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## A Monologue on the Taxation of Business Gifts

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# BRIGHAM YOUNG UNIVERSITY LAW REVIEW



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J. REUBEN CLARK LAW SCHOOL

# A Monologue on the Taxation of Business Gifts\*

Erik M. Jensen\*\*

## INTRODUCTION

This article considers whether the concept of "business gift" should have continuing viability with respect to the Internal Revenue Code of 1986, as amended (the Code).<sup>1</sup> At its genesis early in this century,<sup>2</sup> the concept was poorly conceived.<sup>3</sup> Moreover, the Supreme Court's seminal decision in *Commissioner v. Duberstein*<sup>4</sup> has led tax advisers into an analytical quagmire,<sup>5</sup>

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\* I have chosen something approaching a monologue format in reaction to the proliferation of articles in dialogue form. See, e.g., James D. Gordon III, [fill in just about anything written during JDG III's post-promotion period]. The dialogue jam threatens to make law review articles far more readable than they should be.

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1. Those readers who are pressed for time and would like a summary of the article might now turn to the next-to-last sentence of the text.
2. In case the BYU folks follow usual law review publishing schedules, I should make it clear that the reference in the text is to the 20th century.
3. See Gerard M. Brannon, *Tax Loopholes and Original Sin*, 37 TAX NOTES 841, 849 (1987) (footnote omitted):

[O]ther sets of current tax problems . . . can be traced to sloppy thinking in the early days of the income tax. The original framers were correct in concluding that income once taxed as it entered the family should not be taxed again simply because the earner transfers normal consumption rights to another family member. This original gift exclusion was, however, too broadly written and led to such foolishness as . . . a long line of litigation and legislation on business gifts.

For more on sinful conception, see NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Modern Library ed., 1950). On a more serious note (more serious than Hawthorne?!), see 1 BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 10.2.1 (2d ed. 1989) (discussing history and rationale of gift exclusion for federal income tax purposes); see also Bruce I. Kogan, *The Taxation of Prizes and Awards—Tax Policy Winners and Losers*, 63 WASH. L. REV. 257 (1988) (describing treatment of prizes and awards in business context); Wendy Gerzog Shaller, *The New Fringe Benefit Legislation: A Codification of Historical Inequities*, 34 CATH. U. L. REV. 425, 429-33 (1985) (describing Internal Revenue Service's historical role in developing tax treatment of in-kind compensation); Daniel Shaviro, *A Case Study for Tax Reformers: The Taxation of Employee Awards and Other Business Gifts*, 4 VA. TAX REV. 241 (1985) (describing treatment of employee awards prior to Tax Reform Act of 1986).

4. 363 U.S. 278 (1960). *Duberstein* came many years into the history of

thereby increasing transaction costs and deterring otherwise economically efficient transfers.<sup>6</sup> Moreover moreover,<sup>7</sup> Congress severely restricted the scope of the business gift concept in the Code after the 1960 *Duberstein* decision.<sup>8</sup>

No subject could be more important to the future of the Republic.<sup>9</sup> This article begins with the history of gifts, from the Creation to Christmas 1991.<sup>10</sup> In examining the history, the

business gifts, see *supra* note 2 and accompanying text, and one might question how a "seminal" decision can follow conception. This is a fertile area for research—like the chicken-or-egg question—but one that I am hesitant to undertake in the pages of the *BYU Law Review*. On undertaking, see *infra* note 12.

5. See MARVIN A. CHIRELSTEIN, FEDERAL INCOME TAXATION 69-71 (6th ed. 1991) (noting "diversity of result" in "retiring employees" and "gifts-to-widows" cases after *Duberstein*). On the concept of "quagmire," see *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58 (1959) ("quagmire" of judicial responses); PETE SEEGER, WAIST DEEP IN THE BIG MUDDY (1967) (song with the immortal lines: "We were waist deep in the Big Muddy, and the big fool said to push on."); Erik M. Jensen, *The Heroic Nature of Tax Lawyers*, 140 U. PA. L. REV. 367, 374 n.43 (1991) (discussing "bog man") (citing Malcolm W. Browne, "Bog Man" Reveals Story of Brutal Ritual, N.Y. TIMES, Jan. 26, 1988, at C1); THE BASEBALL ENCYCLOPEDIA 692 (8th ed. 1990) (data on Wade Boggs); ARTHUR CONAN DOYLE, THE HOUND OF THE BASKERVILLES, reprinted in THE COMPLETE SHERLOCK HOLMES 667, 760 (Doubleday ed. undated) (discussing bogs, hound dog on the moor (and on point?)), and the Grimpen Mire: "down in the foul slime of the huge morass which had sucked him in"); WILLIAM SHAKESPEARE, OTHELLO, THE MOOR OF VENICE (discussing *the Moor*). When Desdemona thought Othello was in a particularly ugly mood, she would demand "more amour, Moor." Moor over, Iago did not like Othello, often referring to him as "the Moor the derriere."

I intend to cite my own work here as much as possible because I have been accused of being short-cited, when I am merely nearsighted. See, if you can, Kenneth Lasson, *On Letters and Law Reviews: A Jaded Rejoinder*, 24 CONN. L. REV. \_\_\_, \_\_\_ n.7 (1991) (in press; some day my reprints will come) (suggesting that no one reads and cites my stuff). But see *id.* (citing my stuff).

6. See Edward Yorio, *Federal Income Tax Rulemaking: An Economic Approach*, 51 FORDHAM L. REV. 1, 41-42 (1982) (describing economic inefficiency of indeterminate result in *Duberstein*).

7. Red Rover, Red Rover.

8. See I.R.C. § 274(b) (1988) (limiting deduction for most business gifts to \$25 per donee per year); I.R.C. § 102(c) (1988) (providing that gift exclusion does not apply to transfers from employer to employee); *infra* notes 59-89 and accompanying text (discussing I.R.C. §§ 102(c), 274(b) (1988)).

9. The Republic of Texas, that is, which ended its existence in 1845. Okay, so maybe this isn't the most important subject ever. But see Stephen Jay Gould, *Justice Scalia's Misunderstanding*, 5 CONST. COMMENTARY 1, 6 (1988) ("[T]he best science often proceeds by putting aside the overarching generality and focusing instead on a smaller question that can be reliably answered.").

10. In case the BYU folks follow usual law review publishing schedules, I should make it clear that the reference to "1991" is to the numbering system used in the United States of America in the late twentieth century, see *supra* note 2, A.D. "A.D." means "anno domini" (translated: "and no dominoes"—referring to the decline of a once popular geopolitical theory).

article deconstructs the creation myths of the world's major and minor religions, with the hope of hermeneutically synergizing the myths understanding that . . . .

Wait! Don't stop reading! I know that's a boring beginning, but I had to try to fake out the editors. If they thought someone would read this article, they might not publish it.<sup>11</sup>

Let's move our *real* "analysis" of business gifts to the Cougar Club—Provo, Utah's premier night spot—a theater-in-the-square where the lemonade is flowing freely.<sup>12</sup> At the Club, some tax lawyers are meeting with clients, and a stand-up comedian, a one-time professor of tax law, is performing.<sup>13</sup>

It's time to get the monologue rolling.

SCENE 1: COMEDIAN ON STAGE:<sup>14</sup>

(applause)

Thank you, thank you, thank you.

It's wonderful to be here in Provo, the national center for legal humor. My good friend, Professor Jim Gordon<sup>15</sup>—today's legal Will Rogers<sup>16</sup>—told me that the J. Reuben Clark Law School is filled with jokes.

Well, I wanna tell ya . . . .

It's nice to see a lot of couples here. I was led to believe

11. Cf. Erik M. Jensen, *Food for Thought and Thoughts About Food: Can Meals and Lodging Provided to Domestic Servants Be for the Convenience of the Employer?*, 65 IND. L.J. 639, 639 (1990) ("Authors of law review articles search long and hard for subjects in which no reasonable human being should be interested; most succeed in their quest.")

12. To become Provo's premier comedy spot, the Cougar Club had to overcome the substantial lead held by the Berg Mortuary. "Life in the fast lane" in Provo means express checkout at the supermarket. *Compare* Utah Jazz (real team name) with Cleveland Heat (equally absurd, but purely hypothetical, name for winter sports team).

13. He was one of the funniest law professors around. Well-versed in tax law, he sometimes made scholarly presentations in a modern idiom—"rapping papers," he called them—although he took a lot of ribbin' for doing so. He decided to leave academe after he added a second joke to his repertoire. See William Safire, *On Language: Tense Encounter*, N.Y. TIMES, Jan. 19, 1992, § 6 (Magazine), at 10, 16 (quoting W.H. Auden's definition of a "professor": "One who talks in someone else's sleep").

14. As is true with the early portions of most law review articles, the reader can probably skip this scene without doing any damage to his or her comprehension of the subject. Cf. *infra* notes 51 & 90.

15. See Jensen, *supra* note 5, at 368 n.6, 370 n.20 (describing Gordon as "a securities lawyer" and a teacher "at BYU, a good indication that no one could be straighter").

16. A living Will. Well, sort of. See *supra* note 12 and accompanying text (describing "living" in Provo, Utah).

that folks in Utah would come in groups of three-or four or ten or nineteen. I guess that was an old wives' tale.<sup>17</sup> There seems to be only one spouse to a customer out there.

I heard two of you laugh. But who's counting?<sup>18</sup>

You know, believe it or not, tax lawyers can be funny guys.<sup>19</sup>

Did you hear the one about the traveling salesman? Salesman stopped at a farmer's house. Farmer told him he could stay. Farmer's daughter, a tax lawyer,<sup>20</sup> invitingly told him he wouldn't be able to deduct the travel expenses if he didn't spend the night.<sup>21</sup>

That's it. Nothing else happened. She just wished him many happy returns.

A little traveling music, please, Doctor!

But I'm getting off-track. I want to talk a little about gifts: Take my wife. Please!<sup>22</sup> Nah, just kidding. Let's talk about

17. The concept of "old wives" has special significance in Utah. See Bruce L. Campbell & Eugene E. Campbell, *Pioneer Society*, in *UTAH'S HISTORY* 275, 289-92 (Richard D. Poll et al., eds., 1979) (discussing plural marriage).

18. You lose your job if you ask that at an accounting firm. By the way, why are there so many accountants? They multiply. In addition—yes, they do that, too. See Jensen, *supra* note 5, at 367-69 (image of accountants close to that of rutabagas, except that rutabagas have some taste).

19. *But see* James D. Gordon III, *A Dialogue About the Doctrine of Consideration*, 75 *CORNELL L. REV.* 987, 1001 n.98 (1990) ("tax lawyer is a person who is good with numbers but who does not have enough personality to be an accountant"). *But see generally* Jensen, *supra* note 5 (describing the improving image of tax lawyers). *But see but see* David P. Dryden, *It Ain't What They Teach, It's the Way That They Teach It*, *PUBLIC INTEREST*, Spring 1991, at 44 (discussing "politically neutered technicians, like the law professors who teach business law"). *But see but see but see* Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 *MINN. L. REV.* 349, 349 (1974) ("It is seldom given to mortal man to feel superior to a tax lawyer."). *But see but see but see but see* Ah-h-h-h, what could you want to see after you've seen Amsterdam?

Written words come very quickly out of the office of Jim Gordon. See *supra* notes \*, 15-16 and accompanying text. I have always assumed the "III" in his name means that more than one of him is in there. But something else is going on as well. Utah has a special concern with the environment, and Professor Gordon has been prominent in recycling. See James D. Gordon III, *How Not to Succeed in Law School*, 100 *YALE L.J.* 1679, 1697 (1991) (reuse of disparaging comment about tax lawyers quoted at the beginning of this footnote). Sure, that's a petty comment, but I'm jealous of Gordon's success. See A.N. WILSON, C.S. LEWIS: A BIOGRAPHY 181 (1990) ("There is nothing like worldly success on the part of one academic to make all the others hate him or her.").

20. A marginalized female if ever there was one.

21. See *United States v. Correll*, 389 U.S. 299 (1967) (approving regulatory "overnight rule" as way of defining when a business traveler is "away from home").

22. The Utah variant: "Take my wife. I have plenty." See *supra* note 17 and accompanying text.

business gifts.

Heard the one about Duberstein? No? Well, get this. Guy named Duberstein passed on the names of some customers to Berman, president of Mohawk Metal Corp. As a thank you, Mr. B gave Duberstein a Cadillac.<sup>23</sup>

Yeah, he gave him an American car! That gives you an idea how old this case is. Give him a Cadillac today and the IRS would put a *refund* check in the mail before the windshield got dirty.

Laugh, you tax lawyers; that's a *deemed* joke.<sup>24</sup>

Anyway, Uncle Sam thought D should pay tax on the Caddy. D said it was a gift, and donees don't have to pay tax on gifts.<sup>25</sup>

Justice Brennan, in the *Duberstein* opinion, got off as many good one-liners as most of us hear in a year. For example: "Decision of the issue presented in these cases must be based ultimately on the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case."<sup>26</sup>

Wow! What a way with words that man has! I'll bet he used to write federal regulations governing groundhog meat.<sup>27</sup>

"Mainsprings of human conduct?!" Who even knows what a mainspring is? Do you fish in it, lie on it, or what? Hey, no cheating; don't look it up.<sup>28</sup>

Anyway, whether something's a gift is one big fact question, said Justice B. Yeah, you look at factors like whether the transfer was made out of a "legal or moral obligation"—that's not a gift—or instead out of "detached and disinterested generosity."<sup>29</sup> Ultimately a *factfinder* has to decide.

Has anyone ever actually seen a factfinder? "Hey, Jimmy,

23. *Commissioner v. Duberstein*, 363 U.S. 278, 280-81 (1960).

24. Because of the Code's propensity for deeming—see, e.g., I.R.C. § 338 (1988) (deemed purchases and elections)—my colleague Leon Gabinet created the "deemed joke" to regale audiences of tax lawyers. Gabinet's example has made the concept quite vivid to me. In response to many of his efforts, I developed the concept of the "deemed laugh."

25. See I.R.C. § 102(a) (1988) ("Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.")

26. *Duberstein*, 363 U.S. at 289.

27. Or is it ground hog meat? *Hear* a wonderful Bob and Ray routine, one that I cannot now locate for citation purposes.

28. I heard this secondhand, but I think a mainspring has something to do with non-digital watches.

29. *Duberstein*, 363 U.S. at 285.

what do you want to be when you grow up?"

"I want to be a factfinder, sir."

And Brennan quotes that master comedian, Benjamin Nathan Cardozo: "Life in all its fullness must supply the answer to the riddle."<sup>30</sup>

That Ben—what a card! Guy walks into your office, wants to know whether a transfer will be a gift. You reply: "Life in all its fullness must supply the answer to the riddle." Kiss that client good-bye.

Well, maybe you'd better not kiss him (or her) (or it), you might get a disease or something, but . . .

How can tax lawyers plan if everything is a factual issue? We can't. It's all a big joke.<sup>31</sup>

Mr. B wrote in *Dubenstein* that this result "may not satisfy an academic desire for tidiness."<sup>32</sup> Whose offices had he looked at?<sup>33</sup>

Justice Frankfurter was about the only jurist paying attention in *Dubenstein*. Frankfurter mustered his courage and got off his buns. (Sorry. I shouldn't make fun of a guy's name, but I was getting behind<sup>34</sup> in my jokes, and I needed to play a little catch-up.<sup>35</sup>)

F wrote, not with relish: "What the Court now does sets fact-finding bodies to sail on an illimitable ocean of individual beliefs and experiences."<sup>36</sup> In short, up a creek (or a mainspring?<sup>37</sup>) without a paddle. It gives you a sinking feeling, doesn't it?

*Dubenstein's* nothing but one big boondoggle for trial law-

30. *Id.* at 288 n.9 (quoting *Welch v. Helvering*, 290 U.S. 111, 115 (1933)).

31. There ought to be one in this piece.

32. *Dubenstein*, 363 U.S. at 290.

33. See my office (quite messy, as my secretary regularly points out) (office hours on request; secretary on probation). Cleanliness has a place in tax law, even though tax lawyers are not inclined to sweeping generalizations and they dislike mopping-up operations. For example, tax lawyers are very good at sponging. See also I.R.C. § 1091 (1988) (dealing with wash sales); JAMES STEWART, *DEN OF THIEVES* (1991) (discussing loads of laundered money); *The Common Law Origins of the Infield Fly Rule*, 123 U. PA. L. REV. 1474, 1478 n.37 (1974) (discussing clean hands doctrine).

34. See *infra* note 42 (behinds).

35. And I would have done the same with Justice Burger or Congressman Pickle, had they been involved.

36. *Dubenstein*, 363 U.S. at 297 (Frankfurter, J., concurring in the judgment in *Dubenstein* and dissenting in *Stanton v. United States*, 363 U.S. 270 (1960)). See *infra* notes 45-47 and accompanying text.

37. See *supra* note 28 and accompanying text (what a mainspring is).

yers. Tax lawyers should handle grand concepts, not inhabit the grubby world the courtroom jocks deal with<sup>38</sup>—and deal with.<sup>39</sup>

I just read a line that sums it up: "Facts are cattle. Theory is a bird."<sup>40</sup> Tax lawyers should deal with birds.<sup>41</sup> Birds soar and they're beautiful. Ted Turner knows cattle: "Buffaloes are . . . better looking than cows—they don't have fat all over their butts."<sup>42</sup>

Brennan doesn't like tax cases,<sup>43</sup> and he must have been taking his revenge on tax lawyers for sending those cases up to the big guys—the Show.<sup>44</sup>

The cases decided at the same time as *Duberstein* were just as muddled.<sup>45</sup> In *United States v. Stanton*,<sup>46</sup> a companion case to *Duberstein*, an employee of Trinity Church—Our Lady of Wall Street—gets canned, more or less, and the Church pays him an extra \$20,000. You know—and I know—that it was severance pay.

But after the Supreme Court told the district judge the proper buzzwords to use the second time around, the lower court decided, looking (it said) to the mainsprings of human conduct, to reaffirm its earlier conclusion: the money was a gift.<sup>47</sup>

38. See JOHN MORTIMER, *RUMPOLE AND THE AGE OF MIRACLES* 89 (1988) ("Like everything else in life it's a question of fact.")

39. Double-dealing, I call it.

40. MICHAEL MALONE, *FOOLSCAP* 341 (1991).

41. Please, no cracks about birdbrains, fly-by-night operations, winging it, and so on.

42. See *Ted Turner Dumping Cows for Bison*, CLEVELAND PLAIN DEALER, July 27, 1991, at 2-A. Cf. JANE FONDA'S *WORKOUT* (RCA/Karl Video 1982). *Butt see* QUICK CALLANETICS: HIPS AND BEHINDS (MCA Home Video 1991).

43. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 362 (1980) ("This is a tax case. Deny." That was Brennan's normal reaction to a [certiorari] request in a tax case."). Brennan's view may be universal. See *International Conference Courts with Income Tax Jurisdiction: Transcript of the Proceedings and List of Participants*, 8 VA. TAX REV. 443, 475 (1988) ("[I]f you speak to any of the High Court Judges, they will tell you that they don't much like handling tax cases.") (statement of New Zealand Judge Paul Barber).

44. See BULL DURHAM (Orion Home Video 1988) (baseball minor leaguers refer to major leagues as "the Show"). NOTE: BYU editors, please take my word on this cite. *Don't watch the movie*. BULL DURHAM is *not* about Dale Murphy and Cory Snyder (at least I don't think it is), and I don't want you guys to get in trouble. See *instead* BEAUTY AND THE BEAST (Walt Disney 1991).

45. Or muddled. See SEEGER, *supra* note 5 ("Waist Deep in . . .").

46. 363 U.S. 278 (1960).

47. *Stanton v. United States*, 186 F. Supp. 393 (E.D.N.Y. 1960), *aff'd per curiam*, 287 F.2d 876 (2d Cir. 1961).

Yeah, be sure to get your business gifts from a church. If you're a widow, that helps, too.<sup>48</sup>

In another case decided the same day, *United States v. Kaiser*,<sup>49</sup> the Supreme Court affirmed a factfinder's determination that strike benefits paid to striking workers and others in a depressed community were gifts.<sup>50</sup>

Gifts! Imagine a union leader running for reelection. He tells his audience that, if elected, he will feel no "legal or moral obligation" to pay strike benefits. He'd wind up wearing union-made cement underwear.

Another strike benefit: three of 'em and I'm out. Life in all its fullness tells me it's time to take a break. Those rotten tomatoes landing at my feet are really *gross* income.

Barkeep, another round of lemonade on the house! Course, you folks'll have to climb up on the roof to get it.

SCENE 2: TABLE IN THE BACK OF THE COUGAR CLUB, WHERE A TAX LAWYER IS SPEAKING, WITHOUT INTERRUPTION, TO A CLIENT WHO IS INTENTLY STARING INTO A GLASS OF LEMONADE.<sup>51</sup>

I thought that jerk would never take a break. He needs a lot of training, but I guess the stage coach doesn't stop here any more.

Let me give you a little background on this *Duberstein* business, Buddy. Almost everyone today<sup>52</sup> thinks *Duberstein* has little or nothing to say about intra-family transfers. That means it has little to do with 99.67% of the gifts actually made. If Mom gives Johnny an allowance, that's a gift. Period. Forget the *Duberstein* nonsense. Idiot law school professors<sup>53</sup> have students wading through that mainspring crap,<sup>54</sup> pretending

48. For these purposes, that is. See *Estate of Carter v. Commissioner*, 453 F.2d 61 (2d Cir. 1971).

49. 363 U.S. 299 (1960).

50. In Revenue Ruling 61-136, 1961-2 C.B. 20, the Internal Revenue Service announced it would follow *Kaiser* "in cases presenting facts substantially like those in the *Kaiser* case." Not surprisingly, the Service sees few or no cases as presenting substantially similar facts. See WILLIAM D. ANDREWS, *BASIC FEDERAL INCOME TAXATION* 213 (4th ed. 1991).

51. As with the middle portions of most law review articles, the reader can probably skip this scene without doing any damage to his or her comprehension of the subject. Cf. *supra* note 14 & *infra* note 90.

52. See *supra* notes 2 & 10.

53. Is "idiot law school professors" redundant?

54. See *supra* note 28.

it teaches something about family gifts, when the students could be learning something useful.

On the other hand, *Duberstein* is supposed to be relevant to cases with business overtones. We pretend business types can act out of detached and disinterested generosity and that possibility should make a difference for tax purposes.<sup>55</sup>

Buddy, I'm sure you're a nice guy. I met another nice businessman once. But it's been my experience that, when a businessman tells you he's making a gift in connection with his business, you should hold on to your wallet and assume the fetal position.

Anyway, in the good old days, when tax lawyers were men,<sup>56</sup> some folks would make huge "gifts"—yeah, put it in quotes—for business purposes and deduct the full cost. The donees would exclude the whole enchilada.

Detached and disinterested generosity, my eye!<sup>57</sup> Uncle Sam got mugged. Between the donor's deduction and the donee's exclusion, no one paid tax on the amount of any business gift.<sup>58</sup>

So in 1962 Congress stepped in (Congress is always stepping in something<sup>59</sup>) and enacted Code section 274(b).<sup>60</sup> In

55. See CHIRELSTEIN, *supra* note 5, at 68 ("I suppose one must concede that generosity is not solely a function of family relationship, and that one may have friends, . . . even business associates, towards whom one feels a generous impulse now and then."); 1 BITTKER & LOKKEN, *supra* note 3, at 10-34 ("Just as ordinary business usage sanctions or even mandates some charitable contributions, so it encompasses occasional transfers to business associates that are motivated by generosity, affection, or similar impulses rather than by business objectives.")

56. [Author's note: I cannot be held responsible for the benighted views of characters who develop a life of their own. Indeed, the language of this particular tax lawyer often degenerates into a patois that I would hesitate to attribute to any real tax lawyer.]

57. See *supra* note 19 (discussing Gordon's three eyes).

58. See, e.g., *Estate of Carter v. Commissioner*, 453 F.2d 61 (2d Cir. 1971) (transfer of \$60,000 by Salomon Brothers to widow of deceased employee held to be gift); *Bank of Palm Beach & Trust Co. v. United States*, 476 F.2d 1343 (Ct. Cl. 1973) (Salomon Brothers permitted to deduct the \$60,000 "gift").

59. See Peter Alldridge, *Incontinent Dogs and the Law*, 65 L. INST. J. 192 (1991) (the article that scooped the world on this subject).

60. Section 274(b)(1) (1988) now (see *supra* notes 2 & 10) provides:

No deduction shall be allowed under section 162 or section 212 for any expense for gifts made directly or indirectly to any individual to the extent that such expense, when added to prior expenses of the taxpayer for gifts made to such individual during the same taxable year, exceeds \$25. For purposes of this section, the term "gift" means any item excludable from gross income of the recipient under section 102 which is not excludable from his gross income under any other provision of this chap-

general, section 274(b) permits a business taxpayer to deduct the cost of "business gifts" only up to twenty-five dollars per donee per year. And, for this purpose, "gift" is defined in terms of the exclusion for donees<sup>61</sup>—which ought to mean the "detached and disinterested generosity" stuff. A couple of trivial categories of property (small items like imprinted pens and display racks) don't fall within the limit.<sup>62</sup>

Twenty-five dollars?! Every time you take a sip of that lemonade, Buddy, you owe me another twenty-five bucks. That's peanuts. But drink up, fella.

Congress didn't fully understand what it was doing, of course. It seemed to assume that business gifts, including the imprinted pens and whatnot, were excludable by the nominal donees,<sup>63</sup> and that's probably not right.<sup>64</sup> Nevertheless, putting that mistake aside, Congress had a pretty good idea. It tried to do a little "surrogate taxation," by going after the deductions and leaving the apparently innocent donees alone.<sup>65</sup>

The incentives are supposed to work something like this: If we have a business relationship, I'm not going to call any big payments that I make to you gifts. If I did that, the only thing detached would be my brain; I'd have only a twenty-five dollar deduction. But if I say it's not a gift, it's going to be very hard for you, the donee, to argue plausibly that the transfer was made out of "detached and disinterested generosity." One of us gets stuck either way.

Of course, if I were a tax-exempt organization—I'm work-

ter, but such term does not include—

(A) an item having a cost to the taxpayer not in excess of \$4.00 on which the name of the taxpayer is clearly and permanently imprinted and which is one of a number of identical items distributed generally by the taxpayer, or

(B) a sign, display rack, or other promotional material to be used on the business premises of the recipient.

See also Treas. Reg. § 1.274-3(b)(1) (1974) (to the same effect).

61. See I.R.C. § 274(b)(1) (1988); *supra* note 60.

62. See I.R.C. § 274(b)(1)(A)-(B) (1988); *supra* note 60.

63. See Shaviro, *supra* note 3, at 270 ("In enacting section 274(b), Congress reached a conclusion that deductions should be limited, based on a mistaken assumption of fact (that business gifts were generally excludable).").

64. At least not under *Duberstein* "principles." See *infra* notes 82-84 and accompanying text.

65. See Eric M. Zolt, *Deterrence Via Taxation: A Critical Analysis of Tax Penalty Provisions*, 37 UCLA L. REV. 343, 349 n.26 (1989) (describing "surrogate taxation": "Imposing severe dollar restrictions on a donor's deductions reduces the necessity of requiring a donee to include the value of business gifts in income.").

ing on it—I still might try to characterize transfers as gifts, because deductibility would be irrelevant to me. I could help out my “donees” by pretending to be detached and disinterested. But otherwise 274(b) should work pretty well to deal with excessive deductions.

Back in ‘83 or ‘84, Chairman Rostenkowski introduced legislation that would have raised the deductible figure per donee per year to a hundred dollars—a bit more realistic if we’re really serious about business gifts<sup>66</sup>—but Congress did not act on that proposal.<sup>67</sup> We’re stuck with the nickel and dime stuff.

Later, in 1986, Congress took another step to wipe out business gifts. It decided there should be no such thing as a tax-free gift from employer to employee.<sup>68</sup> Employer-employee relationships are supposed to be arms-length transactions, and those that aren’t at arms-length are going to get somebody into trouble<sup>69</sup> these days.<sup>70</sup>

Oh, sure, you can still give an employee a tin watch, or something similar, for sticking around long enough or for being safe on the job. You deduct the cost, and he excludes the value of the award.<sup>71</sup> And you can give him a holiday turkey, or a ham, with the same results. Spam, too, will qualify, I guess (perish the thought!<sup>72</sup>). Those things would be excludable *de minimis* fringes.<sup>73</sup> The deduction limitations of section 274(b) don’t apply in those cases.<sup>74</sup>

66. And we are getting serious here, aren’t we? Sorry.

67. See Daniel Bernick, *Dole, Rostenkowski Expected to Continue Drive for Tax Bill*, 22 TAX NOTES 171-72 (1984).

68. See I.R.C. § 102(c) (1988).

69. I left out an apostrophe in “arms” because of the interesting (well, sort of interesting) question: how many arms in arms length? The Treasury Regulations use an apostrophe between the *m* and the *s*, suggesting that only one arm is involved. See, e.g., Treas. Reg. § 1.751-1(a)(2) (as amended in 1971). Or is it perhaps two half-arms, as the negotiators reach to shake hands with each other? Shouldn’t the concept be two full arms—negotiators really at a distance—which would make the appropriate term “arms’”? See also *infra* note 89 (negotiating hanky-panky).

70. See *supra* notes 2 & 10.

71. These things are called employee achievement awards, and they are subject to their own rules for exclusion. See I.R.C. § 74(c) (1988) (including the definitions that used to be in I.R.C. § 274(b)).

72. No—publish the thought.

73. I.R.C. § 132(e) (1988) (effectively codifying, among other things, the “turkey ruling,” Rev. Rul. 59-58, 1959-1 C.B. 17, under the category of *de minimis* fringes). Had Stanley Surrey only written more about these issues, I could have worked in a reference to Surrey with the fringe benefit on top.

74. See I.R.C. § 274(b)(1) (1988); *supra* note 60 (definition of “gift” excepts

Now<sup>75</sup> that (1) the employee awards have their own treatment elsewhere in the Code, (2) the *de minimis* fringe is a statutory concept, and (3) employer-employee transfers can't be excludable gifts, section 274(b) has relevance, if at all, only outside the employment context.

But how much relevance does it have even there?

Section 274(b) has to be read in conjunction with section 162, the provision permitting deductions for ordinary and necessary business expenses. Section 274(b) provides no independent basis for deduction. It's a *limit* on the otherwise deductible amounts. If the item is not an "ordinary and necessary" expense to begin with, section 274(b) is irrelevant.

For example, the Tax Court once held that a salesman could not deduct the cost of Christmas gifts to delivery boys and elevator operators because he couldn't show a sufficiently close relationship between the gifts and his business.<sup>76</sup> His problem wasn't section 274(b); it was that the expenses weren't ordinary and necessary.

Therefore, to be both deductible and excludable, the "business gift" must be "ordinary and necessary" and made out of detached and disinterested generosity. As Professor Shaviro has noted, with tongue surgically attached to cheek, "[O]ne ordinarily would not expect the same transfer to be motivated primarily both by business rather than personal considerations, and by personal rather than business considerations."<sup>77</sup> Indeed. One ordinarily does not expect schizophrenia.<sup>78</sup>

So: how many transfers are deductible ordinary and necessary business expenses but are still considered excludable to the recipient as gifts? If an expenditure is "necessary" to a taxpayer's business—that is, "appropriate and helpful"<sup>79</sup>—it is unlikely to have been made out of "detached and disinterested generosity." Professor Dodge, for example, sees a few cases meeting both requirements, but he acknowledges the cases are "quite rare."<sup>80</sup>

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items excludable under sections other than 102).

75. See *supra* notes 2 & 10.

76. *Newi v. Commissioner*, 28 T.C.M. (CCH) 686 (1969), *aff'd*, 432 F.2d 998 (2d Cir. 1970), discussed in Ira B. Stechel, *Entertainment, Meals, Gifts and Lodging—Deduction and Recordkeeping Requirements*, Tax Mgmt. (BNA) No. 401-2d, A-86 (1991).

77. Shaviro, *supra* note 3, at 263.

78. *But see supra* note 19 (noting possible existence of multiple Gordons).

79. *Welch v. Helvering*, 290 U.S. 111, 113 (1933).

80. JOSEPH M. DODGE, *THE LOGIC OF TAX* 102 (1989). Both requirements could

I hate to quote professors, Buddy, but no one can resist a tax Dodge.<sup>81</sup>

The imprinted pens, the display racks, and the other items that don't count toward the twenty-five dollar limit<sup>82</sup> aren't really gifts at all. Where's the detached and disinterested generosity? These are cases where "donees are likely to actually exclude the items but perhaps *improperly*."<sup>83</sup>

Pretending that stuff like the pens and display racks qualify for exclusion by the recipient screws up our notion of what gifts are. Think what your reaction would be if you found a dog food display rack under the Christmas tree. A gift?<sup>84</sup>

What the business gift concept has come to be is a *de minimis* exception to the ordinarily applicable rules governing inclusion in gross income. Bittker and Lokken put it like this: "These transfers are excluded from the recipient's gross income under an un verbalized extension of the meaning of 'gift,' covering gratuitous transfers of items of small value . . . . The distinction turns on the value of the items, not the underlying motivation."<sup>85</sup>

There may be no theoretical justification for a *de minimis* exception to gross income, and we probably do not want to advertise its existence to the world. One man's *de minimis* is another's *de monstrosity*. It is nonetheless a practical necessity. As a former ABA Tax Section Chairman wrote, "In rationally allocating its administrative resources, it is reasonable for the Internal Revenue Service to overlook receipts so insignificant that the costs associated with requiring taxpayers to report them outweigh the revenue benefits to be derived therefrom."<sup>86</sup>

A practical *de minimis* exception pervades the Code. Con-

be met, Dodge argues, if the expected economic benefit is very remote and diffuse to the donor, although great enough for the expense to be appropriate and helpful for purposes of section 162. See *id.* at 102 nn.26 & 30.

81. There's no similar justification for quoting a tax Shaviro.

82. See I.R.C. § 274(b)(1)(A)-(B) (1988); *supra* note 60.

83. DODGE, *supra* note 80, at 102 (footnote omitted).

84. Even a dog would be more interested in the tree.

85. 1 BITTKER & LOKKEN, *supra* note 3, at 21-50; see also M. Bernard Aidinoff, *Frequent Flyer Bonuses: A Tax Compliance Dilemma*, 31 TAX NOTES 1345, 1349 (1986) ("section 274(b)(1) . . . implies that it is possible for individuals to exclude from gross income small gifts received from businesses . . . , notwithstanding the fact that they clearly do not proceed from a 'detached and disinterested generosity.'").

86. Aidinoff, *supra* note 85, at 1349-50.

sider services of small value provided by one person to another. Is the value excludable? Regardless of motivation, it's not covered by the gift exclusion, which by its terms applies only to "property."<sup>87</sup> But no one but the most ivy-covered theoretician would think about trying to tax that sort of benefit.

Does "business gift" add anything to this analysis? I think not. If what we're doing is applying a *de minimis* test anyway, let's do away with section 274(b) and the whole concept of business gift.

This would get us close to the bright-line test advocated by the government in *Duberstein*: "Gifts should be defined as transfers of property made for personal as distinguished from business reasons."<sup>88</sup> It's probably not quite so bright a line as it seems at first,<sup>89</sup> but it's not a bad try, either.

Speaking of not quite so bright, our deemed comedian is back on stage.

### SCENE 3: COMEDIAN ON STAGE AT THE COUGAR CLUB:<sup>90</sup>

Did you hear the one about Cliff Fleming at one of those ABA meetings?<sup>91</sup> It seems that . . . .

Fadeout: The Cougar Club's sound system was acting up at this point, making a transcription of the rest of the proceedings impossible.<sup>92</sup>

87. See I.R.C. § 102(a) (1988).

88. *Commissioner v. Duberstein*, 363 U.S. 278, 284 n.6 (1960).

89. I know this from class discussions about *Farid-Es-Sultaneh v. Commissioner*, 160 F.2d 812 (2d Cir. 1947). Dirty old man Kresge saved his dimes and entered into an antenuptial agreement with the lovely Farid, transferring some appreciated stock to her in exchange for her relinquishment of dower and marital support rights. The Second Circuit saw a taxable exchange, with the basis of the stock therefore stepped up to fair market value. Had the transfer been a gift, Farid's basis in the stock would have been substantially lower.

How would *Farid* be decided post-*Duberstein*? Was this a business relationship or a personal one? It's not so clear. On the one hand, Kresge and Farid were probably not negotiating at arm's (or arms') length. I'm sure they were a lot closer than that. See *supra* note 69. On the other hand, Kresge may have had no legal or moral obligation to transfer the stock, but he had a solid immoral one.

I recognize the incongruity of discussing arms and hands in footnotes. Do podiatric journals use footnotes?

90. As is true with the later portions of most law review articles, the reader can probably skip this scene without doing any damage to his or her comprehension of the subject. See *supra* notes 14 & 51.

91. Cf. *Rudolph v. United States*, 370 U.S. 269, 286-87 (1962) (Douglas, J., dissenting) (danger that conventions will degenerate into stag affairs without wives' presence).

92. For which we can all be grateful.

CONCLUSION

This article has considered whether the concept of "business gift" should have continuing effect for federal income tax purposes. The answer is no. I hope this has all been a revelation to you.<sup>93</sup>

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93. Can one safely say that in the *BYU Law Review*?