REPRODUCING VALUE: HOW TAX LAW DIFFERENTIALLY VALUES FERTILITY, SEXUALITY & MARRIAGE

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*Section 213 of the Internal Revenue Code permits a deduction for an individual's fertility expenses, but it does not do so evenhandedly. This paper focuses on the current discriminatory effects of Section 213 doctrine as it is applied to the deductibility of fertility treatments for single persons and or homosexual couples, as compared to heterosexual, married couples. Traditional economic analysis of the Code fails to explain such discrimination, thus a new approach is required. Utilizing tools from anthropological theory, this paper recognizes and analyzes our tax code—and specifically Section 213—as a cultural artifact and therein challenges the presumed objectivity of our conception of what is "medical," "natural/normal" reproduction, and "fertility/infertility." By revealing and reforming the normative consistencies underlying the seemingly inconsistent pre- and post-*Magdalin v. Commissioner *Section 213 doctrine, this Article proposes that we can embrace new forms of parenthood enabled by reproductive technologies and remedy the current discriminatory application of Section 213 as applied to fertility treatment expenses.*

INTRODUCTION

> *"Power may operate at the levels of ideas, persuading the mind of its legitimacy . . . ."*[1]

> *"[T]axes are what we pay for civilized society . . . ."*[2]

Taxes and culture have marched hand-in-hand throughout history. It would seem fitting, therefore, to study our tax code as a cultural artifact. Contemporary

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[1] Timothy Mitchell, *Everyday Metaphors of Power,* 19 THEORY AND SOC'Y 545 (1990).

[2] Compañia General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

tax scholarship, however, is limited in this regard.[3] Yet it should not be. When viewed through the lenses of culture and history, the tax code's puzzles may seem far less puzzling. Indeed, doctrinal disarray may reveal itself as reproducing hidden value judgments.

Consider, for example, Section 213 of the Internal Revenue Code, a section that provides taxpayers a deduction for qualifying medical care expenses.[4] Current Section 213 doctrine, as applied to the costs of fertility treatments, makes little sense on its face. There is a marked disjunct between, on the one hand, the IRS's position in *Sedgwick v. Commissioner*[5] and *Magdalin v. Commissioner*,[6] the key cases, and, on the other, IRS Publications, Revenue Rulings, Memoranda and Letters on the deductibility of fertility treatments and other medical expenses.[7] Post-*Sedgwick*/*Magdalin*[8] Section 213 doctrine discriminates by making the deductibility of fertility treatments contingent upon a taxpayer's gender, sexuality, and relationship status, though the IRS must rely upon arguments that are at best inconsistent with—and, at worse, flatly contradict—its previous pronouncements to effectuate this result.[9]

More than simple doctrinal inconsistency is at play here. When Section 213 intersects with fertility treatments, the IRS and the Tax Court must draw the line between *medical* and *personal* expenses, wrestle with notions of what constitutes the body, and define *normal* or *natural* reproduction. Once one recognizes the hidden value judgments in the doctrine, the IRS's and Tax Court's doctrinal inconsistency is normatively consistent. Under the Code—as presently interpreted by the IRS and the Tax Court—some persons are proper parents, while others are not. Some persons' reproductive decisions are valued and therefore encouraged. Others' are not. Thus, the deductibility of fertility treatments under Section 213 ultimately rests on normative judgments about whose reproduction we value and whom we deem to be proper parents.

Existing scholarship identifies certain inconsistencies between IRS pronouncements and the outcomes of *Sedgwick* and *Magdalin* but offers little

[3] Critical Tax Theory scholars tend to approach the Code from this perspective. Despite their important contributions, however, the powerful majority of tax scholarship does not analyze the Code as the product of a cultural framework.

[4] I.R.C. § 213 (2004).

[5] *See infra* Part I.D.

[6] Magdalin v. Comm'r, 96 T.C.M. (CCH) 491 (2008).

[7] For a discussion of these inconsistencies as such, *see infra* Part II.; s*ee also* Katherine Pratt, *Deducting the Costs of Fertility Treatment: Implications* of Magdalin v. Commissioner *For Opposite-Sex Couples, Gay and Lesbian Same-Sex Couples, and Single Women and Men*, 2009 WIS. L. REV. 1283 (2009).

[8] Some of the relevant IRS pronouncements occurred after 1994's *Sedgwick*. However, I will refer to pre and post-*Sedgwick/Magdalin* doctrine. The full force of *Sedgwick* is best understood when taken alongside *Magdalin*. Thus while a pre/post-*Sedgwick/Magdalin* distinction does not strictly follow chronology, it is a conceptual distinction which aids the discussion.

[9] *See* Pratt, *supra* note 7.

explanation of their origin or significance.[10] This Article aims to fill this gap in the scholarship by using anthropological theory to identify and discuss the culturally mediated nature of medicine, the body, and definitions of normalcy. Anthropological analysis of Section 213 doctrine will show that the value judgment at the core of the doctrine—that reproduction should occur and be subsidized only in the context of a heterosexual, married household—was operating pre-*Sedgwick* and *Magdalin*. With this background, it is evident that *Sedgwick* and *Magdalin*, though facially inconsistent, share underlying and unifying value judgments and assumptions with other IRS pronouncements. As such, by placing *Magdalin* and *Sedgwick* in their cultural context, this Article explains the hidden consistency beneath the surface inconsistency in Section 213 doctrine.

The aim of this analysis is not simply descriptive, however. The Tax Court and IRS do not question the assumed objectivity of Section 213's application to fertility treatments. But such objectivity is a fiction. The Tax Court and IRS cannot avoid making value judgments when they struggle to define what is *medical*, *normal* or even what constitutes the *body* and its *normal* or *natural* capacities. Recognizing the inevitability of value judgments at the intersection of the body, fertility treatments, and Section 213, this Article aims to construct a normative framework for reforming current doctrine.

Section 213 doctrine stumbles over various rationales to justify the outcome with which the IRS and Tax Court are most comfortable—that fertility treatments be readily deductible for medically infertile, heterosexual, married couples, but not for anyone else. The end result is a muddled, arbitrary, and discriminatory Section 213 that devalues homosexual and single parenthood. The IRS and Tax Court should replace their heteronormative, marriage-centric values with ones that validate new forms of parenthood now enabled by reproductive technologies.

Part I will explore the details of Section 213 doctrine, examining relevant statutory language, Treasury Regulations, as well as IRS pronouncements and the limited case law in the area of fertility treatments and Section 213. Part II introduces the reader to anthropological theory, utilizing it to explain the underlying value judgments which fuel surface inconsistencies in Section 213 doctrine, thereby exposing those inconsistencies as symptoms of the very existence of such judgments. Part III proposes significant reforms to reconcile Section 213 doctrine.

[10] *Id.*

I. REPRODUCTION AND TAXES

A. History and Statutory Text

1. Reproductive Technologies: An Overview

Fertility treatments and *reproductive technologies* are umbrella terms that embrace medical interventions into the reproductive process ranging from hormone therapy to "full" and "gestational surrogacy."[11] IVF, or in vitro fertilization, is one of the most common forms of assisted reproductive technologies.[12] IVF involves joining an egg and sperm—either the patient's, donor's, donors', or a combination thereof—in a laboratory setting, and implanting the embryo in a woman's uterus.[13] The costs of fertility treatments—though varying based on the complexity of the procedures being used and whether a surrogate is involved—make fertility treatments a ready source of potential deductions under Section 213: the average cost is $60,000 to achieve live birth.[14] With this general introduction to the world of reproductive technology, it is now possible to delve into an analysis of Section 213 doctrine.

2. Section 213

Section 213 of the Internal Revenue Code, titled "Medical, dental, etc., expenses," creates a deduction for qualifying, unreimbursed medical expenses in excess of 7.5 percent of the taxpayer's adjusted gross income.[15] Prior to 1942, the Code did not permit any deductions for medical care expenses, but rather considered them to be non-deductible personal expenses.[16] Congress' desire to encourage taxpayers to seek medical care and to ease the burden of "'extraordinary medical expenses'"[17] led it to create the Section 213 deduction.[18] Essentially, Congress recognized that extraordinary medical expenses "reduce a taxpayer's 'ability to pay,'" and therefore should be deductible.[19]

The text of Section 213 states in pertinent part:

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[11] Anna L. Benjamin, *The Implications of Using the Medical Expense Deduction of I.R.C. § 213 to Subsidize Assisted Reproductive Technology*, 79 NOTRE DAME L. REV. 1117, 1119 (2004) (quoting *Revenue Revision of 1942: Hearings Before the H. Comm. On Ways and Means*, 77th Cong. 1612 (1942) (statement of Randolph E. Paul, Tax Advisor to the Sec'y of the Treasury)); *see* John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE. W. RES. L. REV. 323, 350 (2004) (defining gestational surrogacy as involving a sperm donor and a separate egg donor and surrogate, as opposed to "full surrogacy" where the same woman acts as egg donor and surrogate).

[12] *See* Jim Hawkins, *Financing Fertility*, 47 HARV. J. ON LEGIS. 115 (2010); Benjamin, *supra* note 11, at 1119.

[13] Benjamin, *supra* note 11, at 1119.

[14] *Id.* at 1120.

[15] I.R.C. § 213 (2005) (note that the floor will increase to 10% for taxable years after 2012).

[16] I.R.S. Gen. Couns. Mem. 34,832 (Apr. 5, 1972).

[17] Benjamin, *supra* note 11, at 1132.

[18] *Id.*

[19] Pratt, *supra* note 7, at 1289.

> (a) Allowance of deduction.—There shall be allowed as a deduction the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent . . . to the extent that such expenses exceed 7.5 percent of adjusted gross income . . . .
>
> (d) Definitions.—For the purposes of this section—
>
> > (1) The term "medical care" means amounts paid—
> >
> > (A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, *or* for the purpose of affecting any structure or function of the body. . . .[20]

In 1990, Congress created an exemption disallowing a deduction for certain cosmetic surgery expenses which would normally qualify as procedures affecting the structure or function of the taxpayer's body:[21]

> (9) Cosmetic surgery.—
>
> > (A) In general.—The term "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.
> >
> > (B) Cosmetic surgery defined.—For purposes of this paragraph, the term "cosmetic surgery" means 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.[22]

In a recent opinion, Judge Halpern of the Tax Court articulated a framework for analyzing the deductibility of an expense under Section 213. Recognizing that Congress created a "series of rules and exceptions" in the code,[23] the IRS begins with the principle—codified in Section 262—that an individual cannot deduct personal expenses.[24] Sections 213(a) and (d)(1) create an exception to the general prohibition of deductibility found in Section 262 for qualifying medical expenses over 7.5 percent of the taxpayer's adjusted gross income.[25] An expense qualifies if it meets either condition of the two-prong test created in Section 213(d)(1), i.e., if it is (i) "for the diagnosis, cure, mitigation, treatment, or prevention of disease"

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[20] I.R.C. §§ 213(a), 213(d) (2005) (emphasis added). The allowance in subsection (a) of a deduction for costs incurred by the taxpayer and/or the taxpayer's spouse and dependents will be referred to as *aggregation*. *See, e.g.*, Pratt, *supra* note 7, at 1320-25.

[21] *See* Katherine T. Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121, 1142-43 (2004) (viewing the amendment to represent a narrowing of the *structure/function* prong).

[22] I.R.C. § 213(d)(9) (2005).

[23] *See* O'Donnabhain v. Comm'r, 134 T.C. 34, 90 (2010) (Halpern, J., concurring).

[24] *Id.*; *see also* I.R.C. § 262 (2005).

[25] *See O'Donnabhain*, 134 T.C. at 48.

("*disease prong*") or (ii) "for the purpose of affecting any structure or function of the body"[26] ("*structure/function prong*").

If an expense seemingly qualifies under the rule created by Section 213(a) and Section 213(d)(1), the taxpayer must then determine if the expense is subject to the Section 213(d)(9)(A) exception for cosmetic surgery.[27] All is not lost, however, for the taxpayer who undergoes cosmetic surgery if his or her surgery qualifies for the "third order exception [which] restor[es] deductibility" for some cosmetic surgeries.[28]

B. Treasury Regulations and IRS Interpretations

When drafting Section 213, Congress intended the definition of medical care to be "broadly defined."[29] But the IRS and the Tax Court have interpreted Section 213 to create a "limited exception" to the non-deductibility of personal expenses, specifically in the area of fertility treatments.[30] Primary tax law sources, including Treasury Regulations, Tax Court decisions, IRS Revenue Rulings, Private Letter Rulings, General Counsel Memoranda, and Information Letters provide a complete picture of what constitutes qualifying medical care. Although each of these sources has different precedential value, their importance for this inquiry lays in demonstrating the IRS's and Tax Court's operating value judgments and assumptions regarding the *body* and what is *medical* and *normal* in the fertility context.

1. Treasury Regulation 1.213-1

Any analysis of the coverage of fertility treatments under Section 213 must begin with Treasury Regulation 1.213-1(e)(1). Regulation 1.213-1(e)(1) elaborates upon the meaning of medical care, reading, in pertinent part:

> (e) Definitions—(1) General. (i) The term medical care includes the diagnosis, cure, mitigation, treatment, or prevention of disease. Expenses paid for "medical care" shall include those paid for the purpose of affecting any structure or function of the body or for transportation primarily for and essential to medical care.
> (ii) Amounts paid for operations or treatments affecting any portion of the body, including obstetrical expenses and expenses of therapy or X-ray treatments, are deemed to be for the purpose of affecting any structure or function of the body and are therefore paid for medical care . . . .

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[26] I.R.C. § 213(d)(1)(A) (2005).

[27] *See O'Donnabhain*, 134 T.C. at 90.

[28] *Id.*

[29] S. REP. NO. 1631-77 (1942).

[30] *See, e.g.*, Magdalin v. Comm'r, 96 T.C.M. (CCH) 491, *2 (citing Jacobs v. Comm'r, 62 T.C. 813, 818 (1974)). For a discussion of the relationship between the IRS, Treasury, Congress and the courts in creating and interpreting tax law, see Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. Rev. 185 (2004).

> Deductions for expenditures for medical care allowable under section 213 will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness. Thus, payments for the following are payments for medical care: hospital services, nursing services (including nurses' board where paid by the taxpayer), medical, laboratory, surgical, dental and other diagnostic and healing services, X-rays, medicine and drugs . . . . However, an expenditure which is merely beneficial to the general health of an individual, such as an expenditure for a vacation, is not an expenditure for medical care.[31]

The meaning of this provision is hotly contested territory not only in the debate regarding the deductibility of fertility treatments, but also the deductibility of other procedures and care under Section 213.[32] As we shall see, implementation of Regulation 1.213-1(e)(1) in the area of fertility treatments has been inconsistent at best.

2. IRS Interpretive Opinions

Over the past forty years, the IRS has issued a number of opinions in various forms regarding the deductibility of fertility and reproductive medical expenses. A review of these sources provides a comprehensive view of the IRS's understanding of the applicability of Section 213 to such expenses. Further, such review shows how, over time, the IRS's standpoint on the deductibility of certain expenses shifts, hinting at the ever-evolving nature of what constitutes medical care—a concept which will be explored on a theoretical level in Part II. Lastly, a review of these pronouncements lays the groundwork for showing how the inconsistencies of Section 213 doctrine reveal hidden IRS and Tax Court value judgments and assumptions regarding reproduction and family structure.

i. IRS Publication 502

IRS Publication 502, "Medical and Dental Expenses," synthesizes previous IRS statements regarding the deductibility of an expense to aid taxpayers in completing their tax returns.[33] Among others allowances, Publication 502 expressly provides for the deductibility of medical expenses for abortions, birth control pills, pregnancy tests, sterilization, and vasectomies.[34] Regarding "fertility enhancement" expenses specifically, Publication 502 provides that "the cost of the following procedures to *overcome an inability to have children*" are deductible:

> (1) "[p]rocedures such as *in vitro* fertilization (including temporary storage of eggs or sperm)"; and

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[31] Treas. Reg. § 1.213-1(e)(1)(ii)&(ii) (emphasis added).

[32] *See, e.g.*, *O'Donnabhain*, 134 T.C. at 90 (providing an extended discussion of Treas. Reg. § 1.213-1(e)(1) and its impact on the deductibility of treatment for gender identity disorder).

[33] *See* I.R.S. Publ'n 502 (Dec. 9, 2008).

[34] *Id.*

> (2) "[s]urgery, including an operation to reverse prior surgery that prevented the person operated on from having children."[35]

Although the publication reiterates the provision of Regulation 1.213-1(e)(1)(ii), which states that "[m]edical care expenses must be primarily to alleviate or prevent a physical or mental defect or illness,"[36] it does not restrict the deductibility of fertility treatment to costs expended to address a specific disease or organic etiology. Rather, it simply states that a taxpayer may deduct the costs of fertility treatments or surgery whose purpose is "to overcome an inability to have children."[37] The unqualified nature of this statement is critical to an analysis of inconsistent positions taken by the IRS and the Tax Court.

ii. Revenue Rulings

Although Publication 502 clearly states that the cost of birth control is a deductible medical care expense regardless of the taxpayer's reason for using birth control, this was not always the case.[38] Revenue Ruling 67-339, issued in 1967, limited the deduction of the cost of birth control only in "circumstances [where] in the opinion of the physician[,] the possibility of childbirth raises a serious threat to the life of the wife."[39] According to the Chief Counsel of the IRS, a woman who could not safely carry a baby to term was "clearly [suffering from] a physical defect or illness."[40] The Chief Counsel specifically cautioned against the expansion of the deduction to encompass the costs of birth control when a woman simply wanted to prevent pregnancy but could safely carry a child;[41] i.e., truly elective use of birth control. A mere six years later, however, the IRS issued Revenue Ruling 73-200, which recognized the deductibility of the cost of birth control, regardless of the taxpayer's motivation in using it.[42] Whereas the IRS previously felt that truly elective birth control was non-deductible medical care, with passage of time, shifting public opinion on sexuality, and the continued evolution of medical knowledge, the agency revised its conception to recognize the deductibility of such expenses.

The IRS built upon this shift in subsequent opinions, further expanding its concept of what constitutes deductible reproductive medical care under Section 213. Also in 1973, the IRS issued Revenue Ruling 73-201, which held that vasectomies and elective abortions qualify as medical care.[43] Both operations, the

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35 *Id.*

36 *Id.*

37 *Id.*

38 I.R.S. Publ'n 502 (Dec. 9, 2008); *see also* Rev. Rul. 67-339, 1967-2 C.B. 126.

39 Rev. Rul. 67-339, 1967-2 C.B. 126.

40 Frederick R. Parker, Jr., *Federal Income Tax Policy and Abortion in the United States*, 13 MICH. ST. U. J. MED. & L. 335, 342 (2009) (alteration in original).

41 *Id.*

42 Rev. Rul. 73-200, 1973-1 C.B. 140 ("[T]he amount expended for the birth control pills is an amount paid for medical care.").

43 Rev. Rul. 73-201, 1973-1 C.B. 140.

IRS reasoned, satisfy the *structure/function* prong of the Section 213 medical care definition.[44] Importantly, the IRS stated that both operations satisfied the requirement of Regulation 1.213-1(e)(1)(ii) that allowable expenditures be "primarily for the prevention or alleviation of a physical or mental defect or illness,"[45] regardless of the fact that the procedures did not address an underlying disease or condition. The IRS strengthened this stance in Revenue Ruling 73-603, stating that a woman may deduct the cost of any procedure "render[ing] her incapable of having children," whether elective or not, as such a procedure falls under the *structure/function* prong.[46] Thus, if the procedure satisfies the *structure/function* prong, the taxpayer's motivation in pursuing a procedure is immaterial, as is whether the procedure treats an underlying condition.

iii. General Counsel Memoranda

Where the Revenue Rulings themselves are sparing in discussion, a 1972 IRS General Counsel Memorandum elaborates on the principles supporting deduction of costs for vasectomies, elective abortion, and surgeries to prevent conception. Importantly, the memorandum addressed the scope of Regulation 1.213-1(e)(1)(ii), which states that allowable expenditures must be "primarily for the prevention or alleviation of a physical or mental defect or illness."[47] More specifically, the memorandum reasons that Regulation 1.213-1

> cannot be given a broad interpretation without conflicting with other parts of the regulations. This is so because the regulations specifically allow a deduction for obstetrical expenses (generally not related to any physical or mental defect or illness) and because the fourth sentence of section 1.213-1(e)(1)(ii) . . . concludes from statements made in the first three sentences, that payments for medical and surgical services (among others) *are* payments for medical care.
>
> Accordingly, we conclude that the [*primarily for* . . . provision] . . . was not intended to and does not, apply to any medical expenses otherwise meeting the statutory definition of medical care, such as amounts paid for legal surgical operations, since those operations affect a structure or function of the body.[48]

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[44] *Id.*

[45] *Id.* ("Since the purpose of the [vasectomy] is to effect both a structure and a function of the body, its cost is an amount paid for medical care as defined in section 213(e) of the Code and section 1.213-1(e)(1)(ii) of the regulations."). With respect to an abortion, the ruling concluded that "[s]ince the operation . . . is deemed to be for the purpose of affecting a structure or a function paid the body, its cost is an amount paid for medical care as defined in section 213(e) of the Code and section 1.213-1(e)(1)(ii) of the regulations." *Id.*

[46] Rev. Rul. 73-603, 1973-2 C.B. 76 ("[A] taxpayer's expenditures for an operation . . . at her own request to [be sterilized] are deemed to be for the purpose of affecting a structure or function of the body, and therefore, are amounts paid for medical care.").

[47] Rev. Rul. 73-201, 1973-1 C.B. 140.

[48] I.R.S. Gen. Couns. Mem. 34,832 (Apr. 5, 1972) (first emphasis added).

In support of this principle, the memorandum favorably quotes an earlier tax court case in which the court evaluated the regulation. The opinion read as follows: "[c]learly the word 'primarily' [in the 'primarily for' provision of Regulation 1.213-1(e)(1)(ii)] was used with reference to *those types of expenditure which by their nature have no more than a remote or general relationship to health . . . . A bill for physician's services rendered for any of the enumerated statutory purposes is not such*."[49] Revenue Rulings 73-201 and 73-603 adopted this principle, holding that procedures that satisfy the *structure/function* prong satisfy Regulation 1.213-1(e)(1)(ii).[50] Taken alongside these revenue rulings, this General Counsel Memorandum instructs us that the *primarily for* provision of Regulation 1.213-1(e)(1)(ii) cannot apply to expenses which (a) qualify under the *structure/function* prong, (b) are not otherwise excluded by the cosmetic surgery exemption, and or (c) are paid for expressly medical expenses.[51]

The IRS's subsequent pronouncement in Revenue Ruling 2007-72 rests on the same logic as the General Counsel Memorandum. In Revenue Ruling 2007-72, the IRS stated that the cost of a pregnancy test qualifies as a deductible medical care expense.[52] In holding the test to be deductible, Revenue Ruling 2007-72 first emphasized that, per Regulation 1.213-1(e)(1)(ii), "obstetrical services" are deemed to be deductible medical care that satisfies the *structure/function* prong of Section 213, hinting that a pregnancy test could qualify as obstetrical care under that prong.[53] After all, a pregnancy test does not treat or diagnose a disease, and, therefore, the *disease* prong seems unavailable. Nevertheless, the IRS held that a test which evaluates "changes in the functions of the body . . . that are unrelated to disease" qualifies as deductible care, "even though its purpose is to test the healthy functioning . . . rather than detect disease[,]" a position which seems to ground deductibility in the *disease* prong despite the absence of any disease to treat or diagnose.[54] This outcome clarifies that when the IRS faces medical care which appears to it to be expressly medical, it does not require the presence of underlying disease as a prerequisite to deductibility under Section 213 and that it views reproductive care as a fully medicalized field.[55]

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[49] I.R.S. Gen. Couns. Mem. 34,832 (Apr. 5, 1972) (quoting Starrett v. Comm'r, 41 T.C. 877, 822 (1964).

[50] *See* Rev. Rul. 73-201, 1973-1 C.B. 140; Rev. Rul. 73-603, 1973-2 C.B. 76.

[51] *See* IRS Gen. Couns. Mem. 34,832 (Apr. 5, 1972); *see also* O'Donnabhain v. Comm'r, 134 T.C. 34 (2010)(Holmes, J. concurring).

[52] Rev. Rul. 2007-72, 2007-50 I.R.B. 1154.

[53] *Id.*

[54] *Id.*

[55] *See* discussion *infra* Part II. For our immediate purpose, however, it simply means that fertility and reproductive care are readily identified as medical care.

iv. Letter Rulings and Interpretations

Though all of the aforementioned IRS pronouncements address reproductive care, they do not—excluding Publication 502—specifically discuss fertility treatments. In recent years, however, the IRS issued two important letters evaluating the deductibility of fertility expenses. Each letter expressly identified certain fertility treatments as qualifying medical expenses with little limitation.

In 2003, the IRS issued a private letter ruling permitting a taxpayer who had undergone significant, unsuccessful fertility treatments to deduct the costs of egg donation, including the donor's expenses.[56] In order to reach its ultimate conclusion that the procedure was deductible, the agency drew upon the revenue rulings that held that vasectomy and sterilization costs are deductible as procedures that affect a structure or function of the body.[57] Recognizing egg donation as a "procedure [whose] purpose [is to] facilitat[e] pregnancy by overcoming infertility[,]" the IRS reasoned that the procedure "affects a structure or function of the body" and therefore similarly satisfies the *structure/function* prong of Section 213.[58] The IRS also analogized the deductibility of the donor's expenses to the deductibility of a kidney donor's expenses by the donee.[59] The IRS later faced but refused to recognize this analogy in the *Magdalin* case, an inconsistency which will be subsequently addressed.[60]

In 2005, the IRS once again took up the issue of the deductibility of egg donor fees and again it found such fees to be deductible as medical expenses under Section 213.[61] As its rationale, the IRS noted that "[f]ertility is a function of the body" and the costs of fertility treatments aimed at "overcom[ing] infertility" satisfy Section 213. [62] Specifically, the costs of egg or embryo donation to be implanted in the taxpayer's body qualify as "medical care of the taxpayer."[63] The IRS drew upon the kidney donor analogy once again, demonstrating the strength of this analogy in the mind of the IRS.[64] The IRS touched upon the issue of whether fertility is a function of all bodies in *Magdalin*, where it took a narrower view than that of the plain meaning of the language used herein.[65]

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[56] I.R.S. Priv. Ltr. Rul. 2003-18-017 (May 2, 2003).

[57] *Id.*

[58] *Id.*

[59] *Id.* ("[E]xpenses the taxpayer pays to obtain an egg donor, including the donor's expenses, are directly related and preparatory to the taxpayer's receiving the donated egg or embryo. The expenses are therefore the taxpayer's medical expenses and are deductible by the taxpayer in the year paid.").

[60] *See* Magdalin v. Comm'r, 96 T.C.M. (CCH) 491 (2008).

[61] I.R.S. Info. Ltr. 2005-0102 (Mar. 29, 2005).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *See* Magdalin v. Comm'r, 96 T.C.M. (CCH) 491 (2008).

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In sum, from its pronouncements on fertility treatments, it is clear that the IRS:

> (1) recognizes fertility as a function of the body;[66]
> (2) views treatments aimed at overcoming an inability to have children as qualifying medical expenses;[67] and
> (3) does not require that an underlying disease be present for medical treatment to qualify as deductible—*e.g*., vasectomies, birth control, and abortion costs.[68]

These pronouncements do not qualify the deductibility of care based on a person's gender, marital status, or sexuality. However, *Sedgwick v. Commissioner* and *Magdalin v. Commissioner* addressed reproductive care on the margins—a heterosexual couple utilizing surrogacy and a gay man having children through a combination of IVF and surrogacy.[69] These cases exhibit inconsistencies with the pronouncements that illuminate the IRS's and Tax Court's long-concealed value judgments regarding the *body*, the line between *medical* and *personal*, what constitutes *normal* reproduction and ultimately, who makes a proper parent.

C. Case Law on the Deductibility of Fertility Treatments

There is limited case law on the deductibility of fertility treatments under Section 213. But the two key cases—*Sedgwick v. Commissioner* and *Magdalin v. Commissioner*—reveal puzzling inconsistencies. Indeed, the cases suggest a significant narrowing of the scope of deductible fertility treatments when compared with the doctrine discussed above.[70] But these surface inconsistencies can be explained by a deep *consistency*. This Article proposes that *Sedgwick* and *Magdalin*, properly understood, reveal the assumptions with which the IRS and the Tax Court have always operated in applying Section 213 to fertility treatments.

1. *Sedgwick v. Commissioner*

Sedgwick v. Commissioner addressed the issue of the deductibility of surrogacy costs for an infertile heterosexual couple.[71] Although the case settled

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[66] I.R.S. Info. Ltr. 2005-0102 (Mar. 29, 2005).

[67] *See* I.R.S. Publ'n 502 (Dec. 9, 2008); IRS Info. Ltr. 2005-0102 (Mar. 29, 2005); I.R.S. Priv. Ltr. Rul., 2003-18-017 (May 2, 2003).

[68] *See* I.R.S. Publ'n 502 (Dec. 9, 2008); Rev. Rul. 2007-72, 2007-50 I.R.B. 1154; Rev. Rul. 73-603, 1973-2 C.B. 76; Rev. Rul. 73-201, 1973-1 C.B. 140; Rev. Rul. 73-200, 1973-1 C.B. 140; I.R.S. Gen. Couns. Mem. 34,832 (Apr. 5, 1972).

[69] *See* Sedgwick v. Comm'r, No. 10133-94, LEXSTAT 94 PTT 13-53 (T.C. filed June 14, 1994); Magdalin v. Comm'r, 96 T.C.M. (CCH) 491 (2008).

[70] *See infra* Part I.D.

[71] Sedgwick v. Comm'r, No. 10133-94, LEXSTAT 94 PTT 13-53 (T.C. filed June 14, 1994). The case, which resulted in a settlement, is discussed in Pratt, *supra* note 7, at 8-9, from which this summary is taken.

without an opinion in favor of the taxpayer, the IRS argued and continues to argue that surrogacy expenses do not qualify as medical expenses under Section 213.[72] Notably, *Magdalin v. Commissioner*, discussed below, punts on the issue, refusing to discuss whether surrogacy costs would be deductible for persons the court views as infertile.[73] In *Sedgwick*, the IRS argued that surrogacy is "elective" and bears only on the taxpayer's "general mental health," making it a non-deductible personal expense per Regulation 1.213-1(e)(1)(ii).[74] As explained further below, this stance flatly contradicts the existing Section 213 doctrine discussed above.[75]

2. *Magdalin v. Commissioner*

The Tax Court decided *Magdalin v. Commissioner* in 2008, the First Circuit upheld the Tax Court ruling,[76] and the Supreme Court denied certiorari.[77] Thus, *Magdalin* stands as the authoritative pronouncement in this area.

Taxpayer William Magdalin was a gay man who used gestational surrogates and IVF to have two children.[78] The Tax Court denied deductions for Magdalin's surrogacy and IVF expenses, concluding that Magdalin "cannot deduct those expenses because he has no medical condition or defect to which those expenses relate and because they did not affect a structure or function of his body."[79] The First Circuit affirmed on that basis, noting that Magdalin "stipulated that he was not infertile and that his previous children had been produced by *natural* processes."[80] Accordingly, the court reasoned, the surrogacy and IVF expenses "were not for the treatment of any underlying medical condition suffered by the taxpayer" and therein failed under the *disease prong*.[81] Because the procedures, in the court's view, affected only the structure or function of the surrogates' bodies, Magdalin's claim failed under the second, *structure/function* prong of Section 213 as well.[82] Most importantly, the court apparently adopted the IRS's argument that an underlying disease is a precursor even to the deductibility of care that satisfies the *structure/function* prong.[83]

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72 Pratt, *supra* note 7, at 1303.

73 *See* Magdalin v. Comm'r, 96 T.C.M. (CCH) 491 (2008) (stating that because Magdalin was not medically infertile, "[w]e therefore need not answer lurking questions as to whether (and, if so, to what extent) expenditures for IVF procedures and associated costs . . . would be deductible in the presence of an underlying medical condition.").

74 Pratt, *supra* note 7, at 1303.

75 *Id*. at 1330-34; *see also* Treas. Reg. § 1.213-1(e)(1)(ii) (1979).

76 *Magdalin*, 96 T.C.M. (CCH) 491.

77 Magdalin v. Comm'r. 130 S. Ct. 2388 (2010).

78 *Magdalin*, 96 T.C.M. (CCH) 491.

79 *Id.*

80 Magdalin v. Comm'r, 2009 WL 5557509 (1st Cir. 2009) (emphasis added).

81 *Id.*

82 *Id.*

83 *See Magdalin*, 96 T.C.M. (CCH) 491; *see also* Pratt, *supra* note 7, at 1311, 1325.

With this background, this Article now turns to the inconsistencies in Section 213 doctrine as exemplified by *Sedgwick* and *Magdalin* and revealed by examination of the IRS's divergent pronouncements.

II. POWER AND DIFFERENCE IN REPRODUCTION

Consider for a moment the following hypothetical. A heterosexual married couple is medically fertile, but both partners carry the Tay-Sachs gene, which can result in Tay-Sachs disease, a genetic disorder that results in physical and mental deterioration and early death. Although neither parent suffers from the disease, if they have a child, that child has a 25% chance of suffering from Tay-Sachs and a 50% chance of being a genetic carrier.[84] The couple seeks out egg and sperm donors who are not carriers and the wife undergoes IVF to be implanted with an embryo. Utilizing these technologies provides the only means, other than adoption, for this couple to guarantee that their child does not suffer from Tay-Sachs.[85] Could the couple deduct the costs of the donors and IVF?

Tracking the intuitive response to this question, it is clear that under the pre-*Sedgwick*/*Magdalin* doctrine, the hypothetical couple would be entitled to a deduction for at least the IVF procedure, the most expensive aspect of their treatment. This is the case because, under the pre-*Sedgwick/Magdalin* framework, there is no disease requirement for the *structure/function* prong. But the couple would not be entitled to a deduction following *Sedgwick* and *Magdalin*. The IVF procedures do not satisfy the *Magdalin* disease requirement, as the couple is medically fertile.[86] To view the fertility expenses as mitigation or treatment of their unexpressed genetic condition reads the *disease* prong uncharacteristically broadly. Thus the couple's expenses fail under the first prong of Section 213. Although the procedures affect the structure of the wife's body, the treatments still should not be deductible under the second, *structure/function* prong because *Magdalin* makes an underlying disease a precursor to the deductibility of treatment under either prong.[87]

What explains this inconsistency between the pre and post-*Sedgwick/Magdalin* doctrine? This Part argues that the IRS and the Tax Court are operating with a heteronormative, marriage-centric understanding of *natural* or *normal* reproduction, what qualifies as *medical*, and who makes an appropriate parent. This set of norms drove the IRS and the Tax Court to conclude in *Magdalin* that a deduction was not permissible—not because of any command in the doctrine, but rather because the taxpayer in that case did not fit the IRS's and the Tax

[84] Nat'l Human Genome Research Inst., *Learning About Tay Sachs Disease*, NAT'L INST. OF HEALTH & LEARNING, http://www.genome.gov/10001220 (June 28, 2010).

[85] *Id.*

[86] *See Magdalin*, 96 T.C.M. (CCH) 491; *see also* Pratt, *supra* note 7, at 25.

[87] *See* Pratt, *supra* note 7, at 1325.

Court's understanding of who a proper parent is. Thus, *Magdalin* represents a break in the doctrine that reveals an underlying reproduction of value.

With the help of Professor Katherine Pratt's existing scholarship on the issue, the following discussion systematically evaluates and reveals the inconsistencies and inequalities of post-*Sedgwick/Magdalin* Section 213 doctrine based on an individual's relationship status, gender and sexuality. Part II.A applies that doctrine based on each of those facts. Part II.B discusses the inconsistencies that are revealed in Part II.A. And Part III.C considers those surface inconsistencies through the lens of culture and history, showing the consistent normative commitments that explain the disarray in the doctrine.

*A. Applications of Post-*Sedgwick/Magdalin *Doctrine*

This Section begins by examining the inconsistencies in existing doctrine when viewed through the lens of relationship status, gender, and sexuality.

1. Heterosexual Couples

Section 213 doctrine places the fewest restraints on a heterosexual couple attempting to deduct the costs of fertility treatment. A medically infertile,[88] heterosexual, married couple can deduct any fertility treatments, excluding surrogacy costs, without incident and regardless of which individual is the cause of the medical-infertility—including even the costs of procedures such as sperm collection for a medically fertile man for IVF treatment.[89] Indeed, such a couple can deduct the costs even when physicians cannot identify an organic etiology for the infertility.[90] *Sedgwick* and *Magdalin* leave uncertain whether a medically infertile heterosexual, married couple may deduct surrogacy costs.[91] However, if the couple can demonstrate medical infertility, all surrogacy costs, including egg and or sperm donation, should be deductible under the rationale that, like a kidney donor, the surrogate provides a substitute for normal functioning of the reproductive systems of the couple.[92] Surrogacy so viewed should satisfy the first prong of Section 213 as treatment for disease.[93] Nevertheless, the IRS took the opposite position in *Sedgwick* and the Tax Court refused to address the question in

[88] *See* discussion *infra* Parts II.-III. For its current purpose, it means infertility traceable to an organic etiology, as opposed to a person's sexuality or relationship status. *See* Pratt, *supra* note 7, at 1286.

[89] *See* Pratt, *supra* note 7, at 1320-24.

[90] *Id*. at 1321. This reality undermines the argument in *Magdalin* that an underlying disease is a precursor to deductibility under either prong. Instead it supports a definition of infertility defined by the end result—inability to have a child—regardless of the cause of that result. *See* discussion *infra* Part III.

[91] *Id*. at 1320-22.

[92] *Id*. at 1322-24.

[93] *Id*. at 1304-05.

Magdalin, thereby perpetuating a disjunct between the logical conclusion of existing doctrine and actual outcomes for individual taxpayers.[94]

Although a medically infertile, married, heterosexual couple can easily take advantage of Section 213 for a wide range of fertility treatments, re-envision that couple as unmarried, and the situation becomes more complicated.[95] The first hurdle such a couple faces is establishing proof of infertility.[96] Existing definitions of infertility and the aggregation permitted under Section 213 remove the need for a *married* couple to show proof of infertility—other than the inability to conceive or carry a baby to term without assistance—or to determine which spouse is infertile.[97] An unmarried couple, however, cannot file jointly or take advantage of Section 213's permitted aggregation of the taxpayer's body with that of his or her spouse and dependents.[98] This reality creates the need for the taxpayer to demonstrate his or her medical infertility over and above his or her inability to have a child, a challenge not faced by a similar couple who is married and one which limits the scope of treatments deductible to an unmarried couple.[99]

Recall that, for tax purposes, each partner in an unmarried heterosexual couple is treated as being single.[100] This tax treatment mirrors that of a person who is actually single, as well as gay and lesbian individuals even if they are in a relationship or legally married under state law.[101] If a man is infertile, he can deduct the costs of treatment for his infertility.[102] If his girlfriend undergoes artificial insemination or IVF for which the man pays the costs, he should be able to deduct those costs as treatment of his infertility under the first prong of Section

94 *See* Pratt, *supra* note 7, at 1320-24; *see also* Magdalin v. Comm'r, 96 T.C.M. (CCH) 491 (2008).

95 There are no published opinions or IRS pronouncements addressing the deductibility of fertility treatments for an unmarried, heterosexual, medically-infertile couple.

96 Pratt, *supra* note 7, at 1322-23.

97 *Id*. at 1320-24.

98 *Id*.; I.R.C. § 213(a) (2004) (limiting aggregation to spouse and dependents).

99 Pratt, *supra* note 7, at 1320-24.

100 *Id.*

101 *Id*. at 1311-12 (noting that the Defense of Marriage Act (DOMA) forces all homosexual couples to file separately as it "prohibits federal recognition of same-sex marriages"). Importantly, in May 2012 the First Circuit Court of Appeals found DOMA to be unconstitutional. *See* Mass. v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 15 (1st Cir. 2012) ("[T]he rationales offered do not provide adequate support for section 3 of DOMA."). Likewise, in October 2012, the Second Circuit Court of Appeals also declared DOMA unconstitutional. *See* Windsor v. U.S., 2012 WL 4937310 (2d Cir. 2012). Further, the Obama Administration has officially stated that it will no longer argue in support of the constitutionality of the Act and has pressured the Supreme Court for speedy review of lower court rulings finding DOMA unconstitutional. *See, e.g.*, *DOMA Appeal: Obama Administration Asks Supreme Court for Quick Review of Gay Marriage Law*, HUFFINGTON POST (Jul. 3, 2012), http://www.huffingtonpost.com/2012/07/03/doma-appeal-supreme-court-gay-marriage_n_1648119.html; *Obama: DOMA Unconstitutional, DOJ Should Stop Defending in Court*, HUFFINGTON POST (Feb. 23, 2011), http://www.huffingtonpost.com/2011/02/23/obama-doma-unconstitutional_n_827134.html. The outcome of a potential Supreme Court ruling on the constitutionality of DOMA could have far-reaching implications, perhaps opening the door to joint-filing for same-sex couples.

102 Pratt, *supra* note 7, at 1323.

213.[103] If the woman paid her own costs, however, she could not deduct the expenses, post-*Magdalin*.[104] Although the expenses should qualify under the *structure/function* prong, the *Magdalin* disease requirement would preclude the deduction nevertheless, because the woman is medically fertile and therein does not suffer from an underlying disease.[105] The reverse of this situation also holds.[106] In comparison, either party of a married couple or the couple filing jointly could deduct all of the costs above because Section 213 permits aggregation of the body of the taxpayer and his or her spouse,[107] a result which reflects the IRS's and Tax Court's bias in favor of marriage. However, even this couple is, on balance, in a better position under Section 213 than are medically fertile singles or homosexual couples.

2. Lesbian Couples and Single Women

Assuming these women do not want to engage in sexual relations with men simply to have children,[108] a lesbian couple, or a single woman, even if medically fertile, clearly cannot have a child without at least some medical intervention.[109] But which of their reproductive technology expenses will be deductible, if any? If one partner or a single woman is medically infertile, the costs of diagnosing and treating medical infertility, such as IVF, are likely deductible expenses *for that taxpayer*.[110] However, the couple will run into resistance in deducting the costs of sperm donation, as the "woman's body, whether fertile or infertile, can never supply sperm."[111] This fact allows the IRS or the Tax Court to determine that the cost of sperm donation does not treat a disease or malfunction of the taxpayer's body.[112] Recall that such costs are, however, deductible to a heterosexual married couple, who do not have to trace infertility to either partner.[113] Nevertheless, a lesbian couple or single woman who is medically infertile is in a distinctly better position than when the couple or woman is medically fertile.

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[103] *Id*. at 1323-24.

[104] *Id*. at 1323-24, 1346 (arguing that a woman should be able to deduct such expenses under the *structure/function* prong, but ultimately recognizing that *Magdalin* prohibits this deduction).

[105] *Id*.

[106] *See id*. at 1322-24 (claiming that where a couple's infertility is attributable to the woman, she can deduct the costs of treatments to mitigate her infertility, but her boyfriend cannot).

[107] Pratt, *supra* note 7, at 1320-24, 1346.

[108] No person, whether heterosexual or homosexual, should be pushed to engage in an undesired sexual relationship simply to have children. *Magdalin* rightly argued that by denying deductibility of fertility treatments and perpetuating a heteronormative conception of reproduction, the Tax Court and IRS were encouraging such behavior. *Id*. at 1335 (citing Petitioner's Reply Brief). Such relationships are both "unstable" and blatantly disregard that to do so may run counter to a person's sexuality and morality. *Id*.

[109] *Id*. at 1287-88.

[110] *Id*. at 1320-24.

[111] *Id*. at 1324.

[112] Pratt, *supra* note 7, at 1324.

[113] *Id*. at 1320-21, 1330.

Post-*Magdalin*, a medically fertile lesbian couple or single woman will face significant challenges in attempting to deduct the costs of fertility treatments. As previously discussed, *Magdalin* attempts to make underlying medical infertility a prerequisite for deducting even fertility treatment expenses which satisfy the *structure/function* prong.[114] Therefore, a medically fertile lesbian couple or single woman could be excluded from deducting the costs of all fertility treatments—not just sperm donation—because the infertility is "not attributable to medical infertility [but rather] . . . dysfertility that is a result of [the couple's] sexual orientation."[115] Post-*Magdalin*, in the absence of demonstrated medical infertility, medically fertile single women or lesbian couples seeking to use fertility treatments to have a child will likely be precluded from deducting those costs.[116]

3. Gay Couple or Single Man

Biological realities command that, short of engaging in a sexual relationship with a woman only to have a child, a single man or gay couple must rely upon egg donation and surrogacy to have a child.[117] Any man, regardless of his sexuality or marital status, can deduct the costs of testing for and treatment of *his* medical infertility.[118] The problem arises when a man is medically fertile and seeks to utilize egg donation and surrogacy in order to have a child.[119] *Magdalin* unequivocally states that a medically fertile man cannot deduct the costs of egg donation or surrogacy because (i) he does not suffer from medical infertility—thereby precluding deductibility under the *disease* prong—and (ii) because the treatments affect the structure or function of a third party—thereby precluding deductibility under the *structure/function* prong.[120] Although the taxpayer in *Magdalin* was homosexual, the holding of the case applies with equal force to any medically fertile man, be he single or a partner in a gay couple.[121] Thus, current Section 213 doctrine heavily burdens men, making medically fertile single men or gay couples responsible for the full costs of fertility treatments.[122]

Operating with a working knowledge of the effects of post-*Sedgwick/Magdalin* Section 213 doctrine, it is now time to ask whether these outcomes are appropriate. Are the IRS and Tax Court consistently applying a unified set of principles regarding the intersection of Section 213 doctrine, the body, and fertility treatments, which just happens to result in discrimination based on a person's gender, sexuality or marital status?

114 *Id*. at 1321-22.
115 *Id*. at 1330.
116 *Id*. at 1325-31; s*ee also infra* note 101.
117 *Id*. at 1287-89.
118 Pratt, *supra* note 7, at 1320-31.
119 *Id*. at 1324-27.
120 *Id*. at 1330-34.
121 *Id*. at 1339-40.
122 *Id*.

B. Four Inconsistencies in Section 213 Doctrine

As will be discussed below, Section 213 doctrine currently displays four seeming inconsistencies which result in the inequitable outcomes identified in Part II.A.

1. Inconsistent Aggregation of the Body

As Professor Pratt has discussed, the Tax Court and the IRS inconsistently aggregate the body of the taxpayer and others receiving medical care.[123] Aggregation refers to the expansion of the term "of the body" in Section 213 to allow the taxpayer to deduct expenses for medical care of persons other than taxpayer.[124] Section 213 explicitly permits the aggregation of the taxpayer's body with that of his or her spouse and dependents, thereby making the costs of all fertility treatments of a heterosexual, married couple deductible to either spouse.[125] Expanding aggregation beyond Section 213's explicit language, the IRS and the Tax Court permit a married, heterosexual couple to aggregate their bodies with an egg and or sperm donor's body, allowing the couple to deduct the donor's costs.[126] Yet that aggregation is cut off when the taxpayer is medically fertile but requires reproductive technologies to have a child because of his or her sexuality or marital status.[127]

2. Failure to Consistently Recognize Fertility as a Function of All Bodies

The IRS specifically identified fertility as a function of the body, yet post-*Sedgwick/Magdalin* doctrine fails to recognize fertility as a function of all bodies.[128] If fertility is a recognized function of the body, there is no necessary reason that it is less so based on a person's gender, sexuality, or relationship status. Nevertheless, in *Magdalin*, the IRS argued that reproduction is not a function of the male body.[129] As Pratt notes, this argument is "preposterous," as no person, male or female, can reproduce without the genetic material of the other gender.[130] The fact that a woman bears a greater burden in human reproduction does not make reproduction a function of her body more than a man's body.[131] Furthermore, the aforementioned IRS Information Letter on the issue made no distinction based on

123 *Id*. at 1311-32.

124 *Id*.

125 I.R.C. § 213(a) (2004); Pratt, *supra* note 7, at 1312-13, 1321-22.

126 Pratt, *supra* note 7, at 1338.

127 *Id*. at 1338-39.

128 I.R.S. Info. Ltr. 2005-0102 (Mar. 29, 2005).

129 Magdalin v. Comm'r, 96 T.C.M. (CCH) 491 (2008); *see also* Pratt, *supra* note 7, at 1323.

130 Pratt, *supra* note 7, at 1332.

131 *Id*.; *see also* Sherry Ortner, *Is Female to Male As Nature is to Culture?*, *in* WOMEN, CULTURE, AND SOCIETY (M.Z. Rosaldo & L. Lamphere eds., 1974).

gender in its statement that fertility is a function of the body.[132] Thus, the IRS/Tax Court's position in *Magdalin* contradicts its previous statements.[133]

3. Inconsistent Application of the "Substitute for Normal Functioning" Doctrine

Professor Pratt identifies that the IRS and the Tax Court have articulated a "substitute for normal functioning" doctrine regarding the deductibility of medical expenses.[134] Evolving out of the realm of rulings on the deductibility of organ donor expenses by the donee taxpayer, the principle is simple: when a donee taxpayer pays the medical expenses of his or her donor, those expenses are deductible as treatment for the taxpayer's disease or condition.[135] When a procedure or expense provides a substitute for normal functioning, it may satisfy either prong of Section 213.[136] The fact that the expenses were incurred for treatment of a body other than the taxpayer's is immaterial, as the Tax Court permits aggregation of his or her body with that of the donor.[137] Extending such arguments to the deductibility of fertility treatments, surrogacy costs for a medically infertile woman should be easily deductible, yet the IRS has challenged the deductibility of such expenses.[138] Further, surrogacy with egg donation for men or sperm donation with AI or IVF for women represent the best and only means of effectuating the normal functioning of a single or homosexual person's reproductive system.[139] Nevertheless, despite frequent analogies between kidney-donor rulings and fertility treatments in past pronouncements, in *Magdalin* and *Sedgwick*, the court and the IRS severed that relationship, again creating inconsistency in Section 213 doctrine.

4. Inconsistent Requirement of the Presence of Disease

Perhaps the IRS's and the Tax Court's most glaring inconsistency—and the one most detrimental to medically fertile single persons and homosexual couples—is their inconsistency in requiring the presence of disease as a precursor to deductibility of fertility treatments. In the absence of such medical infertility, the IRS views these fertility procedures as non-deductible personal choices.[140] The IRS goes so far as to state that because Magdalin could have children "'naturally'

132 I.R.S. Info. Ltr., 2005-0102 (Mar. 29, 2005).

133 Pratt, *supra* note 7, at 1330-32.

134 *Id*. at 1297-98, 1306-1308.

135 *Id*. at 1297-98.

136 *Id*. (noting that kidney donor expenses both qualify for deductibility as treatment for a disease (first prong) and result in procedures which affect the structure of the donor's body (second prong), compared with a deduction for a seeing-eye dog which acts as a substitute for normal functioning but is deductible under only under the first prong).

137 *Id*. at 1297-98.

138 *Id*. at 1305-06.

139 Pratt, *supra* note 7, at 1321-30, 1335-37.

140 Magdalin v. Comm'r, 2009 WL 5557509 (1st Cir. 2009); *see also* Pratt, *supra* note 7, at 1334-35 (citing respondent's argument).

or 'normally' [as he had with his previous wife,] he chose not to," thereby reifying the perception of his expenses as non-deductible personal expenses.[141] Such a *medical/personal* distinction casts reproduction by medically fertile single persons or homosexual couples as akin to a personal expense, such as a vacation, which only generally benefits the health of the taxpayer.[142]

Requiring disease as a precursor to deductibility for medical expenses that satisfy the *structure/function* prong fails as a valid requirement in three ways.[143] First, the requirement completely disregards that Section 213 is written in the disjunctive, permitting deductions of expenses "for the diagnosis, cure, mitigation, treatment, or prevention of disease, *or* for the purpose of affecting any structure or function of the body . . . ."[144] Second, it ignores that the IRS and the Tax Court already allow deductions as medical care for birth control, vasectomy, and sterilization expenses without the presence of an underlying disease.[145] Third and last, it ignores that Regulation 1.213-1(e)(1) expressly states that costs for "obstetrical expenses . . . are deemed to be for the purpose of affecting any structure or function of the body and are therefore paid for medical care[.]" Such expenses are inherently medical, and the nature of these expenses should not change based upon the sexuality, gender or relationship status of those who pay them.[146] But if the IRS and Tax Court cannot rely on the rest of Section 213 doctrine to support the *Magdalin* disease requirement, where did they look to create such an inconsistent requirement?

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Recognizing the seeming inconsistencies between the arguments in *Sedgwick* and *Magdalin* and the IRS's various positions on the deductibility of fertility treatments, what can we make of these inconsistencies? When faced with the concepts of surrogacy, single, or gay and lesbian reproduction—concepts which challenge notions of kinship and the reproductive process[147]—the IRS and the Tax Court seemed to narrow their conceptualization of medical care. The question which naturally arises is: why this sudden rigidity?

At points, existing scholarship comes tantalizingly close to discussing some of these broader questions. Professor Pratt recognizes that Section 213 doctrine has something to say about the IRS's and Tax Court's conceptualization of the

141 Pratt, *supra* note 7, at 1334 (citing respondent's argument).

142 *See* Treas. Reg. § 1.213-1(e)(1)(ii) (1979); *see also* Pratt, *supra* note 7, at 1303-04 (discussing how by making surrogacy appear to be a personal choice, rather than medical care, *Sedgwick* equated reproduction with a vacation).

143 Pratt, *supra* note 7, at 1330-32.

144 I.R.C. § 213(d)(1)(A) (2004) (emphasis added); *See* Pratt, *supra* note 7, at 1330.

145 *See infra* Part III.B.; *see also* Pratt, *supra* note 7, at 1330-32.

146 Treas. Reg. § 1.213-1(e)(1)(ii) (1979).

147 *See* CHRIS SCHILLING, THE BODY AND SOCIAL THEORY 3 (2d ed. 2004); Nancy E. Levine, *Alternative Kinship, Marriage and Reproduction*, 37 ANN. REV. ANTHROPOLOGY 375, 379 (2008).

body;[148] that reproductive technologies have the capacity to "challenge traditional notions of family" which may affect the IRS's and Tax Court's opinions on cases;[149] that the definition of infertility, and thus the decisions the IRS and the Tax Court make based upon that definition, are heteronormative.[150] But she does not identify the underlying *consistency* in the IRS's and Tax Court's hidden normative judgments or propose avenues for reform. Instead, Pratt focuses on whether the "facially-neutral" definition of medical care would pass constitutional muster given its discriminatory effect.[151] Applying anthropological theory to the inconsistencies Pratt discusses shifts the inquiry to one of analyzing the source of these inconsistencies. Doing so ultimately reveals the unifying, underlying logic of pre- and post-*Sedgwick/Magdalin* Section 213 doctrine, a logic that values reproduction by married heterosexuals over reproduction by other social groups.

C. Lessons of Anthropological Theory

Tax exemptions or deductions are effectively government subsidies of certain behavior or actions.[152] On one level, the outcome of *Magdalin* and its logic seems consistent with the Tax Court's and IRS's desire to subsidize only care which treats their definition of medical infertility. But the discriminatory results of this position and its demonstrated inconsistencies with prior IRS doctrine suggest that other forces are at work. Anthropological theory can help us understand those social and cultural forces.

1. Anthropology and Reproduction

Reproductive technologies challenge our culturally determined understanding of the body and its capacities as well as our definitions of "reproduction" and "family;" they create situations that do not fit our existing cultural order.[153] Single parents and gay and lesbian couples have a new means of accessing the cultural category of parenthood because of the doors opened by reproductive technologies.[154] The very possibility that a woman or man can have child without an opposite-sex partner "challeng[es] the centrality of heterosexual intercourse and the two-person, opposite gender model of parenthood[.]"[155] Surrogacy challenges notions of kinship and destabilizes the presumed relationship between a child and

148 *See* Pratt, *supra* note 7, at 1311 (identifying that *Magdalin* raises the question "how do we define the term 'of the body', as used in section 213(d)(1)(A) . . . ?").

149 *Id*. at 1325-26.

150 *Id*. at 1326.

151 *Id*. at 1338-45.

152 Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 236 (1987) (Stevens, J., concurring).

153 *See* SCHILLING, *supra* note 147, at 3; Levine, *supra* note 147, at 379.

154 Rayna Rapp, *Gender, Body, Biomedicine: How Some Feminist Concerns Dragged Reproduction to the Center of Social Theory*, 15 MED. ANTHROPOLOGY Q. 466, 470 (2001).

155 Levine, *supra* note 147, at 379.

gestational mother as its social mother and family.[156] But the role that these challenges play in structuring Section 213 is essentially unexplored.

Although legal scholars recognize the challenge reproductive technologies represent to notions of the *body*, *family*, and *reproduction*, their scholarship tends to stop at this observation.[157] For anthropologists, this is simply the point of departure for the discussion, rather than the end result. Anthropological theory allows us to address why reproductive technology is so threatening or destabilizing, and more specifically for our purposes, why these technologies might prompt such inconsistency in Section 213 doctrine. The Tax Court and IRS are not set up to evaluate, on a normative level, the impacts of reproductive technologies, but their failure to results, as we have seen, in inconsistent and discriminatory doctrine. Anthropological theory can help explain the source of these inconsistencies and to re-envision a coherent, consistent, and equitable Section 213 doctrine regarding fertility treatments.

Consider, for example, the following categories for arranging thought about reproduction:

> Fertile/Infertile.
> Health/Disease.
> Normal/Abnormal.
> Natural/Unnatural.

As subjects of scientific inquiry, these categories command an air of objectivity.[158] It is because of this appearance of value-neutrality that these classifications require stringent examination to ensure that their use does not result in inequality and discrimination.[159] To explore the normative assumptions of these terms, it is necessary to understand why they are viewed as objective and value-neutral, as well as the role culture plays in defining them. Discussions of the veiled exercise of power, the cultural assumptions that occur in supposedly objective sciences, the power of discourse, and labels such as fertile/infertile and normal/abnormal are all within the purview of anthropological theory.[160]

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156 *Id.* at 381-82 ("[S]urrogacy, more unambiguously than any other NRT, introduces contractual arrangements into private affairs, [and] fragments motherhood into genetic, gestational and social components[.]").

157 *See* Pratt, *supra* note 7, at 1325-38.

158 *See* SCHILLING, *supra* note 147, at 71 (claiming that certain viewpoints understand the "natural as the 'raw material' of social life, and sexual or racial difference is taken as prior to social differences . . . For example, 'woman' and 'man' are ontologically stable objects which make no allowance for cross-cultural or trans-historical change. [Foucault problematizes this notion, however, recognizing] the natural [as] a construction of the social."); *see also* Deborah Findlay, *The Good, the Normal and the Healthy: The Social Construction of Medical Knowledge About Women*, 18 CAN. J. OF SOC. 115, 116 (1993) ("[T]he technical presentation of scientific and medical knowledge often obscures the socio-cultural context so integral to the process of defining that knowledge[.]").

159 *See* Findlay, *supra* note 158, at 116 (noting that such seeming objectivity conceals the culturally-mediated process of distinguishing "which knowledge is accepted as 'fact' and which is deemed 'artefact'").

160 For an overview of legal anthropology as a sub-field, see Sally Falk Moore, *Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999*, 7 J. ROYAL ANTHROPOLOGICAL INST. 95-116,

In applying Section 213, the IRS and Tax Court operate under a number of assumptions of which they do not seem to be aware: first, that what is *normal/natural* functioning is a constant and objectively determined classification; second, that classifying what is *medical* is an objective exercise; and third, that the *body* and its capacities are stable entities. Anthropological theory allows us to problematize these notions and reveals the very real cultural influences on what we understand to be *normal/abnormal*, *health/disease*, *medical/personal*, and *natural/unnatural*. To fully explain these categories and their foundations in cultural assumptions and beliefs, it is necessary to take a few steps back from our ultimate aim and examine philosophical approaches to the body as well as medical anthropology scholarship.

To understand the anthropology of medicine and the body one must first grasp one of Western culture's primary philosophical assumptions regarding the body.[161] Western thought, particularly in the area of the body, operates in dualisms.[162] Tracing mind-body dualism to Descartes, anthropologists and social theorists also identify the following concept as Cartesian dualism.[163] Cartesian dualism understands "human existence [as being] bifurcated into two realms or substances: the bodily or material [and] . . . the mental or spiritual."[164] Though this distinction is not, in and of itself, a negative one, it provides the foundation for a perception of the body as:

> (1) "*alien*" to the individual;
> (2) a force of "confinement and limitation;" and
> (3) an "*enemy*" to the individual—a physicality which demands care and is vulnerable to disease.[165]

While there is a wealth of scholarship in this area, the importance of Western culture's dualistic heritage is that it allows the body to be understood as: (a) separate from the individual, and (b) something to be managed.[166]

Such dualistic thinking is not limited to our perception of the body. Dualisms such as male/female, culture/nature, rational/magical, and normal/aberrant are common to everyday experience.[167] Yet, such dualisms are "conceptual

95 (2001).

161 *See* SUSAN BORDO, UNBEARABLE WEIGHT: FEMINISM, WESTERN CULTURE, AND THE BODY 144 (2003); Nancy Schepher-Hughes & Margaret M. Lock, *The Mindful Body: A Prolegomenon to Future Work in Medical Anthropology*, *in* UNDERSTANDING AND APPLYING MEDICAL ANTHROPOLOGY 208 (Peter J. Brown ed., 1998). For lack of a better term, I will speak of *Western culture*. Undoubtedly this categorization overwrites nuances and lived realities of cultural experience. The term does, however, encompass a recognized school of thought regarding medicine and an understanding of and philosophical approach to the body. As such, for all of its faults, the term *Western culture* is useful in a discussion of the body and the development of medical knowledge of the body.

162 *See* Schepher-Hughes & Lock, *supra* note 161.

163 *Id.*

164 BORDO, *supra* note 161, at 144.

165 *Id.* at 145.

166 *Id.* at 144-51.

167 *See* Scheper-Hughes & Lock, *supra* note 161, at 208; *see also* Ortner, *supra* note 131, at 71.

categories" rather than empirical truths.[168] Closer to home, Section 213 creates the dualistic relationship of *medical/personal*.[169] Undoubtedly, there are differences between men and women or products of culture and of the natural world, but our culturally mediated understanding of these entities structures our beliefs that they are fundamentally opposed, mutually exclusive, hierarchically ranked, or even clearly dichotomous.[170] Once again, there is a wealth of scholarship on the existence and effect of these dualisms, but the key point for our discussion is to recognize: (a) the pervasiveness of dualistic thinking; and (b) that our understanding of these dualisms—even their very existence—is culturally constructed. Such dualisms operate extensively in both defining subjects of medical knowledge and fueling the perception of medical science as being removed from culture.[171]

Science commands an air of objectivity, of being separate from the world of culture and social biases.[172] Anthropology teaches us, however, that science and medical knowledge are not so divorced from culture. Medical anthropology provides a theoretical base from which to problematize notions of what is *medical* and its corollary categories of *natural* and *normal functioning.*

As a point of departure, medical anthropology recognizes the sociocultural nature of all medical systems.[173] To reinforce the notion that a medical system—be it shamanism or the U.S. healthcare system—exists within a given cultural system, anthropology refers to each medical system as an ethnomedicine.[174] What most would term "medicine"—"the medicine of hospitals and mainstream doctors of the industrialized world"[175]—is reconceptualized as "biomedicine," drawing attention to biomedicine's reliance upon theoretical principles of biological sciences, as opposed to another worldview.[176] The identifying characteristics of biomedicine include:

> (1) "The individual (rather than the collectivity) is the focus of treatment;
> (2) emphasis is on the somatic or physical illness and treatment . . .;
> (3) the sick or deviants are to be institutionalized;

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168 Ortner, *supra* note 131, at 71-72.

169 *See* I.R.C. § 213 (2004); Treas. Reg. § 1.213-1(e)(ii) (1979).

170 Ortner, *supra* note 131, at 71.

171 *See* Scheper-Hughes & Lock, *supra* note 161, at 208-21 (discussing the process of learning medical knowledge and identifying operating dualisms); *see also* Findlay, *supra* note 158, at 116 (fact/artefact distinction).

172 JOHN M. JANZEN, THE SOCIAL FABRIC OF HEALTH: AN INTRODUCTION TO MEDICAL ANTHROPOLOGY 188 (2002) ("In the Western industrial world, science is considered to be the source and standard of medical knowledge. Science is commonly understood to be knowledge that is somehow systematized, orderly, and established through widespread empirical observation, laboratory research, or experimentation under specially controlled conditions[.]").

173 *See id*. at 214 (noting that all medical traditions are "ethnomedicine[s]" and identifying the "culture of biomedicine") (internal quotation omitted).

174 *Id.*

175 *Id*. at 4.

176 *Id.*

> (4) [there is] a mechanistic metaphor of the body—the body is a machine that may be repaired or receive replacement parts [drawing upon mind/body dualism]; and
> (5) medicine is predominantly attuned to a 'single cause' etiology."[177]

Recognizing that our medical system is culturally grounded and that it operates from a particular worldview lays the groundwork for challenging the objectivity of what we understand to be *medical*, *disease*, or *normal functioning*.

Oft-invoked in the anthropology of medicine and the body, Michél Foucault's theories of the body, discourse, and disciplinary and legal systems are extremely influential to social theory. His theories are particularly helpful in illustrating the roles medicine and law play in perpetuating inequality through their normalizing discourse. Central to Foucault's conception of power is the "panopticon," Jeremy Bentham's famous idea of a prison with a central tower and inward facing cells.[178] Each prisoner is visible to the tower, as well as to the others, but no prisoner can see into the tower, creating extensive visibility and the capacity for concealed observation.[179] Critical to this prison model is the fact that because the prisoners cannot see into the tower, they are never truly sure whether the warden is observing them.[180] This reality, combined with their visibility to each other, "assures the automatic functioning of power"[181]—*i.e.*, the prisoners grow to self-regulate their behavior because they *may* always be observed but can never *know* if they are observed in fact.[182]

Foucault expands the notion of the panopticon into a theory of modern operations of power. For Foucault, medicine, education, and the workplace are all modern-day panopticons.[183] Modern power, drawing upon dualistic thinking, functions through a normalizing process.[184] Most specifically for our inquiry, advances in medical knowledge increase the visibility of the human body, recreating it as a subject of knowledge and scrutiny.[185] Increased knowledge and visibility fuels a normalizing project: classifying individuals as usual/deviant, normal/abnormal, and the like.[186] At its core, modern power homogenizes and normalizes, only individualizing aberrant, deviant behavior.[187] Applied to our current inquiry, Foucault's theories explain that when the medical profession, the

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[177] JANZEN, *supra* note 172, at 215.

[178] MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 200 (1st ed., 1977) [hereinafter FOUCAULT, DISCIPLINE].

[179] *Id.*

[180] *Id.* at 200-02.

[181] *Id.* at 201.

[182] *Id.* at 201.

[183] *Id.* at 228.

[184] FOUCAULT, DISCIPLINE *supra* note 178, at 199 ("[A]ll the authorities exercising individual control function according to a double mode; that of binary division and branding[.]").

[185] *Id.* at 184-85, 199, 203.

[186] *Id.* at 199-203.

[187] *Id.* at 193-203.

Tax Court, or the IRS classify behavior or biological processes as normal or natural, they are engaged in an exercise of power which is culturally mediated.

Another key aspect of Foucault's theory of modern power is that it is diffuse.[188] Power is not held by one group and denied to another.[189] Rather, "it is a moving substrate of force relations . . . [which] comes from everywhere."[190] As every individual learns and internalizes classifications of what is normal or abnormal, usual or deviant, he or she perpetuates the normalizing force of power.[191] In doing so, each individual ensures the survival of inequalities created by the normalizing process, *all the while largely unaware of that fact.*[192] Revealing the source and mechanisms of inequality therefore requires focused analysis.

Foucault's work is extensive and his impact on social theory profound. Thus, this brief introduction inevitably excludes many of the intricacies of his work. At their core, Foucault's theories of discipline and normalization provide us with these critical ideas:

> (1) There is a certain inevitability to power—power is not simply something exercised from above in a clear and visible way. Rather, it is internalized and exercised by those who are also its subjects, though they are largely unaware of its operation.
> (2) Classifications of *normal*, *natural*, and *medical* are exercises of power—modern power frequently operates through culturally mediated, homogenizing, and normalizing processes which are produced by and reinforce such labels.

What these crucial points teach us is that when the Tax Court and IRS understand one form of reproduction as *medical*, *normal*, or *natural*, and another form simply as *personal* choice, they are engaged in a value-laden exercise, even if they are unaware of that fact. Such classifications are mechanisms of power which perpetuate inequalities grounded in cultural conceptions of a person or behavior.

Medicine and definitions of normalcy are not the only culturally mediated categories at play in this discussion. The body itself and what qualifies as its *natural* or *normal* functioning are also fluid concepts.[193] This principle

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188 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 89-94 (1978) [hereinafter FOUCAULT, HISTORY].

189 *Id.*

190 *Id.* at 93; *See also* FOUCAULT, DISCIPLINE, *supra* note 178, at 203 ("Power has its principle not so much in a person as in . . . an arrangement whose internal mechanisms produce the relation in which individuals are caught up . . . Consequently, it does not matter who exercises power . . . Similarly it does not matter what motive animates him[.]").

191 FOUCAULT, DISCIPLINE, *supra* note 178, at 193-203; FOUCAULT, HISTORY, *supra* note 188, at 89-94.

192 FOUCAULT, HISTORY, *supra* note 188, at 89-94.

193 *See* JANZEN, *supra* note 172, at 192; SCHILLING, *supra* note 147, at 3; *see also* Schepher-Hughes & Lock, *supra* note 161, at 144 ("What is considered normal—in behavior, thinking, or even physical attributes—is cultural.").

undermines the IRS's and Tax Court's operating assumptions that the body and its capacities are static and separate from cultural influence.

While the body is something that is knowable to medicine—the subject of classifications of normal or aberrant—it is also a moving target whose meaning shifts.[194] Writing specifically of the effects of ever-evolving medical technologies, social theorist Chris Schilling writes:

> Quite simply, the body is potentially no longer subject to the constraints and limitations that once characterized its existence. Nevertheless, as well as providing people with the potential to control their bodies, the situation has also stimulated among individuals a heightened degree of reflexivity about what the body is, and an uncertainty about how it should be controlled. As science facilitates greater degrees of intervention into the body, it destabilizes our knowledge of what bodies are, and runs ahead of our ability to make moral judgments about how far science should be allowed to reconstruct the body.
>
> Indeed, it would not be too much of an oversimplification to argue that the more we have been able to control and alter the limits of the body, the greater has been our uncertainty about what constitutes an individual's body, and what is 'natural' about a body. For example, artificial insemination and *in vitro* fertilization have enabled reproduction to be separated from the corporeal relations which have traditionally defined heterosexual experience.[195]

The weight of these observations comes to bear heavily on Section 213 doctrine regarding fertility treatments.

As the body and its *natural* or *normal* capacities are unstable, so too are what qualifies as *medical* and *disease*. With increasing medical knowledge comes new subjects of classification, new perceptions of what is normal or aberrant, and new normalizing discourses.[196] To highlight the fluid nature of *disease*, consider the following: The World Health Organization compiles and disseminates the "International Classification of Disease."[197] Used by practitioners and health insurance companies,[198] the

> classifications of symptoms, syndromes, signs, and diseases or conditions represent an attempt to codify for practitioners those conditions whose diagnoses and therapies are deemed legitimate for reimbursement. *The aura of reality given to a cluster of signs and symptoms when they are*

194 SCHILLING, *supra* note 147, at 3.

195 *Id.* at 3-4.

196 *See supra* text accompanying notes 173-87.

197 JANZEN, *supra* note 172, at 196.

198 The Tax Court even acknowledges that it looks to such classifications to determine whether something qualifies as disease. *See* O'Donnabhain v. Comm'r, 134 T.C. 34, 58 (2010) ("We have also considered a condition's listing in a diagnostic reference text as grounds for treating the condition as a, 'disease', without inquiry into the condition's etiology.").

> *named as a disease is strengthened if this naming legitimizes the payment of funds for treatment by medical practitioners and institutions*.[199]

New diseases must, therefore, gain widespread acceptance as such before they can gain an "aura of reality."[200] But by what processes does a "cluster of signs and symptoms" come to be classified as a disease and thus become the subject of medical knowledge and management?[201]

The process of making subjects medical or re-envisioning life experiences as "medical problems" is known to anthropologists as *medicalization.*[202] Biomedicine views disease as "'deviation' from a 'biological norm,'"[203] but that norm may be culturally constructed. Even infertility, the subject of our current inquiry, was not cast as a disease until the 1960s and 1970s, when couples delayed trying to conceive and research into these couples' resulting difficulties boomed.[204] When increasing medical knowledge combines with cultural valuations of the worth of a behavior or characteristics, what is "badness [becomes] sickness."[205] Classifications which seem objective—what is *disease* and what qualifies as a subject of *medical* inquiry or treatment—are in fact culturally and historically contingent and therefore subject to change.

Taken as a whole, these theories illuminate the culturally influenced nature of what we believe to be *medical*, *disease*, and *normal* functioning. As such, medical anthropology, anthropology of the body, and Foucault crack the foundation of the IRS's and Tax Court's operating assumptions. What is *normal*/*natural* functioning is neither constant nor objectively determined; medicine is not a wholly objective enterprise, and the body and its capacities are culturally mediated, dynamic entities. Yet these observations alone cannot explain the inconsistencies of Section 213 doctrine. The scholarship of Mary Douglas gives us a rich vocabulary to explain why society tends to narrow rules in the face of situations that challenge what is "normal," as did the Tax Court and IRS in *Sedgwick* and *Magdalin.*

In her seminal work, *Purity and Danger*, Douglas writes of notions of the culturally determined nature of concepts such as purity and contagion:

> If we abstract pathogenicity and hygiene from our notion of dirt, we are left with the old definition of dirt as matter out of place . . . . It implies two conditions: a set of ordered relations and a contravention of that order. Dirt

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199 JANZEN, *supra* note 172, at 198-99 (emphasis added).

200 *Id.*

201 *Id.*

202 Gay Becker & Robert D. Nachtigall, *Eager for Medicalisation: The Social Production of Infertility as a Disease,* 14 SOC. OF HEALTH & ILLNESS 456-471 (1992); Adele E. Clarke et al., *Biomedicalization: Technoscientific Transformations of Health, Illness, and U.S. Biomedicine,* 68 AM. SOCIOLOGICAL REV. 161, 194 (2003).

203 Findlay, *supra* note 158, at 121.

204 Becker, *supra* note 202, at 457.

205 Clarke et al., *supra* note 202, at 161 (quoting Conrad and Schneider (1980)).

> then, is never a unique, isolated event. Where there is dirt there is system.[206]

Essentially, culture creates a series of classifications—right/wrong, clean/unclean—which provide a system through which a person can perceive the world.[207] Culture is that system, the repository of "standardized values of a community [that] mediates the experience of individuals."[208]

Recognizing that culture acts as a system that mediates an individual's experience or as providing a means of ordering the world to make it intelligible, Douglas then explains why challenges to that order are so poorly received. Where there is order, there must be disorder.[209] Culture, as a classificatory scheme, "must give rise to anomalies, [it] must confront events which seem to defy its assumptions."[210] These anomalies prompt a reification of our conceptualization of what is ordered, what is right, and what fits.[211] But disorder and anomaly, things that defy or challenge cultural categories, also threaten the existence of the system.[212] Douglas writes: "Though we seek to create order, we do not simply condemn disorder. We recognise that it is destructive to existing patterns; also that it has potentiality. It symbolises both danger and power."[213] In short, "anomalous events may be labeled dangerous."[214] When faced with that which threatens order, individuals frequently respond by reifying the validity and boundaries of the existing system and shunning that which challenges them.[215]

2. Section 213 Doctrine in Cultural Context

None of the foregoing discussion discounts that there are observable, empirical realities that medicine or the Tax Court and IRS can classify as *medical*, *natural*, or *normal*. Even a common observer can distinguish between surgery to fix a shattered femur and an elective nose-job. Though both surgeries involve medical care, the former seems more necessary and more worthy of subsidy than the latter. Essentially, we readily, and seemingly without objection, feel that normalcy for the first patient requires fixing her leg, whereas the second patient can live a normal life, even with a nose with which she is unhappy. Though we are

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206 MARY DOUGLAS PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO 44 (2002).

207 *Id*. at 44-48. Further, "[p]erceiving is not a matter of passively allowing an organ—say of sight or hearing—to receive a ready-made impression from without . . . It is generally agreed that all our impressions are schematically determined from the start . . . As learning proceeds objects are named. Their names then affect the way they are perceived next time[.]" *Id*. at 45.

208 *Id*. at 48.

209 *See id*. at 117.

210 *Id*. at 48.

211 DOUGLAS, *supra* note 206, at 48 ("[A] rule of avoiding anomalous things affirms and strengthens the definitions to which they do not conform[.]").

212 *Id*. at 117.

213 *Id*.

214 *Id*. at 49.

215 *Id*. at 49, 160-72.

working with empirical realities—observable qualities of the body and its capacities—we make judgments throughout the process as to which conditions warrant care and which deviations we feel compelled to treat or even view as deviations. Reproductive care operates at the boundaries of our understanding of the body, making apparent value judgments that normally occur without incident.

We have seen four seeming inconsistencies in Section 213 doctrine:

(1) Inconsistent aggregation of the body;
(2) Failure to consistently recognize fertility as a function of the body;
(3) Inconsistent application of the "Substitute for Normal Functioning" Doctrine; and
(4) Inconsistent requirement of the presence of disease.

It was not until faced with the fact patterns of *Sedgwick* and *Magdalin*, however, that these inconsistencies emerged. Anthropological theory provides an explanation for both the timing and existence of these inconsistencies.

Sedgwick and *Magdalin* exposed the value judgments with which the IRS and Tax Court approached the deductibility of fertility treatments under Section 213. Surrogacy and the use of reproductive technologies to enable a homosexual man to be a biological parent without a female partner challenged the agency's and the court's commonly held assumptions of kinship, family structure, and the definition of reproduction as a heterosexual act involving two people.[216] When faced with factual situations which challenged their heteronormative, marriage-centric conception of reproduction, the IRS and Tax Court responded as Mary Douglas would predict: they reified their value judgments, denying the benefits of Section 213 to persons or couples who do not fit the mold formed by these judgments. Yet, this realization does not explain the seeming inconsistencies between the arguments employed by the IRS and the outcomes given by the Tax Court in *Sedgwick* and *Magdalin* and other IRS pronouncements.

The seeming inconsistencies between pre- and post-*Sedgwick/Magdalin* Section 213 doctrine dissolve when one recognizes that pre-*Sedgwick/Magdalin* doctrine was not as value-neutral as it appeared. Rather, the same heteronormative, marriage-centric judgments and assumptions were at work pre-*Sedgwick/Magdalin*, and it was the very challenge to those assumptions that Magdalin and the Sedgwicks represented which brought them into relief.[217] Re-evaluating each of the seeming inconsistencies between pre- and post-*Sedgwick/Magdalin* Section 213 doctrine with the tools of anthropological theory clarifies this point.

Magdalin caused the IRS and the Tax Court to reveal their value-laden conception of *natural* or *normal* reproduction. The IRS's argument that Magdalin could have children "naturally"[218] assumes that only heterosexual reproduction is

[216] See Pratt, *supra* note 7, at 1325-27; *see also* Levine, *supra* note 147, at 376-82.
[217] *See* Pratt, *supra* note 7, at 1328-36.
[218] Brief for Appellee at 8, Magdalin v. Comm'r, 2009 WL 6809176 (1st Cir. 2009) (No. 09-1153).

natural.[219] Just as Foucault argues, the normalizing effect of the label *natural* or *normal* conceals a culturally mediated value judgment. One could view any reproduction assisted by medical technologies to be *unnatural* or *abnormal*, but this is not where the IRS and the Tax Court drew the line.[220] Rather, they chose to define *natural* or *normal* reproduction based on the sexuality of the person attempting to have a child: married, heterosexual reproduction—even when assisted by reproductive technologies—is considered *natural*, while a medically fertile homosexual person's use of the same technologies constitutes an *unnatural* personal choice.[221] Thus, *Magdalin* allows us to see the heteronormative definition of *natural* or *normal* which had theretofore lain dormant in Section 213 doctrine. This distinction plays a role in each of the seeming inconsistencies between *Sedgwick* and *Magdalin* and other IRS pronouncements.

The IRS's and the Tax Court's failure to consistently recognize fertility as a function of the body reflects its gendered view of reproduction. Recall that male/female is a common dualism in Western culture.[222] Frequently, that dualism overlaps with the culture/nature dualism, one which identifies men as further removed from the natural world and women as bound to it.[223] The relationship of these dualisms reflects and perpetuates the view that women are inherently more tied to and defined by their reproductive roles.[224] When the IRS argued that reproduction is not a function of a male body, it articulated this dualism, illustrating that the IRS and Tax Court have a gendered view of reproduction.[225] The IRS likely held this view in the IRS Information Letter, which identified fertility as a function of the body; *Magdalin* simply exposes it as an underlying assumption.

The IRS's and the Tax Court's inconsistent requirement of the presence of disease derives from its attempt to make the *medical/personal* distinction one that protects a heteronormative, marriage-centric conception of reproduction and family. It is the outgrowth of an attempt to cloak the devaluation of single or homosexual parenthood with the supposed objectivity of science. By requiring the presence of an underlying disease for fertility treatment to be *medical* rather than *personal*, the IRS and Tax Court drew a line between *medical* and *personal* that discriminates based on sexuality and or marital status.[226] A fertility treatment is no less a medical procedure when the patient is homosexual or heterosexual, married or unmarried—the nature of the procedure does not change. Yet the IRS's and the

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[219] *See* Pratt, *supra* note 7, at 1336-40 (noting that this concept of natural casts homosexual reproduction as unnatural).

[220] *See id*. at 1328-37; *see also* Robertson, *supra* note 11, at 331.

[221] See Robertson, *supra* note 11, at 331.

[222] *See* Ortner, *supra* note 131.

[223] *Id*. at 71-72.

[224] *Id*. at 71-76.

[225] *See* Magdalin v. Comm'r, 96 T.C.M. (CCH) 491 (2008) (IRS's argument that fertility is not a function of the male body).

[226] *Id.*; *see also* Pratt, *supra* note 7, at 1336.

Tax Court's re-reading of Section 213 to require the presence of an underlying disease both reflects and perpetuates their belief that reproduction should occur between—and be readily subsidized for—married, heterosexual persons.

Taken together, the IRS's and Tax Court's selective application of the "substitute for normal functioning" doctrine and aggregation of the body allows them to perpetuate their heteronormative view of *natural* or *normal* reproduction, as well as their marriage-centric values. Pre-*Sedgwick/Magdalin* IRS pronouncements specifically allow a taxpayer to aggregate his or her body with that of an egg and or sperm donor's body. Post-*Sedgwick/Magdalin*, the Tax Court and IRS are unwilling to permit such aggregation when the taxpayers are either attempting to use surrogacy to treat their medical infertility or are single or homosexual persons using reproductive technologies to have a child. In rejecting the "substitute for normal functioning" principles and disallowing aggregation for the Sedgwicks, the Tax Court rejected a reproductive model that explicitly challenges kinship structures by bringing a third person—rather than simply that person's egg or sperm—into the reproductive act. In rejecting these principles for Magdalin, the Tax Court failed to recognize the validity and value of homosexual reproduction, instead perpetuating their heteronormative view of reproduction in Section 213. Stating the point another way, when faced with challenges to the cultural order, the IRS and the Tax Court rejected what they understood to be subversive and reified the existing order.[227]

Nothing in the *Sedgwick* or *Magdalin* opinions suggests that the IRS or Tax Court are deliberately and insidiously attempting to deny equal treatment under the Tax Code to singles or gay and lesbian couples seeking parenthood.[228] Nevertheless, the Tax Court and the IRS are using value-laden assumptions, which elevate heterosexuality and a married, heterosexual model of the family over other family models. However, recognizing the existence of such assumptions only gets us part way to remedying the discriminatory effects of their operation. Anthropology instructed us that where the IRS and Tax Court assumed objectivity—in the categories of *normal*, *natural* and *medical*—there are inherent value-laden judgments and assumptions. In doing so, it drew attention to the operation of such judgments and assumptions in Section 213 doctrine. The IRS and Tax Court cannot avoid working with such categories and thus cannot escape making value judgments as they work with Section 213. Therefore, the only way to ensure a non-discriminatory Section 213 doctrine is to recognize the inevitability of such value judgments and adopt new ones that embrace broader definitions of

[227] DOUGLAS, *supra* note 206, at 117, 160-72.

[228] *But see*, Lisa C. Ikemoto, *The Infertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007 (1996). (writing that the overall regulation of reproductive technologies and social perception of their appropriate use from this perspective, asserting that prohibitions against the use of reproductive technologies to such persons reflects a deliberate agenda of continuing the subordination of women and ensuring the primacy of a heterosexual model of the family).

reproduction, proper function, what is medical, and who, ultimately, makes a suitable parent.

III. PRODUCING NEW VALUES: MOVING TOWARD A NON-DISCRIMINATORY SECTION 213 DOCTRINE

Once we recognize the inevitability of the Tax Court and IRS making value judgments at the intersection of Section 213 and fertility treatments, the next step is to ensure that the judgments they make are the *right* ones. In using the term *right*, I align myself with a growing percentage of the population that recognizes that a family does not have to mean a mother, a father, and child.[229] Rather, a family can consist of a child with two mothers, two fathers, or simply one parent. Thus, when I speak of the *right* value judgments, I mean those which do not judge a person's ability to be a parent based upon his or her sexuality, gender, or relationship status. Reproductive technologies and social mores have both evolved, opening the door to biological parenthood for a broader range of individuals than ever before. The Tax Code should evolve accordingly.

Informed by anthropological theory and an understanding of Section 213 doctrine, we have an opportunity to recreate Section 213 into a doctrine that: (1) is internally consistent; (2) is adapted to the changing realities of the body's meaning and capacities; (3) reflects changing social mores; and (4) provides opportunities to all taxpayers to benefit from Section 213, regardless of their gender, sexuality or relationship status. Furthermore, this revamping of Section 213 requires no overhaul of the doctrine, but simply a shift in the value judgments that had heretofore operated without recognition. Thus, each of the following proposals for reform builds upon existing Section 213 doctrine while re-envisioning the IRS's and Tax Court's operating judgments and assumptions, thereby grounding the proposed reforms in the Code itself.

A. Recognizing Fertility as a Function of All Bodies

Beginning with the least controversial shift first, the IRS and the Tax Court should replace their gendered view of reproduction with one that recognizes reproduction as a function of all bodies, male and female. The IRS stated this exact principle,[230] but was operating with a gendered view of reproduction that drastically narrowed the scope of the IRS's previous pronouncement.[231] By replacing a gendered view of reproduction with a gender-neutral view, fertility treatments fall under the *structure/function* prong regardless of patient's gender.

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229 Inevitably, this conception of *right* values will isolate some. For a discussion of changing social mores on what constitutes a family, see PEW RESEARCH CENTER, THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES (Nov. 18, 2010), *available at* http://pewresearch.org/pubs/1802/decline-marriage-rise-new-families; *see also* PEW RESEARCH CENTER, SUPPORT FOR SAME SEX MARRIAGE EDGES UPWARD (Oct. 6, 2010), *available at* http://people-press.org/report/662/same-sex-marriage.

230 I.R.S. Info. Ltr. 2005-0102 (Mar. 29, 2005).

231 Brief for Appellee, Magdalin v. Comm'r, 2009 WL 6809176 (1st Cir. 2009) (No. 09-1153).

Doing so, however, only partially addresses the discriminatory effects of Section 213 doctrine. The Tax Court and the IRS could still decide that reproduction is not a covered function of homosexual or single bodies, using the *Magdalin* disease requirement or the medically fertile/medically infertile distinction to perpetuate its heteronormative, marriage-centric view of reproduction. Thus, further reform is necessary to ensure that all persons can deduct fertility treatments, regardless of their sexuality or relationship status.

B. Reconceptualizing Infertility

Recall that IRS Pub. 502 makes treatments aimed at "overcoming an inability to have children" deductible.[232] The IRS Private Letter Ruling held that the costs of egg donation were deductible because egg donation is a "procedure [whose] purpose [is to] facilitat[e] pregnancy by overcoming infertility."[233] A heterosexual, married couple can deduct the costs of fertility treatment even when there is no discernible organic etiology, suggesting that the IRS and Tax Court judge the presence of infertility simply by the end result: an inability to have a child without assistance.[234] Nothing in these pronouncements explicitly prohibits a medically fertile single person or a homosexual couple from deducting the costs of treatments to *overcome their inability to have children*, yet current Section 213 doctrine narrows this broad language because of its underlying judgments and assumptions.

The Tax Court's and IRS's bias toward married, heterosexual reproduction creates a concept of "infertility" that excludes an inability to have a child because of a person's sexuality or relationship status.[235] To create a non-discriminatory Section 213, the Tax Court and IRS must abandon this value judgment.

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232 I.R.S. Pub. 502, at *10 (Dec. 9, 2008).

233 I.R.S. Priv. Ltr. Rul. 2003-18-017 (May 2, 2003).

234 Pratt, *supra* note 7, at 1321.

235 For examples of heteronormative definitions of fertility, the likes of which the IRS and Tax Court adopt, see *Infertility*, U.S. DEP'T OF HEALTH & HUMAN SERVICES, http://www.womenshealth.gov/faq/infertility.cfm. (last updated Jul. 1, 2009) (defining infertility as "not being able to get pregnant after one year of trying. Or, six months, if a woman is 35 or older. Women who can get pregnant but are unable to stay pregnant may also be infertile."); *Infertility*, NATIONAL INSTITUTES OF HEALTH, http://www.nlm.nih.gov/medlineplus/infertility.html (last visited Nov. 22, 2010) (using the definition of "not being able to become pregnant after a year of trying. If a woman keeps having miscarriages, it is also called infertility . . . About a third of the time, infertility can be traced to the woman. In another third of cases, it is because of the man. The rest of the time, it is because of both partners or no cause is found."); *Frequently Asked Questions About Infertility*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, http://www.asrm.org/awards/index.aspx?id=3012 (last visited Nov. 22, 2010) (stating that infertility is "a disease of the reproductive system that impairs one of the body's most basic functions: the conception of children. Conception is a complicated process that depends upon many factors: on the production of healthy sperm by the man and healthy eggs by the woman; unblocked fallopian tubes that allow the sperm to reach the egg; the sperm's ability to fertilize the egg when they meet; the ability of the fertilized egg (embryo) to become implanted in the woman's uterus; and sufficient embryo quality. Finally, for the pregnancy to continue to full term, the embryo must be healthy and the woman's hormonal environment adequate for its development. When just one of these factors is impaired, infertility can result.").

The Tax Court and the IRS must instead embrace a broader definition of fertility that allows taxpayers to deduct medical expenses for medical infertility, as well as functional infertility—*i.e.*, a person's inability to conceive a child naturally because of his or her sexual orientation or relationship status.[236]

Adopting such a notion of infertility replaces existing IRS and Tax Court assumptions and value judgments with ones that bring Section 213 doctrine into line with evolving notions of family and the shifting capacities of the body permitted by reproductive technologies. Functional infertility, as a concept, embraces the idea that infertility resulting from a person's relationship status or sexuality is as equally worthy of treatment as is medical infertility. Thus, functional infertility requires that the IRS and Tax Court abandon their heteronormative view of the meaning of *natural* or *normal*. Instead, functional fertility requires the IRS and Tax Court to adopt the view that reproduction through the use of ARTs is *natural* and *normal* when used by homosexuals and heterosexuals alike. The concept also requires the IRS and Tax Court to let go of their marriage-centric conception of reproduction. As functional fertility recognizes *as infertility* the infertility caused by a person's being single, it severs the relationship between marriage and the deductibility of fertility treatments currently embedded in Section 213 doctrine. At its core, embracing functional infertility would require the Tax Court and IRS to abandon the value judgment that only heterosexual, married persons are suited to be parents, and therefore that only those persons are worthy of receiving subsidies for fertility treatment. In its stead comes the idea that all persons are equally capable of being parents and worthy of receiving help in that process.

Once the Tax Court and IRS embrace a conception of functional infertility and adopt the new value judgments and assumptions it requires, fertility treatments will be deductible for all persons. For example, a man, be he single or a partner in a homosexual couple, could deduct the costs of egg donation, IVF, and surrogacy as treatment for his functional infertility under the first prong of Section 213. A medically fertile woman could deduct sperm donation and artificial insemination or IVF costs as treatment for her functional infertility, be it attributable to her status as a single person or her properly functioning sexuality which results in an inability to have a child with the partner of her choice. Though this reform achieves our goal, it leaves untouched the inconsistency of the *Magdalin* disease requirement, and thus our work continues.

[236] I reject the term dysfertility advanced by Ikemoto, *supra* note 218, and embraced by Pratt, *supra* note 7, at 1327, as it implies that there is something *dys*functional about that person's single status or sexuality which results in his/her infertility.

C. Restoring Consistency: Removing the "Disease as Precursor to Deductibility" Requirement

To repair Section 213's internal inconsistency, the IRS and Tax Court must remove the *Magdalin* disease requirement that makes the presence of a disease a precursor to deductibility even under the *structure/function* prong. This requirement was an outgrowth of the IRS's and Tax Court's attempt to make the *medical/personal* distinction one which fit their heteronormative, marriage-centric conception of reproduction and family. Once the Tax Court and IRS replace these values with ones that equally value all forms of parenthood and notions of family, the *Magdalin* disease requirement becomes an unnecessary relic of pre-reform Section 213. Requiring the existence of an organic pathology as a prerequisite for deductibility under Section 213 conflicts with existing doctrine. Support for removal of this requirement lies both in IRS pronouncements, as well as the recent Tax Court opinion of *O'Donnabhain v. Commissioner*.[237]

Previous analysis of IRS pronouncements regarding the deductibility of reproductive care and fertility treatments under Section 213 made clear that the IRS never required the presence of an underlying disease for medical care such as a vasectomy or an abortion to be deductible.[238] Treasury Regulation 1.213-1(e)(1)(ii) itself expressly states that "*obstetrical expenses . . . are deemed to be for the purpose of affecting any structure or function of the body and are therefore paid for medical care*[.]"[239] A concurring opinion in *O'Donnabhain* reinforces that the *primarily for* provision of Regulation 1.213-1(e)(1) does nothing to weaken this statement or existing pronouncements.

In his concurring opinion in *O'Donnabhain*, Judge Holmes directly addresses whether Regulation 1.213-1(e)(1)(ii) operates to require the presence of an underlying disease as a precursor to deductibility of medical care that would otherwise satisfy the *structure/function* prong of Section 213. If a procedure satisfies the *structure/function* prong of Section 213,[240] the only relevant question, writes Holmes, is whether the procedures constitute non-deductible cosmetic surgery.[241] This is the case because, as Holmes states, the *primarily for* provision of 1.213-1(e)(1)(ii) applies only to medical expenses incurred under the first prong.[242] To read that aspect of the regulation as applying to expenses qualifying

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[237] *O'Donnabhain* required the Tax Court to consider the deductibility of the taxpayer's sex reassignment procedures. Holding for the taxpayer, the court engaged in extensive discussion of the meaning of the terms, *disease* and *treatment*. O'Donnabhain v. Comm'r, 134 T.C. 34 (2010). In November 2011, the IRS issued an Action on Decision memorandum in which it acquiesced to the Tax Court decision.

[238] *See supra* text accompanying notes 30-66, 131-140 for a discussion of the invalidity of this requirement.

[239] Treas. Reg. § 1.213-1(e)(1)(ii) (1979) (emphasis added).

[240] *O'Donnabhain*, 134 T.C. at 86 (Holmes, J. concurring).

[241] *Id.*

[242] *Id.*

under the *structure/function* prong would "overturn even the IRS's settled opinion that procedures as diverse as abortion [and] . . . vasectomies . . . qualify as 'medical care' because they affect a structure or function of the body."[243] Under this logic, which is in line with other IRS pronouncements in the area, the *Magdalin* disease requirement must be discarded as an inconsistency attributable to previously held value judgments and ill-founded operating assumptions. Thus, striking the *Magdalin* disease requirement would bring Section 213 doctrine into line with a proper reading of the statutory language, binding Treasury Regulations, and the weight of existing IRS pronouncement.

Reforming Section 213 doctrine to remove the invalid *Magdalin* disease requirement accomplishes another result: it allows female taxpayers to deduct fertility treatments under the *structure/function* prong of Section 213. Fertility treatments expressly affect the structure and function of a woman's body; removing the disease as a precursor to deductibility under the *structure/function* prong removes that barrier to deductibility of such treatment costs. Though this is a step toward creating a non-discriminatory Section 213 doctrine, it is, however, insufficient.

To treat the removal of the *Magdalin* disease requirement as the only necessary reform would not fully address the heteronormativity, marriage-centric focus, and gender bias of the IRS's operating value judgments. Absent reforms that recognize functional infertility as infertility, a medically fertile woman could still face challenges to deducting her full treatment costs, such as those of sperm donation.[244] Unless we also reform the IRS's and Tax Court's gendered notions of reproduction—making fertility a covered function of male bodies—simply removing the *Magdalin* disease requirement does not extend deductibility of fertility treatments to single men or homosexual couples, as the fertility treatments they utilize would not directly affect the structure or a covered function of their own bodies. At its core, removal of the *Magdalin* disease requirement would, by eradicating the heteronormativity currently embedded in the *medical/personal* distinction, indicate a shift toward recognizing the validity and value of single and homosexual parenthood. To fully embrace this new value and ensure that Section 213 does not discriminate on the basis of a person's gender, sexuality, or marital status, the IRS and Tax Court must adopt all of the proposed reforms.

Each of the proposed reforms to Section 213 doctrine—recognition of fertility as a function of all bodies, embracing the concept of functional infertility, and removing disease as a precursor to deductibility under the *structure/function* prong—combines teachings of both anthropological theory and Section 213

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[243] *Id*. at 98 (internal citations omitted).

[244] *See* Pratt, *supra* note 7, at 1324 (discussing how the IRS and Tax Court could prevent deductibility of sperm donation costs when a woman is medically-fertile as a "woman's body, whether fertile or infertile, can never supply sperm" so donor costs do not treat a disease or directly affect the structure or function of the woman's body).

doctrine itself. Embracing anthropological theory, these reforms acknowledge two essential facts:

> (1) perceptions of the body, reproduction, and normalcy are fluid and value-laden; and
> (2) value judgments at the intersection of Section 213 doctrine and reproductive technologies are both necessary and inevitable.

Rather than attempting to skirt such value judgments or assume, as the Tax Court and IRS have, that these judgments can be avoided, the proposed reforms deliberately restructure the values of the Tax Court and IRS to re-envision Section 213 as a non-discriminatory doctrine. Adopting new value judgments makes an overhaul of Section 213 unnecessary, as it is the latent value judgments, rather than the actual doctrine, that effectuate discriminatory outcomes. Thus, by combining the teachings of anthropological theory and Section 213 doctrine, we can re-envision Section 213 as a consistent, non-discriminatory doctrine that reflects our evolving understandings of family and the body's new capacities, all the while remaining in the familiar realm of the Code.

CONCLUSION

Employing the lens of anthropological theory to examine Section 213 provides new insights. *Sedgwick* and *Magdalin* ceased to be simply inconsistent with prior doctrine and became analytical tools, revealing the IRS's and Tax Court's underlying heteronormative, marriage-centric value judgments. Where the Tax Court and IRS are ill-equipped to analyze or even recognize the culturally mediated nature and normative impact of concepts and terms they so readily use—*medical/personal*, the *body*, *normal*, *natural*, *reproduction*—anthropological theory steps in to provide this missing capacity. Most importantly, anthropological theory forces a realization that considering the deductibility of fertility treatments under Section 213 ultimately requires us to make value judgments about whose reproduction we value and who we deem to be proper parents. By making us recognize the inevitability of engaging in such judgments, anthropological theory provides a welcome opportunity to deliberately change those judgments and to reform a discriminatory doctrine into one that values and supports an individual's right to make a family as he or she desires, regardless of that individual's gender, sexuality or marital status.