

Comment

WHEN HARRIET LEFT OZZIE FOR WANDA, AND THE TAX IMPLICATIONS OF THAT DECISION

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I. Introduction

Debates over same-sex marriage dominate the current political scene, with the legalization of gay marriage in Massachusetts prompting a number of other states to enact laws defining marriage as between a man and a woman.¹ Proponents of same-sex

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¹ In 1996, Congress passed the Defense of Marriage Act (DOMA), which prohibits the federal government from recognizing state authorized same-sex marriage and allows states to refuse to recognize same-sex marriages performed in other states. 28 U.S.C. § 1738C (2005). “By April 2004, thirty-eight states had DOMAs.” American Bar Association Section of Family Law, *A White Paper: An Analysis of the Law*

marriage argue that denying same-sex couples the right to marry violates the Equal Protection Clause.² While homosexual couples may enter into relationships as committed and intimate as those of heterosexual couples,³ the federal government and forty-nine states do not allow these unions to be consecrated in marriage.⁴ Not only are such couples denied state recognition of their union, but they are denied the benefits that

Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships, 38 FAM. L.Q. 339, 348 (2004). In addition, in the 2004 election, eleven states enacted legislation to define marriage as between a man and a woman. Anne C. Mulkern, *U.S. Measure to Ban Gay Nuptials to Return*, DENVER POST, Nov. 4, 2004, at A16. Meanwhile, the Massachusetts Supreme Court effectively legalized gay marriage in two recent cases. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that Massachusetts' marriage licensing law violated the state constitution, by denying same-sex couples the right to marry); *In re Opinion of Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004) (holding that the state constitution required full civil marriage, not merely civil unions, for same-sex couples).

Compare the United States with other democracies: Belgium, Denmark, Germany, Greenland, the Netherlands, Norway, and Portugal all have same-sex marriage, while Canada, Columbia, Finland, France, Iceland, and Sweden have same-sex civil unions. *Marriage Laws*, at http://usmarriagelaws.com/search/alternative_lifestyles/same_sex_marriage/gay_laws_around_the_world_/index.shtml (last visited March 5, 2005). Some countries, like Hungary and Scotland, do not have same-sex marriage or civil unions, but allow gays some rights that normally accompany marriage. *Id.*

² Patricia A. Cain, *Imagine There's No Marriage*, 16 QLR 27 (1996) (noting that the equal protection argument is one of two arguments most commonly used in support of gay marriage, with a fundamental rights argument being the second).

³ The plaintiffs in *Goodridge* were seven couples who had been in committed relationships for anywhere from four to thirty years. 798 N.E.2d at 949. Some of these couples also had children and/or parents living with them. Sarah Carlson-Wallrath, *Why the Civil Institution of Marriage Must Be Extended to Same-sex Couples*, 26 HAMLIN J. PUB. L. & POL'Y 73, 74 (2004).

⁴ Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C.L. REV. 595, 599 (2004). Massachusetts is the only state that currently allows gay marriage. See Nancy K. Kubasek, Alex Frondorf, & Kevin J. Minnick, *Civil Union Statutes: A Shortcut to Legal Equality for Same-Sex Partners in a Landscape Littered with Defense of Marriage Acts*, 15 U. FLA. J.L. & PUB. POL'Y 229, 232-34 (2004) (discussing the states that have, at one time or another, recognized unions between same-sex couples); *Goodridge*, 798 N.E.2d 941; *In re Opinion of Justices to the Senate*, 802 N.E.2d 565. Alaska and Hawaii also had their state courts "grant same-sex couples the right to marry." Kubasek, Frondorf, & Minnick, *supra*, at 233. However, after these decisions, a public outcry in both Alaska and Hawaii caused the state constitutions to be changed to define marriage as between one man and one woman. *Id.* at 233-34. Vermont, while among the 49 states that do not allow gay marriage, does allow civil unions between same-sex couples. *Id.* at 234.

accompany such recognition.⁵ Marriage is more than an issue of morality; it also has practical effects as it creates legal entitlements and privileges.⁶

The practical effects of marriage can be seen in the tax law.⁷ The Internal Revenue Code (I.R.C.), state tax legislation, and the related common law have numerous provisions or decisions that treat married individuals differently from unmarried individuals.⁸ Married couples receive special treatment with regard to: income taxes; property rights; intestate succession; and gift and estate taxation.⁹

This paper details the disparate tax treatment that unmarried couples receive, paying special attention to same-sex couples who are unable to marry and, thus, unable to determine the tax treatment that they will receive. Section II provides background information on how the evolution of marriage led to the current gay marriage debate and explains the connection between marriage and tax law. Section III follows with a discussion of the Defense of Marriage Act and its efforts to prevent same-sex couples from receiving the benefits of marriage. Sections IV and V examine the differences in tax consequences for married and unmarried couples, whether beneficial or detrimental. Section IV begins by addressing the area of income tax, where marriage can confer a bonus or a penalty. This section discusses the differences in income tax rates and in what

⁵ “Some examples of the financial benefits same-sex couples lack are tax benefits like filing jointly, government benefits like Social Security, the ability to sue for wrongful death, and the inability to take advantage of community property laws.” Eleanor Michael, Note, *Approaching Same-Sex Marriage: How Second Parent Adoption Cases Can Help Courts Achieve the “Best Interests of the Same-Sex Family,”* 36 CONN. L. REV. 1439, 1465 (2004).

⁶ Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359, 359 (1995).

⁷ Michael, *supra* note 5, at 1442 (noting that married couples receive more tax and health benefits).

⁸ The provisions and decisions that differentiate between married and unmarried individuals will be discussed throughout the rest of this paper.

⁹ Carlson-Wallrath, *supra* note 3, at 79-80 (also noting that married couples receive special treatment with regard to the ability to share in a partner’s medical policy; the ability to make medical decisions for one’s partner; “the right to bring claims for wrongful death and loss of consortium, and for funeral and burial expenses and punitive damages resulting from tort actions”; being allowed to visit partners and children in hospitals; purchasing health insurance policies; and designating beneficiaries for retirement and pension plans).

contributes to taxable income for married and unmarried individuals. In Section V, the paper goes on to address the various tax problems created for same-sex couples by the possession and transfer of property that occurs as part of a normal relationship. It explains how married couples may more easily conduct their day-to-day relations and plan for the future. Part A discusses the dissolution of the relationship, i.e., divorce, and the tax consequences related to the division of property and subsequent support payments. Part B examines both gift and estate taxes. Part C of this section specifically examines joint tenancies and the gift and estate tax problems that these may create.

II. Background

When one thinks of marriage, one probably does not think of tax law. Yet, marriage and tax law are not totally unrelated. Throughout history, marriage has been both spiritual and economic in nature. At one point in history, marriages resulted from negotiations between two families, with the betrotheds having little say in the matter.¹⁰ Such arrangements were normally dependent on the exchange of property – the woman on one hand and goods, termed a dowry, on the other.¹¹ Perhaps arising out of the treatment of women as property, “[h]istorically, women lost all rights upon marriage,”

¹⁰ See Carlson-Wallrath, *supra* note 3, at 77.

¹¹ See *id.*

such as “the right to own property as well as to sue or be sued in their own name.”¹² This left a woman as little more than an extension of her husband.¹³

As society progressed, marriage became about “love first, and money last.”¹⁴ By the time the United States had taken shape, marriage was considered “the most important relation in life . . . having more to do with the morals and civilization of a people than any other institution.”¹⁵ Ten years later, the court found taxation to be as vital to the nation as marriage was to life, stating;

“The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.”¹⁶

While both marriage and tax were considered very important by the court, much time would pass – and the beliefs surrounding marriage would evolve – before the two came together in a single debate.

In 1965, Justice Douglas described marriage as “a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”¹⁷ This sacredness was reflected in earlier law by the requirement that sex and procreation take

¹² Jennifer Levi, *Toward a More Perfect Union: The Road to Marriage Equality for Same-Sex Couples*, 13 WIDENER L.J. 831, 339-40 (2004). Women’s achievement of rights did not really begin until 1920, when women were granted the right to vote and, thus, participate in their government. Sarah C. Courtman, Note & Comment, *Sweet Land of Liberty: The Case Against the Federal Marriage Amendment*, 24 Pace L. Rev. 301, 312 (2003). They began to move outside of the home during World War II, when women were needed to work in factories. *Id.* After the war, they were pushed back inside the home, where they remained, for the most part, for several decades. *Id.* (noting that, in the 1960’s, only 7% of doctors, 3% of lawyers, and 1% of engineers were women).

¹³ Levi, *supra* note 12, at 839-840 (paraphrasing Blackstone’s classical line about marriage: “that in marriage, the man and woman become one, and that one is the husband”).

¹⁴ Carlson-Wallrath, *supra* note 3, at 77.

¹⁵ *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

¹⁶ *Nicol v. Ames*, 173 U.S. 509, 515 (1898).

¹⁷ *Griswold v. Conn.*, 381 U.S. 479, 486 (1965).

place within the confines of marriage.¹⁸ Around the time Justice Douglas made his statement about marriage, another “court declared that the 'standards of society are such that sexual relations or lascivious actions by persons who do not have the benefit of marriage to one another are regarded as obscene, unchaste and immoral.’”¹⁹ Evidence suggests that, in the first half of the 1900’s, “intense public and private pressure” existed not to have, or raise, children out of wedlock.²⁰ During this time period, society also frowned upon miscegenation. “At the country's inception, nearly every state criminalized interracial marriages.”²¹ Same-sex marriage was not even a possibility, as sodomy, prior to 1961, was considered a crime in all 50 states and the District of Columbia.²²

Therefore, marriages traditionally occurred within racial boundaries and between a man and a woman. “The husband focuse[d] on his career and providing income to the household, [and] the wife subordinate[d] her career (or abandon[ed] the workplace altogether) to become the family's primary caretaker and otherwise meet the household's needs.”²³ During the period when traditional marriages still compromised the majority of marriages, the federal government implemented joint tax filing for married couples.²⁴ Before this, the income tax laws did not provide for joint filing and husbands and wives completed individual tax returns.²⁵

¹⁸ Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 345 (2004) (also discussing that notion that sex was essential to the marriage contract).

¹⁹ *Id.* at 345 (quoting *State v. Jones*, 205 A.2d 507, 509 (Conn. Cir. Ct. 1964)).

²⁰ *Id.* at 348-49 (mentioning the former prevalence of “shotgun weddings”).

²¹ Levi, *supra* note 12, at 837-38 (noting that Massachusetts criminalized interracial marriage as early as 1705).

²² Courtman, *supra* note 12, at 318.

²³ Hamilton, *supra* note 18, at 312.

²⁴ M. Wood, *Marriage Penalty Hurts Black Families More, Brown Says*, NEWS & EVENTS (Univ. of Va. Law Sch., Charlottesville, Va.), Feb. 3, 2004, at http://www.law.virginia.edu/home2002/html/news/2004_spr/brown_tax.htm (noting that it was 1948 when joint federal tax filing began, a time period when 80% of working husbands had a stay at home wife).

²⁵ Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 U.C.L.A. L. REV. 983, 989 (1993).

Early 1900's attitudes about marriage gave way to notions of privacy. In 1965, the court decided that married couples had the right to use contraceptives.²⁶ Several years later, the fact that sex occurred outside of marriage was acknowledged, when the court extended the right to contraceptives to unmarried individuals.²⁷ Justice Brennan stated, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²⁸ In 1973, the notion of privacy in procreation was broadened to cover abortion.²⁹ This concept of individual determination also resulted in miscegenation statutes being held unconstitutional.³⁰ In so holding, the court stated, "the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."³¹

Around the time that the traditional view of marriage was giving way to notions of individual rights, such as privacy, homosexuals began openly fighting for their rights. In 1969, the Stonewall Riot broke out in New York City, "where 'gays fought back during a police raid of the [Stonewall] bar' in Greenwich Village."³² This would begin the modern gay rights movement in America.³³

However, it would be a long time before the court applied the principle that intimate relationships and decisions are a private matter, belonging to the individual, to homosexuals. The gay community first challenged sodomy laws on a national level in

²⁶ *Griswold*, 381 U.S. 479.

²⁷ *Eisenstadt v. Baird*, 405 U.S. 438 (1971).

²⁸ *Id.* at 453.

²⁹ *Roe v. Wade*, 410 U.S. 113 (1973). This right was later upheld by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

³⁰ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

³¹ *Id.* at 12.

³² Courtman, *supra* note 12, at 305 (quoting *LESBIANS, GAY MEN, AND THE LAW* 202 (William B. Rubenstein ed., 1993)).

³³ *Id.* (noting the decades of oppression that gays had endured before beginning their rights movement).

1986, decades after the concept of privacy was first enunciated.³⁴ However, this challenge was unsuccessful.³⁵ It was not until 2003 that the right to engage in homosexual practices was recognized in *Lawrence v. Texas*.³⁶ The court stated that “[t]he petitioners [, two gay men] are entitled to respect for their private lives,” and held that “[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”³⁷

In the same year that *Lawrence* was decided by the Supreme Court, the Massachusetts Supreme Judicial Court held that the disallowance of same-sex marriage violated the due process and equal protection clauses of the state constitution in *Goodridge v. Department of Public Health*.³⁸ Unfortunately, the *Goodridge* decision was tried in “the court of public opinion,” as well as in the real court system.³⁹ This decision arguably caused the gay marriage debate to explode,⁴⁰ with 11 states enacting legislation to define marriage as between a man and a woman in 2004.⁴¹ This heightened discussion on gay marriage brought tax laws into the debate, with the court in *Goodridge* noting that same-sex couples were denied the “concrete tangible benefits that flow from civil marriage, including, but not limited to, rights in property, probate, tax, and evidence law

³⁴ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

³⁵ *Id.*

³⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁷ *Id.* at 578.

³⁸ *Goodridge*, 798 N.E.2d 941 (holding that full marriage rights were required – civil unions being inadequate).

³⁹ Levi, *supra* note 12, at 831.

⁴⁰ T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55 (2004); *see* Levi, *supra* note 12, at 831.

⁴¹ Mulkern, *supra* note 1.

that are conferred on married couples,”⁴² and with other proponents of same-sex marriage also raising tax issues as proof of an equal protection violation.⁴³

An argument can be made that the beliefs and prejudices of society are reflected in the tax law. It continues with the concept that women are an extension of their husbands: first, in a more modern and beneficial way, by allowing tax free transfers of property between the two;⁴⁴ and second, by tacking the woman’s income onto that of her husband and thereby taxing her at a higher rate.⁴⁵ It prizes the traditional family over other sorts of relationships, penalizing married couples with two incomes – thus, encouraging the husband to work and the wife to stay at home⁴⁶ – and penalizing unmarried couples that have one partner supporting the other – thus, encouraging them to marry.⁴⁷ The I.R.C. does denote some progress by recognizing that not all children are born into wedlock and allowing special tax rates in those situations.⁴⁸ Finally, the tax law sends the old fashioned message that marriage is preferable to merely “living together,”

⁴² In re Opinion of the Justices to the Senate, 802 N.E.2d at 567.

⁴³ Brief of Amici Curiae Boston Bar Association Massachusetts Lesbian and Gay Bar Association, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860) (making an equal protection argument and discussing the inequalities of tax law); Ruth Padawer, *Rights for Same-Sex Couples Become Law; Governor Praises Step for ‘Fairness, Respect,’* THE RECORD (Bergen County, NJ), Jan. 13, 2004, at A03 (noting that gay-rights supporters argued in New Jersey courts that being denied the tax benefits of marriage violated their equal protection rights).

⁴⁴ I.R.C. §§ 2056 (2005) (estate tax), 2523(a) (2005) (gift tax), 1041 (2005) (no gain or loss on transfers between spouses).

⁴⁵ Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 618-19 (1993). The woman’s income is the income that is tacked on because the woman is usually the lower wage earner. *Id.* at 619.

⁴⁶ Arguably, it could encourage the wife to work and the husband to stay at home, but this is not usually the case. *See infra* note 87 and accompanying text. Women are “overwhelmingly likely to be the secondary, or lesser, earner.” McCaffery, *Slouching Towards Equality*, *supra* note 45, at 601. In addition, 40% of women with young children (under six years of age) do not work, but the fathers of young children almost always work. *Id.* at 602.

⁴⁷ I.R.C. § 1(a)-(c) (2005). *See infra* note 101 and the accompanying text (Table 2). The I.R.C. might have penalized unmarried relationships where both partners work if it could have distinguished these relationships from those of unrelated taxpayers.

⁴⁸ I.R.C. § 1(b) 2005.

by allowing married couples to more easily plan for their future,⁴⁹ protecting them if they fail to plan for their deaths,⁵⁰ reducing what is considered taxable for married couples,⁵¹ and providing structure to the dissolution of their relationships.⁵² This especially discriminates against same-sex couples who are unable to marry.

III.DOMA: Preventing State Recognition of Same-Sex Marriages from Having Economic Effect

Even if society progresses to the point where gay marriage is legalized, the Defense of Marriage Act (“DOMA”)⁵³ will bar same-sex couples from receiving married tax-treatment under federal tax laws.⁵⁴ DOMA states:

“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.”⁵⁵

DOMA is broad sweeping; it “cuts across all federal laws which grant rights or responsibilities to married persons, and mandates that those rights and responsibilities not apply to same-sex spouses, even though they are validly married under applicable state law.”⁵⁶ Unless DOMA is repealed or found unconstitutional,⁵⁷ the only benefits of state-legalized, gay marriage will be within the state. Therefore, the majority of problems that will be discussed in this paper will not be relieved by state allowance of gay marriage.

⁴⁹ See *infra* notes 196-208 and accompanying text.

⁵⁰ See *infra* notes 162-72 and accompanying text.

⁵¹ See *infra* notes 118-27, 154-61 and accompanying text.

⁵² See *infra* notes 143-50 and accompanying text.

⁵³ The act, which was intended to protect the sanctity of marriage, was ironically sponsored by a Republican Representative, Robert Barr, who was twice divorced and in his third marriage. Courtman, *supra* note 12, at 319.

⁵⁴ Patricia A. Cain, *Federal Tax Consequences of Civil Unions*, 30 CAP. U. L. REV. 387, 388 (2002).

⁵⁵ 1 U.S.C. § 7 (2005).

⁵⁶ Virginia F. Coleman, *Married in Massachusetts: Now What? Status of Same-Sex Couples Under Federal Law, Laws of Other States, and a Few Planning Thoughts*, SK020 ALI-ABA 279, 285 (2004).

⁵⁷ The constitutionality of DOMA will inevitably be challenged. *Id.* at 284.

However, a case could be made that DOMA will not prevent all federal tax benefits. As the paper will discuss, support given by one partner to another could be construed as a taxable gift.⁵⁸ This will be a hard argument to make in states that allow gay marriage, because such support would be a legal obligation under state law and the fulfillment of a support obligation is not considered a gift under the gift tax.⁵⁹ However, this is but a small benefit, given all the other tax detriments still faced by same-sex couples.

In addition to being denied federal tax benefits, individuals who are legally married in one state, but move to another, may be denied state tax benefits too.⁶⁰ Not only does the federal DOMA prevent the federal government from recognizing same-sex marriages, DOMA gives states the right to refuse to recognize same-sex marriages from other states.⁶¹ In light of this, many states have enacted their own Defense of Marriage Acts.⁶²

All of these DOMAs have taken effect despite the Full Faith and Credit Clause, which requires that "Full Faith and Credit . . . be given in each State to the public Acts, Records, and judicial Proceedings of every other State."⁶³ The federal DOMA arguably creates an exception to this constitutional requirement in the case of gay marriage.⁶⁴ As long as this exception remains valid, same-sex couples will be denied the federal tax

⁵⁸ See *supra* notes 157-58 and accompanying text.

⁵⁹ Rev. Rul. 68-379, 1968-2 C.B. 414; Coleman, *supra* note 56, at 287 (noting that "the more luxurious the support provided the closer the question becomes").

⁶⁰ Coleman, *supra* note 56, at 298.

⁶¹ Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years from Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. Ill. U.L. Rev. 589, 620 (2004).

⁶² *Id.*

⁶³ U.S. CONST. art. IV, § 1.

⁶⁴ Courtman, *supra* note 12, at 321-22. DOMA only "arguably" creates an exception because the Full Faith and Credit Clause does not specifically provide Congress with the power to create such an exception. *Id.* at 322. Without such authority, Congress theoretically should only be able to bypass a constitutional mandate by amending the Constitution. *Id.* However, the constitutionality of DOMA, whether questioned under the Full Faith and Credit Clause or under Equal Protection, is beyond the scope of this paper.

benefits and, in certain states, the state tax benefits that accompany marriage. Therefore, until national recognition, both state and federal, is given to same-sex marriages, the benefits of such marriages will be slight. Ironically, not only are homosexual taxpayers denied economic benefits by DOMA, but so is the federal government; if gay marriage were allowed, “the net annual gain to the government would be about \$750 million by 2011.”⁶⁵

IV. Income Taxes Under the I.R.C.: the Marriage Penalty, the Ozzie and Harriet Family, and the Benefit of Being Head of Household

For the purpose of income taxes, the Internal Revenue Code (I.R.C.) distinguishes between married and unmarried individuals.⁶⁶ It categorizes individuals into four classes: married filing jointly, head of household, unmarried individuals, and married filing separately.⁶⁷ For the moment, the head of household category will be ignored. In addition, the discussion will assume that married couples file jointly.⁶⁸

A. Marriage Penalties and Bonuses

1. Tax Brackets

Some tax rules result in a tax penalty, while others result in a tax benefit.⁶⁹ Income tax is one area where marriage can confer a penalty, although some married couples do receive a tax benefit.⁷⁰ “Married couples will often have tax liability

⁶⁵ John Tierney, *Political Points*, N.Y. TIMES, June 27, 2004, at 18.

⁶⁶ I.R.C. § 1 (2005).

⁶⁷ I.R.C. § 1(a)-(d) (2005).

⁶⁸ Married couples receive no benefit from filing separately; the income tax consequences will be equivalent to, or worse than, those for married couples filing jointly. *See infra* note 66 and accompanying text (Table 1); Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 469 (2000) (stating that “[f]or a two-earner couple, filing as married, whether electing to file jointly or separately, triggers a marriage tax penalty”).

⁶⁹ A tax penalty means that a persons taxes are increased, while a tax benefit means that they are decreased.

⁷⁰ Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 465-66.

different from the combined tax liabilities the spouses would have if single.”⁷¹ If the tax liability is greater than it would have been if single, it is termed a “marriage penalty,” and if it is lesser, it is termed a “marriage bonus.”⁷² A married couple with two wage-earning spouses typically pays a marriage penalty,⁷³ while a married couple with a “wage-earning spouse who supports his or her stay-at-home spouse” receives a marriage bonus.⁷⁴

To understand how bonuses and penalties result, one must understand the effect that splitting income has on taxpayers. If \$50,000 of income was *evenly* split between two unmarried taxpayers with A receiving \$25,000 and B receiving \$25,000, both would have the advantage of the lower tax brackets. A would have her first \$22,100 taxed at 15% and B would have his first \$22,100 taxed at 15%, making a total of \$44,200 taxed at 15%.⁷⁵ The remaining \$2,900 for each of them would then be taxed at 28%, resulting in a total of \$5,800 taxed at 28%. The total combined taxes would be \$8,254. If that income was combined and taxed to one person, only \$22,100 could be taxed at 15% (as opposed the \$44,200 before) and the remaining \$27,900 would be taxed at 28% (as opposed to the \$5,800 before). The total combined taxes would be \$11,127. Thus, if income is split, more income is taxed at a lower rate, resulting in less tax.⁷⁶ Evenly split income (also called a “perfect income split”) results in the lowest combined tax.⁷⁷

⁷¹ Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 339 (1994).

⁷² *Id.*

⁷³ Patricia A. Cain, *Dependency, Taxes, and Alternative Families*, 5 J. GENDER RACE & JUST. 267, 278 (2002) (noting that “the current tax rules encourage [individuals in a relationship where] both earn income to avoid marriage”).

⁷⁴ *Id.* at 272.

⁷⁵ See I.R.C. § 1(c) (2005).

⁷⁶ Zelenak, *supra* note 71, at 340.

⁷⁷ *Id.*

By treating spousal income as jointly earned, the I.R.C. splits the income between the husband and wife, giving the taxpayer the benefit of two tax brackets (hers and her spouse's).⁷⁸ However, unlike the above example, the I.R.C. does not split the income evenly between them. Rather than make “the tax rate brackets for married couples twice as wide as the brackets for single taxpayers,” i.e, a perfect income split, the I.R.C. made the brackets “wider than the brackets for single taxpayers, but less than twice as wide.”⁷⁹ This uneven split of income results in some married taxpayers suffering a penalty, while other married taxpayers receive a benefit.

A taxpayer that supports his spouse receives a marriage bonus, because he has more income covered by the lower tax brackets⁸⁰ than an unmarried taxpayer does. For example, if Dave is married and earns \$80,000 in income, he will have \$36,900 taxed at 15% and \$43,100 taxed at 28% (resulting in a tax of \$17,603). Compare his situation if he were single: Dave would only have \$22,100 taxed at 15% and \$31,400 taxed at 28%. In addition, some of the income, \$26,500, would be taxed at 31%. This results in a tax of \$20,322. Because Dave is married, he has an extra \$14,800 taxed at 15% and an extra \$11,700 taxed at 28%; whereas if he were single, all of that money would have been taxed at 31%. This results in a tax savings of \$2,719. The marriage benefit results from

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ For each filing category, the I.R.S. has developed a set of tax brackets. *See* I.R.C. § 1(a)-(d) (2005). As a person earns more in income, a person moves up in tax brackets and some of that income is taxed at a higher rate. For example, for a person filing as an individual, the first \$22,100 she earns in income is taxed at 15%. *Id.* at 1(c). If she earns more than \$22,100 but not over \$53,500 she moves up to the next tax bracket, where her next \$31,400 of income (income over \$22,100 but not over \$53,500) is taxed at 28%. *Id.* The next \$61,500 earned (income over \$53,500 but not over \$115,000) is taxed at 31%. *Id.* So, as she earns more money she keeps moving up the chain of tax brackets.

The amount of tax payable when one falls within a certain tax bracket is the combination of two numbers: 1) a specified amount, which equals the tax owed on the money that fell into the lower tax bracket(s); and 2) the amount that results from excess income, i.e., the income that did not fall into the lower tax brackets, being multiplied by that bracket's tax rate. For example, a taxpayer who earns \$80,000 and files as an individual, owes \$12,107 + (\$80,000 – \$53,500) * 31%. I.R.C. § 1(c) (2005).

income that would have been pushed into a higher tax bracket if single being allowed to remain in lower tax brackets. It remains there because Dave's wife does not work, leaving Dave free to use her share of the lower tax brackets.

However, if she did work, a marriage penalty might be imposed. Suppose that, instead of earning the \$80,000 himself, Dave only earned \$50,000 and his wife, Ann, earned \$30,000. Dave and Ann still pay the same amount in taxes: \$17,603. However, once again compare their situation if they were single. Dave and Ann would each have \$22,100 taxed at 15%, with a total of \$44,200 being taxed at 15% (compare to the \$36,900 that is taxed at 15% if married). Their remaining income, \$35,800 total, is taxed at 28% (compare to the \$43,100 taxed at 28% if married). They would pay total taxes of \$16,654, a tax savings of \$949. Because Dave and Ann are married, they had \$7,300 taxed at 28%; it would have been taxed at only 15% if they were single. The marriage penalty results from income that would have remained in a lower tax bracket if single being pushed into a higher tax bracket.

If two unmarried individuals both can take advantage of the lower tax brackets, they achieve the effect of a perfect income split, i.e., the lowest combined tax possible.⁸¹ Because married couples cannot evenly split income, they cannot replicate the savings that unmarried couples can achieve. Therefore, a married couples' ability to receive a marriage bonus is dependent upon one spouse's ability to use the other spouse's share of the lower tax brackets.

The effect of marriage on income taxes is demonstrated by the following table (and related graph), which assumes a total income of \$80,000 between the partners, the

⁸¹ See Zelenak, *supra* note 71, at 340. Keep in mind the head of household category is being ignored for the moment.

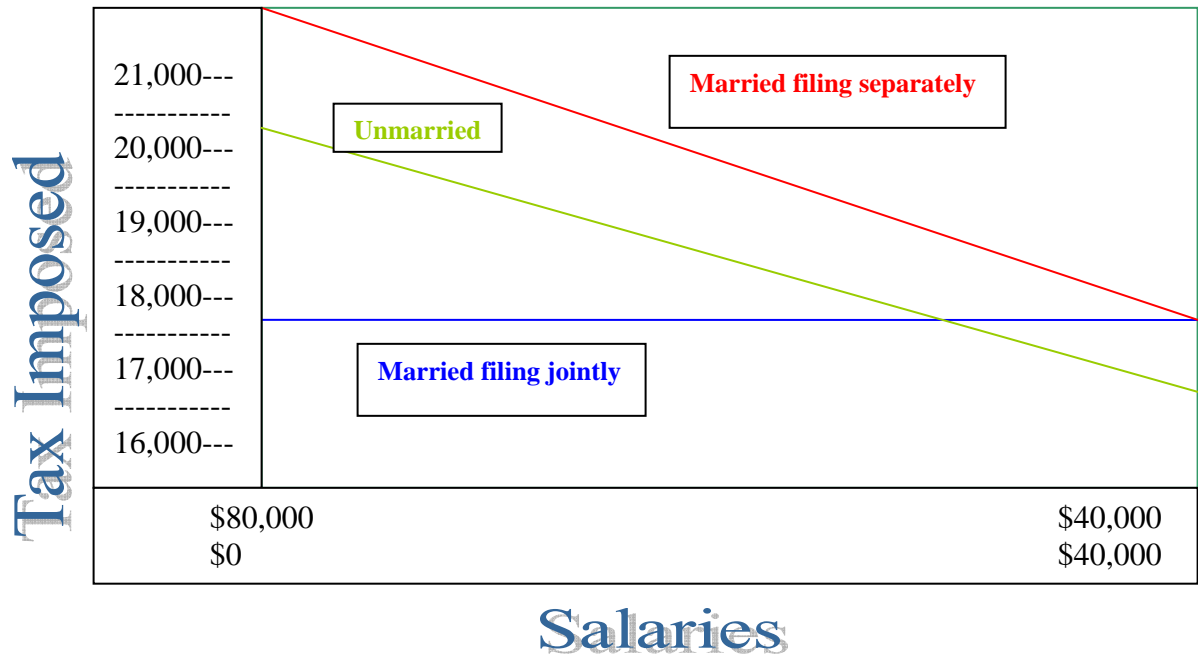
same total income used in the examples above. The amount listed is the tax the partners would pay as a couple, not what one partner would pay individually.

Table 1. Income Taxes for Couples with a Total Income of \$80,000⁸²

	Partner A \$80,000/yr Partner B \$0/yr	Partner A \$70,000/yr Partner B \$10,000/yr	Partner A \$60,000/yr Partner B \$20,000/yr	Partner A \$50,000/yr Partner B \$30,000/yr	Partner A \$40,000/yr Partner B \$40,000/yr
Married Filing Jointly	\$17,603	\$17,603	\$17,603	\$17,603	\$17,603
Unmarried Individuals	\$20,322	\$18,722	\$17,122	\$16,654	\$16,654
Married Filing Separately	\$21,564.25	\$19,464.25	\$18,065.75	\$17,765.75	\$17,603

Graph Accompanying Table 1.

⁸² Numbers were obtained using the formulas provided in I.R.C. §1(a), (c), & (d) (2005) (not taking into account inflation adjustment under §1(f)).



Unless one spouse contributes all of, or substantially all of, the income to the relationship, married couples pay more in income taxes than they would if single. A spouse who is the sole wage earner will always pay less in taxes than an unmarried counterpart, because he will always receive his wife’s share of the lower tax brackets. In addition, a spouse that earns almost all of the income still gets some advantage from his wife’s lower tax brackets. For instance, in the table, if one spouse earned \$70,000 and the other earned \$10,000, the couple pays less in taxes than they would if unmarried. Therefore, the federal income tax system “is built around the concept of the traditional family – the Ozzie and Harriet family of 1950’s television where the husband works outside the home and the wife stays at home and cares for the children.”⁸³

However, the “Ozzie and Harriet type family” no longer constitutes the typical family arrangement. Around 53% of married couples are comprised of two working

⁸³ Cain, *Dependency, Taxes, and Alternative Families*, *supra* note 73, at 267.

spouses.⁸⁴ In addition, an increased number of families have only a single parent, usually the mother.⁸⁵ Another increasingly prevalent family type is the family headed by unmarried couples.⁸⁶ In the cases where the traditional family does exist, such households are usually white and “traditionally gendered,” with the man supporting the household economically and the woman taking care of the household non-economically.⁸⁷ Because the traditional “Ozzie and Harriet type family” only exists in a minority of cases, the tax advantage that results from the I.R.C. treating married income as jointly earned does not benefit the majority of society.⁸⁸

2. The Earned Income Tax Credit

Marriage may also harm poor people, who would otherwise qualify for the Earned Income Tax Credit.⁸⁹ The credit is “refundable,” which means the individual gets money from the government and can operate under negative tax rates.⁹⁰ Qualification for the credit is dependent upon low income.⁹¹ In most cases, if an unmarried individual who qualifies for the credit were to marry someone who earned a comparable, albeit low,

⁸⁴ Gallanis, *supra* note 40, at 57.

⁸⁵ *Id.*

⁸⁶ *Id.* 105,480,101 households exist in America. *Id.* at 59. Couples, either married or unmarried, head 56.9% of these households. *Id.* 10.9% of households headed by couples are headed by same-sex partners. *Id.*

⁸⁷ Levi, *supra* note 12, at 901-02. Levi discusses the racial impact that tax laws have, which indicates that tax laws harm all marginalized groups. *Id.* African American households suffer more from the marriage penalty because a woman’s role as a co-provider increases in minority communities. *Id.* at 602 (noting that African American couples are more likely to be harmed by the marriage penalty than white couples “in all but the upper range of income levels”). In addition, the poor suffer more than the rich or middle class, because women are also more likely to be co-providers in low income households. *Id.*

⁸⁸ See Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 469 (noting that about 50% of married couples suffer a penalty); Jason, Fields, *America’s Family and Living Arrangements: 2003*, CURRENT POPULATION REPORTS P20-553, at 3, <http://www.census.gov/prod/2004pubs/p20-553.pdf> (Table 1 of the U.S. Census Bureau Report has data indicating that 51% of households are those of married couples).

⁸⁹ Suffredini & Findley, *supra* note 4, at 601 n.24. See I.R.C. § 32 (2005).

⁹⁰ McCaffery, *Taxation and the Family*, *supra* note 25, at 995.

⁹¹ Suffredini & Findley, *supra* note 4, at 601 n.24. In many cases, it is also necessary to have a child. See I.R.C. § 32 (2005) (because of the low phaseout amounts that apply to individuals without children one would have to be extremely poor to qualify otherwise).

salary, the credit would diminish or disappear entirely.⁹² Poor married couples, who may be unaffected by the income tax marriage penalty, may instead suffer a penalty in this regard.⁹³ Once again, a couple with a stay-at-home spouse would not suffer a penalty.⁹⁴

Because domestic partners are not married, they are not subject to a penalty when they both bring income into the household.⁹⁵ This makes it appear as if same-sex couples are not harmed by their inability to get married, at least in the realm of income taxes.⁹⁶ Of course, there is always the detriment of having to file two tax returns as opposed to one.⁹⁷ Moreover, whether same-sex couples benefit financially from filing as unmarried individuals depends upon whether both earn income. Same-sex couples that resemble a traditional family, with one partner working and the other staying home, are penalized by their inability to get married.⁹⁸

3. Head of Household Status

For same-sex couples with children, the burden placed on same-sex couples with only one wage-earner is relieved somewhat if the wage-earner can file as a head of household.⁹⁹ Like married couples, heads of households have more money sheltered in the lower tax brackets than unmarried individuals. Head of household status also benefits

⁹² *Id.* (observing that “most households earning \$10,000 or less were headed by single working individuals, who qualify for the Earned Income Tax Credit”).

⁹³ See I.R.C. § 1(a)-(c) (2005) (listing a tax rate of 15% for low income taxpayers regardless of filing status).

⁹⁴ This is because the second spouse would not add to the income of the first, therefore not raising the income above the qualifying line.

⁹⁵ Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 469 (pointing out that two people who both earn an income are better off filing as individuals).

⁹⁶ Of course, regardless of the financial outcome, there is always the harm that results from the message that is sent to same-sex couples: that their relationships are not good enough. Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 466 (classifying this as stigmatic harm).

⁹⁷ Suffredini & Findley, *supra* note 4, at 600 (noting that married couples may file joint returns).

⁹⁸ Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 470 (using a hypothetical example to demonstrate this point).

⁹⁹ Cain, *Dependency, Taxes, and Alternative Families*, *supra* note 73, at 273-74 (noting that heads of households are in a similar position to married couples).

same-sex couples with dual incomes, as they receive even lower income tax rates than before.¹⁰⁰ The following table (and accompanying graph) uses the same information as Table 1, but also includes a head of household category.

Table 2. Income Taxes for Couples with a Total Income of \$80,000 Including Head of Household¹⁰¹

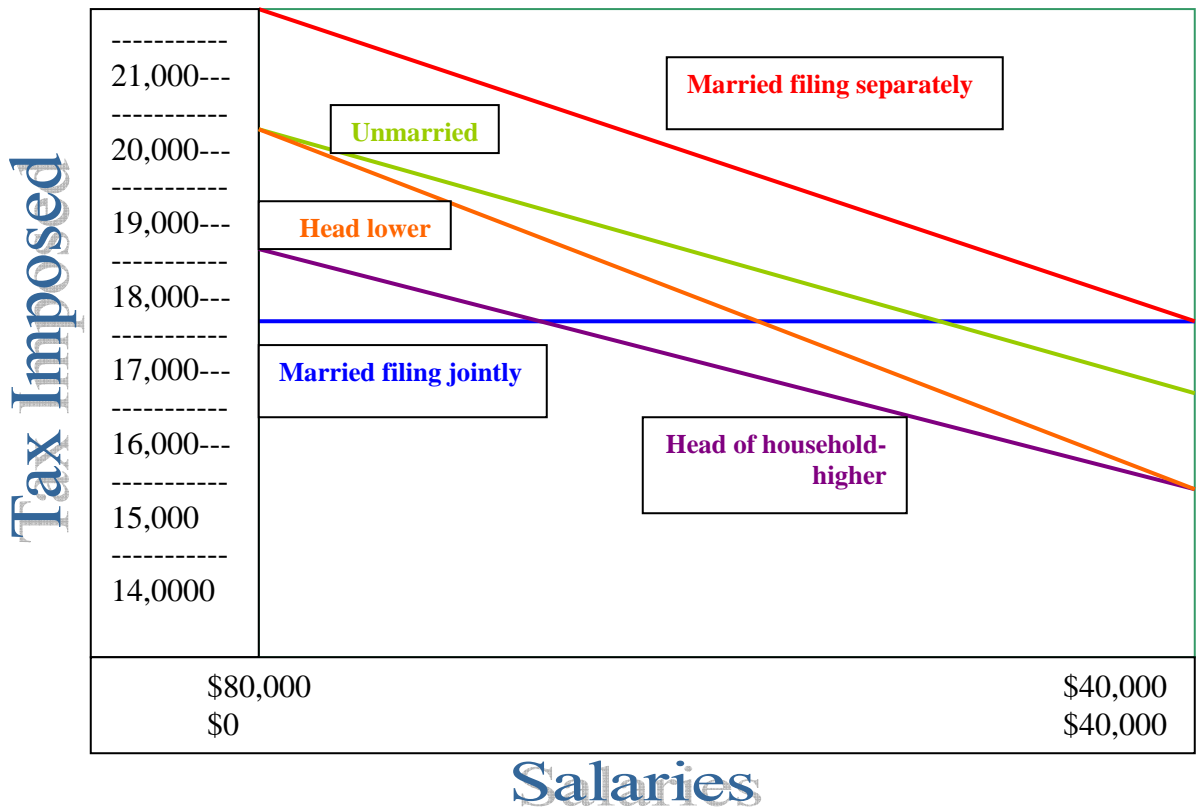
	Partner A \$80,000/yr Partner B \$0/yr	Partner A \$70,000/yr Partner B \$10,000/yr	Partner A \$60,000/yr Partner B \$20,000/yr	Partner A \$50,000/yr Partner B \$30,000/yr	Partner A \$40,000/yr Partner B \$40,000/yr
Married Filing Jointly	\$17,603	\$17,603	\$17,603	\$17,603	\$17,603
Unmarried Individuals	\$20,322	\$18,722	\$17,122	\$16,654	\$16,654
Married Filing Separately	\$21,564.25	\$19,464.25	\$18,065.75	\$17,765.75	\$17,603
Head of Household – Higher Wage Earner	\$18,660	\$17,252	\$15,952	\$15,679	\$15,679
Head of Household – Lower Wage Earner ¹⁰²	\$20,322	\$18,722	\$17,122	\$15,679	\$15,679

Graph Accompanying Table 2.

¹⁰⁰ *Id.* at 278. See *supra* text accompanying notes 80-81 for a discussion of what a same-sex couple would pay in income taxes if both were to file as unmarried individuals.

¹⁰¹ Numbers were obtained using the formulas provided in I.R.C. §1(a)-(d) (2005).

¹⁰² Because the a taxpayer must show that he provided over half the cost it took to maintain the household, it is doubtful that the lower wage earner could achieve head of household status when his income is extremely disproportionate to the income of the higher wage earner. I.R.C. § 2(b)(1) (2005). However, I still included the figures for consideration.



Head of household status offers some benefits, at least if the higher wage earner can claim that status. It comes close to replicating the married status for couples with one primary wage earner, although, for couples with only one wage earner, the tax treatment still fails to provide as much benefit as received by the “Ozzie and Harriet type family.”

To be considered a head of household, a taxpayer must (1) be unmarried;¹⁰³ (2) have a child, either biological or adopted, or a stepchild that lives in his home for over half of the year as a member of the household;¹⁰⁴ and (3) furnish greater than “half of the cost of maintaining the household during the taxable year.”¹⁰⁵ Therefore, merely being

¹⁰³ I.R.C. § 2(b)(1) (2005).

¹⁰⁴ I.R.C. § 2(b)(1)(A), (2)(A), (3)(B) (2005).

¹⁰⁵ I.R.C. § 2(b)(1) (2005).

the source of support for a child is not enough to secure head of household status.¹⁰⁶ This may create problems for same-sex couples, as the higher wage-earner may not be the biological parent.¹⁰⁷ If not the biological parent, the higher wage-earner must either be the adoptive or step- parent.¹⁰⁸ It is impossible to be a stepparent, since same-sex couples cannot marry.¹⁰⁹ He also may have difficulty in adopting the child.¹¹⁰ In such cases, the lower-income, biological or adoptive parent could claim head of household status instead. However, he would have to prove that he supplied over “half of the cost of maintaining the household.”¹¹¹ This may be difficult since he earns less income.¹¹² Despite being co-parents, a same-sex couple with a child, or children, may not be able to take advantage of the tax breaks that other parents normally receive.¹¹³

4. Standard Deductions

¹⁰⁶ Cain, *Dependency, Taxes, and Alternative Families*, *supra* note 73, at 279. However, if the non-biological parent provides the majority of support for the child and the child lives in his home, he should be able to claim a dependency exemption. Chase, *supra* note 6, at 385.

¹⁰⁷ Cain, *Dependency, Taxes, and Alternative Families*, *supra* note 73, at 279-80 (discussing a real life example).

¹⁰⁸ I.R.C. § 2(b)(1)(A), (2)(A) (2005).

¹⁰⁹ See *supra* note 4 and accompanying text for a discussion of the illegality of gay marriage, and *supra* notes 53-65 and accompanying text for a discussion of the fact that, even if states allowed gay marriage, same-sex couples would not qualify as married under federal law.

¹¹⁰ There is the problem of second-parent adoption. “Second-parent adoption concerns the problem of how a gay partner can legally adopt his or her partner’s child without terminating the first parent’s parental rights.” Zachary A. Kramer, *Exclusionary Equality and the Case for Same-Sex Families: A Reworking of Martha Fineman’s Re-visioned Family Law*, 2 Seattle J. for Soc. Just. 505, 517 n.84 (2004). In addition, some states may not allow a homosexual to adopt. See Fla. Stat. Ann. § 63.042(3) (West 1997) (forbidding adoption by a homosexual), *held const’l* by Lofton v. Sec. of Dep’t of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004). However, the following states allow second-parent adoption through legislation or court decisions: California, Connecticut, the District of Columbia, Illinois, Indiana, Massachusetts, New York, New Jersey, Pennsylvania, and Vermont. American Bar Association Section of Family Law, *supra* note 1, at 362.

¹¹¹ I.R.C. § 2(b)(1) (2005).

¹¹² Cain, *Dependency, Taxes, and Alternative Families*, *supra* note 73, at 278 (noting that, “if the earning partner in the couple is not the biological parent of the child, the benefit is denied”).

¹¹³ A same-sex couple also may not be able to benefit from the Child Tax Credit. *Id.* at 284. The credit provides \$700 per child for 2005 through 2008. I.R.C. § 24(a)(2) (2005). In order to qualify for the deduction, the child must be related to the taxpayer in one of the following ways: 1) biological or adopted child, stepchild, or descendant; 2) sibling, stepsibling, or the descendant of a sibling or stepsibling that the taxpayer is raising as his own child; or 3) an eligible foster child. I.R.C. §§ 24(c)(1)(C) (2005); 32(c)(3)(B) (2005).

Such couples not only pay more in income taxes, they also receive a smaller standard deduction.¹¹⁴ As an unmarried individual, the wage-earning partner would receive a standard deduction of only \$3,000.¹¹⁵ If married, the wage-earning partner would be entitled to a standard deduction of \$5,220.¹¹⁶ Similar to the tax brackets, a married couple receives a larger standard deduction than an unmarried couple, but not twice as large. Once again, married, dual wage earners would receive a smaller total standard deduction, because \$5,220 is less than the total deduction they would have received if unmarried – \$6,000; and a married couple with one wage earner receives a greater tax benefit, because the wage earner is allowed to use his spouse’s standard deduction. Therefore, an individual who supports his heterosexual partner, has an extra \$2,220 of taxable income as a result of being unable to marry.¹¹⁷ This means that an unmarried wage-earner who provides for his or her partner is subject to a higher income tax and has more taxable income, if filing a non-itemized return, than a married wage-earner.

5. Domestic Partner Benefits

Regardless of whether both partners file as unmarried individuals or whether one is able to file as head of household, same-sex couples may have a greater taxable income than married couples for reasons other than the inability to take the marital deduction. One situation that causes homosexuals to have a greater taxable income is employer-provided, domestic partner benefits.¹¹⁸ The I.R.C. exempts “employer-provided coverage

¹¹⁴ Cain, *Dependency, Taxes, and Alternative Families*, *supra* note 73, at 471. A standard deduction is taken when a taxpayer does not itemize. *Id.* at 470.

¹¹⁵ I.R.C. § 63(c)(2)(D) (2005).

¹¹⁶ I.R.C. § 63(c)(2)(A), (7) (2005) (using the applicable percentage for the year 2005).

¹¹⁷ Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 471.

¹¹⁸ Coleman, *supra* note 56, at 289 (noting that “certain employee benefits” that are provided to a same-sex partner will result in federal income tax).

under an accident or health plan” from the gross income of the employee.¹¹⁹ The regulations further expand on this principal and specify that the tax-exempt coverage must be for “personal injuries or sickness incurred by [the employee], his spouse, or his dependents.”¹²⁰ Therefore, unless a homosexual employee’s partner qualifies as a dependent, her income will include the coverage that her employer provided for her partner. A dependent includes an individual “who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer’s household.”¹²¹ A dependent must receive over half of his or her support from the taxpayer.¹²²

Therefore, domestic partner benefits probably do not result in extra taxable income for someone who is the sole wage-earner, because the taxpayer’s partner would be receiving over half of her support from the taxpayer. However, if both partners work the benefits probably will be taxable; if an individual is working, it is unlikely that over half of his support comes from someone else. Therefore, in the case of two wage earners, the domestic partnership benefits would be taxable, whereas no tax would apply if they were married.

Traditionally, employer provided benefits, such as healthcare, did not cover same-sex partners.¹²³ However, an increasing number of employers are offering these benefits.¹²⁴ This relieves the burden placed on same-sex couples by their inability to get

¹¹⁹ I.R.C. § 106(a) (2005) (exempting amounts expended in order to provide coverage); § 105 (2005) (exempting payments made for medical care).

¹²⁰ Treas. Reg. § 1.106-1 (2005).

¹²¹ I.R.C. § 152(a)(9) (2005).

¹²² I.R.C. § 152(a) (2005).

¹²³ See Suffredini & Findley, *supra* note 4, at 606.

¹²⁴ Suffredini & Findley, *supra* note 4, at 606.

health coverage and other employer-provided benefits.¹²⁵ However, such benefits also create taxable income for a homosexual employee.¹²⁶ While the benefits of partnership coverage undoubtedly outweigh the detrimental tax consequences, heterosexual couples receive the same benefit without the detrimental result.¹²⁷

6. Sale of a Principal Residence

Another situation that creates differences in income between heterosexuals and homosexuals is the sale of a principal residence.¹²⁸ The I.R.C. provides that “[g]ross income shall not include gain from the sale or exchange of property” if, during the preceding five years, the property was owned and used as the taxpayer’s principal residence for an aggregate period of two years.¹²⁹ The gain from such a sale is excluded up to \$250,000 for an individual and \$500,000 for a married couple, provided that both spouses meet the use requirement and one spouse meets the ownership requirement.¹³⁰ Therefore, married couples can exclude more gain from the sale of a home than unmarried couples.¹³¹

¹²⁵ See Suffredini & Findley, *supra* note 4, at 606. When employers deny coverage to domestic partners, homosexuals in effect earn less income. Chase, *supra* note 6, at 365. Not only does their compensation not include the value of healthcare for one’s partner, but they then bear the cost of providing such coverage themselves. See *id.*

¹²⁶ Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 471-72.

Employers are also at a disadvantage, because their administrative costs for their employee benefit programs increase due to reporting duties to the IRS. *Id.* at 473.

¹²⁷ See Cynthia L. Barrett, *Estate Planning for Same-sex Couples - 2004*, SK020 ALI-ABA 311, 335 (2004) (suggesting that the receipt of employee benefits provides economic security); Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 471-72 (noting that employee benefits, such as a “no additional-cost service,” a “qualified employee discount,” or health insurance, that are provided to an employee’s spouse are not subject to income tax).

¹²⁸ Frank S. Berall, *Tax Consequences of Unmarried Cohabitation*, 23 QLR 395, 399 (2004).

¹²⁹ I.R.C. § 121 (2005). The taxpayer’s principal residence is normally the residence “the taxpayer uses a majority of time during the year.” Treas. Reg. § 1.121-1(b)(2) (2005). Use and ownership can be established through non-concurrent periods, and “short temporary absences” are still considered part of the period of use. Treas. Reg. § 1.121-1(c)(1)-(2) (2005).

¹³⁰ I.R.C. § 121 (2005).

¹³¹ Berall, *Tax Consequences of Unmarried Cohabitation*, *supra* note 128, at 399.

Same-sex couples can mitigate this by owning the home jointly. If two taxpayers own the principal residence jointly, but file separate returns, they each may deduct \$250,000 – giving them the same total deduction as a married couple – provided that they each meet the requirements of section 121.¹³² Therefore, the only real difference for married versus same-sex couples is the ownership requirement. In a marriage, only one partner has to be an owner.¹³³ This may not be a problem for same-sex couples who buy a home together, but, if one partner already owned the home, planning will be required.¹³⁴ In addition, unless both partners have capital to contribute to the cost of the home, setting up this arrangement will result in a taxable gift.¹³⁵

The key problem is that opposite-sex couples can choose whether to marry, either ensuring favorable tax consequences or purposely opting for the negative tax treatment.¹³⁶ Same-sex couples do not receive an option.¹³⁷

V. Transfers and Property During Life and At Death: Taxes on the Relationship

The tax code treats a husband and a wife as a unit, allowing property to flow freely between them with no adverse tax consequences.¹³⁸ Under the Internal Revenue

¹³² Treas. Reg. § 1.121-2(a)(2) (2005).

¹³³ I.R.C. § 121(b)(2)(A)(i) (2005).

¹³⁴ A part ownership interest will have to be transferred to the other partner in enough time before the sale of the home to allow the ownership requirement to be met.

¹³⁵ See *infra* notes 209-18 and accompanying text.

¹³⁶ Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 468 (noting that the burdens of the tax code are elective for heterosexuals, but mandatory for homosexuals).

¹³⁷ *Id.* at 468.

¹³⁸ I.R.C. §§ 2056 (2005) (estate tax), 2523(a) (2005) (gift tax), 1041 (2005) (no gain or loss on transfers between spouses). Although, this free flow of property is also considered to create a marriage penalty. Anthony C. Infanti, *Tax Protest, "A Homosexual," and Frivolity: A Deconstructionist Meditation*, 24 ST. LOUIS U. PUB. L. REV. 21, 32 n.47 (2005). This is because spouse are "unable to obtain beneficial results from transactions between [each other]." *Id.* (citing I.R.C. § 267 (2004)). I.R.C. § 267 disallows the deduction of losses from the "sale or exchange of property" between related parties, which includes spouses. In addition, an individual is treated as constructively owning stock owned by his spouse. I.R.C. § 318 (2005). This could determine whether gain or loss from a redemption of stock is treated as capital or ordinary. I.R.C. § 302(a), (d) (2005). Therefore, business transactions where both spouses are involved may be more complicated and less beneficial. Infanti, *supra*, at 32 n.47.

Code (“I.R.C.”), married couples do not pay gift and estate tax on transfers to each other.¹³⁹ It also states that married couples do not recognize gain or loss on transfers to each other.¹⁴⁰ In addition, no tax consequences result from the transfer of property between spouses pursuant to a divorce.¹⁴¹ Same-sex couples do not get these luxuries. While their property may be intermixed for personal reasons, the tax code ignores this reality and treats their property as separate.¹⁴²

A. Property at Divorce

Under the I.R.C., no tax consequences result from the transfer of property between spouses incident to divorce.¹⁴³ Prior to the enactment of this rule, the Court, in *United States v. Davis*,¹⁴⁴ held that transfers of property incident to divorce were taxable exchanges. The question in this paper becomes whether the *Davis* rule still applies to unmarried taxpayers.¹⁴⁵ If so, “a gay or lesbian partner may be subject to gift [or income] tax for making support payments or dividing shared property depending on the amount, circumstances, and original contribution towards the particular divided asset.”¹⁴⁶

For example, assume that a lesbian couple, Joy and Mary, are ending their relationship. They share a home together and the house is in Joy’s name. Pursuant to their breakup, they sell the house for \$200,000 and split the money. Joy agrees to pay Mary \$500 a month in support payments for the next five years. The \$100,000 Mary received from the house could be viewed as a taxable gift. In addition, the \$500 per

¹³⁹ I.R.C. §§ 2056 (2005) (estate tax), 2523(a) (2005) (gift tax).

¹⁴⁰ I.R.C. § 1041 (2005).

¹⁴¹ I.R.C. § 1041(a) (2005).

¹⁴² Cain, *Imagine There’s No Marriage*, *supra* note 2.

¹⁴³ I.R.C. § 1041(a) (2005).

¹⁴⁴ *United States v. Davis*, 370 U.S. 65 (1962) (taxing the transferor of the property).

¹⁴⁵ Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 482.

¹⁴⁶ Chase, *supra* note 6, at 367. However, the tax consequences of same-sex support payments are somewhat mitigated by the fact that, although the recipient must include them in gross income, the donor “is allowed an offsetting deduction.” *Id.* at 391.

month would be income. If they had been married, the marital deduction would have prevented the \$100,000 from being a taxable gift, and the I.R.C. would not view the support payments as income.

In addition to the possible tax consequences that could result from the dissolution of a same-sex relationship, same-sex couples must also deal with the fact that no laws govern such dissolution.¹⁴⁷ “[T]he laws of divorce provide clear and reasonably predictable guidelines for child support, child custody, and property division.”¹⁴⁸ However, no laws regulate how property is to be divided or whether support payments are to be made in the case of a break-up between a same-sex couple.¹⁴⁹ This leaves one partner at the mercy of the other in what may be a free for all for partnership property. However, this uncertainty may be avoided through planning. Same-sex couples can contract as to what will occur in the event their relationship dissolves.¹⁵⁰

B. Gift and Estate Taxes

Gift and estate taxes are not an issue for many people, because the I.R.C. gives a unified credit that shelters \$1,500,000 of taxable estate per person; therefore a person may transfer up to \$1,500,000 total, during life and at death, without paying taxes.¹⁵¹ However, because any transfer of money or property to one’s partner, including transfers made for support, could be construed as a gift, same-sex couples have an increased chance of approaching the \$1,500,000 total.¹⁵² Same-sex couples that surpass that

¹⁴⁷ *Id.* at 367.

¹⁴⁸ *Goodridge*, 798 N.E.2d at 963.

¹⁴⁹ *Chase*, *supra* note 6, at 367 (also noting that same-sex couples may not take advantage of community property laws).

¹⁵⁰ *Id.* at 389-90.

¹⁵¹ I.R.C. § 2010 (2005) (making the applicable exclusion amount \$1,500,000 for the years 2004 and 2005, and increasing the applicable exclusion in the years after 2005); *Cain*, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 474.

¹⁵² *Cain*, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 475.

\$1,500,000 are at a disadvantage to married couples, because they are paying taxes on transfers to their partners. In addition, even if same-sex couples are able to shelter as much money from taxation as married couples, they have greater estate planning costs.¹⁵³

1. Relationship Transactions – Gifts and Income

When property is transferred from one person to another for no, or less than adequate, consideration, a taxable gift results.¹⁵⁴ Although, taxpayers may give \$11,000 per year per individual tax free.¹⁵⁵ The marital deduction allows married taxpayers to transfer unlimited amounts to their spouses tax free.¹⁵⁶ Because same-sex couples cannot receive the marital deduction, the financial support that one partner gives another may be viewed as a taxable gift.¹⁵⁷ A gift tax return will have to be filed if the support is greater than \$11,000 per year.¹⁵⁸ In addition, if one person owns a home and the other gives him or her money to help with the expenses of the home, it may be viewed as rent.¹⁵⁹ Rent would be taxable as income.¹⁶⁰ The normal transactions and arrangements that occur

¹⁵³ Kathie J. Gummere & Michael J. Tucker, *Straight Talk on Estate Planning for Gay and Lesbian Couples*, 40-AUG ARIZ. ATT'Y 22, 23 (2004) (noting that “more planning is needed for unmarried couples, because they can't take advantage of the safety nets that are in the law for married couples”); see Barrett, *supra* note 127, at 345-51 (discussing different estate planning techniques).

¹⁵⁴ I.R.C. §§ 2501 (imposing a gift tax), 2512 (valuation of gifts); Treas. Reg. § 25.2512-8 (noting that “[t]ransfers reached by the gift tax are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration [less than the value of the property].”)

¹⁵⁵ I.R.C. § 2503(b).

¹⁵⁶ I.R.C. § 2523(a).

¹⁵⁷ Cain, *Imagine There's No Marriage*, *supra* note 2.

¹⁵⁸ *Id.* See I.R.C. § 2503(b) (2005) (excluding the first \$10,000 worth of gifts to an individual from taxation and adjusting it for inflation); *Party Talk: The Lawyer's Guide to Friendly Requests for a Little Free Advice*, 67 TEX. B.J. 948, 952 (2004) (noting that the current annual exclusion amount is \$11,000). In addition, payments of “certain tuition and medical expenses” are excluded from taxation. Berall, *Tax Consequences of Unmarried Cohabitation*, *supra* note 128, at 405 (citing I.R.C. § 2503(e)).

¹⁵⁹ Patricia A. Cain, *Taxing Lesbians*, 6 S. CAL. REV. L. & WOMEN'S STUD. 471, 477 (1997).

¹⁶⁰ I.R.C. § 61(a)(5) (2005).

when two people share a life together have tax consequences for same-sex couples that would not occur if they could marry.¹⁶¹

2. Inheritance & Estate Taxes

a) Inheritance Rights

Property passes in one of two ways at death: by will or intestate succession.¹⁶² Normally, under intestate statutes, one's property would first go to her spouse and children.¹⁶³ If a decedent does not have a spouse or children, then her property will pass to other relatives.¹⁶⁴ For a gay person, special problems arise, because her partner cannot be a spouse¹⁶⁵ and her children may not be considered her children under the law.¹⁶⁶ This means that a person's partner and possibly her children are not provided for in the event of her death without a will.¹⁶⁷

While "state inheritance laws provide strong protection for a decedent's surviving spouse," such laws provide little or no protection for a domestic partner.¹⁶⁸ This is because inheritance laws provide protection based on marriage.¹⁶⁹ A spouse has the right

¹⁶¹ Marriage also gives couples a benefit related to gifts to third parties. A gift by one spouse to a third party is considered made by both spouses, i.e., the gift is split between the two – thus, \$22,000, instead of \$11,000, may be transferred tax free. I.R.C. § 2513(a)(1) (2005); Berall, *Tax Consequences of Unmarried Cohabitation*, *supra* note 128, at 405. Same-sex couples may also give \$22,000 to a third party if each gives \$11,000. *See* I.R.C. § 2503(b)(1) (2005). However, if one partner earns most of the money, it is unlikely that both partners will be able to contribute \$11,000, whereas if one spouse earns most of the money, it does not matter whether the other spouse is actually able to contribute towards the gift. *See* I.R.C. § 2513(a)(1) (2005).

¹⁶² Thomas R. Kellogg, Esq., J.D., *Determination of Heirship*, 68 AM. JUR. 3D *Proof of Facts* § 1 (2004).

¹⁶³ Scott M. Donahue, *Living Together: Estate Planning Basics*, 38 NEW. ENG. L. REV. 547, 549 (2004).

¹⁶⁴ *See* Kris Bulcroft & Phyllis Johnson, *A Cross-National Study of the Laws of Succession and Inheritance: Implications for Family Dynamics*, 2. J.L. & FAM. STUD. 1, 12 (discussing the order of intestate succession in Washington State).

¹⁶⁵ While a same-sex partner can be a spouse in Massachusetts, the federal government does not recognize state authorized same-sex marriages. DOMA, 28 U.S.C. § 1738C (2005).

¹⁶⁶ *See supra* notes 104-110 and accompanying text.

¹⁶⁷ *See* Donahue, *supra* note 163, at 552 (discussing the fact that regardless of whether everyone is aware of whom a decedent wanted to inherit her property and regardless of whether such a person, or people, are left destitute, intestacy law will apply).

¹⁶⁸ T Gallanis, *supra* note 40, at 56.

¹⁶⁹ *Id.* at 60.

to share in “the estate if the decedent dies intestate.”¹⁷⁰ The spouse is also protected against disinheritance, whether intentional or unintentional.¹⁷¹ Because these rights are predicated on marriage, same-sex partners are left without inheritance rights in almost every state.¹⁷²

A minority of states allow inheritance rights for domestic partners under common law marriage or putative spouse doctrines.¹⁷³ A common law marriage is established when parties agree to enter into a husband-wife relationship and openly live together as husband and wife, even though they were never married.¹⁷⁴ “[T]he putative spouse doctrine permits opposite-sex partners who believe in good faith that they have entered into a valid marriage, but in fact have not, to be treated as legal spouses.”¹⁷⁵ Accordingly, if either of these doctrines applies, the individuals are treated as legal spouses, which means they inherit as spouses would under the laws of intestate succession.¹⁷⁶

Not only do a minority of states have the common law marriage and putative spouse doctrines, but the federal government has them too.¹⁷⁷ People may qualify for

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (noting that protection against intentional disinheritance is termed “elective share” and that unintentional disinheritance can occur through a premarital will that was never updated after marriage).

¹⁷² *Id.*

¹⁷³ T Gallanis, *supra* note 40, at 60. “Eleven states (Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah) and the District of Columbia still permit the traditional common law marriage to arise within their borders. A twelfth state, New Hampshire, has codified a statutory version of common law marriage applicable only on death.” *Id.* at 61. Two states, Colorado and Illinois, have adopted versions of the putative spouse provision found in the Uniform Marriage and Divorce Act. *Id.* at 62-63 (citing Unif. Marriage & Divorce Act § 209, 9A U.L.A. 192 (1998 & Supp. 2003)) (noting that the act is now downgraded to the Model Marriage and Divorce Act (“MMDA”). Twelve other states have adopted non-MMDA versions of the putative spouse doctrine. *Id.* at 63 (listing the twelve states: California, Idaho, Nebraska, Texas, Wisconsin, California, Michigan, Mississippi, New Jersey, New York, Oregon, and Utah).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 62.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 61-62.

Supplemental Security Income (“SSI”) if they have a common law marriage.¹⁷⁸ “SSI is a federal income maintenance program administered by the Social Security Administration (SSA) providing a guaranteed income for individuals who are aged (65 or older), blind, or disabled.”¹⁷⁹ Therefore, a person with a spouse or deemed spouse is able to use their pooled income, so that an individual who alone may make too much money to qualify may qualify when his income is viewed in conjunction with that of his spouse.¹⁸⁰ The federal government also adopted a version of the putative spouse doctrine for social security benefits.¹⁸¹ “At the death of a person who paid into the social security system, social security benefits are paid to his “eligible dependents and survivors.”¹⁸² A putative spouse would be eligible to receive these benefits.¹⁸³

However, these domestic partner rights are usually limited to opposite-sex couples.¹⁸⁴ No state that recognizes common law marriage extends such recognition to same-sex couples.¹⁸⁵ In addition, same-sex couples will not be able to rely on the putative spouse doctrine because they are on notice at the time of any ceremony that there is a legal impediment to them being married, i.e., the fact that they are gay.¹⁸⁶ While, ironically enough, same-sex couples probably represent the best example of people who hold themselves out as married, as it is the closest they can get to marriage, they will not

¹⁷⁸ 42 U.S.C. § 1382c(d) (2005) (stating that “if a man and woman are found to be holding themselves out to the community in which they reside as husband and wife, they shall be so considered for purposes of this subchapter”).

¹⁷⁹ Sarah H. Bohr, *Overview of Social Security Insurance Benefits and Supplemental Security Income (SSI)*, 40 Soc. Sec. Rep. Serv. 685, 687 (1993) (noting that the program is needs based).

¹⁸⁰ *See id.* at 699.

¹⁸¹ 42 U.S.C. § 416(h)(1)(B)(i) (2005) (stating that, if people went through a marriage ceremony in good faith and the marriage would have been valid but for a legal reason unknown at the time of the ceremony, then such marriage is treated as a valid marriage).

¹⁸² Jonathan Barry Forman, *Making Social Security Work*, 65 OHIO ST. L.J. 145, 149 (2004).

¹⁸³ 42 U.S.C. § 416(h)(1)(B)(i) (2005).

¹⁸⁴ Gallanis, *supra* note 40, at 60.

¹⁸⁵ Jennifer Seidman, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 OHIO ST. L.J. 211, 217 n.37 (2004).

¹⁸⁶ *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1980), *cert. denied*, 458 U.S. 1111, 1123 (1982).

be able to take advantage of the doctrines that recognize near-marriage relationships. Without specific legislation that provides inheritance rights for same-sex couples, such couples neither are able to obtain such rights through marriage nor through common law recognition of relationships that closely resemble marriage.¹⁸⁷

Therefore, to protect their rights, same-sex couples need to engage in estate planning, creating wills and/or trusts that will ensure that their property passes to their partners and any children.¹⁸⁸ Although such devices allow same-sex couples to pass their property to the people they wish to inherit, their problems are not entirely solved. Even if same-sex couples plan for their deaths, their wills may be challenged by the decedent's relatives.¹⁸⁹ If homosexuals have relatives that object to their sexual orientation it is extremely likely that a challenge will occur.¹⁹⁰

In order to prevent challenges from being successful, same-sex couples can employ several techniques. First, such "couples should use statutory wills, and should be careful to observe all technical formalities."¹⁹¹ Second, new wills should be drafted every so often and the prior versions retained; this helps to prove that the testator intended, over a long-term basis, to have his partner inherit.¹⁹² In conjunction with this, all prior wills that named someone besides her partner as the main beneficiary should be destroyed.¹⁹³ It should be noted that these precautions will only serve to make a will enforceable, not free from challenge, leaving same-sex couples with yet another cost not

¹⁸⁷ Gallanis, *supra* note 40, at 63-64 (noting that inheritance rights for same-sex couples "arise from specially drafted statutes or interpretations of state constitutions" and discussing states (Hawaii, California, Vermont, and Massachusetts) that have such provisions).

¹⁸⁸ Chase, *supra* note 6, at 368.

¹⁸⁹ Chase, *supra* note 6, at 394.

¹⁹⁰ HAYDEN CURRY & DENNIS CLIFFORD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 9:6 (6th ed. 1991).

¹⁹¹ Chase, *supra* note 6, at 395.

¹⁹² *Id.*

¹⁹³ *Id.*

borne by their married counterparts – that of defending litigation.¹⁹⁴ In addition, even with a valid will, they still must face the fact that they will pay more in estate taxes than a married couple.¹⁹⁵

b) Estate Taxes and Planning

A same-sex couple cannot take advantage of the marital deduction, which allows married couples to pass property tax-free to their spouses.¹⁹⁶ Because of this, same-sex couples cannot take advantage of their unified credits, which shelter up to \$1,500,000 apiece,¹⁹⁷ and the lower tax brackets as easily as a married couple can.¹⁹⁸ While still alive, one spouse can transfer property tax-free to the other spouse, because of the gift tax marital deduction, to avoid having all property end up in one spouse's estate.¹⁹⁹ This allows both spouses to use their unified credits and more money to be taxed at a lower rate, resulting in greater tax savings.

To illustrate this point, suppose a married couple has \$4,000,000 in assets (all of which will be included in the taxable estate), but all of the assets are in the husband's name. If the wife dies first, her unified credit goes unused since she has no assets in her estate. When the husband dies, he entirely uses his unified credit and then is taxed on the remaining \$2,500,000 in assets (\$4,000,000 in total assets minus the \$1,500,000 sheltered by the unified credit). He will pay \$1,025,800 in estate taxes.²⁰⁰

¹⁹⁴ Suffredini & Findley, *supra* note 4, at 610.

¹⁹⁵ *Id.* at 367.

¹⁹⁶ I.R.C. § 2056. (2005) (under which the taxable estate of the decedent does not include the value of property that was included in the gross estate and passed to his spouse); Chase, *supra* note 6, at 367.

¹⁹⁷ I.R.C. § 2010 (2005) (allowing the unified credit to shelter up to \$1,500,000 for 2005).

¹⁹⁸ Coleman, *supra* note 56, at 286 (Noting that “[a] transfer to a same-sex spouse over and above the annual exclusion will constitute a taxable gift using unified credit or generating a gift tax, which of course largely negates the purpose of the transfer in the first instance”).

¹⁹⁹ See I.R.C. § 2523 (2005) (allowing tax-free *inter vivos* transfers between spouses).

²⁰⁰ I.R.C. § 2001(c) (2005).

Had he transferred \$1,500,000 in assets to his wife during life, then she could have used her unified credit and they would have only been taxed on \$1,000,000 instead of \$2,500,000. Instead of paying \$1,025,800 in estate taxes as he would have if all the assets remained in his estate, they will only pay \$345,800.²⁰¹ This results in a tax savings of \$680,000.

For even greater tax savings, he could transfer assets to her in excess of the amount sheltered by the unified credit. The tax savings would result from the fact that they would take advantage of the lower tax brackets twice, once for each spouse, thus allowing more money to be taxed at lower rates. To put it another way, the money that would have fallen into one spouse's higher estate tax rates can instead be taxed at the other spouse's lower rates. Continuing with the example, suppose that he transferred \$2,000,000 in assets to his wife during his life. That leaves them both with \$2,000,000 in their taxable estate. Each has \$1,500,000 sheltered, leaving each with \$500,000 subject to tax. Each will pay \$155,800 in tax, resulting in a total tax of \$311,600 – the lowest tax that can be achieved.

As shown by the example, married couples can lower their total estate taxes by planning for their deaths and making lifetime transfers to each other to equalize property ownership between the two spouses. The lifetime transfers themselves are not subject to gift tax, since they are made between spouses.²⁰² By contrast, if same-sex couples cannot make tax-free *inter vivos* gifts, as a result they experience more difficulty in estate planning.²⁰³

²⁰¹ I.R.C. § 2001(c) (2005).

²⁰² I.R.C. § 2523 (2005).

²⁰³ Coleman, *supra* note 56, at 286-87.

c) Individual Retirement Accounts

Greater difficulty in planning also is found in other areas too. Many couples plan for their future by setting up IRA's or qualified retirement plans.²⁰⁴ These plans give the surviving spouse the option of rolling over the plan proceeds and deferring the distribution until the age of 70, instead of being immediately taxed on the proceeds.²⁰⁵ Thus, a surviving spouse can avoid the immediate payment of taxes and allow the amount to "continue to receive tax sheltered growth" until she turns 70.²⁰⁶ However, the advantages that these plans offer married couples are not available to same-sex couples.²⁰⁷ The proceeds will be immediately taxed. In addition, the full value of the plan will be included in the estate of the unmarried decedent because same-sex couples do not receive a marital deduction.²⁰⁸

C. Joint Tenancies

The gift and estate tax consequences for same-sex couples particularly affect couples when they create a joint tenancy. The creation of a joint tenancy will be a taxable gift if one party contributes more than the other.²⁰⁹ If Steve and Bill buy a home

²⁰⁴ See Frank S. Berall, *Estate Planning Considerations for Unmarried Same or Opposite Sex Cohabitants*, 23 QLR 361, 379 (2004).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Patricia Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 476. A taxable gift results if one partner contributes more to the creation of a joint tenancy, because the other partner usually has the power to sever the joint tenancy and take "an undivided one-half interest in the property." *Id.* Therefore, when a joint interest in property is created that has a right of survivorship capable of being defeated "by either party severing his interest," the party that contributed the greater amount of money makes a gift to the other party in "the amount of half the value of the property" minus the consideration given by the other party. Treas. Reg. 25.2511-1(h)(5) (2005). Of course, if the joint tenancy cannot be unilaterally severed, no taxable gift would occur. See *id.* In Michigan, for example, certain joint tenancies are not unilaterally severable. *Albro v. Allen*, 454 N.W.2d 85, 93 (Mich. 1990). In addition, the joint tenants also can contract to make the joint tenancy non-severable. Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 476 n.51 (noting that "such agreements would typically have to be in writing to avoid Statutes of Frauds problems").

together and both contribute \$50,000, then no taxable gift results. However, if Steve contributes \$80,000 and Bill contributes \$20,000, Steve has made a gift of \$30,000 to Bill.²¹⁰ After taking into account the fact that Steve is allowed to give Bill \$11,000 per year tax free, Steve has made a taxable gift of \$19,000.²¹¹ This would not be a concern if Steve and Bill were married since the I.R.C. does not tax gifts to one's spouse.²¹²

The I.R.C. also brings the joint tenancy into the estate of the first to die.²¹³ For unmarried taxpayers, the Code includes 100% of the value of the property in the decedent's gross estate, unless it can be shown that consideration was furnished by the other owner(s).²¹⁴ Therefore, same-sex couples should keep records of their respective financial contributions to jointly-owned property.²¹⁵ If they cannot rebut the presumption, the first to die will pay more estate tax than is necessary.²¹⁶ Even with perfect records, same-sex couples still pay an estate tax on the decedent's share of the property, which passes to the survivor.²¹⁷ By contrast, married couples do not pay estate taxes on property that is transferred from one spouse to the other.²¹⁸

²¹⁰ I.R.C. § 2512 (2005).

²¹¹ This assumes that Steve has made no previous gifts to Bill that year. Under I.R.C. § 2503(b), the first \$11,000 of gifts made to a person during the year are "not included in the total amount of gifts made during such year." I.R.C. § 2503(b) (citing a \$10,000 amount, but allowing it to be adjusted for inflation, which puts the current amount at \$11,000).

²¹² I.R.C. § 2523(a) (2005).

²¹³ I.R.C. § 2040(a) (2005).

²¹⁴ Treas. Reg. § 20.2040-1(a) (2005). However, only half of the value of the property is included in the estate of a married decedent. I.R.C. § 2040(b)(1) (2005).

²¹⁵ See Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 479-80 (noting that the surviving partner will have to prove "that she contributed equally to the property," but lamenting the fact that "[f]ew people keep perfect records for twenty or thirty years" and they will be "overtaxed" as a result).

²¹⁶ *Id.* at 480.

²¹⁷ I.R.C. § 2040(a) (2005).

²¹⁸ I.R.C. § 2056 (2005).

VI. Conclusion

Instead of raiding gay bars, the government is now raiding gay men and women's pockets.²¹⁹ Tax law exhibits a bias against unmarried couples, especially same-sex couples who are denied the option to marry. While heterosexual unmarried couples are given validation of their relationships upon marriage, homosexual couples receive the message that their relationships can never be good enough.²²⁰ They receive this message in a variety of ways, as the majority of federal tax law benefits married couples.²²¹

However, there is an exception with regard to income tax, where the I.R.C. chooses to distinguish between types of married couples and only benefit traditional families, i.e., Ozzie and Harriet families with a working dad and a stay-at-home mom.²²² Therefore, one of the only tax benefits that same-sex couples receive from being unmarried stems from a different bias held by the I.R.C., a bias that promotes the traditional role of women as homemakers and discriminates against minorities and lower-income families.²²³ On account of this, if both partners earn income, same-sex couples fare better in terms of income taxes.²²⁴ Yet, same-sex couples are still denied the benefit of joint filing²²⁵ (even though that benefit may carry with it a penalty), and same-sex couples that mirror a traditional family – with one partner supporting the other – pay more in federal income taxes than they would if married.²²⁶ Same-sex couples also have more items that contribute to taxable income, with employee benefits that are provided to

²¹⁹ See *supra* text accompanying note 32 (discussing the Stonewall Riot).

²²⁰ Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 466.

²²¹ See Albert B. Crenshaw, *No Gay Marriage Benefits at the Federal Level*, WASHINGTON POST, Dec. 21, 2003, at F04 (noting that there are “1,049 federal laws in which marital status is a factor”).

²²² Cain, *Dependency, Taxes, and Alternative Families*, *supra* note 73, at 267.

²²³ See *supra* notes 46, 87 and accompanying text.

²²⁴ Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 469.

²²⁵ Suffredini & Findley, *supra* note 4, at 600.

²²⁶ Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 470.

their partners being taxed and the sale of their principal residence possibly not receiving as large of exclusion.²²⁷ Therefore, the area of income tax is not entirely beneficial for same-sex couples, and any benefit it offers is miniscule in light of all of the other tax discrimination received.

Conducting a same-sex relationship is a taxable enterprise, because the transfers of property that occur in any committed relationship could be viewed as gifts or income, and taxed as such.²²⁸ The division of property and any subsequent support payments may be viewed in the same way.²²⁹ While married couples are allowed to make tax-free gifts to each other, same-sex couples do not receive this luxury.²³⁰ Nor do they receive the luxury of having transfers of property incident to divorce be considered tax free.²³¹ Therefore, much of their daily lives generate taxable income as the tax law ignores the realities of their relationship.

In addition, same-sex couples encounter trouble upon death, with no right to inherit, or right against being disinherited, given to a same-sex partner.²³² Hence, wills are a necessity for same-sex couples.²³³ Even with a will, they pay more with regard to their estate.²³⁴ Same-sex couples are not allowed to make tax-free bequests to their partners (“the marital deduction”).²³⁵ They also face more difficulty in planning to avoid

²²⁷ See *supra* notes 118-35 and accompanying text.

²²⁸ Cain, *Imagine There's No Marriage*, *supra* note 2.

²²⁹ Chase, *supra* note 6, at 367.

²³⁰ I.R.C. § 2523(a) (2005).

²³¹ I.R.C. § 1041(a) (2005).

²³² T Gallanis, *supra* note 40, at 56.

²³³ See Chase, *supra* note 6, at 368.

²³⁴ *Id.* at 368.

²³⁵ I.R.C. § 2056 (2005).

estate taxes,²³⁶ and must keep better records than married couples to ensure that some items are not overtaxed.²³⁷

While society may be becoming more enlightened with regard to same-sex relationships – with the recognition of the right to engage in homosexual practices²³⁸ and some states becoming more gay-friendly²³⁹ – the tax law will not reflect this enlightenment. Even if every state evolved to legalize gay marriage, the Defense of Marriage Act prevents the federal government from recognizing such marriages.²⁴⁰ Plus, it is unlikely that most states will so evolve and the Defense of Marriage Act has aided them in their resistance, by allowing the States to refuse to recognize same-sex marriages performed in other states.²⁴¹ In light of this, the benefits provided by same-sex marriage will be restricted to the state level (if benefits are even allowed there), and federal tax law will continue to discriminate against same-sex couples.

So what happens when Harriet leaves Ozzie for Wanda? She discovers that her new relationship is not given the same deference as her last. If Wanda supports her as Ozzie did, they pay more in income taxes because they are not allowed to file jointly.²⁴² Additionally, Wanda will not be allowed head of household status, even if she supports Harriet's children, because Wanda would not be a biological, adoptive, or stepparent.²⁴³ The support that Wanda gives Harriet may be taxed as a gift, despite the fact they are

²³⁶ Coleman, *supra* note 56, at 286-87.

²³⁷ Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 479-80.

²³⁸ *Lawrence*, 539 U.S. 558.

²³⁹ See *supra* note 4. Gay culture has also been incorporated into mainstream society through television shows like *Will and Grace* and *Queer Eye for the Straight Guy*.

²⁴⁰ Cain, *Federal Tax Consequences of Civil Unions*, *supra* note 54 at 388.

²⁴¹ Wojcik, *supra* note 61, at 620.

²⁴² Cain, *Heterosexual Privilege and the Internal Revenue Code*, *supra* note 68, at 470.

²⁴³ I.R.C. § 2(b)(1)(A), (2)(A), (3)(B) (2005).

living as wife and wife.²⁴⁴ If Wanda leaves Harriet, Harriet does not have a right to a certain dissolution of the property or support payments; and, the property dissolution and support payments, if made, might be taxable.²⁴⁵ Alternatively, they could remain together until their deaths. In which case, if Wanda forgets to make a will, Harriet and her children will be left penniless.²⁴⁶ Conversely, if Wanda makes a will and leaves everything to Harriet, the transfer is taxable.²⁴⁷

The court once noted that “the power to tax is . . . the power to keep alive.”²⁴⁸ It was correct. Not only do taxes keep the government and country running, but they also “keep alive” the prejudices of society. Gay couples, taboo in Ozzie and Harriet’s time, remain taboo in the world of tax, which ignores the realities of homosexual relationships. Thus, tax remains “an area where gay and lesbian issues generally remain shrouded in darkness, forcibly banished to the invisibility of the closet.”²⁴⁹

²⁴⁴ Cain, *Imagine There’s No Marriage*, *supra* note 2.

²⁴⁵ Chase, *supra* note 6, at 367; *see* I.R.C. § 1041(a) (2005).

²⁴⁶ T Gallanis, *supra* note 40, at 56.

²⁴⁷ Chase, *supra* note 6, at 367-68; *see* I.R.C. § 2056 (2005).

²⁴⁸ *Nicol*, 173 U.S. at 515.

²⁴⁹ Infanti, *supra* note 138, at 21-22.