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LAW ON THE FRONT LINES: PUSHING THE BOUNDARIES OF “MARRIAGE”

JULIA BELIAN¹

This article is about same-sex marriage, but it may not be the article you are expecting. Like all the articles in this Symposium edition, it examines the law of same-sex marriage, but it is neither a critique of those laws per se, nor is it an exploration of theory or jurisprudence. This article explores the daily reality of married life in a federation comprising more than fifty sovereign governments, each with its own developing law on the subject. The law in these many jurisdictions varies, as much law does, and so those seeking to coordinate their legal affairs across jurisdictional lines face familiar problems of planning and implementing any actions that implicate sometimes contradictory law. If anything sets the problem of same-sex marriage apart in this day and age, it is the fact that choice of law problems have not truly been problems for this area of law for a long time, and so most of us (lawyers and legal scholars included) really do not know how to resolve certain questions. These questions are not high-order conceptual problems; in fact, this article focuses entirely on the most mundane of legal questions. Our lack of answers does not arise out of the questions' complexity, but instead out of their relative novelty. Those of us who are legally married to someone of the same sex are facing questions to which there are no clear answers yet. To navigate this territory requires creativity and resilience in addition to legal knowledge, because in many cases, we are making the answers up as we go. This makes the law of same-sex marriage – the daily, living law of ordinary people's lives, what I am calling “law on the front lines” – a fascinating laboratory for legal problem-solving.

In keeping with the novelty of the issues, this article must begin in a relatively novel way, so to speak. It must begin with a story. The story begins in November 2005. I was having breakfast with a friend of mine in the Omaha-Council Bluffs area, where I lived at the time. My friend,

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Ingrid Evans Olson, mentioned she and her partner, who live on the Iowa side of the metropolitan Omaha area, were thinking of joining in a plaintiff group challenging Iowa's ban on same-sex marriage.² We discussed the pros and cons of signing onto litigation that was unlikely to win anything but notoriety for her and her family, especially since the two of them had a baby on the way. Somewhere during our talk, I quoted the old saying that "you can't unring a bell," and told her I thought this bell, in particular, might ring in their lives for a long time, no matter how the case turned out.

Ingrid and her partner did join in as plaintiffs on that case, and to our collective surprise, they won. On Friday, April 3, 2009, the Supreme Court of Iowa issued its decision in *Varnum v. Brien*³ holding that section 595.2 of the Iowa Code, which provided that the only marriage was one between a male and a female, violated equal protection afforded under the Iowa Constitution.⁴

My partner, Holly, and I had discussed marriage for at least as many years as we had been together, seesawing on the topic every time we reviewed our limited options. Ideally, we preferred to be married in our church, but our denomination (Episcopal) seemed eons away from offering that choice to us. As our years together increased, so did the possibility of marriage – provided we were willing to travel for it, and provided we were not too picky about that word, "marriage." The first flicker of hope had erupted first in Hawaii,⁵ only to be watered down to a "reciprocal beneficiaries" law.⁶ Vermont upped the ante with civil unions in 2000,⁷ and the Massachusetts court made actual marriage an option in May 2004.⁸ Connecticut began offering civil unions in October, 2005,⁹ and our kids started to pester us, asking when we were going to get married, and why we had not done it already. We seriously considered it. When the mayor of San Francisco began issuing wedding licenses despite state law,¹⁰ we looked at the cost of flights to the Bay area, where I had lived for a couple of years, but just could not afford the trip. Upon passage of Connecticut's civil union legislation, my best friend from law school, who practiced in

² IOWA CODE § 595.2 (2011).

³ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (holding the statutory ban unconstitutional).

⁴ *See id.* at 907.

⁵ *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), reconsideration and clarification granted in part, 74 Haw. 645, 852 P.2d 74 (1993).

⁶ HAW. REV. STAT. ANN. § 572C-1 et seq. (1997).

⁷ *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

⁸ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

⁹ CONN. GEN. STAT. ANN. §§ 46b-38aa - 46b-38oo (2005).

¹⁰ JOE DIGNAN and RENE SANCHEZ, *San Francisco Opens Marriage to Gay Couples*, THE WASHINGTON POST, Feb. 13, 2004, at A01.

New Haven, urged us to come for a visit and take advantage of the new law. We considered Canada but learned that if one of the parties has been divorced, which was our situation, we would need to file various documents that would have to be signed by Holly's ex-husband, as well as hire an attorney to write an opinion letter setting forth why the divorce should be recognized- a solution that promised to be costly and difficult.¹¹ The ruling overturning Iowa's ban on same-sex marriage in my friend's case, *Varnum*, got us excited for almost 24 hours before Polk County District Court Judge Robert Hanson ordered a stay on his own ruling to permit appeal to the Iowa Supreme Court.¹² When the California Supreme Court overturned the California ban in 2008,¹³ we went so far as to make plane and hotel reservations. But those plans were soon scuttled by the passage of Proposition 8 in November that same year.¹⁴ When Connecticut turned the corner and made actual marriage available that same November, we shifted gears and started aiming for March 2009, when business would take me to New York and possibly allow for a quick train trip to Connecticut – on a Friday the 13th, and in the middle of Lent, no less!¹⁵ Illness and expense got in the way again, however, and we reluctantly retreated to our earlier view, that we really wanted to get married “at home,” whatever that might mean. We would prefer to marry in our church, but regardless of that chance, traveling to places where we had limited connections was not what we wanted.

In January of this eventful year, I had accepted and begun a position on the faculty at the University of Detroit Mercy School of Law. Because our youngest was a junior in high school, we made the difficult decision that only I would travel to Detroit the first year, while my family remained in Omaha. We took pains to retain Omaha as my legal domicile that first year – we did not know much about Detroit beyond its troubled reputation, and it seemed sensible to upend as little as possible until we were confident that we could make a good life together in southeastern Michigan. I also had

¹¹ See *Getting Married in Ontario*, SERV.ONT. (Feb. 2008), <http://www.ontario.ca/ontprodconsume/groups/content/@onca/@lifeevents/@married/documents/document/243951.pdf>

¹² DAVID PITT, *Iowa Gay Marriage Applications Halted*, ASSOCIATED PRESS (Sept. 1, 2007), <http://www.edgeboston.com/index.php?ch=news&sc=&sc3=&id=36301&pf=1>.

¹³ See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

¹⁴ JESSE MCKINLEY and LAURIE GOODSTEIN, *Bans in 3 States on Gay Marriage*, NEW YORK TIMES Nov. 6, 2008, at A1.

¹⁵ See generally DAVID CRESSY, *The Seasonality of Marriage in Old and New England*, 16 J. Interdisciplinary History 1 (1985); see also THE EPISCOPAL DIOCESE OF NEW YORK, *Weddings and Funerals*, available at <http://www.dioceseny.org/pages/75-weddings-and-funerals> (last visited October 3, 2012).

concerns about our various estate planning and other legal documents, which I feared could become even more complicated than they already were, if our year apart was ever deemed an actual “separation.” I kept my Nebraska driver’s license and voter registration, and because I was able to arrange a house-sitting deal to cover my needs for shelter, not much changed for us, legally speaking, over the course of that first school year – until April

Until April.

Omaha, Nebraska, is embroidered on all sides by small towns that have evolved into suburbs of the city. Council Bluffs, Iowa, is just one of those towns. Despite the state boundary lines, people in the community routinely live and work on either side, basing their decisions on a variety of factors such as schools, work, taxes, and housing prices, but seldom think much about the “Iowa” or “Nebraska” division unless it is football season. Throughout most of our time in Omaha, we actually lived closer to (most of) Council Bluffs than we did to (most of) Omaha. Holly had held jobs in Omaha and in Council Bluffs, we both had colleagues and friends who lived on both sides of the river, and we regularly ran over to Council Bluffs for shopping, dining, and recreation – just as we regularly attended theater events in Ralston (where our son also took drum lessons), dined in La Vista, and visited friends in Bellevue. Council Bluffs, in other words, was as much “home” to us as any other portion of the metro Omaha area. The decision in *Varnum* was good news for our friends who were plaintiffs, but magical for us, as it opened the door, finally, for us to get married *at home*. The roller-coaster of recent court and electoral decisions across the nation left me thinking I had become immune to feeling any excitement about another gay marriage development, but I was wrong. Although I was convinced something would happen to derail our plans again, we were thrilled to make them.

Time, however, was of the essence. My first year at UDM had gone well, and we had decided to move the whole kit ‘n caboodle to Detroit as soon as possible, which would be mid-May. The *Varnum* decision came down April 3, but the ruling was not to take effect until April 24, allowing time for state offices to prepare for the change.¹⁶ That delay was lengthened by three days to accommodate state budget cuts, which closed

¹⁶ See JEFF ECKHOFF & GRANT SCHULTE, *Unanimous Ruling: Iowa Marriage No Longer Limited to One Man, One Woman*, DES MOINES REG. (Apr. 3, 2009), <http://www.desmoinesregister.com/article/20090403/NEWS/90403010/Unanimous-ruling-Iowa-marriage-no-longer-limited-one-man-one-woman>.

state offices on select “furlough” days, including Friday, April 24.¹⁷ That gave us less than a month to get things arranged. So I did what any self-respecting legal academic would do in such a time-sensitive situation: I researched. I looked up Iowa law regarding marriage license applications and reviewed the procedures set forth on the county web sites of every county I could find with information. We were navigating our way through a legal terrain where no one knew exactly how the rules were supposed to work.

I. THE FORMS

By the second week of April, the application available online had not changed from its previous incarnation, which required that we specify names and information for both “bride” and “groom.” This did not bother me very much—I was more worried that such a technicality could present problems on April 27, the day we planned to submit our application. I ended up calling the county recorder’s office in Pottawattamie County, where Council Bluffs is located, three different times to discuss the procedures.¹⁸

During the first call, Lynn (a clerk in that office) told me that they really weren’t sure what they were supposed to do, and that I should call someone at the state level to find out. The person I spoke with in the Iowa Attorney General’s office, in turn, referred me back to the counties, with a promise that a revised form would be posted as soon as the Supreme Court signed the order. Lynn, in the meanwhile, would consult with her boss to determine how they planned to handle it.

On my second call, another county employee regaled me for fifteen minutes about how frustrated they all were with the state’s slow production of the new form, observing that the Supreme Court would not get the order signed until 10 a.m. or later on April 27, and that it might be all well and good for *them* to start their workday that late, but *they* did not have to help the public all morning without proper forms!

A third call to Lynn allowed us to nail down the details, with Lynn’s assurances us that we could submit the old form without trouble. She did not have any advice about which of us should be the “bride” and which the “groom.” But she did address my real worry—she promised that the Pottawattamie County office would accept it, however we decided that

¹⁷ *Iowa Gay Marriage Delayed*, ASSOCIATED PRESS (Apr. 7, 2009), <http://www.365gay.com/news/iowa-gay-marriages-delayed/>.

¹⁸ God bless you, Lynn, for all your patience.

issue. She confirmed that the staff was somewhat nervous about what was coming, as they had no idea whether they would have five or five hundred applicants on the first day. The staff, she said, just wanted to do their jobs, and were hoping no one would be angry with them if things were disorganized due to circumstances beyond the county's control. I made a point to tell her how wonderful everyone was being, and I promised we would not submit our application on Monday, but would wait a day to spare them at least one more headache. Iowa law requires a three-day waiting period between submission of the application and issuance of the license, but I still felt optimistic we would have time, provided nothing happened to change Iowa law between the end of April and the middle of May. I also made sure to send an e-mail to county recorder John Sciortino, to praise the county office's professional handling of a challenging situation. Finally, I sent an all-call to everyone I knew who might be able to keep an eye on the county courthouse, to offer help to the county officials on Monday in the event there were crowds of either applicants or protestors.

II. THE LICENSE

As Holly and I discussed the plight of the workers at the recorder's office, we decided that although we were going to wait to submit our application, the employees there could probably use some moral support on that first day. The best moral support I knew of was Holly's brownies, so she agreed to bake a batch to take over there on that Monday. I sent an e-mail to Ingrid later that Monday evening, recounting the events as Holly had described them to me:

When Holly went in today, she marched up to the counter and asked the lady there whether Lynn was in today. She looked at Holly somewhat askance and said, "I'm Lynn . . . whyyyy?" Holly popped the brownies up on the counter and said, "These are for you." "Why???" asked Lynn. "They're from Julia Belian . . . you spoke with her several times last week about how to do the application for a marriage license," Holly told her. Lynn claimed to remember, and Holly reiterated how much we appreciated all their hard work and dedication to their job. To which Lynn replied, "These [brownies] are still warm!" and protested, saying, "I need brownies like I need a hole in my head." Holly assured her, "You need these, they're made with Ghirardelli chocolate. . .". And all the people said, "Mmmmmmm." Because by now, workers were sniffing their way up from the back offices asking, "What is that smell?" Lynn told them, "It's brownies,

for us!” They all said, “Why????” and Lynn repeated our story for them while they helped themselves to the treats.

Then Holly did it. “OK, Julia made me promise I wouldn’t turn our paperwork in today, because she was so worried y’all would be swamped, but you’re not very busy right now, and I have it with me . . . but you can’t tell her I broke my promise!” I told Holly later she probably thought, “What a way to start your marriage, don’t tell my fiancée I broke my promise”! So Holly gave Lynn the paperwork and the money and encouraged her to review it line by line to be sure it was OK. Lynn did exactly so, and finally pronounced, “Yes, this application is fine, you will be issued a license.”

Poor Holly, despite all my instructions, had forgotten what was coming next: “You can pick it up on Thursday.” She said she just deflated, because she had forgotten about the three-day waiting period. After all the years of waiting, another three days shouldn’t have mattered, but on the other hand, after all those years, the last thing she wanted to hear was that we would have to wait . . . again. Lynn said, “Or you can come anytime, we’ll keep it here for you for six months . . .” Holly rebounded quickly, assuring her, “Oh no, I’ll be here Thursday!” Lynn laughed and said that’s what everyone was saying. Then Lynn asked if Holly wanted the receipt. Holly’s rather enthusiastic “YES” seemed to sort of throw her off until Holly said, “You know, for the scrapbook!” (Holly told me she didn’t want to have to explain how obsessed I was with keeping track of all the paperwork).

When Holly returned on Thursday to pick up our license, she finally encountered a crowd—but it was not in the line of applicants. A group of protestors had rallied on the courthouse steps, bearing signs portending all the disasters that would follow recognition of same-sex marriage and identifying the group as members of the National Socialist Movement, headquartered in – you guessed it – Detroit, Michigan.¹⁹ Holly managed to snap a photo of the group, with her own hand holding our license in the foreground, but in her nervousness she then dropped all the papers to the ground. One of the young men protesting stepped over and helped her pick them up with a respectful “Here you go, ma’am.” Holly thanked him and mentioned that her *partner* would have been very upset if she had lost the license so soon after picking it up. For some reason, that remark seemed to sour his friendly disposition.

¹⁹ NATIONAL SOCIALIST MOVEMENT, <http://www.nsm88.org> (last visited Sept. 10, 2012).

III. NAMES

The biggest surprise for me came when Holly sent me the license. My initial vague impression was that there were too many “Belians” on the form. I finally realized that she had, at the last moment, altered our application to show her intention to change her last name to mine once we married. I eventually surmounted (most of) my inordinate feelings of pride over that fact, and on Friday, May 15, 2009, we made that name change official as we were married in the company of about thirty friends on the banks of the Missouri River. The day itself was much like our story, beginning in clouds and threatening storms, but clearing up in the middle of our service so that we made our vows in fresh sunshine under aching blue skies. We had decided not to have a reception, as we wanted to attend an art opening held in support of the Kent Bellows Foundation, a cause very near and dear to our hearts.²⁰ So, instead, we suggested that those who wanted could follow us to the gallery. Our friends at the gallery, meanwhile, had ordered us a cake, which was served not only to us and those who trailed behind us, but to every person attending the gallery that night. Most of them seemed rather confused about the presence of a wedding cake at an art opening and further confused as they read the names written in icing among the more “ordinary” wedding cake decorations. They all took a piece anyway. Two days later, we finished packing our things and hit the road for our new home in Michigan, where Holly’s new name would prove to be the next chapter in our education about law on the front lines.

Michigan law does not recognize marriages between two men or two women. Michigan is, in fact, one of twenty-nine states that presently bar same-sex marriage by both statute and by constitutional amendment. And they don’t pull any punches. Article 1, § 25 of the State Constitution provides that “the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.” Similarly, Michigan Compiled Laws § 551.1 states that “[m]arriage is inherently a unique relationship between a man and a woman,” and that “[a] marriage contracted between individuals of the same sex is invalid in this state.” Barely 48 hours after being pronounced “married to each other,” we took up residence in Michigan and asserted, to each other, at least, that Michigan could think what it liked, but we were married, whether our new state agreed or not.

²⁰ See THE KENT BELLOWS STUDIO, <http://kentbellows.org/> (last visited Sept. 10, 2012).

But quotidian details can wear down quixotic aspirations, and so, in our first week in our new home, we started to grapple with the uncertainties of our status, one question at a time. The first issue was the name. Holly had become a Belian under Iowa law, but would Michigan issue a driver's license under that name? I re-examined the Iowa marriage license application and the laws governing it and noted that statutory authorization of a change of name clearly arose within the "Domestic Relations – Marriage" portion of the Iowa Code.²¹ If Michigan thought our marriage invalid, would it likewise think Holly's new name invalid? I called the Chicago-based Midwest Regional Office of Lambda Legal, a national advocacy organization headquartered in New York, to get their opinion. The representative I spoke with said she doubted Michigan would issue a license based on an Iowa marriage certificate and that she expected we would have to petition for a name change in the Michigan courts. Now, that was certainly an option, but we found ourselves balking at the idea, for several reasons. First, it seemed that filing such a petition would undercut our position, as it would imply acceptance of the very premise in question, that is, that Michigan has the authority, under the United States Constitution's full faith and credit clause, to refuse to accept the validity of our marriage.²² We wanted to presume our marriage was valid every chance we got. Let them try to prove the contrary, if they wished. Second, I am cheap.²³ I couldn't see the sense in paying a filing fee, and who knows what other costs, to ask a Michigan court to "grant" a right we'd already paid for in Iowa.²⁴ Third, what if the court said "no"? Some courts in Michigan are famous for their stalwart stances against lesbians and gay men, arguably going well beyond the call of duty to ensure that our rights remain carefully circumscribed.²⁵ I watched the Irv Younger tapes in law school: I have been trained not to ask questions to which I do not know the

²¹ See IOWA CODE § 595.5 (2011).

²² I am well aware that many scholars, all of them far better qualified than I to plumb the depths of Constitutional Law, find no such constitutional issue in a state's refusal to acknowledge Iowa's public act of licensing and certifying our marriage. I am not qualified to counter such arguments, but I am smart enough to refuse the challenge and dumb enough to still think I'm right.

²³ Beggarly, chinchy, chintzycheeseparating, close, near, penny-pinching, close-fisted, hard-fisted, tight-fisted, grudging, miserly, tight, parsimonious. How about frugal!

²⁴ The cost of a marriage license in Pottawattamie County is \$35. See POTTAWATTAMIE COUNTY, <http://www.pottcounty.com/government/recorder/vital-records.php> (last visited Mar. 21, 2011).

²⁵ See UnmarriedAm., *Michigan Judge Stays in Second Parent Adoption Hearings*, http://www.unmarriedamerica.org/members/news/2002/July-DP/MI_judge_stays_in_second_parent_adoption_hearings_June_25,2002.html; see also BRENDAN BOUFFARD, *Same-sex Parents Fight for Joint-custody Rights*, STATE NEWS (Nov. 28, 2009), http://www.stateneews.com/index.php/article/2006/11/samesex_parents_fight_for_jointcustody_.

answer.²⁶

Besides, something in this was ringing a bell somewhere in my semi-conscious memory. I thought I had seen something on this issue a few years back, when I was teaching Elder Law and had a good excuse to prowl through the Social Security Administration's Program Operations Manuals. After a bit of Googling, I found what I had recalled: A guidance issued during California's flirtation with same-sex marriage directing Social Security employees to accept marriage-based name-change documents even after the passage of Proposition 8.²⁷ A bit of musing led me to a hypothesis: if the average Social Security employee reads their e-mail as cursorily as I do, they might see and register the content without necessarily thinking through it. They might not even question whether the California name-change directive should apply in Michigan. The Social Security Administration, after all, needs uniformity and efficiency—wasn't that the justification for the Defense of Marriage Act?. So it seemed plausible that such an employee would think it necessary (or at least advisable) for the directive to be applied uniformly in every state. It was worth a shot. If that worked, I thought, we could tackle the Secretary of State's office about the driver's license.

The Social Security officer was unimpressed – probably uninterested – in the details. Present marriage certificate and proof of identity, fill out the proper form, and the SSA would issue the new card. And so they did.

When reviewing the requirements for obtaining a Michigan driver's license, I was next startled by the proofs required.²⁸ First, you must present a Social Security card.²⁹ Next, you'll have to produce some proof that you are in the United States legally – the ten-item list of options includes a certified birth certificate or a valid, unexpired U.S. passport.³⁰ In addition, you must also present proof of identity – the tip sheet is careful to point out that more than one such document may be required. Fourteen possible documents are listed, ranging from a driver's license issued in another state to a marriage license to military identification to school records to a second

²⁶ See IRVING YOUNGER, *The 10 Commandments of Cross-Examination*, <http://www.dayontorts.com/uploads/file/Younger%20on%20Cross--10%20Commandments.pdf>; see also YOUNGER, *The Art of Cross-Examination*, A.B.A. MONOGRAPH SERIES NO. 1 (ABA Section on Litigation 1976).

²⁷ The POMS I read at the time was RM 00203.210, which has since then been replaced by RM 10212.035, effective May 24, 2010.

²⁸ *Applying for a License or ID? You'll Need the Following Documents*, THE STATE OF MICHIGAN (June 2012), http://www.mi.gov/documents/DE40_032001_20459_7.pdf.

²⁹ *Id.*

³⁰ *Id.*

document from the “legal presence” column.³¹ That’s right – a valid U.S. passport alone is *not* sufficient to prove *both* legal presence *and* identity. Finally – yes, there’s more – finally, you must present proof of Michigan residency, which must be proven by *two* documents from an eight-item menu that includes a lease, utility bills, bank account statements, credit card statement, pay stub, auto policy, tax receipts, or a Michigan vehicle title and registration.³² This last category of proof was especially perplexing, since as far as we could tell, you couldn’t open a bank account without a driver’s license, most employers want to see a driver’s license, and registering your vehicle and obtaining auto insurance seemed to require a driver’s license as well – which, of course, you could not get if you couldn’t offer those documents as proof of residency . . . For me, none of these columns were problematic because: (a) I had done the road-work to find us a home and get the utilities turned on ahead of time, and (b) I am a lawyer, and therefore, by nature a paranoid pack-rat.. Even so, I possessed only ten of the 47 different kinds of documents listed on the tip sheet. I was just lucky that I had one or two things from every column. Holly was not so lucky. She was good on Social Security (whew!), legal presence, and identity, but came up one short on proof of Michigan residency, because although her name was on our lease, all the utilities were in my name.³³ We could obtain another utility service – say, cable TV or internet – and wait for the bill to come, but then we would have gone more than the thirty days allowed a new resident to obtain a Michigan license.

Holly is one of the most optimistic people I know, so she remained undeterred by the rules and regulations. I fretted all the way to the counter. I was at least able to persuade her that I should go first, thinking that, with luck, we might then be able to bootstrap her application with mine, which they would have already approved. The Michigan Secretary of State branch offices require license applicants to show the clerk all their documentation before they will even issue a number indicating your position in line. I offered each of my papers as the clerk rattled off each requirement, earned my number, and stood at the nearest empty counter, filling out the application itself and listening to the clerk’s conversation with Holly. Everything was fine until, as I feared, we got to the proof of residency. Holly explained that we had just moved here, that we had just gotten married, and that all the utilities were in her spouse’s name.

³¹ *Id.*

³² *Id.*

³³ Through my short-sightedness, I had mistakenly decided it would be convenient, and therefore appropriate, to have both electricity and gas available in our new home when we arrived.

At this point, the clerk interrupted her, and said, “Your spouse? Who’s your spouse?” By now, I had sidled back up to that counter and quietly said, “I am,” and handed her the same utility bills she had already inspected on my behalf. She re-inspected the bills, took one long glance at me over the top of her glasses, and asked, “You got a marriage certificate?” Fortunately, we had submitted the application and fee for our certificate the same day we were married, and it had already arrived, allowing Holly to whip it out of the envelope and hand it across the counter before the words had completely escaped her lips. The clerk’s relief was obvious. “Well, if you got a marriage certificate, that’s fine!” It did not seem to matter to her that it was issued in Iowa; the initial red flag raised was defeated with an official piece of paper. By now, the branch manager had joined us, clearly alerted to the possibility of trouble, and asked what the problem was. The clerk cut me off before I could start my long-winded explanation, saying, “Oh, they got all their utility bills in *her* name [pointing at me], so *she* don’t have no bills, but they’re married, so it’s OK.” The branch manager tilted her head, looking slightly puzzled. “Married?” The clerk dealt the papers out like a poker hand. “Sure, see, marriage certificate right here, and their name is the same, and here’s the bills.” The branch manager looked them over, nodded as much to herself as to anyone else, and then halted, her eyes on the marriage certificate. “May 15?,” she asked. We said yes. She smiled. “Congratulations,” she said, and walked away to handle some real problem at another window. I breathed a sigh of relief, Holly said, “I told you we wouldn’t have any problems!” and we went to get our vision tested.

And this was when I began to see our situation in a new light. Michigan *law* might refuse to recognize our marriage, but many of the good *people* of Michigan did not seem to have a problem recognizing what they saw in front of them: Two people, married like any other two people. But it wasn’t just our charm that persuaded them, it was the accretion of signifiers: certificates, identity cards, invoices, and licenses. Perception is in the eye of the beholder. Much of the daily details of law arise in administrative offices, and marriage recognition begets recognition of marriages, formal law notwithstanding.

IV. THE BURDEN SHIFTS

Not long after we successfully applied for our driver’s licenses, I needed to make a routine appointment with a physician’s office. This is a task I’ve always dreaded simply because of the tedium and tiresomeness of repeated

explanations of our domestic arrangements, of filling out forms that fail to fit our facts. I made the call after days of stalling. We began with the routine of information-gathering that is a hallmark of modern medical care: Name? Address? Employer? Insurance Company? And soon enough, here it came: Single, married, or divorced?

I stopped dead in my tracks, and felt myself starting to smile just a bit.

“Married,” I said. I heard typing.

“Husband’s name?”

Instead of my accustomed sigh of fatigue, I smiled slightly more.

“My spouse’s name is Holly Belian. That’s H-O-L-L-Y.”

The typing stopped. “Did you say ‘Holly’?”

“Yes.” In the past, I would have felt obliged to explain, but this time, I simply said, “Yes.” No explanations, just, “Yes.”

The information-gatherer hesitated. “Uhm, should I write you down as domestic partners?”

I paused, but not for long. “No; we’re married. We got married in Iowa just last month.” I was now grinning at the truth of it as I repeated, “We’re married!”

My enthusiasm was not contagious, however. She hesitated again – oh, how I recognized that pause, that search for words that will inform without inflaming – and said, “Well, I don’t really have a way to put that down here.”

I took some pity on her, but not much. “I understand,” I said, but continued, “and I’m sorry that your form doesn’t work very well.”

“So I can put you down as domestic partners?”

“No.”

Again, a very long pause, and I finally added, “I don’t know what to tell you. I understand that your form doesn’t work, but I can’t tell you to write down ‘Domestic Partners’ because we’re not. We’re legally married. You’ll just have to do the best you can, I guess.”

We hung up shortly thereafter. I have no idea how she solved her dilemma, and am frankly not persuaded that the form itself somehow makes it impossible to check “married” and write “Holly Belian” into the blank for the spouse’s name. But I realized that something truly magnificent had occurred regardless of that office’s inept forms.

The burden had shifted.

It was no longer my problem that other people might have a hard time knowing how to categorize my domestic life. We are married. It is a simple and easy thing to say, for all that it conveys – and that is a huge part of the point. I had read about the first civil union ceremonies in

Connecticut, where some poor officiant had no idea what language to use, first declaring the couple “married,” then correcting herself to say that they were “unionized.”³⁴ What else could she say – that they were now “civilized”? Civilly united? Joined in civil union? That is at least a legal status, but the question plagues the LGBT community with or without such clumsy legal language. How do I describe us, if we are not married?

The dilemma extends to names for each other. Would I like you to meet my girlfriend? She’s more than that. My friend? Same problem, only worse. My partner? That works in many places, but law firms and any collection of lawyers tend to be salient exceptions. My mate? Too intimate. My roommate? Heavens, I hope we left that fiction behind about thirty years ago. My woman? Too proprietary (and rather rude, I think). My old lady? I value my life too much. My life partner? That makes me sound like some sort of new-age-alternative-thinker, but I’m an Episcopalian property law professor, for goodness’ sake. My better half? Well, I may have to admit it’s true, but I’m still more inclined to say “my taller half,” since Holly is about 10 or 11 inches taller than I.³⁵ In short (no pun intended), the English language is no more suited to such ersatz marriage than we are. But now that we are married, I can introduce you to “my spouse,” and it is true and accurate, if a wee bit clinical. My students have no such qualms, referring easily to Holly as my wife. I try it on, rolling it around in my mouth, thinking I am starting to sound too much like the old Geritol ad, but still: It’s true, it’s accurate, it works.

V. BENEFITS

Recognition of marriage is not all about words; it’s also about money. We had our names, we had our driver’s licenses, but now we needed health insurance. My employer provides generous benefits, including several choices of health care plans, all at very affordable rates. Holly’s employer offered severely limited health care benefits, and the premiums for even that constricted coverage were so high that it seemed the only reason to continue her coverage at all was to ensure she kept “creditable coverage” (and would thereby escape the nightmare of pre-existing condition exclusions) until we could switch her to another plan.³⁶

³⁴ DAVID A. FAHRENTHOLD, *Connecticut’s First Same-Sex Unions Proceed Civilly*, WASH. POST (Oct. 2, 2005), available at <http://www.washingtonpost.com/wpdyn/content/article/2005/10/01/AR2005100100962.html>.

³⁵ Our church friends refer to us at times as “the Belians Great and Small.”

³⁶ 29 U.S.C. §§ 1181 (a)(1)–(3) (1996) (stating a health insurer may exclude coverage of pre-existing conditions for as long as twelve months, eighteen months in the case of a “late enrollee”, but

If we were an opposite-sex couple, our marriage would itself have created the opportunity to enroll Holly under my employer-sponsored health insurance. Under the Health Insurance Portability and Accountability Act of 1996 (HIPAA),³⁷ employees who wish to enroll themselves or their dependents in their employers' health insurance plan may ordinarily do so only upon initial hire or during an annual "open enrollment" period.³⁸ Certain events, however, require employers to offer a "special enrollment" period, a 30-day window following the "qualifying event" within which the employee may enroll, or may enroll a dependent, even though the event occurs outside the annual "open enrollment" period.³⁹ The events which require an employer to offer special enrollment are the events that create a new dependent of an employee – i.e., birth, adoption, placement for adoption, or marriage.⁴⁰ Although employers who offer any insurance to employees' dependents must provide special enrollment for new dependents, employers are not required to offer any dependent insurance. If an employer does want to offer dependent insurance, its obligation (or opportunity) to provide similar coverage for same-sex spouses will depend, in part, on state law, and that obligation may be limited, in turn, by federal law. Not only does federal law not require provision of such benefits, it clearly bars provision on identical terms. None of the rules for special enrollment under HIPAA apply to same-sex spouses, because the Defense of Marriage Act (DOMA) limits the definition of marriage for federal purposes to "a legal union between one man and one woman as husband and wife."⁴¹ Therefore, any employer wanting to provide health-care benefits to same-sex spouses of employees will have to negotiate with the insurance provider (which is under no obligation to do so). Moreover, the laws governing employee benefit plans under the Employee Retirement and Security Act of 1974 (ERISA)⁴² provide that noncompliance with its requirements will subject employers with ERISA-governed benefit plans to potentially significant excise taxes.⁴³ If the noncompliance is deemed more than "de minimis," the

the exclusion period will be reduced based on how long the insured had "creditable coverage" prior to enrollment).

³⁷ 29 U.S.C. § 1181 (1996).

³⁸ Employee Benefits – Cafeteria Plans, 72 Fed. Reg. 43938-01 (proposed Aug. 6, 2007) (to be codified at 26 C.F.R. pt. 1).

³⁹ 26 U.S.C. § 9801(f) (1996).

⁴⁰ See *id.*; see also PERMITTED ELECTION CHANGES, 26 CFR § 1.125-4 (2001).

⁴¹ 1 U.S.C. § 7 (1996).

⁴² Pub.L. 93-406, 88 Stat. 829 (1974).

⁴³ 26 U.S.C.A. § 4980D (2005).

penalty imposed on the employer will be the greater of \$100 a day or \$15,000.⁴⁴ In a worst-case scenario, the employer could possibly lose preferred tax treatment for its benefit plans.⁴⁵ Benefits provided to same-sex spouses, therefore, must be administered very carefully to ensure that the employer's generous impulses do not result in the mistaken provision of opportunities and considerations that are not permitted under ERISA. Employers are understandably skittish about any tinkering that might amount to "noncompliance," especially with regard to something as substantial as health care insurance.

In our case, this has resulted in a curious patchwork of policies, none of which are clearly delimited by any plan description. As a matter of official policy, my employer, the University of Detroit Mercy (UDM), does not discriminate on any of many bases, including "sexual orientation."⁴⁶ By and large, we have found that policy lived out in beautiful and sometimes surprising ways by the *people* of UDM – the students, the faculty, the staff and administration. That overarching policy and welcoming attitude are also mirrored in *some* of the particular policies in place at the university. Upon inquiry and request, we have been able to secure *some* of the benefits routinely afforded to opposite-sex spouses, but not all of them. Some of the challenges we have encountered can be blamed on governmental regulation. UDM's generosity, however magnanimous it might be, is understandably circumscribed by the need to comply with federal law. In addition, Michigan law regulates some aspects of the plans that UDM offers its employees. Finally, the companies that administer the benefits plans have their own policies in place. But the overlay of federal and state law and provider policies are not the only roadblocks that have stymied us. UDM itself, like many employers, is not of one mind regarding provision of benefits to same-sex couples, and neither are all its personnel. It seems clear that there is internal disagreement on at least some of these issues. In light of UDM being "a Catholic University in the Jesuit and Mercy traditions,"⁴⁷ this is may be less surprising than the amount of support and welcome we have enjoyed. In and among all these interstices, we have found benefits, but they are not unalloyed.

First, consider our health care coverage. UDM offers employees a

⁴⁴ *Id.*

⁴⁵ Employee Benefits – Cafeteria Plans, *supra* note 31 (proposing a plan that permits elections under than as prescribed does not qualify as a "cafeteria plan," which status is key to gaining favorable tax treatment for the plan, the benefits it pays, and the employees it covers).

⁴⁶ UNIV. OF DETROIT MERCY, *Equal Employment Opportunity*, <http://www.udmercy.edu/hr/employment/eoo/index.htm>.

⁴⁷ UNIV. OF DETROIT MERCY, *Mission and Identity*, <http://www.udmercy.edu/mission/>.

choice of three different health insurance plans: There are two Preferred Provider plans, both of which are offered through Blue Cross-Blue Shield Michigan (BCBSM), and there is one Health Maintenance Organization (HMO) plan, administered by Health Alliance Plan. BCBSM will not cover domestic partners or same-sex spouses – period, end of discussion. Luckily, HAP (The Health Alliance Plan of Michigan) will. When I first began working at UDM, I had signed up for BCBSM (for no particular reason other than that I had previously been insured under a BCBS plan in another state). Obtaining health insurance for Holly, therefore, required that I change my plan to HAP and then add her to my coverage.⁴⁸ We were not averse to the switch, but we could not make that switch until the annual open enrollment period, because under DOMA our marriage was not a marriage, which meant that under ERISA, I had no qualifying event that would permit me to change my benefit plan in the middle of the plan year. This forced us to obtain COBRA coverage for Holly until she found employment that offered adequate health care insurance an option that was better than having no coverage at all, but one that cost us close to a thousand dollars more than we would have had to spend had we been eligible for special enrollment under ERISA. And, of course, our choices of medical providers was much more limited under an HMO than it would be under a PPO plan, although our premiums were, admittedly, significantly lower. In short, we had fewer options, and more restrictions and cost, than opposite-sex newlyweds would have had, even at the same workplace. And the costs increase once the tax consequences are added to the tab.

ERISA regulations also prohibit us from obtaining insurance coverage for our youngest son. Dusty was then 20 years old, lived with us, was economically dependent on us, was a full-time student, and did not have access to an employer-provided health plan. But because he is technically my step-son – or rather, is technically *not* my step-son under federal or Michigan law – he could not be added to my insurance plan even with the generous changes to federal law enacted under President Obama’s health care reform in 2010.⁴⁹ I called our Human Resources department when the

⁴⁸ We also had to comply with UDM’s spousal coordination policy, which requires spouses to obtain health care insurance from their own employers as their primary coverage unless they are not employed, cannot obtain such insurance, or cannot obtain such insurance for less than a certain premium amount each month. See UNIV. OF DETROIT MERCY, *UDM Spousal Coordination Frequently Asked Questions (FAQ)*, <http://www.udmercy.edu/hr/benefits/medical/index.htm> (last visited Mar. 24, 2011).

⁴⁹ AFFORDABLE CARE ACT, 75 Fed. Reg. 27,123, 27,124 (May 13, 2010). The new law permits an adult child to remain covered under a parent’s or step-parent’s health care plan so long as they are under

enrollment period for adult children was announced, but was told in no uncertain terms that it absolutely would not permit us to purchase insurance for Dusty under my plan. The e-mail reads:

Let me begin by first stating, domestic partner provision under HAP is a *special courtesy* designed specifically to add coverage ONLY for an individual of the same gender (emphasis added). The new health care law as it relates to dependent children qualifies ONLY the subscriber's dependents that are related by birth, legal adoption, legal guardianship or marriage. Unfortunately, as you stated Michigan does not recognize same gender marriages, therefore Holly's child is not legally recognized as your dependent and cannot be added to your coverage. Please let me know if you have additional questions.⁵⁰

To be fair, I am reasonably confident that the correct answer under federal law is “no” regardless of any individual attitude, and so I do not blame the messenger for the entire message in this case. This benefit, arising as it does under an ERISA-governed plan, is itself governed by ERISA, and as set forth above, ERISA is very strict about jobs, titles, and titles. Still, that e-mail made very clear to me that not everyone at UDM is equally enthusiastic about providing “special courtesies”—in this case, basic health care – to families like ours. The lesson we learned at the Michigan Secretary of State branch office proves true in the negative, as well: the law, whatever it is, is applied by people, and depends, to some extent, on the individual attitudes scattered across the front lines. The benefits manager who replied to my question does not see Holly's health coverage as a component of my compensation, which it certainly is for every other employee, but as some sort of idiosyncratic generosity, the kind of good fortune that, like the weather, should neither be complained about nor counted on. The previous benefits manager, by contrast – the one who had to tell me we could not enroll Holly in the plan until the open enrollment period – tried her best to find some workaround for us and was genuinely sorry for the disparate treatment we had to accept. The message in each case was the same, but the messengers were worlds apart. That difference matters to our perception of my employer: ERISA may bar adding Dusty to my health care plan, but it certainly does not require anyone to be rude about it. The difference can matter beyond affecting perceptions. On the front lines of changing law, and even in an institution

the age of 26 and do not have access to an employer-sponsored plan. The child does not have to be a full-time student, does not have to be economically dependent on the parent or step-parent, and does not have to live with the parent or step-parent.

⁵⁰ E-mail from a UDM benefits manager to author (October 25, 2010) (on file with author).

committed to equitable treatment, not everyone will like the idea, and some may act in ways that undermine the institutional commitment in ways both subtle and not.

Some of UDM's benefits are not governed by ERISA, and UDM has chosen to be generous in some of those areas. In addition to its undergraduate campus and law school, the University of Detroit Mercy also has a School of Dentistry, and faculty and their families are eligible for dental care provided by the School.⁵¹ If the patient elects to receive dental care from a supervised student,⁵² there is no charge. If a patient would prefer care provided by a faculty member, that option is available at a charge that is significantly lower than self-pay dental care (or even dental care under previous dental insurance plans I have had). Because this program is entirely internal to the University, it is not governed by ERISA, and for that reason, perhaps, we had no problem getting dental care for myself or Holly. Each time the clinic prints a care plan showing the ordinary charge for procedures that have been completed, I am sobered by the value of these particular benefits. Similarly, we have had no difficulty utilizing the Flexible Spending Account for all of our qualified out-of-pocket expenses. With few exceptions, these providers have not even mixed up our accounts, a problem I was certain would happen with us now sharing name as well as gender.

But in some other areas where UDM could offer benefits to spouses of employees, it has so far chosen not to do so. One of the most significant benefits available to employees and opposite-sex spouses is tuition reimbursement. Holly has applied to a number of area graduate programs and is interested in one offered at UDM, but as a private institution, UDM's tuition is approximately double that of nearby state schools. After the response I got to my question about health care coverage for our son, I was very reluctant to approach my assigned benefits manager, because I was fairly certain she would give us a negative answer straight out. Holly had no qualms about asking the admissions and other administrative personnel of the program in which she was considering enrolling; to a person, they all volunteered the information about spousal tuition reimbursement and were quite certain it would be available for Holly. Quite certain – but quite

⁵¹ Other employees and dependents may also qualify for dental care at the School of Dentistry, but employees do not routinely have access to information about benefits provided to other non-similarly situated employees, whose terms of employment may be governed by collective bargaining agreements, among other things.

⁵² The patient must also fit the School's criteria, which admits to its student program only those patients who need care that is more than routine but not so great that a supervised student cannot competently provide it.

wrong, as it turned out. One of the administrators sent the inquiry to the UDM's associate vice president in charge of human resources, and his answer was clear, even while his attitude was encouraging: UDM does not provide tuition reimbursement to same-sex partners or spouses, *not now*, he said, *but raise the issue again*. Apparently, the topic comes up with some regularity, and perhaps the policy will change . . . someday. Although we felt a bit like Dorothy when we got the news,⁵³ we again felt at least somewhat mollified by the responses of the people we encountered. It is admirable and adorable that almost everyone assumes UDM is the kind of employer that would never discriminate against same-sex spouses; all we need now is to make it true.

VI. TAXES

The disparate tax treatment of benefits provided to couples whose marriages are not recognized has been thoroughly treated by other scholars.⁵⁴ I see no point in attempting to re-till that ground, and therefore will focus instead on those aspects of our taxes where answers are not as readily available. The issues we face in our daily lives are not always the same as the issues discussed by scholars, in part because some of our issues seem so simple.

With regard to taxes, I will make no bones about the bottom line: We might be paying less by avoiding the "marriage penalty," or we might be paying more. We have not done the comparative math because we really don't even care. We would be proud and pleased to pay the "marriage penalty" long abused by countless couples. Our pursuit of marriage recognition is not fundamentally about gaining advantages, though we certainly don't mind them. We want to accede to the privileges *and the responsibilities* of married couples in this country. If that costs us financially, we are not opposed to that in principle. We know our attitude is a luxury afforded to us by my relatively high-paying career,⁵⁵ one that many couples (regardless of gender) do not enjoy. Still, I would be just as proud to pay higher taxes because I am married as I would be to pay child support because I was a parent, or to serve in the military because my country needed me.

⁵³ THE WIZARD OF OZ (Warner Bros. 1939) ("Not so fast. not so fast! I'll have to give the matter a little thought. Go away and come back tomorrow.").

⁵⁴ See generally Stephen T. Black, *Same-Sex Marriage and Taxes*, 22 BYU J. PUB. L. 327 (2008).

⁵⁵ Not that high-paying, of course; in this, my 10th year of law teaching, I still do not make anywhere near the salary I made in my last year of private practice, where I was only an associate.

But whether they're higher or lower, the taxes must be paid, and that requires that a form be filled out. And again the rubber hits the road: *Which filing status do I check?* Near the bottom of the federal individual income tax return, Form 1040, is a box designated for the taxpayer's signature. By signing the form, the taxpayer affirms the following statement, which is printed in very small (6-point) type within the box:

Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Making false statements under oath – whether in court or in a sworn written declaration, verification, certificate, statement, or affidavit – constitutes perjury under federal law under at least two different provisions.⁵⁶ In addition, federal law includes specific provisions for false statements (whether under oath or not) made in a variety of particular settings, including false statements made before a court or grand jury,⁵⁷ in bankruptcy procedures,⁵⁸ and to the Immigration and Naturalization Service.⁵⁹ In that same vein, the Internal Revenue Code provides its own penalties for making and signing “any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . .”⁶⁰ False disclosures or statements to the Internal Revenue Service can constitute a misdemeanor,⁶¹ but signing and filing a tax return containing false statements is a felony and is punishable by a fine up to \$100,000 and/or three years in prison.⁶²

All tax commentators agree that because same-sex spouses are not “married” under federal law, pursuant to DOMA, each same-sex spouse must select the “Single” filing status for federal taxes. Choosing either “Married filing jointly” or “Married filing separately” could undermine the declaration that the return is “correct” and support perjury charges. On the other hand, a legally married person who selects “Single” filing status is

⁵⁶ 18 U.S.C. §§ 1001, 1621 (1994).

⁵⁷ 18 U.S.C. § 1623 (1994).

⁵⁸ 11 U.S.C. § 523 (2005).

⁵⁹ 8 U.S.C. § 1357 (2006).

⁶⁰ 26 U.S.C. § 7206 (1982).

⁶¹ 26 U.S.C. § 7207 (1982).

⁶² *Id.* The penalty is capped at a lower maximum fine than federal perjury generally (i.e., under 18 U.S.C. § 1621, which permits imprisonment up to five years).

also undermining the declaration that the return is “true, correct, and complete.” Lambda Legal notes that “some worry that they could risk a penalty no matter how they prepare their federal return.”⁶³ This concern seems especially pronounced for those who reside in a state where their marriage is recognized, as the spouses must select irreconcilable filing statuses on their state and federal returns. As residents of Michigan, of course, we do not have that additional problem, as our filing dilemma is simply repeated under Michigan law.⁶⁴

Lambda Legal offers a “sample disclosure statement” that can be tailored to a couple’s specific setting and submitted along with tax returns.⁶⁵ The statement describes the legal conundrum and permits a taxpayer to select the federally required “Single” filing status and simultaneously avoid appearing to deny the validity of her own marriage:

The above named taxpayer married a person of his/her same sex in [place] in [year]. (A copy of the marriage certificate is attached.) The taxpayer has not filed as “married” on the federal income tax return and/or filed a joint federal tax return solely because, pursuant to the Defense of Marriage Act, the federal government defines marriage as a legal union between a man and a woman. By filing as “single,” the taxpayer is in no way disavowing his/her marriage.⁶⁶

We prepared a statement much like this to file with all our tax returns, and once I was ready to file them, I realized with a jolt that we had a new problem: So far as I could discern, there was no way to file electronically and also attach statements that do not have a corresponding form. Was it really a big deal to have to file a paper return? I suppose not; it does require quite a bit more care in the assembly of the package, as certain statements that are merely transcribed for an electronic return must be physically included with a paper return. In addition, it took me a while to figure out that the forms include an “Attachment Sequence Number” in the top right-hand corner to help the filer put it together correctly. Order of assembly has never been an issue in my electronically filed returns, as the

⁶³ *Tax Considerations for Same-Sex Couples*, LAMBDA LEGAL (Jan. 18, 2012), http://data.lambdalegal.org/publications/downloads/fs_tax-considerations-for-same-sex-couples.pdf.

⁶⁴ If our marriage were recognized at the state level, we would still face inconvenience if we chose to file jointly, because doing so would most likely require us to prepare an additional “dummy” federal form in order to derive our adjusted gross income to use on the state return. See, e.g., *Iowa Tax Treatment of Same-Sex Marriages*, DEPT. OF IOWA REVENUE, <http://www.iowa.gov/tax/taxlaw/ssmarriage.pdf>.

⁶⁵ *Sample Attachment to Federal Tax Return*, LAMBDA LEGAL, http://data.lambdalegal.org/publications/downloads/form_sample-attachment-to-federal-tax-return.pdf.

⁶⁶ *Id.*

software assembled the forms in the correct order for me. The biggest concern I had about filing a paper return, frankly, was that paper filing significantly delays delivery of any refund. We had, at that time, just entered into a sales contract to purchase a home, and everything connected with the financing depended on the timely arrival of our income tax refunds. The refunds did not, in fact, arrive in time, and we were able to move forward on the real estate deal only because Holly happened to leave one job for another and took the opportunity to cash out her retirement plan to make up the difference. We took a big hit in taxes and penalties by doing that; I will confess that it brought me close to regretting our decision to stake our ground on the tax return.

The learning curve we have traveled since May 2009 encouraged me to look a little harder this year for some way to document our situation that would permit e-filing. By now I have learned that the answer does not have to be clearly identified as an answer, so long as it seems reasonable; it may not actually be “the answer,” but it seems that on the front lines, “close enough” may be a legitimate legal category. After looking through the directory of forms at www.irs.gov, I discovered Forms 8275 and 8275-R. According to its instructions, “Form 8275 is used by taxpayers and income tax return preparers to disclose items or positions, except those taken contrary to a regulation, that are not otherwise adequately disclosed on a tax return to avoid certain penalties.”⁶⁷ Similarly, (and contrastingly), “Form 8275-R is used by taxpayers and tax return preparers to disclose positions taken on a tax return that are contrary to Treasury regulations.”⁶⁸ Both forms are methods, according to some commentators, for “audit-proofing” a tax return.⁶⁹ Instructions for both forms explicitly state that the forms are “filed to avoid the portions of the accuracy-related penalty due to disregard of rules or to a substantial understatement of income tax for non-tax shelter items if the return position has a reasonable basis.”⁷⁰ A taxpayer who itemizes a deduction or takes a credit that, ultimately, the IRS rejects will, obviously, owe additional tax. That is unhappy enough, but the real kicker comes in the form of a penalty for taking the chance. Federal law provides for a 20 percent penalty on any underpayment attributable to negligence or disregard of Treasury rules or regulations, or any substantial

⁶⁷ I.R.S. Treas. Dir. 62063F (Rev. Feb. 2006).

⁶⁸ I.R.S. Treas. Dir. 143171 (Rev. Feb. 2011).

⁶⁹ See, e.g., John Lyke, *IRS Form 8275 & Audits*, THE BULL & BEAR FIN. REPORT, <http://www.thebullandbear.com/articles/2010/0210-Lyke.html>.

⁷⁰ I.R.S. Treas. Dir. 62063F (Rev. Feb. 2006); I.R.S. Treas. Dir. 143171 (Rev. Feb. 2011).

understatement of the amount of tax due, among other things.⁷¹ The penalty does not apply, however, if the position “has a realistic chance of being sustained on its merits” or “is adequately disclosed.”⁷² Reasonable people might disagree on whether one’s filing positions have a realistic chance of being sustained, but Forms 8275 and/or 8275-R provide clear assurance regarding disclosure.⁷³ I briefly considered changing our strategy this year and choosing “Married, Filing Jointly” for our return, which we would then supplement with Form 8275-R, but our front porch needed to be removed and the brickwork repaired. I decided that, this year at least, we really need front steps more than we need to set legal precedent, and so I chose to comply with the regulations as I understand them and document the problem on Form 8275.

Of course, even with that decision made, executing it turned out to be more complicated than I had expected. Form 8275 offers room for several types of information, including the applicable regulation, Revenue Procedure, or “etc.”; the item or group of items being disclosed, including the form or schedule and line number of the item or group of items; the amount of the item or group of items; a “detailed description of items,” and a “detailed explanation.”⁷⁴ The form provides, however, only three lines for the “detailed description,” which I soon discovered is hardly enough to begin to explain the issues. And it is, frankly, the IRS’s own fault that there is so much to say, because the IRS itself is taking positions that are utterly irreconcilable, even to someone like me who is fairly willing to suspend disbelief when I enter the invented world of Tax Land. First, there is DOMA, a federal law which prohibits any recognition of same-sex marriage for federal purposes. DOMA is affirmed in IRS Publication 17: “For federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife.”⁷⁵ The Tax Court has backed this position in a 2009 case, refusing joint filing status to a North Carolina taxpayer.⁷⁶ In December, 2010, however, the IRS revised Publication 555, explaining proper tax treatment of community property, to take the position that “registered domestic partners” in California must each report half of all income earned by either as community income under California’s

⁷¹ 26 U.S.C. § 6662.

⁷² TREAS. REG. § 1.6662-3(a) (2003).

⁷³ I.R.S. Treas. Dir. 62063F (Rev. Feb. 2006); I.R.S. Treas. Dir. 143171 (Rev. Feb. 2011).

⁷⁴ *Id.*

⁷⁵ I.R.S. PUB. 17, (Dec. 21, 2011).

⁷⁶ *Merrill v. Commissioner*, T.C.M. 2009-166 (2009).

community property regime.⁷⁷ The publication expressly denies that this position accords RDP couples status as “married” under federal law: “RDPs (and individuals in California who are married to an individual of the same sex) are not married for federal tax purposes. They can use only the single filing status, or if they qualify, the head of household filing status.”⁷⁸ Despite the denial of marital status for filing purposes, the publication also claims that the IRS’s position on community property is equally binding on same-sex spouses in California: “For 2010, a RDP in Nevada, Washington, or California (or a person in California who is married to a person of the same sex) generally must follow state community property laws and report half the combined community income of the individual and his or her RDP (or California same-sex spouse).”⁷⁹ In other words, same-sex spouses in California are not married for federal purposes and may not file joint income tax returns as spouses, but they do have to treat all income of either of them as community property. This position forces a rather amusing editorial tic throughout the publication, as every reference to “spouse” must immediately followed by the (presumably *sotto voce*) parenthetical, “(or RDP/California same-sex spouse),” causing the Publication to read a little crazily even for those accustomed to the oddities of Internal Revenue writing.⁸⁰ Meanwhile, earlier in 2011, U.S. Attorney General Eric Holder announced that the administration would no longer defend the constitutionality of Section 3 of DOMA.⁸¹ While this certainly was consistent with other decisions implemented by the Executive Branch, including the extension, by Presidential Memorandum, of benefits to same-sex partners of federal employees,⁸² it jarred discordantly with the IRS position, especially its position in *Windsor v. U.S.*, which is – you guessed it – a tax case (although an estate tax case, not an income tax case) in which the plaintiff is suing to compel the IRS to recognize her marital status.⁸³ The federal government, in other words, does not have “a”

⁷⁷ I.R.S. PUB. 555, (Feb. 24, 2011).

⁷⁸ *Id.* at 2.

⁷⁹ *Id.*

⁸⁰ *Id.* at 2–3.

⁸¹ Attorney General Eric Holder, *Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act*, U.S. DEPT. OF JUSTICE OFFICE OF PUBLIC AFFAIRS (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

⁸² Barack Obama, *Presidential Memorandum-Extension of Benefits to Same-Sex Domestic Partners of Federal Employees*, OFFICE OF THE PRESS SECRETARY (June 2, 2010), <http://www.whitehouse.gov/the-press-office/presidential-memorandum-extension-benefits-same-sex-domestic-partners-federal-emplo>.

⁸³ *Windsor v. U.S.*, 2011 U.S. Dist. LEXIS 84107, at *2 (S.D.N.Y. 2011) (summarizing plaintiff’s complaint, which challenged the constitutionality of Section 3 of DOMA).

position on same-sex marriage. It has several positions, which are arguably inconsistent with each other, and which raise some level of doubt about the correctness of the IRS's position on filing status.

In case you had not noticed, it has taken considerably more than two lines to summarize all the recent developments relevant to our disclosure on Form 8275. Eventually, we drafted two versions, the longer of which we included on my return, while the shorter one, born of exhaustion as much as anything, went on Holly's.⁸⁴ The long version is really not long at all, but it took eight lines to write, meaning it spans the explanation space for items 1, 2, and 3. Luckily, this was the only item we needed to disclose! Disclosure seemed imperative to us for at least a couple of different reasons. First, it is by no means clear that our tax status is static, but to preserve our claim without landing in jail requires that we file these returns according to published law and IRS interpretation, and then file an amended joint return later, if we choose. Once the amended joint return is rejected or ignored, we can either join other taxpayers currently suing for refunds⁸⁵ or, at the least, file a protective claim for a refund with Form 843, the Claim for Refund and Request for Abatement. Clearly stating on Form 843 that our claim is based on current, ongoing litigation should keep the claim open while we wait to see which way the wind eventually blows. Second, beyond purely tax-related concerns, and arguably, more importantly, we try very hard to maintain our "paper trail" in order to thoroughly and consistently document our relationship. Because same-sex spouses' rights as health care or financial attorneys-in-fact – whether as spouses or pursuant to a properly executed power of attorney under state law – are not always acknowledged or respected, we must consider every legal act we take, not only as it affects our goals for the moment, but also as it might affect our ability to accomplish our goals in the future. Failure

⁸⁴ The longer version states, "Under the Defense of Marriage Act, the Service refuses to recognize any marriage other than that between one man and one woman. The above named taxpayer married a person of her same sex in Iowa in 2009 and filed a certified copy of the marriage certificate with her 2009 federal return. The taxpayer has selected "single" filing status only because of the Service's inconsistent position on the subject (see, e.g., CCA 201021050 and Publ. 555) and by such selection is in no way disavowing her marriage or its validity under the U.S. Constitution." Julia Belian, *Disclosure Statement*, personal federal income tax return, copy on file with author (and IRS). The shorter version reads, "Taxpayer married person of same sex in Iowa in 2009 & filed certified copy of marriage certificate with 2009 return. Choice of filing status is not intended as disavowal of marriage or its validity." Holly Belian, *Disclosure Statement*, personal federal income tax return, copy on file with author (and IRS).

⁸⁵ See generally Amy S. Elliott, *IRS's Definition of Marriage—Where It Stands Now*, TAX ANALYSTS DOC. SERV. (2011), <http://law.scu.edu/blog/samesextax/file/Amy%20Elliott%20story%20on%20DOMA.pdf> (summarizing current litigation where taxpayers are suing for refunds).

to treat our own marital status consistently could make us even more vulnerable to third-party claims that our relationship should not be recognized. This was a primary motivator, for example, in our decision that I would not change my legal domicile during my first year at UDM Law. Some entities require “domestic partners” to share a residence for a specified period of time in order to qualify for benefits or for other kinds of relationship recognition,⁸⁶ a requirement seldom or never imposed on spouses in a legally recognized marriage. We also were concerned about ensuring that I could make decisions for our son (then still a minor) if Holly should become unable to do so, something that was tricky enough when we were physically in the same town every day. So although it created additional headaches for us during that first year,⁸⁷ we were not willing to create any gap in our record of years sharing a legal residence. This was before we had even married, so that our tax-filing status was not yet a puzzle. Once we did marry, however, these same concerns made us both very reluctant to check the “Single” filing status on our tax return. It seems, admittedly, a small thing, but marriage is not a status that one can switch on and off willy-nilly – or at least, it shouldn’t be.

VII. PROPERTY

We were able to buy our house in the summer of 2010,⁸⁸ and that process, like so many others, has required us to think through a myriad of issues, some of which we are still working through. For a variety of reasons, we secured the financing in my name alone, which required that I take title to our house in my name alone. We have known all along this is a precarious position, especially when we contemplate the inevitable fact that one of us is very likely to die before the other. In Michigan, as elsewhere, spouses have certain rights in each other’s property at death. The surviving spouse of a decedent who has no will has a right to an interstate share of the decedent’s estate.⁸⁹ If I should die first, Holly would, if our marriage

⁸⁶ See, e.g., *Domestic Partnership Affidavit*, STATE OF ILLINOIS (May 21, 2007), http://www.state.il.us/cms/download/pdfs_benefits/DomesticPartnerPacketuniononly07.pdf (stating that domestic partners must reside together for one year in order to qualify for benefits).

⁸⁷ As just a few examples, maintaining a legal residence in Nebraska affected my ability to pay for purchases by check or credit card where the merchant was unwilling to accept either without a Michigan driver’s license, gave me some additional explaining to do each time I crossed the border to teach at the University of Windsor Faculty of Law in our Dual J.D. program, and forced me to keep an eagle eye out for mailings from my own employer, such as reimbursement checks, that went out by U.S. mail to my legal residence instead of coming to me by way of campus mail.

⁸⁸ The house that is currently missing its front steps, *supra* text accompanying note 67.

⁸⁹ MICH. COMP. LAWS § 700.2102(1)(a) (2012).

were recognized, receive my entire estate, a result that comports with my desires.⁹⁰ Should Holly die first, and have no will, Michigan law is far less generous: I would have a right to the first \$100,000 of her estate and one-half of the balance, and her children from her prior marriage would divide the rest.⁹¹ Based on our current asset picture, however, that would not be a terrible result; most of our “wealth” consists of the house and my retirement investments, and until we correct that problem, the first \$100,000 of Holly’s estate would easily amount to the entirety of her estate. In addition, spouses under Michigan law have rights to certain statutory amounts – the homestead allowance,⁹² the family allowance,⁹³ and a prescribed amount of personal property.⁹⁴ Once adjusted for inflation, those amounts total just over \$44,000.⁹⁵ But, of course, Michigan law does not presently recognize our marriage. Under Michigan law, therefore, we are strangers to each other, lacking any rights in each other’s estates, or even the standing to raise the issue in court.⁹⁶ As the statutes read, we do not even have the right to make decisions regarding each other’s funerals or disposition of remains.⁹⁷

We can, of course, change most of that by executing wills nominating each other as personal representatives, naming each other as devisees, or both, and we have done that.⁹⁸ Probating a will, however, requires a court proceeding, and I, for one, will feel more comfortable once we have determined a way to hold title to our house that will allow title to pass by operation of law, rather than by order of the Probate Court. We could hold it in joint tenancy, certainly, but we cannot transfer title from me to both of us as joint tenants without renegotiating our mortgage, because any such transfer would trigger the mortgage’s acceleration clause, making the entire balance of the note due and payable immediately. Even if the mortgage presented no problem, such a transfer potentially creates additional tax issues for us, issues that formed part of the impetus to take title the way we

⁹⁰ *Id.*

⁹¹ MICH. COMP. LAWS § 700.2102(1)(f) (2012).

⁹² MICH. COMP. LAWS § 700.2402 (2012).

⁹³ MICH. COMP. LAWS § 700.2403 (2002).

⁹⁴ MICH. COMP. LAWS § 700.2404 (2002).

⁹⁵ *Supra* notes 86–88.

⁹⁶ MICH. COMP. LAWS § 700.1105(c) (2002).

⁹⁷ MICH. COMP. LAWS § 700.3206 (2002).

⁹⁸ It is not entirely clear what document, if any, rebuts the presumptions under Michigan law regarding power to direct disposition of remains, but the statute does contemplate the possibility that the presumptions, which would leave either of us out of the decision process for the other, can be rebutted. We have executed documents purporting to grant each other that authority, but until the time comes when we need them, there is no clear law to tell us how effective these documents will be.

did in the first place. At present, and for the foreseeable future, our incomes are nowhere near equal. With regard to our home purchase, had we taken title as joint tenants, every dollar value of the house contributed by one of us in excess of the amount contributed by the other would have been a gift under federal gift tax law.⁹⁹ This would be true despite the fact we did not pay the entire amount due.¹⁰⁰ Somewhat perversely, at the death of the first of either joint tenant to die, the entire value of the property is deemed part of the decedent's estate for estate tax purposes unless the surviving joint tenant can prove contribution.¹⁰¹ This may be true even if a gift tax had previously been assessed on the initial taking of title as joint tenants.¹⁰² Because we did not contribute equally to the initial purchase of the house and probably never will contribute equally to payments, we balked at taking title as joint tenants and creating, at a minimum, a need for a paper trail beyond what we felt ready to track. Transferring title from me as a sole owner to both of us as joint tenants at any time in the future will create the same problems.¹⁰³ An outright devise of the property at my death, should I die first, will not result in any additional tax problems and makes bookkeeping simpler for the foreseeable future, but at some point we hope to devise a plan for transferring rights to the house to Holly without triggering gift taxes. Fortunately for us, the present value of the house is small enough that an orderly series of transfers of the annual exclusion amount can, over a matter of a few years, equalize our ownership interests without undue tax burdens, but again, such a process must either be done in a way that does not accelerate the mortgage or must wait until we have paid the mortgage in full. In addition, joint tenancy will not provide creditor protections that are available to opposite-sex spouses. Under Michigan law, opposite-sex spouses can take title as tenants by the entirety, and in fact, it is presumed they did unless the title instrument clearly states otherwise.¹⁰⁴ Property held as tenants by the entirety is completely shielded from creditor claims in Michigan,¹⁰⁵ a protection that is assuredly not available for joint tenants.

We also need to focus attention on plans for retirement. We both have paid enough Social Security premiums to qualify for some retirement

⁹⁹ See generally I.R.C. § 2503(b)(1), 2505(a)(1).

¹⁰⁰ *Id.*

¹⁰¹ I.R.C. § 2040(a).

¹⁰² See IRC § 2040(a), Treas. Reg. § 20.2040-1(c), Ex. 4.

¹⁰³ Treas. Reg. § 25.2511-1(h), Ex. 5.

¹⁰⁴ See, e.g., *Butler v. Butler*, 332 N.W.2d 488 (Mich. 1983); see also *In re Selle's Estate*, 292 N.W.2d 147 (Mich. 1980).

¹⁰⁵ *Tkachik v. Mandeville*, 764 N.W.2d 318 (Mich. 2009).

benefit, assuming the system continues more or less in its present form for another thirty years or so – but that is, itself, possibly a rather large assumption. If we do enjoy benefits from Social Security, they will not include survivor benefits to either of us on the death of the other, unless, by then, the federal laws have changed. Holly is named as survivor beneficiary of my retirement plans, but under current law, her options for taking distributions are not as flexible or advantageous as those available for opposite-sex spouses.¹⁰⁶ Many of these rules have changed for the better in recent years, but as yet, the treatment of same-sex spouses and opposite-sex spouses is very disparate.¹⁰⁷

CONCLUSION

With the law changing at a rapid pace, identifying and maximizing our legal rights and protections is often a tiring process, but it is also an exciting time in which to explore new possibilities constantly opening up. Even ten years ago, neither of us could have imagined how much more at home we could feel in the world, as our relationship becomes less and less a point of controversy and more and more just the well-worn cliché of an old married couple. In the end, as in the beginning, our life together is never off-the-shelf, but must be custom crafted every step of the way. We will keep asking these same questions, because the answers still are either not entirely certain or are changing as I write. We are now legally married, and delighted to be so, but current law remains an ill-fitting garment; we are finally allowed to wear it, but it remains up to us to ensure that all our parts are covered!

¹⁰⁶ I.R.C. § 401 (2010).

¹⁰⁷ See generally Stephen T. Black, *Same-Sex Marriage and Taxes*, 22 BYU J. PUB. L. 327 (2008).