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Bringing Sexual Orientation and Gender Identity into the Tax Classroom

Anthony C. Infanti

Over the past few years, the Law School Admission Council (LSAC) has undertaken several empirical studies on the law school climate for lesbian, gay, bisexual, and transgender (LGBT) students. In a report that recently appeared in the *Journal of Legal Education*,[1] several members of LSAC's subcommittee on LGBT issues analyzed the data produced by these studies. The subcommittee members reported that, despite improvement in the past decade, LGBT students "still encounter[] substantial discrimination on law school campuses and in law school classrooms."[2] Indeed, "[n]early a quarter of [LGBT] respondents to the study reported that they had witnessed or experienced discrimination in law school because of their sexual orientation or identity."[3] As a result, many LGBT law students "feel disenfranchised from their broader law school communities," causing them to "not feel safe 'coming out' on law school campuses" and to "go back into the closet in law school."[4]

In an appendix of "best practices," the subcommittee members included a myriad of suggestions for improving the law school climate for LGBT students. Among them is a recommendation to cover LGBT issues in non-LGBT classes:[5]

> Inclusion of such issues is important for several reasons: (1) it serves an important expressive value because it signals the integration and value of [LGBT] perspectives by all faculty; (2) it helps validate [LGBT] experiences and makes [LGBT] persons visible in the classroom and larger community;

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1. Kelly Strader et al., An Assessment of the Law School Climate for GLBT Students, 58 J. Legal Educ. 214 (2008).
2. *Id.* at 214.
3. *Id.* at 221.
4. *Id.* at 214.
5. *Id.* at 241.

> and (3) it is relevant to the professional goals of many [LGBT] students who came to law school to advocate in this area.[6]

For these and other reasons,[7] I include coverage of sexual-orientation-related issues in my tax courses, especially in my basic income tax and estate and gift tax courses.

Interestingly, I experience some of the same trepidation in raising LGBT issues in these decidedly non-LGBT courses that many of the surveyed LGBT students reported.[8] In the generally conservative environment of law school, I always have some concern about how students will receive the discussion. Given that I am open about being gay, will they tap into negative stereotypes and think that I am proselytizing? Will my credibility as a teacher be undermined in their eyes? Will the discussion remain respectful and will I be able to manage it appropriately? Will students complain to the administration that my class is too "political" or will my end-of-semester student evaluations be negatively affected?

For the most part, my fears were groundless. Bringing sexual orientation into the classroom has generally proved to be exciting, as I watch many of my heterosexual students' eyes open wide when they become conscious of the practical, everyday impact of sexual-orientation-based discrimination on lesbians and gay men. For my lesbian and gay students, I hope that these discussions serve the expressive and validating functions described by the LSAC subcommittee members in the text quoted above.

To achieve these results, I find it important to keep sexual-orientation-based discrimination from being perceived as an abstract impact on some "other" person whom the students do not know and with whom they have no connection. To establish the personal connection that helps students empathize with lesbians and gay men as they face a hostile tax system,[9] I use narrative to frame the discussion. Sometimes the narrative is my own, other times it is the

6. *Id.* at 223.

7. Among the other reasons is an attempt to integrate my research and teaching interests. *See, e.g.,* Anthony C. Infanti, The Internal Revenue Code as Sodomy Statute, 44 Santa Clara L. Rev. 763 (2004). In keeping with this aim, it is worth noting that I also raise other critical perspectives in classroom discussions (e.g., those based on race, gender, and class), and I have been working on a critical tax reader with Bridget Crawford that can be used as a classroom supplement to provide a perspective on tax that is absent from most tax textbooks. *See* Critical Tax Theory: An Introduction (Anthony C. Infanti & Bridget J. Crawford eds., Cambridge University Press, New York, forthcoming, 2009).

8. Only 43.8% of respondents reported that they were "very comfortable" discussing LGBT issues in class. Strader et al., *supra* note 1, at 225. The reports of a strong majority of the respondents ranged from "somewhat comfortable" (28.9%) to "comfortable in some cases, but not others" (14.6%) to "somewhat uncomfortable" (11%) to "very uncomfortable" (1.7%) discussing LGBT issues in class. *Id.*

9. For an explanation of why I characterize the tax system as hostile to LGBT persons, see Anthony C. Infanti, Deconstructing the Duty to the Tax System: Unfettering Zealous Advocacy on Behalf of Lesbian and Gay Taxpayers, 61 Tax Law 407, 422-36 (2008).

story of family or friends, and yet other times I create a hypothetical situation for the students. Narratives provide students with concrete situations that, in most cases, real people have confronted as they apply the tax laws to their lives. Set against the general background of the "neutral" tax rules that we are studying, these concrete situations make it easier both for the students to see how differences in treatment play out and for me, as the teacher, to discuss the policy issues raised by differential treatment based on sexual orientation.

To help others interested in bringing sexual orientation and gender identity into their tax classes, I have identified several areas likely to be covered in tax courses in which a discussion of LGBT issues is relevant. This list is not exhaustive, but provides a starting point for thinking about when and how one might bring sexual orientation and gender identity into the tax classroom. At the same time, I would not (and do not) raise LGBT issues in class at every turn for fear of undercutting the intended impact of these discussions. Nonetheless, there is a distinct need to integrate at least some discussion of LGBT issues into the tax classroom. In fact, in one of the LSAC climate surveys, tax was the non-LGBT course that the least number of students identified as addressing LGBT issues.[10]

The general areas of the tax curriculum that I have identified for inclusion here are: fringe benefits, health insurance, attribution rules, medical expenses, property transfers, and income splitting. In each of these areas, I first discuss the general tax rules that serve as the backdrop for the discussion. Next, I recount a narrative that—in a concrete, personalized setting—raises the question of how these general tax rules apply to LGBT individuals. I then explain how the rules apply to the situation faced by the LGBT individual(s) in the narrative. Finally, I explore some of the policy considerations that one might raise (or that might surface on their own) in the course of a class discussion of the narrative situation.

I. Fringe Benefits

A. Background

Under § 61, gross income includes all income from whatever source derived, including compensation for the performance of personal services. If compensation is paid in property or services, then the fair market value of that property or those services must normally be included in gross income.[11] Nevertheless, § 132 contains a series of exceptions to this general rule that allow employees to exclude certain fringe benefits from their gross income.

Section 132(a)(1) and (2) exclude from an employee's gross income the value of any no-additional-cost service provided by an employer to the employee as well as the bargain element of certain employee discounts on property or services offered by the employer for sale to customers in the ordinary course

10. Strader et al., *supra* note 1, at 224 n.36.

11. Treas. Reg. § 1.61-2(d)(1) (as amended in 2003).

of business.[12] This exclusion applies equally to no-additional-cost services and discounts provided to the spouse and dependent children of an employee.[13] For this purpose, as is generally the case for federal tax purposes, whether a different-sex couple is married–and, therefore, whether an individual qualifies as the "spouse" of the taxpayer–is determined by reference to state (and not federal) law.[14]

B. How Do These Rules Apply to Same-Sex Couples?

When teaching § 132, I always use the example of free air travel by airline employees because it requires students to sift through § 132 and the associated regulations to find and apply the relevant rules concerning the exclusion for no-additional-cost services. In doing the problems in their textbook,[15] students learn how to jump back and forth within the statute–and between the statute and the regulations. They also quickly realize that this fringe benefit is tax free not only to the airline employee, but also to the employee's spouse and children and, in contrast to all other no-additional-cost services, even when provided to the employee's parents.[16]

Once we have completed the problems assigned in the textbook,[17] I tell my students that my partner is an airline employee. The airline for which he works offers domestic partner benefits, which makes me eligible for free travel on that airline (as well as discounted travel on other airlines under reciprocal agreements). Because this is the first time we encounter the intersection of sexual orientation and tax in the course, I then tell my students about the federal Defense of Marriage Act (DOMA), which provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[18]

Thus, even though my partner and I were married in Canada several years ago, I cannot qualify as his "spouse" for purposes of federal law, including

12. I.R.C. § 132(a)(1), (2), (b), (c) (2008).

13. *Id.* § 132(h)(2).

14. Boyter v. Comm'r, 668 F.2d 1382, 1385 (4th Cir. 1981) ("We agree with the government's argument that under the Internal Revenue Code a federal court is bound by state law rather than federal law when attempting to construe marital status."); *cf.* 1 U.S.C. § 7 (2008) (providing a federal rule for determining the marital status of same-sex couples that overrides any inconsistent state rule).

15. Joel S. Newman, Federal Income Taxation: Cases, Problems, and Materials 114-15 (3d ed., West, St. Paul, MN, 2005).

16. I.R.C. § 132(h)(3) (2008).

17. Newman, *supra* note 15, at 114-15.

18. 1 U.S.C. § 7 (2008).

federal tax law. This means that although my partner's parents and any children that we might have will all be able to take advantage of this fringe benefit on a tax-free basis, I cannot. In fact, whenever I fly "free," my partner sees the income in his next paycheck increased by the value of my flight,[19] and his employer withholds additional taxes from his pay to cover what he owes on this increase in his income.

Students are sometimes surprised to find that the same holds true for same-sex couples who have entered into a valid marriage in, for example, Massachusetts or Connecticut, because those states recognize same-sex marriages for state law purposes, including for purposes of state tax law.[20] In this respect, DOMA departs from the general rule (mentioned above) that the federal tax laws defer to state law on questions of determining a couple's marital status. DOMA singles out certain marriages that are recognized under state law (i.e., those entered into by same-sex couples) and denies them recognition for federal tax purposes.

C. Policy Issues

This differential treatment raises serious equity concerns. In its conventional sense,[21] the tax notion of "horizontal" equity would seem to dictate that two similarly situated taxpayers with similar income should be taxed similarly. But, in this situation, my partner is taxed more heavily than his married heterosexual co-workers receiving the same fringe benefit. The sole basis for treating these two taxpayers—who have received the same item of income from the same employer as compensation for their performance of personal services—is the sex of the respective taxpayer's spouse. Under the applicable rules, a free flight provided to a same-sex spouse is taxed while a free flight provided to a different-sex spouse is tax free.

Interestingly, when my partner's airline adopted its domestic partner benefits policy, it probably thought that it was eliminating just this sort of discrimination. The airline was trying to do the "right" or "fair" thing by providing all of its employees with equal pay for equal work; however, the federal government has foiled the airline's attempt to equalize the treatment of its employees. Through the tax laws, the federal government has stepped in to reinstate the discriminatory treatment of the airline's lesbian and gay employees that existed prior to the adoption of the domestic partner benefits

19. The rules for valuing this benefit are found in Treas. Reg. § 1.61-21(h) (as amended in 1992).

20. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Mass. Dep't Revenue, Tech. Info. Release 04-17, at ¶ D(1)(b)(i) (July 7, 2004); *see* Conn. Dep't Revenue Servs., Connecticut Resident Income Tax Return and Instructions 13 (2007) (indicating that, even before the advent of same-sex marriage in Connecticut, same-sex couples who had entered into a civil union in Connecticut would generally be treated the same as married couples for Connecticut tax purposes, even though they were not treated so for federal tax purposes).

21. For a warning that care should be taken in applying the conventional sense of tax equity to members of traditionally subordinated groups, see generally Anthony C. Infanti, Tax ~~Equity~~, 55 Buff. L. Rev. 1191 (2008).

policy. In other words, the federal government has ensured that, by reason of the application of the tax laws, the airline will still only be able to provide its lesbian and gay employees with a lesser fringe benefit package than the airline provides its heterosexual employees. By interfering in this way with an employer's ability to equalize the compensation packages of its employees, § 132 also raises serious concerns about the neutrality of the tax laws.

II. Health Insurance

A. Background

The tax treatment of employer-provided accident or health insurance coverage is related to the topic of fringe benefits, though it might just as well be covered separately in connection with a discussion of the exclusion under §§ 104 and 105 for amounts received by an employee through accident or health insurance plans for personal injuries or sickness. Again, as a starting point, § 61 includes in gross income all income from whatever source derived, including compensation for the performance of personal services. If compensation is paid in property or services, then the fair market value of that property or those services must normally be included in gross income.[22]

Section 106(a) allows an employee to exclude from gross income the value of "employer-provided coverage under an accident or health plan." By regulation, this exclusion is expanded to encompass the value of coverage provided to the spouse and dependents of the employee as well.[23] Thus, the value of an employer's contribution toward accident or health insurance for its employees, their spouses, and their dependents is free of tax.

To determine the tax treatment of amounts paid out under employer-provided accident or health plans, one must turn to §§ 104 and 105. On the one hand, § 105 applies to employees who were able to exclude the value of employer-provided accident or health coverage from gross income under § 106. Under § 105(b), the employee can further exclude from gross income payments made under the accident or health insurance plan for the medical care of the employee, a spouse, or a dependent. Section 105(c) additionally permits an employee to exclude from gross income payments compensating for permanent loss or loss of use of a part or function of the body or for permanent disfigurement of the employee, a spouse, or a dependent, so long as the payment is not computed by reference to the time absent from work. Under § 105(a), payments not falling within either of the foregoing two categories are includible in gross income. Section 104, on the other hand, applies to employees who paid for accident or health coverage with after-tax dollars. Under § 104(a)(3), to the extent that an employee (1) directly paid for accident or health coverage and/or (2) was required to include employer-paid premiums for such coverage in gross

22. Treas. Reg. § 1.61-2(d)(1) (as amended in 2003).

23. *Id.* § 1.106-1 (1960); Prop. Treas. Reg. § 1.106-1, 72 Fed. Reg. 46,421 (Aug. 20, 2007); Notice 2004-79, 2004-49 I.R.B. 898.

income, then a proportionate part of amounts paid out under that coverage for personal injury or sickness of the employee, a spouse, or a dependent are excluded from gross income.[24]

B. How Do These Rules Apply to Same-Sex Couples?

Many employers, including my own and my partner's, now offer accident and health insurance coverage for the domestic partners of their employees.[25] We thus have a choice between two different health insurance plans, and it would seem to make sense for the two of us to opt for whichever plan provides the best coverage for the least cost. In terms of coverage, both my partner and I judge my employer's plan to be the better of the two. But how much would it cost for my partner to switch to my plan?[26]

Currently, my partner pays $60 per month (deducted from his salary on a pretax basis) toward his health insurance coverage while I pay nothing toward mine. My employer subsidizes the health insurance coverage of domestic partners to the same extent that it subsidizes the coverage of the spouses of its married heterosexual employees. If I were to add my partner to my health insurance coverage, my contribution toward my health insurance coverage would immediately increase from $0 to $141. This is the same nominal increase that a married different-sex couple would experience; however, my married co-workers are able to have this amount deducted from their pay on a pretax basis.[27] I cannot.[28] If I were able to have this amount deducted from pay on a pretax basis, I would be able to save nearly $40 in taxes per month (assuming that my marginal tax rate is twenty-eight percent). This means that my married co-workers with the same marginal tax rate effectively pay only $101 (after taking into account the tax savings) toward their spouses' health insurance, while I would pay the full $141 out of pocket if I were to add my partner to my coverage. Each year, I would pay a total of $480 more than my married heterosexual colleagues for the same health insurance coverage. This is a significant disparity and one that militates against the possibility that my partner and I would choose to add him to my health insurance coverage.

24. Treas. Reg. §§ 1.104-1(d) (as amended in 1970); 1.105-1(c), (d) (as amended in 1964).

25. Human Rights Campaign Found., The State of the Workplace for Gay, Lesbian, Bisexual and Transgender Americans: 2006–2007, at 1 (2007) (indicating that a majority of Fortune 500 companies offer domestic partner benefits).

26. For purposes of the discussion in the text below, I have omitted payroll taxes from this calculation because most basic income tax courses do not entail the study of payroll taxes. To raise this issue, one could mention that the amounts discussed in the text below actually understate the cost of adding a domestic partner to an employee's health insurance coverage because of the need to factor into such cost the payroll taxes that would apply to the additional compensation income.

27. Rev. Rul. 2002-3, 2002-1 C.B. 316; *see* Prop. Treas. Reg. § 1.125-1(a)(2), (3)(B), 72 Fed. Reg. 43,938 (Aug. 6, 2007).

28. Prop. Treas. Reg. § 1.125-1(h)(2)-(3), 72 Fed. Reg. 43,938 (Aug. 6, 2007).

But this possibility grows increasingly remote once we add to the balance the additional income tax due on my employer's contribution toward this coverage. Unless my partner were to qualify as my "dependent," which he does not, the excess of the fair market value of his health insurance coverage over the amount that I paid toward that coverage would be deemed additional compensation income to me.[29] My married heterosexual co-workers who add their different-sex spouses to their health insurance coverage are not taxed on this amount.[30]

Assuming that the fair market value of the coverage provided to my partner over the amount that I contribute toward that coverage is equal to the increase in my employer's monthly contribution toward my health insurance coverage, my income would increase each month by the amount of $411. Again assuming a marginal tax rate of twenty-eight percent, I would owe an additional $115 in income tax each month on this amount. That brings the total cost to $256 per month to switch my partner to my health insurance plan—this is two and one-half times what it would cost my married heterosexual co-workers in the same tax bracket to do the same thing. This creates a radically different cost-benefit analysis for two otherwise similarly situated employees. In the end, we naturally decided that the enhancement in coverage that my (thankfully, healthy) partner would get from switching to my health insurance plan was not worth the more than $3,000 per year that it would cost us.

C. Policy Issues

The tax treatment of employer-provided health insurance coverage raises the same horizontal equity and neutrality concerns that were mentioned above in connection with the discussion of the exclusion for no-additional-cost services under § 132. The tax laws draw a sharp distinction between similarly situated taxpayers receiving the same benefits package from the same employer–based solely on the sex of the employee's spouse. This differential tax treatment either discourages the employee from adding her partner to her health insurance coverage or requires the employee to forfeit a significant additional amount of her salary (in comparison to her similarly situated heterosexual colleagues) to obtain the same fringe benefit.

Especially at a time when health insurance is near the top of the national agenda, the narrative in the previous section also raises an issue concerning the erection of senseless barriers to gaining access to the best available health insurance coverage. In attempting to convince an employer to establish a domestic partner benefits policy, one of the key selling points is that the cost to the employer is remarkably low. Indeed, one study found that nearly two-thirds

29. I.R.S. Priv. Ltr. Rul. 2003-39-001 (June 13, 2003). It is worth noting that, because the premiums for this coverage would be taxable to me, amounts paid out under that coverage for personal injury or sickness of my partner would be excluded from my gross income under § 104(a)(3). *Id.*; *see also, e.g.*, I.R.S. Priv. Ltr. Rul. 2008-46-011 (Aug. 8, 2008); I.R.S. Priv. Ltr. Rul. 2008-41-013 (July 1, 2008).

30. *See supra* note 23.

of employers experience "a total financial impact of less than 1 percent of total benefits cost" and that "[r]ates of enrollment have not been particularly high."[31] The low enrollment is most commonly explained as a result of either (1) an employee's fear of discrimination if she "outs" herself by asking to add her domestic partner to her health insurance coverage or (2) the availability of health insurance coverage through the domestic partner's own employer.[32] Generally left out of the discussion, however, is the possibility that the tax cost of the benefits makes adding a partner—especially one with existing coverage through her own employer—prohibitively expensive, even if that coverage would provide better health care for the partner. Query whether the rates of enrollment for domestic partner health insurance coverage would experience a dramatic increase if the tax treatment of same-sex and different-sex couples were equalized.

The tax treatment of employer-provided accident and health insurance further raises concerns about stigmatization. The only way around the added tax costs described in the previous section is for the lesbian or gay employee's partner to qualify as his or her dependent for tax purposes. To meet this requirement, the employee must provide more than one-half of the partner's support, the two must share the same principal place of abode, and the partner must be a member of the employee's household.[33] Where both partners work, it will often be difficult to satisfy the support prong of this test. But, even if the employee does provide the requisite level of support and can qualify the partner as a tax dependent, what does this say about their relationship?

When one married different-sex spouse provides the other with health insurance coverage through work, the value of that benefit is excluded from gross income regardless of whether both spouses are employed, regardless of their individual levels of income, regardless of their relative financial contributions to maintaining their household, and even regardless of whether they actually live together. Married different-sex spouses are treated for this and other tax purposes as a single economic unit—two individuals working together (whether inside or outside the home) toward the common goal of making a life together. In contrast, same-sex couples who qualify for the same tax treatment as married different-sex couples are not treated as co-venturers in this joint enterprise, but as a breadwinner and a "dependent." A different-sex spouse who works in the home is not labeled a "dependent" of the spouse who works in the paid labor market; she is still simply a "spouse" for tax purposes.[34]

31. Human Rights Campaign, Domestic Partner Benefits: Cost and Utilization, http://www.hrc.org/issues/workplace/benefits/4827.htm (last visited Nov. 29, 2008).

32. *Id.*

33. I.R.C. §§ 105(b), (c), 152(a), (d) (2008); Prop. Treas. Reg. § 1.106-1, 72 Fed. Reg. 46,421 (Aug. 20, 2007); Notice 2004-79, 2004-49 I.R.B. 898.

34. I.R.C. § 152(b)(2) (2008) ("An individual shall not be treated as a dependent of a taxpayer under subsection (a) if such individual has made a joint return with the individual's spouse under section 6013 for the taxable year beginning in the calendar year in which the taxable year of the taxpayer begins."); *id.* § 152(d)(2)(H) (excluding spouses from the definition of

However, a same-sex partner engaged in precisely the same work in the home[35] is labeled a "dependent" of the partner who works in the paid labor market—as if the stay-at-home partner were contributing nothing at all of value to the relationship.

Finances are a source of stress in any relationship. The tax laws only exacerbate that stress when they mark one partner as nothing more than a financial drag on the other, regardless of the contribution that she makes to the relationship. Though same-sex couples in this situation manage to circumvent the additional tax costs normally associated with domestic partner health insurance coverage, they still do pay a price—in terms of the stigmatization of their relationship—in order to obtain a valuable fringe benefit that is readily available to, and easily accessible by, married different-sex couples.

III. Attribution Rules

A. Background

It is often said that our tax system is premised on the notion that all taxpayers are "self-interested, unaffiliated individuals—the atomistic rationalists of the classic economic model."[36] When a taxpayer is dealing with strangers, this assumption might be correct; however, when a taxpayer is dealing with family members, this assumption is either incorrect or will likely prove incorrect, both because there is an affiliation between the taxpayer and the family member and because family ties may overcome self-interest. Anticipating these possibilities, Congress has peppered the Internal Revenue Code (Code) with rules that take account of this probable lack of self-interested, arm's length dealing. For example, when a family member acquires the taxpayer's debt from an unrelated creditor, § 108(e)(4) treats the taxpayer as having acquired the debt herself for purposes of determining whether she has discharge of indebtedness income. In addition, § 267(a)(1) disallows the deduction for any loss realized on a sale or exchange of property between family members, and § 1031(f) strips a previous like-kind exchange between family members of the benefits of nonrecognition treatment if one of them disposes of the property received in the exchange within two years of the exchange. Furthermore, § 302(c) takes into account the ownership of family members in determining whether a corporation's redemption of its stock sufficiently altered the redeeming shareholder's interest in the corporation such that it should be treated as more akin to an arm's length sale or exchange than a distribution of property from the corporation to the shareholder.

"qualifying relative").

35. Take, for example, my sister, who, as described *infra* Part VI, was a stay-at-home mother for more than four years so that she could care for her and her partner's children.

36. *See generally* Theodore P. Seto, The Unintended Tax Advantages of Gay Marriage, 65 Wash. & Lee L. Rev. 1529, 1538 (2008).

Though many of the adjustments in the Code that take account of family relationships are–like §§ 108(e)(4), 267(a)(1), 1031(f), and 302(c)–in the nature of anti-abuse rules, others are designed to benefit taxpayers. For example, the special estate tax valuation rule for family farms and real property held by small businesses in § 2032A applies only if the property passes to a "qualified heir," who must be a "member of the decedent's family." In addition, a corporation that exceeds the 100-shareholder limit on eligibility to make an S election can nonetheless elect pass-through tax treatment if attribution rules bring the corporation within the limit. For this purpose, attribution rules in § 1361(c)-(1)(A) treat both husbands and wives and all members of a family as single shareholders. Furthermore, § 121(b)(2)(A)(i) allows one spouse's ownership of property to be attributed to the other for purposes of determining whether the couple will be allowed one or two $250,000 exclusions from gross income for gain recognized on the sale of a principal residence.

B. How Do These Rules Apply to Same-Sex Couples?

While the legal relationship between husband and wife is always taken into account in the formulation and application of these attribution rules,[37] the legal relationship between two same-sex partners (whether married, in a civil union, or in a domestic partnership) never is.[38] This means that same-sex partners are treated as self-interested strangers for purposes of all of these rules that make adjustments to take into account family relationships. To illustrate the different ways in which these rules apply to same-sex and different-sex couples, I have chosen two of the rules mentioned in the background section above: From the anti-abuse category, I will discuss the loss disallowance rule in § 267(a)(1). From the category of adjustments that benefit taxpayers, I will discuss the § 121 exclusion for gain recognized on the sale of a principal residence.

1. Section 267

I own a bit of stock in an insurance company that I inherited from my father when he passed away some eight years ago. (My father, who was never wealthy and never owned any other stock, received this stock when the insurance company from which he had purchased a small life insurance policy converted from a mutual insurance company to a stock insurance company.) This stock has plummeted in value during the past several months. If I were to sell these shares to my partner for their current fair market value in cash, I would realize and recognize a loss.[39] I would be able to deduct that loss for purposes of computing my federal income tax (either against my capital

37. *See id.* at 1541 ("Spouses are related parties for purposes of *all* related-party rules applicable to individuals....").

38. *Id.* at 1543 ("gay marriage by itself never invokes *any* related-party rules–taxpayer-favorable or anti-abusive").

39. I.R.C. § 1001(a), (c) (2008).

gains or, more likely, up to $3,000 of my ordinary income) because we are not recognized as "family" for purposes of § 267.[40] In the end, I would be able to reduce my federal income tax burden without really parting with those shares of stock, which would remain within what I consider to be–notwithstanding Congress's protestations to the contrary–my family. A married different-sex couple in that same situation would be barred from recognizing this "paper" loss because they are considered family by § 267.[41]

2. Section 121

My partner and I each owned a home when we met. After we were together for a few years, we decided that it made sense for me to sell my home and to move into my partner's home. When we first began discussing this consolidation of our living arrangements, my partner floated the idea of my simply moving in to his home without changing the title to the property, because a title change would trigger the payment of several thousand dollars of state and local real estate transfer taxes. (Though these taxes do not apply to transfers between spouses, they do apply to transfers between same-sex partners.)[42] As discussed briefly in Part V below, for tax and nontax reasons, we ultimately decided against this course of action; however, it is worth exploring here some of the tax reasons why we rejected this option.

In order to avoid potential gift tax issues from this arrangement, I would have had to pay monthly rent to my partner, and he would have had to include those rental payments in his gross income and pay income tax on them.[43] More to the point, however, this arrangement would have required us to forego the ability to benefit (at least in part)[44] from two § 121 exclusions for gain recognized on the sale of a principal residence. To benefit from the exclusion, § 121 requires the taxpayer to have owned and used the property as a principal residence for two years during the five-year period prior to the sale.[45] Even though both of us would have been living in the house and using it as a principal residence, my partner–as the sole "owner"–would have been the only one entitled to the exclusion under § 121 upon a sale of the property. In contrast, a similarly situated married different-sex couple filing a joint federal income tax return

40. *Id.* §§ 165(c)(2), 267(b), (c)(4), 1211(b).

41. The married different-sex couple's loss is additionally disallowed by § 1041, which is discussed *infra* Part V.

42. 72 Pa. Stat. §§ 8101-D, 8102-C, -C.3(6) (2008).

43. I.R.C. § 61(a)(5) (2008); *see* Dickman v. Comm'r, 465 U.S. 330 (1984) (intrafamily, interest-free loan gave rise to a taxable gift in the amount of the foregone interest); 5 Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates, and Gifts ¶ 121.3.4 (2d. ed., Warren, Gorham & Lamont, Boston, 1993) (discussing the application of this case to the rent-free use of property).

44. *See infra* Part V for a discussion of the impact of my partner's sale of one-half of his home to me on his eligibility for the § 121 exclusion.

45. I.R.C. § 121(a) (2008).

would still benefit from two § 121 exclusions because the ownership of one spouse would be attributed to the other for this purpose.[46] Whether a couple is entitled to one or two § 121 exclusions can be vitally important either in an inflationary market (e.g., the recent housing bubble) or when the couple lives in their home for an extended period of time.

C. Policy Issues

Naturally, these examples once again raise horizontal equity concerns. However, they also highlight the intersection between sexual orientation and class and raise interesting issues concerning the influence of stereotypes on our thinking.

Though I have been careful here to discuss how the Code's attribution rules provide mixed results for both same-sex and different-sex couples, in the literature, commentators addressing the application of attribution rules to same-sex couples seem to focus disproportionately on the ability of same-sex couples to use their exclusion from these rules to their financial advantage.[47] In other words, commentators focus on the ways in which same-sex couples can "abuse" or "manipulate" the tax laws for their own personal gain. When these issues have arisen in class, I have noticed a similar focus in the thinking of students.

I wonder why so much attention is paid to the possibility for abuse or manipulation and so little attention is paid to the possibility that same-sex couples are disadvantaged by their exclusion from the many attribution rules that are designed to benefit taxpayers. Is it because lesbians and gay men continue to be viewed as outsiders—operating not within, but outside and against the system? Or is it a relic of our not too distant history of being treated as criminals, who in one state deserved the possibility of being imprisoned for life until just a few short years ago?[48]

46. *Id.* § 121(b)(2)(A)(i). Moreover, the gift tax issue raised by the rent-free use of the property is likely obviated for the married different-sex couple by their state law obligation to support each other. Rev. Rul. 68-379, 1968-2 C.B. 414; *see, e.g.*, 23 Pa. Cons. Stat. § 4321(1) (2008) ("Married persons are liable for the support of each other according to their respective abilities to provide support as provided by law.").

47. *E.g.*, William P. Kratzke, The Defense of Marriage Act (DOMA) Is Bad Tax Policy, 35 U. Mem. L. Rev. 399, 436-42 (2005) (discussing how DOMA's exclusion of same-sex couples from the Code's "unity of interest" provisions is bad tax policy because it allows same-sex couples to manipulate the tax system in ways that Congress has deemed inappropriate for different-sex couples); Anthony Rickey, Loving Couples, Split Interests: Tax Planning in the Fight to Recognize Same-Sex Marriage, 23 Berkeley J. Gender L. & Just. 145 (2008) (developing a tax shelter that exploits same-sex couples' exclusion from relevant attribution rules); Seto, *supra* note 36, at 1539 ("Here, I propose...to answer a single question: 'Should gay marriage automatically trigger related-party anti-abuse rules currently triggered by heterosexual marriage?'").

48. *See* Idaho Code § 18-6605 (2008); Lawrence v. Texas, 539 U.S. 558 (2003) (striking down the remaining state sodomy laws, including Idaho's, as they apply to consensual sex between adults).

I also wonder whether this focus stems from the stereotype of lesbians and gay men as an affluent group with a great deal of discretionary income at its disposal.[49] Much of the potential for abuse and manipulation of the Code's related party rules requires existing wealth or disposable income—not to mention access to sophisticated (and expensive!) tax planning advice. Whatever its source, this disproportionate focus on manipulation or abuse that only a wealthy few can hope to execute successfully does nothing more than further feed and reinforce the myth of lesbian and gay affluence.[50]

When these issues are discussed in class, it is important to present a balanced view of how exclusion from the attribution rules can both benefit and harm same-sex couples. If students' focus begins to gravitate toward same-sex couples' ability to take advantage of this exclusion, it would be worth asking them to reflect on what is pulling them in this direction. Is their thinking subtly influenced by stereotypes about lesbians and gay men, and are they unwittingly feeding and reinforcing those very same stereotypes by allowing their thinking to be influenced by them?

IV. Medical Expenses

A. Background

Section 213 allows a taxpayer to deduct expenses paid for "medical care," provided those expenses have not been compensated for by insurance or otherwise, but only to the extent that the allowable expenses exceed 7.5 percent of the taxpayer's adjusted gross income. For this purpose, "medical care" is defined in relevant part as an amount paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body."[51] This definition is qualified by an exception for amounts paid for cosmetic surgery. Thus, "'medical care' does not include cosmetic surgery or other similar procedures, unless the surgery or procedure is necessary to ameliorate a deformity arising from, or directly related to, a congenital abnormality, a personal injury resulting from an accident or trauma, or disfiguring disease."[52] In this context, "cosmetic surgery" is defined as "any procedure which is directed at improving the patient's appearance and does not meaningfully promote the proper function of the body or prevent or treat illness or disease."[53]

49. *See* David M. Skover & Kellye Y. Testy, LesBiGay Identity as Commodity, 90 Cal. L. Rev. 223, 230–33 (2002) (discussing the commercial gains of the LGBT community that are fueled by this perception).

50. *See generally* M.V. Lee Badgett, Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men (Univ. of Chicago Press, Chicago, 2001).

51. I.R.C. § 213(d)(1)(A) (2008).

52. *Id.* § 213(d)(9)(A).

53. *Id.* § 213(d)(9)(B).

In interpreting the disallowance of deductions for cosmetic surgery, the Internal Revenue Service (IRS) has indicated that it will allow a deduction for expenses associated with breast reconstruction surgery following a mastectomy that was part of a taxpayer's treatment for cancer.[54] The IRS will also allow a deduction for expenses associated with laser eye surgery to correct a taxpayer's myopia, but it will not allow a deduction for expenses associated with teeth whitening to correct discoloration due to age.[55] In addition, the IRS initially disallowed a deduction for expenses associated with a series of surgeries to remove a mass of loose skin, which had resulted from an obese taxpayer's loss of more than 100 pounds, on the ground that the taxpayer's doctor had described the surgery as cosmetic in nature.[56] The Tax Court, however, disagreed with the IRS and allowed the medical expense deduction because obesity is a recognized disease, the skin mass was a deformity caused by this disease, and removal of the skin mass was not purely a matter of aesthetics because the mass was prone to infection and interfered with the taxpayer's daily living.[57]

B. How Does This Rule Apply to Transgender Individuals?

As of this writing, the case of *O'Donnabhain v. Commissioner* is pending before the U.S. Tax Court.[58] Rhiannon O'Donnabhain was born male, but "had experienced extreme discomfort with her anatomical sex and felt a deep sense of inappropriateness in the gender role of that sex" since childhood.[59] Over time, these feelings only grew stronger and, to combat them, O'Donnabhain entered the military, then worked in the male-dominated field of engineering, and finally married and had children.[60] Yet, the "feelings of conflict with her body intensified, resulting in regular, severe emotional pain...The emotional turmoil increased to such an extent that by 1996, Ms. O'Donnabhain felt like her life was unraveling."[61]

After her marriage ended, O'Donnabhain's therapist diagnosed her with gender identity disorder, "finding that [she] met the criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), and as a transsexual, in accordance with the criteria for

54. Rev. Rul. 2003-57, 2003-1 C.B. 959.

55. *Id.*

56. Al-Murshidi v. Comm'r, No. 4230-00S, 2001 WL 1922698 (T.C. Dec. 13, 2001).

57. *Id.*

58. O'Donnabhain v. Comm'r, No. 006402-06 (T.C. filed Apr. 3, 2006).

59. Petition at 3, O'Donnabhain v. Comm'r, No. 006402-06 (T.C. Apr. 3, 2006), *available at* http://www.glad.org/uploads/docs/cases/odonnabhain-tax-court-petition.pdf.

60. Gay & Lesbian Advocates & Defenders, In re Rhiannon O'Donnabhain, http://www.glad.org/work/cases/in-re-rhiannon-odonnabhain/ (last visited May 4, 2009) [hereinafter GLAD].

61. Petition, *supra* note 59, at 4.

transsexualism in the International Classification of Diseases-10."[62] In both cases, the standard for treatment required individualized assessment, and the treatment could range from hormone therapy, to living in the new gender role, to surgery.[63] As part of her treatment, O'Donnabhain began to take feminizing hormones in 1997; legally changed her name in 2000, announced that change to her family and co-workers, and presented as female in her daily life for at least one year; and then underwent sex reassignment surgery in 2001.[64] "Following her sex reassignment surgery, Ms. O'Donnabhain finally has a sense of comfort with her body. Feelings of conflict and pain have disappeared as she has succeeded in integrating her physical, mental, and emotional selves."[65]

Given that her sex reassignment surgery was part of the medically indicated treatment for a diagnosed illness, O'Donnabhain deducted the costs of that treatment on her tax return under § 213. The costs for the surgery totaled approximately $25,000.[66] O'Donnabhain was then audited. The local IRS office seemed willing to allow the deduction; however, after seeking advice from the Chief Counsel's office, the IRS disallowed the deduction on the ground that O'Donnabhain's sex reassignment surgery was "cosmetic" within the meaning of § 213(d)(9).[67]

Pointing to the legislative history, the Chief Counsel's office found that Congress intended to allow a deduction only for medically necessary cosmetic surgery, such as:

> (1) procedures that are medically necessary to promote the proper function of the body and which only incidentally affect the patient's appearance; and (2) procedures for treatment of a disfiguring condition arising from a congenital abnormality, personal injury, trauma, or disease (such as reconstructive surgery following the removal of a malignancy).[68]

The Chief Counsel's office concluded that "[t]here is nothing to substantiate that these expenses were incurred to promote the proper function of the taxpayer's body and only incidentally affect the taxpayer's appearance. The expenses also were not incurred for treatment of a disfiguring condition arising from a congenital abnormality, personal injury, trauma, or disease (such as

62. *Id.* at 3.

63. *Id.* at 4.

64. *Id.* at 5-7.

65. *Id.* at 7.

66. GLAD, *supra* note 60.

67. I.R.C. Chief Couns. Adv. 2006-03-025 (Jan. 20, 2006). Transgender individuals also face the same battle over whether their gender-confirmation-related care is medically necessary or merely cosmetic when attempting to seek reimbursement under state Medicaid programs. Dean Spade, Documenting Gender, 59 Hastings L.J. 731, 783-88 (2008).

68. I.R.C. Chief Couns. Adv. 2006-03-025 (Jan. 20, 2006).

reconstructive surgery following the removal of a malignancy)."[69] Moreover, noting controversy surrounding sex reassignment surgery, the Chief Counsel's office indicated that "[o]nly an unequivocal expression of Congressional intent that expenses of this type qualify under section 213 would justify the allowance of the deduction in this case."[70]

C. Policy Issues

The application of § 213(d)(9) to O'Donnabhain's situation raises an interesting issue of perspective; namely, from whose perspective is it determined that a given surgery is purely cosmetic in nature? As a starting point, it is interesting to note that Congress did not disallow deductions for all cosmetic surgeries. Instead, Congress chose to draw a line between different types of cosmetic surgery, making the expenses of some cosmetic surgeries deductible and disallowing a deduction for others. To be deductible, § 213(d)-(9)(A) requires cosmetic surgery to be "necessary to ameliorate a deformity." Thus, a deductible procedure is one that corrects a defect in the taxpayer's appearance that is visible to others; after all, a procedure that corrects a nonvisible deformity could hardly be called "cosmetic."

In other words, a procedure that merely improves upon an appearance that others do not find misshapen or defective is purely cosmetic and, therefore, nondeductible; however, a procedure that corrects an appearance that others do find misshapen or defective is not purely cosmetic and, therefore, is deductible. As noted above, breast reconstruction surgery, laser eye surgery, and removal of a mass of skin from a patient with significant weight loss have all been found to give rise to a medical expense deduction under § 213(d)-(9). Interestingly, in each of these cases, the surgery brought the taxpayer's body into conformity with general societal expectations of what a "normal" and "properly functioning" body looks like. That is, the breast reconstruction surgery restored the breasts that society expects women to have; the laser eye surgery allowed the taxpayer to go about his day without the encumbrance of eyeglasses or contact lenses that mark his myopic eyesight as defective; and the skin removal surgery gave the taxpayer the trimmer body shape that is considered "normal" in American society. In contrast, the teeth whitening did nothing more than improve an otherwise acceptable appearance. The taxpayer's teeth were not defective; they had merely—and quite naturally—changed color due to the passage of time. The teeth whitening might have improved the taxpayer's self-image, but it was not necessary to correct what others perceived to be a defect or deformity.

The IRS has placed O'Donnabhain's sex reassignment surgery in the same category as teeth whitening. Because others do not perceive O'Donnabhain's male body form as misshapen or defective, surgery to change that body into a female form did nothing more than improve or change an otherwise acceptable

69. *Id.*

70. *Id.*

appearance. O'Donnabhain's sex reassignment surgery was not necessary to correct what others would consider a deformity—quite the contrary, there are many who would argue that her surgery actually deformed a perfectly acceptable body.[71] Viewed from this perspective, O'Donnabhain's perception of a bodily defect (i.e., the disconnect that she experienced between the form of her body and her gender identity) and the significant psychological distress that defect has caused her are, quite simply, irrelevant. Indeed, in enacting § 213(d)(9), Congress attempted to distinguish between procedures that are medically (i.e., perceived by others as) necessary and procedures that are purely cosmetic (i.e., those that "are, in essence, voluntary personal expenses, which like other personal expenditures (e.g., food and clothing) generally should not be deductible in computing taxable income").[72]

At first glance, this might appear to be nothing more than a necessary objective/subjective distinction necessitated by administrative concerns in dealing with expenses that might entail mixed (i.e., medical and personal) motives.[73] Adopting an objective approach to determining whether surgery is purely cosmetic in nature certainly makes it easier for both taxpayers and the IRS to decide whether expenses associated with cosmetic surgery are deductible. Nevertheless, behind this apparently benign objective/subjective distinction lies a whole array of other, far more problematic binaries. As applied to O'Donnabhain's situation, this objective/subjective distinction masks the privileging of physical health over mental health by allowing a deduction for cosmetic surgery that addresses a physical issue (i.e., breast reconstruction for a cancer patient) but not allowing a deduction for the same surgery when it addresses a mental health issue (i.e., O'Donnabhain's diagnosed gender identity disorder). It also masks the privileging of a majority/hetero perspective over a minority/trans perspective by allowing the IRS, the courts, and society more generally to judge what a "normal" body shape is/ought to be for O'Donnabhain rather than allowing her to make that determination for herself. It additionally masks the privileging of a "natural" over a constructivist view of gender by equating birth sex with gender identity and refusing to accept the possibility of a conflict between the two. It further privileges the wealthy over the poor and working class by denying access to

71. *See, e.g.,* Margaret Wente, The Explosive Rethinking of Sex Reassignment, The Globe & Mail (Toronto, Ont., Can.), Aug. 25, 2007, at A19.

72. 136 Cong. Rec. S15711 (Oct. 18, 1990) (containing the Senate report for the Omnibus Budget Reconciliation Act of 1990). One might argue that the surgical expenses were voluntary or personal because O'Donnabhain was already presenting as female in her daily life before the surgery. But, under that argument, laser eye surgery is just as voluntary or personal in nature—and thus should be rendered nondeductible—because the taxpayer could just as well have affected others' perception of the functioning of his eyesight by wearing contact lenses.

73. *See, e.g.,* Pevsner v. Comm'r, 628 F.2d 467, 470 (5th Cir. 1980) (indicating that, in adjudicating claims concerning the deductibility of expenses for business clothing, the courts have adopted an objective test for determining whether clothing is adaptable to ordinary street usage and noting the administrative benefits of this approach).

surgery—for those who would choose it—to all but those who can afford to pay for it out of pocket.

Moreover, even if O'Donnabhain ultimately proves successful in obtaining a deduction under § 213 for her sex reassignment surgery, that success will come at the price of bolstering the medicalization/pathologization of gender identity and the concomitant reification of the rigid, male/female gender binary that the medical establishment promotes and polices through its treatment of transgender persons.[74]

V. Property Transfers

A. Background

Though the federal tax system is generally built around the notion that the individual is the proper taxable unit,[75] there are a number of provisions in the Code that expand the unit to include a spouse (and, sometimes, dependents). These provisions treat the married different-sex couple (or "traditional" family) as a single economic unit for tax purposes. Most visibly, the treatment of married different-sex couples as a single economic unit is evidenced in §§ 1041, 2056, and 2523.[76]

Section 1041 provides that no gain or loss is recognized upon the transfer of property from one spouse to the other. Sections 2056 and 2523 allow the taxpayer a deduction for estate and gift tax purposes for transfers made to a spouse or a surviving spouse. Taken together, these provisions allow for the transfer of property within the taxable unit (i.e., from one married spouse to the other) without triggering income, gift, or estate taxes. That is, a transfer of property will generally not trigger any of these taxes unless the transfer takes the property outside of the marital/economic unit.

In the case of the income tax, the married different-sex couple is afforded a grace period following the dissolution of their relationship during which they will continue to be treated as a single economic unit despite their estrangement. Section 1041(a) creates this grace period by not only covering transfers between spouses, but also transfers between former spouses that are incident to divorce. For this purpose, a transfer is incident to divorce if it "occurs within 1 year after the date on which the marriage ceases" or if it "is related to the cessation of the

74. *See generally* Dean Spade, Resisting Medicine, Re/modeling Gender, 18 Berkeley Women's L.J. 15 (2003).

75. *See* 1 Bittker & Lokken, *supra* note 43, ¶ 2.3 ("From its inception,...the federal income tax has been based on the...view that every individual should be permitted to file a personal income tax return embracing his or her own income but not the income of the taxpayer's spouse, children, or other relatives.").

76. "The committee believes that a husband and wife should be treated as one economic unit for purposes of estate and gift taxes, as they generally are for income tax purposes. Accordingly, no tax should be imposed on transfers between a husband and wife." S. Rep. No. 97-144, at 127 (1981), *as reprinted in* 1981 U.S.C.C.A.N. 105, 228.

marriage."[77] The former category of transfers (i.e., those occurring within one year of the cessation of the marriage) actually covers any transfer of property between the former spouses, regardless of whether it is actually related to the divorce.[78] Transfers occurring after this one-year period elapses are presumed to be related to the cessation of the marriage if they are made pursuant to a divorce or separation instrument and occur within six years of the cessation of the marriage.[79]

B. How Do These Rules Apply to Same-Sex Couples?

Simply put, these rules have absolutely no application to same-sex couples. Rather than being treated as a single economic unit, same-sex couples (and others in nontraditional family arrangements) are treated as legal strangers to each other for tax purposes. In the absence of the protection of §§ 1041, 2056, and 2523, a transfer of property from one member of a same-sex couple to another will be a taxable event. It will either trigger income tax (in the case of a sale or other disposition), gift or estate tax (in the case of a gratuitous transfer), or a combination of income and transfer taxes (in the case of a part-sale, part-gift).

Consider, for example, what occurred when my partner and I consolidated homes in Pittsburgh. As discussed above, we each owned a home before we met. Eventually, we decided that it made sense to sell my home and for me to move into my partner's home. As part of the move—and to signify that my partner's home would no longer be his home, but our home—he conveyed the property to the two of us as joint tenants with right of survivorship.

If my partner had made this conveyance gratuitously, the transfer of one-half of the property to me as a joint tenant with a right of survivorship would have triggered gift tax.[80] The gift tax unified credit would have applied to this transfer and sheltered us from the actual payment of tax; however, the transfer would have significantly reduced the amount of property that my partner could transfer free of gift tax over the remainder of his lifetime without the payment of tax.[81] A similar transfer from a wife to a husband would be completely protected from gift tax by § 2523.[82] As a result, the wife's gift tax

77. I.R.C. § 1041(c) (2008).

78. Temp. Treas. Reg. § 1.1041-1T, Q&A-6 (as amended in 2003).

79. *Id.* at Q&A-7.

80. Treas. Reg. § 25.2511-1(e), (h)(5) (as amended in 1997). Pennsylvania permits joint tenants with right of survivorship to unilaterally sever the tenancy, *see, e.g.*, Vegas v. Brinton, 451 A.2d 687, 688 (Pa. Super. Ct. 1982), which would mean that one-half of the value of the property would have been subject to gift tax.

81. I.R.C. § 2505(a) (2008). When considered in light of the discussion of income splitting, *infra* Part VI, this can be a significant concern even for middle-income same-sex couples.

82. *See* I.R.C. § 2523(d) (2008) (taking such a transfer out of the exception for terminable interests).

unified credit would remain untouched, enlarging the amount that she could transfer over her lifetime free of gift tax.

Instead, we chose to have my partner sell me a one-half interest in his home. Fortunately, the net proceeds of the sale of my prior home were sufficient to cover the cost of purchasing one-half of my partner's home; otherwise, we would have had to come up with some sort of a financing arrangement.[83] By purchasing a one-half interest in the home for its fair market value, we were able to avoid the specter of the gift tax[84]—but at the price of triggering the income tax. At the time of the transfer, my partner was required to reckon up his gain or loss on this sale of a one-half interest in our home. Though the gain was significant, he did qualify for relief from income tax under § 121, which allows an individual to exclude the first $250,000 of gain on the sale of his principal residence once every two years.[85]

Again, however, this ability to avoid paying tax now will have repercussions later. The IRS has taken the position that my partner only gets one $250,000 exclusion under § 121 with respect to our home—no matter how long the interval between this and any other sale.[86] In other words, he gets only one exclusion even if the sale of our home to a third party takes place more than two years after my purchase of a one-half interest in the home. This means that when we sell the house in the future, he will only be entitled to exclude so much of his one-half of the gain as does not exceed the portion of the $250,000 exclusion that remained to him after I purchased my one-half interest. A similar sale from a wife to a husband would have been completely protected from income tax by § 1041, leaving the wife's § 121 exclusion untouched and fully available for use on a later sale of the home to a third party.

If, at some point, my partner and I were to decide to dissolve our marriage, we would have to be concerned about the potential tax consequences of dividing our property between us. If we were content with continuing to own our home (and, say, rent it out to a third party), we could simply sever our joint tenancy with right of survivorship and own the property as tenants in common.

83. Either I would have had to obtain a loan from a bank or borrow the money from my partner. Going to a bank would have meant incurring any fees associated with obtaining a home loan and paying interest to the bank. By borrowing the money from my partner, I would have been able to avoid the bank fees, but I would still have had to pay him interest that he would have had to include in his gross income. *Id.* § 61(a)(4). In either case, I might have been able to deduct the interest payments, *see id.* § 163(h)(3); however, that deduction would have reduced, but not eliminated, this cost. Moreover, the interest rate on any loan from my partner would, at least, have had to equal the "applicable federal rate" in order to avoid the application of § 7872, which looks to the nature of the transaction (and not the relationship between the parties) and would have subjected my partner to income and gift tax on any foregone interest.

84. *Cf. id.* § 2512(b); Treas. Reg. § 25.2512-8 (as amended in 1992).

85. Treas. Reg. § 1.121-4(e) (as amended in 2002).

86. T.D. 9030, 2003-8 I.R.B. 495, 497-98.

This severance would not be a taxable event for income tax purposes.[87] If, however, we were not content to remain as co-owners of the home and one of us were to buy out the other's interest, that sale of one-half of the home would be a taxable event (subject to the—in my partner's case, limited—application of the § 121 exclusion). A divorcing different-sex couple would be protected from income tax by § 1041 in this case.

If the two of us were instead to live a happy life together for decades to come, the existence of the right of survivorship could come back to haunt us at the time that the first of us passes away. Under § 2040(a), the entire value of the home would be included in the gross estate of the first to pass away, unless his executor could demonstrate the extent to which the survivor actually contributed (out of the survivor's own funds) to the purchase or improvement of the property.[88] With the passage of decades, the documents that evidence our respective contributions toward the purchase or improvement of our home could easily have been lost, destroyed, or disappeared. This would make carrying the burden of proof difficult, if not impossible—especially given "that the IRS has never provided any guidelines for what would be an acceptable level of proof when two partners have owned property jointly for many years."[89] This could mean that the first of us to pass away would be required to pay estate tax on property that really belongs to the survivor. In the case of a married different-sex couple, § 2040(b) provides simplified rules for property held by the couple as joint tenants with right of survivorship, because the existence of § 2056 renders an inclusion in the gross estate all but irrelevant:

> The committee believes that the taxation of jointly held property between spouses is complicated unnecessarily. Often such assets are purchased with joint funds making it difficult to trace individual contributions. In light of the unlimited marital deduction..., the taxation of jointly held property between spouses is only relevant for determining the basis of property to the survivor (under sec. 1014) and...certain [other] provisions. Accordingly, the committee believes it appropriate to adopt an easily administered rule under which each spouse would be considered to own one-half of jointly held property regardless of which spouse furnished the consideration for the property.[90]

C. Policy Issues

Again, with similarly situated taxpayers receiving different tax treatment, the drumbeat of horizontal equity concerns continues to sound. But this difference in treatment also raises other interesting policy concerns. At one level, drawing on typical tax policy goals, this difference raises a question of tax

87. Rev. Rul. 56-437, 1956-2 C.B. 507.

88. Treas. Reg. § 20.2040-1(a)(2) (as amended in 1960).

89. Patricia A. Cain, Death Taxes: A Critique from the Margin, 48 Clev. St. L. Rev. 677, 694 (2000).

90. S. Rep. No. 97-144, at 127 (1981), *as reprinted in* 1981 U.S.C.C.A.N. 105, 228.

neutrality. Sections 1041, 2056, and 2523 allow married different-sex couples to treat tax as a neutral factor in arranging and rearranging both the ownership of property as between themselves and the form of that ownership (e.g., separate ownership v. tenancy in common v. joint tenancy with right of survivorship or tenancy by the entirety). When same-sex couples wish to undertake such economic arranging and rearranging between themselves, they will find that tax is far from a neutral factor–indeed, it can act as a strong impediment to achieving what the couple views as the most efficient ownership structure for their property.

At a deeper level, one can see that more insidious issues arise regarding the integrity of the couple. Taken together, §§ 1041, 2056, and 2523 afford married different-sex couples a certain "zone of privacy" because, having made transfers of property within the couple wholly nontaxable events, Congress has carved out a space in which different-sex couples need not worry about the prying eyes of the government intruding in their private financial dealings.[91] After the U.S. Supreme Court decided *Lawrence v. Texas*,[92] same-sex couples thought that they had finally banished the prying eyes of the government from their homes. Not so. The IRS can still knock on the door of a same-sex couple (or a grieving surviving same-sex partner), come in, and probe all of their financial dealings with one another–because those dealings have tax consequences and are, therefore, considered a legitimate topic of government inquiry.[93]

VI. Income Splitting

A. Background

The ability of married different-sex couples to file a joint federal income tax return under § 6013 is another example of the treatment of such couples as a single economic unit. The joint return is designed to allow "a husband and wife"[94] to split their income between them for federal income tax purposes. In effect, "[j]oint returns subject all married couples with the same amount of taxable income to the same tax liability, regardless of how their income and deductions are divided between them."[95] As a result, "married couples...have no incentive to engage in income-splitting devices to shift income from one

91. Naturally, different-sex couples are subject to estate tax audits; however, outright transfers of property within the couple will not be an issue in those audits because such transfers are not subject to tax. Different-sex couples need only be audited with respect to transfers that take property outside the couple. In contrast, same-sex couples are subject to tax and audit on all transfers, whether the property remains within or is taken outside the couple.

92. 539 U.S. 558 (2003).

93. To get a sense of what this intrusion might look like, *see* Cain, *supra* note 89, at 696-97, which provides a series of short narratives based on stories from lawyers and accountants who have represented lesbian and gay clients in estate tax audits.

94. I.R.C. § 6013(a) (2008).

95. 4A Bittker & Lokken, *supra* note 43, ¶ 111.3.2.1.

spouse to the other because the joint return itself is an efficient income-splitting device."[96] This ability to split income can continue even after the marriage ends, if one spouse pays the other alimony and the couple elects into the alimony inclusion-deduction regime established by §§ 71 and 215.

Overall, the ability to split income may be a positive, negative, or neutral tax aspect of marriage.[97] For some couples, the ability to split income provides a marriage bonus, meaning that they pay less tax as a married couple than they would if they were unmarried and each filed "single" tax returns. This marriage bonus is largest for couples in which only one spouse earns income. For other couples, filing a joint return means paying more tax as a married couple than they would if they had remained unmarried and each filed a "single" return. This marriage penalty is largest for couples with equal incomes.[98] Yet other couples find themselves in a situation where filing a joint return produces neither a marriage penalty nor a marriage bonus.

However flawed and criticized it might be on other grounds,[99] the income-splitting privilege provided by the joint return contributes to rendering tax a neutral factor in decisions about whether and to what extent the couple will pool their finances. In other words, when filing a joint return, the couple is treated as if they split their income equally between them, regardless of whether they (1) actually do split their income, (2) only partially split their income, or (3) keep their finances completely separate.

B. How Do These Rules Apply to Same-Sex Couples?

Same-sex couples are, of course, ineligible to file a joint federal income tax return because they are not "a husband and wife." Thus, even if they

96. *Id.*

97. *See* Cong. Budget Office, For Better or for Worse: Marriage and the Federal Income Tax 29-30 (1997) (indicating that, under the basic measure of the marriage penalty/bonus, 21 million couples paid a marriage penalty, 25 million couples received a marriage bonus, and 3 million couples neither paid a marriage penalty nor received a marriage bonus in 1996).

98. Provisions other than the tax rate schedules also contribute to the marriage penalty. For example, the marriage penalty is exacerbated whenever a married couple is only afforded the same tax benefit as a single individual even though each of the spouses could qualify for that benefit separately. *Compare, e.g.*, I.R.C. § 221 (2008) (providing the same monetary ceiling for educational interest deductions for single individuals and married couples, who are compelled to file jointly to obtain this benefit) *with id.* § 121 (doubling the amount of gain that can be excluded from gross income on the sale of a principal residence in the case of a married couple filing a joint return).

99. *See, e.g.*, Dorothy A. Brown, The Marriage Bonus/Penalty in Black and White, 65 U. Cin. L. Rev. 787 (1997); Lily Kahng, Innocent Spouses: A Critique of the New Tax Laws Governing Joint and Several Tax Liability, 49 Vill. L. Rev. 261 (2004); Marjorie E. Kornhauser, Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return, 45 Hastings L.J. 63 (1993).

are permitted to file a joint return for state income tax purposes, a same-sex couple must file two separate "single" returns for federal income tax purposes. Incidentally, this disparity in treatment increases the reporting burden and cost of compliance for same-sex couples in states that legally recognize their relationships. Because some of these states use the federal income tax return as a starting point for computing their own taxes, same-sex couples often find it necessary to translate their two "single" federal returns into a mock "joint" federal return before they can then complete their "joint" state tax return.[100]

Because they cannot be considered married for federal tax purposes, it is often noted that same-sex couples can avoid the marriage penalty. This point is supported by citations to studies such as the 2004 Congressional Budget Office report estimating that, if the federal government and all fifty states were to recognize same-sex marriage, there would be a small, positive impact on federal tax revenues due, in part, to the operation of the marriage penalty.[101] Yet, the individuals making these points seldom recognize that these studies are based on incomplete information and questionable assumptions. The CBO study, for example, readily admits the problems associated with: (1) accurately identifying the number of same-sex couples in the population; (2) predicting the number of same-sex couples who would marry, if permitted to do so; and (3) reconstructing these couples' income and assets based on limited data.[102] Recalling the discussion above regarding the exemption of same-sex couples from the Code's attribution rules,[103] one can only wonder about the extent to which stereotypes about lesbian and gay men—and particularly the myth of affluence—wittingly or unwittingly color the assumptions upon which these studies are based.

Even putting aside the additional burdens imposed on same-sex couples when they file their state tax returns and the questionable results of studies regarding the effect of the marriage penalty on same-sex couples, those who argue that same-sex couples are financially better off by not having the government recognize their relationships for tax purposes miss the mark in an important respect. In contrast to married different-sex couples, same-sex

100. *See* Catherine Martin Christopher, Note, Will Filing Status Be Portable? Tax Implications of Interstate Recognition of Same-Sex Marriage, 4 Pitt. Tax Rev. 137, 141, 143, 144, 145-46 (2007).

101. Cong. Budget Office, The Potential Budgetary Impact of Recognizing Same-Sex Marriages 2, 3 (2004), *available at* http://cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf.

102. *Id.*; *see also* James Alm et al., Wedding Bell Blues: The Income Tax Consequences of Legalizing Same-Sex Marriage, 53 Nat'l Tax J. 201 (2000).

103. *See supra* Part III.

couples must be cognizant of the tax ramifications of pooling their income. Where the two do not contribute to the pool in exactly equal amounts, the partner who contributes more to the pool has effectively made a transfer to the partner who contributes less. Without the income-splitting privilege and the exemption from income and gift tax for transfers between spouses afforded by §§ 1041 and 2523, the couple must determine the character–and tax consequences–of the amount transferred between them.

To take a concrete example, let's consider the situation faced by my sister Elyse and her partner Cindy. Like many same-sex couples,[104] they have children–in fact, they now have three. Before the birth of their first child, my sister left her job. For more than 4½ years, Elyse chose to stay at home and care for their children. During that time, Cindy worked in the paid labor market to support their family and was the sole earner.[105] Had they been able to file a joint federal income tax return during that time, they would have received a marriage bonus (i.e., Cindy would have paid less federal income tax than she did filing her "single" returns during that period). But Cindy and Elyse have more to worry about than just missing out on the marriage bonus. During the time that Elyse was not working, Cindy was the only one contributing to the financial pool. By supporting Elyse, Cindy made a series of transfers to her that need to be characterized for both income and gift tax purposes to determine whether Cindy actually owed even more tax.

For income tax purposes, there exists a variety of different potential characterizations for the transfers between Cindy and Elyse. For example, Cindy might be treated as having made a gift each time the mortgage and utility bills were paid, a trip was made to the grocery store, or a withdrawal was made from the ATM.[106] If so, Cindy would continue to pay income tax on her

104. At the time of the 2000 census, approximately 22% of all households headed by male same-sex couples in the United States had children living with them and approximately 34% of all households headed by female same-sex couples in the United States had children living with them. Tavia Simmons & Martin O'Connell, U.S. Census Bureau, Census 2000 Special Reports: Married-Couple and Unmarried-Partner Households: 2000, at 9 tbl.4 (2003), *available at* http://www.census.gov/prod/2003pubs/censr-5.pdf.

105. Moreover, now that my sister has returned to the paid labor market, the significant differential in their pay means that the problem described in the text above persists. My sister wished to find part-time work, but was unable to do so. The full-time job Elyse got is in a different field from the one that she worked in before having children, and it pays far less than the work that she did before. Indeed, for now, her pay barely covers the cost of childcare and, therefore, adds little to Cindy and Elyse's financial pool.

106. Patricia A. Cain, Same-Sex Couples and the Federal Tax Laws, 1 Tul. J.L. & Sexuality 97, 114-15 (1991).

wages,[107] and Elyse would pay no income tax on those gifts.[108] Alternatively, the pooling might be characterized as a support arrangement.[109] In that case, Cindy would still be subject to income tax on her wages, and Elyse would pay no income tax on the support payments.[110] A more frightening alternative would require both Cindy and Elyse to pay income tax on the transfer—on the ground that it constitutes payment for Elyse's household services or, more simply, technically constitutes "income" to each of them.[111] Yet another possibility is that the transfer could represent some combination of the above (e.g., part support, part gift; part support, part income; or part gift, part income).

Already dizzy from the array of potential income tax characterizations for these transfers, Cindy and Elyse must consider these same transfers from a gift tax perspective as well. Those transfers can also be characterized in a variety of ways for gift tax purposes—each with their own specific tax consequences. For example, the transfers might be treated as taxable gifts from Cindy to Elyse.[112] Alternatively, the transfers might be treated as payments in exchange for Elyse's household services, in which case the transfers will escape gift tax—but, as described above, trigger income tax.[113] Another possibility is that the transfer might be characterized as a support payment, which would escape gift tax (just as it escapes income tax).[114] Yet another possibility is that the transfer could represent some combination of the above (e.g., part nontaxable support payment, part taxable gift or part nontaxable payment for services, part taxable gift).

You might be inclined to dismiss these gift tax complications on the ground that the gift and estate taxes are imposed on only a small slice of the taxpaying population; namely, the wealthiest among us. But if gift tax were imposed

107. *See* Lucas v. Earl, 281 U.S. 111, 114-15 (1930). Registered domestic partners and married same-sex couples in California should be eligible for the income-splitting privilege even in the absence of being able to file a joint federal income tax return because they are subject to California's community property regime. *See* Poe v. Seaborn, 282 U.S 101 (1930). The IRS has, however, taken the position that same-sex couples in California are ineligible for income splitting. I.R.S. Chief Couns. Mem. 2006-08-38 (Feb. 24, 2006). This position appears to be driven more by ideology than by sound application of the tax laws, and it has come in for strong criticism. *E.g.*, Patricia A. Cain, Relitigating *Seaborn*: Taxing the Community Income of California Registered Domestic Partners, 111 Tax Notes 561 (2006); Dennis J. Ventry, Jr., No Income Splitting for Domestic Partners: How the IRS Erred, 110 Tax Notes 1221 (2006).

108. I.R.C. § 102 (2008).

109. Cain, *supra* note 106, at 115-16.

110. 1 Bittker & Lokken, *supra* note 43, ¶ 10.2.6; Cain, *supra* note 106, at 116.

111. Bruce Wolk, Federal Tax Consequences of Wealth Transfers Between Unmarried Cohabitants, 27 UCLA L. Rev. 1240, 1244-62 (1980); *see also* Patricia A. Cain, The Income Tax: Taxing Lesbians, 6 S. Cal. Rev. L. & Women's Stud. 471, 476 (1997).

112. Cain, *supra* note 106, at 125; Wolk, *supra* note 111, at 1275-81.

113. Treas. Reg. § 25.2512-8 (as amended in 1992).

114. Rev. Rul. 68-379, 1968-2 C.B. 414.

on transfers between members of a same-sex couple—that is, on every rent or mortgage payment, on every purchase of clothing, and even on purchases of food—then this transfer tax on the wealthy would effectively become a sales tax imposed on a broad swath of the lesbian and gay community. As soon as the total amount of transfers from Cindy to Elyse exceeded the gift tax annual exclusion ($13,000 in 2009),[115] Cindy would begin spending down her unified credit, which is currently capped at $1 million.[116] As a single-earner with jointly held property in an area with a high cost of living, Cindy would easily exceed the annual exclusion and spend down her unified credit each year. Once her unified credit has been exhausted, which is a distinct possibility over the course of a long-term relationship (or even a series of long-term relationships), Cindy would begin paying gift tax at the eye-popping rate of forty-one percent.[117] Thus, for same-sex couples, gift taxation is a possibility whose importance should neither be trivialized nor ignored.[118]

Finally, it is worth noting that, because the income tax and the gift tax operate independently, the characterization of a single transfer from Cindy to Elyse need not be consistent across these taxes.[119] In other words, just because a transfer is characterized as a gift for gift tax purposes does not mean that it must be characterized as a gift for income tax purposes. In practice, this results in the further multiplication of the potential tax characterizations for the transfers from Cindy to Elyse. It also opens the door to the possibility of truly punitive taxation of same-sex couples. For example, a transfer might be characterized as income to both Cindy and Elyse for income tax purposes and as a taxable gift from Cindy to Elyse for gift tax purposes.[120] This would result in a portion of Cindy's income being subject to triple taxation. While pondering this terrifying possibility, it is worth recalling that married different-sex couples need not worry about any of this, due to the combination of the income-splitting privilege and §§ 1041 and 2523.

Faced with a veritable constellation of potential tax characterizations and high financial stakes, same-sex couples, such as Cindy and Elyse, who pool their income and investments must examine all of the possibilities and settle on the appropriate tax treatment for any transfer between them. Neither

115. Rev. Proc. 2008-66, § 3.30, 2008-45 I.R.B. 1107.

116. I.R.C. § 2505(a)(1) (2008).

117. Internal Revenue Serv., Dep't of Treasury, Instructions for Form 709, at 12 (2008). In the absence of congressional action, this rate temporarily drops to 35% in 2010 and then returns to 41% in 2011. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 511(d), (f)(3), 901, 115 Stat. 38, 70-71, 150.

118. *See* Cain, *supra* note 89, at 696, for a story about the IRS asserting on audit that all transfers from one (i.e., the wealthier) partner to the other were taxable gifts.

119. *See, e.g.*, United States v. Davis, 370 U.S. 65, 69 n.6 (1962); Comm'r v. Beck's Estate, 129 F.2d 243, 246 (2d Cir. 1942).

120. Cain, *supra* note 106, at 124-25; Adam Chase, Tax Planning for Same-Sex Couples, 72 Denv. U. L. Rev. 359, 375 (1995).

Congress nor the IRS has made this task any easier, as they both have been conspicuously silent on the question of how the tax laws apply to same-sex couples. Yet, despite this lack of guidance, the tax laws attach a presumption of correctness to whatever tax treatment the IRS deems appropriate (after the fact and without any advance public notice) and place the burden on same-sex couples to prove that their chosen treatment is correct.[121] If, on audit, the couple fails to carry this burden, they may find themselves liable not only for additional tax but also for interest and penalties (if they cannot show reasonable cause for the failure).[122] The IRS has, in fact, used this procedural advantage against lesbian and gay taxpayers on audit.[123]

Even if a couple manages to win the battle with the IRS over an alleged failure appropriately to characterize the transfer between them, they may find that the war is far from over. In addition to settling on an appropriate tax characterization for the transfer, same-sex couples must comply with recordkeeping and reporting requirements that are ostensibly designed to help verify the accuracy of their tax returns. For income tax purposes, each taxpayer is required to "keep such permanent books of account or records...as are sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return."[124] Likewise, for gift tax purposes, each taxpayer is required to "keep such permanent books of account or records as are necessary to establish the amount of his total gifts ...together with the deductions allowable in determining the amount of his taxable gifts, and the other information required to be shown in a gift tax return."[125] Furthermore, if a taxpayer makes gifts to a person in excess of the annual exclusion, she is required to list separately on her gift tax return each and every gift made during the calendar year to that person, including gifts that are not taxed because of the annual exclusion.[126]

In practice, these requirements impose an impossible compliance burden on same-sex couples. The tax laws essentially require same-sex couples to keep records documenting every penny that they spend, save, or give away. Every trip to the grocery store, the clothing store, and the bank must be documented to determine who spent what and on whom. Without these records, the couple will find it difficult, if not impossible, to counter IRS assertions about the size or character of the transfer between them. Even couples who avoid pooling

121. Tax Ct. R. 142(a)(1); United States v. Janis, 428 U.S. 433, 440 (1976); Welch v. Helvering, 290 U.S. 111, 115 (1933). The recordkeeping issues described in the text below make it unlikely that same-sex couples will benefit from the burden-shifting provisions in § 7491. *See* I.R.C. § 7491(a)(2)(A) (2008) (limiting burden shifting to taxpayers who have "complied with the requirements under this title to substantiate any item").

122. Infanti, *supra* note 7, at 790-97.

123. *See* Cain, *supra* note 89, at 696-97; *see also* Infanti, *supra* note 9, at 433-34.

124. Treas. Reg. § 1.6001-1(a) (as amended in 1990).

125. *Id.* § 25.6001-1(a) (as amended in 1977).

126. *Id.* § 25.6019-3(a) (as amended in 1994).

or carefully avoid differing contributions to the pool may be tripped up by these recordkeeping requirements because, without the appropriate records, the couple may find it difficult to disprove the existence of an asserted transfer between them.

Such a crushing (not to mention insulting) recordkeeping and reporting burden can only breed noncompliance. Whether intentional or unintentional, this noncompliance may give the IRS an opportunity to increase the amount of additional tax owed and to impose penalties. Furthermore, there is the potential for criminal liability for those who either throw up their hands at the impossibility of the task or who refuse to acquiesce in their own oppression. Again, married different-sex couples need not worry about these reporting requirements because transfers between them are rendered essentially irrelevant by the combination of the income-splitting privilege and the protection afforded by §§ 1041 and 2523.

And just as married different-sex couples may continue to share income after the end of their relationship, so may same-sex couples. Yet, even though divorcing different-sex couples are afforded elective access to continued income splitting for tax purposes through the alimony inclusion-deduction regime of §§ 71 and 215, same-sex couples continue to be dogged by the same uncertainties about the tax treatment of sharing income (along with the associated reporting and recordkeeping requirements) after their relationship has ended as they were during their relationship. It is simply unclear how continued transfers of income from one partner to the other after the end of their relationship will be characterized and treated for federal income and gift tax purposes.[127]

C. Policy Issues

Horizontal equity is again an issue here, but in a different way. Instead of presenting a stark choice between being subject to current tax or not (e.g., in the case of fringe benefits or property transfers), the income-splitting privilege raises interesting questions of visibility versus invisibility. The ability to file a joint federal income tax return (and the accompanying protections of §§ 1041 and 2523) affords married different-sex couples predictable (though not always, from their perspective, favorable) tax treatment. Though Congress has told same-sex couples that they cannot have access to the set of tax rules applicable to married different-sex couples, both Congress and the IRS "have utterly failed to provide meaningful guidance on how the Code should be applied to same-sex couples, sometimes even in the face of direct pleas for such guidance from conscientious taxpayers."[128]

127. *See* Patricia A. Cain, Taxing Families Fairly, 48 Santa Clara L. Rev. 805, 841-42 (2008); Chase, *supra* note 120, at 391.

128. Infanti, *supra* note 9, at 427 (emphasis added).

This difference in treatment is neither benign nor accidental.[129] Through the application of DOMA to the tax laws, the federal government clearly attempts to banish same-sex relationships from sight by creating every incentive for same-sex couples to retreat to the invisibility of the closet (i.e., to file returns and statements with the IRS that do not connect one partner with the other in any way) in an effort to avoid detection and punishment. This overt hostility toward same-sex couples stigmatizes them by branding their relationships inferior to those of different-sex couples. In effect, the tax laws at once embody and perpetuate societal prejudice, discrimination, and hostility toward lesbians and gay men by giving such activity the imprimatur of the federal government.

Conversely, echoing the earlier discussion in connection with property transfers, the recordkeeping and reporting requirements for same-sex couples represent not only an onerous burden but also a severe invasion of privacy. As mentioned above, after *Lawrence v. Texas*,[130] the government can no longer break into bedrooms to determine with whom and how lesbians and gay men have sex, but it can still use the tax laws to knock on the front door, come in, and probe the couple's every financial move. In contrast, the tax laws effectively afford married different-sex couples a privileged zone of privacy (or, if you will, the privilege of being visibly invisible) by treating them as a single economic unit—because transfers within the couple generally have no tax consequences, the government has no need to inquire about them.

VII. Some Parting Thoughts

As happens when broaching any "controversial" issue in the classroom, bringing sexual orientation and gender identity into the teaching of tax will sometimes excite the students, sometimes generate lively and respectful discussions, and at other times just fall flat. Honestly, there is no way to eliminate the possibility of adverse results, and a few students will invariably feel disgruntled because they are not receptive to, or comfortable with, discussing sexual orientation or gender identity under any circumstances. In the process of trial and error that is teaching, I have learned to avoid being distracted by a few outliers and to focus instead on my general audience, which is composed of law students who remain open to perspectives different from their own and to persuasion based on logical argument.

129.

> Far from finding themselves in a presumptively cooperative relationship, lesbian and gay taxpayers must contend with a federal government that has already declared itself openly hostile to them. The federal government has enacted legislation that overtly discriminates against same-sex couples; has generally refused to provide guidance on the tax treatment of same-sex couples in areas left unclear by that legislation; has provided unsound, ideologically-motivated guidance when it has spoken; and has used its tactical advantages to persecute lesbian and gay taxpayers.

Id. at 434-35.

130. 539 U.S. 558 (2003).

In keeping with this idea of being attentive to one's audience, I have merely provided the raw material here for bringing LGBT issues into the tax classroom. How a given teacher decides to use this raw material will depend on a number of factors, including the composition of the student body and the particular tax course being taught. Thus, even though the discussion in this essay often draws together material covered in different tax courses to provide a complete picture of how LGBT individuals experience the tax laws, it will be necessary in the classroom to adjust the level of detail to suit the context. For example, the discussion of property transfers above entailed coverage of the income, gift, and estate tax consequences of such transfers. In a basic income tax course, one might skip some or all of the estate and gift tax aspects of property transfers or simplify the discussion greatly so as not to confuse students unnecessarily and draw their attention away from the general point of the discussion. In contrast, in an estate and gift tax course, most (if not all) students will have taken the basic income tax course already, and a fuller discussion of the interaction between these taxes will not only be appropriate, but desirable–so that students can begin to see that different taxes do not operate in isolation, but interact with each other. In this regard, it is also helpful to weave these discussions into the larger fabric of the course–using them to make or reinforce general points–instead of treating them as token discussions.

In addition, depending upon personal preference and the tolerance of students for a more intimate class setting, the narratives that frame the discussion of LGBT issues could be told as a story in the classroom, as I generally do, or they could be written out as a note or a problem for the students to consider as they complete the assigned reading for class. Moreover, for those who do not wish to personalize the narratives by drawing upon their own experiences (or for those tax teachers who are not themselves LGBT), I would encourage borrowing freely from the narratives in this essay. Personal vulnerability is not a necessary ingredient for making LGBT issues relevant to students. In the end, any story that provides a concrete situation that students can understand and relate to will serve to raise the consciousness of heterosexual students about the impact of the tax laws on LGBT individuals. At the same time, telling these stories will improve the climate for LGBT students by affirming the value of LGBT perspectives on the law and validating the experience that LGBT students bring to the tax classroom.