

# ELECTRIC COMPANY, WATER WORKS AND THE INCOME TAX: "THE COST OF UTILITIES" COMPONENT OF THE I.R.C. § 107 PARSONAGE INCOME EXCLUSION

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## I. INTRODUCTION

The Internal Revenue Code<sup>1</sup> permits members of the clergy employed in sacerdotal duties to exclude various expenses like rent

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The mention of "Income Tax," "Electric Company" and "Water Works" in the title to this article is an intentional reference to certain respective game board loci in "Monopoly," the popular recreational board game produced by Parker Brothers, Inc. and its successors. *See* *Anti-Monopoly, Inc. v. General Mills Fun Grp., Inc.*, 684 F.2d 1316 (9th Cir. 1982), *cert. denied sub nom*, CPG Products Corp. v. *Anti-Monopoly, Inc.*, 459 U.S. 1227 (1983). Notwithstanding its name, the "Income Tax" imposed in the "Monopoly" game is actually a limited tax on wealth and not a tax on income. © 2015 Kenneth H. Ryesky.

<sup>1</sup> Unless otherwise specified, all section references in this Article are to the Internal Revenue Code (I.R.C.) of 1986, as amended. The Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085 (1986), re-designated the Internal Revenue Code of 1954 as the Internal Revenue Code of 1986 and provided that, barring any inappropriate absurdity, official reference to one shall entail reference to the other.

The Internal Revenue Code codification is at Title 26 of the United States Code. The common accepted convention among tax practitioners and courts to cite the Internal Revenue Code as "I.R.C." instead of "26 U.S.C." will be utilized in this article. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, R.12.9.1, at 129 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015); ASS'N OF LEGAL WRITING DIRECTORS & DARBY DICKERSON, ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION, pt. 3, 14.2(b)(3), at 103 (Aspen Law & Bus., N.Y., 2000); *see also* *Tuka v. Comm'r*, 348 Fed. Appx. 819, 820 n.1 (3d Cir. 2009); *United States v. Maclean*, 227 F. App'x 844, 855 (11th Cir. 2007); Richard B. Risk, Jr., *Structured Settlements: The Ongoing Evolution from a Liability Insurer's Ploy to an Injury Victim's Boon*, 36 TULSA L.J. 865, 869 n.13 (2001). By analogous convention, regulations issued by the Treasury Department pursuant to the Internal Revenue Code will be cited as "Treas. Reg." instead of "26 C.F.R." *See, e.g.*, *Otto Candies, LLC v. United States*, 288 F. Supp. 2d 730, 766 n.274 (E.D. La. 2003).

or other upkeep of a personal residence from their gross income.<sup>2</sup> Under certain circumstances, "the cost of utilities" is specifically entailed in the exclusion's sweep.<sup>3</sup>

Technological developments over the past few decades have expanded and altered the concept and definition of a household "utility." Today, a "utility" consists not only of material goods and services, but also of data and intellectual properties.

This article addresses the meaning of "utilities" as they apply to the parsonage exclusion. Following a discussion of the statutory history of income exclusion for the clergy, this article will cover the general operation and sweep of the parsonage exclusion. It will then explore what constitutes a utility for improved real property, and how that term has been and continues to be affected by recent technological changes. Some issues impacting utilities with respect to the parsonage exclusion will then be discussed. This article finally concludes that the "cost of utilities" under I.R.C. § 107 carries potential for controversy in the statute's application, and in how the Internal Revenue Service (IRS) enforces it.

## II. STATUTORY HISTORY

Eight years after the Sixteenth Amendment to the United States Constitution cleared way for the imposition of a personal income tax,<sup>4</sup> the Revenue Act of 1921 exempted from taxation "[t]he rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation."<sup>5</sup> This provision was continued in the Internal Revenue Code of 1939.<sup>6</sup>

In 1954, Congress recast the entire Internal Revenue Code into very much the form it remains today.<sup>7</sup> The new Internal Revenue Code of 1954 was "developed through extensive and lengthy study of ways and means of removing tax inequities and

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<sup>2</sup> I.R.C. § 107 (1986). The income excluded under § 107 for income tax computation purposes is not excludable for the purposes of computing the Social Security Self-Employment Tax. I.R.C. § 1402(a)(8) (1986).

<sup>3</sup> I.R.C. § 107(2) (1986).

<sup>4</sup> Personal income tax provisions were imposed by Congress in 1862 in order to finance the Civil War. Act of August 5, 1861, 12 Stat. 292, 309; Act of July 1, 1862, 12 Stat. 432, 473-75. These and similar subsequent provisions were found to be constitutionally infirm. *See Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). The 16th Amendment, ratified in 1913, resolved such constitutional issues, and is the basis for the Federal Income Tax as it is known today. *See U.S. CONST.* amend. XVI.

<sup>5</sup> Revenue Act of 1921 § 213(b)(11), 42 Stat. 227, 239 (1921).

<sup>6</sup> I.R.C. § 22(b)(6) (1939).

<sup>7</sup> *See supra* note 1.

tax restraints,"<sup>8</sup> and was intended "to remove inequities, to end harassment of the taxpayer, and to reduce tax barriers to future expansion of production and employment."<sup>9</sup>

One such inequity in the 1939 Code and its predecessors was in the disparate tax treatment of the clergyperson,<sup>10</sup> whose employing congregation did not furnish a personal residence, but who explicitly or implicitly augmented the minister's salary with an allowance so that the minister might make provision for a household abode. The Bureau of Internal Revenue<sup>11</sup> had long taken the position that such a compensational allowance was not excludable from a minister's income,<sup>12</sup> but that posture traveled a rough and rocky road in the courts. For example, in the *Appeal of Gillespie*,<sup>13</sup> the Board of Tax Appeals was confronted with a situation in which the church negotiated the rental of a manse for its minister, and paid the minister an additional rental allowance, which the minister then paid to the manse's landlord. The court found the minister to be an agent of the church, and thus avoided the question of whether payments in lieu of the church-owned housing fell within the exclusion provided by § 213(b)(11) of the Act of 1921.<sup>14</sup> The Government also lost on the issue in some cases

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<sup>8</sup> H.R. REP. NO. 83-1337, at 2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 4017, 4025; *see also* 83d Cong., S. FIN. COMM. REP. ON INTERNAL REVENUE CODE OF 1954, *as reprinted in* 1954 U.S.C.C.A.N. 4629, 4629. The introductory materials to the respective House and Senate documents are mostly verbatim.

<sup>9</sup> H.R. REP. NO. 83-1337, at 1. (1954). *Plus ça change, plus c'est la même chose* ("the more things change, the more they stay the same"). *See, e.g., In re Fichner*, 677 A.2d 201, 205 n.3 (1996).

<sup>10</sup> At the time, all but a few clergypersons in America were of the male gender, though as early as 1853 the Oberlin Theological Seminary did ordain a woman: Antoinette Louisa Brown (later married surname Blackwell). *See Mrs. Blackwell is 87*, N.Y. TIMES, May 21, 1912, at 1.

Notwithstanding that I.R.C. § 107 is couched in the male gender, it must of course be construed to apply to clergypersons without regard to gender. *See* 1 U.S.C. § 1 (2012).

Consistent with the writing practice standards now expected of the legal profession, this article employs gender-neutral language, unless the specific written passage is a direct quotation, or the circumstances otherwise compel the use of any particular gender to the exclusion of another. *See* Judith S. Kaye, *A Brief for Gender-Neutral Brief-Writing*, 205 N.Y.L.J. 28 (1991); *cf. Estate of Fannie Greene*, 2006 N.Y. Misc. LEXIS 5063 at \*1 n.1 (Surr. Ct. Kings Co. 2006) ("In the Notice of Motion, a non-neutral gender salutation was used. Any papers submitted to this Court are to contain gender neutral language.").

<sup>11</sup> Under a reorganization of the Treasury Department effective August 26, 1953, the "Bureau of Internal Revenue" became the "Internal Revenue Service." T.D. 6038, 1953-2 C.B. 443.

<sup>12</sup> I.T. 1694, 2-1 C.B. 79 (1923).

<sup>13</sup> 2 B.T.A. 1317 (1925).

<sup>14</sup> *Id.*

where the church was unable to find a parsonage for rental in the prevailing housing market.<sup>15</sup>

The IRS's wagon was totally broken down in *Williamson v. Commissioner*,<sup>16</sup> when the Eighth Circuit, in reversing the Tax Court, declared itself convinced "that it was not the intent nor purpose of Congress that a house allowance in lieu of the rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel should be included in his gross income."<sup>17</sup>

By the time *Williamson* was decided in 1955, Congress had specifically addressed the disparity between clergy who were owners, and those who were renters or who received living quarters as part of their compensation. The parsonage exclusion law under the 1939 and 1921 statutes, at least as construed and applied by Internal Revenue, was found by Congress to be "unfair to those ministers who are not furnished a parsonage, but who receive larger salaries (which are taxable) to compensate them for expenses they incur in supplying their own home."<sup>18</sup> Section 107 of the Internal Revenue Code of 1954 placed ministers who owned their homes on par with those who received living quarters from their congregation (or a designated stipend therefore).<sup>19</sup> Shortly thereafter, the IRS licked its wounds from litigating *Williamson* and other cases by declaring that for pre-code of 1954 tax returns, it would thenceforth accept the exclusion from income of payments to a minister in lieu of housing.<sup>20</sup>

Approximately a quarter-century later, the construction of I.R.C. § 107 was called into question when some ministers were fortunate enough to be able to provide housing for themselves and their families for an out-of-pocket expenditure that was less than the fair market rental value. The Tax Court ruled that the

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<sup>15</sup> *Conning v. Busey*, 127 F. Supp. 958 (S.D. Ohio 1954); *MacColl v. United States*, 91 F. Supp. 721 (N.D. Ill. 1950).

Subsequent to the decision in *Conning*, on August 16, 1954, the Internal Revenue Code of 1954 was enacted. See notes 18–19 *infra* and accompanying text.

<sup>16</sup> 224 F.2d 377 (8th Cir. 1955).

<sup>17</sup> *Id.* at 381.

<sup>18</sup> S. FIN. COMM. REP. NO. 1622, 83d Cong., 2d Sess., at 16 (1954), *quoted in Warnke v. United States*, 641 F. Supp. 1083, 1087 n.2 (E.D. Ky. 1986).

<sup>19</sup> As originally enacted, I.R.C. § 107 provided:

In the case of a minister of the gospel, gross income does not include —

(1) the rental value of a home furnished to him as part of his compensation; or

(2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.

<sup>20</sup> Rev. Rul. 56-58, 1956-1 C.B. 604.

exclusion was limited to the actual costs to the ministers, even in cases where the fair market rental would be greater.<sup>21</sup>

Then, in 2000, the Tax Court was confronted with the opposite situation. When Reverend Richard D. Warren's expenditures for the upkeep of his own family house (which had been duly designated by his employer as a housing allowance) had exceeded the fair market rental value, he sought to exclude the entire amount; however, the IRS contended that Warren's allowable exclusion was limited to the fair market rental value of the housing.<sup>22</sup> The Tax Court ruled in the Reverend's favor, finding that while Subsection 1 of I.R.C. § 107 was couched by Congress in terms of "rental value,"<sup>23</sup> Subsection 2 spoke in terms of usage of a "rental allowance."<sup>24</sup>

The IRS appealed the Tax Court's ruling to the Ninth Circuit which, *sua sponte*, transformed what otherwise had been an issue of statutory construction into a question of the very constitutionality of the parsonage exemption itself, appointing Professor Erwin Chemerinsky as an amicus curiae to brief the court on the matter.<sup>25</sup> Before the Ninth Circuit could rule on the matter, however, Congress hastily enacted the Clergy Housing Allowance Clarification Act of 2002,<sup>26</sup> limiting the allowance amount excludable under I.R.C. § 107(2) to "the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities."<sup>27</sup> This limitation in the Code applied to all tax years beginning on or after January 1, 2002, and with

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<sup>21</sup> Reed v. Comm'r, 82 T.C. 208 (1984).

<sup>22</sup> Warren v. Comm'r, 114 T.C. 343 (2000), *appeal dismissed*, 302 F.3d 1012 (9th Cir. 2002).

<sup>23</sup> I.R.C. § 107(1) (1986). The "rental value" language of Subsection 1 obviously follows the language of the respective parsonage exclusion provisions from the 1939 Code and the 1921 Revenue Act. *See* Revenue Act of 1921 § 213(b)(11), 42 Stat. 227, 239 (1921); *see also* I.R.C. § 22(b)(6) (1939).

<sup>24</sup> I.R.C. § 107(2).

<sup>25</sup> Warren v. Comm'r, 282 F.3d 1119 (9th Cir. 2002). Professor Chemerinsky described the telephonic exchanges between himself and a court attorney in connection with the court's recruitment of him as an amicus. *See* Erwin Chemerinsky, *The Parsonage Exemption Violates the Establishment Clause and Should be Declared Unconstitutional*, 24 WHITTIER L. REV. 707, 735 (2003). The amicus brief written by Chemerinsky is available at 2002 TNT 117-39, Tax Analysts Doc 2002-13072 (June 18, 2002).

<sup>26</sup> Clergy Housing Allowance Clarification Act of 2002, Pub. L. No. 107-181, 116 Stat. 583. The Act was specifically passed in order to avoid the parsonage exemption from being declared unconstitutional in the appeal of *Warren*. *See* 148 CONG. REC. H1299-H1300 (daily ed. Apr. 16, 2002) (statement of Rep. Ramstad); 148 CONG. REC. H1300-H1301 (daily ed. Apr. 16, 2002) (statement of Rep. Pomeroy); 148 CONG. REC. H1301 (daily ed. Apr. 16, 2002) (statement of Rep. Johnson).

<sup>27</sup> Clergy Housing Allowance Clarification Act of 2002, Pub. L. No. 107-181, § 2(a), 116 Stat. 583.

respect to tax years beginning before that date, gave a pass to those, including Rev. Warren, who had excluded the allowance exceeding the fair rental value on tax returns filed prior to April 17, 2002.<sup>28</sup> The IRS, accepting of, if not entirely pleased with, the line thus drawn in the sand for future tax returns, and having no further legal basis to maintain its posture with respect to Warren, stipulated with Rev. Warren that the case be dismissed, which the Ninth Circuit did over the vehement objections of Prof. Chemerinsky, who in turn had his own professional, if not personal agenda in the matter.<sup>29</sup>

I.R.C. § 107, quite laconic for an Internal Revenue Code provision, currently provides:

§ 107. Rental value of parsonages. In the case of a minister of the gospel, gross income does not include--  
 (1) the rental value of a home furnished to him as part of his compensation; or  
 (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.<sup>30</sup>

### III. THE OPERATION AND SWEEP OF THE PARSONAGE EXEMPTION

#### A. *The Eligible Clergy*

From the earliest times, the laws of England have been influenced by the Church, and special privileges for the clergy have long been part of the legal system from which the American system evolved.<sup>31</sup> In light of such a heritage, there is no denying the predisposition of the legal system to carve out favored niches

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<sup>28</sup> See *id.* at §§ 2–3. The tax years at issue in Rev. Warren's dispute with the IRS were 1993, 1994 and 1995. See *Warren v. Comm'r*, 114 T.C. 343 (2000), *appeal dismissed*, 302 F.3d 1012 (9th Cir. 2002). April 17, 2002 was the date the bill that would be enacted was first received and read in the Senate, following its passage by the House of Representatives.

<sup>29</sup> *Warren*, 302 F.3d at 1013–14. The constitutional issues behind I.R.C. § 107 are beyond the ambit of this article; for further discourse consider Chemerinsky, *supra* note 25, and Justin Butterfield, Hiram Sasser, and Reed Smith, *The Parsonage Exemption Deserves Broad Protection*, 16 TEX. REV. L. & POL. 251 (2012).

<sup>30</sup> I.R.C. § 107 (2002).

<sup>31</sup> See, e.g., THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 8–9, 301–06 (5th ed., 1956).

for members of the clergy and religious institutions.<sup>32</sup> Nevertheless, the American legal system has long made accommodations for persons professing a faith that is not in the majority.<sup>33</sup>

Though the phrase "minister of the gospel" has obvious specific connections to the Christian faith, constitutional considerations dictate that the statute be applied in a religiously-neutral manner.<sup>34</sup> Indeed, the implementing regulations are couched in terms of job function, and not in terms of any particular religious denomination.<sup>35</sup> The exemption has, in fact, been applied to non-Christian clergy.<sup>36</sup>

The individual claiming benefit under § 107 must engage in work that entails "religious worship or the ministration of sacerdotal functions."<sup>37</sup> Merely being duly ordained by a religious denomination and employed by an organized religious denomination, or an entity closely connected therewith, will not qualify an individual for the I.R.C. § 107 exclusion if the job duties are not of a sacerdotal nature.<sup>38</sup>

A surviving spouse of a deceased clergy member may not claim the § 107 exclusion with respect to any rental allowance paid after the clergyperson's death.<sup>39</sup>

#### B. *Comma, Plus: Construing the "Plus The Cost Of Utilities" Phraseology*

I.R.C. § 107(2) allows the clergyperson to exclude from gross income:

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<sup>32</sup> See, e.g., WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 104–09 (1975), see also *Bond v. Pittsburgh*, 368 Pa. 404, 408 (Pa. 1951) ("[T]here is no class of institutions more favored and encouraged by our people as a whole than those devoted to *religious* or charitable causes.") (emphasis added).

<sup>33</sup> In Colonial New York, Jewish officeholders were specifically permitted to take an oath of office that omits the words "upon the true faith of a Christian." *Laws of the Colony of New York*, ch. 538 (July 12, 1729), in 2 THE COLONIAL LAWS OF NEW YORK 513, 515 (Albany, James P. Lyon, State Printer, 1894).

<sup>34</sup> See *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 669 (1970) ("The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited.")

<sup>35</sup> See Treas. Reg. §§ 1.107-1 to 1.1402(c)-5; see also Rev. Rul. 58-221, 1958-1 C.B. 53 ("What constitutes the conduct of religious worship depends on the tenets and practices of a particular religious body constituting a church or church denomination.")

<sup>36</sup> *Id.*

<sup>37</sup> Treas. Reg. § 1.1420(c)-5(b)(2)(iii).

<sup>38</sup> *Kirk v. Comm'r*, 425 F.2d 492 (D.C. Cir. 1970), cert. denied, 400 U.S. 853 (1970); *Flowers v. United States*, Civil Action No. CA 4-79-376-E, 1981 U.S. Dist. LEXIS 16758 (N.D. Tex. Nov. 25, 1981); *Tanenbaum v. Comm'r*, 58 T.C. 1 (1972).

<sup>39</sup> Rev. Rul. 72-249, 1972-1 C.B. 36.

[T]he rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, *plus the cost of utilities.*"<sup>40</sup>

How is the phrase "plus the cost of utilities" after the comma to be construed?

Taxation statutes are to be strictly and narrowly construed, and "[i]n case of doubt they are construed most strongly against the government, and in favor of the citizen."<sup>41</sup> If indeed § 107 is ambiguous, it must be construed to allow the cost of utilities in addition to that of rental value.<sup>42</sup>

Congressional intention in enacting a statute is, however, the paramount consideration in construing any statute.<sup>43</sup> The primary intent of Congress in its unusually rapid enactment of the Clergy Housing Allowance Clarification Act was obviously to save I.R.C. § 107 itself.<sup>44</sup> The initial bill, as introduced by Representative Ramstad, contained a section of "Findings, Purposes and Construction."<sup>45</sup> This section was deleted from the final version of the bill, but Rep. Ramstad stated on the House floor, without contradiction, that the section's excision was "in order to accommodate the tradition that the Committee on Ways and Means normally has; that is, not to include such language in tax legislation."<sup>46</sup> Ramstad went on to emphatically state, without gainsay, that the section's deletion "does not, let me repeat that, does not, reflect the lack of support within the House or among the

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<sup>40</sup> I.R.C. § 107(2) (2002)(emphasis added).

<sup>41</sup> *Ocean Drilling & Exploration Co. v. United States*, 988 F.2d 1135, 1156 (Fed. Cir. 1993) (quoting *Gould v. Gould*, 245 U.S. 151, 153 (1917)).

<sup>42</sup> But tax exemptions and deductions are a matter of legislative grace, and assuming that the statute providing for the deduction or exemption is, or has been clarified, the particular taxpayer bears the burden of demonstrating that all requisites for the deduction or exemption have been fulfilled. *Indopco, Inc. v. Comm'r*, 503 U.S. 79, 84 (1992); *IHC Health Plans, Inc. v. Comm'r*, 325 F.3d 1188, 1193 (10th Cir. 2003); *Colonial Savings Ass'n. v. Comm'r*, 854 F.2d 1001, 1006 (7th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989).

<sup>43</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

<sup>44</sup> See *supra* notes 26–28 and accompanying text.

<sup>45</sup> H.R. 4156 IH, 107th Cong., 2d. Sess., § 2 (April 10, 2002).

<sup>46</sup> 148 CONG. REC. H1300 (daily ed. Apr. 16, 2002) (statement of Rep. Ramstad).

bill's sponsors."<sup>47</sup> Accordingly, the "Findings, Purposes and Construction" section of the original bill can be consulted for insight on congressional intent.

One relevant purpose of the legislation set forth in the originally-introduced measure was to "minimize controversies between clergy and the Internal Revenue Service by clarifying the extent to which a parsonage or a housing allowance is not considered gross income for Federal income tax purposes."<sup>48</sup> The initial measure further provided that nothing in the act "be construed to reverse or modify any regulation, revenue ruling, or other guidance that was issued by the Internal Revenue Service prior to the date of enactment of this Act, except with respect to the effective date of the fair market value limitation."<sup>49</sup> Additionally, the initial measure included a congressional finding that it would behoove the IRS "to provide additional guidance with respect to fair market valuation determinations in order to minimize disputes regarding valuation under section 107 of the Internal Revenue Code of 1986."<sup>50</sup>

The Findings, Purposes and Construction in the original bill, together with the explicit use of the word "clarification" in the title of the Act, compel the conclusion that congressional intent was to clarify existing law, not to create any new genre or subspecies of benefits excludable by clergypersons from their gross income. It thus would follow that the phrase "plus the cost of utilities" was placed there to ensure that the calculus of the excludible income uniformly included the cost of utilities. Such would be consistent with utilities costs treatment in other areas of the law where utilities costs interplay with rent, including the Department of Housing and Urban Development's Tenant-Based Housing Assistance Programs,<sup>51</sup> Department of Agriculture Direct Multi-Family Housing Loans and Grants Programs,<sup>52</sup> and the Department of the Army Real Estate Handbook's guidelines on property appraisals.<sup>53</sup>

Moreover, even before the Clergy Housing Allowance Clarification Act, utility costs that were separate and apart from the rental payments were treated as potentially excludible by the Tax Court if all the requisites for excludability otherwise were

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<sup>47</sup> *Id.*

<sup>48</sup> H.R. 4156, 107th Cong., § 2(a)(6) (2d. Sess. 2002).

<sup>49</sup> *Id.* at § 2(b).

<sup>50</sup> *Id.* at § 2(c).

<sup>51</sup> See 24 C.F.R. § 982.4(b) (2015) (Definition of "Fair Market Rent.").

<sup>52</sup> See 7 C.F.R. § 3560.11 (2015) (Definition of "Shelter Costs.").

<sup>53</sup> 32 C.F.R. § 644.45(e) (2015).

present.<sup>54</sup> Even earlier, the IRS itself specifically allowed the exclusion of utilities in addition to rent payments if paid by the employing congregation or designated by the congregation as part of a housing allowance.<sup>55</sup>

This conclusion is not without its practical problems. Congress and other legislative bodies presumptively know of business and commercial practices,<sup>56</sup> manufacturing processes,<sup>57</sup> common practices in personal services such as barbering and hairdressing,<sup>58</sup> and even the ritual practices of various religions.<sup>59</sup> The legislature can, *a fortiori*, be presumed to know less specialized matters of even broader common knowledge. This presumption would certainly entail the inescapable fact that household utility consumption, including, but not limited to,

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<sup>54</sup> See, e.g., *Swaggart v. Comm'r*, 48 T.C.M. (CCH) 759 (1984); *Eden v. Comm'r*, 41 T.C. 605 (1964). Where the utilities costs do not fulfill all of the requisites for excludability, such as when there is no designation or resolution by the governing body of the house of worship, the IRS has imputed utilities payments as income to the clergyperson. *United States v. Clarke*, 562 F.3d 1158, 1161 n.4 (11th Cir. 2009), *cert. denied*, 558 U.S. 1077 (2009).

<sup>55</sup> See Rev. Rul. 59-350, 1959-2 C.B. 45; see also I.R.S. Priv. Ltr. Rul. 5910234540A (Oct. 23, 1959); I.R.S. Priv. Ltr. Rul. 5804244950A (Apr. 24, 1958); I.R.S. Priv. Ltr. Rul. 5509169250A (Sept. 16, 1955). Though IRS Private Letter Rulings are not accorded precedential status and are not binding upon the IRS or the courts with respect to other taxpayers, I.R.C. § 6110(k)(3), there nevertheless are expectations that such rulings reflect the IRS's policies, and that there will be some degree of consistency from one taxpayer to another in similar circumstances. See *Internet Corp. v. Comm'r*, 209 F.3d 901, 908 (6th Cir. 2000), *reh'g denied*, Case No: 99-1046, 2000 U.S. App. LEXIS 12247 (6th Cir. June 1, 2000); *Harco Holdings v. United States*, 977 F.2d 1027, 1035 n.13 (7th Cir. 1992), *amended on denial of rehearing en banc*, No. 91-1387, 1992 U.S. App. LEXIS 29078 (7th Cir. Nov. 9, 1992); *Shaev v. Saper*, 320 F.3d 373, 381 n.5 (3d Cir. 2003); *Thom v. United States*, 283 F.3d 939, 943 n.6 (8th Cir. 2002), *reh'g denied*, No. 01-2014, 2002 U.S. App. LEXIS 14378 (8th Cir. July 12, 2002); *True Oil Co. v. Comm'r*, 170 F.3d 1294, 1302 (10th Cir. 1999); see also Christopher M. Pietruszkiewicz, *Does the Internal Revenue Service Have a Duty to Treat Similarly Situated Taxpayers Similarly?*, 74 U. CIN. L. REV. 531 (2005).

I.R.C. § 6110(k)(3) was formerly I.R.C. § 6110(j)(3) until its re-designation by the Internal Revenue Service Restructuring and Reform Act of 1998., Pub. L. No. 105-206, § 3014(a), 112 Stat. 685, 731. Such a re-designation can cause confoundment and consternation to the legal researcher. See Kenneth H. Ryesky, *Tax Simplification: So Necessary and So Elusive*, 2 PIERCE L. REV. 93, 100-01 (2004).

<sup>56</sup> See, e.g., *Comm'n's Workers of Am. v. Beck*, 487 U.S. 735, 759-60 (1988); *A. T. Massey Coal Co. v. Barnhart*, 381 F. Supp. 2d 469, 481 (Dist. Md. 2005), *aff'd*, 472 F.3d 148 (4th Cir. 2006); *Corus Staal BV v. U.S. Dept. of Commerce*, 259 F. Supp. 2d 1253, 1264 (Ct. Int'l. Trade, 2003), *aff'd*, 395 F.3d 1343 (Fed. Cir. 2005); *Barajas v. Oren Realty & Dev. Co.*, 67 Cal. Rptr. 2d 62, 67-68 (Cal. Ct. App. 1997); *Sterling v. Lapidus*, 10 A.D.2d 180, 183 (1st Dept. 1960).

<sup>57</sup> See, e.g., *Essex v. State*, 175 N.W. 795, 796 (Wisc. 1920).

<sup>58</sup> See, e.g., *State v. Cavender*, 292 P. 763, 765 (Kans. 1930).

<sup>59</sup> See, e.g., *State v. Hughes*, 209 A.2d 872, 881 (Conn. Cir. Ct. 1965), *cert. denied*, 152 Conn. 745 (Conn. 1965).

water, gas and electricity, varies from household to household, and is largely (though not completely) dependent upon the number of individuals in the household, and also affected by the number and frequency of household guest visits.<sup>60</sup> Nevertheless, the other administrative agencies that must deal with costs of utilities in the programs they administer seem to be able to handle the task; there is no reason why the IRS, an agency that employs real estate valuation experts,<sup>61</sup> should not be able to meet the challenge.

### C. *The General Limitations of the I.R.C. § 107 Exclusion*

The Secretary of the Treasury has been empowered and enjoined to "prescribe all needful rules and regulations" in enforcing and administering the provisions of the Internal Revenue Code.<sup>62</sup> Although done in the name of the Secretary of the Treasury, the process of promulgating Treasury Regulations<sup>63</sup> places most of the work upon the Treasury's subordinate agency, the IRS.<sup>64</sup> Accordingly, the discussion that follows will be couched in terms of the IRS promulgating regulations unless referring to a specific task or prerogative of the Treasury Department proper.

Pursuant to its powers and mandates, the IRS has in fact promulgated regulations to implement and clarify I.R.C. § 107. Treasury Regulation § 1.107-1 first discusses the requisite duties and services to be rendered in order to qualify for status as a clergyman,<sup>65</sup> and then further clarifies the meanings of "home"

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<sup>60</sup> See, e.g., *Lindsey v. Smith*, 303 F. Supp. 1203, 1207 (W.D. Wash. 1969) (reproducing tables showing household expense standards, from then-operative regulations, reflecting increased utility expenses for larger families); *T. F. v. C. W.*, No. 04-40200, 2006 Del. Fam. Ct. LEXIS 144 at \*19 (Del. Fam. Ct. 2006) ("Wife testified that the utility bills are higher because there are additional people in her house.").

<sup>61</sup> See I.R.M. 4.48.1.2.1 (May 1, 2006); see also *In re Taylor*, Case No. 94-3596-9P3, 1996 Bankr. LEXIS 1572 (M.D. Fla. March 22, 1996); *Serdar v. Comm'r*, 52 T.C.M. (CCH) 750 (1986).

<sup>62</sup> I.R.C. § 7805(a) (2012).

<sup>63</sup> See *supra* note 1 for discussion of the citation "Treas. Reg." to refer to Title 26 of the Code of Federal Regulations.

<sup>64</sup> See *Treas. Reg. § 601.601* (2012).

Though the Internal Revenue Service is a sub-agency of the Department of the Treasury, it does not have a strict line reporting relationship to the Treasury, inasmuch as the IRS's Commissioner and Chief Counsel serve at the pleasure of the President and the whim of Congress, regardless of any inclinations held by the Secretary of the Treasury. I.R.C. § 7803(a)(b) (2012). Moreover, the IRS's Chief Counsel has a dual reporting relationship to both the Commissioner of Internal Revenue and the Treasury's General Counsel. I.R.C. § 7803(b)(3).

<sup>65</sup> *Treas. Reg. § 1.107-1(a)* (2012).

Following the language of I.R.C. § 107, the regulation is couched in terms of "minister of the gospel." See *supra* notes 5–7 and accompanying text. The

and "rental allowance" for purposes of the exclusion.<sup>66</sup> The rental allowance portion of the clergyperson's remuneration must somehow be specifically designated as such by the employer prior to its receipt by the clergyperson.<sup>67</sup> Moreover, the allowance cannot exceed a reasonable recompense for the services actually performed by the clergyperson claiming it.<sup>68</sup> If it otherwise complies with the foregoing, the allowance for rental or housing may be the sole compensation received by the clergyperson from his or her employing congregation.<sup>69</sup>

Determining reasonable compensation for any services is a case-specific affair that often must take into consideration diverse and complex factors,<sup>70</sup> and the services of a clergyperson would certainly be no exception.

Of course, the very language of the statute—recounted verbatim in the regulation—limits the excludible amount to the rental value of the home, regardless of whether the home is rented or owned by the clergyperson.<sup>71</sup>

The regulation places limitations upon the rental allowance that can be excluded. Specifically, the rental allowance must be used towards the rental or purchase of a home, or for "expenses directly related to providing a home."<sup>72</sup> To the extent that the rental allowance is not used for any home expenses, it is not excludable under I.R.C. § 107.<sup>73</sup> Expenses for food or servants are not "directly related" to home expenses, and thus are not excludable. If the home is part of a farm or business property, the

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regulation, of course, is and must be construed in a sectarian-neutral manner. *See supra* notes 34–36 and accompanying text.

<sup>66</sup> Treas. Reg. § 1.107-1(b).

<sup>67</sup> *Id.* ("The designation of an amount as rental allowance may be evidenced in an employment contract, in minutes of or in a resolution by a church or other qualified organization or in its budget, or in any other appropriate instrument evidencing such official action."); *see also* *Ling v. United States*, 200 F. Supp. 282 (D. Minn. 1961); *Chambers v. Comm'r*, 101 T.C.M. (CCH) 1550 (2011).

<sup>68</sup> Rev. Rul. 78-448, 1978-2 C.B. 105.

<sup>69</sup> *See* *Holmes v. Comm'r*, T.C. Summary Op. 2010-42 (April 12, 2010) (Housing allowance only compensation received from congregation).

The differences between the United States Tax Court's Memorandum Opinions and Summary Opinions have been briefly expounded upon by a Tax Court Judge. *See* Mary Ann Cohen, *How to Read Tax Court Opinions*, 1 HOUS. BUS. & TAX L.J. 1 (2001). Subsequent to Judge Cohen's article, the United States Tax Court did make its theretofore limited in accessibility summary opinions available to the public on its website.

<sup>70</sup> *Kennedy v. Comm'r*, 671 F.2d 167 (6th Cir. 1982); *Palmetto Pump & Irrig. Co. v. Tomlinson*, No. 4007-Civ-T, 1962 U.S. Dist. LEXIS 5135 (S.D. Fla. 1962), *aff'd*, 313 F.2d 220 (5th Cir. 1963).

<sup>71</sup> I.R.C. § 107 (2012); Treas. Reg. § 1.107-1(a) (2012).

<sup>72</sup> Treas. Reg. § 1.107-1(c).

<sup>73</sup> *Id.*

amount prorated or allocated towards the farm or business is also not excludable.<sup>74</sup>

The exclusion does not apply to more than one home, even if the clergyperson in fact uses an additional home as a seasonal residence and does not use either dwelling for commercial or nonresidential purposes.<sup>75</sup> The rental allowance cannot be excluded when the clergyperson rents out the home during an extended absence (but the usual deductions for the upkeep of income producing rental property may pertain).<sup>76</sup> Further, the exclusion of the cost of the various utilities from the income of the clergyperson does not operate to exclude such utilities from sales and/or excise taxes imposed by states upon such utility services.<sup>77</sup>

Being excluded from gross income in the first place, expenses for a housing allowance are not deductible from gross income.<sup>78</sup>

#### IV. WHAT CONSTITUTES A UTILITY

Society expects that human residences have certain amenities, including (but hardly limited to) the availability of various goods and services used in everyday, household life. Some of these goods and services<sup>79</sup> have remained essentially unchanged over the centuries, while others have developed along with the technological state of the art.

In the context of delinquent tax collections, the IRS has procedures in its Internal Revenue Manual to formulate an appropriate collection strategy for financially analyzing the taxpayer.<sup>80</sup> In determining the taxpayer's necessary living expenses, the Internal Revenue Manual (I.R.M.) enumerates an apparently nonexclusive list of utilities: "The utilities include gas, electricity, water, heating oil, bottled gas, trash and garbage collection, wood and other fuels, septic cleaning, telephone and cell

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<sup>74</sup> *Id.*

<sup>75</sup> *Comm'r v. Driscoll*, 669 F.3d 1309 (11th Cir. 2012), *cert. denied*, 133 S.Ct. 358 (2012), *rev'g*, *Driscoll v. Comm'r*, 135 T.C. 557 (2010).

<sup>76</sup> Rev. Rul. 72-588, 1972-2 C.B. 77.

<sup>77</sup> *See, e.g.*, Dept. of Rev. Mo. Ltr. Rul. No. LR 6170 (Mar. 19, 2010).

<sup>78</sup> *See* Va. Tax Comm'r Rul. 12-141 (Aug. 29, 2012).

<sup>79</sup> The provision of a utility often has attributes of both a good and a service, setting the stage for disputes over what the utility provider's responsibilities are. *See, e.g.*, *iTravelers Prop. & Cas. Ins. Corp. v. Yankee Gas Servs. Co.*, CV 990266606S, 2000 Conn. Super. LEXIS 1447 (Conn. Super. Ct. May 19, 2000); *Pierce v. Pac. Gas & Elec. Co.*, 166 Cal. App. 3d 68 (Cal. Ct. App. 1985); *Dubin v. Michael Reese Hosp. & Med. Ctr.*, 74 Ill. App. 3d 932 (Ill. Ct. App. 1979), *rev'd on other grounds*, 83 Ill. 2d 277 (Ill. 1980).

<sup>80</sup> *See* I.R.M. § 5.15, Financial Analysis Handbook.

phone."<sup>81</sup> The IRS, which utilizes the diverse scope of its I.R.M. roster to qualify utility expenses as living expenses even for delinquent taxpayers, would surely also utilize its scope qualify a clergy person's parsonage exclusion as a utility expense, particularly one in good standing with his or her tax obligations.

Utilities can be classified in various ways. They can be classified by their manner of delivery. Water, electricity and land line telephone, for example, are typically delivered through an infrastructure of wires, cables or pipes, while garbage and refuse collection is done by personnel on specialized vehicles,<sup>82</sup> and cell phone service is done through invisible radio frequency wave transmissions.<sup>83</sup>

Utilities can also be classified according to the nature of their function. Given the congressional recognition that the clergy person's station in life and work has certain unique attributes,<sup>84</sup> the function of the utilities used in the clergy person's household affairs is relevant in analyzing whether a given utility in a given situation would be what Congress intended to be excludable from the clergy person's income under I.R.C. § 107.

#### A. *Classification of Utilities*

Various goods and services commonly used in household life activities will now be classified according to function:

##### 1. Energy Utilities:

The household has various energy needs. Typical household energy uses include space heating and cooling, water heating, lighting, refrigeration, cooking, appliances and electronics.<sup>85</sup>

Some utilities involve the supply of energy in one form or another.<sup>86</sup> Energy utilities can take on many forms. Some of these are subsequently discussed.

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<sup>81</sup> I.R.M. § 5.15.1.9(1)(A) (Oct. 2, 2009).

<sup>82</sup> *See, e.g.*, *N. Star Alaska Hous. Corp. v. United States*, 30 Fed. Cl. 259, 267 (Fed Cl. 1993) ("Refuse collection, although essential, does not logically flow from a list delineating gas, oil and water. It is not a traditional form of utility.").

<sup>83</sup> *See, e.g.*, *Bell Atl. Mobile of Mass. Corp. v. Comm'r of Revenue*, 884 N.E.2d 978, 982 (Mass. 2008) ("Bell Atlantic Mobile does not own or need poles, wires, pipes, or underground conduits.").

<sup>84</sup> *See infra* notes 228–37 and accompanying text.

<sup>85</sup> *See* U. S. ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2014 Table A4, at A-9, A-10 (EIA 2014).

<sup>86</sup> There are public welfare programs, which, for the purpose of calculating government assistance payments to the recipient, make a distinction between

a. Electricity

Electricity, which has concerned many legal minds that have sought to analyze its nature and classify it as either a good or a service for legal purposes,<sup>87</sup> is typically delivered via an infrastructure of wires and cables. It is a versatile utility in that it can be brought to its destination through flexible and portable wires, as distinguished from heavy, rigid and stationary pipes.

Congress enacted the Rural Electrification Act of 1936,<sup>88</sup> the unabashed purpose of which was to extend electrical service to persons living in rural areas who otherwise would not be able to avail themselves of electricity in their homes.<sup>89</sup> Congress has explicitly codified its policy that the availability of electricity is a vital public interest, and that the electric generation and delivery industry needs regulation in order to ensure its sound functioning and financial stability.<sup>90</sup>

b. Gas

Flammable hydrocarbon gas is a major and familiar source of energy for heating, cooking and other uses. As records of litigation attest, utility enterprises were purveying gas to American residences for illumination and cooking purposes at least as early as the middle of the nineteenth century.<sup>91</sup> It is not the purpose of this Article to delve into the physical and chemical properties or interchangeabilities of the various types of hydrocarbon gasses; suffice it to say that there are diverse varieties and admixtures, including, but not limited to, natural gas, propane, liquefied petroleum gas (LPG) and methane.<sup>92</sup>

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energy utilities and non-energy utilities. *See, e.g.*, *Estey v. Comm'r*, 21 F.3d 1198, 1201 (1st Cir. 1994).

<sup>87</sup> *See, e.g.*, *Pierce v. Pac. Gas & Elec. Co.*, 212 Cal. Rptr. 283 (Cal. Ct. App. 1985); *Dubin v. Michael Reese Hosp. & Med. Ctr.*, 393 N.E.2d 588 (Ill. App. Ct. 1979), *rev'd on other grounds*, 425 N.E.2d 350 (Ill. 1980); *Helvey v. Wabash Cnty. REMC*, 278 N.E.2d 608, 610 (Ind. App. Ct. 1972).

<sup>88</sup> Rural Electrification Act of 1936, Pub. L. No. 74-605, 49 Stat. 1363.

<sup>89</sup> *Pub. Serv. Co. of Colo. v. Pub. Util. Comm.*, 350 P.2d 543, 545 (Colo. 1960), *cert. denied* 364 U.S. 820 (1960).

<sup>90</sup> 16 U.S.C. § 824 (2015).

<sup>91</sup> *See, e.g.*, *Gas-Light Co. of Balt. v. Colliday*, 25 Md. 1 (1866); *Comm'r v. N. Liberties Gas Co.*, 12 Pa. 318 (1849). Safety issues associated with the toxic and flammable qualities of the gas were also relevant. *See, e.g.*, *Flint v. Gloucester Gas Light Co.*, 85 Mass. (3 Allen) 343 (Mass. 1862); *Holly v. Bos. Gas Light Co.*, 74 Mass. (8 Gray) 123 (Mass. 1857).

<sup>92</sup> *See, e.g.*, GEN. ACCOUNTING OFFICE *sub nom* GOV'T ACCOUNTABILITY OFFICE (2004), 1 LIQUEFIED ENERGY GASES SAFETY 3–4 (1978); I.R.S. Gen. Couns. Mem. 20151001F (Dec. 10, 2014) (discussing Compressed Natural Gas (CNG))

The various types of gasses are distributed via a pipeline infrastructure system, truck or rail in pressurized containers of various sizes, or some combination of the two.<sup>93</sup> Some residences, in rural areas and elsewhere, are not hooked into gas distribution pipes and mains utility infrastructure, but have their own gas storage tank on premises. Such a tank can be a fixture, which is periodically refilled with gas from the distributor's truck,<sup>94</sup> or else the tank (often referred to as a "cylinder") is serviced by the distributor interchanging a fully charged cylinder with the exhausted one, which, in turn, is recharged and delivered to the same or another customer.<sup>95</sup>

### c. Heating Oil

As the name implies, heating oil is a fuel used for space heating or water heating. The fuel oil is delivered by truck to an appurtenant tank on or near the household premises, from which it is drawn into the furnace or boiler for consumption.<sup>96</sup> Households using heating oil are found mainly, but not solely, in the northeastern region of the United States.<sup>97</sup>

### d. Kerosene

Notwithstanding the safety issues involved in the use of kerosene heaters,<sup>98</sup> 1.7 million American households used them in

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under Internal Revenue Code and Treasury Regulations, and other fuels as their energy equivalents relate to CNG).

<sup>93</sup> See, e.g., GEN. ACCOUNTING OFFICE *sub nom* GOV'T ACCOUNTABILITY OFFICE (2004), PROPANE: CAUSES OF PRICE VOLATILITY, POTENTIAL CONSUMER OPTIONS, AND OPPORTUNITIES TO IMPROVE CONSUMER INFORMATION AND FED. OVERSIGHT 6-7 (GAO-03-762, June 2003).

<sup>94</sup> See, e.g., *V-1 Oil Co. v. Utah State Dep't of Pub. Safety*, 131 F.3d 1415, 1419 (10th Cir. 1997); *Mick v. Level Propane Gases, Inc.*, 203 F.R.D. 324 (S.D. Ohio 2001).

<sup>95</sup> See, e.g., *Suburban Propane v. Proctor Gas, Inc.*, 953 F.2d 780 (2d Cir. 1992).

<sup>96</sup> See, e.g., *City Fuel Corp. v. Nat'l Fire Ins. Co. of Hartford*, 846 N.E.2d 775 (Mass. 2006); *Christopher v. Glen-Mor Fuel Oil Co.*, 95-01505-F, 1996 Mass. Super. LEXIS 39 (Mass. Super. Ct. 1996); *People v. Wilco Energy Corp.*, 284 A.D.2d 469 (N.Y. App. Div. 2001).

<sup>97</sup> ENERGY INFO. ADMIN., *supra* note 85, at Table US2, (reporting 8.4 million fuel oil households in the United States, of which 6.5 million were in the Northeast Region.).

<sup>98</sup> Consumer Prod. Safety Comm'n, CPSC and NKHA Stress Kerosene Heater Safety (CPSC Pub. 5052, 2011); see also *Yarbrough v. Sears, Roebuck & Co.*, 628 So. 2d 478 (Ala. 1993); *Carney v. S.E. Nichols, Inc.*, 87 A.D.2d 977 (N.Y. App. Div. 1982).

2005,<sup>99</sup> no doubt motivated more by the savings on the household budget than deterred by the fear of the inherent safety hazards.<sup>100</sup>

Kerosene is seldom, if ever, delivered through a utility pipe infrastructure, but is instead delivered to the home via a distributor's truck<sup>101</sup> or purchased and carried home from a filling station or store<sup>102</sup> (either mode is susceptible to unplanned, unwanted and potentially deadly flare-ups or explosions if the kerosene is adulterated with gasoline or other liquid that has a lower combustion point).<sup>103</sup>

#### e. Coal

Though the once-commonplace residential use of coal declined during the second half of the twentieth-century, there still remain some households that use it as a fuel for home heating.<sup>104</sup> While more than 90% of America's 2006 and 2007 coal production was consumed in electric power generation, there was still a small market, less than one-third of one percent of the coal output, used as heating fuel for homes and commercial businesses.<sup>105</sup> Coal is transported from the mine via railway and/or barge to the regional or local distributors and then delivered to the customers' homes and businesses via truck.<sup>106</sup>

#### f. Wood

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<sup>99</sup> ENERGY INFO. ADMIN., *supra* note 85, at Table US2.

<sup>100</sup> *See, e.g.*, Heidi Fenton, *Fire Officials: Save Money Safely*, MUSKEGON CHRON., Dec. 7, 2009, at A4; *Portable Kerosene Heaters on the Rise*, N.Y. TIMES, Aug. 27, 1981, at C8; *see also* Advertisement, N.Y. TIMES, Dec. 20, 1864, at 7, col. 5 ("Charity . . . The charitably disposed can do no better thing than visit the store of The Kerosene Lamp-Heater Company . . . and purchase a Kerosene Or Gas Cooking or Heating Stove, and make a Holiday Present to some of their friends who have need to economize in their Household Expenses.").

<sup>101</sup> *See, e.g.*, *Azeltine v. Lutterman*, 254 N.W. 854 (Iowa 1934); *Great Am. Ins. Co. v. Watts*, 393 P.2d 236 (Okla. 1964).

<sup>102</sup> *See, e.g.*, *Dart v. Pure Oil Co.*, 27 N.W.2d 555 (Minn. 1947); *Chapman v. Deep Rock Oil Corp.*, 77 N.E.2d 883 (Ill. App. Ct. 1948); *Frazier v. Ayres*, 20 So. 2d 754 (La. Ct. App. 1945).

<sup>103</sup> *See supra* notes 100, 102.

<sup>104</sup> *See* Tom Zeller Jr. & Stefan Milkowski, *Coal Is Returning to Home Furnaces*, N.Y. TIMES, Dec. 27, 2008, at B1.

<sup>105</sup> U.S. ENERGY INFO. ADMIN., ANNUAL COAL REPORT 2008 8 Table ES1 (Mar. 2010).

<sup>106</sup> *See, e.g.*, *Southard v. Dir., Office of Workers' Comp. Programs*, 732 F.2d 66, 67 (6th Cir. 1984); *Walling v. Nw.-Hanna Fuel Co.*, 67 F. Supp. 833, 834-35 (D. Minn. 1946), *aff'd sub nom.*, *Nw.-Hanna Fuel Co. v. McComb*, 166 F.2d 932 (8th Cir. 1948). Before trucks and automobiles were the usual mode of transportation, the coal was, of course, delivered via horse wagon. *See, e.g.*, *Denver v. Utzler*, 88 P. 143 (Colo. 1906); *Days v. S. Trimmer & Sons, Inc.*, 176 A.D. 124 (N.Y. App. Div. 1916).

Humankind has used wood since antiquity as fuel for heating and cooking.<sup>107</sup> During America's colonial and formative<sup>108</sup> periods, testamentary provisions in wills to supply surviving spouses with firewood were not unusual.<sup>109</sup> During that period, clergypersons were compensated with firewood for their services.<sup>110</sup> As a necessary commodity, firewood was accorded favored rates for bridge crossing tolls in Schenectady, New York in the early nineteenth-century<sup>111</sup> and, in the late nineteenth-century, was known to have been a valuable compensation employee perquisite from at least one employer.<sup>112</sup>

Even into the twenty-first century, people continue to use firewood for home energy needs,<sup>113</sup> and entrepreneurs established businesses to supply these households.<sup>114</sup>

Firewood is not delivered through an infrastructure of pipes or conduits. Instead, it must be split and stacked,<sup>115</sup> which is often times a dreadful and undesirable task<sup>116</sup> (sometimes to the point of

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<sup>107</sup> See, e.g., Walter Hough, *Aboriginal Fire-Making*, 3 AM. ANTHROPOLOGIST 359 (1890); Steven R. James et al., *Hominid Use of Fire in the Lower and Middle Pleistocene: A Review of the Evidence*, 30 CURRENT ANTHROPOLOGY 1 (1989); Nicolas Rolland, *Was the Emergence of Home Bases and Domestic Fire a Punctuated Event? A Review of the Middle Pleistocene Record in Eurasia*, 43 J. ARCHEOLOGY ASIA & PAC. 248 (2004).

<sup>108</sup> The years from the American Revolution until the Civil War have been viewed by legal scholars as the Formative Era of American law. ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938); BERNARD SCHWARTZ, *THE LAW IN AMERICA 23-87* (McGraw-Hill, N.Y., 1974); see also *State Bar v. Ariz. Land Title & Trust Co.*, 366 P.2d 1, 7 (Ariz. 1961).

<sup>109</sup> See, e.g., *Kennedy v. Nedrow*, 1 U.S. 415 (1789); *Jackson v. Martin*, 18 Johns. 31 (N.Y. Sup. Ct. 1820); *M'Call v. Peach's Adm'r*, 17 Va. (3. Munf) 288 (Va. 1812); *Webb v. Evans*, 1 Binn. 565 (Pa. 1809); *Haines's Lessee v. Witmer*, 2 Yeates 400 (Pa. 1798).

<sup>110</sup> See, e.g., *Runkel v. Winemiller*, 4 H. & McH 429, 430, 451 (Md. 1799); *Stearns v. First Parish in Bedford*, 38 Mass. (21 Pick.) 114 (Mass. 1838); *Ernst v. Bartle*, 1 Johns. Cas. 319 (N.Y. Sup. Ct. 1800).

<sup>111</sup> See *Hearsey v. Pruyn*, 7 Johns. 179 (N.Y. Sup. Ct. 1810).

<sup>112</sup> See, e.g., *Fletcher v. Balt. & Potomac R.R. Co.*, 168 U.S. 135, 137 (1897).

<sup>113</sup> See, e.g., *Ludwig v. Astrue*, 681 F.3d 1047, 1049 (9th Cir. 2012); *Conley v. NLRB*, 520 F.3d 629, 635 (6th Cir. 2008); *United States v. Tobacco*, 428 F.3d 1148, 1151 (8th Cir. 2005); *Heib v. Arches Fin., Case No. CV-08-155-FVS*, 2008 U.S. Dist. LEXIS 81107, at \*8 (E.D. Wash. Oct. 14, 2008); *In re Sarmiento*, Bankruptcy Case No. 05-18653 EEB, Chapter 7, 2006 Bankr. LEXIS 4188 at \*2, 6 (Bankr. D. Colo. Sept. 29, 2006).

<sup>114</sup> See, e.g., *United States v. Brown*, CIVIL ACTION NO. 1:07CV79, 2007 U.S. Dist. LEXIS 88651, at \*1 (N.D. W.Va. Nov. 21, 2007); *McWilliams v. Courtney*, 945 So. 2d 242 (La. Ct. App. 2006); *People v. Dinome*, 873 N.Y.S.2d 513 (Dist. Ct., 1st Dist., Nassau Cty. 2008).

<sup>115</sup> See, e.g., *Camargo v. Trammell Crow Interest Co.*, 318 F. Supp. 2d 443 (E.D. Tex. 2004); *Travis v. Bohannon*, 115 P.3d 342, 344 (Wash. Ct. App. 2005).

<sup>116</sup> See, e.g., *Brown v. George*, Civil Action No. 02-1686-KAJ, 2005 U.S. Dist. LEXIS 20375, at \*3-4 (D. Del. Sept. 19, 2005), *dismissed sub nom.*, *Brown v. Kid*,

contributing to family unhappiness and discord).<sup>117</sup> The advent of the pellet stove, however, which efficiently produces heat from fuel pellets made from compressed sawdust, wood waste and other biomass,<sup>118</sup> obviates much of consumers' labor and handling that is inherent in traditional firewood energy technologies.<sup>119</sup>

g. Steam

There are residences, typically, but not necessarily, in apartment buildings that are supplied with steam for heating.<sup>120</sup> A clergyperson living in such an abode would obviously be able to treat the cost of such steam service as a utility.

h. Ice

Ice was once commonly delivered to households for the purpose of cooling food in receptacles known as "ice boxes."<sup>121</sup> The term "ice box" was used in everyday parlance to refer to the refrigerator appliances that replaced iceboxes, but has since

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Civil Action No. 02-1686-KAJ, 2005 U.S. Dist. LEXIS 38909 (D. Del. Oct. 17, 2005).

<sup>117</sup> See, e.g., *id.*

<sup>118</sup> In connection with residential home heating, the term "biomass fuel" is defined as "any plant-derived fuel available on a renewable or recurring basis, including agricultural crops and trees, wood and wood waste and residues (including wood pellets), plants (including aquatic plants), grasses, residues, and fibers." I.R.C. § 25C(d)(6) (2015).

The residential energy credit for computing income tax, and whether the clergyperson who uses biomass fuel for household heating may qualify for it, lies beyond the ambit of this Article. See I.R.C. § 25C.

<sup>119</sup> See, e.g., MASS. DIV. OF ENERGY RES., WOOD PELLET HEATING 1 (2007); JAMES E. HOUCK & PAUL E. TIEGS, EPA, RESIDENTIAL WOOD COMBUSTION TECHNOLOGY REVIEW (EPA 1998); see also *Narragansett Pellet Corp. v. City of East Providence*, C.A. No. 06-464 ML, 2007 U.S. Dist. LEXIS 71884, at \*4 (D.R.I. 2007); but see *Webb v. Astrue*, Civil Action No. 2:11-CV-00103, 2012 U.S. Dist. LEXIS 104072, at \*22 (N.D. W.Va., 2012) (noting unsuccessful disability claimant's implicit allegation of difficulty and exertion in carrying 40-pound bag of pellets for stove).

<sup>120</sup> See, e.g., *La Salle Townhouses Coop. Ass'n. v. Detroit Edison Co.*, 244 N.W.2d 343 (Mich. Ct. App. 1976); see also Lynette Holloway, *Steam Pipe on West Side Spews Asbestos Into Sky*, N.Y. TIMES, July 30, 1994, at p. 23; Tessa Melvin, *Small Private Utility Faces Uncertain Future*, N.Y. TIMES, Mar. 16, 1986, at 1.

The steam utility can be geothermal in origin. See *Mann v. United States*, 86 Fed. Cl. 649, 657 (2009), *appeal dismissed*, 356 Fed. App'x 387 (Fed. Cir. 2009).

<sup>121</sup> See, e.g., *Hoffman & Crowell, Inc. v. Harrison*, 156 S.E. 685 (Ga. 1930); *Standard Accident Ins. Co. v. Cherry*, 40 S.W.2d 873 (Tex. Civ. App. 1932), *aff'd*, 48 S.W.2d 755 (Tex. Civ. App. 1932).

become obsolete and archaic.<sup>122</sup> The technological transition from iceboxes to refrigerators, in addition to impacting the language usage in society, posed challenges to some entrepreneurs and landlords.<sup>123</sup>

The ice industry's customer base today is now primarily commercial and industrial, few, if any, households still use ice boxes;<sup>124</sup> but if, perchance, a clergyperson's household were in fact to regularly use ice to chill food (or even to chill the ambient air in the residence), then the ice would qualify as a utility for the purposes of I.R.C. § 107.

## 2. Water

Unlike fish and other aquatic creatures that are constantly surrounded by the water their bodies need to exist, humans and other terrestrials must affirmatively act to obtain their biological water needs, to the point where personal hydration has become an innate, second nature behavior for most individuals.

Water stands in contradistinction to energy utilities such as gas, wood, coal or heating oil in that while such utility substances are only burned for their energy, water is used without the need for such chemical reduction. While the energy utilities can appear in many manifestations, there is only one form of water as a utility in its own right.<sup>125</sup>

By the first century of the common-era, delivery of water via indoor plumbing was a common attribute of many Roman homes.<sup>126</sup> Some households during America's formative era were supplied by water delivered through primitive aqueducts consisting of hollowed out logs.<sup>127</sup> By the beginning of the twentieth-century, many Americans had in-home water service<sup>128</sup>

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<sup>122</sup> See, e.g., Neil Steinberg, *Democrats for Senate: Dull and Duller*, CHICAGO SUN-TIMES, Jan. 11, 2010, at 18 ("'Negro' fell out as a term of art in the 1960s, replaced by 'black,' a word thought to reflect greater pride. I didn't use 'Negro,' not because I was sensitive, God knows, but because I was young, the same way I wouldn't call a refrigerator an 'icebox' or a radio a 'wireless.'").

<sup>123</sup> See, e.g., *Sardone v. Joseph Diamond Holding Co.*, 279 N.Y.S. 659 (N.Y. App. Div. 1935), *appeal dismissed*, 268 N.Y. 631 (1935).

<sup>124</sup> See, e.g., *The Coolest Job in Town*, GRAND RAPID PRESS, July 13, 2003, at E1.

<sup>125</sup> *But see supra* notes 120–23 and accompanying text for discussion of water, in the form of ice or steam, as an energy utility.

<sup>126</sup> See, e.g. WILL DURANT, *THE STORY OF CIVILIZATION, CAESAR AND CHRIST* 433 (Simon & Schuster, 1944).

<sup>127</sup> See, e.g., *Arbuckle v. Ward*, 29 Vt. 43 (Vt. 1856).

<sup>128</sup> Though there did remain, for some dwellings, the need to carry in water via bucket or other portable receptacle. See, e.g., *Biker v. Indus. Comm'n*, 160 N.E. 180, 182 (Ill. 1928); *Tex. & La. Lumber Co. v. Brown*, 109 S.W. 950 (Tex. App. 1908).

and, indeed, much effort in the way of legislation and infrastructure had been accomplished to bring water to America's cities, and much more would follow.<sup>129</sup>

Today, almost every home in America has an indoor water supply, whether from a shared system or a private well.<sup>130</sup> Functional indoor plumbing is expected as the norm in America,<sup>131</sup> even in residences of the lowest socioeconomic classes.<sup>132</sup> It accordingly is beyond cavil that water is a utility whose cost is excludible under I.R.C. § 107. Moreover, the IRS would be hard pressed to deny that filters, water softeners and similar mineral content adjustment devices are necessary components of the water utility, at least in areas where the prevalent water supply contains undesirable minerals, chemicals, particulates or pollutants.<sup>133</sup>

And although water is now typically delivered via a pipe and water main infrastructure,<sup>134</sup> there are situations where the infrastructure's water supply is unfit for household purposes and bottled water must be used.<sup>135</sup>

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<sup>129</sup> See, e.g., GERARD T. KOEPEL, *WATER FOR GOTHAM: A HISTORY* (2000); NELSON MANFRED BLAKE, *WATER FOR THE CITIES: A HISTORY OF THE URBAN WATER SUPPLY PROBLEM IN THE UNITED STATES* (1956).

<sup>130</sup> See John H. Pomeroy and Elmer Jones, *Well Water Supplies: Getting the Best from Your Own System*, in U.S. DEPT. OF AGRIC., *HANDBOOK FOR THE HOME*, 1973 YEARBOOK OF AGRIC., H.R. DOC. NO. 93-29, at 146 (1973).

<sup>131</sup> Many hospitals and other health care facilities have what amounts to utility service to similarly provide oxygen and/or nitrous oxide for patient care. Confusion between the two substances can prove deadly. See *Dubin v. Suburban Gen. Hosp.*, 12 Pa. D. & C.3d 685 (Pa. Ct. Com. Pl., Montgomery Cty. 1979); *Am. Medicorp, Inc. v. Lord*, 578 S.W.2d 837 (Tex. Civ. App. 1979). One need not possess an imagination in the league of a Jules Verne to comprehend, in the event of future human colonization of the moon, the provision of oxygen utilities in the lunar homestead dwellings.

<sup>132</sup> The minimum standard enunciated in the Bureau of Indian Affairs Housing Improvement Program includes, *inter alia*, that a dwelling's plumbing system "include[s] a properly installed system of piping and fixtures." 25 C.F.R. § 256.2 (2015) (Definition: Standard Housing (1)(iv)).

<sup>133</sup> See N.C. ex. rel. *McDevitt v. Acme Petroleum and Fuel Co.*, 30 Fed. App'x 287 (4th Cir. 2002); Pomeroy & Jones, *supra* note 130, at 149; see also Joseph Berger, *The Water's Fine, but Is It Kosher?: Crustaceans From Faucet Ruffle Orthodox Jews*, N.Y. TIMES, Nov. 7, 2004, at N44. (reporting the prevalence of dead microscopic copepod crustaceans in New York City tap water).

An argument might be made that the House of Representatives' adoption of the Department of Agriculture's Handbook in which the *Pomeroy* article appeared as an official document of its own constitutes congressional imprimatur of its advice to install a water softener where the water supply contains an abundance of hardening minerals. See *Cook v. Principi*, 318 F.3d 1334, 1345 (Fed. Cir. 2002), *reh'g denied*, 56 Fed. App'x 496 (Fed. Cir. 2003), *cert. denied*, 539 U.S. 926 (2003)

<sup>134</sup> See *supra* notes 129–32 and accompanying text.

<sup>135</sup> See, e.g., *Rowe v. E.I. Dupont De Nemours & Co.*, Civil No. 06-1810 (RMB); Civil No. 06-3080 (RMB), 2009 U.S. Dist. LEXIS 94604, at \*26–27 (D.N.J. Oct. 9, 2009); *McDevitt*, 30 Fed. App'x at 290; see also *Conn. v. Mass.*, 282 U.S.

### 3. Removal of Wastes

All households produce waste materials, which must be removed. Indeed, the use of some utilities might yield household waste materials whose removal is necessitated, including the familiar tap water to waste water, or ash from the use of coal.<sup>136</sup> The removal of such wastes is frequently treated as a utility.<sup>137</sup>

Trash, garbage<sup>138</sup> and other solid wastes are typically removed by the familiar compactor truck vehicles. This service is typically provided either by the local municipality or contracted for with a private carter.<sup>139</sup>

Waste water and other liquid wastes are typically removed from the home through one or more drainpipes, which can lead to a cesspool or septic tank for drainage and decomposition on or near the premises, or else to a sewer system for treatment at a sewage treatment facility.

Mindful, no doubt, of the health principles that dictate a need to keep potable water sources separated from household liquid wastes,<sup>140</sup> public policy encourages or mandates the use of a

660, 668 (1931) ("Lawrence is the only city in Massachusetts using Merrimack water for drinking. It consumes an extraordinary amount of bottled water the cost of which in 1916 was about 55 per cent of the amount paid for public water for all purposes.").

<sup>136</sup> See, e.g., *Bowen v. Morgillo*, 23 A.2d 719, 720 (Conn. 1941).

<sup>137</sup> Some homes require a system to remove radon gas that is formed from the decay of the radioactive elements in the soil. See, e.g., *Snyder v. Roach Bros. Realtors*, 17 Pa. D. & C.4th 60 (Pa. Ct. Com. Pl., Chester Cty. 1992); Karen Hoyden Curtin, *Indoor Radon: Regulating a Blameless Cause*, 3 BUFF. ENVTL. L.J. 181 (1995). The radon mitigation system is typically operated with electric power; thus, the utility expense would be mostly in the costs attributable to the electricity utility. *Id.* at 196–200.

<sup>138</sup> Though the terms "garbage" and "trash" are often used interchangeably, some municipalities differentiate between the two in definition and/or in provided collection services. See, e.g., *City of New Smyrna Beach v. Fish*, 384 So. 2d 1272, 1273 (Fla. 1980); see also 65 ILL. COMP. STAT. 5/11-19-2 (1961) (defining "garbage," "refuse" and "ashes").

<sup>139</sup> See, e.g., *Ramsgate Court Townhome Ass'n v. West Chester Borough*, 313 F.3d 157 (3d Cir. 2002); *Cnty. Hous. Mgmt. Corp. v. City of New Rochelle*, 381 F. Supp. 2d 313 (S.D.N.Y. 2005); see also *Wyomissing Borough Annexation*, 74 Pa. D. & C. 49, 64–65 (Pa. Ct. Com. Pl., Berks Cty. 1950) ("The persons who testified in favor of annexation, for the most part, stated they desired more adequate police protection, garbage and ash removal, sewers, and other services now being rendered by the borough to its residents."). Separation of various types of wastes for recycling purposes is often required, see, e.g., *Recycling of department-managed solid waste*, N.Y. COMP. CODES R. & REGS. tit. 16, §305 (2015).

Provision of waste collection has been called a "quasi-utility function" of a municipality. *Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985).

<sup>140</sup> Cf. RUDYARD KIPLING, *Natural Theology*, in RUDYARD KIPLING COMPLETE VERSE 342, 343 (Definitive ed., Anchor Press: Doubleday 1989) (1895).

sewer instead of a cesspool or septic tank, when practicable,<sup>141</sup> as households become physically more proximate to one another.<sup>142</sup> Inasmuch as cesspools and septic tanks require periodic cleaning lest they overflow,<sup>143</sup> conversion from a septic tank or cesspool to sewer, where the maintenance, if any, is usually not directly the homeowner's responsibility, is often desirable,<sup>144</sup> though occasionally problematic.<sup>145</sup>

A sewer system infrastructure can be municipally owned and operated, or private.<sup>146</sup> The Cloaca Maxima, a sewer system built as a public works project in Rome, has remained in continuous use as a municipal utility for over two thousand years.<sup>147</sup>

#### 4. Information

Historically, information, commercial and otherwise, was gleaned and garnered in the marketplace or other public forum, much of it through town criers or, for the literate, newspapers.<sup>148</sup>

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My privy and well drain into each other.  
 After the custom of Christendie.  
 Fevers and fluxes are wasting my mother.  
 Why has the Lord afflicted me?  
 The Saints are helpless for all I offer—  
 So are the clergy I used to fee.  
 Henceforward I keep my cash in my coffer,  
 Because the Lord has afflicted me.

*Id.*

<sup>141</sup> Sometimes a sewer system is not physically proximate, or connection to it is impossible without encroaching upon an intervening property. *See, e.g.*, *Field-Escandon v. DeMann*, 251 Cal. Rptr. 49 (Cal. Ct. App. 1988).

<sup>142</sup> *See, e.g.*, Rhode Island Cesspool Act, of 2007, 23 R.I. GEN. LAWS § 23-19.15-12 (2016); *see also* *McCandless v. Campbell*, 20 Haw. 411 (Haw. 1911).

<sup>143</sup> *See, e.g.*, *Hopkins v. Euskolitz*, NO. CV91-0323399S, 1996 Conn. Super. LEXIS 1716 (Conn. Super. Ct. July 2, 1996); *Fidelity-Philadelphia Trust Co. v. Wengert*, 67 Pa. D. & C. 351, 358 (Pa. Ct. Com. Pl., Phila. Cty. 1948).

<sup>144</sup> *See, e.g.*, *Greenwood Addition Homeowners Ass'n v. City of San Marino*, 18 Cal. Rptr. 2d 350, 352 (Cal. Ct. App. 1993).

<sup>145</sup> *See, e.g.*, *Stanford v. City of Ontario*, 495 P.2d 425 (Cal. 1972).

<sup>146</sup> *See, e.g.*, *Gabriel v. Borough of Paramus*, 212 A.2d 550 (N.J. 1965).

<sup>147</sup> *See, e.g.*, Paul Bennett, *In Rome's Basement*, NAT'L GEOGRAPHIC, July 2006, at 88.

<sup>148</sup> *See, e.g.*, FRANK PRESBREY, *THE HISTORY AND DEVELOPMENT OF ADVERTISING* 3-4, 10-12 (1929); *Nantucket*, N.Y. TIMES, August 13, 1867; THOMAS HARRISON REID, *FORM AND FUNCTIONS OF AMERICAN GOVERNMENT* 205-06 (1921); J. THOMAS SCHARF & THOMPSON WESTCOTT, *HISTORY OF PHILADELPHIA 1609-1884* 857 (Philadelphia, L. H. Everts & Co. 1884); *see also* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996) ("Even in colonial days, the public relied on 'commercial speech' for vital information about the market. Early newspapers

In locales where modern technology has yet to take hold, signals from drums and horns continue to carry information from village to village even into the Twenty-First Century.<sup>149</sup> This information was communal in nature, delivered or transmitted to a station, not to a terminal in a private household.

As the technology of electrical impulse developed, however, they eventually developed the ability to install in individual households and, in many cases, became the norm. Information could be brought into an individual home through an infrastructure, just as water and energy could. Entrepreneurs could then organize entities to build and maintain such infrastructures and provide information utilities to the public.

Unlike many other types of utilities, information can both come into a household and emanate from the household. In the case of the telephone,<sup>150</sup> this attribute of information is so pervasive and familiar that it is well nigh beyond second nature. Moreover, two-way information transmission is no less a cause than a consequence of our modern standard of living; the establishment of communications among agrarian communities, and between agrarian communities and the urban and suburban areas, contributed to increased farm production in America.<sup>151</sup>

Some of these information utilities are presently discussed:

#### a. Telegraph

Following Samuel F. B. Morse's experiments during the 1830s, Congress appropriated \$30,000 for Professor Morse to construct an experimental telegraph line from Washington to Baltimore.<sup>152</sup> Once the telegraph technology was shown to be feasible and was further perfected, numerous telegraph service providers emerged throughout the United States and beyond, the industry grew, and, with numerous mergers, consolidations and

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displayed advertisements for goods and services on their front pages, and town criers called out prices in public squares.").

<sup>149</sup> See, e.g., Aaron Mushengyezi, *Rethinking Indigenous Media: Rituals, 'Talking' Drums and Orality as Forms of Public Communication In Uganda*, 16 J. AFRICAN CULTURAL STUD. 1, 107 (2003).

<sup>150</sup> See *infra* notes 166–78 and accompanying text.

<sup>151</sup> See, e.g., Carl Taylor, *The Rise of the Rural Problem*, 2 J. SOC. FORCES 1, 31–33 (1923).

<sup>152</sup> Act of March 3, 1843, ch. 84, 5 Stat. 618, 618–19. Exactly two years later, Congress made a supplementary appropriation of \$8,000, Act of March 3, 1845, ch. 71, 5 Stat. 752, 757.

asset purchases, the Western Union Telegraph Company emerged with the dominant monopoly in the telegraphy industry.<sup>153</sup>

The telegraph used Morse Code, an alphabetic system of short and long electrical impulses,<sup>154</sup> respectively called "dots" and "dashes," transmitted from one station to another by successive opening and closing of an electrical circuit by a telegraphic key or other device, and translated into English (or other language) by trained human operators.<sup>155</sup>

The state of the art advanced significantly in the succeeding years. This was evident at the 1876 United States Centennial Exhibition in Philadelphia, where many novel telegraphy innovations were placed on display (and indeed, the Exhibition itself not only was wired for the services of several telegraph companies, but also extensively used telegraphic communication for its own administrative purposes).<sup>156</sup> Among the innovations displayed at the Centennial Exhibition was a device that translated and printed out the Morse Code messages without the intervention of a human.<sup>157</sup>

Since the 1850's, the companies consolidated and merged. By the 1880s, the Western Union Telegraph Company dominated and created an industrial oligopoly.<sup>158</sup>

Western Union and other telegraph companies operated establishments in various locales, and provided the service of sending telegraphic messages from one locale to another, including, in localities where a full time office was not economically feasible, the agency of some local business establishments.<sup>159</sup> After the local Western Union office or agency

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<sup>153</sup> See generally ROBERT LUTHER THOMPSON, *WIRING A CONTINENT: THE HISTORY OF THE TELEGRAPH INDUSTRY IN THE UNITED STATES, 1832-1866* (1947); EDWIN GABLER, *THE AMERICAN TELEGRAPHER: A SOCIAL HISTORY, 1860-900* 37-56 (1988).

<sup>154</sup> In contexts other than telegraphy, the Morse Code impulses need not necessarily be electrical, but can take other forms, including flashing lights and/or audio sounds. See *Osburn v. Pilgrim*, 273 S.E.2d 118, 120 (Ga. 1980).

<sup>155</sup> See, e.g., *O'Reilly v. Morse*, 56 U.S. 62, 94 (1854); *W. Union Tel. Co. v. Foster*, 247 U.S. 105, 112 (1918); *Bellows v. United Elec. Mfg. Co.*, 160 F. 663, 663-64 (2d Cir. 1908); *Cleeton v. Hewlett-Packard Co.*, 343 F. Supp. 1215 (D. Md. 1972), *aff'd*, 475 F.2d 1399 (4th Cir. 1973); *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 219 F. Supp. 289, 295 (S.D.N.Y. 1963), *rev'd on other grounds*, 346 F.2d 532 (2d Cir. 1995).

<sup>156</sup> UNITED STATES CENTENNIAL COMMISSION. INTERNATIONAL EXHIBITION, 1876. REPORT OF THE DIRECTOR-GENERAL, INCLUDING THE REPORTS OF BUREAUS OF ADMINISTRATION. 721-39 (Philadelphia, J.P. Lippincott & Co., 1879).

<sup>157</sup> *Id.* at 724-25.

<sup>158</sup> See *supra* note 153.

<sup>159</sup> See, e.g., *State v. Austin*, 725 P.2d 252, 253 (N.M. Ct. App. 1985); *Western Union Says Walkout is Easing*, N.Y. TIMES, April 12, 1952, at 28 (referring to small town Western Union offices that were sideline businesses "operated by barbers, in funeral parlors, gas stations and drug stores").

received the telegraphic message, it would be printed out as a telegram and then delivered via messenger to its recipient.<sup>160</sup>

The telegraph would eventually become an instrument of communication in some private homes, including those of plutocratic industrialists<sup>161</sup> and even some middle class households.<sup>162</sup>

But a rival to the telegraph arose, namely, the telephone,<sup>163</sup> which was far more amenable to household use than the telegraph. The two modes of communication would, very early on, use the same wire infrastructures.<sup>164</sup> But the telephone, with all of its technological improvements, eventually made the telegraph obsolete and, on January 27, 2006, Western Union ended its long and honorable telegraphy service.<sup>165</sup>

#### b. Telephone

Telephone equipment was exhibited and demonstrated at the 1876 Centennial Exhibition in Philadelphia,<sup>166</sup> and commercial telephone service became available the next year.<sup>167</sup> Following some very contentious litigation, Alexander Graham Bell successfully asserted his patent rights in the telephone.<sup>168</sup> The local and regional telephone companies eventually merged and

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<sup>160</sup> See, e.g., *Trammell v. W. Union Tel., Co.*, 129 Cal. Rptr. 361, 364 (Cal. Ct. App. 1976); *Sweet v. W. Union Tel., Co.*, 102 N.W. 850 (Mich. 1905). The small town drug store where the author, as a high school student, was gainfully employed as a stock and delivery clerk was the local contract agency for Western Union. *Id.* The author thus had occasion deliver Western Union telegrams to their recipients. *Id.*

<sup>161</sup> See *Rockefeller Private Wire*, N.Y. TIMES, October 6, 1911, at 1 (reporting the connection of a private telegraph line to John D. Rockefeller's home in Pocantico Hills, NY).

<sup>162</sup> See *Tells He Killed Wife, Then Shoots Himself*, N.Y. TIMES, May 18, 1937, at 18 (reporting that perpetrator of murder-suicide disclosed his misdeeds "over a private telegraph line which he and several neighbors operated" in Stratford, Connecticut); *Girl Out of Cuban Jail*, N.Y. TIMES, July 19, 1906, at 4 (Reporting imprisonment of three Americans in Cuba by the American military authorities for erecting and maintaining private telegraph lines to their residences.).

<sup>163</sup> See, e.g., *United States v. W. Elec. Co.*, 531 F. Supp. 894, 912 (D.N.J. 1981).

<sup>164</sup> See, e.g., *A Rival to Western Union*, N.Y. TIMES, February 4, 1883, at 1.

<sup>165</sup> See, e.g., Bradley Keoun and Elizabeth Hester, *The End of the First Wired Age*, PHILA. INQUIRER, February 3, 2006, at A2; Shelly Freierman, *Western Union Sends its Last Telegram. Stop*, INT'L HERALD TRIB., February 7, 2006, at 16.

<sup>166</sup> See, e.g., UNITED STATES CENTENNIAL COMMISSION, INTERNATIONAL EXHIBITION 1876: REPORTS AND AWARDS, GROUP XXI 130–32 (Francis A. Walker, ed., Philadelphia, J.B. Lippincott & Co., 1877); see also *The Tel. Cases*, 126 U.S. 1, 322–24 (1888).

<sup>167</sup> See *Tel. Cases*, 126 U.S. at 572–73; JOHN BROOKS, TELEPHONE: THE FIRST HUNDRED YEARS 59 (1975).

<sup>168</sup> See, e.g., *Tel. Cases*, 126 U.S. at 564.

consolidated, with the American Telephone & Telegraph Company (AT&T) becoming not only America's ultra-dominant telephone service provider, but America's largest corporation.<sup>169</sup>

At first, private telephone service in the home was a luxury of the wealthy.<sup>170</sup> Telephone service for the masses was provided by businesses such as drugstores, which allowed the public to place calls on coin-operated pay phones,<sup>171</sup> and also took incoming calls.<sup>172</sup> But telephone service would expand to come within reach of virtually all of America, boosted, no doubt, by enunciated Congressional policy "to assure the availability of adequate telephone service to the widest practicable number of rural users"<sup>173</sup> and the accompanying statutory scheme to encourage the financing of such rural telephone services.<sup>174</sup>

The national infrastructure of wires and cables connected to each and every home is no longer an absolute requisite for telephone service, for the technological state of the art now supports connection via radio wave transmissions to cellular telephones ("cell phones").<sup>175</sup>

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<sup>169</sup> See generally BROOKS, *supra* note 167. So successful was AT&T that the government eventually found it to have too large a market share for healthy competition, and so, the Justice Department eventually forced its divestiture into regional holding companies. *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983). The breakup of AT&T would effect complications in many areas of American life, *see. See, e.g.*, Kenneth H. Ryesky, *Ma Bell's Legacy: Artifacts in Decedents' Estates from the Forced Divestiture of American Telephone and Telegraph*, 8 J. SUFFOLK ACAD. L. 1 (1992).

<sup>170</sup> *See, e.g.*, *A Fine Mansion Burned*, N.Y. TIMES, January 9, 1989, at 3 (reporting that fire at an opulent residence was reported over the residence's private telephone).

<sup>171</sup> *See, e.g.*, *Gray Tel. Pay Station Co. v. W. Elec. Co.*, 101 F.2d 853 (7th Cir. 1939); *S. Bell Tel. & Tel. Co. v. Parker*, 47 S.E. 194, 195 (Ga. 1904); *Dowling v. MacLean Drug Co.*, 248 Ill. App. 270 (Ill. App. Ct. 1928); *Druggists and Telephones*, N.Y. TIMES, November 28, 1898, at 10; *see also* *People ex rel. Shiels v. Greene*, 71 N.E. 777, 777 (N.Y. 1904) ("Q. When did you send the message? A. On July 20th at five-thirty p. m. Q. From where? A. The telephone station in the drug store at 34th street and 7th avenue, the northwest corner.").

<sup>172</sup> *See, e.g.*, *Druggists and Telephones*, *supra* note 171.

<sup>173</sup> 7 U.S.C. § 921 (1949).

<sup>174</sup> *Id.*

<sup>175</sup> *See In re Application for Pen Register*, 396 F. Supp. 2d 747, 750–51 (S.D. Tex. 2005). One implication of the fact that telephone service is no longer necessarily dependent upon physical connection to a fixed physical infrastructure is that telephone number area codes are no longer necessarily dispositive of the location of the caller or call recipient. *Compare State ex rel. Worley v. Wolke*, No. 78-503, 1979 Wisc. App. LEXIS 3232, at \*6 n.8 (Wis. Ct. App. April 18, 1979) (finding, *inter alia*, telephone call to 414 area code as basis for venue in Milwaukee), *with* *Wright v. City of Las Vegas*, 395 F. Supp. 2d 789, 803 n.11 (S.D. Iowa 2005) ("With the mobility of cellular phones, Chagra, equipped with a number brandishing a Georgia area code, could have called from virtually anywhere.").

Cell phones enable personal communication away from the home,<sup>176</sup> and have altered many common and usual behaviors in society, for good and bad.<sup>177</sup> An increasing number of individuals have found it cost-effective to use cell phones exclusively, entirely discontinuing the use of landline telephones and thus relieving households of the need for physical connection to the wire and cable infrastructures.<sup>178</sup>

### c. Audio and Video Programming

Guglielmo Marconi and others developed and perfected the transmission of radio waves, and brought the state of the radio wave broadcast from transmitting and receiving Morse Code to the transmission and reception of voice and other sounds.<sup>179</sup> Vladimir Zworykin advanced the technology to the point where video images could be transmitted over the airwaves.<sup>180</sup>

But geographical conditions cause broadcast signals to vary from one location to another, and sometimes the individual television (or radio) cannot receive an intelligible signal at a given location.<sup>181</sup> By 1923, the village of Dundee, Michigan, located in such a fringe reception area, had a municipal system to receive radio broadcast signals on a common antenna, and transmit the broadcasts into the homes of subscribers over an infrastructure of wiring strung for that purpose.<sup>182</sup> Using the same concept, several community antenna television (CATV) systems began to appear in the late 1940s in many cities, including Astoria, Oregon, Tuckerman, Arkansas, and Mahanoy City and Lansford, in Pennsylvania.<sup>183</sup>

<sup>176</sup> See, e.g., *Henry v. Med-Staff, Inc.*, No. SA CV 05-603 DOC (ANx), 2007 U.S. Dist. LEXIS 49853, at \*24–25 (C.D. Cal. July 5, 2007).

<sup>177</sup> See, e.g., *Abuelhawa v. United States*, 556 U.S. 816, 821–23 (2009) (observing that cell phone technology has made the use of a telephonic medium to purchase illegal drugs a more common practice, even where the illegal substances are for personal use).

<sup>178</sup> See, e.g., *The Disappearing Land Line*, ALB. TIMES UNION, April 20, 2009, at A1; Jason Kuiper, *Wireless Phones Move into the Lead in Nebraska*, OMAHA WORLD-HERALD, September 30, 2006, part 1A.

<sup>179</sup> See, e.g., *Marconi Wireless Tel. Co. v. United States*, 81 Ct. Cl. 671 (Ct. Cl. 1935), *aff'd in part, rev'd, and remanded*, 320 U.S. 1 (1943).

<sup>180</sup> See, e.g. *Westinghouse Elec. & Mfg. Co. v. Radio Corp. of America*, 24 F. Supp. 933 (D. Del. 1938).

<sup>181</sup> See, e.g., *Oak Indus., Inc. v. Zenith Elecs. Corp.*, 697 F. Supp. 988 (N.D. Ill. 1988).

<sup>182</sup> Grayson L. Kirk, *Supplying Broadcasts Like Gas or Electricity*, RADIO BROADCAST, May 1923, at 35–37.

<sup>183</sup> See MEGAN MULLEN, TELEVISION IN THE MULTICHANNEL AGE 33–41(2008). The early CATV systems seem to have been facilitated, if not driven, by appliance merchants who saw the obvious potential for sales of television sets if better reception could be brought to their communities. *Id.*

By 1952, there were seventy CATV systems with 14,000 total subscribers in the United States, and by 1960 there were 640 CATV systems serving 650,000 subscribers.<sup>184</sup> In enacting the Cable Television Consumer Protection and Competition Act of 1992, Congress found that "[n]early 56,000,000 households, over 60 percent of the households with televisions, subscribe[d] to cable television."<sup>185</sup>

The problems of fringe reception areas were resolved by the technologies of electronic transponders on satellites encircling the earth,<sup>186</sup> facilitating the emergence of the direct broadcast satellite (DBS) systems as a technological alternative to delivery of video (and audio) programming via cable infrastructures.<sup>187</sup> "Multichannel video programming" is now used as an inclusive term to describe the service to the consumer, accounting for the diverse and developing technologies and delivery modes involved.<sup>188</sup> By 2011, over 114 million American households subscribed to a multichannel video-programming distributor.<sup>189</sup>

#### d. Internet

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<sup>184</sup> *Id.* at 41.

<sup>185</sup> Cable Television Consumer Protection and Competition Act of 1992, 106 Stat. 460, § 2(a)(3) (1992). This article will defer to the scholarship of others in discussing Congress' varying policies of regulation, deregulation and reregulation of the cable television industry. *See, e.g.*, In-Sung Yoo, Comment, *The Regulatory Classification of Internet Protocol Television: How the Federal Communications Commission Should Abstain from Cable Service Regulation and Promote Broadband Deployment*, 18 *COMMLAW CONSPECTUS* 199 (2009); Thomas Hildebrandt, *Unplugging the Cable Franchise: A Regulatory Framework to Promote the IPTV Cable Alternative*, 42 *GA. L. REV.* 227 (2007); Shyamkrishna Balganes, *The Social Costs of Property Rights in Broadcast (and Cable) Signals*, 22 *BERKELEY TECH. L.J.* 1303, 1345–47 (2007).

<sup>186</sup> *See, e.g.*, *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256 (10th Cir. 2004).

<sup>187</sup> *See, e.g.*, *DIRECTV, Inc. v. Tolson*, 513 F.3d 119, 120–21 (4th Cir. 2008); *Direct Broadcast Satellite Service and Competition in the Multichannel Video Distribution Market: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. 1–78 (2001); KIRAN DUWADI & ANDREW STEWART WISE, *FED. TRADE COMM'N, RESEARCH ON THE UNITED STATES MULTICHANNEL VIDEO INDUSTRY AT THE FEDERAL COMMUNICATIONS COMMISSION*, <http://www.fcc.gov/ownership/materials/newly-released/research.pdf> (accessed December 20, 2015).

<sup>188</sup> 47 U.S.C. § 522(13) (1996) ("[T]he term 'multichannel video programming distributor' means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.")

<sup>189</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC Rcd. 12-81 (July 20, 2012).

It is beyond the scope of this article to relate anything resembling an authoritative history of the Internet. Nevertheless, the Internet's effective status as a household utility warrants some brief mention of its evolution.

In 1967, the Advanced Research Projects Agency (ARPA) of the United States Department of Defense funded a preliminary study for the design of a computer communications network.<sup>190</sup> Based upon this study, ARPA funded a project to connect computers at Stanford Research Institute, UCLA, UC-Santa Barbara, and the University of Utah, thus beginning the ARPANet communications system.<sup>191</sup> The academic/military ARPANet eventually evolved into the Internet and was used commercially.<sup>192</sup>

Like the telegraph,<sup>193</sup> the Internet began as a government-funded, academic applied research project for military applications, and, following development, was then put into commercial use, where it was subsequently improved upon by private sector inventors and entrepreneurs, to the enhancement and stimulation of commerce and trade, and to the general public benefit.

Internet service is now recognized as a utility, and, as such, is a deductible business expense when properly substantiated.<sup>194</sup> Even in the context of a bankruptcy debtor, who is expected to forgo many standard amenities,<sup>195</sup> the Internet has been found to be a reasonable living expense.<sup>196</sup>

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<sup>190</sup> See *Something to Share*, FED. COMM. COMM'N, <http://transition.fcc.gov/omd/history/internet/something2share.html> (last updated Nov. 21, 2005); *Internet History from ARPANET to Broadband*, CONG. DIG., February 2007, at 35; see also *Shea ex rel. Am. Reporter v. Reno*, 930 F. Supp. 916, 925–26 (S.D.N.Y. 1996), *aff'd sub nom. Reno v. Shea*, 521 U.S. 1113 (1997).

<sup>191</sup> *Id. Something to Share*, *supra* note 190

<sup>192</sup> See *Making the Connections*, FED. COMM. COMM'N, <http://transition.fcc.gov/omd/history/internet/making-connections.html> (last updated Nov. 21, 2005); *Internet History from ARPANET to Broadband*, CONG. DIG., *supra* note 190, at 35.

<sup>193</sup> See *supra* notes 152–65 and accompanying text.

<sup>194</sup> See, e.g., *Koepke v. Comm'r*, T.C. Summary Opinion 2008-151 (2008); *Soholt v. Comm'r*, T.C. Summary Opinion 2007-49 (2007); *Hansen v. Dep't of Revenue*, TC-MD 081122D, 2009 Or. Tax LEXIS 216, at \*37–38 (Or. T.C. 2009).

Business expenses for internet service will, of course, be disallowed if not properly substantiated by the taxpayer, e.g., *Houston v. Comm'r*, 98 T.C.M. (CCH) 569 (2009); *Bogue v. Comm'r*, 93 T.C.M. (CCH) 1351 (2007); *Stockwell v. Comm'r*, 93 T.C.M. (CCH) 1347 (2007); *Davis v. Comm'r*, 92 T.C.M. (CCH) 514 (2006); *Verma v. Comm'r*, 81 T.C.M. (CCH) 1720 (2001).

<sup>195</sup> See *infra* notes 255–62 and accompanying text.

<sup>196</sup> *In re Truss*, 404 B.R. 329, 334 (Bankr. E.D. Pa. 2009). The *Truss* decision strongly indicated that while telephone service was necessary for the debtor couple, the expenses of two cell phones and a land line should be pared back, as should what obviously was a premium grade of cable television service. *Id.* Indeed, another Bankruptcy judge noted that both a cell phone and a land line "may be convenient, but they are not necessary." *In re Smith*, No. 15-10762, 2015 Bankr. LEXIS 2683 (Bankr. N.D. Ind. May 11, 2015).

## e. The Converging Technologies

The transitional decades from the Twentieth Century to the Twenty-First Century have witnessed the convergence of information technologies, nanotechnologies, cognitive technologies and biotechnologies.<sup>197</sup> This convergence has impacted, and will continue to impact, telecommunications in general, and the delivery of information in particular. Not the least of this impact will be the modes of information delivery, and the legal challenges of regulating the services provided to the public.<sup>198</sup> One example of this is Voice over Internet Protocol (VoIP), a technology that delivers telephone service over an Internet connection.<sup>199</sup> Another example is the portable electronic device, which, unlike the mono-functional radio, cell phone, or beeper, is a hand-held multifunctional system that has "become an electronic Swiss Army knife capable of exploiting [information, communications, and entertainment services] convergence and easily toggling between first, second, and third generation wireless functions."<sup>200</sup>

Another developing technology is "cloud computing," which entails computing functions being performed, on demand, at some remote site whose services are shared by multiple users. As the typical household's computing needs become increasingly

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<sup>197</sup> See, e.g., David Castle, *Genomic Nutritional Profiling: Innovation and Regulation in Nutrigenomics*, 9 MINN. J.L. SCI. & TECH. 37, 51–54 (2008); William Sims Bainbridge, *Converging Technologies and Human Destiny*, 32 J. MED. & PHIL. 197 (2007).

<sup>198</sup> See, e.g., *Competition and Convergence: Hearing Before the S. Comm. on Commerce, Sci., and Transp., U. S. Senate*, 109th Cong. (2006); Robert M. Frieden, *Universal Service: When Technologies Converge and Regulatory Models Diverge*, 13 HARV. J. L. & TECH. 395 (2000); Frank P. Darr, *Converging Media Technologies and Standing at the Federal Communications Commission*, 7 HARV. J. L. & TECH. 1 (1993); Alamdar S. Hamdani, *Technological Convergence—"A Multiplicity of Sources,"* 36 HOUS. L. REV. 321 (1999); Victoria A. Ramundo, *The Convergence of Telecommunications Technology and Providers: The Evolving State Role in Telecommunications Regulation*, 6 ALB. L.J. SCI. & TECH. 35 (1996); Joseph A. Pantoja, *Desirable Economic Cooperation among High-Technology Industries: A Look at Telephone and Cable*, 1994 COLUM. BUS. L. REV. 617 (1994).

<sup>199</sup> See, e.g., Marc Elzweig, Comment, *D, None of the Above: On the FCC Approach to VoIP Regulation*, 2008 U. CHI. LEGAL F. 489 (2008); Linda A. Rushnak, Comment, *Is Voice Over Internet Protocol (VoIP) Subject to Regulation under the Telecommunications Act of 1996?*, 17 ALB. L.J. SCI. & TECH. 213 (2007); Mark C. Del Bianco, *Voices Past: The Present and Future of VoIP Regulation*, 14 COMM'LAW CONSPECTUS 365 (2006).

<sup>200</sup> Rob Frieden, *Lock Down on the Third Screen: How Wireless Carriers Evade Regulation of Their Video Services*, 24 BERKELEY TECH. L.J. 819, 823 (2009); see also *Anderson v. Comm'r*, 97 T.C.M. (CCH) 1179 (2009) (reciting that contraband intended for taxpayer, while the taxpayer was incarcerated, "included a cell phone that had Internet service, long distance, overseas capacity.").

sophisticated, it is not difficult to imagine a future scenario for the everyday provision and usage of cloud computing as a residential information utility.<sup>201</sup>

The term "utilities," entails a diverse selection of goods and services used by the household. Future technological changes can be expected to alter the way such utilities are delivered, utilized and/or regulated, and indeed, can be expected to create new types of utilities.

### B. *The North Star Alaska Case*

Though having no issues anent to the I.R.C. § 107 parsonage exemption (nor any other provision of the Internal Revenue Code), the case of *North Star Alaska Housing Corp. v. United States*<sup>202</sup> sheds light on the difficulties of defining a "utility," whether for tax purposes or otherwise.

The North Star Alaska case involved a dispute as to whether refuse collection constituted a "utility" within the meaning of the contract between North Star Alaska Housing Corp. and the Army Corps of Engineers (and thus the responsibility of the Corps).<sup>203</sup> On the issue, the Court of Federal Claims noted:

Essentially, plaintiff argues that Alaska's definition of refuse collection as an utility should apply to this contract because defendant did not draft an all inclusive list of utilities. An item, however, included on a list will be qualified and limited to the words which it is associated. 'words, like men, are known by the company that they keep.' Webster's Dictionary (2nd ed.), defines 'Utility' as a service that is provided to the public, such as electricity or water. The enumerated utilities under the contract are 'water, sewer, gas, electric current, oil, or other

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<sup>201</sup> See, e.g., Paul Lanois, *Caught in the Clouds: The Web 2.0, Cloud Computing, and Privacy?*, 9 NW. J. TECH. & INTELL. PROP. 29 (2010); PETER MELL & TIM GRANCE, NAT'L INST. OF STANDARDS AND TECH., THE NIST DEFINITION OF CLOUD COMPUTING (Sept. 2011), <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf> (accessed December 20, 2015); GOVERNMENT ACCOUNTABILITY OFFICE, INFORMATION SECURITY: ADDITIONAL GUIDANCE NEEDED TO ADDRESS CLOUD COMPUTING CONCERNS, (Oct. 6, 2011); see also *In re Cunnius*, 770 F. Supp. 2d 1138, 1144–45 (W.D. Wash. 2011).

<sup>202</sup> *N. Star Alaska Hous. Corp. v. United States*, 30 Fed. Cl. 259 (Fed. Cl. 1993).

<sup>203</sup> *Id.* The contract would spawn other contentious issues for litigation. See *N. Star Alaska Hous. Corp. v. United States*, 85 Fed. Cl. 241, *aff'd* 356 Fed. App'x 415 (Fed. Cl. 2009).

forms of power or fuel.' In general, these utilities are chemical or physical 'elements.' They are products that are essential to a home which provide necessities such as heat and electricity. Refuse collection, although essential, does not logically flow from a list delineating gas, oil and water. It is not a traditional form of utility.<sup>204</sup>

The Court did not construe "utilities" to include garbage collection because it was defined elsewhere in the contract as an "operational service," which the contract explicitly provided was the responsibility of the plaintiff North Star Alaska Housing Corp.<sup>205</sup> Nevertheless, the Court's dictum insinuates two potentially troublesome concepts in defining a utility; firstly, the concept that a utility need be a "chemical or physical 'element'," and secondly, the concept of a "traditional" form of utility.<sup>206</sup>

#### 1. The Utility as a "Chemical or Physical 'element'"

That a utility need be a "chemical or physical 'element'" and not a service is an absurd concept for the Court to advance. This is because the Court counts electricity, which is not a chemical or physical "element," as a utility. "Electric power, in fact, is understood as a combination of current, which is the moving electrical charge itself, and voltage, which is the difference in electrical potential between two points on a circuit."<sup>207</sup> The electric utilities then provide a ready electrical potential, which is put to work (and charged to the customer) upon completion of an electrical circuit.<sup>208</sup>

And neither do the information utilities discussed above constitute "chemical or physical 'elements.'"<sup>209</sup>

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<sup>204</sup> *N. Star Alaska Hous.Housing Corp.*, 30 Fed. Cl. at 267 (citations omitted). The Court immediately thereafter noted: "As a matter of fact, neither party could cite to another state which defines refuse collection as an utility. Other than Alaska's statute, plaintiff advances no reasonable explanation of why the list should be expanded to include refuse collection." Perhaps the respective counsels for the parties overlooked Nev. Rev. Stat. Ann. § 118B.0195(1)(e), which, even at the time of the trial, defined "garbage collection" as a utility.

Ironically, garbage and refuse collection services are referred to as "traditional utility services" by the Florida Supreme Court in *Pinellas County v. State*, 776 So. 2d 262, 268–69 (Fla. 2001).

<sup>205</sup> *N. Star Alaska Hous. Corp.*, 30 Fed. Cl at 267–68.

<sup>206</sup> *Id.* at 267.

<sup>207</sup> *Mediacom Corp. v. Rates Tech., Inc.*, 34 F. Supp. 2d 76, 82 (D. Mass. 1998).

<sup>208</sup> *Id.*; see also *Scott Paper Co. v. Comm'r*, 74 T.C. 137, 147–49 (1980).

<sup>209</sup> See *supra* notes 148–96 and accompanying text.

## 2. The "Traditional" Form of a Utility

The concept of a "traditional" utility is susceptible to many understandings. One type of utility traditionalism involves the structure and practices of the industry, such as the existence or nonexistence of a monopoly,<sup>210</sup> or the use of one industry participant's infrastructure to carry the goods/services of a competitor.<sup>211</sup>

Another type of utility traditionalism is based upon the particular good/service availed to the consumer. As one regulatory agency finding explained:

The obvious distinction between Radio Common Carrier service and more traditional utility service is that in the latter the subscriber is aware of his need without being told. Radio Common Carrier service, on the other hand, remains to a great extent a service to be promoted and sold—the potential subscriber has still to be convinced of his need. Thus, a survey showing the number of people in an area without gas, or electric or telephone utility service, indicates some necessity by mere absence of available service. The same cannot be said of Radio Common Carrier service. It is of nebulous necessity, and we reach the hazardous conclusion that the necessity at the present stage of development is not really clear until it is developed and promoted.<sup>212</sup>

The American law is built upon precedent and tradition. Nevertheless, whether a given goods/services combination constitutes a "traditional" utility is not always an appropriate litmus test. As mentioned previously, many goods/services combinations are based upon technologies that were unknown and unimaginable during the development of the "tradition."<sup>213</sup> Moreover, carrying the argument of "tradition" ad extremum, one

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<sup>210</sup> See, e.g., *Maryland People's Counsel v. Heintz*, 516 A.2d 599 (Md. App. 1986). *Heintz* implicitly recognized that monopoly and competition are apparently a continuum and not mutually exclusive alternatives, inasmuch as it makes mention of a "quasi-traditional utility." *Id.* at 602 n.8.

<sup>211</sup> See, e.g., *Midland Cogeneration Venture L.P. v. Pub. Serv. Comm'n*, 501 N.W.2d 573, 584 (Mich. Ct. App. 1993) (discussing the "initial evolutionary period" of gas pipeline operators providing transportation services to competitors).

<sup>212</sup> *Gen. Commc'n Sys., Inc. v. State Corp. Comm.*, 532 P.2d 1341, 1347 (Kan. 1975) (quoting a Commission finding).

<sup>213</sup> See *supra* notes 197–201 and accompanying text.

might argue that firewood is the only energy utility that meets the test of tradition.<sup>214</sup>

Utilities do develop and improve along with the technological state of the art.<sup>215</sup> Accompanying the technological developments has been a greater emphasis on, and need for, information in society at large, and in the functioning of the household specifically. The predictions from 1973 and before that information would play an increasingly vital role in the household<sup>216</sup> have come true many times over. Information utilities as known to society in the early twenty-first century have no long-reaching history the way more "traditional" utilities such as water<sup>217</sup> or gas.<sup>218</sup>

Accordingly, whether and to what extent a utility may or may not be "traditional" should not necessarily make or break the excludability of its cost under I.R.C. § 107.<sup>219</sup>

### C. *The Elusive Definition of "Utility"*

There are various impediments to clearly defining "utility," whether for the purposes of I.R.C. § 107 or otherwise.

The continuous changes in the technologies have all but ensured that any exclusive statutory or regulatory roster will likely become obsolete. Accordingly, while a listing of examples of utilities can be quite helpful, inclusion of a given goods/services combination in such a listing would not be appropriate as a definitive litmus test for qualification as a utility. Indeed, the Internal Revenue Service has provided a roster of utilities in its own Manual, albeit not specifically for the purposes of Section 107, as guidance for its own agents,<sup>220</sup> but the context of that roster is couched in terms of

<sup>214</sup> See *supra* notes 107–19 and accompanying text.

<sup>215</sup> See *Midland Cogeneration Venture*, 501 N.W.2d at 584; *In re Hackensack Meadowlands Dev. Comm'n*, 558 A.2d 1344, 1350 n.4 (N.J. Super. Ct. 1989) (discussing "a newly-defined public utility.").

<sup>216</sup> See, e.g., Beatrice Paolucci, *Computerized Families are on the Horizon, but You and I will Still Call the Shots*, in U.S. DEPT. OF AGRICULTURE, HANDBOOK FOR THE HOME 5 ("With the increasing amounts of information a family is required to process, the home computer outlet will become a necessity for both decision making and family record storage and retrieval.").

<sup>217</sup> See, e.g. *Comm'rs of Spring Garden v. Smith*, 15 Serg. & Rawle 160 (Pa. 1827); *Millaudon v. New-Orleans Water Co.*, 11 Mart.(o.s.) 278 (La. 1822).

<sup>218</sup> See, e.g. *Comm'rs v. N. Liberties Gas Co.*, 12 Pa. 318 (Pa. 1849); *Smith v. Dreer*, 3 Whart. 154 (Pa. 1838).

<sup>219</sup> *But cf.* *City of Gainesville v. State*, 863 So. 2d 138, 145 (Fla. 2003) (enumerating, as a factor in determining whether a utility's charge constitutes a user fee or a special assessment, "whether the fee is for a traditional utility service . . .").

<sup>220</sup> I.R.M. § 5.15.1.9(1)(A) (10-02-2009).

The Internal Revenue Manual is for the benefit of IRS personnel only and confers no rights upon the taxpayer, *i.e.*, it has no force of law. See, e.g. *United*

tailoring its application to the particular taxpayer and situation<sup>221</sup> and obviously leaves room for additional utilities not specified in its enumeration.

It has been shown that utilities cannot be defined in terms of whether or not the goods/services are delivered via an infrastructure of wires or pipes or other conduits physically connected to the home. Modern technologies now facilitate the delivery of information via electromagnetic signals received at home satellite dishes as an alternative to the cable system hook-up.<sup>222</sup> Paradoxically, the local unavailability of the technologies associated with utility delivery infrastructure has also compelled households to find alternate means to avail themselves of what typically are infrastructure-supplied utilities, including truck delivery of bottled gas<sup>223</sup> or bottled water.<sup>224</sup>

And neither can the definition of "utility" be dependent upon whether the particular good/service delivery is overseen as a utility by some governmental regulatory agency. While the delivery of energy utilities such as gas or electricity may be subject to the regulation of a Public Service Commission or the like, alternatives such as firewood or ice are rarely if ever given such governmental oversight.<sup>225</sup>

The Internal Revenue Code does not, and cannot, provide a precise definition of certain parameters and categories that are necessary to compute the relevant tax.<sup>226</sup> For such parameters and categories the individual circumstances must be considered, with due regard to the regulations and to case law.<sup>227</sup> In light of the diverse types and forms of utilities, the past and ongoing technological changes and developments affecting utilities, and the

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States v. Will, 671 F.2d 963, 967 (6th Cir. 1982); Fargo v. Comm'r, 447 F.3d 706, 713 (9th Cir. 2006).

Nevertheless, courts great and small do cite to it, thus making use of its guidance. See, e.g. United States v. Boyle, 469 U.S. 241, 244 n.1 (1985); *Id.* at 254 (Brennan, J., concurring); Brown v. Comm'r, T.C. Summary Opinion 2009-176 (2009); Sharps, Pixley, Inc. v. Director, Div. of Taxation, 16 N.J. Tax 626, 630 n. 2 (N.J. T.C.1997).

<sup>221</sup> See, e.g., I.R.M. § 5.15.1.7.6 (10-02-2009) ("Other expenses may be allowed if they meet the necessary expense test. The amount allowed must be reasonable considering the taxpayer's individual facts and circumstances.").

<sup>222</sup> See, e.g., DIRECTV, Inc. v. Tolson, 513 F.3d 119, 120–21 (4th Cir. 2008).

<sup>223</sup> See *supra* notes 94 and 95 and accompanying text.

<sup>224</sup> See *supra* note 135 and accompanying text.

<sup>225</sup> See New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

<sup>226</sup> See, e.g., *In re Rott*, 73 B.R. 366, 372 (Bankr. D.N.D. 1987) ("The circumstances of each case shall be considered because 'gross income' is not an accounting term capable of precise definition."); Hope School v. United States, 612 F.2d 298, 301 (7th Cir. 1980) ("The Internal Revenue Code nowhere gives a precise definition of 'trade or business,' but some guidelines can be gleaned from the Treasury Regulations and case law.").

<sup>227</sup> *Id.*

varying circumstances from one household to another, the term "utility" similarly eludes precise definition.

#### V. ISSUES IMPACTING UTILITIES WITH RESPECT TO I.R.C. § 107

The term "utilities" sweeps a broad ambit. Various issues relating to utilities in connection with Section 107 are now discussed, in no particular order:

##### A. *The Unique Occupation of the Clergy*

Unless the Internal Revenue Code provides otherwise, all income from any source is included in an individual's gross income.<sup>228</sup> For policy reasons, certain items are specifically excluded from gross income in Part III of Subchapter B of Chapter 1 of the Internal Revenue Code.<sup>229</sup> Among the items given such favored treatment in Part III are military combat pay,<sup>230</sup> payments to foster caregivers,<sup>231</sup> meals and lodging furnished to employees for the employer's convenience,<sup>232</sup> and, as discussed in this article, housing furnished to a clergyman.<sup>233</sup> Each of these classes of receipts that otherwise would be included in gross income would, in the view of Congress, somehow unjustly weigh upon individuals on account of their particular occupational situations.

In enacting the Clergy Housing Allowance Clarification Act of 2002, Congressional sentiment was that the home of a clergyman "is not just shelter, but an essential meeting place for members of the congregation, and also, in light of the unique relationship between a pastor or a clergy member and the congregation, the distinct housing component of it is a unique feature of that relationship."<sup>234</sup>

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<sup>228</sup> I.R.C. § 61.

<sup>229</sup> I.R.C. §§ 101, *et. seq.*

Excluding an item from gross income *ab initio* is more advantageous to the taxpayer than including it and then reducing the gross income by way of a deduction, inasmuch as certain deductibility ceilings or floors are dependent upon the reckoning of gross income. *See, e.g.*, I.R.C. § 67 (imposing threshold of 2% of gross income for deductibility of miscellaneous itemized deductions); I.R.C. § 213(a) (imposing threshold of 7.5% of gross income for deductibility of medical expenses); *see also* Knight v. Comm'r, 552 U.S. 181 (2007); Matthew Williams, *The Taxation of Contingent Attorney's Fees: Is the Capitalization Theory a Viable Solution to Prevent Taxpayer Inequity?*, 37 TEX. TECH L. REV. 1173 (2005).

<sup>230</sup> I.R.C. § 112.

<sup>231</sup> I.R.C. § 131.

<sup>232</sup> I.R.C. § 119.

<sup>233</sup> I.R.C. § 107.

<sup>234</sup> 148 CONG. REC. H1300 (daily ed. April 16, 2002) (statement of Rep. Pomeroy)

Indeed, nearly a century earlier, the Country Life Commission, created by President Theodore Roosevelt, found that the productivity of America's farming sector was dependent upon the functionality of its social systems, and, while taking pains to avoid any sectarian favoritism, further found that churches (of whatever denomination) played a key role in the vitality and productivity of the rural society.<sup>235</sup> The Commission specifically noted:

There should be better financial support for the clergyman. In many country districts it is pitifully small. There is little incentive for a man to stay in a country parish, and yet this residence is just what must come about. Perhaps it will require an appeal to the heroic young men, but we must have more men going into the country pastorates, not as a means of getting a foothold, but as a permanent work.<sup>236</sup>

Accordingly, while various individual members of the Commission (and of Congress) no doubt had their personal sectarian agendas (and those of their constituents) at heart, the clergy housing exemption of I.R.C. § 107 and its predecessors provided and continues to provide many decidedly nonsectarian benefits to America as a whole. Though the clergyperson's personal religious life cannot be automatically subsumed into his or her occupational duties for taxation purposes,<sup>237</sup> any limitations or qualifications placed upon income excludability under the Section 107 parsonage exemption must be construed and propounded in light of the clergyperson's unique occupational attributes. More to the point, the roles of the various utilities in the clergyperson's occupation/household must be accorded due regard.

### *B. Relevant Standards of Utility Service*

The local or community practices and standards are often relevant to determining whether or not activities and expenditures are allowed. For example, the Federal Subsistence Board may authorize the taking of fish and wildlife in Alaska according to a

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<sup>235</sup> *Report of the Country Life Commission*, S. DOC. NO. 60-705, at 60–63 (1909).

<sup>236</sup> *Id.* at 62–63.

<sup>237</sup> *See, e.g.*, *Feldman v. Comm'r*, 86 T.C. 458 (1986) (disallowing deduction of congregational rabbi and spouse for expenses paid in connection with son's bar mitzvah reception at the synagogue where the rabbi served).

"community's customary and traditional practices,"<sup>238</sup> and residents of nursing homes and other long term care facilities have a right to obtain photocopies of their records "at a cost not to exceed the community standard."<sup>239</sup>

The New York Court of Appeals enunciated various factors to be considered in fixing an attorney's compensation when it decided the *Freeman* case.<sup>240</sup> These factors include the standard fees charged by lawyers in similar situations,<sup>241</sup> which obviously take into account the local bar's fee practices and rates.<sup>242</sup> The IRS and the courts have used the *Freeman* factors in determining whether or not attorney fees could be considered for tax purposes.<sup>243</sup>

The courts have similarly allowed deductions for trustee's fees based upon the customs and practices of the community.<sup>244</sup>

It would follow, then, that community standards should factor into any limitations that may be imposed upon utilities for purposes of I.R.C. § 107.<sup>245</sup>

The telephone utility's evolution over the years is quite illustrative of how standards can change with time. There was a period which saw the common use of the "party line" arrangement, whereby multiple subscribers would share the same telephone line but could not use it simultaneously for incoming or outgoing calls.<sup>246</sup> One disadvantage of the party line arrangement was that the telephone of each party line subscriber would simultaneously ring with the distinctive ring pattern of the recipient whenever any member of the party line would receive a call.<sup>247</sup> Another disadvantage was the issue of privacy; all parties to the party line could eavesdrop on a telephone conversation on any other party's telephone.<sup>248</sup> And monopolization of the party line by any

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<sup>238</sup> 50 C.F.R. § 100.10(d)(5)(4) (2011).

<sup>239</sup> 38 C.F.R. § 51.70(b)(2)(ii) (2016); 42 C.F.R. § 483.10(b)(2)(ii) (2016).

<sup>240</sup> *In re Estate of Freeman*, 34 N.Y.2d 1, 9 (N.Y. 1974).

<sup>241</sup> *Id.*

<sup>242</sup> *See, e.g.*, *Estate of Baird v. Comm'r*, T.C. Memo 1997-55 (1997); William Kummel, Note, *A Market Approach to Law Firm Economics: A New Model for Pricing, Billing, Compensation and Ownership in Corporate Legal Services*, 1996 COLUM. BUS. L. REV. 379, 383 n.10 (1996).

<sup>243</sup> *See, e.g.*, *United States v. White*, 853 F.2d 107 (2d Cir. 1988), *cert. granted sub nom. White v. United States*, 489 U.S. 1051 (1989), *cert. dismissed* 493 U.S. 5 (1989); *see also* Robert A. Traylor, *The Fox is on the Town, O!: White v. United States*, N.Y. ST. B.J., April 1990, at 42.

<sup>244</sup> *E.g.*, *Comm'r v. Burrow Tr.*, 333 F.2d 66, 67-68 (10th Cir. 1964).

<sup>245</sup> *Elderkin v. Gaster*, 288 A.2d 771, 777 (Pa. 1972).

<sup>246</sup> *See, e.g.*, *Louisville v. Louisville Home Tel. Co.*, 148 S.W. 13, 14 (Ky. 1912).

<sup>247</sup> *Id.*

<sup>248</sup> *See, e.g.*, *Rathbun v. United States*, 355 U.S. 107, 111 (1957); *State v. Rasco*, 144 S.W. 449, 457 (Mo. 1912).

subscriber could delay and otherwise complicate the summoning of help in emergency situations.<sup>249</sup>

Notwithstanding these drawbacks, many opted for party line arrangements, due, no doubt, to the lower costs of a party line telephone subscription.<sup>250</sup> By the close of the Twentieth Century, party line telephone service arrangements had become all but obsolete,<sup>251</sup> and indeed, it now is not unusual for a household to have a personal cell phone for every member of the household.<sup>252</sup>

### C. *Appropriate Standard of Living for the Clergy*

The degree and type of utility services supplied to a residential unit have a direct and obvious impact upon the household's standard of living. While it certainly is contrary to public policy to insist that clergypeople and their families live in poverty and squalor,<sup>253</sup> neither was the I.R.C. § 107 exclusion intended to give those in the pastoral profession a fast track to opulence or a license to engage in self-dealing with congregational assets.<sup>254</sup>

Though the allowable standard of living of any given clergyman is not at all defined, cues can be taken from the Bankruptcy Code. In a Chapter 7 Bankruptcy liquidation,<sup>255</sup> a debtor's entitlement to retain one cell phone (but not two) has been recognized.<sup>256</sup> Moreover, the Bankruptcy Code provides an undue hardship discharge exception for otherwise undischargable student loans.<sup>257</sup> "The debtor's total living expenses should not exceed what is reasonable and necessary. To be reasonable and necessary, expenses must be modest, not extravagant, and commensurate with the debtor's resources. Provided that total expenses remain minimal, the debtor is not expected or required to

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<sup>249</sup> See, e.g., *State v. Zelinski*, 166 A.2d 383 (N.J. 1960); see also ALASKA STAT. § 42.20.120 (2015); N.Y. PENAL L § 270.15 (2016); 18 PA.C.S. § 6902 (2016) (criminalizing the refusal to relinquish a party line in an emergency situation).

<sup>250</sup> See, e.g., *Louisville Home Tel. Co. v. Louisville*, 113 S.W. 855, 863 (Ky. 1908); *Pioneer Tel. & Tel. Co. v. Westenhaver*, 118 P. 354 (Okla. 1911).

<sup>251</sup> See, e.g., David Batstone, *Down Country Roads, Come Modern Phones*, N.Y. TIMES, December 15, 1997, at D6; Marlene Werner, *Aloha to the GTE Party Line*, N.Y. TIMES, October 14, 1996 at D5.

<sup>252</sup> Some households have been known to have, in addition to every member's personal cell phone, an additional cell phone for the household at large. See *In re Haar*, 373 B.R. 493, 500 (Bankr. N.D. Ohio 2007).

<sup>253</sup> See *supra* notes 235 and 236 and accompanying text.

<sup>254</sup> See, e.g., *Heritage Vill. Church and Missionary Fellowship, Inc. v. Bakker*, 92 B.R. 1000 (Bankr. D. S.C. 1988).

<sup>255</sup> 11 U.S.C. §§ 701 *et seq.* (2015).

<sup>256</sup> *In re Goodall*, Bankruptcy No. 07-302219, Chapter 7, 2007 Bankr. LEXIS 4490 (D. N.D. Sept. 14, 2007).

<sup>257</sup> 11 U.S.C. § 523(a)(8) (2016).

implement every conceivable cost-saving measure. [internal citations omitted]"<sup>258</sup> Such a debtor is, however, expected to tighten the household purse strings in order to pay off creditors.<sup>259</sup>

Even the undue hardship standard, which is not defined with any precision, does not require that the debtor be reduced to "utter hopelessness,"<sup>260</sup> and, being subject to a case-specific analysis in its application,<sup>261</sup> does leave debtors a degree of autonomy to tailor their standard of living to their particular circumstances. Indeed, a telephone, whether cellular or land line, can be a necessity even for a debtor in a student loan undue hardship discharge situation.<sup>262</sup>

The law similarly expects those responsible for alimony or child support to retrench from their former lifestyles in order to ensure that their obligations to provide for their children and/or ex-spouses are fulfilled.<sup>263</sup> Notwithstanding such priorities, the payers of alimony or child support are entitled to have utilities for their own households.<sup>264</sup>

The leeway for lifestyle for the solvent clergyperson upon whose income no ex-spouse, child or creditor has any claim of priority is entitled to some measure more, and surely no less, than that accorded the improvident debtor or the payer of alimony or child support.

#### *D. Utilities: Personal and Household*

Though Section 107 is an exclusion provision and not a deduction provision,<sup>265</sup> the treatment of the telephone in the context of business deductions is instructive as to the demarcation between

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<sup>258</sup> *In re Mulherin*, 297 B.R. 559, 565 (Bankr. N.D. Iowa 2003).

<sup>259</sup> *See, e.g., In re Lynch*, 299 B.R. 62 (Bankr. S.D.N.Y. 2003); *cf. Knox v. Sallie Mae*, CHAPTER 7, CASE NO. 0506951EE, ADVERSARY NO. 060060, 2007 Bankr. LEXIS 3873 (Bankr. S.D. Miss. Nov. 6, 2007) (finding that family expenses of four cell phones for household, plus cable television and high speed Internet access did not demonstrate that debtor had made adequate attempts to reduce household expenses).

<sup>260</sup> *In re Hornsby*, 144 F.3d 433, 437 (6th Cir. 1998).

<sup>261</sup> *In re Miller*, 275 B.R. 271, 273–74 (Bankr. E.D. Tenn. 2002), *rev'd & remanded on other grounds* 377 F.3d 616 (6th Cir. 2004).

<sup>262</sup> *See In re Pollard*, 306 B.R. 637, 646 (Bankr. D. Minn. 2004).

<sup>263</sup> *See, e.g., Nevarez v. Nevarez*, 626 A.2d 867, 872 (D.C. Ct. App. 1993) ("It may be that the father will have to modify his lifestyle, live in less expensive housing, drive a cheaper car (or use public transportation), and focus on his children's present needs rather than on his own retirement. That, however, is the very result which the Council intended."); *see also Merritt v. Merritt*, B168760, 2004 Cal. App. Unpub. LEXIS 4867 (Cal. Ct. App. May 20, 2004); *Pierce v. Pierce*, 916 N.E.2d 330 (Mass. 2009).

<sup>264</sup> *See, e.g. Radziwon v. Radziwon*, 710 So. 2d 748 (Fla. Ct. App. 1998).

<sup>265</sup> *See supra* note 229 and accompanying text.

business and personal expenses. As discussed earlier, the clergyperson's household is uniquely intertwined with the clergyperson's profession (which is a primary reason for the I.R.C. § 107 exclusion in the first place).<sup>266</sup> Accordingly, the boundary between personal and business for the clergyperson coincides in many respects with the boundary between household and personal.

Under Section 262 of the Internal Revenue Code of 1954, the general rule was (and continues to be) that personal, living, and family expenses are not deductible for income tax purposes unless specifically provided in the Code.<sup>267</sup> In 1988, Congress expressly provided that "in the case of an individual, any charge (including taxes thereon) for basic local telephone service with respect to the 1st telephone line provided to any residence of the taxpayer shall be treated as a personal expense."<sup>268</sup>

Viewing the 1988 amendment from the perspective of the available relevant technologies,<sup>269</sup> the terminology "telephone line," with its obvious reference to the wire and cable infrastructures,<sup>270</sup> was used by Congress at a time when cellular telephone technology was only beginning to become available to the public (and at a significantly higher cost than the customary land line telephone).<sup>271</sup> Accordingly, the cell phone was viewed, and used, primarily if not overwhelmingly as the equipment of business and not as the ubiquitous personal communication device it has become today.

As with other goods and services, consumers of utilities traditionally have been households.<sup>272</sup> The physical and economic availability of cell phone technology has in many respects transformed telephone service from a household service to a personal accoutrement, particularly where each household member has his or her own cell phone.<sup>273</sup> Because the use of a personal cell

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<sup>266</sup> See *supra* notes 228–37 and accompanying text.

<sup>267</sup> I.R.C. § 262(a) (1954), formerly denoted I.R.C. § 262 with no subsections.

<sup>268</sup> Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 5073(a), 102 Stat. 3342, 3682 (1988), codified at I.R.C. 262(b).

<sup>269</sup> *Amtrak v. United States*, 338 F. Supp. 2d 22, 27 (D.D.C. 2004), *aff'd* 431 F.3d 374 (D.C. Cir. 2005).

<sup>270</sup> See *supra* notes 163 and 164 and accompanying text.

<sup>271</sup> Cf., e.g., David Rampe, *A.T.&T. in Rate Cut Today*, N.Y. TIMES, January 1, 1988, at 39 (reporting that average land line residential customer pays approximately \$9 per month for out-of-state telephone service); Sharon L. Bass, *The Growth of Car Phones is Busy, Busy*, N.Y. TIMES, December 11, 1988, at 1 (reporting that cellular car phones cost from \$600 to \$1,700, with monthly service charges ranging from \$38 to \$150).

<sup>272</sup> John F. Grashof & Donald F. Dixon, *The Household: The "Proper" Model for Research into Purchasing and Consumption Behavior*, 7 ADVANCES IN CONSUMER RES. 486 (1980).

<sup>273</sup> See *In re Haar*, 373 B.R. 493, 500 (Bankr. N.D. Ohio 2007). It is not unheard of for one individual to have two cell phones, for reasons ranging from keeping civilian employment separate from military reserve obligations, McDuffie

phone can now in many instances be attributed and allocated more to a specific individual than to a household, the individual cell phone used by the clergyperson's child can now be decoupled from the clergyperson's household, at least to the extent that the household is an attribute of the clergyperson's occupation.<sup>274</sup>

If I.R.C. § 107 were a deduction statute and not an exclusion statute,<sup>275</sup> this functional shift would likely be cause for significant controversy. But exclusions do not operate exactly the same as deductions, accordingly, a telephone's non-deductibility as a personal expense does not necessarily prevent its excludability under Section 107.

Nevertheless, the personalization of utilities such as the telephone raises excludability issues in situations such as the personal cell phone service purchased for and used exclusively by the clergyperson's child. Even giving due regard to the unique occupational niche of the clergyperson,<sup>276</sup> the clergyperson's child's cell phone is arguably beyond the type of household expense so intertwined with the clergyperson's duties.<sup>277</sup>

Just as Congress saw fit to draw a line in the sand by statutorily treating the first residential telephone line as a personal expense,<sup>278</sup> Congress can certainly legislate (and/or the IRS can decree by regulation) limitations under I.R.C. § 107 on the excludability of the costs of personalized telephone accounts attributable to such household members whose presence in the household is only incidental and not an integral part of the clergyperson's occupation. In such regard, it is noted that a clergyperson's spouse is often expected to function in conjunction with the clergyperson in the performance of the clergyperson's duties; this should be a factor in deciding whether the cost of the

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v. *Eli Lilly & Co.*, No. 04 Civ. 05995 (LTS) (HBP), 2009 U.S. Dist. LEXIS 30332, at \*7 (S.D.N.Y. 2009), or to maintaining secret romantic relationships, *Freeman v. Ace Tel. Ass'n*, 404 F. Supp. 2d 1127, 1135 (D. Minn. 2005), *aff'd* 467 F.3d 695 (8th Cir. 2006).

<sup>274</sup> *Cf. In re Estate of Aitken*, 610 N.Y.S.2d 436 (N.Y. Surr. Ct., N.Y. Cty. 1994) (recognizing that technological advances have enabled individualized precise allocation of expenses formerly charged to office overhead), *see also* Kenneth H. Ryesky, *An Overhead View of Aitken and Herlinger*, 22 WESTCHESTER B. J. 219 (1995).

<sup>275</sup> *See supra* note 265 and accompanying text.

<sup>276</sup> *See supra* notes 228–37 and accompanying text.

<sup>277</sup> *Cf., In re Gray*, Case No. 06-927, Chapter 11, 2009 Bankr. LEXIS 2130, at \*10 n.2 (Bankr. N.D. W. Va. 2009) (finding that debtor's reasonable expenses for cell phone service should not include that portion of the bill attributed to cell phone used by debtor's adult daughter).

<sup>278</sup> *See supra* note 268 and accompanying text.

cell phone used by the clergyperson's spouse ought be excludable from the clergyperson's income.<sup>279</sup>

And just as the new and emerging technologies can shift a utility item's usage from a household basis to a personal basis, so, too can the technological changes shift the personal to the household. An example is the plug-in electric automobile, whose recharge can entail significant amounts of electricity,<sup>280</sup> presumably using power purchased on the general household electric bill.

## VI. UTILITIES AND § 107: WHITHER NOW?

As the late Circuit Judge Ellsworth Van Graafeiland noted, "[o]ne of the most esoteric areas of the law is that of federal taxation."<sup>281</sup> I.R.C. § 107 is among the more esoteric topics within the body of federal tax law.<sup>282</sup> Inasmuch as the LEXIS-NEXIS annotations of I.R.C. § 107 do not contain any category for utilities,<sup>283</sup> the "cost of utilities" under Section 107 carries tax law yet another degree further on the esoteric scale.

But cases from time to time do arise which require the IRS, the tax bar and the courts "to explore one of the lesser known chambers in a labyrinthine Internal Revenue Code honeycombed with obscure passageways."<sup>284</sup> There have already been abusive

<sup>279</sup> See, e.g., Herman W. Smith, *Urbanization, Secularization, and Roles of the Professional's Wife*, 13 REV. OF RELIGIOUS RES. 134 (1932); Marion Harland, *Ministers' Wives*, 149 N. AM. REV. 371 (1889); see also *Chapman v. Phx. Nat'l Bank*, 85 N.Y. 437 (N.Y. 1881) ("In that month she was married to Rev. Dr. Chapman, a Presbyterian minister; and from the time of her marriage to December, 1865, she resided with her husband . . . discharging the duties pertaining to her station as the wife of a minister and a planter."); *Mo. Pac. Transp. Co. v. Simon*, 135 S.W.2d 336, 337 (Ark. 1939) ("Mrs. Adcock, 58 years of age, is the wife of a minister. Her duties were such as are ordinarily discharged by a minister's wife.").

<sup>280</sup> See, e.g. I.R.C. §§ 30(d)(1)(F)(i) & 30D(d)(1)(F)(i) (2015) (specifying a minimum 4 kilowatt-hour battery capacity for qualifying plug in electric vehicles eligible for certain tax credits).

<sup>281</sup> *United States v. Regan*, 937 F.2d 823, 827 (2d Cir. 1991), *amended on other grounds* 946 F.2d 188 (2d Cir. 1991), *cert. denied sub nom. Zarzecki v. United States*, 504 U.S. 940 (1992); see also *Bursten v. United States*, 395 F.2d 976, 981 (5th Cir. 1968) ("We must note here, as a matter of judicial knowledge, that most lawyers have only scant knowledge of tax law."). An esoteric sidelight to the *Regan* case is that one of the attorneys for the defendant Regan was Jerome Kurtz, Esq., a former Commissioner of Internal Revenue.

<sup>282</sup> See *Chemersinsky*, *supra* note 25 at 735 ("I confess that I had never heard of the parsonage exemption until I received a call from the Ninth Circuit staff attorney asking me to participate in the Warren case.").

<sup>283</sup> Author's accession of 26 U.S.C.S. § 107 in the LEXIS-NEXIS database (accessed December 20, 2015).

<sup>284</sup> *United States v. Second Nat'l Bank of N. Miami*, 502 F.2d 535, 549 (5th Cir. 1975), *cert. denied* 421 U.S. 912 (1974).

uses of purported "churches" to avoid or evade the taxes,<sup>285</sup> including abusive "church" schemes in which the "minister" attempts to invoke I.R.C. § 107.<sup>286</sup> Moreover, Section 107 itself (albeit not its "cost of utilities" provision) gave rise to several unexpected adventures and misadventures in connection with the *Warren* case.<sup>287</sup>

Adam Smith noted that taxation "ought to be certain and not arbitrary."<sup>288</sup> As a tax collecting agency, the IRS often must balance many factors in how it administers the tax laws. Though claims that the Income Tax violates the Constitution are regularly voiced by unenthusiastic taxpayers (or non-payers),<sup>289</sup> public toleration for actual or contrived Constitutional unsoundness in any taxation scheme is very strongly correlated with public perceptions of fairness in the manner in which the tax is imposed and administered.<sup>290</sup> The diverse variables in defining what constitutes a utility,<sup>291</sup> as well as the well-known variations in the dynamics of individual households, pose many challenges to Adam

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<sup>285</sup> *E.g.*, *S. Church of Universal Bhd. Assembled, Inc. v. Comm'r*, 74 T.C. 1223 (1980).

<sup>286</sup> *E.g.*, *Randolph v. Comm'r*, T.C. Memo 1987-432 (1987); *Rose v. Comm'r*, T.C. Memo 1984-537 (1984); *Winston v. Comm'r*, T.C. Memo 1984-248 (1984); *Makkay v. Comm'r*, T.C. Memo 1984-16 (1984).

<sup>287</sup> *See supra* notes 22–29 and accompanying text.

<sup>288</sup> ADAM SMITH, *THE WEALTH OF NATIONS* (NY, Edwin Cannan, ed., Modern Amer. Library, 1937) (1789) (Book V, Chapt. II, Pt. II at 778 (Maxim II.)).

<sup>289</sup> *See, e.g.*, *Cheek v. United States*, 498 U.S. 192 (1991); *United States v. Sassak*, 881 F.2d 276 (6th Cir. 1989); *Scott v. United States*, 521 F.2d 1188, 1192 (9th Cir. 1975); *Rutherford v. Comm'r*, T.C. Memo 1981-518 (1981); *see also* Christopher S. Jackson, *The Inane Gospel of Tax Protest: Resist Rendering Unto Caesar - Whatever His Demands*, 32 GONZ. L. REV. 291, 298–307 (1996).

Claims that a tax violates the national Constitution are in no way unique to the United States. *See, e.g.*, *Deputy Commissioner of Taxation v. Levick*, [1999] FCA 1580 (Fed. Ct. Australia 1999); *Regina v. Sydel*, 2005 BCPC 413 (Brit. Col. Prov. Ct. 2005); *Regina v. Dove*, [2004] O.J. No. 4015 (Ontario Sup. Ct. Just. 2004); *B. v. Comptroller of Inland Revenue*, [1974] 2 MLJ 110 (Malaysia Fed. Ct. Civ. App., 1974); *Tan v. Del Rosario*, Philippines Sup. Ct., G.R. No. 109289 (October 3, 1994); *Youngstrom v. Kosrae*, [1991] FMSC 12 (Kosrae, Micronesia, 1991); *see also* *Metcash Trading Ltd. v. Comm'r*, 2001 (1) BCLR 1 (CC) (S. Afr. Const. Ct., 2000) (upholding constitutionality of South African value added tax).

<sup>290</sup> *See, e.g.* Leo P. Martinez, *The Trouble with Taxes: Fairness, Tax Policy, and the Constitution*, 31 HASTINGS CONST. L.Q. 413 (2004); Edward J. McCaffery, *Tax's Empire*, 85 GEO. L.J. 71 (1996).

The author presumes that I.R.C. § 107 is valid and has had a salutary effect upon American tax policy, and does not now affray into any Constitutional controversies regarding the statute. *Compare Chemerinsky, supra* note 25 (questioning the Constitutionality of I.R.C. § 107) *with* Dean T. Barham, *The Parsonage Exclusion under the Endorsement Test: Last Gasp or Second Wind?*, 13 VA. TAX REV. 397 (1993) (asserting the Constitutionality of I.R.C. § 107); *see also* note 301, *infra*.

<sup>291</sup> *See supra* notes 79–227 and accompanying text.

Smith's ideal of taxation simplicity. Amidst these inherent complexities and meanderings, there is much potential for abuse of the "cost of utilities" provision of I.R.C. § 107. The IRS must be prepared to put down its foot if and when a taxpayer takes the Section 107 "cost of utilities" provision too far beyond the bounds of reasonableness and fairness.

## VII. CONCLUSION

The current trends of increased taxation, together with the increasing acceptability of tax cheating behaviors among the many sectors of American public,<sup>292</sup> will certainly provide a basis for many to rationalize new and novel ways to evade taxes.<sup>293</sup> Nor has the IRS been secretive about its desire to give greater scrutiny to the individual houses of worship<sup>294</sup> (which may well entail examination of the personal tax returns of the clergyperson and/or other employees<sup>295</sup>). One therefore cannot entirely dismiss the

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<sup>292</sup> See, e.g. NATIONAL TAXPAYER ADVOCATE, 2004 ANNUAL REPORT TO CONGRESS 228–29 (2004), <https://www.irs.gov/pub/tas/ntafy2004annualreport.pdf> (accessed December 20, 2015).

<sup>293</sup> See James Tackett, Joe Antenucci, and Fran Wolf, *A Criminological Perspective of Tax Evasion*, 110 TAX NOTES 654 (Feb. 6, 2006).

<sup>294</sup> See, e.g., *Charity Oversight and Reform: Keeping Bad Things from Happening to Good Charities*: Hearing before the S. Comm. on Finance, 108th CONG.139 (2004) (written Statement of Mark W. Everson, Commissioner of Internal Revenue), stating:

Disclosure is an important way for the IRS to identify participants in abusive transactions. However, our disclosure scheme, which originally was developed to address the taxable sector, does not yet fit all tax-exempt participants because the method of reporting does not fit all tax-exempt entities well. For example, an organization must attach Form 8886 to its annual tax return for each year that the organization participates in a listed transaction. For this purpose, "tax return" includes information returns, so tax-exempt entities that file information returns are covered by the regulations. However, entities that are not required to file any return are not covered. This excepted category includes churches, small exempt organizations, state and local governments, state and local government retirement plans, and Indian tribal governments. Thus, these entities are not covered by the section 6011 disclosure net.

*Id.*

<sup>295</sup> See I.R.M. 4.76.7.12.3 (06-01-2004).

The procedural checks and balances that pertain when the IRS examines a house of worship lie beyond the purview of this article. See I.R.C. § 7611; see also *Music Square Church v. United States*, 218 F.3d 1367 (Fed. Cir. 2000), *cert. denied* 531 U.S. 1013 (2000).

Tony Alamo, the founder of the Music Square Church, had previously been convicted of tax evasion. See *Jury Convicts an Evangelist of Tax Evasion*,

prospects of a Section 107 "cost of utilities" issue materializing before the IRS or the courts, or in Congressional committees.

When confronted with an issue in an obscure area of the law, the judiciary often relies upon legal briefings by counsel,<sup>296</sup> and upon the scholarship of previously published law review articles,<sup>297</sup> sometimes decades after the article's appearance.<sup>298</sup> Technological advancements often raise questions in the applicability of the established statutes, including but not limited to the status of an electronically-encoded transit fare card as a written instrument which can be forged,<sup>299</sup> and the validity of electronic signatures of the issuing officer on common everyday electronic traffic violation tickets.<sup>300</sup>

Technological changes in everyday living habits and standards are implicating the I.R.C. § 107 parsonage exemption. The research and analysis of this article is now available to aid in the resolution of such technological issues as may hereafter arise, whether in the context of taxation or otherwise.<sup>301</sup> Further research and analysis by other scholars is encouraged by this author.

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N.Y. TIMES, June 12, 1994, at 30. The IRS's respective examinations of both church and clergyperson were obviously related.

<sup>296</sup> See, e.g. *Abbott v. State*, 245 S.W.3d 26, 28 (Tex. CT. App. 2007), (Gray, J., dissenting), *rev'd & remanded*, 271 S.W.3d 694 (Tex. Crim. App. 2008); *Thompson v. Amoco Oil Co.*, 705 F. Supp. 1349, 1353 (C.D. Ill. 1989), *vacated & remanded* 903 F.2d 1118 (7th Cir. 1990).

<sup>297</sup> See, e.g. *Thompson v. Burke*, 556 F.2d 231, n. 10 at 237 (3d Cir. 1977); *Phelps v. Watson-Stillman Co.*, 293 S.W.2d 429, 433 n.1 (Mo. 1956); Judy M. Cornett, *The Legacy of Byrd v. Hall: Gossiping about Summary Judgment in Tennessee*, 69 TENN. L. REV. 175, 197 (2001); Steven B. Duke, *Humble Genesis*, 50 ARIZ. L. REV. 1227, 1232 (2008) ("If, as some contend, judges don't read or even pay attention to law review articles, why are so many articles cited in court opinions? Why do court opinions more and more resemble law review articles?")

<sup>298</sup> See, e.g. *Marcella v. Brandywine Hosp.*, 47 F.3d 618, 621 (3rd Cir. 1995) (citing Wesley A. Sturges, *The Legal Status of the Red Cross*, 56 MICH. L. REV. 1 (1957)). The American Red Cross was a defendant in *Marcella*.

<sup>299</sup> See, e.g., *People v. Mattocks*, 12 N.Y.3d 326 (N.Y. 2009).

<sup>300</sup> See, e.g., *People v. Rose*, 805 N.Y.S.2d 506 (N.Y. Rochester City Ct. 2005).

<sup>301</sup> The constitutionality of the I.R.C. § 107 parsonage exemption has been challenged unsuccessfully. See *Freedom From Religion Found. v. Lew*, 773 F.3d 815 (7th Cir. 2014); *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836 (9th Cir. 2011).