TAXING BRIBES IN THE FORM OF FLATTERING NEWS COVERAGE

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Men are more often bribed by their loyalties and ambitions than by money.[1]

ABSTRACT

In this Article, I pose the question: Should we tax illegal non-monetary benefits without a direct FMV such as flattering news coverage received by a public official bribe-taker? And if the answer is positive, the derivative question is how we should evaluate these non-monetary benefits. This Article claims that briberies should be taxed differently than any other illegal income.

To understand this question, I refer to a hypothetical case in which a high-ranking public official is accused of bribery while seeking improved coverage from a chief editor of a newspaper, a transaction that does not involve any cash transfer. I use this case as a prototype to illustrate how public officials can enjoy illegal non-monetary (that is, not just monetary) benefits thanks to their public position. Flattering a public official with positive news coverage can constitute the crime of bribery, but the transaction does not have a direct market price. Bribery is an illegal barter transaction, and to answer the question posed above, I first define those non-monetary benefits and then review the justifications for taxing illegal income. These two layers are valuable for building the argumentation, which is twofold. First, illegal income—whether monetary or non-monetary—given to a public official as such is essentially different from other illegal income and consequently should be taxed more. This reasoning is based on the equity principle, since the bribe-taker's illegal benefit can be derived by virtue of his or her position as a public official using public resources that are not available to other individuals. This unique usage of public resources justifies an additional tax liability, resting on the benefit principle that can take the form of a special "political" surtax. My second claim is that the default rule for weighing the non-monetary benefit, which does not involve any cash transfer and a direct fair market value, should follow the presumption of equality since bribery is a tit-for-tat barter transaction. This, however, is a rebuttable default rule in cases where the fair market value is not mutually

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[1] United States v. Wunderlich, 342 U.S. 98, 103 (1951) (Jackson, J., dissenting). In this case, the Court examined a "finality clause" in a contract with the petitioner, the United States, which relegated disputes to "the contracting officer, with the right of appeal to the head of the department 'whose decision shall be final and conclusive upon the parties . . . .'" *Id.* at 99. Justice Jackson referred to this proverb while determining that although one party can act as a judge in his own case, *id.* at 103, in cases of "gross mistake as necessarily implied bad faith," judicial remedy should be provided, *id.* at 102.

viable for the parties and when the non-monetary bribe has idiosyncratic subjective value.

I. INTRODUCTION

This Article poses the question: Should we tax non-monetary benefits such as flattering news coverage received by a public official bribe-taker? And if the answer is yes, the derivative question is how should we evaluate these non-monetary benefits. In this Article, I claim that briberies should be taxed differently than other forms of illegal income.

Public officials possess a power not available to other individuals who work in the private arena.[2] They possess public-political connections depending on their seniority and position. For that reason, criminal laws specify particular offenses involving political corruption, such as bribery. Bribery can carry many forms, usually involving direct monetary value, but some public officials may also enjoy non-monetary benefits by taking corrupt advantage of their public position when this bribery does not include cash flows. But there are various forms of non-monetary bribes. For example, assume a high-ranking public official, such as a member of Congress, is charged with bribery while seeking improved coverage from the chief editor of a leading daily newspaper. The leading newspaper publishes positive articles about that public official while publishing negative ones about the public official's opponents. In return, the high-ranking public official weakens, by way of regulation, a free-of-charge newspaper that reduces the advertising profits of the editor's newspaper, mainly in the weekend edition (hereinafter: the "Member-of-Congress case").[3] The bribery

[2] I use the term "public officials" as defined under 18 U.S.C. § 201(a).

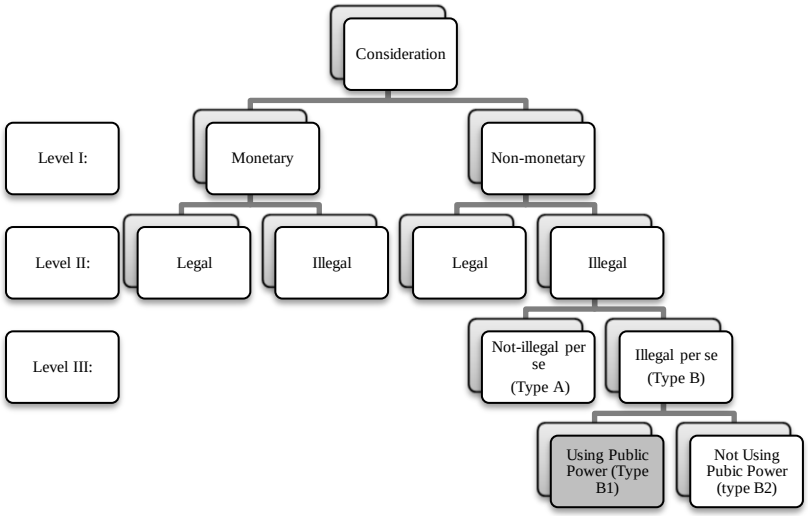
[3] This example shares some similarities with two pending cases indicting former Israeli Prime Minister Benjamin Netanyahu on charges of bribery. Those indictments are based on what I refer to in this Article as non-monetary bribes. It should be noted that I do not take a position per se whether the facts in these cases are sufficient to constitute criminal offenses or not, but I use them as a prototype to my research question. In one case (referred to in the media as Case 2000, after police parlance), Mr. Netanyahu is charged with fraud and breach of trust while seeking improved coverage from Mr. Arnon Mozes, Chief Editor of the leading daily print newspaper *Yediot Ahronot*. The charges are that Mozes undertook that his newspaper would start publishing positive articles on Mr. Netanyahu and negative ones on his opponents, and in return, Mr. Netanyahu would weaken, by way of regulation, free newspaper *Israel Hayom*, that reduced the advertising profits of *Yediot Ahronot*, mainly in the weekend edition. Mr. Mozes is charged with attempted bribery, and although a charge of bribery was also considered against Mr. Netanyahu, the charge eventually was lowered to fraud and breach of trust. For the sake of (tax) discussion, I will treat this as an exchange of benefits similar to "bribery." *See* Raoul Wootliff, *The State of Israel v. Benjamin Netanyahu: The Specifics of the PM's Indictment*, TIMES ISR. (Nov. 28, 2019), https://www.timesofisrael.com/the-state-of-israel-v-benjamin-netanyahu-the-specifics-of-the-pms-indictment/ [https://perma.cc/3VV4-PL58]; Raoul Wootliff, *The State of Israel v. Benjamin Netanyahu: Netanyahu Indicted for Corruption in Three Cases, in First for a Sitting PM*, TIMES ISR. (Jan. 28, 2020), https://www.timesofisrael.com/netanyahu-indicted-for-corruption-in-three-cases-in-first-for-a-sitting-pm/ [https://perma.cc/HAG6-9US6]. In another case, Case 4000, it is alleged that when serving as Minister of Communication, Mr. Netanyahu acted in a conflict of interests by making regulatory decisions in favor of Mr. Shaul Elovitch, who was the controlling shareholder in Bezeq, Israel's largest telecommunication provider. In return, Mr. Elovitch interfered and changed reports on *Walla*, a major news portal, which he also owned, so as to favor Mr. Netanyahu. *See Benjamin Netanyahu: What Are the Corruption Charges?*, BBC NEWS (May. 22, 2020), https://www.bbc.com/news/world-middle-east-47409739 [https://perma.cc/95PG-R7BS]. Cases 2000 and 4000 are thus taken as exemplification prototypes to illustrate how public officials can enjoy illegal non-monetary benefits in a barter transaction thanks to their public position. These examples are dissimilar to another pending case where it is alleged that Mr. Sebastian Kurz, the former Austrian Chancellor, used direct public funds to pay tabloids to receive favorable news coverage since that case involves a direct money transfer. *See, e.g.*, Katrin Bennhold*, Fake Polls and Tabloid Coverage on Demand: The Dark Side of Sebastian Kurz*, N.Y. TIMES

in this case does not include the exchange of cash, and "flattering" news coverage does not have a direct fair-market value ("FMV").[4]

In this Article, I do not question whether the Member-of-Congress case constitutes the crime of bribery under 18 U.S.C § 201, but assume as my starting point, for methodological reasons, that those acts are bribes and that the public official received non-monetary benefits. In this example, the benefit was positive coverage, but in other cases, it can take a different form. Against this background, I discuss whether we should tax this illegal non-monetary benefit and, if yes, how? To answer this question, I first assess the uniqueness of these benefits on three levels, corresponding to Parts II to IV. In Part II, I address the question of defining non-monetary benefits. Since I focus on a criminal activity, I then review in Part III the rationales for taxing illegal income. I focus on doctrines available in the U.S. and other common-law jurisdictions. The premise of the subsequent parts is that we need to tax illegal income for the sake of equity. Part IV represents the third level of my discussion; it analyzes the rationale for special taxation of both monetary and non-monetary bribes received by public officials. It differentiates between two types of illegal activities—illegal activity for tax purposes only (referred to in this Article as Type A) and activity that is illegal per se (Type B); the latter is then categorized according to whether or not one makes illegal use of one's public position (referred to in this Article as Type B1). This roadmap is illustrated in the following scheme:

(Oct. 17, 2021), https://www.nytimes.com/2021/10/17/world/europe/austria-sebastian-kurz-scandal-chancellor.html [https://perma.cc/C8JP-KU8B].

[4] The article does not deal with flattering news coverage that is habitually and directly paid for. *See, e.g.*, David Barboza, *In China Press, Best Coverage Cash Can Buy,* N.Y. TIMES (Apr. 3, 2012), https://www.nytimes.com/2012/04/04/business/media/flattering-news-coverage-has-a-price-in-china.html.



The discussion concentrates on the highlighted cell and argues that when we tax public officials, the ability-to-pay principle is insufficient, since the public official uses resources not available to all taxpayers, whether they produce their income legally or illegally. For that reason, we may use the benefit principle as a better indicator to tax the public official's illegal income. After concluding that we should tax extra non-monetary bribes, I turn in Part V to evaluating benefits that lack direct-fair-market value. Since bribes are a give-and-take transaction, I suggest barter analysis as the default rule. Nevertheless, when FMV is very high and since a non-monetary bribe carries a subjective value, the barter equation method is not always suitable. I therefore offer alternative methods, such as evaluating personal prestige. This Part is followed by concluding comments.

II. WHAT ARE NON-MONETARY BENEFITS?

My first modest goal is to define non-monetary benefits used in this Article. To do so, as depicted in the above scheme, I should first clarify what monetary benefits are. Monetary benefits carry multiple forms and can be given in the civil or the criminal field. Perhaps the most common is a cash transfer, but monetary benefits can also be income in-kind, providing direct goods or services such as a gym membership, free meals, or jewelry that have direct-market prices.

Similar to monetary benefits, non-monetary benefits can also be either civil or criminal ones (as depicted in Level II in the above scheme). But contrary to monetary benefits, non-monetary benefits are not cash transfers or income in-kind. We can use a residual definition and define non-monetary benefits as any benefits that are not fiscal, but intangible, with subjective value for the receiver and that do not have a direct-market price. Within an

employment relationship in the civil field, an employer can grant an employee flexible working hours and reward them certificates for being the best employee. These are examples of non-monetary benefits that are legitimate and may improve the working environment.

In the public arena, theoretically, non-monetary benefits can also be either civil or criminal. But due to the special relationship, it is plausible to assume most types of non-monetary benefits may be considered as constituting a criminal act such as bribery or a gratuity. Non-monetary benefits for public officials can also be flattering coverage as in the Member-of-Congress case, but they can also consist of political benefits from one public official to another[5] as well as other logrolling activities.[6] In this Article, I focus on positive coverage as an illustration of non-monetary bribes.

Bribery of (domestic) public officials is anchored under 18 U.S.C § 201.[7] Both bribery and gratuity require two participants, one of whom is a public official: In bribery, one person offers the bribe to the public official who accepts it;[8] the same thing happens in the case of a gratuity.[9] These two

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[5] Brennan Hughes, *The Crucial "Corrupt Intent" Element in Federal Bribery Laws*, 51 CAL. W.L. REV. 25, 30 (2014).

[6] Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784 (1985). Note however that the article focuses exclusively on non-monetary benefits that are seen as a bribery offense.

[7] Note that there are other bribery offenses. *See* Hughes, *supra* note 5, at 43. Bribery is anchored also in many other penal codes of various jurisdictions. *See* §§ 290–291, Penal Law, 5737-1977, LSI 226 (1977) (Isr.); Bribery Act 2010 c. 23, §§ 1–2 (U.K.).

[8] *See* 18 U.S.C. § 201, titled "Bribery of Public Officials and Witnesses," which describes the bribery from the bribe-giver (§ 201(b)(1)) and bribe-taker (§ 201(b)(2)) points of view and states:

> (a) For the purpose of this section—(1) the term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; . . . .
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> (b)Whoever—
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> (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—
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> (A) to influence any official act; or
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> (B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
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> (C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;
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> (2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:
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> (A) being influenced in the performance of any official act;
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> (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (C) being induced to do or omit to do any act in violation of the official duty of such official or person . . . .

[9] *See* 18 U.S.C. § 201(c):

offenses are similar though not identical. The main difference is the proximity between the given value[10] and the official public act. If there is a direct relation, meaning a tit-for-tat transaction, then the offense is considered a bribe.[11] If, on the other hand, the given value is partly related, such as a "thanks gift" after the official act was carried out, it may be considered a gratuity;[12] the punishment for the first offense is much more severe.[13] For the sake of this tax discussion, I will not differentiate between bribery and gratuity. I will refer to both as "bribery."

Bribery has five essential elements: (1) a public official; (2) corrupt intent to bribe; (3) a benefit given, offered, or promised to the public official; (4) a connection between the benefit and the official act; and (5) the relationship involves intent to influence the official's activity.[14] In this Article, I focus on the third element, referring to "anything of value" given within the definition of bribery in § 201.[15] "Anything of value" is not limited to "standard" money payments,[16] but also include non-monetary benefits, which are at the core of this discussion, such as the positive news coverage allegedly given in the aforesaid case.

III. TAXING ILLEGAL INCOME – RATIONALE AND HISTORICAL REVIEW

The second essential level for my argument is that illegal income should be taxed. Although presently illegal income is generally treated as taxable income, the literature on the topic and the judiciary previously disputed its taxability and discussed the rationale of taxing illegal income. I will first

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(c)Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person . . . .

[10] Value is defined under 18 U.S.C. § 641 as "face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

[11] Hughes, *supra* note 5, at 28.

[12] See the explanation on this section given by the U.S. Dep't of Just., Crim. Res. Manual § 2041 (2020), https://www.justice.gov/jm/criminal-resource-manual-2041-bribery-public-officials [https://perma.cc/77DZ-H3VZ].

[13] 18 U.S.C. § 201(b)(4); 18 U.S.C. § 201(c)(3).

[14] Hughes, *supra* note 5, at 28; Lowenstein, *supra* note 6, at 784 (analyzing political bribes and supporting intermediate political theory). For the bribery offense in Israel, *see* Mordechai Kremnitzer & Liat Levanon, *How Far Can the Crime of Bribery Reach*, 1 ALEI MISHPAT 369 (2000) (Hebrew); Mordechai Kremnitzer & Doron Navot, *On the Question of Criminal Activity by Public Servants in Conflict of Interest Situations*, *in* CONFLICT OF INTEREST IN THE PUBLIC SPHERE: LAW, CULTURE, ETHICS, POLITICS 501, 519–24 (Daphne Barak Erez, Doron Navot & Mordechai Kremnitzer eds., 2009) (Hebrew).

[15] See the "modes of bribery" in § 293, Penal Law, 5737-1977, LSI 226 (1977) (Isr.) and "other advantage" given within the bribery definition in the Bribery Act 2010 c. 23, §§ 1–2 (U.K.). Also, the Foreign Corrupt Practices Act prohibits bribery and defines "anything of value" (but to foreign officials). *See* 15 U.S.C. §§ 78dd-1; *see also* Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 AM. BUS. L.J. 325, 359–61 (2012).

[16] *See* Lowenstein, *supra* note 6, at 806–07.

review the central arguments for and against taxing illegal income, though readers familiar with this topic might skip this Part.

Is the unlawful activity a trade? In the earlier 1913 version of the Internal Revenue Code, "income" only included income generated from any lawful act.[17] Three years later the word "lawful" was omitted without any explanation.[18] Illegal activity can be methodically carried out similarly to any other trade and can serve as a source of livelihood. The mere fact that this income is accrued illegally does not contradict the fact that it is income and is derived from trade.[19] If A sells products, he derives his income from his trade; if B also sells products, his income is to be treated the same even though those products are stolen. Nevertheless, this perception of legal and illegal income was not accepted in all common-law jurisdictions. For example, in the British case, *Lindsay v. Commissioners of Inland Revenue*, from 1932,[20] the court differentiated between incidental illegality and crime per se.[21] This case is an example of incidental illegality since the parties were wine merchants who broke the law by deceiving local custom authorities and selling wine in the U.S., where it was then prohibited. The Lord President (Clyde) determined that "[t]he nature of the transaction here . . . was neither more nor less than the commercial disposal of a quantity of rye whisky. . . . the disposal of the whisky on behalf of the partnership is not, in my opinion, outside the sphere of trade";[22] he continued to ask, "But what of the taint of illegality and wrongdoing which was associated with it?"[23] Nevertheless, the court determined that "the profits of crime could not be assessable to Income Tax as the profits of trade" and continued to express its difficulty.[24] Even during the 1960s, courts still maintained that "illegal trade" was clearly not a trade; for example, in *J P Harrison, Ltd. v. Griffiths*,[25] the court examined burglary:

> [T]ake a gang of burglars. Are they engaged in trade or an adventure in the nature of trade? They have an organisation. They spend money on equipment. They acquire goods by their efforts. They sell the goods. They make a profit. What detail is lacking in their adventure?

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[17] *See* Revenue Act of 1913, ch. 16, § 2(B), 38 Stat. 167 (emphasis added) (stating, inter alia, that "the net income of a taxable person shall include . . . of any *lawful* business carried on for gain or profit, or gains or profits and income derived . . .").

[18] *See* Revenue Act of 1916, ch. 463, § 2(a), 39 Stat 757; *see also* Boris I. Bittker, *Taxing Income from Unlawful Activities*, 25 CASE W. RES. L. REV. 130, 131 (1974).

[19] *See, e.g.*, Partridge v. Mallandaine (Surveyor of Taxes) 2 TC 179, 181 (1886) (U.K.)

> ([I]f a man were to make a systematic business of receiving stolen goods, and to do nothing else, and he thereby systematically carried on a business and made a profit of £2,000 a year, the Income Tax Commissioners would be quite right in assessing him if it were in fact his vocation. There is no limit as to its being a lawful vocation, nor do I think that the fact that it is unlawful can be set up in favour of these persons as against the rights of the revenue to have payment in respect of the profits that are made.).

[20] Lindsay v. The Comm'rs of Inland Revenue, 18 TC 43, 55 (1932) (U.K.).

[21] *See* Keith Day, *The Tax Consequences of Illegal Trading Transactions*, 1971 B.T.R. 104, 106–07 (1971).

[22] *Lindsay,* 18 TC at 54.

[23] *Id.*

[24] *Id.* at 55 (pointing out that "I am offering no opinion on the point. I am only saying that such a case would, in the unlikely event of its occurring, present the difficulty in an acute form. But, in the present case, the 'trade' did not consist in the commission of crime; it consisted in the marketing of a commercial article. The frauds on the Customs authorities were only incidents of that 'trade.' ")

[25] J P Harrison (Watford), Ltd. v Griffiths (H M Inspector of Taxes) [1960] 40 TC 281 (UK).

> You may say it lacks legality, but it has been held that legality is not an essential characteristic of a trade. You cannot point to any detail that it lacks. But still it is not a trade, nor an adventure in the nature of trade. And how does it help to ask the question: If it is not a trade, what is it? It is burglary, and that is all there is to say about it.[26]

Nowadays, in the U.S. and many other jurisdictions,[27] illegal income falls within the scope of gross income under 26 U.S.C. § 61, that includes "all income from whatever source derived."

Does the taxation of illegal earnings undermine the constitutional rights? One claim against taxing illegal earnings is that it violates the Fifth Amendment, which protects a person from self-incrimination. The Fifth Amendment states that "[n]o person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."[28] It has been claimed that taxing illegal earnings violates this constitutional right since doing so requires the wrongdoer to report his earnings from the illegal activity when filing their returns.[29]

In general, courts in the U.S. and other jurisdictions have dismissed this contention.[30] In *Sullivan v. United States*, the U.S. Supreme Court held that filing a tax return with illegal income reported does not violate the Fifth Amendment.[31] In a subsequent case, *United States v. Brown*, the Court held that the right against self-incrimination does not exempt one from filing a tax return and revealing the amount of income but may protect against revealing its source.[32] However, one "major theme" in the debate about taxing illegal income is that in order for the government to know how much income was generated from the illegal activity, the government would need to undertake

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[26] *Id*. at 299.

[27] In a leading Israeli case—the Wasserman case—the court argued that illegal or immoral profits can be classified as a trade or vocation under Income Tax Ordinance [New Version], 6 D.M.I. 120 (1961) (Isr.), § 2(1); see the leading verdict in Israel deciding that a prostitute's income is derived from their trade and should be taxed accordingly. Income T.A. (TA) 923/62 Wasserman v. Tax Commissioner, PM 38 377 (1964) (Isr.); *see also* C.A. 4157/13 Damary v. Tax Commissioner Rehovot, ¶¶ 42–43 (Feb. 3, 2015), Nevo Legal Database (Isr.) (Hebrew) [hereinafter *Damary* case]; Mann v. Nash (H M Inspector of Taxes) [1932] 16 TC 523, 528 (U.K.) (as quoted in *HMRC Internal Manual, Business Income Manual BIM22010—Meaning of Trade: Exceptions and Alternatives: Illegal Activities—What Is a Trade?* (2020) https://www.gov.uk/hmrc-internal-manuals/business-income-manual/bim22010.). Nevertheless, as some scholars suggest, "[t]oday, the true principle may be that taxpayers cannot set up unlawful character of their acts against the Revenue." GLEN LOUTZENHISER, TILEY'S REVENUE LAW 374 (9th ed. 2019).

[28] U.S. CONST. amend. V.

[29] Meaning the taxpayer fails to comply with 26 U.S.C. § 6651, titled "Failure to File Tax Return or to Pay Tax." In Israel, it was also claimed that the requirement to submit information to the tax authorities under the Income Tax Ordinance (Isr.) § 135 violates taxpayers' rights against self-incrimination. For review of the judiciary development concerning self-incrimination in tax law, see Shay Harel & Meir Ackonis, *Self-Incrimination Also in "Civil Investigation" According to the Tax Ordinance and the Calcoda Verdict—Is It Really the End of the Story?*, 14(2) TAX, a-60 (2000) (Hebrew); *see also* the *Damary* case, *supra* note 27, at ¶ 37.

[30] But it was determined in the UK that when the information is given for reasons other than tax ones (such as, within a divorce proceeding), the privilege against self-incrimination may be available. *See, e.g.*, R v. K [2009] EWCA Crim 1640.

[31] *See, e.g.*, Sullivan v. United States, 15 F.2d 809 (4th Cir. 1926), *rev'd*, 274 U.S. 259 (1927).

[32] "A careful reading of Sullivan and Garner, therefore, is that the self-incrimination privilege can be employed to protect the taxpayer from revealing the information as to an illegal source of income, but does not protect him from disclosing the amount of his income." United States v. Brown, 600 F.2d 248 (10th Cir. 1979); *see also Anti-Tax Law Evasion Schemes—Law and Arguments (Section IV)—Constitutional Amendment Claims*, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/anti-tax-law-evasion-schemes-law-and-arguments-section-iv [https://perma.cc/7ULV-RWY6].

costly investigations that exceed the amount of tax that would otherwise be collected.[33]

Other constitutional claims raised against taxing illegal income are that it can implicate double jeopardy and lead to excessive fines.[34] Under the Fifth Amendment, no person can be charged with substantially the same crime twice;[35] and according to the Eighth Amendment, the government may not impose excessive fines.[36]

A taxpayer found to have illegal income may face both criminal and civil sanctions.[37] The question is whether these dual sanctions jeopardize his constitutional rights under either the Fifth or Eight Amendment clauses above.

The issue of double jeopardy was discussed in the major case of *United States v. Halper*.[38] In that case, the Court examined whether a civil sanction served as punishment rather than as a remedial measure. After assessing the civil-sanction goal, the Court held that the sanction violated the Double Jeopardy Clause. Nevertheless, in taxation, not every civil sanction is aimed at punishment, and additional tax liability does not necessarily constitute an excessive fine violative of the Eighth Amendment. This claim was further examined in *McNichols v. Commissioner*,[39] when a convicted drug dealer was required to pay tax on his forfeited assets. The Court held that the tax authorities did not violate any constitutional right—neither the Eighth nor the Fifth Amendments—since the tax was a civil sanction. These issues were also reassessed in *Thomas v. Commissioner*,[40] where the Court held that the additional tax levied was in proportion to the deficient amount and the government's costs of collecting the tax. This outcome falls in line with many other tax decisions, holding that the civil sanctions and the related additional tax do not violate the Double Jeopardy Clause and are rather a safeguard to protect revenue and repay the government's high enforcement costs.[41]

Can the tax authorities tax illegal income when the law requires restitution? And the derivative question: *Do tax authorities have a preemptive right to restore taxation before compensating victims*? In the 1946 case *Commissioner v. Wilcox*,[42] the Court replied to the first question

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[33] *See, e.g*., Bittker, *supra* note 18, at 139.

[34] *See, e.g.*, the *Damary* case, *supra* note 27, at ¶ 37.

[35] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ." U. S. CONST. amend. V.

[36] U.S. CONST. amend. V. Some other constitutional claims were raised against taxation. *See Anti-Tax Law Evasion Schemes*, *supra* note 32.

[37] For civil sanctions, see, for example, 26 U.S.C. § 6662, titled "Imposition of Accuracy-Related Penalty on Underpayments"; 26 U.S.C. § 6663, titled "Imposition of Fraud Penalty"; Christine Manolakas, *The Taxation of Thieves and Their Victims: Everyone Loses but Uncle Sam*, 13 HASTINGS BUS. L.J. 31, 45–49 (2016). For elaboration on criminal sanctions, see Manolakas, *supra*, at 49–53.

[38] United States v. Halper, 490 U.S. 435 (1989) (discussing whether in that case, a civil penalty should be considered also as "punishment" and cause double jeopardy).

[39] McNichols v. Comm'r, 13 F.3d 432 (1st Cir. 1993).

[40] Thomas v. Comm'r, 62 F.3d 97 (4th Cir. 1995). *But see* Swellen M. Wolfe, *Recovery from Halper: The Pain from Additions to Tax Is Not the Sting of Punishment*, 25 HOFSTRA L. REV. 161 (1996) (suggesting a five-step analysis for civil tax sanctions examining their necessity and goals).

[41] *See* Wolfe, *supra* note 40, at 212.

[42] "[T]he bare receipt of property or money wholly belonging to another lacks the essential characteristics of a gain or profit . . . . We fail to perceive any reason for applying different principles to a situation where one embezzles or steals money from another." Comm'r v. Wilcox, 327 U.S. 404, 408 (1946).

in the negative.[43] The Court held that embezzled money could not be included in gross income since it was similar to a loan. The Court held that the receiver of these funds ought to repay this gain and he lacks a claim of right to this gain.[44] Nevertheless, six years later in *Rutkin v. United States*,[45] the Court held that extortion funds should be included in gross income. The Court in *Wilcox* explained that by taxing the wrongdoer, it would give unlawful preference to the state over the victim, who is entitled to restitution.[46] Subsequently, however, the Court decided that illegal activity should be taxed even though the wrongdoer may still be required to pay restitution on the illegal amount.[47]

Still, even if illegal activities involving victims are taxed, should we give priority to the tax authorities or allow the wrongdoer to compensate the victim first? Some scholars argue that although illegal activity such as theft should be taxed, the victim's right to be compensated cannot be secondary to the state's right to collect the unpaid tax.[48] This debate is beyond the scope of this Article.

Does the taxation of the illegal activity exonerate it or make the State a "silent partner"?[49]A strong argument against taxing illegal activities is that doing so might legalize the illegal act and would thus be morally unacceptable. Accordingly, if criminal law condemns the activity but tax law approves it by taxing it, it seems that the law (via tax law) tacitly authorizes the activity and absolves any wrongdoing.[50] In that respect, one area of law condemns the act while the other condones it. This asymmetry blurs the line between right and wrong and should not be advanced by law.

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[43] In Israel, this was discussed in the *Damary* case, *supra* note 27. The decisions of the Supreme Court in both the appeal and the further hearing held that illegal income should be taxed despite the restitution, though the bone of contention was whether the taxpayers could carry their losses backward. In the UK, the general principle is that illegal expenses should not be relieved due to public policy considerations. *See* HUGH J. AULT & BRIAN J. ARNOLD, COMPARATIVE INCOME TAXATION—A STRUCTURAL ANALYSIS 290 (3d ed. 2010).

[44] *See* Rev. Rul. 12335 G.C.M. 24945, 1946-2 C.B. 27–28:

> The correct rule appears to be that the mere act of embezzlement does not of itself result in taxable income inasmuch as the owner does not lose title to the property embezzled. However, where the owner condones the taking of the property and forgives the indebtedness, taxable income may result to the embezzler, depending on the facts in the particular case.

[45] Rutkin v. United States, 343 U.S. 130 (1952).

[46] "Sanctioning a tax under the circumstances before us would serve only to give the United States an unjustified preference as to part of the money which rightfully and completely belongs to the taxpayer's employer." *Wilcox*, 327 U.S. at 410.

[47] James v. United States, 366 U.S. 213, 219–20 (1961). The court in *James* applied a certain "control test" that can be either based on or related to the "claim of right doctrine." *See* Harold Dubroff, *The Claim of Right Doctrine*, 40 TAX L. REV. 729, 740 (1985).

[48] *See* Manolakas, *supra* note 37, at 53–56; *see also* Robert T. Manicke, *A Tax Deduction for Restitutionary Payments—Solving the Dilemma of the Thwarted Embezzler*, 1992 U. ILL. L. REV. 593, 620–22 (1992) (suggesting that the embezzler who restitutes the embezzlement be allowed to deduct that amount from his income for accumulative reasons, inter alia, since then only net income is being taxed and otherwise it is punishment, which should be meted out in the criminal court rather than through the tax administrative channel).

[49] *See* Bittker, *supra* note 18, at 131, 145 (discussing whether the government is a "silent partner" for taxing income from an activity that it also prohibits).

[50] *See, e.g.*, Steinberg v. United States, 14 F.2d 564 (2d Cir. 1926). "Did Congress intend anything other than legitimate labor, as opposed to criminal effort in labor, in imposing a tax from which it was to secure revenue to pay the obligations of the government?" *Id.* at 568. "[I]t is incredible to believe that it was intended that a bootlegger be dignified as a taxpayer for his illegal profit, so that the government may accept his money for governmental purposes, as it accepts the money of the honest merchant taxpayer." *Id.* at 569.

The contrary, and prevailing, argument, rejects the "silent partner" contention. Tax authorities are a State agency tasked with collecting taxes and reducing enterprises' profits. This is a technical task that does not involve any moral approval. Bittker analogizes this charge to other State authorities required to confiscate and sell criminals' property seized by the police.[51]

From a tax policy viewpoint, can an equity criterion justify not taxing unlawful activity? To answer this question, recall that there are various kinds of unlawful activities. Let us take for example the same individuals A and B from the above example. Selling products is a legal activity per se. A declares his income and pays his taxes, whereas B conceals his activity from the tax authorities and does not pay taxes (Type A income). This is one kind of illegal activity—mainly a tax offense. Another kind is where the income is accrued from a criminal offense (Type B income), such as theft or drug dealing. In the subsequent discussion, I focus on illegal income derived by public officials (Type B1 income). Meanwhile, however, let us treat all Type B income as a single whole as addressed so far in the literature. The illegal act can be regular or irregular,[52] but each act, whether legal or illegal, increases an individual's ability to pay; even in the past, courts challenged this discrimination and stated that "[i]t does not satisfy one's sense of justice to tax persons in legitimate enterprises, and allow those who thrive by violation of the law to escape."[53] In *Rutkin* (discussing money attained by extortion), the Court determined that "[a]n unlawful gain, as well as a lawful one, constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it."[54] Thus, the equity principle is a strong argument in supporting the taxation of illegal income. Otherwise, we let sinners profit from the sin and discriminate between the sinner and the law-abiding citizen.

The premise of this Article is that illegal income *should* be taxed (putting aside the questions of deducting illegal expanses and possible restitution),[55] following the rationale of various cases ruling that the Legislature did not intend to distinguish between legal and illegal income for tax purposes.[56]

IV. THE RATIONALE FOR ADDITIONAL TAXATION ON BRIBES

So far, we have reached two conclusions: First, non-monetary benefits have value, and second, illegal income should be taxed. On the third level, I now explore the taxation of bribes (assuming the courts had already convicted the public official of bribery).

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[51] Bittker, *supra* note 18, at 145.

[52] *Id.* at 138.

[53] Sullivan v. United States, 15 F.2d 809 (4th Cir. 1926), *rev'd*, 274 U.S. 259 (1927). Nevertheless, there was the problem of self-incrimination since the individual did not declare his illegal income and did not file his returns. The outcome of this verdict was that the tax authorities could collect tax from illegal income if they could prove the illegal income without the taxpayer's help. But the latter compromise was rejected by the Supreme Court. *See* Bittker, *supra* note 18, at 131–32.

[54] *Rutkin,* 343 U.S. at 137.

[55] *See* James v. United States 366 U.S. 213, 219–20 (1961).

[56] *See* Bittker, *supra* note 18, at 136 (stating that "[t]hroughout this tortuous judicial history, the Justices have agreed in principle that Congress did not intend to differentiate between honest and dishonest taxpayers, and that 'income' is taxable whether generated by legal or illegal activities"). It should be noted that even scholars who believe that unlawful income should be taxed only if the activity is a trade may consider bribery as part of the public official occupational activity.

A monetary bribe given to a public official is illegal income that should be taxed based on the above explanation. The question addressed in this Part is whether we should treat the illegal income accrued to the public official similarly to other illegal (and legal) incomes. For simplicity's sake, in this Part I refer to monetary and non-monetary bribes without distinction. In the following Part, I distinguish between the two and focus solely on non-monetary bribes.

A bribe, whether monetary or non-monetary, is given to a public official due to the power the official possesses. The benefit—that is, "anything of value"—is inherent to the bribery offense.[57] A person who wishes to bribe will only bribe a person he believes can illegally help him achieve a public benefit since this person usually holds an important position of power.[58]

From a tax perspective, two different types of illegal income should be taxed. First, income should be taxed that is derived from a legal act but fails to comply with a tax order. An example would be a businessman who does not declare income derived illegally (Type A illegal income).[59] Second, income should be taxed that is illegal income and is derived from an act that is illegal per se, such that the illegality is external to the tax law, such as income derived from bribery or drug dealing (Type B illegal income). Type B illegal income can be further subdivided into two subcategories: illegal criminal income accrued as a result of public power (Type B1) and income derived from other illegal activities (Type B2). As discussed above, both illegal incomes should be taxed to maintain the equity principle, but the question is whether we should distinguish between them for tax purposes.

Let us assume that an entrepreneur wishes to build a factory. To do so, she needs to receive a planning permit. She may retain the services of an expert in an arm's-length transaction and pay him X$, or she may follow the faster illegal route and bribe a public official who works in the building commission and illegally pay him the same amount. Both the expert and the bribe-taker receive the same economic power (X$); but beside the illegality there is a vital difference between them. The bribe-taker has accrued Type B1 income, and if we take the ability-to-pay principle as a sole indicator of equity, both have the same ability to pay since both have earned X$ (legally or illegally). The problem is that this principle ignores the power available only to the bribe-taker, which should be taken into consideration in evaluating the tax liability of both parties. An ideal society should promote equal distribution of benefits, but here certain benefits are available only to people who have "connections." Therefore, I claim that since both individuals do not have the same ability or opportunity to *benefit* from the specific public connection open only to the bribe-taker, the public official, we should take this public connection into consideration while calculating

[57] *See supra* text accompanying note 16.

[58] In this discussion, we ignore cases of bribing go-betweens for the sake of simplicity.

[59] See, for example, the general evasion offense under 26 U.S.C. § 7201, titled "Attempt to Evade or Defeat Tax," and Income Tax Ordinance (Isr.) § 220.

their tax liability.[60] It should be noted that we refer only to actual bribes received by public officials and not to attempted bribery.[61]

It is argued that even in the civil field, *former* public officials have the power to benefit from using (in practice) public goods that are not available to other individuals.[62] For example, a former Defense Minister or Chief of Staff who has established a private arms-trade company can make use of his worldwide connections and knowhow accrued during his public tenure. This (actual) use of public goods excludes individual skills but includes connections, meaning specific information that can be gained exclusively in the public arena such as access to other public officials and, particularly, decision makers.[63] To put it differently, this (legal) use of public goods available only to public officials grants them greater opportunities and may hinder equity when they use such public goods in the private field. Therefore, it is contended that this benefit from using public resources which are unavailable to most individuals increases the former official's welfare and coincidently his ability to pay.[64]

Even scholars who may dispute the conclusion that former public officials enjoy some benefits (especially when there is no cooling-off period) in the *civil* arena would find it hard to dispute that bribes to public officials are given specifically because of their current public position and connections.[65] Type B1 illegal income is not identical to Type A income and not even to type B2. Recall our two individuals—the expert and the bribe-taker—who both receive X$. Should we tax them equally? The common tax principle for achieving equity is the ability-to-pay principle, which does not distinguish between incomes A and B and between incomes B1 and B2.[66] People should pay taxes according to their ability.[67] If the income is in the same amount, the taxation of incomes A, B1 and B2 should be identical in the civil field. People with higher abilities should pay more (vertical equity), and vice versa. People with the same ability to pay should have the same tax burden (horizontal equity).[68] According to the diminishing-marginal-utility principle, the ability-to-pay principle is understood as the equal-sacrifice rule.[69] Applying this rule to both our individuals means we are required to tax them equally since both have the same ability to pay—that is, X$.

However, does the ability-to-pay principle capture the power used by the public official in producing his illegal income? In order to answer this question, we should understand the merits of the benefit principle. The

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[60] See Limor Riza, Should We Tax the "Clintons" and Other Former Senior Civil Servants More? Yes, We Should, 18 U.C. DAVIS BUS. L.J. 109 (2018).

[61] In this Article I do not adopt the theory of potential-income taxation. For a short review on the potential-income tax theory, see Dagney Faulk, Jorge Martinez-Vazquez & Sally Wallace, Using Human-Capital Theory to Establish a Potential-Income Tax, 63 PUB. FIN. ANALYSIS 415, 415–19 (2007).

[62] Riza, *supra* note 60.

[63] *Id.* at 112, 117.

[64] Indicators of public connections may be the seniority of the former public official, the length of his service, and the linkage between the new private income and the former position's salary. *Id.* at 124.

[65] *See supra* text accompanying note 14 (discussing the elements required for the crime of bribery).

[66] *See, e.g.*, Liam Murphy & Thomas Nagel, The Myth of Ownership: Taxes and Justice (2002).

[67] And perhaps within their "trade," as the above discussion surrounding notes 17–27.

[68] Joel Slemrod & Jon Bakija, Taxing Ourselves: A Citizen's Guide to the Debate Over Taxes 87–89 (4th ed. 2008).

[69] John Stuart Mill inferred the equal sacrifice principle from Adam Smith's equal ability to pay. *See, e.g.*, MURPHY & NAGEL, *supra* note 66, at 24.

benefit principle was also suggested as a principle for measuring equity. According to this principle, people should pay tax on the benefits they use and receive from the State. In that respect, taxes are treated as "prices" in the open market.[70] The benefit principle reflects a libertarian approach and suffers from practical weaknesses such as measurement problems.[71] Mainly for those reasons, the prevailing equity principle is the ability-to-pay principle, translated into tax laws as tax brackets.

Although the ability-to-pay principle is the dominant principle in many tax jurisdictions, both principles can be traced back to Adam Smith, who defined the equity principle as follows: "The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state."[72]

Smith merged both principles by referring to an individual's ability and his "enjoyment." Using these facets of equity, it seems that the ability-to-pay principle is a sufficient equity principle in many cases, but that it is insufficient as an indicator for taxing public officials, particularly the bribe-taking public official.

The premise of this discussion, as discussed in Part III, is that we first need to tax illegal activities. Now, recall our two individuals—the expert and the bribe-taker. Both receive X$ and according to the ability-to-pay principle should be taxed equally, since each has the same ability (X$). But is this an impartial outcome? The bribe-taker received his (illegal) income due to his close proximity to public goods, such as public connections. In criminal law, we usually punish him since the corrupt act is connected to "wrongfulness, duty and advantage."[73] In the civil field of tax law, however, since we tax illegal and legal income equally, as discussed above, we focus on the "advantage," meaning the additional benefit accrued by the corrupt act. The public official *benefited* more from using public ties within his current occupational position, which increased his ability to produce income. In that respect, although the ability-to-pay and benefit principles carry different rationales, in our case, they merge into Smith's equity definition. The bribe-taker has a high ability to pay as a result of the *benefits* he derived from *illegally* using his public sources, which are not available to the other expert individual and other criminals. For the bribe-taker, the ability and the benefit are tied together, whereas for the expert the only relevant measure is the ability to pay.[74]

For the sake of illustration, this Article uses the example of positive news coverage. How should we refer to negative news coverage? It should be

[70] This principle was originated by the contrarian paradigm; for its development, see Joseph M. Dodge, *Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles*, 58 TAX L. REV. 399, 401–04 (2005).

[71] For more criticism on the benefit principle, see, for example, SLEMROD & BAKIJA, *supra* note 68, at 62–64.

[72] Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 825 (R.H. Campbell & A.S. Skinner eds., 1979); see also Murphy & Nagel, supra note 66, at 12.

[73] Hughes, *supra* note 5, at 52.

[74] Even scholars who may believe that we should not tax illegal activity may differentiate between illegal income accrued in the private field and illegal income accrued in the public arena. The difference may be in referring to a different legal offence, but this difference—as in the tax field—is based on the (mis)use of public benefits.

noted that this Article focuses only on bribes where public officials illegally receive (non-monetary) benefits. An opposite scenario is where the public official is criminally coerced (for example, by extortion or blackmail) to do something; if not, for example, he would face negative news coverage.[75] We may treat the actual negative news coverage as a non-monetary loss, but this scenario and its evaluation are food for thought and beyond the scope of our discussion.

Contrary to the mainstream view on horizontal equity, in which people with the same income should pay the same taxes,[76] I claim that individuals such as the bribe-takers who use public resources to produce their (illegal) income should pay more for that *usage*, even more than a criminal who produced Type B2 income. This additional tax is not a sanction on the illegal activity; rather, it is a sanction on an additional use of a public good and can take the form of higher tax brackets or a special "political" surtax in the civil-tax arena.[77] This follows the rationale that horizontal equity based on income can be a standalone principle somewhat in line with Musgrave, who considers horizontal equity as a solid principle independent of any distributive theory that is adopted and thus not derived from vertical equity.[78] By conflating those principles, we can not only tax the bribe-taker on the income he accrued, but can also impose higher taxation on him in order to achieve horizontal equity. I will leave the precise assessment of the added tax to economists and suffice ourselves in this Article with determining that from a civil-tax perspective, the X$ derived by the bribe-taking public official is *unequal* to the X$ accrued by the expert (and even X$ from type B2). The bribe-taker's illegal benefit was accrued by virtue of his or her position as a public official using public resources that are not accessible to all individuals (such as the expert). This utilization of public resources justifies additional tax liability in bribery cases based on the benefit principle.

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[75] We can raise the question of whether public officials possess a certain "intangible personal property." It was held in *Sekhar v. United States*, 570 U.S. 729 (2013) that a "recommendation" of a public officer is not an intangible personal property for the sake of extortion under the Hobbs Act (18 U.S.C § 1951). The court held with regard to the extortion offense that "the property extorted must . . . be transferable—that is, capable of passing from one person to another. . . ." *Id*. at 729. In our case, we can claim that when an individual serves as a public official he holds an intangible property (even if it is not transferable as held in *Sekhar*, *id.* at 734). Justice Alito believes that we should not stretch "the concept of property beyond the breaking point" and that "[i]t is not customary to refer to an internal recommendation to make a government decision as a form of property." *Id.* at 740. Although our research question at stake is the opposite of extortion of a public official, we may use the analogy to "intangible personal property." In the *Sekhar* case, the court held that the recommendation of the so-called "extorted" individual cannot be personal property since "[i]f the general counsel had left the State's employ before submitting the recommendation, he could not have taken the recommendation with him, and he certainly could not have given it or sold it to someone else." *Id.* at 742. But in our situation, we consider first not the extortion but the bribery offense, and second the use of the power within the public office.

[76] Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139, 140 (1989).

[77] In some jurisdictions, there are various sanctions on illegal income such as deduction restrictions. Note, however, that those restrictions are treated as sanctions. Here we focus on the civil facet of the taxation and on sanctioning the activity.

[78] Richard A. Musgrave, *Horizontal Equity, Once More*, 43 NAT'L. TAX J. 113, 116 (1990). Whereas, for example, Kaplow, claims that horizontal equity is not an independent normative principle. *See* Kaplow, *supra* note 76, at 140.

V. EVALUATING NON-MONETARY BRIBES

I have just concluded in Part IV that bribes should be taxed even more than legal or illegal income accrued without using public connections.[79] Since I believe that bribes—whether monetary or not—should be taxed in accordance with the benefit principle, we now address the next question: How to evaluate *non-monetary* bribes that do not involve any cash exchange and do not have a *direct* market price? Non-monetary bribes are valuable to both sides of the transaction, but here I focus on the value accrued to the public official, the bribe-taker. In what follows, I would like to offer some mechanisms for evaluating those non-monetary bribes, although this is not an exhaustive list, and each case should be examined on its own merits.

A. BARTER TRANSACTION

Bribery, whether monetary or non-monetary, can be seen as a barter transaction. Therefore, the first evaluation mechanism is treating and taxing the transaction as a barter between two parties, which persists in all bribery instances.[80] Barter is defined by the IRS as "the exchange of goods or services."[81] It refers to intentional-commercial exchanges[82] where "[u]sually there's no exchange of cash."[83]

Barter commercial transactions are usually taxed,[84] since they increase one's wealth,[85] although they may cause some misunderstandings and misperceptions.[86] First, since income is not narrowly defined,[87] and since

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[79] *See supra* text accompanying note 77.

[80] Note, however, that some scholars claim that bribery requires more than quid pro quo. *See* Hughes, *supra* note 5, at 26, 32. *But see* Lowenstein, *supra* note 6, at 786–87 (claiming that "the bribery laws are supposed to require a quid pro quo—an explicit exchange of a specific benefit for a specific official action (or inaction)—a requirement that is evaded easily, and is difficult to prove even when it has not been evaded.").

[81] *See Topic No. 420 Bartering Income*, IRS, https://www.irs.gov/taxtopics/tc420 [https://perma.cc/5EWA-776N]. Barter was considered as an exchange of services already in 1927 in *Hellmich v. Missouri Pac. R. R. Co.*, 273 U.S. 242, 254 (1927); *see also* Jasper L. Cummings Jr., *Circular Cash Flows and the Federal Income Tax*, 64 TAX LAW. 535, 544 (2011).

[82] Pareja refers to it as "any organized or intentional barter transactions." Sergio Pareja, *It Taxes a Village: The Problem with Routinely Taxing Barter Transactions*, 59 CATH. U. L. REV. 785, 792–806 (2010).

[83] The full IRS definition is as follows:

> Bartering is the exchange of goods or services. A barter exchange is an organization whose members contract with each other (or with the barter exchange) to exchange property or services. The term doesn't include arrangements that provide solely for the informal exchange of similar services on a noncommercial basis (for example, a babysitting cooperative run by neighborhood parents). Usually there's no exchange of cash. An example of bartering is a plumber exchanging plumbing services for the dental services of a dentist.

See id. Newman mentions that business parties usually prefer cash transfer; barters are carried out to conceal illegal activity or the sale of goods that cannot be sold in the open market. *See* Joel S. Newman, *Determining Value in Barter Transactions: A Response to Robert Keller's* The Taxation of Barter Transactions, 68 MINN. L. REV. 711, 712 (1984).

[84] *See*, *e.g.*, Rev. Rul. 80-52, 1980-1 C.B. 100.

[85] *See*, *e.g.*, Andrew P. Lycans, *An Assignment by Any Other Name: Contingent-Fee Agreements as Partial Assignments of the Claim*, 101 MICH. L. REV. 1102, 1127 (2003); CA 247/63 Tax Commissioner v. Schaefer, PD 17 2713 (1963) (Isr.).

[86] *See* Pareja, *supra* note 82, at 788–89.

[87] In the U.S., "gross income means all income from whatever source derived." 26 U.S.C. § 61(a) (titled "Gross Income Defined"). "Gross income" is elaborated as to include "income realized in any form, whether in money, property or services." 26 C.F.R. § 1.61-1(a). In the UK, for example, income tax is specified under the Income Tax Act 2007, c. 3, § 3, and stretched over other acts such as Income Tax

there is no need for cash transfer to create income including income in-kind.[88] Second, if the consideration is not in cash, the value of income should be estimated. It is common to determine the value as the FMV,[89] which is equal for both transaction parties and should be included in the same taxable year it was received.[90] Some bartering transaction may be excluded from tax if the value received is explicitly excluded from gross income in the law.[91]

Let us assume two parties—Tracey and Gayle—are in a *legal commercial* barter transaction. If Tracey gives Gayle services *t* and Gayle in return gives services *g*, we assume these services are given at FMV, since parties at arm's length would not give free gifts to unrelated parties. Pareja treats barters as "exchanges in which both parties enter the exchange only because each is receiving a quid pro quo for his goods or services."[92] Tracey's "attributed" income is for *t*, and her imputed expenses are for *g*. Since this is a symmetrical transaction, Tracey's income is Gayle's expenses,[93] and Tracey's expenses are Gayle's gross income.[94] If it were not a barter transaction, each gross income or expense would have equaled the same amount. It is thus presumed that the consideration is equal in value because it was also executed by unrelated parties. Indeed, the leading case, *United States v. Davis*,[95] states that certain exchanges enacted by arm's-length parties are presumed "to be equal in value to the property for which they were exchanged." In order to assess the value of the transaction, the tax authorities take a step back and assume there were money transfers in the fair market,[96] and the same amount is imputed to both parties.

(Earnings and Pensions) Act 2003, c. 1 (ITEPA) and Income Tax (Trading and other Income) Act 2005, c. 5 (ITTOIA).

[88] In the UK, for example, courts specified that trade is not limited to monetary activities. *See* Gold Coast Selection Trust Ltd. v. Humphrey [1948] 30 TC 209 (*aff'd* in Johnson v. HMRC [2016] UKFTT 10, ¶ 39 (TC)).

[89] 26 C.F.R. § 1.61-2(d) (titled "Compensation for services, including fees, commissions, and similar items.") *See, e.g.*, Rev. Rul. 79-241979-1 C.B. 60 (discussing the FMV of a service barter transaction). This discussion is based on the "equivalence presumption." *See* DAVID ELKINS, TAXATION OF BARTER TRANSACTIONS: THEORY, COMBINATION TRANSACTIONS, AND INTEREST-FREE LOANS (Tel-Aviv 2012) (Hebrew). This is the common conception for taxing barter transactions, but there are other models. *See id.* at 77.

[90] 26 U.S.C. § 451 titled "General Rule for Taxable Year of Inclusion," according to which the barter transaction should be reported; 26 U.S.C. § 6045 titled "Returns of Brokers," which defines "broker" as a "barter exchange," § 6045(c)(1)(B)); *see also* Form 1099-B (mainly relevant to barter exchange organizations), https://www.irs.gov/pub/irs-pdf/f1099b.pdf; *Publication 525 (2021), Taxable and Nontaxable Income*, IRS, https://www.irs.gov/publications/p525 [https://perma.cc/WRF9-3YVB]. For a brief history of the obligation to report barter transactions within barter exchange organizations, see Pareja, *supra* note 82, at 787, 804.

[91] *See, e.g.*, Pareja, *supra* note 82, at 792.

[92] *Id.* at 798 n.98.

[93] At this stage, we ignore if the expenses can be deducted in accordance with 26 U.S.C § 162.

[94] *See* Robert I. Keller, *The Taxation of Barter Transactions*, 67 MINN. L. REV. 441 (1983) (referring to situations without symmetry as "the deduction without income approach" and "the income without deduction approach").

[95] U.S. v. Davis, 370 U.S. 65 (1962) (examining the tax liability of a taxpayer following a martial separation agreement); *see also* Phila. Park Amusement Co. v. U.S., 126 F. Supp. 184 (Cl. Ct. 1954) ("[T]he value of the two properties exchanged in an arm's-length transaction are either equal in fact, or are presumed to be equal."); Keller, *supra* note 94, at 452–53, 459–60; Clifford L. Porter, *The Cost Basis of Property Acquired by Issuing Stock*, 27 TAX LAW. 279 (1974); ELKINS, *supra* note 89, at 146.

[96] *See* Keller, *supra* note 94, at 452–54 (arguing that in some cases, the FMV and the presumption of equality differ, the presumption of equality is rebuttable, and the evidence of the real value of the transaction which differs from FMV is available). But Newman, with regard to some barter transactions, assumes that parties prefer cash to goods/services transfers. When they accept in-kind income it usually

Let us analyze the example brought in the preface. But for simplicity's sake, let us slightly change the facts to a *monetary bribe* and assume that the newspaper's chief editor, the alleged bribe-giver analogized to Gayle, did not give the Member of Congress, the alleged bribe-taker analogized to Tracey, positive coverage. Rather, in consideration for his request to weaken the rival newspaper, the alleged bribe-taker gave X$ to the Member of Congress. If this was the case, the bribe felony would have been much easier to detect, evaluate, and eventually tax. And as mentioned above, in most cases we assume that the barter transaction should be treated as though there was a cash transfer[97] since it is economically equivalent to a cash transfer.[98] Since we believe that in a commercial relationship there are no "free meals," we can consider the X$ as the FMV equal to both parties.

How would we tax Tracey in a *civil monetary* dual transaction? If there was a civil, non-criminal transaction such that Tracey paid Gayle X$ for the services and vice versa, Tracey (analogized to the Minister) would have received X$ in an arm's-length transaction that would be subject to taxation. But how would we tax Tracey if there was no exchange of money, that is, a barter transaction that is still a civil one (that is, not a criminal offense) without a cash exchange? In this case, the tax authorities would be required to backtrack and assess that the exchange benefit equaled. If we moderate this example and assume an *illegal* barter activity, this would mean that it would be treated as gross income, as jurisdictions tend to do. The main reason is that the legislature and judiciary currently treat all economic benefits as gross income no matter their source and regardless of whether they are received in cash or in-kind.[99]

Many barters are carried out as a means to execute illegal transactions,[100] and the equivalence presumption is highly applicable for those incidents.[101] The above Member-of-Congress case is an example of alleged *illegal barter* transactions.[102] The fact that they involve barter transactions is not questionable since the transaction is between two unrelated parties where one party provides services to the other and vice versa. The more difficult question is to value the benefit for both sides. As one Treasury Regulation states, and as elaborated above, the assumption is that it was exchanged at FMV,[103] where FMV is the price that should be paid in a willing voluntary exchange between unrelated parties. For example, with regard to evaluation of a charitable contribution "the fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable

means that the good/service has low marketability and thus Keller's presumption of equivalence does not apply. Newman, *supra* note 83, at 713.

[97] *See* Pareja, *supra* note 82, at 786, 817.

[98] Keller, *supra* note 94, at 442–44, 468. Keller also discusses trade units and assumes that the value is equal for both parties, stating that "Therefore, the economic value of a trade unit to each member is the same regardless of what the member gave up to acquire it . . . . In equating the two sides of a barter exchange, the only relevant factor is the value, not the cost, incremental or otherwise, of the goods and services given up." *Id.* at 497.

[99] *See* discussion *supra* Part III; *see also* Keller, *supra* note 94, at 447.

[100] Newman, *supra* note 83, at 712.

[101] ELKINS, *supra* note 89, at 119.

[102] Mr. Kurz, former Austrian Chancellor, is accused of making a direct payment for an alleged illegal action, which is not a barter transaction. *See supra* text accompanying note 3.

[103] *See* 26 C.F.R. 1.61-2(d) (2021); *see also supra* text accompanying note 89. FMV is defined in 26 CFR § 1.897-1.

knowledge of relevant facts."[104] Thus, in general (though not always) FMV is an objective criterion[105] for the value in a barter transaction for both parties.

The main problem in the bribery transactions discussed in this Article is that the bribe is non-monetary. It may have a subjective value for the bribe-taker, but can we still apply the FMV criterion?[106] Tax authorities may indeed assume that the value for both parties is equal,[107] and may present the FMV of the transaction. Apparently, the value to the Member of Congress is difficult to ascertain, but the value to the daily newspaper in the aforesaid case is much clearer. The alleged reason for the bribery is the reduction in advertising revenues from weekend newspapers due to the distribution of the free competitor. This reduction can be easily quantified based on the newspaper's books and counteracting it could be attributed to the Minister. This is one way to evaluate the transaction that can be justified according to the benefit principle that public connections can be taxed more highly.[108] It should be noted that the benefits accrued to the Member of Congress are real and not potential—in our example, he received positive news coverage. In this Article, I do not argue that we should tax the public official on the opportunity to take bribes; instead, we should tax the public official based on actually receiving bribes.[109] But in order to evaluate the magnitude of the bribe, we use the FMV of the other party even if the other party was not able to exercise the bribe. In other words, even if the other party did not profit at the end of the day from the illegal transaction, we use the FMV to *estimate* his expected income and attribute it to the public official. Thus, the default rule should be evaluating the transaction according the visible (potential) FMV of one party since we are all aware that in the free market there are no free gifts and one can expect that the external value is the value for both parties. In addition, parties in an arm's-length transaction would not wish to give more than they get—a barter transaction is therefore primarily a quid pro quo transaction.

Nevertheless, the amount imputed to the Member of Congress in the above case may be tens of millions, well beyond the affordability of an individual.[110] Therefore, we should consider opting out of the default rule and offering other, less common ways to assess the Minister's transaction, at least in cases where the FMV is beyond the means of both parties (let alone

[104] *See* 26 C.F.R. 1.170A-1(c)(2) (2021) (titled "Charitable, etc., Contributions and Gifts; Allowance of Deduction"); *see also* Goldman v. Comm'r, 388 F.2d 476, 478 ("[W]here a deductible charitable contribution is made in property other than money, the allowable deduction is the fair market value computed on the price an *ultimate consumer* would pay, and that what might be paid by a dealer buying to resell is not a proper consideration.") (emphasis added); Keller, *supra* note 94, at 449–50.

[105] Keller, *supra* note 94, at 450.

[106] *See* discussion *supra* Part II on the subjective value of non-monetary benefits.

[107] *See supra* text accompanying note 96 (discussing the presumption of equality); *see also* Keller, *supra* note 94, at 452.

[108] *See supra* text accompanying note 77.

[109] This Article does not apply the theory of potential income taxation. *See* Faulk et al., *supra* note 61.

[110] See, for example, the liquidity problem that may occur in barter transactions. Pareja, *supra* note 82, at 799–800; *see also* ELKINS, *supra* note 89, at 136.

ordinary individuals).[111] In other words, this quandary still does not mean that we should not attribute value to the non-monetary transaction, but that we may adopt other evaluation methods in the barter transaction.

In this uncommon case, the value of the benefit can serve as a probative, but not conclusive value.[112] In our example, although the alleged bribe-taker has non-monetary gain, we can analogize it to the other bribery barters. For example, a big enterprise from a developed country bribes a low-ranking civil servant in a developing country in order to obtain a government permit to build a plant. The civil servant is pleased to receive a mere $500, which is more than his monthly salary, whereas the permit is worth millions to the bribe-giver. In this case, we have an illegal (monetary) barter, but one that is economically unequal for both parties. Nevertheless, in the above case we discuss a senior public official—the Member of Congress—so that the chances for greater symmetry are higher.

If the FMV, however, is not viable, we may use a more subjective evaluation and set aside the objective FMV,[113] especially since non-monetary bribes have idiosyncratic subjective value. In other words, one can claim that the value derived for the newspaper is not a proper indication of the value to the Minister. In that case, we can set aside the "barter-equation method"[114] and symmetry assumption. In cases such as this, we can move away from the symmetry typical to barter transactions and adopt a more general view according to which each party has its own gain that is independent of the value obtained by the other barter party.[115] This idea can also find reference in older legal precedents. For example, in *Seas Shipping Co. v. Commissioner*, the Second Circuit stated that "[t]here are obvious dangers in evaluating the consideration involved in one side of a barter-transaction by determining the worth of the consideration on the other side."[116] To conclude, barter symmetry can help us evaluate non-monetary bribes in some instances, as described above, but we can adopt a more specific mechanism, as discussed in the next section.

B. MISCELLANEOUS EVALUATION

When it is easy to establish the value for the bribe-giver, but it is very high and unfeasible to ascribe to an individual under the reasonableness test,[117] as discussed above, we may adopt a different evaluation device.

[111] Nevertheless, one may claim that this high value should be included in the gross income since it may reflect the additional tax that should be imposed on the public officials. *See supra* text accompanying note 77.

[112] *See* Keller, *supra* note 94, at 454–55.

[113] *Cf.* Turner v. Comm'r, No. 41763, 1954 LEXIS 207, at *3 (T.C. May 13, 1954) (holding in a case where the IRS wished to add the retail cost of tickets won on a radio show to the taxpayer and wife's gross income that since the taxpayer and wife's tickets were beyond their means, their value could not "equal their retail cost").

[114] For evaluating the two sides of the barter, see Seas Shipping Co. v. Comm'r, 371 F.2d 528 (2d Cir. 1967).

[115] *See* Keller, *supra* note 94, at 446–47, 453–54; Lycans, *supra* note 85, at 1128 ("[W]hen the government can independently value the gain of each party, it should use the actual gain each received.").

[116] *See* Seas Shipping Co. v. Comm'r, 371 F.2d at 529, quoted subsequently in Amerada Hess Corp. v. Comm'r, 517 F.2d 75, 87 (3d Cir. 1975), and in the subsequent restriction of this method in Pope & Talbot, Inc. v. Comm'r, 162 F.3d 1236 (9th Cir. 1999).

[117] *See* AHARON BARAK, PROPORTIONALITY IN THE LAW 455 (2010) (Hebrew); AHARON BARAK, *Proportionality and Reasonableness*, *in* PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 371 (2012).

Another mechanism for evaluating the non-monetary benefits of the kind allegedly accrued by the public official in the above Member-of-Congress case involves the assessment of goodwill, regardless of the gain accrued to the other party. To do so, we first need to evaluate personal goodwill and then discuss it for tax purposes. Personal goodwill is personal reputation "that will probably generate future business."[118] It can also be defined as "the most 'intangible' of the intangibles."[119] Despite these definitions, goodwill cannot be easily defined and has thus received different interpretations.[120] IRS regulations define it as "the value of a trade or business attributable to the expectancy of continued customer patronage. This expectancy may be due to the name or reputation of a trade or business or any other factor."[121] Goodwill is difficult not only to define but also to measure; nevertheless, in many instances, personal goodwill needs to be evaluated. For example, it needs to be evaluated in cases of divorce when the parties wish to split the marital property and where one party claims that she or he deserves an equal share of his or her former spouse's goodwill in the business.[122] Although personal goodwill is considered intangible, it is a sellable asset,[123] and its evaluation is often required in cases of selling a corporation (or its shares).[124] Furthermore, personal goodwill can inhere in a corporation, for example, when the individual shareholder makes the most important management decisions or when the entire corporation's achievements are based on his skills.[125]

For that reason, various mechanisms have been suggested to evaluate personal goodwill. One common mechanism is the "adjusted net asset value," which considers the value of the company as all its assets both tangible and intangible, minus its liabilities, where tangible assets are evaluated according to FMV.[126] Other techniques are, for example,

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[118] Dugan v. Dugan, 457 A.2d 1 (N.J. 1983).

[119] *See id.* at 5 (quoting DONALD KIESO & JERRY WEYGANDT, INTERMEDIATE ACCOUNTING 570 (3d ed. 1980))*; see also* Alicia B. Kelly, *Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill*, 51 RUTGERS L. REV. 569 (1999).

[120] *See id.* at 577–78; Christopher E. Anderson, *Goodwill Valuation in Marital Dissolution*, KY. BAR ASS'N 1 (2012), https://cdn.ymaws.com/www.kybar.org/resource/resmgr/2012_Convention_Files/ac2012_6.pdf.

[121] *See* 26 C.F.R. § 1.1060-1(3)(b)(2)(ii) (2021), titled "Special Allocation Rules for Certain Asset Acquisitions"; 26 C.F.R. § 1.197-2(b)(1) (2021), titled "Amortization of Goodwill and Certain Other Intangibles."

[122] *See, e.g.*, Kelly, *supra* note 119, at 570 (suggesting in cases of professional goodwill a percentage ownership interest in the forthcoming expected income derived by the goodwill).

[123] *See Publication 551, Basis of Assets*, IRS, https://www.irs.gov/publications/p551 [https://perma.cc/TN68-LTQ9].

[124] *See* Allocation of ADSP and AGUB Among Target Assets, 26 CFR § 1.338-6(b)(2)(vii) (2022) (defining goodwill as Class VII for federal tax purposes).

[125] Martin Ice Cream Co. v. Comm'r, 110 T.C. 189, 206–07 (1998) (discussing personal goodwill caused by shareholder's business relationship); Darian M. Ibrahim, The Unique Benefits of Treating Personal Goodwill as Property in Corporate Acquisitions, 30 Del. J. Corp. L. 1, 9 (2005); Robert F. Reilly, Goodwill Valuation Approaches, Methods, and Procedures, Fin. Advisory Servs. Insights, Spring 2015, at 10, 13; see also Income T.A. (Center) 35155-10-14 Riesman v. Tax Commissioner, ¶ 49 (Dec. 15, 2018) (Nevo Legal Database) (Isr.) (Hebrew); C.A. 7493/98 Sharon v. Tax Commissioner, ¶ 3 (Dec. 15, 2003) (Nevo Legal Database) (Isr.) (Hebrew) (stating that although goodwill does usually belong to the business itself, in some cases it can belong to the business owners if they are the "gravity force" towards the customer).

[126] For general techniques to assess goodwill, see, for example, Reilly, *supra* note 125, at 15.

"comparable transaction,"[127] "discounted cash flow,"[128] "excess earnings,"[129] and the "multiattribute utility model".[130] It should be noted that the personal goodwill of a public official as opposed to a businessman is difficult to evaluate since it seems untradeable but mutatis mutandis some methods are still feasible, such as the excess earnings.

After crossing the first hedgerow of evaluating personal goodwill, the second stage is to discuss how to tax it. In many jurisdictions, goodwill is treated as a capital gain.[131] Despite the estimation constraints, goodwill is measured and taxed and can serve as a plausible evaluation device in the example of the above Member-of-Congress case. In that case, the alleged bribe-taker received a non-monetary benefit in the form of favorable news coverage, helping increase his reputation and thus his "personal goodwill." Goodwill has a taxable value, and the tax authorities should tax this positive coverage according to one of the evaluation systems suggested above.

In the example brought in this Article, a third available mechanism is to examine the potential outcome of the positive coverage provided to the briber. If there is a conviction in the case presented, the value to the alleged bribe-taker is the value of remaining in power as a Member of Congress for another term. The immediate financial value is the expected salary and other derivative benefits to which the Member of Congress is entitled during that term, as well as other opportunities for financial payoff; but naturally, there is also the value of power and reputation, which can be evaluated as explained above.[132]

Since the Member-of-Congress case is used in this Article only as an example, I do not attempt to cover all possible evaluation methods for all non-monetary bribes. Nevertheless, since all non-monetary briberies are barter transactions, it seems that the first evaluation method—the barter

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[127] *See* Anderson, *supra* note 120, at 9–10 (comparing the transaction to similar transactions in the market in order to obtain an indication of the value of the requested assets/reputation).

[128] *See* Anderson, *supra* note 120, at 10–11 (evaluating the future expected business income and discounting it to present value).

[129] *See* Anderson, *supra* note 120, at 11 (finding the technique common in assessing mainly professional goodwill).

[130] The MUM technique is intended to separate personal and enterprise goodwill. Conceived by a lawyer named David N. Wood, this is a mathematical formula that evaluates attributes of goodwill such as abilities, work habits, and age, and gives each a certain weight. *See* David N. Wood, *An Allocation Model for Distinguishing Enterprise Goodwill from Personal Goodwill*, 18 AM. J. FAM L. 167 (2004); *see also* Anderson, *supra* note 120, at 12–13. For the evaluation methods available in Israeli law, see DAVID ELKINS, TAXATION OF INTELLECTUAL PROPERTY 143–64 (Bursi ed., 1993).

[131] For example, how should we treat goodwill raised during a corporate sale? A corporation can be sold either by selling its shares or by asset sale. Generally, out of tax considerations, sellers prefer selling their shares directly to avoid two-tier taxation, but buyers may prefer an asset sale. *See* Lucas Parris, *An Overview of Personal Goodwill*, MERCER CAP., https://mercercapital.com/article/an-overview-of-personal-goodwill [https://perma.cc/E5ET-352X]. In the UK, tax relief for a corporation acquiring goodwill was reintroduced in 2019 but only if there is a strong connection to the intellectual property (by repealing Corporation Tax Act 2009, c. 4, § 816 (CTA), and amending Finance Act 2019, c. 1, §§ 25–26). But where personal goodwill is involved, both parties may prefer a different tax planning. If a shareholder sells personal goodwill, it is taxed directly at the shareholder level at a low capital gain tax rate, thus avoiding the corporate tax. *See, e.g.*, Ibrahim, *supra* note 125, at 43. The other party—the buyer—can still enjoy the 15-year amortization period for the goodwill and receive a step-up in basis in accordance with 26 U.S.C § 197. In Israel, goodwill is also treated as an asset and is subject to capital gains tax. Until 2003 (Amendment No. 132 of the Income Tax Ordinance), goodwill unpaid for at purchase was subject to a lower tax rate of 10% and thus induced various tax planning. Today, it is subject to the regular rates applied to capital gains under Income Tax Ordinance (Isr.) § 91 (distinguishing, inter alia, between entities, individuals, and substantial stockholders).

[132] Naturally, this is also related to some extent to personal goodwill.

transaction—is relevant for all and that it should serve as the default rule. If, however, the FMV is somewhat atypical, we may set aside the symmetrical measurement and adopt other mechanisms that focus only on the bribe-taker who enjoys a non-monetary benefit. There may be additional economic mechanisms to evaluate the bribe, depending on the particular case, and each case should be examined separately. Non-monetary bribes can come in many forms and there is no one single mechanism to evaluate them all.

VI. CONCLUSION

This Article examines the question of whether we should tax non-monetary bribes and, if yes, how. To answer this question, we refer to the Member-of-Congress case as a prototype. How should we tax a high-ranking public official who receives a bribe in the form of positive news coverage and, in return, exercises his regulatory power? First, we defined non-monetary benefits in a residual way as benefits that are invisible but have subjective value for the receiver without a direct FMV. The alleged benefits granted to the bribe-taker in the Member-of-Congress case are an example of non-monetary benefits. Our second level of argumentation was to clarify the justification for taxing illegal income, where an illegal benefit is inherent to any bribery offense, whether the consideration is monetary or not. On the third level, our argumentation was further developed in two directions. First, illegal income—whether monetary or non-monetary—given to a public official is not similar to other illegal incomes, and consequently should be taxed more than other illegal incomes. This reasoning is based on the equity principle. The bribe-taker's illegal benefit can be accrued thanks to his position as a public official using public resources not available to other individuals. Although the ability-to-pay principle is the dominant principle in many tax jurisdictions, we cannot take it as a sole indicator of equity while taxing the bribe-taker. The bribe-taker has a high ability to pay as a result of the benefits he derived from illegally using his public sources. This unique use of public resources justifies an additional tax liability, resting on the benefit principle that can take the form of higher tax brackets or a special "political" surtax. Our second claim is that the default rule for valuing the non-monetary benefit should follow the presumption of equality since bribery is a tit-for-tat barter transaction. However, in cases where the FMV is not mutually viable for the parties and the non-monetary bribe has idiosyncratic subjective value, we may deviate from the default rule and adopt other estimation methods, such the ones based on evaluating goodwill. A non-monetary benefit given as a bribe to a public official is not a "free lunch." On the contrary, this non-monetary bribe has a value to the public official that should be taxed extra following the motto "there's no such thing as an untaxable 'public free lunch.'"