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Parsonage Problems: The Ethics of Taxation

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The One Hundred and Seventh Section of the Internal Revenue Code excludes from gross income the value of housing provided to any "minister of the gospel," a provision of the tax code famously known as parsonage, which was enacted to allow a church to provide a residence to its minister without fear that such a transaction would be taxable. Not only can they provide a residence, they also can provide money for such a residence. For any other employee this money simply would be taxable income.

It is not surprising that cases abound regarding the details of who is considered to be a "minister of the gospel" so as to be entitled to tax-free income. At present, the law is well established to include clergy that do not believe in the "gospels" themselves; clergy of any religion can receive the benefit. Moreover, even people who are not generally considered to be ordained – i.e. not really ministers -- can receive parsonage. The U.S. Tax Court has ruled that a cantor in a synagogue may receive parsonage; however, the same court ruled that a "minister of education" at a church may not. Even more famously, that same court denied parsonage to a person who worked as the "the national director of Interreligious Affairs for the American Jewish Committee" -- even though he was a rabbi -- since his job did not have a clerical function. To add to the seemingly arbitrary nature of these decisions (since the definition of who should be allowed to receive parsonage is still ambiguous), I once advocated in a tax journal that non-ordained Orthodox women working in Jewish schools as religious role models are entitled to parsonage, just as (non-ordained) nuns are.

All of these details may be fascinating to tax lawyers, but they hardly facilitate the much more serious discussion about whether parsonage in general is a good idea or not. Consider the idea of parsonage itself. In essence, the government is choosing to subsidize the wages of clergy by making some

THE ASPEN CENTER FOR SOCIAL VALUES
Addressing Social Values through Thought and Action
Looking Forward • March 2014

Parsonage Problems: The Ethics of Taxation

portion of their salary tax free. This is a common strategy on which the government embarks when it wishes to encourage a particular activity. For example, municipal bonds are tax free to encourage their purchase. Federal law exempts from taxes the pay earned by active duty military personal when they are in a combat zone, and many states exempt school supplies from sales tax in the weeks prior to the start of school. These are only a few examples where the government provides a tax benefit to encourage an activity.

Should clergy be given that special status? Is parsonage constitutional?

The second question is, perhaps surprisingly, the easier one. In general, the Constitution of the United States is widely understood to allow the government – both state and Federal – to provide benefits to all religions equally, even if it does not provide such benefits outside the confines of religion generally. In the context of parsonage, what this means is that it would be a severe and direct violation of the Constitution if the government provided for parsonage to those faiths that, for example, believed in the Gospels or which had any gospels, but denied parsonage to faiths that did not believe in the Gospels or did not have any sacred works: it is axiomatic to American Constitutional law that the government cannot purposively favor one faith over another. Of course, the government can provide benefits that functionally aid one faith more than another – parsonage provides little benefit to iterant preachers, for example – so long as the opportunity is available to all preachers. Yet, the government cannot determine which religion is true or false or which doctrines are correct or not and on that basis provide legal benefits or burdens. For this reason, the government is able exempt all religious institutions from property taxes (which is similar to parsonage in the big picture), even when it is subject to dispute as to whether the government can exempt all bibles from sales tax (which may encroach upon determining which "bible" is true or not).

Another equally important constitutional challenge to parsonage is that of entanglement: The famous Supreme Court decision of Lemon v Kutzman in 1971 prohibited excessive entanglement between government and any religious institution; "entanglement" is a code word here for labeling as unconstitutional situations where the relationship between the government and any given faith is so close that people might be confused and think that the two are really one. While the scholarly legal consensus is that parsonage is not excessive, there is a real and reasonable fear that as the regulatory framework and government investigation over whether a minister

Parsonage Problems: The Ethics of Taxation

truly qualifies as a minister grows more complex, entanglement will necessarily result. None of us would want ministers to have to stop continually to consider the whether a given activity will qualify or deny them their special tax status. The finer the governmental distinctions between types of ministers, the more likely will problems regarding governmental regulation and constitutionality arise. Nonetheless, we have not yet reached that point, and parsonage remains constitutional.

Even though something is constitutional, however, it does not mean that it is wise to implement it. Indeed, the more fundamental inquiry must answer whether parsonage is a prudent practice – not if it is legal but if it is just – in a society such as ours. This inquiry raises three interrelated questions, each one focusing on ideas of fairness.

The first is the most basic: Does the American legal or political tradition embrace the concept of a fair tax, and if so, is there any clear idea of what fairness in taxation demands? The Jewish tradition, for example, has an elaborate literature from the medieval period about what is an ethically proper way to tax a community. The late Israeli Supreme Court Justice, Menachem Elon, devotes many pages to this issue in his classical work, focusing on the underlining values that fair taxation imposes on society, from the ancient Jewish tradition where scholars were exempt from most communal taxes to medieval discussions about what should be the proper ratio between per capita and wealth taxes to fund communal projects such as building a wall around the community to deter theft and murder. In these discussions, the claim of the poor is that only the wealthy should pay for such a wall – as only they have something worth stealing – while the wealthy insist that all human life is precious and the wall protects everyone from marauding bandits that kill and plunder. The Jewish tradition has much to contribute to any legal system that really considers the ethics of taxation. Yet, sadly enough, there is almost no such ethical or legal discourse in the United States. Unlike the Jewish tradition, American tax law seems to be grounded only in the witticism of Jean Baptiste Colbert that "The art of taxation consists in so plucking the goose as to obtain the largest amount of feathers with the least possible amount of hissing." In this model, who gets taxed and at what rate is not a function of any claim of justice or fairness, but simply a function of practical politics (Those that hiss, get plucked less than those that don't, unless they have a high feather-to-hiss ratio!) Ethically, it is unreasonable to complain about the fairness of any particular tax deduction, unless the tax system is committed to

THE ASPEN CENTER FOR SOCIAL VALUES
Addressing Social Values through Thought and Action
Looking Forward • March 2014

Parsonage Problems: The Ethics of Taxation

fairness generally.

If our tax policy is simply functional – we get the cash from whomever puts up the least effective resistance - then ethical claims about what makes for a fair tax in the context of parsonage is no more reasonable than injecting ethics and fairness into a discussion of whether the oil industry ought to pay a different tax rate than the solar industry on the basis of environmental fairness or whether capitol gains ought to be taxed at a rate higher or lower than income on the basis of socio-economic fairness. Indeed, it might be unethical to subject the parsonage allowance alone to such a review when no other part of our tax code is required to be ethical at all. What is clear is that the medieval Jewish tradition, which did believe in an ethical tax code generally and had judicial review of taxes in places where the Jews had taxing authority, was insistent that clergy [read: rabbis of the Jewish community] were tax exempt and the standard explanation for why that was fair was that clergy were both poor and public servants and thus worthy of this benefit.

Second, perhaps we should be asking whether we need to expand (rather than limit) parsonage: why should organizations that do charitable good – whether secular or religious -- not be allowed to grant their leadership parsonage as well? If the Jewish tradition is correct that poor public servants ought to be provided this worthy benefit, shouldn't we apply that principle more generally today? While there are many wonderful religious organizations, there are also many wonderful secular ones, all of which do good. All not-for-profits generally receive property tax exemptions; why shouldn't the leadership of not-for-profits receive parsonage?

Justification for why they don't can be seen as historical: the clergy was the place where charity and good deeds were located and where it was assumed that its workers continued to toil away not-withstanding below-market wages, out of love of God or fear of heaven or loyalty to all of God's creations.

Yet a contemporary justification flows from the first, I think. Modern times might have well expanded the list of public service organizations that to good, but the modern America tradition of secular charities seems to be that while the organizations do good, the leaders of those organizations do well. In an era where the CEO of the United Way earns more than $1,000,000, granting a parsonage exemption – without the commitment by the leadership to live in modesty - seems unwise. This justification for parsonage seems valid. Therefore, it should be the case that parsonage is limited to leaders of organizations that are historically committed to modestly paying its leading workers. A weaker

Parsonage Problems: The Ethics of Taxation

argument – but one still advanced – focuses on the historical role religion uniquely plays in the American model of community; in many communities it is solely religious organizations that form the bedrock of communal values.

The third questions flows from the second: Perhaps parsonage is good, but only in moderation; maybe our society ought to put an upper limit on the income earned by people who can receive parsonage? The newspapers are full of stories of ministers who live in multi-million dollar mansions yet receive parsonage, and there is even a discussion in the tax literature over whether a minister can receive parsonage for his second home! The oft repeated joke about clergy and poverty resonates: A first year divinity student is visiting a religious community during a major celebration and he spots the immense dining room, the tastefully appointed tables, the flower vases and the filet mignon ready on the table and announces, "If this is poverty, bring on chastity!" Our religious leaders should not live as corporate titans, and if they do, we ought not to subsidize this with a tax break.

Here I think that the critics of parsonage make a very valuable point. The Jewish tradition presupposed that public servants live fiscally modest lives and struggled to make ends meet, and all in the pursuit of the public good – hence a small tax break was fair given the small pay and harsh working conditions of clergy. Like loan repayment programs for law students who embark on lives of public service rather than working in a law firm, the justice of this type of program is only apparent when public service – like the priesthood – comes with a vow of poverty. It would seem logical that the law should cap the total income of those who can receive parsonage to those ministers who salaries are reflective of the fiscally modest, caring and giving professions. However, if the purpose of parsonage is not tied to poverty but to some other policy goal, then this limitation may prove counter-productive.

What this inquiry truly reveals is a deep inarticulacy about the role of fairness and value-driven goals in our tax system. The issue is less about whether parsonage is fair, and more about what fairness means in the context of taxation. If we are to have an honest conversation about parsonage that discusses it in the framework of ethical taxation, we need first to develop a model for ethical taxation that we can apply generally, so that a fair tax is more than a tax that manages to evade the interest-group firing line. Once we have that model, we can then consider whether parsonage should be limited to religious organizations or not, and what should be the proper income range to be entitled to parsonage.

THE ASPEN CENTER FOR SOCIAL VALUES
Addressing Social Values through Thought and Action
Looking Forward • March 2014

There Really is Nothing New Under the Sun: Polygamy and Religion in the Public Discourse

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"The life of the law has not been logic; it has been experience."
—Oliver Wendell Holmes, Jr.

Every now and again polygamy attempts another mainstream comeback. Recently, a federal judge in Utah struck down part of the state's anti-polygamy law as unconstitutional. Fans of the "Sister Wives" reality TV stars, who filed the suit, are still rejoicing at the decision, and the network has announced the premier of yet another polygamous reality show, "My Five Wives." At the other end of the spectrum, another lawsuit, filed by the Department of Justice, alleges that polygamous clans are secretly running the show in townships in Utah and Arizona, manipulating the political process from behind the scenes. In Texas, the Attorney General's Office is inching closer to seizing a massive polygamous ranch. What competing narratives about polygamy in America reveal is that whether or not a clean-cut version of plural marriage could legally exist theoretically, in practice it does not, and what we actually have is an unregulated, harmful situation.

While there is a strong federal constitutional argument to be made that the ban on polygamy should be repealed, polls reveal that public opinion remains strongly in favor of the ban. The question then is this: If polygamy is constitutionally acceptable, are there any legitimate arguments to be made against it?

When it comes to legal/social issues, the prevailing wisdom in America is not to look to religion for guidance, in deference to church-state separation. In general, this is a good thing, as it prevents dominant religious voices from controlling the political process. But sometimes it also makes sense to separate the religious system from its legal and philosophical sources and the experience from the esoteric, if only to see how other societies have dealt with similar issues.

The Bible, for example, was an extremely progressive document for