment are worn thin and through which I think one can glimpse the outlines of a writer earnestly concerned with moral problems.

One such instance occurs in an entertaining chapter entitled, "What Is a Loophole?" Eisenstein repeats an often made observation that a "loophole" is a tax provision favorable to another which one does not like. However, although he cites the view of Dickens' character from *A Tale of Two Cities*, Jerry Cruncher, who describes his work of removing bodies from graves as that of "a Resurrection-Man," as a satisfactory guide to the ethics behind the "loophole" characterization, he introduces a better standard when he says, "In short, whether a dispensation is a loophole depends on the guiding concept of right and wrong."[17] And again when he says, "We cannot learn very much by asking what is a loophole. The meaningful questions are those which focus on the precise purposes and effects of a dispensation. Of course, the answers will vary, for they will reflect different standards of good and evil."[18]

Another instance which afforded a rather good view of the reformer behind the facade which this book carefully constructs occurs when the ideology of barriers and deterrents is discussed. It is obvious that here is an area which elicits a treatment by Eisenstein which is mixed with anger and passion. Those who employ this ideology (most of whom, although not all, are Republicans) are, he feels, rather nasty people who know not the truth. Although their ideology has not failed to achieve tax reduction, this does not, as one might ex-

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15. CAHN, THE SENSE OF INJUSTICE 49 (1949).
16. P. 230.
17. P. 185.
18. P. 197.

pect, entitle them to Eisenstein's praise. His purpose is to discredit them publicly because, I submit, their view of a good society does not accord with his.

He sets about his task by describing the ideologists of barriers and deterrents as a gloomy lot who are not above predicting the downfall of the nation if their taxes are not reduced. They chant that in the absence of such reduction the incentives to work and invest will be substantially undermined and the supply of venture capital will be dangerously diminished. In response the author observes acidly that despite today's high taxes our system is functioning better than ever. We are richer and taxes are higher than thirty years ago. Such facts, he asserts, expose the ideology as a false dogma used by the rich to reduce their taxes.

These are the harsh words of one who is engaged in advancing a cause about which he feels strongly. So intense is his feeling that he cannot refrain from slanting his material in rather obvious ways. For example, to refute the charge that high taxes impair the will to work the study by Sanders [19] is cited. This is proper because it was Sanders' conclusion that executives had not ceased to work arduously and conscientiously even though taxes were quite high. Nonetheless, Sanders' study contains a qualification which is not adequately dealt with by Eisenstein. After stating his conclusion, Sanders observed: "This does not mean, however, that they are working as *effectively* as ever. Higher taxes are only one segment of a general enlargement of the impact of government on business, the broad result of which is to divert a substantial fraction of executive energies and abilities into channels other than those which may be called 'productive' in the strict economic sense of the word."[20] This diversion of effort which is a part of any large revenue-producing tax system is further underscored by Sanders in his discussion of pension plans and the investments of executives. Eisenstein does not note this qualification nor does he deal with the problem.

Again he slants his material when he refers to Hall's study [21] to support the view that executive exertions are not abated by high taxes. He omits a conclusion which Hall states with firmness: "High progressive personal income taxation of executives, in the opinion of the writer, reduces the output of goods and services. Although partially offset by an increase in the years of active employment, the dominant effect arises from the indirect reduction in efforts of executives and their impaired allocation among different companies."[22]

But he does not altogether ignore this conclusion of Hall. A page or two

19. SANDERS, EFFECTS OF TAXATION ON EXECUTIVES (1951).

20. *Id.* at 76-77.

21. HALL, EFFECTS OF TAXATION: EXECUTIVE COMPENSATION AND RETIREMENT PLANS (1951).

22. *Id.* at 279-80. The "indirect reduction in efforts" results from deferred retirements. Hall also concludes that deferred compensation plans reduce the output of goods and services while retirement plans increase such output.

later he speculates, "Let us suppose, however, that Professors Sanders and Hall are too optimistic; that some executives have failed to adjust themselves to high rates and are disturbed by a tax neurosis."[23] He then observes in tones distinctly out of harmony with the current fascination of the Democratic Party with economic growth and investment incentives that tax induced leisure may not be a bad thing. Again, he acknowledges a few sentences later that a diversion of talent from business to other fields may be quite desirable. Nowhere, however, does he grapple seriously with the qualifications which appear in the studies of Sanders and Hall. More important, Eisenstein seems unaware of the possible consequences of the ethos surrounding the federal tax system to what Max Weber called the spirit of capitalism.[24] That such consequences exist is reasonably certain (for example, deductibility is a better argument for spending than Franklin's views on thrift are for saving), and it would be even more certain were the ethos of taxation as Eisenstein describes it. In the long run these consequences will be the most lasting accomplishment of our tax system.

Another instance of slanting occurs in the treatment of investment incentives and the system of taxing capital gains. Eisenstein makes his refutation of what he calls "the dogma of diminishing risk," the view that present tax rates reduce the incentive to take business risks, by standing on the well known study of the problem by Butters, Thompson and Bollinger.[25] His interpretation of this study can be presented fairly by quoting three sentences:

> The combined effect, then, of the ordinary rates and the capital gain rate is to reinforce the individual traits of investors. The security-minded become more cautious and the risk-minded more daring . . . "The tax incentives operate in both directions, and it may well be that those tending to channel funds to new ventures actually outweigh in significance those tending to divert funds from such investments."[26]

This is a reasonably accurate description although I have set out in the footnote a "one-paragraph distillation" prepared by the authors of the study which is more qualified.[27] The point to note is that Eisenstein appears to acknowledge

23. P. 73.

24. WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (student ed. 1958).

25. BUTTERS, THOMPSON & BOLLINGER, EFFECTS OF TAXATION: INVESTMENTS BY INDIVIDUALS (1951).

26. Pp. 78-79. The last sentence of this quotation is itself a quotation from the Butters, Thompson and Bollinger study.

27. This appears in Chapter II, a chapter summarizing the factual findings, of the Butters, Thompson and Bollinger study, *op. cit. supra* note 25, at 50-51:

> With all the above factors taken into account, the following is the best one-paragraph distillation of our findings that we can give. The tax structure, as of 1949, cut substantially into the investment capacity of the upper income and wealth classes—the strategic source of venture capital for investment in business—and, on balance, it also decreased the willingness of these investors in the aggregate to make equity-

that capital gains taxation affects the incentive to invest. Accordingly, he should deal with the problem when his case for the abolition of the special rate for capital gains is made some fifteen or twenty pages later. This he does not do. Ignored is the following passage from the Butters, Thompson and Bollinger study:

> In other words, if the existing balance in investment incentives is to be maintained, any increases in capital gains taxation would need to be offset by compensating in the rates at which ordinary income is taxed and preferably also by a reduction or elimination of the existing opportunities for obtaining tax-exempt income from relatively riskless investments.[28]

In fact, he asserts that the "dispensation for capital gains is [not] a sensitive reaction to high rates."[29] Perhaps not, but there is presently a relationship between them which should be considered if the Butters, Thompson and Bollinger study is accepted.

This study is again used in a somewhat misleading fashion when Eisenstein considers "the dogma of inadequate savings,"[30] the view that high taxes are destroying the sources of venture capital. It is cited for the proposition that the role of individual investors as a source of venture capital has been "greatly exaggerated."[31] The report does say this but continues in this fashion:

> The future of the free enterprise system, it is often implied, depends mainly—almost exclusively—on the continued ability and willingness of individuals with large incomes to provide the venture capital and equity funds needed to finance business growth. *It is not our intention to minimize the strategic role played in our economic system by this source of funds—as will be abundantly clear from the following discussion.*[32]

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type investments. In other words, for equity-type investments considered as a whole the investors who were induced by taxes to shift to less risky investment positions appear to have overbalanced the opposite reaction of appreciation-minded investors. The latter group, however, may have been so stimulated by the tax structure to seek out investments offering unusually large capital gains potentialities, such as promising new ventures, as actually to increase the flow of capital to such situations. However this may be, it is clear that the combined impact of these effects fell short of drying up the supply of equity capital which private investors were willing and able to make available to business. The evidence indicates that the accumulation of investable funds by the upper income classes has been consistently large during the postwar years, despite the existing tax structure, and that individuals with large incomes and substantial wealth continue as a group to hold and invest a large proportion of their funds in equity-type investments. . .

28. This appears in a discussion of the major policy implications of the Butters, Thompson and Bollinger study, *op. cit. supra* note 25, at 67.

29. P. 104.

30. Pp. 79-88.

31. P. 81.

32. BUTTERS, THOMPSON & BOLLINGER, *op. cit. supra* note 25, at 3 (emphasis added).

There are other complex problems overlooked by Eisenstein in his passionate dislike of those who hold the ideology of barriers and deterrents. For example, although he recognizes that the taxation of capital gains at a special rate has economic consequences, he fails to discuss the consequences which might result from the taxation of all gains at the applicable ordinary income rates. These consequences, which could include some diminution in reliance upon retained earnings as a source of investment funds and perhaps some decline in the search for "growth situations," suggest, as Walter Blum has put it, "that the capital gains issue is knotty."[33] Similarly, Eisenstein points out correctly that operation of the dividend-received credit reduces the overtaxation of dividends received by the right to a greater extent than it does those received by the poor. In so doing, however, he neglects to emphasize that overtaxation of corporate earnings, as well as undertaxation, exists to some extent, provided certain assumptions are made regarding the incidence of the tax on corporate income and the notion that equal incomes should be taxed equally irrespective of their source is accepted.[34]

It must be acknowledged that Eisenstein more resembles the nihilist[35] than the social reformer promoting the good life when he discusses the ideology of equity. In his view, it has become an ideology in support of tax reduction because those who wish to be treated favorably emphasize their dissimilarity from all others and those who seek the favorable treatment already accorded to others emphasize their similarity to such others. No one can deny that the principle of equity is often used in this fashion and he mentions many well known instances of it. What will trouble the reader is that practically nothing is done to demonstrate that the guide of equity has often been used in the tax law to prevent tax reduction as well as to eliminate unusually harsh treatment. This astonishingly one-sided treatment of the ideology of equity becomes even less pardonable when the author concludes by suggesting that one should take to heart Edmund Cahn's observation that "those only are equal whom the law has elected to equalize."[36] This does not sound like the Cahn quoted earlier, and indeed it is not. The more contextually accurate quotation is as follows:

> Now equality is in general the creature of positive law. Courts and legislatures establish classes of humanity, categorizing for one or another purpose the duties and rights they desire to effect, to destroy, or to qualify. Thus, before a court, those only are equal whom the law has elected to equalize. *The point is that the inequalities resulting from the*

33. Blum, *A Handy Summary of the Capital Gains Argument*, 35 TAXES 247, 266 (1957).

34. See Holland, *Stockholder Differential Taxation and Tax Relief*, Tax Revision Compendium, HOUSE COMM. ON WAYS AND MEANS, 86TH CONG., 1ST SESS. vol. 3, at 1551 (1959).

35. Gilmore recently drew attention to the fact that one of the strands of legal realism, *i.e.* the attack on conceptualism, sometimes "degenerated into a childish nihilism." Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1038 (1961).

36. CAHN, THE SENSE OF INJUSTICE 14 (1949).

> *law must make sense.* If decisions differ, some discernible distinction must be found bearing an intelligent relation to the difference in result. The sense of injustice revolts against whatever is unequal by caprice. The arbitrary, although indispensable to many of law's daily operations, is always suspect, it becomes unjust when it discriminates between indistinguishables.[37]

Nonetheless I am prepared to stand by my judgment that Eisenstein is a deeply moral man striking out in fury with the weapon of mockery. Viewed from my perspective his book is seriously defective, however, because his view of the good life is never adequately revealed. This failure I suspect is the result of too close adherence to the axioms of that old warrior whose spirit stalks the pages of this book—Thurman Arnold. Many years ago he said, "Public debate is necessarily only a method of giving unity and morale to organizations. It is ceremonial and designed to create enthusiasm, to increase faith and quiet doubt. It can have nothing to do with the actual practical analysis of facts."[38] It is too bad that Eisenstein half believes this.

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37. *Id.* at 14-15 (emphasis added).

38. ARNOLD, THE FOLKLORE OF CAPITALISM 379 (1937).

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