

2011

Dismembering Families

Anthony C. Infanti

University of Pittsburgh School of Law, infanti@pitt.edu

Follow this and additional works at: https://scholarship.law.pitt.edu/fac_book-chapters



Part of the [Civil Rights and Discrimination Commons](#), [Dispute Resolution and Arbitration Commons](#), [Family Law Commons](#), [Health Law and Policy Commons](#), [Inequality and Stratification Commons](#), [Law and Economics Commons](#), [Law and Gender Commons](#), [Law and Society Commons](#), [Sexuality and the Law Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Anthony C. Infanti, *Dismembering Families*, CHALLENGING GENDER INEQUALITY IN TAX POLICY MAKING: COMPARATIVE PERSPECTIVES (2011).

Available at: https://scholarship.law.pitt.edu/fac_book-chapters/5

This Book Chapter is brought to you for free and open access by the Faculty Publications at Scholarship@PITT LAW. It has been accepted for inclusion in Book Chapters by an authorized administrator of Scholarship@PITT LAW. For more information, please contact leers@pitt.edu, shephard@pitt.edu.

Dismembering Families

ANTHONY C. INFANTI*

The concept of the body politic is not new. Elaborate organic images for human society were richly developed by the Greeks. They conceived the citizen, the city, and the cosmos to be built according to the same principles. To perceive the body politic as an organism, as fundamentally alive and as part of a large cosmic organism, was central for them. To see the structure of human groups as a mirror of natural forms has remained imaginatively and intellectually powerful. . . .

The union of the political and the physiological . . . has been a major source of ancient and modern justifications of domination, especially of domination based on differences seen as natural, given, inescapable, and therefore moral (Haraway, 1991: 7–8) (citation omitted).

In the essay from which I took this excerpt, Donna Haraway, a professor of the history of consciousness and feminist studies at UC–Santa Cruz, cautions us not to underestimate the extent to which ‘the principle of domination is deeply embedded in our natural sciences,’ especially ‘if we are to work effectively for societies free from domination’ (*ibid.*, 8). This cautionary note set me to thinking about the primary place where science intersects with the individual US federal income tax—that is, in the deduction for medical expenses under section 213 (26 USC s 213). By chance, as I was reading this essay and pondering its implications for the medical expense deduction, I also happened to be watching same-sex couples around me expand their families with the help of assisted reproductive technologies (eg, intrauterine insemination, in vitro fertilisation, intracytoplasmic sperm injection, and surrogacy). Given the general heteronormativity of our tax laws, I naturally began to wonder whether section 213 treats the expenses that these same-sex couples incur to have children in the same way that it treats precisely the same expenses when different-sex married couples incur them to overcome fertility problems that prevent a more ‘natural’ form of procreation.

It did not take long to realise that section 213 treats the expenses for infertility treatments incurred by so-called traditional families differently from—and more favourably than—the same expenses when incurred by same-sex couples or others in nontraditional family arrangements. That much was, quite honestly, not a surprise to me—nor should it be a surprise to anyone who has ever heard of the Defense of Marriage Act (1 USC s 7), which, for purposes of federal law, refuses recognition to same-sex marriages. More interesting to me, though, was *how* section 213 privileged traditional

* Professor of Law, University of Pittsburgh School of Law. Thanks to the participants at the 2009 Critical Tax Conference at Indiana University–Bloomington for their comments, with particular thanks to Kerry Ryan and Ted Seto for their helpful suggestions.

over nontraditional family arrangements. As I came to see it, section 213 privileges traditional over nontraditional family arrangements through the construction, corporealisation, and even dismembering of families. In this essay, I invite you to accompany me on a short journey as I explain how I see this process of construction, corporealisation, and dismembering of families play out in the text and context of section 213.

SECTION 213

Section 213 of the Internal Revenue Code ('Code') (26 USC s 1 ff) allows a deduction for expenses paid during the taxable year for 'medical care,' which is defined to include 'amounts paid . . . for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.'¹ To prevent a taxpayer from reaping a double benefit, the deduction is limited to medical expenses that have not been previously reimbursed by insurance or otherwise (eg, by a tortfeasor). And a built-in statutory 'floor' disallows any deduction for medical expenses not in excess of 7.5 per cent of the taxpayer's adjusted gross income. The purpose of the statutory floor is twofold. First, it ensures that the deduction is available only if the taxpayer has incurred 'extraordinary' medical expenses that affect her ability to pay federal income tax. Second, it mitigates the possibility that the availability of the deduction will contribute to rising medical costs by discouraging the purchase of private insurance (see Joint Committee on Taxation, 1983: 24).

From this brief description, section 213 probably does not seem a likely candidate for being tagged as furthering domination in American society. After all, from its inception, this provision has aimed to alleviate extraordinary financial burdens on taxpayers who already suffer from significant medical problems—and who, by definition, lack the help of insurance to relieve those burdens (US Congress, 1942: 7800, 8469). But, as laudable as this goal might be, careful attention to the wording of section 213 reveals that it does not apply to all taxpayers equally. In fact, section 213 draws sharp distinctions between different types of families. It furthers the domination of the so-called traditional family and concomitantly contributes to the subordination of lesbian, gay, and other nontraditional families.

Section 213 furthers this domination and contributes to this subordination in a curious way. There are certainly a number of Code sections that draw distinctions between different types of families. For example, educational provisions in the Code allow tax relief for education provided to the taxpayer, a spouse, or dependents (eg, 26 USC ss 25A, 221); the general fringe benefits provision in the Code allows certain fringe benefits to be provided on a tax-free basis to the spouse, dependents, and even parents of employees (*ibid.*, s 132(h), (j)(4)); the more specific exclusion for employer-provided

¹ For decades, commentators have been arguing over whether section 213 has any place in a well-constructed income tax (see, eg, Andrews, 1972: 334–35; Surrey, 1973: 20–23; Kahn, 2002: 27–29). My purpose in this essay is not to add (or detract) from that debate, but to take section 213 as a given and to examine the ways in which heteropatriarchal domination might be embedded in that provision.

meals and lodging applies not only to food and shelter given to the employee, but sometimes also when given to a spouse and dependents (*ibid.*, s 119); and the various attribution rules in the Code amalgamate ownership among family members, often adopting different (ie, broader or narrower) definitions of the ‘family’ depending on the particular purpose of the attribution rule (eg, *ibid.*, ss 267, 318; see Crawford, 2005). Yet, section 213 seems to go beyond merely identifying the relevant economic unit for tax purposes—it actually corporealises that unit. To paraphrase Donna Haraway, section 213 maps the physiological onto the political and creates the ‘body family.’

CONSTRUCTING FAMILIES

As a first step toward understanding the creation of the body family, let’s consider how section 213 constructs the ‘family’ and what type of ‘family’ it constructs. Section 213 allows a deduction not only for expenses paid during the taxable year by the taxpayer for his own medical care, but it also allows the taxpayer a deduction for expenses paid for medical care rendered to his spouse and dependents. Thus, an individual taxpayer is able to combine the medical expenses of others together with his own medical expenses both for purposes of determining whether he has exceeded the rather high statutory floor on deductibility and, if that floor has been exceeded, for purposes of obtaining the tax benefit from the deduction. Thus, by seeing the taxpayer not just as an individual but as a head of household, section 213 creates a family unit and determines the deductibility of medical expenses on the basis of that unit.

Notably, this facet of section 213 dates back to its original introduction into the Code in 1942 (Revenue Act of 1942: s 127(a)). That historical fact is noteworthy because, in the early days of the federal income tax, it appears that Congress assumed ‘that the taxpaying unit would be the individual’ (Cain, 1991: 100). Indeed, it was not until 1948 that Congress introduced the joint federal income tax return as we now know it (Revenue Act of 1948: s 303); it was not until 1951 that Congress created a separate rate schedule for heads of household (Revenue Act of 1951: s 301); it was not until 1984 that Congress fully embraced the idea of the different-sex married couple as a single economic unit for income tax purposes (US Congress, 1984: 1491; Cain, 2000: 680); and it was not until 1986 that Congress enacted the ‘kiddie tax’ that makes the family a quasi-taxable unit (at least with respect to the unearned income of minor children) (Tax Reform Act of 1986: s 1411). Moreover, notwithstanding these significant departures from the early tax norm, commentators continue even today to describe the Code as fundamentally based on the individual as the taxable unit (eg, Bittker and Lokken, 1999: vol 1, para 2.3).

When departing from the norm of focusing on the individual as the taxable unit in section 213, Congress had a specific family structure in mind—that of the traditional, ‘nuclear’ family. The relevant family unit for purposes of the medical expense deduction was (and is) the taxpayer, the taxpayer’s spouse, and the taxpayer’s dependents. Naturally, in 1942, the only ‘spouses’ were the husbands and wives of married different-sex couples. It was not until nearly 55 years later that Congress took the possibility of same-sex marriage seriously, when it enacted the Defense of Marriage Act in 1996. Even so, the focus on different-sex married couples was made abundantly clear in legislative history that describes the proposed deduction in the following terms:

The committee bill allows, within prescribed limits, the deduction of expenses for the medical care of the taxpayer, *his wife*, and *his dependents* (Seidman, 1954: vol 1, p 1397, quoting US Senate Report 77-1631) (italics added).

Therefore, in enacting the predecessor of section 213, Congress undoubtedly had in mind a male taxpayer/head of household. This male taxpayer/head of household could deduct the expenses paid for medical care rendered to his (presumably, stay-at-home) wife.² He could also deduct the expenses paid for medical care rendered to his ‘dependents.’ For this purpose, Congress borrowed the definition of ‘dependent’ from then section 25(b)(2)(A), which allowed a credit for dependents. In 1942, section 25(b)(2)(A) allowed the taxpayer a \$350 credit ‘for each person (other than husband or wife) dependent upon and receiving his chief support from the taxpayer if such dependent person is under eighteen years of age or is incapable of self-support because mentally or physically defective.’ As originally enacted in 1917, the tax allowance for dependents was only available with respect to children who were under the age of eighteen or who were incapable of supporting themselves because they were ‘mentally or physically defective’ (War Revenue Act, 1917: s 1203). Thus, the children who round out the traditional, nuclear family form the core of the tax concept of ‘dependent.’

Since 1917, Congress has supplemented this core by allowing other individuals to qualify as dependents. As mentioned above, even before it enacted the predecessor of section 213 in 1942, Congress marginally expanded the definition of ‘dependent’ by allowing any individual (and not just a child) who was ‘incapable of self-support because mentally or physically defective’ to qualify as a dependent (Revenue Act of 1918: s 216(d)). Since then, Congress has further relaxed the definition of ‘dependent’ to embrace more than just the taxpayer’s children and ‘defective’ individuals who are incapable of caring for themselves and whom the taxpayer supports; nonetheless, the focus is still squarely on relatives of the taxpayer and his/her spouse (ie, the ‘extended’ nuclear family).³ Indeed, to be a dependent, an individual must either meet the requirements for being treated as a ‘qualifying child’ or a ‘qualifying relative’ of the

² This mental picture is consistent with the general mental picture of the framers of the Code, who consistently refer to taxpayers in the masculine gender (1 USC s 1) and who included many features in the Code that

reflect the assumption that our society is composed of heterosexual married couples, with men occupying the ‘public’ sphere and women occupying the ‘private’ domestic sphere (Staudt, 1996: 1571).

Indeed, section 213 still speaks of a deduction ‘for medical care of the taxpayer, *his spouse*, or a dependent’ (italics added).

³ There is a catchall category for anyone else who has the same principal place of abode as the taxpayer and who is a member of the taxpayer’s household (26 USC s 152(d)(2)(H)). Nevertheless, given the further requirement that the taxpayer must provide more than one-half of the potential dependent’s support, this catchall category covers same-sex couples or unmarried different-sex couples at best tangentially (*ibid.*, s 152(d)(1)(C)).

taxpayer (26 USC s 152(a)). Thus, the basic picture of the household painted by the predecessor of section 213 was (and, arguably, still is today) that of the traditional, nuclear family of a breadwinner husband with a wife and children.

CREATING THE BODY FAMILY

But, in section 213, Congress does not merely construct a picture of the family that replicates the traditional, nuclear family norm. Neither does Congress merely sketch out what it considers to be the appropriate taxable unit. Instead, in section 213, Congress creates the body family as a separate person.

Since the enactment of the predecessor of section 213 in 1942, the traditional family has had the ability to aggregate its medical expenses regardless of whether the couple files a joint federal income tax return and, since 1948, regardless of whether the couple avails itself of the income-splitting privilege afforded to married different-sex couples through the joint return. In other words, even today, a taxpayer can deduct expenses paid for medical care rendered to his spouse (and dependents) notwithstanding that the taxpayer and his wife file separate federal income tax returns.

This ability to aggregate expenses even if the spouses actually constitute two separate taxable units is atypical. The payment of one taxpayer's expenses by another does not normally give rise to a deduction in the hands of the payor (*Welch v. Helvering*, 290 US 111, 114–15 (1933); *Jenkins v. Commissioner*, 47 TCM (CCH) 238 (1983)). Instead, the taxpayer whose expenses were defrayed has additional income—potentially includible in her gross income—and that taxpayer is normally the only one entitled to a deduction (*Old Colony Trust Company v. Commissioner*, 279 US 716, 729–30 (1929); *Estate of Slater*, 21 TCM (CCH) 1355 (1962); 26 CFR s 1.164-1(a); Revenue Ruling 75-301, 1975-2 CB 66; IRS Private Letter Ruling 87-33-002; see Dorocak, 2001: 5–27). Thus, the norm of focusing on the individual as the appropriate unit for federal income tax purposes usually dictates that spouses must file a joint federal income tax return—and become a single taxable unit—before one spouse can deduct (or obtain a credit for) expenses paid with respect to the other spouse (see, eg, 26 USC ss 21(e)(2), 25A(g)(6), 135(d)(3), 221(e)(2), 222(d)(4); but see *ibid.*, s 911(c)).

Section 213 takes exactly the opposite approach. It allows expenses to be aggregated across otherwise separate taxable units. A number of other Code provisions echo—and reinforce—this special treatment by allowing the traditional family to aggregate medical expenses even if the couple files separate federal income tax returns (see, eg, 26 USC ss 35(b)(2), (g)(5), 105(b), (c), 162(l), 220, 223; 26 CFR s 1.106-1). Taken together, these provisions create a separate entity—the body family—that exists wholly apart from the individual taxable units of husband, wife, and child (or children).

Though the ability to aggregate the expenses of individuals who constitute separate taxable units across returns is unusual, Congress's creation of the body family as a separate person for purposes of section 213—while otherwise continuing to treat the individual components of that body as separate taxable units—is not. Tax is an area that is replete with instances of embodiment and dis embodiment—that is, of merging two

separate persons into one, of splitting one person into two, and of recognising a collective as a group at some points and as a separate entity at others.

For example, the joint federal income tax return and the combination of sections 1041, 2056, and 2523 merge two separate and distinct individuals—the husband and wife—into ‘one economic unit’ for tax purposes (US Congress, 1981: 127). Yet, even though the marriage continues, the so-called innocent spouse rules can cleave this single economic unit into two when necessary to prevent the innocent spouse from being forced to pay for the tax misdeeds of the other spouse (26 USC s 6015(b)). Conversely, even after the marriage ceases and the couple formally becomes two separate taxpayers, the single economic unit will remain intact for tax purposes if either (1) the couple elects to continue income splitting under the alimony inclusion–deduction regime of sections 71 and 215 or (2) the couple makes property transfers to each other that are incident to their divorce and subject to section 1041.

In addition, an individual taxpayer can create a single-member limited liability company (‘LLC’) in many states. By default, such an entity will be disregarded for federal income tax purposes, meaning that these two persons will be treated as one for tax purposes (26 CFR s 301.7701-3(b)(1)(ii)). At some later point, however, the single owner could simply file the appropriate form with the Internal Revenue Service (‘IRS’) and elect to have the LLC treated as a separate entity, splitting the one taxpayer into two (*ibid.*, s 301.7701-3(c)(1)(i)). Similarly, a corporation will be recognised as a separate entity ‘even if it has only one shareholder who exercises total control over its affairs’ (Commissioner v. Bollinger, 485 US 340, 345 (1988)), effectively allowing an individual taxpayer to split herself into two (or more) at will.

Partnerships are perhaps most emblematic of how the Code can recognise a collective as a group at some points and as a separate entity at others. Partnerships are generally treated as an aggregate of individuals, as evidenced by section 701, which provides:

A partnership as such shall not be subject to the income tax imposed by this chapter. Persons carrying on business as partners shall be liable for income tax only in their separate or individual capacities.

At the same time, however, a partnership is treated as an entity for purposes of making most elections (eg, of accounting and depreciation methods) (26 USC s 703(b); 26 CFR s 1.703-1(b)(1)), for purposes of audit (26 USC ss 6221–31), and generally for purposes of determining the character of gain or loss on the disposition of an interest in the partnership (*ibid.*, s 741; but see *ibid.*, s 751). Similarly, S corporations are sometimes treated as an aggregate of individuals and sometimes as a separate entity (see *ibid.*, ss 1363, 1366, 1371, 1374).

All of these examples—from the coexistence of the joint return and the innocent spouse rules to the tension between the aggregate and entity treatment of partnerships and S corporations—underscore the mutability of personhood for tax purposes. If one taxpayer can so easily become two, two or more can become one, and they all can move continuously and seamlessly back and forth between these statuses, it should not be at all

surprising to find that same mutability surfacing—however partially—in the seemingly innocuous word ‘body’ in section 213.

CORPorealising THE BODY FAMILY

Yet, in creating the body family, Congress appears to go a step beyond its usual fluid notions of personhood. Through section 213, Congress appears to have actually mapped the physiological onto the political—and politicised—construct of the nuclear family for purposes of determining which expenses will be deductible as ‘medical care.’ In short, Congress appears to have corporealised the ‘body family.’

For purposes of section 213, ‘medical care’ is defined in part as ‘amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the *body*’ (italics added). What ‘body’ is Congress referring to in the latter part of this definition? At first glance, one would likely interpret the word ‘body’ to refer to the individual, physical bodies of the taxpayer, his spouse, and his dependents. But given the manner in which section 213 aggregates expenses and creates the body family as a separate person independent of the actual taxable unit, is that really the best or most appropriate interpretation of this word? Might this reference to the ‘body’ not more easily and logically be read as a reference to the collective, constructive ‘body family’?

It is common for illness or disease that strikes one part of your body to affect other parts of your body, whether directly or indirectly. Healing from surgery is usually a whole body experience, laying you up for days or weeks. Even something as minor as the common cold can leave you feeling ‘tired and miserable,’ because your body has directed all of its energy at fighting a virus in your nose or throat (WebMD, 2009). It is also common for an illness or disease that strikes one member of a family to affect other family members, whether directly or indirectly. You might catch that cold that your spouse or child brought home, or you might fight it off but still have to care for the person who is not feeling well. Some serious illnesses—for example, Alzheimer’s disease—can actually have an arguably more serious impact on those surrounding the person with the disease than they have on the afflicted individual.

Section 213 maps these effects of illness onto a ‘body,’ namely, the body family. If illness or disease strikes one part of the body family, the entire body family is considered to be affected in just the same way as other parts of my body are affected when I suffer a head cold. So, even if the taxpayer is not himself ill, an illness or medical condition that strikes his spouse or dependents (ie, other parts of the body family) is treated as affecting (infecting?) him, too, thereby permitting the taxpayer—as titular head of the body family—to take a deduction for medical expenses incurred to diagnose, treat, or cure that illness.

This corporealisation of the body family is perhaps most easily understood when considered from the perspective of the reproductive functions of the body. Reproduction is not a solitary function, by which I mean that the taxpayer/husband cannot reproduce on

his own.⁴ Rather, it takes the taxpayer *and* his wife—each contributing genetic material through a sexual union of two bodies—to reproduce on *their* own. In the context of section 213, reproduction can be seen not as a function of the individual taxpayer’s body, but as a function that can only truly be fulfilled by and through the body family, of which the individual taxpayer’s body forms no more than a part.

The different-sex married couple contemplated by section 213 may, however, experience fertility problems. In that situation, it will be necessary for the couple to seek outside medical assistance to fulfill their desire to reproduce. Different-sex couples ‘are generally advised to seek medical help if they are unable to achieve pregnancy after a year of unprotected intercourse’ (American Society for Reproductive Medicine, 2009).

Most infertility problems are treated with medication or surgery (American Society for Reproductive Medicine, 2009; Pratt, 2004: 1133). Intrauterine insemination may also be used to overcome certain problems (Pratt, 2004: 1133). If the couple still cannot achieve a pregnancy, then assisted reproductive technologies (‘ART’) such as in vitro fertilisation, intracytoplasmic sperm injection, and/or surrogacy (possibly with the help of a sperm or egg donor) may be contemplated (*ibid.*, 1133–34). These treatments can be rather costly and often are not covered by insurance, making them an excellent candidate for a deduction under section 213 if they qualify as ‘medical care’ (*ibid.*, 1123, 1135).

Though there has been some debate about whether infertility treatment qualifies as ‘medical care’ for purposes of section 213, commentators have made a strong case for allowing a deduction for the costs of such treatment. These commentators have argued that infertility treatment qualifies as ‘medical care’ under both prongs of the definition of that term in section 213: Infertility treatments both mitigate or treat a recognised medical condition (ie, infertility) *and* affect a structure or function of the body (ie, reproduction) (*ibid.*, 1126, 1144–61; Benjamin, 2004: 1130–32; Maule, 1982: 663). In addition, the IRS has issued a private letter ruling indicating that the costs associated with securing an egg donor qualify as medical expenses under section 213 (IRS Private Letter Ruling 2003-18-017). Similarly, the costs associated with surrogacy should qualify as medical expenses under section 213 because they constitute ‘payment for a substitute for the . . . diseased or impaired body part, . . . just as the costs of seeing eye dogs, human guides, and note takers are deductible’ (Pratt, 2004: 1159). Furthermore, in its most recent publication explaining the medical expense deduction to taxpayers, the IRS listed ‘fertility enhancement’ as a type of medical expense covered by section 213 (IRS Publication no 502 (2008) ‘Medical and Dental Expenses’ 8). Even Congress seems to expect that the cost of infertility treatments will normally qualify as a deductible medical expense (Pratt, 2004: 1160).

⁴ This may change if human cloning is permitted; however, even were cloning to be permitted, the individual to be cloned would still need to have a qualified individual perform the procedure. So, except in rare instances, even cloning should not be a solitary experience.

The different-sex married couple's ability to deduct the costs of using ART to achieve a pregnancy as medical expenses not only squares with, but also squares, the corporealisation of the body family. Infertility treatments, including ART, can easily be described in the reinterpreted terms of section 213. A function of the body family is to procreate (ie, to grow or extend the body family). If the body family attempts to procreate for a year without success (ie, if the different-sex couple working *together* cannot achieve a pregnancy in that time), an infertility problem is considered to exist. The body family must then seek medical treatment so that the illness or disease can be diagnosed and treated or, at the very least, mitigated. Naturally, the purpose of this treatment is to affect the reproductive function of the body family, by hopefully restoring it to good working order.

Section 213 further reifies the corporealisation of the body family when the incidence—and perceptions about the incidence—of infertility are also taken into account. In about 67 per cent of all cases, the infertility giving rise to the need for medical treatment (and, hence, deductible medical expenses) is associated with one or the other spouse, with the incidence split about evenly between male and female infertility factors (American Society for Reproductive Medicine, 2009). In 20 per cent of cases, the cause of an infertility problem is unexplained (*ibid.*). It is only in about 10 per cent of cases that both spouses experience infertility (*ibid.*). Accordingly, in the vast majority of cases, it is the infertility of a single spouse (or an undetermined factor) that affects the couple's ability to reproduce as a whole.

Given the incidence of infertility, the taxpayer/husband will, in many cases, have no fertility problems himself. Nonetheless, he will be allowed a deduction for his wife's infertility treatments so that *they* can reproduce *together*. In fact, as mentioned earlier, section 213 should go so far as to allow a deduction for the taxpayer/husband's expenses in obtaining replacement genetic material from an egg donor or a replacement womb from a surrogate (or possibly both) in order to mitigate his wife's infertility problems so that the couple can reproduce together. Although the wife's infertility treatment is directed at curing or mitigating her infertility issues, it cannot escape notice that the medical treatment of, or a medical substitution for, the infertile wife directly benefits the fertile husband by allowing him to fulfill his reproductive function. In other words, the infertility treatments of one spouse benefit both spouses—that is, they benefit the body family as a whole—by allowing them each to carry out (or obtain a suitable substitute or replacement for) their separate reproductive functions that can only result in procreation when the two work in tandem as the body family.

The benefit of medical treatment to both spouses/the body family is even clearer when the taxpayer/husband himself experiences infertility. Notwithstanding its actual incidence, infertility tends to be gendered feminine (Ikemoto, 1996: 1008). This is especially so when we think of ART, because no matter which spouse is infertile,

the technology is used on the woman. And it is the woman who is not pregnant. Therefore, as a normative matter, it is the woman who is in/fertile (*ibid.*, 1037).

Thus, when the taxpayer/husband is infertile and it is necessary to resort to ART, the fertile wife must still undergo medical procedures to overcome the taxpayer/husband's infertility and become pregnant. For example, the fertile wife might have to undergo intrauterine insemination. Or she might have to have her eggs extracted, fertilised in vitro (possibly using intracytoplasmic sperm injection), and implanted into her uterus. Or she might have to undergo both of these procedures multiple times to achieve a pregnancy. When resort to a sperm donor is necessary because of the taxpayer/husband's infertility, the wife still must undergo the same procedure(s) to achieve a pregnancy. In this situation, the taxpayer/husband is allowed a deduction under section 213 for medical treatment of his wife—who has no fertility issues at all. The purpose of the wife's treatment is not to cure or mitigate an illness or disease that she has or to affect a structure or function of her healthy body, but to overcome a disease (ie, infertility) that afflicts the taxpayer/husband. The corporealisation of the body family cannot be more clearly illustrated than when, as here, section 213 allows a deduction for the cost of medical treatment of a healthy person in order to mitigate the impact of a disease on the reproductive functioning of a different person's body so that the two can together—as the body family—fulfill their collective desire to procreate.

FURTHERING DOMINATION

Medicalising Procreation

By medicalising procreation as it does, section 213 always already furthers heteropatriarchal domination. Hopefully, the discussion in the previous sections provided ample evidence of the patriarchal aspect of this domination. With its construction and corporealisation of the body family, section 213 certainly betrays an outsized focus on the traditional family model of the taxpayer/husband with a wife and dependents.

At a more basic level, the patriarchal and the heterosexual aspects of this domination stem from the unceasing reference to 'infertility' treatments. Referring to ART as 'infertility treatment' conjures the image of a different-sex couple who is encountering difficulty getting pregnant. But this paints only the most partial of pictures of the groups who use ART to procreate (see Ikemoto, 1996: 1053–57).

Increasingly, same-sex couples and single men and women (whether straight or gay) use ART to create nontraditional families:

This is not a brave new world, but a fertile new world. Right up to the present we seem to exclusively link assisted reproductive technology with infertility. We have books like *Beyond Infertility: The New Paths to Parenthood* that itemize all of the assisted reproductive techniques to help a couple get a child of their own once they have confronted their inability to conceive. No mention is made of gay, lesbian, or single people who have no problems with their fertility. Yet increasing numbers of prospective single, gay, or lesbian mothers and fathers are availing themselves of these new paths to parenthood. For individuals in same-sex couples and for single people, the problem is not that their bodies do not

work, but that they do not have another's body to work with (Ehrensaft, 2005:5).

Psychologist Diane Ehrensaft has suggested that we 'take the emphasis off the problem of infertility and put it on the solution—a solution that embraces not just problems with an individual's reproductive system but also the choice to have a child without the traditional male–female coupling' (*ibid.*). Ehrensaft prefers the more accurate and inclusive term 'assisted conception' to refer to the use of these technologies in place of the more common—and overweeningly heteronormative—'infertility treatment' (or, the IRS's slightly more euphemistic 'fertility enhancement').

Dismembering Families

Yet, picking up again on the discussion in previous sections, there is a deeper level to section 213's furtherance of heteropatriarchal domination. While I was writing this essay, the US Tax Court issued a decision in *Magdalin v. Commissioner* (96 TCM (CCH) 491 (2008)). In that case, William Magdalin, a medical doctor who already had twin sons 'born through natural processes' during a former marriage, had two children using an egg donor and a surrogate. One child was born in 2005 and the other was born in 2006. Dr Magdalin did not suffer from infertility problems; in fact, '[a]t all relevant times, his sperm count and motility were found to be within normal limits.' In a passing reference to claims made on the basis of sexual orientation near the end of the opinion, the court hinted that Dr Magdalin is a gay man.

This case was before the Tax Court because Dr Magdalin claimed a deduction under section 213 for the expenses incurred with respect to the egg donor and the surrogate in these two pregnancies. Those expenses totaled \$52,310 in 2004 and \$43,593 in 2005, the taxable years at issue in the case. After taking into account the 7.5 per cent statutory floor on the deduction, Dr Magdalin claimed a \$34,050 medical expense deduction on his 2004 tax return and a \$28,230 medical expense deduction on his 2005 tax return.

The court ultimately decided that Dr Magdalin's expenses did not qualify as amounts paid for 'medical care,' as that term is defined in section 213. The expenses did not satisfy the first prong of that definition because Dr Magdalin was not suffering from an illness or disease (eg, infertility) that required diagnosis or treatment. The expenses did not satisfy the second prong of the definition of medical care because the treatments did not affect a structure or function of Dr Magdalin's body. Failing to qualify as medical expenses under section 213, the expenses that Dr Magdalin incurred with respect to the egg donor and surrogate were held to be nondeductible personal expenses (26 USC s 262).

The Tax Court's treatment of Dr Magdalin in this case portends the tax treatment of other nontraditional families attempting to conceive through the use of ART. In Dr Magdalin's case, the Tax Court and the IRS focused their attention both on the need for a medical diagnosis of infertility and on the taxpayer's 'male body.' The focus on the taxpayer's own individual body contrasts sharply with section 213's construction and corporealisation of the body family in the case of different-sex married couples. This dual

focus on a diagnosis of infertility and the corporeal body of the individual taxpayer creates the possibility of a constellation of tax treatments that vary depending on the composition of the nontraditional family.

In the case of unmarried different-sex couples, resort to ART will only be necessary where infertility actually does exist. At least some of the cost for the medical treatments for this infertility should be deductible under section 213. However, unless one partner is the dependent of the other for purposes of section 213 (see n 3 above), the Tax Court's and the IRS's focus on the effect of medical treatments on the taxpayer's own, individual body raises a question as to how far deductibility will go. For example, if the male partner in an unmarried different-sex couple is infertile, will treatments of the female partner be deductible because they mitigate the male partner's infertility or will the treatments be nondeductible because they do not affect the male partner's own individual body?

In the case of same-sex couples and single individuals, the Tax Court's and the IRS's dual focus may significantly limit the possibility of deducting expenses associated with ART. For lesbian couples and single women without fertility issues, it seems likely that the cost of obtaining donated sperm would not be deductible because of the lack of an infertility diagnosis and because the donated sperm does not, by itself, affect a structure or function of the woman's body.

The cost of intrauterine insemination using that donated sperm raises interesting questions. If the woman is fertile, would a deduction for the intrauterine insemination be disallowed on the ground that the procedure is not medically indicated, but merely a result of her personal choice as to how to reproduce? Or would a deduction be allowed on the ground that intrauterine insemination affects a structure or function of her body? Or would that ground for deductibility also be jeopardised by arguments about personal choice, especially in view of congressionally imposed restrictions on the deductibility of cosmetic surgery that are based on just such arguments? Compounding these questions, the IRS specifically argued in Dr Magdalin's case that it did 'not believe that procreation is a covered function of petitioner's male body within the meaning of section 213(d)(1).' Though unexplained, this assertion certainly lends itself to the interpretation that section 213 does not cover procreation as a function of an individual taxpayer's body, but only as a collective function of what I have termed the body family. This assertion may, therefore, indicate incipient hostility on the part of the IRS to arguments that an unmarried individual should be allowed to deduct the cost of ART under the second (ie, 'structure or function') prong of the definition of medical care in section 213.

If the woman is experiencing fertility problems (eg, there are several rounds of intrauterine insemination without producing a pregnancy), then it would seem that the cost of in vitro fertilisation (or possibly even a surrogate) would more likely be deductible as a medically indicated treatment for infertility (or as a substitute for the impaired body part). But is the cost of donated sperm a part of this medically indicated treatment or, in keeping with the IRS's views concerning section 213's limited coverage of the procreative function, just an action by an indispensable 'other'?

For gay couples and single men without fertility issues, Dr Magdalin's case is particularly instructive. For them, none of the expenses of ART will be deductible both because they lack a diagnosis of infertility and because none of the ART procedures will be performed on their bodies. For a man with infertility issues, a question arises as to what exactly will be included under the rubric of infertility treatment for purposes of section 213? Will the costs associated with in vitro fertilisation and surrogacy be deductible because they mitigate the effects of male infertility? Or, as with the unmarried different-sex couple, will these costs not be deductible because the treatments do not affect the man's own body?

Encouraging One Family Form and Discouraging All Others

In each of these situations, the questions about the deductibility under section 213 of expenses associated with ART stem directly from the sharp distinctions drawn in that provision between traditional and nontraditional families. On the one hand, section 213 both constructs and corporealises the traditional family. By treating the traditional family as a single 'body,' section 213 elides questions about the necessary identity of the recipient of medical treatment. This is best illustrated by the ability of an infertile taxpayer/husband to deduct the cost of ART treatment administered to his fertile wife. On the other hand, in the case of nontraditional families, section 213 places questions about the identity of the recipient of medical treatments front and center in any analysis of the deductibility of expenses associated with ART. These questions come to the foreground because section 213 generally works to dismember nontraditional families. In other words, section 213 refuses to see the nontraditional family as a unit capable of procreation. Instead of seeing a family, section 213 sees an individual who, by himself or herself, is incapable of procreation.⁵

This dismembering of nontraditional families contributes significantly to section 213's furthering of heteropatriarchal domination. For unmarried heterosexual couples experiencing infertility problems, section 213 creates a powerful economic incentive to marry so that the federal government will help to defray the costs of potentially expensive infertility treatments. For same-sex couples and singles, section 213 will often deny that possibility outright, effectively placing ART out of the reach of all but the most affluent of same-sex couples and singles (ie, those who can afford to pay for these procedures out of their own pocket). Thus, even beyond the normative privileging of traditional over nontraditional family arrangements, section 213 creates a financial incentive for affected

⁵ These sharp distinctions between traditional and nontraditional families are replicated and reinforced wherever section 213 and its standards are incorporated by reference in the Code. For example, even were coverage for ART treatments covered under an employer-provided health insurance plan, section 105(b) only allows a plan's reimbursements for such treatments to be excluded from gross income if those treatments qualify as "medical care (as defined in section 213(d)." In addition, a payment of another's medical expenses cannot escape gift tax unless it is made to a person who provides "medical care as defined in section 213(d)." 26 USC s 2503(e)(2)(B).

different-sex couples to marry and erects a financial barrier to procreation by same-sex couples and single individuals.

References

American Society for Reproductive Medicine (2009) 'Frequently Asked Questions About Infertility' <http://www.asrm.org/Patients/faqs.html#Q2>.

Andrews, WD (1972) 'Personal Deductions in an Ideal Income Tax' 86 *Harvard Law Review* 309.

Benjamin, AL (2004) 'The Implications of Using the Medical Expense Deduction of I.R.C. § 213 to Subsidize Assisted Reproductive Technology' 79 *Notre Dame Law Review* 1117.

Bittker, BI and Lokken, L (1999) *Federal Taxation of Income, Estates & Gifts* (Boston, Warren, Gorham and Lamont).

Cain, PA (1991) 'Same-Sex Couples and the Federal Tax Laws' 1 *Tulane Journal of Law and Sexuality* 97.

-- (2000) 'Death Taxes: A Critique from the Margin' 48 *Cleveland State Law Review* 677.

Crawford, BJ (2005) 'The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law' 3 *Pittsburgh Tax Review* 1.

Defense of Marriage Act (1996) Public Law 104-199, 110 *Statutes at Large* 2419.

Dorocak, JR (2001) 'The Clintons' Legal Defense Fund: Income from Payment of Legal Expenses of Another and Deductibility of Such Expenses' 104 *West Virginia Law Review* 1.

Ehrensaft, D (2005) *Mommies, Daddies, Donors, Surrogates: Answering Tough Questions and Building Strong Families* (New York, Guilford Press).

Haraway, DJ (1991) *Simians, Cyborgs, and Women: The Reinvention of Nature* (New York, Routledge).

Ikemoto, LC (1996) 'The In/Fertile, the Too Fertile, and the Dysfertile' 47 *Hastings Law Journal* 1007.

Joint Committee on Taxation (1983) *General Explanation of the Revenue Provisions of the Tax Equity and Fiscal Responsibility Act of 1982* (Washington, DC, US Government Printing Office).

Kahn, JH (2002) 'Personal Deductions—A Tax “Ideal” or Just Another “Deal”?' 2002 *Law Review of Michigan State University—Detroit College of Law* 1.

Maule, JE (1982) 'Federal Tax Consequences of Surrogate Motherhood' 60 *Taxes* 656.

Pratt, KT (2004) 'Inconceivable? Deducting the Costs of Fertility Treatment' 89 *Cornell Law Review* 1121.

Revenue Act of 1918, ch 18, 40 *Statutes at Large* 1057.

Revenue Act of 1942, Public Law 77-753, 56 *Statutes at Large* 798.

Revenue Act of 1948, Public Law 80-471, 62 *Statutes at Large* 110.

Revenue Act of 1951, Public Law 82-183, 65 *Statutes at Large* 452.

Seidman, JS (1954) *Seidman's Legislative History of Federal Income and Excess Profits Tax Laws: 1953-1939* (New York, Prentice-Hall).

Staudt, NC (1996) 'Taxing Housework' 84 *Georgetown Law Journal* 1571.

Surrey, SS (1973) *Pathways to Tax Reform: The Concept of Tax Expenditures* (Cambridge, MA, Harvard University Press).

Tax Reform Act of 1986, Public Law 99-514, 100 *Statutes at Large* 2085.

US Congress (1942) *Congressional Record* vol. 88.

-- (1981) 'Economic Recovery Act of 1981' *Senate Report* 97-144.

-- (1984) 'Deficit Reduction Act of 1984' *House of Representatives Report* 98-432.

War Revenue Act (1917) ch 63, 40 *Statutes at Large* 300.

WebMD (2009) 'Understanding Common Cold—Basics' <http://www.webmd.com/cold-and-flu/cold-guide/understanding-common-cold-basics>.