Heterosexual Privilege and the Internal Revenue Code

By Patricia A. Cain*

Stephanie Wildman HAS written persuasively about “privilege,” with a focus on the invisible systems of privilege people enjoy on the basis of their race, gender, or sexual orientation. In a 1995 article, she said: “Heterosexuality is privileged over any other relationships. The words we use, such as marriage, husband, and wife, are not neutral, but convey this privileging of heterosexuality.”

Laws that recognize only heterosexual marriage privilege heterosexuals by indicating their relationships are more valuable than same-sex relationships. Gary Spitko has written about this expressive function of law in the case of intestacy statutes that fail to recognize any connection between lifetime partners of the same sex. Such laws cause harm that extends beyond the denial of a possible economic benefit, including the harm of stigmatization caused by the negative message.

The Internal Revenue Code (“Code”) treats spouses differently from unmarried life partners. This is true no matter how financially and emotionally intertwined the unmarried partners are. This disparate treatment of unmarried partners, however, is not always negative when assessing immediate economic benefits. Indeed, the tax treatment of spouses can often be worse than the treatment of unmarried couples in terms of the resulting economic benefits or burdens. The marriage penalty is a prime example of how tax rules can sometimes

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2. Wildman & Davis, supra note 1, at 887.
5. See id.
burden married couples as compared with unmarried couples who are similarly situated. However, the difference in treatment between married and unmarried couples, whether the economic effect is beneficial to one class or the other, always carries stigmatic harm to the extent that the message heard by gay and lesbian taxpayers is that their relationships do not count. Closely related to this stigmatic harm is another hidden burden the Code has created in its privileging of heterosexual marriage. The Code presumes that persons are either married or live their lives with a fair degree of financial separation from others. The reality is that many same-sex, committed couples do not live in a world of financial separation. The tax laws, in effect, force them into a reporting stance that is not reflective of their day-to-day lives.

Thus, there are at least three separately identifiable harms that same-sex unmarried couples experience as a result of the Internal Revenue Code's privileging of heterosexual marriage. They are:

1) Denial of specific tax benefits granted to married couples;
2) Stigmatic harm from failing to accord recognition of same-sex relationships; and
3) Consequential harms or burdens caused by rules that either ignore same-sex relationships or presume that same-sex relationships do not exist.

This article will describe and elaborate on each of these types of harms. In offering these descriptions, I intend to make more visible some of the hidden privileges embodied in current tax laws. Too often, scholars tend to focus only upon the denial of benefits category. In debating whether or not the Code discriminates against same-sex couples, tax scholars have focused only on the first type of harm—the denial of specific tax benefits. Professor Steve Johnson, for example, has argued that to make a claim that the Code discriminates against same-sex couples, one must first add up the individual benefits and burdens imposed upon all same-sex couples before one can conclude legitimately that discrimination exists. While I do not intend my explanations in this article to serve as definitive proof of class-based discrimination, I do hope that the further explanations I offer about the

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6. For example, there will almost always be a tax burden resulting from the marriage of two earners, whereas two unmarried earners will usually pay fewer taxes by claiming the lower rates available for single taxpayers.

7. A subset of this reporting stance harm includes the harms that result from uncertainty. See Patricia A. Cain, *Taxing Lesbians*, 6 S. CAL. REV. L. & WOMEN'S STUD. 471 (1997); see also infra Part III.

harms caused will dispel the notion that discrimination in tax law should be viewed merely as a comparison of direct economic benefits and burdens.

Part I will describe the most common tax benefits and burdens that married and unmarried couples currently enjoy. As the focus of this Article is unmarried same-sex couples, this Part will begin with a description of the benefits that are denied such couples, followed by a description of potential benefits that result from tax burdens such couples can avoid. Part II will describe the stigmatic harm caused by the Code's treatment of same-sex couples, and Part III will describe additional consequential harms.

I. Marital Status, Tax Benefits, and Tax Burdens

Marital status is important under the current federal tax law. Being married can create tax benefits or burdens. The marriage tax penalty, discussed below, is perhaps the most well-known potential burden imposed upon married couples. The way the tax rates are structured, married couples sometimes experience marriage bonuses and marriage penalties. Recent reports indicate that approximately half the married couples filing tax returns report bonuses and half report penalties.9

Other burdens married couples may experience as a result of the tax law's treatment of spouses include burdens stemming from: (1) the constructive ownership of stock;10 (2) the limitations on qualified mortgage interest deductions;11 (3) the nonrecognition of gains on


10. See I.R.C. § 302 (1999). For example, if a husband wishes to redeem all of his stock in a corporation and claim capital gains on the transaction, he cannot do so if his wife also owns stock in the corporation because her stock will be deemed owned by him. See I.R.C. § 318 (1999).

11. Individuals can claim interest deductions on a total of $1.1 million in qualified mortgage indebtedness ($1 million of acquisitions indebtedness and $100,000 of home equity indebtedness). Thus, two individuals can claim deductions on up to $2.2 million of indebtedness. If the individuals are married, however, they must share the $1.1 million limitation. Similarly, two unmarried individuals can claim mortgage interest deductions on a total of four qualified residences, but a married couple is limited to two residences. See generally I.R.C. § 163(h)(3) (1999).
sales or exchanges between spouses; and (4) the nonrecognition of losses on sales or exchanges between spouses.

These burdens, as well as the marriage penalty burden caused by the joint return rates, are often cited as examples of benefits to unmarried couples. Thus, when discussing the Code's denial of benefits to same-sex couples, it is necessary to consider these possible benefits resulting from Code provisions that burden spouses and other related parties.

This section will begin with a brief explanation of the benefits that are denied to same-sex couples, followed by a brief explanation of the burdens that are placed upon certain married couples. The question is whether these burdens in fact create meaningful benefits to same-sex unmarried couples. It is important to note that heterosexual couples can always avoid these burdens by electing not to marry. Same-sex couples, however, have no similar choice and are forced to file as separate individuals. Additionally, the loss of benefits to same-sex couples can sometimes extend beyond the immediate economic losses identified by comparing similarly situated married and unmarried couples.

12. See I.R.C. § 1041 (1999). The inability to recognize a gain on a sale between spouses creates a burden if the purpose of the sale was to acquire a step-up in basis to current fair market value. The step-up in basis can be beneficial in the case of depreciable property, especially if the gain on the sale is taxed at capital gains rates. Before the enactment of section 1041, section 1239 of the Code applied to spousal sales of depreciable property. Section 1239 required that any gain be taxed as ordinary rather than capital gain. The installment sale is another example of manipulating a sale for a gain in order to create benefits to the family unit. If A sells appreciated realty to B on the installment method under section 453 of the Code, A can defer recognition of gain until A receives the purchase price from B. If B then disposes of the realty to a new buyer for cash, B will have no gain because B will have a cost basis equal to current fair market value. If A and B share the same household, then B's cash from the sale is, for all practical purposes, available to the household. Nonetheless, until B actually pays A the installment payments, A will recognize no gain. If structured properly, such a transaction gives the household unit cash with the benefit of a deferred tax payment on the gain. If A and B are related, however, the second disposition by B will be counted as a payment to A on the original installment note, thereby triggering gain. Spouses are related for this purpose. See I.R.C. § 453(e)-(f) (1999). Thus, even before section 1041 was enacted in 1984, the related party rules of section 453, enacted in 1980, would have prevented spouses from claiming this benefit.

13. See I.R.C. § 1041 (1999). By contrast, if A would like to recognize a loss by selling stock to her unrelated same-sex partner, she may do so. The benefit to A is the current tax deduction based on the recognized loss coupled with the ability to keep the depreciated asset's ownership within the household unit.

14. See, e.g., Patricia A. Cain, Same-Sex Couples and the Federal Tax Laws, 1 LAW & SEXUALITY 97, 98-99 (1991); Johnson, supra note 8, at 1774 (explaining that burdens on married couples can be viewed as benefits to unmarried couples).
A. Benefits Denied

1. Filing Status and the Ability to Split Income

Marital status determines filing status under the Code. Married couples can file either jointly or separately, but they cannot file as single individuals.\(^\text{15}\) In some rare cases, a married person who meets specified requirements can file as head of household, a filing status usually reserved for single persons who head households with dependents.\(^\text{16}\)

For a two-earner couple, filing as married, whether electing to file jointly or separately, triggers a marriage tax penalty. As a general rule, two people who both earn an income will pay a lower combined tax if they report their income as single taxpayers rather than as married taxpayers.\(^\text{17}\) If filing status for tax purposes was the only thing marital status determined, then all rational taxpayers interested in utility maximization would marry when marriage reduced the tax burden (e.g., in the case of a one-earner couple) and would stay single or divorce whenever marriage increased the tax burden (e.g., the two-earner couple). Since about half the married couples filing tax returns pay a marriage penalty, it is fair to assume that there must be other benefits derived from marriage—benefits that are sufficient to balance the cost of the tax penalty. Some of these benefits may be economic or societal benefits outside the tax regime. Some marriage benefits, however, occur within the tax regime and may be sufficient to counterbalance the tax detriment caused by the filing penalty. One thing is certain, however: opposite-sex couples have the option of weighing benefits and burdens and making choices.\(^\text{18}\) Same-sex couples do not.

Thus, at least half of all married couples may be viewed as couples who have chosen to bear the marriage tax penalty under the current

\(^{15}\) See generally I.R.C. § 1 (1999) (setting out different tax rates for married filing jointly, married filing separately, and filing single).

\(^{16}\) See I.R.C. § 2(b)–(c) (1999).

\(^{17}\) See Michael J. McIntyre & Oliver Oldman, Taxation of the Family in a Comprehensive and Simplified Income Tax, 90 Harv. L. Rev. 1573, 1587 fig.1 (1977) (graphically illustrating the marriage penalty).

\(^{18}\) Although some opposite sex couples may feel they have no real choice, given the social pressures in favor of marriage, they nonetheless ‘choose,’ in my sense of the word, when they opt in favor of the benefits produced by marriage. To assume otherwise would deny the possibility of individual autonomy. At the same time, I recognize society’s construction of marriage as desirable does in fact unduly pressure some individuals, particularly women, toward choosing marriage. Similarly, society pressures some individuals into choosing heterosexuality. In all such cases, I recognize the limitations on choice that such pressure causes. Choices may be narrowed, but, in my opinion, they are, nonetheless, choices.
income tax scheme because other benefits outweigh the costs. The other half of married couples filing tax returns experience a marriage bonus. The bonus results when the joint return rate allows some amount of income-splitting between the earning spouse and the non-earning spouse. The marriage bonus is clearly an economic benefit for those who qualify for it, and is certainly not available for non-spouses. Even if same-sex couples could marry and become legal spouses in some states, Congress has passed legislation that would specifically deny them the benefit of filing joint returns.

Although the extent of the marriage bonus is difficult to calculate with precision, some comparisons may help demonstrate its effect. First consider John and Mary, a married couple in which John is the wage earner. After all deductions and exemptions, John's taxable income is $36,900. He and Mary will pay taxes at the rate of 15%, for a total of $5,535.21 Now consider Judy and Marie, a committed lesbian couple, who mirror John and Mary exactly. Judy is the sole wage earner, and, after all deductions and exemptions, has taxable income of $36,900. She will pay tax at the rate of 15% and 28% for a total tax due of $7,459.22 The marriage bonus in this case is $1,924—a substantial sum at this level of income.

Moreover, if the two taxpayers, John and Judy, do not itemize, they will be limited to taking the standard deduction. John, by virtue

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19. For example, if H has $10,000 taxable income in excess of $22,100, that excess income will be taxed at the rate of 28% if H is single. But if H is married and if H's wife has no income to add to the joint return, the $10,000 excess will be taxed at the first bracket of 15%, creating a $1,500 savings solely on the basis of the lower rate. A single taxpayer could accomplish the same rate reduction if the tax law would allow him to assign the excess $10,000 of income to his partner and have her report it at her 15% rate. However, such assignments of income, or splitting of income, are not recognized for purposes of computing tax liability. H's income must be taxed to H, even if he actually assigns the right and possession of the income to his partner. See Lucas v. Earl, 281 U.S. 111 (1930).


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.

1 U.S.C. § 7. DOMA also provides that no state is required to recognize same-sex marriages from other states, assuming that such a marriage is recognized by another state. See 28 U.S.C. § 1738C.

21. See I.R.C. § 1 (1999). This figure is based solely on the current rates as stated in section 1 of the Internal Revenue Code, unadjusted for inflation.

22. See id.
of marriage to Judy, is allowed a $5,000 standard deduction. In contrast, Judy, even if she can claim Marie as a dependent and thus use the same number of dependency exemptions as John, will be limited to the unmarried taxpayer's standard deduction of $3,000. Thus, Judy's actual taxable income in this comparison will be $2,000 higher than John's. Since she is at the 28% marginal bracket, this extra $2,000 of income will trigger an additional $560 of income tax. The actual measure of the marriage bonus in this case would then be $2,484.

2. Taxation of Fringe Benefits

Section 132 of the Code lists several types of employee fringe benefits that an employer may provide to the employee free of income tax. Of these, there are two types of benefits that can also be provided to an employee's spouse free of income tax. If the benefit qualifies as a "no additional-cost service" or a "qualified employee discount," then the benefit is tax-free, whether provided directly to the employee or to the employee's spouse (or dependent children). Thus, for example, an airline could provide free standby flight service for its employees and their spouses, and the benefit to the employees (and their spouses) is not considered taxable income. If the employer allows same-sex committed partners of employees to enjoy this service on an equal basis with spouses, the benefit of the partner's travel will be taxable to the gay or lesbian employee. Thus, married airline employees can enjoy cost-free and tax-free airline travel with their spouses, whereas gay and lesbian employees, even if they have won the battle for equal employer-provided benefits, will have to pay a

23. Dependency exemption deductions and standard deductions are subject to inflation adjustments. The amounts being used for the standard deduction, $3,000 for a single taxpayer and $5,000 for a married, filing-jointly taxpayer, are the amounts authorized by the Code, unadjusted for inflation. See I.R.C. §§ 151(d)(1) (dependency exemption is $2,000) and 63(c) (standard deductions).
26. See I.R.C. § 132(h)(2) (providing that spouses and dependent children will be treated as employees for the purpose of determining whether "no additional cost" fringe benefits and "qualified employee discount" benefits can be received free of tax).
27. Indeed, with respect to free airline travel, the Code specifically includes an employee's parents as an additional beneficiary who can receive the benefit free of tax. See I.R.C. § 132(h)(3). Thus, an airline employee can fly with a spouse, dependent child, and parents tax-free, but a gay or lesbian employee cannot fly tax-free with his or her life partner.
28. The spouse may also fly without the employee spouse, depending on the airline's plan.
tax to the federal government for the benefit of flying free with their partners.

A more essential fringe benefit for most working Americans is employer-provided health insurance. Under the Code, this coverage can be enjoyed tax-free by the employee to the extent it benefits the employee, his or her spouse, and dependents. Except for the rare case in which the same-sex life partner of the employee qualifies as a dependent, this differential treatment creates a clear benefit to op-

29. Section 106 of the Code exempts the amount expended for the employee's coverage under an "accident or health plan." I.R.C. § 106 (1999). The regulations under section 106 make it clear the exclusion is extended to the spouse and dependents of the employee. Treas. Reg. § 1.106-1 (1960). Section 105 of the Code then excludes actual payments for medical care made by the employer or the employer-provided health plan, but only to the extent the payments are for the medical care of the employee, employee's spouse, or employee's dependents. See I.R.C. § 105 (1999). A same-sex life partner may qualify as a dependent, but the test for dependency status will have to be met each year. See supra text accompanying note 25.

30. A same-sex partner can qualify as a dependent of the employee taxpayer under section 152(a)(9), which provides for dependency status in the case of an unrelated person who "has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household." I.R.C. § 152(a)(9) (1999). The specific requirements are: the partner must be a citizen or a qualified resident alien; the couple must share the same household for the full year; the employee taxpayer provides over half the support for the partner; and the relationship between the two partners does not violate local law. See I.R.C. § 152(b) (1999). In order for the employee taxpayer to claim the dependency exemption deduction for the partner, there is an additional requirement: the partner's gross income cannot exceed the dependency exemption amount ($2,000 adjusted for inflation). See I.R.C. § 151(c)(1)(A), (d) (1999). However, for exclusion purposes under sections 105 and 106 dealing with employer provided health care, only the first four requirements must be met. See I.R.C. §§ 105-06.

Although there is some speculation about whether a gay or lesbian relationship violates local law in jurisdictions with sodomy statutes still on the books, I believe sodomy statutes are irrelevant to the determination of dependency status. Sodomy statutes prohibit "acts," not "relationships." Cohabitation, bigamy, and even adultery statutes are more obviously directed at relationships, since they are defined by the type of relationship between the persons. Sodomy, by contrast, can occur in every type of relationship, even marriage. That is, there is nothing inherent in the concept of sodomy that requires a particular relationship between the two participants. But see Nicholas v. Commissioner, 62 T.C.M. (CCH) 467 (1991) (holding that a heterosexual male could not claim a dependency deduction for his female partner since they had violated Utah's fornication laws). Some have suggested that Nicholas stands for the proposition that violation of a sodomy statute is sufficient grounds for denying dependency status under section 152(a)(9). See, e.g., Nancy J. Knauer, Heteronormativity and Federal Tax Policy, 101 W. Va. L. Rev. 129, 180 (1998). One possible distinction is that the Utah fornication statute applies only if one of the parties is unmarried. Thus, the statute focuses on the non-marital aspect of the relationship. Many sodomy statutes, by contrast, apply even to married couples. In such states, the relationship is not the main focus. Nicholas does cause problems for states in which sodomy is criminalized only for unmarried couples or for same-sex couples. But even in such states, proof of sodomy will be an issue. In Nicholas, the fact that the taxpayer fathered a child by his
posite-sex married couples who rely on one spouse's employer for medical coverage.

The detriment to the same-sex couple, however, extends beyond the mere loss of the tax-free benefit. In the ongoing political struggle with employers over the question of domestic partner benefits, activists often face resistance from employers over the inclusion of unmarried partners in health plans because the tax rules make it more difficult for employers to administer their plans. Initially, for example, the Internal Revenue Service ("IRS") ruled that employers would have to report as taxable income of the employee the fair market value of domestic partner benefits based on how much it would cost an individual to buy insurance on the open market.\(^3\) Employers typically only know the cost and value of the group insurance benefit they are purchasing, so the requirement to report the fair market value of individual coverage placed an additional burden on employers, a burden that some employers viewed as justification against extending the benefit.\(^2\) Additionally, a number of insurance companies, influenced in part by IRS pronouncements regarding tax consequences, have an-claimed dependent partner was sufficient evidence of fornication. See Nicoholas, 62 T.C.M. (CCH) at 469.

Another complication arises in applying the "in violation of local law" rule when the state has a sodomy statute and the municipality has enacted a domestic partner registration. See, e.g., Mich. Stat. Ann. \$ 28.355 (Law. Co-op.1990) (prohibiting sodomy) and Ann Arbor, Mich., City Code ch. 110, \$ 9:85 (1991) (providing domestic partnership status for same-sex couples). Legislation at the municipal level appears to endorse intimate sexual relationships while the state sodomy statute arguably cuts against such an endorsement, yet no state sodomy statute has been cited successfully as a reason to overturn local domestic partner legislation. Thus, from a public policy perspective—which is why we have the local law rule in the first place—the existence of domestic partner legislation should militate against a "violation of local law" claim.

For an extended discussion of these issues, see Lindsay Brooke King, Enforcing Conventional Morality Through Taxation?: Determining the Excludability of Employer-Provided Domestic Partner Health Benefits Under Sections 105(b) and 106 of the Internal Revenue Code, 53 Wash. \\& Lee L. Rev. 301 (1996).

32. In the early days of domestic partner benefits, the primary concerns of employers were not the tax issues. Rather, they were concerned first that employees would fraudu-

lently represent who their domestic partners were, and second that the addition to the insurance coverage of persons with AIDS would be prohibitively expensive. See James W. Button et al., Private Lives, Public Conflicts 128 (1997). Actual experience has proved these fears unfounded. See Barbara Fried, Domestic Partner Benefits: A Case Study 43–45 (1994). However, worry over tax issues, the need to request private letter rulings, and the additional cost in some cases of FICA and FUTA taxes on the additional wages produced by these taxable benefits has delayed adoption of domestic partner benefit plans by some employers. See id. at 53. See generally Elizabeth Murphy, Understanding the Domestic Partner Dilemma: Perspectives of Employer and Insurer (1992) (discussing the issue of domestic partner benefits from the perspective of the employer and insurer).
nounced to employers that their family coverage could not be used to
cover the health needs of domestic partners. Even though the IRS
did eventually change its interpretation of the law, allowing employers
to compute taxable income on the basis of group insurance rates
rather than individual policies, the absence of clear tax guidelines
continues to affect employer decisions to provide domestic partner
benefits. The experience of domestic partner benefits is one example
of how a loss of tax benefits may extend beyond the immediate eco-
nomic losses of additional tax liability. Tax rules can sometimes cause
third parties—employers and insurance companies—to engage in be-
havior that increases the economic losses to same-sex couples.

3. The Marital Deduction for Gratuitous Transfers

If a spouse transfers property by gift to the other spouse, the
transfer is not subject to gift tax. The same is true for transfers be-
tween spouses at death. Spousal transfers are exempt from taxation
because the Code provides a marital deduction for gift and estate tax
purposes equal to the amount of the transfer. For non-spousal trans-
fers, different rules apply. Any person can transfer up to $10,000 per
year to any other person, whether related or not, free from the gift
tax. For transfers in excess of this annual exclusion, the gift tax is
not due until the cumulative taxable transfers exceed $675,000.

Thus, for many couples, married and unmarried, transfers be-
tween partners do not create any economic burden in the form of
taxes. Most couples in this country do not have more than $675,000 in
assets that can be the subject of a gratuitous transfer. For those who
do, however, the unlimited marital deduction creates extreme inequi-
ties between married and unmarried couples. One should not assume
that the marital deduction affects only the very wealthy. Since the
computation is based on cumulative lifetime and death-time giving,

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33. For example, when the University of Iowa extended health care coverage to the
domestic partners of employees in 1999, Blue Cross/Blue Shield of Iowa did not include
domestic partners under family coverage plans. Thus, the only way to extend coverage
under the plan to domestic partners was to provide them with single coverage.
34. See Priv. Ltr. Rul. 91-09-060 (Mar. 1, 1991), 92-31-062 (Jul. 31, 1992), 96-03-011
(Jan. 19, 1996).
38. See I.R.C. § 2503(b) (1999).
39. The exemption equivalent used to be $600,000. The amount is being increased
year by year until it reaches $1 million in 2006. The phase-in amount for 2000 and 2001 is
the $675,000 exemption amount could be met by a middle-income, unmarried couple in the following hypothetical: Assume Anna and Beth began living together in 1981. By the year 2001, they will have been together for 20 years. Assume further that Anna is the higher earning partner (earning $100,000 in the year 2000) and Beth is the lower earning partner (earning $25,000 in the year 2000). If Anna dies in 2001, the maximum amount she can leave to Beth free of tax will be $675,000, assuming she has made no taxable gifts to anyone since 1976. But when one partner earns significantly more than the other, taxable gifts are likely to occur during their joint lives. Assume, for example, that their joint living expenses are approximately $30,000 a year, excluding the cost of the mortgage Anna pays on her own because she owns the home. Although Anna is unlikely to view payments of consumable items such as groceries and foreign travel as taxable gifts, the IRS may well take the position that such payments are taxable gifts. If the IRS were to prevail, Anna’s taxable estate would include $100,000 of adjusted taxable gifts.

In addition to the $100,000 amount, if Anna owns the home and a retirement plan, her taxable estate could easily exceed the $675,000 current exclusion. In some locations, the average cost of a home ex-
ceeds $400,000.\textsuperscript{44} A taxpayer in the $100,000 salary range is also likely to have at least $400,000 accumulated in retirement plans after twenty years of working. Since many employers provide group term life insurance equal to the employee's annual salary, a $100,000 life insurance policy would not be unusual. Add to these assets an automobile ($25,000), a small stock portfolio ($25,000), and furniture (antiques, oriental rugs, a piano, and artwork totaling $50,000), and Anna could easily have a taxable estate in excess of $1 million at her death.

On a $1 million estate, Anna will pay taxes at the rate of 37% on the first $75,000 above her $675,000 exemption amount ($27,750 in taxes), and will pay tax at the rate of 39% on the next $250,000 ($97,500 in taxes).\textsuperscript{45} Thus, assuming Anna leaves everything to Beth so that Beth can continue the same standard of living, Anna (or more correctly, her estate) will be charged a total of $125,250 in estate taxes. A married couple in the same situation will pay no taxes on the transfer of assets to the surviving spouse.\textsuperscript{46} The $125,250 is an immediate economic loss—a cost that is directly attributable to being unable to marry and to the tax law's refusal to recognize lifetime partnerships of anyone who is not married.

4. Special Problems of Joint Tenancy

Many lesbian and gay couples, like spouses, own property as joint tenants with right of survivorship. Same-sex couples tend to own their residences as joint tenants, and often open joint and survivor bank accounts. For couples who own property worth more than the current exemption level for federal gift and estate taxes,\textsuperscript{47} joint tenancies pose a special tax problem.

Under current tax rules, the creation of a joint tenancy usually constitutes a taxable gift if the tenants' contributions to the purchase or improvement of the property are unequal.\textsuperscript{48} For example, if Anna

\textsuperscript{44} According to a recent report, the national average cost of a four-bedroom house is $231,296. Palo Alto boasts the highest average cost for such a home ($843,500). Beverly Hills ranks second with an average cost of $743,825. See Alan J. Heavens, Palo Alto to Pittsburgh Price Index Illustrates Huge Differences Around Country, PITTSBURGH POST-GAZETTE, Oct. 9, 1999, at H1, available in 1999 WL 25694052.


\textsuperscript{46} See I.R.C. § 2056 (1999).

\textsuperscript{47} The exemption amount for 2000–2001 is $675,000. By 2006, the $1 million exemption amount will be fully phased in. See I.R.C. § 2010 (1999); see also supra note 39.

\textsuperscript{48} The gift will only be taxable to the extent the $10,000 annual exclusion is exceeded. See I.R.C. § 2503(b)(1) (1999). Note that for post-1998 gifts, the $10,000 exclusion will be adjusted for inflation. See I.R.C. § 2503(b)(2) (1999). Thus, if A contributes $20,000 more than B in any given year towards the purchase price or improvements on the jointly
makes a $30,000 down payment to enable Anna and Beth to purchase a home as joint tenants, Anna will be viewed as making a $15,000 gift to Beth.\textsuperscript{49} If Anna has made no other gifts to Beth during the tax year, the completed taxable gift will be $5,000.\textsuperscript{50} The creation of the joint tenancy is viewed as a completed gift of half the value of the property because, in most cases, the donee tenant can sever the joint tenancy unilaterally.\textsuperscript{51} The severance would convert the joint tenancy into a tenancy in common, whereby Beth would own an undivided one-half interest in the property. The IRS maintains the position, as reflected in the Treasury Regulations, that because Beth has the unilateral power to vest half the property in herself, Beth must be viewed as owning half the property outright from the time the joint tenancy was created.\textsuperscript{52}

While creation of the joint tenancy is considered a completed transfer for gift tax purposes, it is not viewed as a completed transfer for estate tax purposes. Under section 2040 of the Code, if the home is still owned by Anna and Beth as joint tenants at Anna’s death, the transfer will be viewed as though it occurred at the death of Anna rather than at the time of the inter vivos transfer. The specific rule of section 2040 establishes a rebuttable presumption that the first joint

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\item owned property, there is no taxable gift unless A has given B other gifts during the year. The $20,000 contribution by A is viewed as a $10,000 gift to B and will qualify for the annual exclusion, provided the joint tenancy is severable. See Treas. Reg. § 25.2511-1(h)(5) (as amended in 1997). If it is not severable, then the gift by A only qualifies to the extent of the value of the present interest, i.e., the currently vested life estate in B. Michigan joint tenancies are often non-severable. See Albro v. Allen, 454 N.W. 2d 85 (Mich. 1990). A non-severable joint tenancy creates a joint life estate in A and B coupled with a contingent remainder to the survivor. Only the life estate qualifies as a present interest and thus only that value qualifies for the $10,000 annual exclusion.\textsuperscript{49}
\item It is assumed that A and B as joint owners are jointly liable on any purchase money mortgage. Thus the only transfer that occurs at closing is the transfer of the down payment. If A, in fact, makes all of the mortgage payments in the future, those payments may also be viewed as gifts since they relieve B of B’s joint obligation to pay the debt.\textsuperscript{50}
\item Gift of $15,000 minus annual exclusion of $10,000 equals $5,000 taxable gift.\textsuperscript{50}
\item Not all joint tenancies are unilaterally severable. See, e.g., Albro v. Allen, 454 N.W. 2d 85, 93 (Mich. 1990) (holding that certain Michigan joint tenancies are not unilaterally severable). Also, joint tenants may agree not to sever by contract. To be enforceable, however, such agreements would typically have to be in writing in order to avoid Statute of Frauds problems.\textsuperscript{51}
\item See Treas. Reg. § 25.2511-1(h)(5) (as amended in 1997). Note that this power to vest is not sufficient to create a taxable gift in the case of a joint tenancy bank account. For example, if A puts $30,000 in a joint and survivor bank account, and B as the joint account holder has the right to withdraw the cash, there is, nonetheless, no completed gift until B actually withdraws the cash. The explanation for this result is that A, as a joint owner, also has the right to withdraw the whole. Thus, the $30,000 deposit is revocable by A until such time as B actually withdraws the cash.\textsuperscript{52}
\end{itemize}
tenant to die contributed 100% of the purchase price to acquire the property. Unless the presumption is rebutted, 100% of the value of the property will be included in Anna’s estate at her death.

When one combines the gift tax and estate tax rules with respect to joint tenancies, the result is that the creation of a joint tenancy will be viewed as a completed transfer for gift tax purposes but not for estate tax purposes. Thus, the same transfer can be subject to both gift taxes and estate taxes. This is not to say the property will be taxed twice if a donor reports the creation of the joint tenancy as a taxable gift of 50% of the value transferred—special estate tax provisions prevent the imposition of a double tax in such cases. Nonetheless, the combined gift and estate tax rules can create excess costs for some same-sex couples.

For example, excess costs may occur when the creation of the joint tenancy triggered a tax immediately payable. A tax would be payable if Anna’s total lifetime gifts exceeded her exemption amount. Assume, for example, that Anna created a joint tenancy with Beth during her lifetime on property worth $2 million. The “deemed” completed transfer to Beth would be $1 million. If this transfer occurred when the maximum exemption was only $675,000, Anna would have to pay $125,250 in gift taxes.

Even if Beth never unilaterally severs the joint tenancy, and even if Beth dies one year after the creation of the joint tenancy so that, in retrospect, the only benefit she received was one year’s use of the property, the tax payable is a final calculation. Anna will have paid this tax only to find that at Beth’s death, she once again owns 100% in value of the property.


54. The estate and gift taxes are levied on cumulative lifetime and death-time gift giving. The final return, so to speak, is made at death. The rules for calculating the final bill make it clear that adjustable taxable gifts (i.e., lifetime gifts) should not be included in the tax base if they are included under estate tax provisions. See I.R.C. § 2001(b)(2) (1999). Thus, in our running example, the $15,000 gift upon creation of the joint tenancy will be ignored in the final return if the full value of the joint tenancy property is included in Anna’s taxable estate. Furthermore, if Anna actually had to pay a gift tax upon the creation of a joint tenancy (i.e., because the gift exceeded her $675,000 exemption), then that gift tax would be credited toward the final estate tax due. Thus, there is no actual double tax, although, as the text explains, there are costly detriments aside from a double tax.

55. See supra Part I.A.3. for a discussion of a $1 million estate and computation of estate taxes due on such an estate. This computation assumes that none of the $1 million transfer qualified for the annual exclusion.

56. Even if no tax had been payable on the creation of the joint tenancies, they still would have been reported as taxable gifts to the extent the value transferred exceeded $10,000. Thus, the gifts would still count against Anna’s cumulative lifetime and death-time
These joint tenancy rules do not apply to spouses. Today, of course, spouses can escape all gift and estate taxes on interspousal transfers due to the unlimited marital deduction. Even before the unlimited marital deduction was enacted, however, a special rule existed for spousal joint tenancies. Under this rule, spouses could elect to treat the creation of the joint tenancy as an incomplete gift for gift tax purposes. This rule makes sense for two people who jointly own and use residential property because it is consistent with the general expectations of the parties. Such a rule avoids taxing the creation of the joint tenancy as a gift when no gift transfer of the property actually occurs, as is the case when Anna and Beth continue to own the property jointly; neither of them severs the tenancy, and Beth, the donee, dies first. If the gratuitous transfer actually does occur at death, section 2040 adequately captures the value of the entire property in the estate of the transferor. Similarly, in the event of a severance or partition of the property during Anna's and Beth's joint lives, a gift tax could be imposed upon the completed gift, assuming there was an actual distribution of half of the property's value to the donee.

The above example demonstrates the burden created by joint tenancy tax rules for same-sex couples in which one partner intends to make a gratuitous transfer of the property to the other. The burden also occurs when two partners contribute equally to the joint tenancy property. Equal contributions prevent the creation of a joint tenancy from being viewed as a taxable gift. Section 2040, however, so strongly presumes that contributions are unequal that it forces the surviving joint tenant to rebut that presumption by proving that she contributed equally to the property. If she cannot prove that she contributed, then the full value is included in the estate of the first partner to die.

exemption of $675,000, even though Beth dies first and never really takes as a gift half of the value of the property.

57. A transfer that creates a non-severable interest in the donee spouse might run afoul of the terminable interest rule because the gift is essentially to spouses for their joint lives with a contingent remainder to the survivor. But the Treasury Regulations specifically provide that the marital deduction is available in such cases. See Treas. Reg. §25.2523(d)-1 (1998).


59. See I.R.C. § 2040 (1999). There are no clear rules regarding how much evidence the surviving joint tenant must produce to rebut the presumption that she contributed nothing. Proof that each joint tenant had sufficient funds available to contribute equally and reliance on the Cohan rule has been held sufficient in at least one case. See Estate of Fratini v. C.I.R., 76 T.C.M. (CCH) 342 (1998) (relying on Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930) (holding that estimation of expenses permissible for deduction purposes)). I recommend to practitioners whose clients insist on using joint tenancies that the partners at least sign an affidavit at time of purchase indicating how much each contrib-
The burden of the section 2040 presumption produces two possible negative effects. One is that the presumption will overtax property transfers between partners who elect to hold property in joint tenancy with right of survivorship and cannot rebut the section 2040 presumption. Few people keep perfect records for twenty or thirty years, which is the payoff period for most mortgages. Life partners may have a particular problem showing who paid which part of each mortgage since partners often combine assets in joint accounts or take turns paying the bills. Taxpayers are often warned to keep records to support their income tax reporting positions for three to six years, but rarely are taxpayers advised to keep cancelled checks and closing real estate documents for twenty or thirty years. The other possible effect is that, if the partners are advised by knowledgeable tax planners, they will likely forego the joint tenancy option in order to avoid the burden created by the section 2040 presumption. Such couples will search for alternative means, often more cumbersome and costly, for passing real property to their life partners at death. In sum, the joint tenancy rules burden same-sex couples by either overtaxing them or forcing them to avoid joint tenancy ownership, even though it may be their preferred form of ownership for non-tax reasons.

5. Tax-Free Property Divisions at Divorce

In 1962, the United States Supreme Court handed down a decision which had an extremely negative impact on divorcing spouses. The decision, United States v. Davis, stated a divorce was a negotiated commercial transaction, similar to a sale or exchange between unrelated parties. Thus, to the extent a husband and wife negotiated a property division based upon their marital claims to property, the Court viewed the property division as a taxable exchange. In analyz-
ing the transaction, the Court appeared to deny the reality of the long-term spousal relationship and instead judged the transaction between the parties as though it were a single exchange transaction occurring between unrelated persons.\textsuperscript{64} This view of the transaction has been criticized elsewhere,\textsuperscript{65} and this article renews those objections. Divorcing spouses are not strangers, and are not negotiating in a manner that can accurately be compared to the negotiations of parties in a commercial transaction.

Lower courts have apparently agreed that not all divorcing spouses should be treated as though they were engaging in taxable exchanges of property. Shortly after the \textit{Davis} decision, distinctions were created that allowed some spouses to characterize their property divisions as equal divisions of vested property rights.\textsuperscript{66} For spouses who could fit within that category, the IRS eventually ruled that such divisions were not realization events, and thus should produce no taxable gains to the exchanging spouses.\textsuperscript{67} In such cases, each spouse would take his or her share of the community or marital property with the historical cost basis attached to it.\textsuperscript{68} Gain would be realized when the property was sold or exchanged to someone other than the divorcing spouse.\textsuperscript{69} In 1984, this “non-realization of gain” rule was codified who exchanged inchoate marital rights for property, was not taxable on the exchange. \textit{See} Rev. Rul. 67-221, 1967-2 C.B. 63. No justification was offered for this result, although several are possible. For example, Mrs. Davis may be viewed as receiving damages in lieu of her right to receive certain support and death benefits, which would have been tax-free receipts. One thing is clear from this ruling. The IRS was not so eager to tax both parties to the alleged taxable exchange as though they were two unrelated individuals negotiating a taxable sale or exchange. Rather, the IRS was concerned that the appreciation, which had accumulated on investment property held during the marriage, be taxed. The most certain way to tax the appreciation was to tax it when Mr. Davis transferred the appreciated property to Mrs. Davis. Had it not been taxed then, presumably the IRS would have been satisfied with taxing all appreciation whenever Mrs. Davis finally disposed of the stock. In any event, taxing the \textit{stock} was the primary concern. Taxing both parties as if they had engaged in a commercial transaction was not. Section 1041 has resolved the problem satisfactorily by opting to tax the appreciation on property accumulated during marriage whenever the divorced spouse disposes of the property. \textit{See} I.R.C. § 1041 (1999).

\textsuperscript{64} \textit{See} \textit{Davis}, 370 U.S. at 72.
\textsuperscript{65} \textit{See} \textit{Cain}, \textit{supra} note 14, at 102–05.
\textsuperscript{66} \textit{See}, \textit{e.g.}, \textit{Carrieres} v. \textit{Commissioner}, 64 T.C. 959 (1975), \textit{aff’d per curiam}, 552 F. 2d 1350 (9th Cir. 1977) (holding spouse’s exchange of community property nontaxable, but exchange of separate property for community property taxable); \textit{Imel} v. \textit{U.S.}, 523 F.2d 853 (10th Cir. 1975) (holding equal division of marital property at divorce in non-commu-
nity property state a nontaxable event).
\textsuperscript{68} \textit{See id.}
\textsuperscript{69} \textit{See id.}
for all spouses. This new rule for spouses is justified as long as one views the marital relationship as a coming together of two persons who intend to share their assets and liabilities forever, or at least for a very long period of time. The two partners view the relationship as one involving a certain amount of "give and take" over time, in which the individuals will each be better off by virtue of the support given by the other partner to the relationship. This coming together for mutual benefit is not viewed as a typical taxable transaction. Rather, it is a tax-free rearrangement of one's personal life in a manner that will, it is hoped, produce both personal and financial gain in the future. So long as the coming together is not a taxable event, the pulling apart ought not to be taxable either. At the dissolution of the relationship, the two people are once again readjusting individual personal and financial arrangements in order to carry out, as near as possible, what their expectations had been when they came together. To tax the dissolution as though it were a cashing out of an investment, such as a voluntary sale of stock, is to ignore the years of nontaxable, indeed tax irrelevant, "give and take" that went into the relationship. The statutory rule for spouses is correct, but not because of the mere fact of marriage. Rather, it is correct because of the years invested in the relationship.

No similar statutory rule is available for same-sex couples who experience the same "give and take" of long-term commitment. The tax rules applicable to such couples are, in fact, subject to much speculation amongst practitioners. Reported cases and rulings are virtually nonexistent. If couples have been together long enough and have jointly acquired property, they may be able to argue they are similar to the pre-section 1041 spouses who merely split up their vested property rights at time of divorce. They could argue equal divisions of prop-

73. For example, one might argue that the situation is analogous to divorcing spouses who split their vested property interests equally at divorce. These spouses are viewed as merely rearranging property interests rather than cashing out of an investment. See Rev. Rul. 81-292, 1981-2 C.B. 158. See also Gen. Couns. Mem. 37,716 & n.2 (Oct. 5, 1978) (explaining why the IRS was willing to view spousal property divisions as nonrealization events).
erty are not a realization event for tax purposes, and thus there should be no recognition of gain or loss.\textsuperscript{74}

For those same-sex couples that more nearly resemble Mr. and Mrs. Davis, the IRS can argue that property transfers are taxable to the same extent that they were in the \textit{Davis} case.\textsuperscript{75} Thus, the benefit of knowing that one can disentangle oneself from a long-term personal relationship without paying taxes on the property disentanglement is a benefit confined to married couples and denied to same-sex couples. Not only is the benefit of tax-free dissolution denied to same-sex couples, but, additionally, the absence of any clear rules explaining how such property divisions ought to be taxed\textsuperscript{76} may cause secondary economic harm. The "divorcing" same-sex couple, even after paying for tax advice, may often end up being advised to pay taxes on property exchanges that are arguably non-taxable non-realization events. Such advice is often given on the assumption that \textit{Davis}, which requires transfers that are incident to the dissolution of personal relationships to be treated as taxable exchanges, is the controlling legal rule for persons who are not covered by section 1041.

This section has listed some of the key tax benefits available only to married couples. The denial of similar benefits to same-sex couples not only denies them the immediate economic benefits produced by the tax law, but can also create secondary economic costs.

\textbf{B. Burdens Avoided}

In those instances in which marriage causes negative tax consequences under current tax law, unmarried same-sex couples are often

\textsuperscript{74} For a more detailed explanation of this argument, see Patricia A. Cain, Taxation of Marvin Payments (on file with University of San Francisco Law Review).

\textsuperscript{75} Although \textit{Davis} only taxed one party to the exchange, the Court's reasoning would support taxing both parties. \textit{Davis} stands for the proposition that when A transfers appreciated property to B in exchange for either property, cash, or services, A is taxed on the appreciation. See \textit{U.S. v. Davis}, 370 U.S. 65, 73 (1962). Thus, if B is also viewed as exchanging either appreciated property or services, B should also be taxed on the exchange.

\textsuperscript{76} The only clear rules applicable to unrelated parties are rulings which explain that a conversion of a single tract of joint tenancy realty to tenancy in common realty is not a realized taxable event, and that a similar change in the form of ownership of contiguous tracts is not taxable. See Rev. Rul. 56-437, 1956-2 C.B. 507; Priv. Ltr. Rul. 93-27-069 (July 9, 1993), and Priv. Ltr. Rul. 93-20-037 (May 21, 1993); see also Rev. Rul. 73-476, 1973-2 C.B. 300 (holding that where three unrelated tenants in common of three separate parcels rearrange their interests so that each party becomes the sole owner of one of the parcels, an exchange occurs so that a gain or loss is realized). But see Rev. Rul. 79-44, 1979-1 C.B. 265 (holding that if the exchange qualifies under section 1031 of the Code, the realized gain will not be recognized).
viewed as receiving a benefit because they are free from these negative consequences. This section will probe that claim and suggest that the alleged benefits to same-sex couples are overstated.

Most of the alleged tax benefits of non-married status stem from the application of two types of rules. First, there are anti-abuse rules which are intended to prevent related parties from manipulating tax provisions to create gains and losses when the economic unit has not really cashed out of its investment. Second, the Code imposes burdens on certain married couples who do not conform to the traditional notion of a working husband and a stay-at-home wife.

1. Burdens Created by Anti-Abuse Rules

Under the Code, spouses are related parties. As such, they are prevented from engaging in certain beneficial transactions that are available to unmarried partners. For example, section 267 of the Code prevents certain related parties, including spouses, from recognizing losses on sales to each other.\(^7\) Similarly, redemption of one spouse’s stock is not viewed as a final termination of the stockholder’s interest in the corporation, which would be entitled to capital gains treatment, if the other spouse continues to own an interest in the corporation.\(^8\) Additional related party rules prevent taxpayers from manipulating the installment sales provisions of section 453 to obtain the benefit of tax deferral when cash is received by one of the related parties.\(^9\)

Same-sex couples can presumably manipulate such rules to their advantage by claiming that they are unrelated taxpayers. However, long-term committed partners with enough wealth to make manipulation of tax rules attractive run the risk of being classified as “related parties” under a number of Code definitions. For example, estate planning concerns often lead wealthy same-sex couples to use inter vivos trusts as a central part of their estate plan. One partner will be the grantor of his own trust and the other partner will often be a trustee or co-trustee and contingent beneficiary. Section 267, which prohibits recognition of losses on sales between related parties, includes within its list of prohibited relationships a fiduciary and benefici-


or a fiduciary and grantor\textsuperscript{81} of a trust.\textsuperscript{82} Section 318, dealing with constructive stock ownership, provides similar attribution rules.\textsuperscript{83}

Presumably, these trust attribution and related party rules apply only in the case of irrevocable trusts. A revocable trust would be classified as a grantor trust,\textsuperscript{84} an entity that is generally ignored for tax purposes.\textsuperscript{85} Indeed, there are special rules for grantor trusts, which treat them differently for purposes of the attribution rules of section 318.\textsuperscript{86} As I interpret these special provisions, the attribution rules would have no negative impact on a single-grantor, revocable trust of the sort used in many estate plans.\textsuperscript{87}

\textsuperscript{80} See I.R.C. \textsection{} 267(b)(6) (1999).
\textsuperscript{81} See I.R.C. \textsection{} 267(b)(4) (1999).
\textsuperscript{82} The fiduciary must be selling trust property as the fiduciary of the trust and not merely selling individually owned property for the related party rules to be triggered. See Rev. Rul. 59-171, 1959-1 C.B. 65.
\textsuperscript{83} See I.R.C. \textsection{} 318(a)(2)(B)(i) (1999) (providing that stock owned by a trust is deemed owned by the trust's beneficiaries); I.R.C. \textsection{} 318(a)(3)(B)(ii) (1999) (providing that stock owned by a beneficiary is deemed to be owned by the trust).
\textsuperscript{84} See I.R.C. \textsection{} 676 (1999).
\textsuperscript{85} The Income Tax Regulations make it clear that grantor trusts are not independent taxpayers. Only the grantor is recognized as a taxpayer. See Treas. Reg. \textsection{} 301.6109-1(a)(2) (1998) (no taxpayer identification number is required for grantor trusts); Treas. Reg. \textsection{} 1.671-4(b)(1), 1.6012-3(a)(9) (1998) (grantor trusts are not required to file separate tax returns).
\textsuperscript{86} See I.R.C. \textsection{} 318(a)(2)(B)(ii) (1999) (providing that the person treated as the owner of a grantor trust shall be considered as the owner of any stock owned by the trust). Although not clearly stated in the statute, the only logical interpretation of this provision is that the trust property will be treated as owned by the grantor and not any of the beneficiaries. See also Priv. Ltr. Rul. 90-35-038 (Apr. 25, 1997). Since grantors are treated as the owners of trust property for every other purpose, one wonders why a special code provision was necessary for section 318 purposes. This latter provision suggests that, in some instances, the trust might be viewed as the real seller/redeemer of stock owned by it. Thus, it would become relevant that stock owned by the grantor (or other person treated as the owner under the grantor trust provisions) could be attributed to the trust. For a single-grantor, revocable trust of the sort used in estate plans, it is presumed the grantor would always be viewed as the only relevant party, and the trust would be completely ignored. Thus, attribution would not occur from the trust to the beneficiary, nor from the grantor to the trust, in that the grantor would be the only relevant taxpayer.

\textsuperscript{87} The special rules in section 318 refer to grantor trusts generally. Irrevocable trusts can be grantor trusts. For such trusts, stock ownership by the trust will not be attributed to the beneficiaries, but rather to the grantors. See I.R.C. \textsection{} 318(a)(2)(B)(ii) (1999). But this attribution rule has no meaningful effect in the case of a revocable grantor trust in which the grantor is, for all practical purposes, the owner of the property anyway. Similarly, section 318(a)(3)(B)(ii), which attributes the grantor's stock to the grantor trust, appears to have no meaningful effect in the case of a single grantor revocable trust. See id. A sale or redemption by the grantor trust would be viewed as a sale or redemption by the grantor under general principles. Hence, if stock is also owned outright by the grantor, that fact will affect such questions as whether there was a complete termination of interest upon redemption. See I.R.C. \textsection{} 302(b)(3) (1999).
There are no specific statutory references to grantor trusts, whether revocable or irrevocable, in section 267. Due to this silence, one might argue that "a trust is a trust is a trust"⁸⁸ and, thus, the related party trust rules apply to all trusts, even revocable trusts. However, the better rule would be to treat the grantor, not the fiduciary, as the true party in interest whenever a sale of trust property occurs. In such cases, the grantor should be viewed as acting in his or her individual capacity since the grantor is considered the owner of the trust property.⁹⁰ Thus, the trust related party rules should not apply in the case of mere revocable trusts.⁹⁰

Nonetheless, these rules could cause problems for same-sex couples who use irrevocable trusts to manage their property interests. Furthermore, other entanglements of financial interests through partnerships and corporations also create possibilities of "related party" status.⁹¹ And, even if a same-sex couple can avoid the trust, partnership, and corporate arrangements that trigger these special "related party" rules, their property and financial affairs may be sufficiently intertwined that transactions between them may appear to be "shams" or lack sufficient substance to be recognized for tax purposes.

The related party rules, after all, presume that certain relationships prevent transactions from being real and thus worthy of recognition for tax purposes. When same-sex couples behave in ways that are similar to spouses and other close family members (e.g., mingling assets), it is certainly possible to view their transactions with the same suspicion accorded to related parties. Assume, for example, that Arthur sells property to his life partner, Burt, on the installment

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⁸⁸. Apologies to Gertrude Stein. I can think of no better way to make this point.
⁹⁰. It is one thing to say that the related party rules should be inapplicable, and another to be able to state definitively that they are inapplicable. The fact that there is no clear authority on this point supports the complaint that the IRS and Treasury exclude same-sex couples when they draft rules and regulations. Silence in this matter creates the sort of uncertainty that effectively imposes additional cost burdens on taxpayers in same-sex committed partnerships.
⁹¹. For example, a corporation and a partnership are related if the same persons own more than 50% in value of the corporate stock and more than 50% of the capital or profit interest in the partnership. See I.R.C. § 267(b)(10) (1999). Similarly, if one partner in a partnership owns stock in a corporation, he will be deemed to own his partner’s stock as well. See I.R.C. § 267(c)(3) (1999). Two people who co-own property and share expenses for its upkeep are not necessarily partners. But co-owners of property may become partners in the eyes of the tax law, even though they have no written partnership agreement, provided they are sufficiently profit-motivated and actively provide services to their tenants. See Treas. Reg. § 301.7701-1(a)(2) (1998).
method. Burt then sells the property for immediate cash to an unrelated third party. No gain should be triggered to Arthur unless Burt actually pays off the installment notes. However, if Burt's cash is either deposited in joint accounts or otherwise made available for Arthur's benefit, the IRS could assert that Arthur is immediately taxable on the gain, even though Arthur and Burt are not covered by the related party rules of section 453. One possible theory would be that Arthur is in constructive receipt of the cash because it has been made available to him by deposit in a joint account. Another possible theory would be that the steps of the transaction should be collapsed so that the sale from Arthur to Burt to the third party should be taxed as a sale from Arthur to the third party.\footnote{For example, Burt might pay both his and Arthur's joint living expenses out of the sale proceeds.}

While in some cases it may be possible, with careful planning, to avoid the "related party" rules and the "sham transaction" theories, such planning adds a cost to the alleged benefit of being unrelated. In addition, for some couples there is something unsettling about claiming to be unrelated when, in fact, the couple experiences their relationship as real.

2. Burdens Created by Archaic Views of Married Couples

There is another type of burden, unrelated to anti-abuse concerns, that is experienced by some married couples and thus viewed as a benefit for similarly situated unmarried couples. The marriage penalty on the two-earner couple, and the limitation on mortgage indebtedness to a shared $1.1 million and two homes, \footnote{See supra Part I.A.1. (discussing the marriage penalty on the two-earner couple).} are both examples of burdens placed on married couples and not their unmarried analogs. Both of these burdens result from the fact that Congress has embraced too readily a view of married couples that is archaic.

a. Marriage Penalty on Two-Earner Couples

The marriage penalty denies married couples the benefit of using the lower single-taxpayer rates because the entire joint return rate system is based on an archaic view of married couples as couples in

which one spouse works and the other stays home.\(^9\) The original aim of the joint return was to allow spouses in such cases to split their income and thus enjoy the same tax benefit that community property spouses enjoyed.\(^9\) The Supreme Court's announcement in *Poe v. Seaborn*,\(^9\) that spouses in community property states could split income for tax purposes, created a tax burden on spouses in non-community property states who could not split income.\(^9\) Finally, in 1948, Congress decided to solve the inequity by allowing all spouses in all states to compute income on a joint return and to use rates that had the same effect as splitting the spouses' combined income equally.

In response to complaints from single taxpayers, Congress changed the rates in 1969, effective in 1971, intending to give some benefits to single taxpayers who were unable to enjoy income-splitting with a partner.\(^10\) When married couples began to include two-earner spouses, the effect of the revised rate schedules created a burden on two-earner married couples compared to their single taxpayer counterparts. Thus far, Congress has not solved the problem, although it has been attentive to the concerns of married couples.

Congress has tried in the past to mitigate the burden on two-earner married couples. For example, in 1981 it enacted a credit provision available to two-earner families that was intended to reduce their tax burden.\(^10\) Then, when tax rates were generally reduced several years later, the credit was repealed.\(^10\) Real rates have increased since 1986, a phenomenon that increases the tax burden on two-earner families. Thus, demands for relief from the marriage tax penalty are prevalent again.\(^10\) There is no indication that Congress in-

\(^9\) See generally Edward J. McCaffery, *Taxing Women* (1997) (describing how modern income tax discriminates against working wives and suggesting that lower taxes be imposed on women in order to overcome the discrimination).


\(^10\) See generally id.


tends to ignore this problem, nor is there indication that Congress intends to punish two-earner married couples. The entire history of the marriage tax penalty and congressional responses to it show only that Congress has not been particularly adept in coming to terms with the problem. Despite the fact the burden persists, there is every indication that Congress continues to seek the best solution, that is, a solution that will not create tax burdens for any sort of married couple, whether it be a two-earner couple or a traditional one-earner couple. Thus, while it is true that, in the short run, some unmarried couples have experienced an unintended benefit because of the rate structure, the benefit is under constant threat of repeal and has, in fact, been virtually inoperative during some of the years of its alleged existence.

b. Mortgage Interest Limitation

Another key discriminatory factor against married couples occurs in the availability of the mortgage interest deduction on qualified mortgage indebtedness. There is no good reason to limit two individuals to fewer mortgage interest deductions solely because they are married. And there is no evidence that Congress intended to create such a burden on married couples. The problem most likely arose because Congress, as in the case of joint return rates, employed an


104. A number of bills are introduced each session that are aimed at eliminating or reducing the marriage tax penalty. Indeed, the tax bill vetoed by President Clinton in September 1999 included a provision aimed at eliminating the marriage tax penalty. See TAX NOTES TODAY, Sept. 24, 1999, available in Westlaw, 1999 TNT 185-1. The marriage penalty relief provisions were threefold: (1) an increase in the standard deduction for married couples; (2) a modification of the earned income credit for married couples; and (3) an increase in the income level at which the 15% tax rate ends for married couples and the 28% rate begins. See TAX NOTES TODAY, Sept. 21, 1999, available in Westlaw, 1999 TNT 182-10.

105. See Knauer, supra note 30 (arguing that this search for the perfect tax law for all married couples is one that consciously leaves out same-sex couples).

106. Since different rates for single and married taxpayers were not enacted until 1969, there was no benefit of being free from the marriage penalty from the time the joint return rates were enacted in 1948 until 1969. All of the benefit during these years flowed to married couples. Furthermore, in 1981, the enactment of the credit for the secondary worker in a married couple reduced the marriage penalty, thereby reducing the benefit of being free from the penalty. See I.R.C. § 221, repealed by Tax Reform Act of 1986, Pub. L. No. 99-514, § 131, 1986 U.S.C.C.A.N. (100 Stat.) 2085, 2113.

archaic view of married couples as having only a single source of income. The mortgage interest deduction limitation treats a married couple as a single unit, despite the fact the unit may contain two taxpayers\(^{108}\) and despite the fact those taxpayers may hold jobs in different towns, thereby requiring them to purchase more than one principal residence.\(^{109}\) There is no reason to believe Congress would be reluctant to expand the deduction benefits for married couples so that they mirror the deductions available to unmarried couples, especially in cases in which married individuals in fact maintain two separate residences. However, until Congress remedies the more prevalent marriage tax penalty caused by the structure of the joint return rates, it is unlikely it will begin amending other provisions, such as the mortgage interest deduction, in order to increase benefits available to married couples. Thus, for the near future, same-sex couples may indeed enjoy the unintended benefits that result from congressional enactments that treat two spouses as a single unit for purposes of limiting deductions. But the benefit is limited to a select group of unmarried couples. The benefit only occurs for unmarried couples who have occasion to borrow more than the $1.1 million ceiling applicable to married couples, or who have occasion to invest in more than two homes—e.g., two principal residences and a vacation home or one principal residence and two vacation homes.\(^{110}\)

### 3. Summary of Burdens Imposed on Married Couples

Thus, there are two types of burdens created by the current tax laws on married couples: anti-abuse rules and rules that presume a traditional one-earner family. The anti-abuse rules can be viewed as creating benefits for unmarried couples to the extent they can manipulate the tax rules to their benefit. However, to do so requires them to

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\(^{108}\) By “taxpayer,” the Code means a person who pays taxes. All married couples contain two “individuals” or, alternatively, two “persons.” But not all married couples contain two “taxpayers.” See generally I.R.C. § 7701 (1999).

\(^{109}\) Married couples are limited to deductions for mortgage interest on a maximum mortgage liability of $1.1 million ($1 million acquisition indebtedness and $100,000 qualified home equity indebtedness) that must be shared between the spouses, whereas in an unmarried couple, each individual is entitled to $1.1 million. In addition to the dollar limitation, there are a number of residence limitations. A married couple can claim two qualified residences between them whereas two unmarried individuals can claim two residences apiece. Thus, a married couple with two residences and two vacation homes can deduct interest on mortgages against only two of the homes. If they were unmarried they could deduct mortgage interest on all four of the homes provided the mortgage amounts do not exceed the dollar limitations. See I.R.C. § 163(h)(3) (1999).

\(^{110}\) See supra text accompanying note 109.
deny the reality that they do in fact operate as a couple, as a unit, and
to run the risk they will in fact be treated as related parties under
special tax rules or sham transaction theories. Thus, to claim that
same-sex couples benefit from the related party rules is to overstate
the benefit.

The other marriage burdening rules stem from the fact Congress
has, over the years, enacted tax laws that presume a traditional one-
earner family. While such tax rules deny benefits to married individu-
als as compared with their unmarried counterparts, heterosexual
couples have the ability to opt out of the archaic model by electing
not to marry. Those who do not opt out will continue to experience
a loss of benefit until these rules are amended. So long as some mar-
rried couples experience these burdens, all similarly-situated, unmar-
rried couples can be viewed as experiencing a benefit. But the benefit
is available to all unmarried couples, whether heterosexual or same-
sex. The heterosexual privilege, in this case, is the privilege of choice.

II. Stigmatic Harm

Every lesbian and gay couple who is confronted with the Code
experiences the stigmatic harm that results from the Code's refusal to
recognize committed personal relationships outside of traditional,
heterosexual marriage. Congress is well aware that no state recognizes
marriage of same-sex couples. Yet, rather than create a set of rules that
recognizes same-sex relationships, Congress has elected to treat such
couples as though they were unrelated. Congress has gone even fur-
ther and announced in the Defense of Marriage Act ("DOMA")
that even if a state recognizes same-sex marriages, Congress will not
accord same-sex spouses the same treatment as opposite-sex spouses
under the Internal Revenue laws. The effect of DOMA is not only to
deny specific benefits, but also to announce that Congress has deter-
mained same-sex spouses are not worthy of recognition under the tax
laws.

While it is easier to see that stigmatic harm occurs as a result of
the explicit discrimination against gay men and lesbians in DOMA,

111. In addition to denying benefits, such provisions also carry stigmatic harm to the
extent they insult the autonomy of married individuals who do not fit the traditional
model.

112. For a further development of this argument, see David L. Chambers, What If? The
Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, 95 MICH. L.

harm also occurs because neither Congress nor the IRS has chosen to
give any attention to the tax situation of same-sex committed partners.
There are no published revenue rulings, IRS publications, or official
guidelines of any sort that relate to a single tax issue affecting same-
sex partners. As this article has demonstrated, a number of important
issues arise under current law, even if long-term committed partners
are not recognized as "spouses" under the tax law.

The IRS has been forced to consider the nature of same-sex com-
mitted relationships for the purpose of determining the tax conse-
quences to employers who provide domestic partner health benefits.
Taxpayers are entitled to receive answers from the IRS about the tax
consequences of proposed transactions, provided the taxpayer re-
quests a private letter ruling in accordance with published proce-
dures. 114 These rulings are binding only on the taxpayer who requests
them and are not supposed to be cited as precedent. 115 The first rul-
ing request regarding domestic partner health benefits was sent to the
National Office of the Internal Revenue Service on May 17, 1989. 116 It
took the IRS over a year to respond to the request. 117 At least six addi-
tional private letter rulings have been issued in the past ten years. 118

According to a National Gay and Lesbian Task Force publication,
there are 570 private employers, 141 colleges and universities, and 87
States or Municipalities who provide domestic partner benefits. 119
Some of these employers offer domestic partner benefits only to same-
sex couples, recognizing that opposite-sex couples have the ability to
marry and become spouses. 120 One would think that the tax rules re-
garding such plans are of sufficient import to employers across the

117.  See id.
the City of Seattle and revising the part of the ruling dealing with valuation of the domestic
partner benefits), 92-31-062 (July 31, 1992), 96-03-011 (Jan. 19, 1996), 97-17-018 (Apr. 25,
119. Some of these entities do not provide health benefits, but most do. See Sally Kohn,
The Domestic Partnership Organizing Manual for Employee Benefits, available in the National Gay
and Lesbian Task Force web site (visited Apr. 3, 2000) <http://www.ngltf.org>. For exam-
pies of cities and companies that grant domestic partner benefits see Ann Arbor, Mich.,
City Code ch. 110, § 9:85 (1991) (granting domestic partnership status, but silent as to
benefits conferred), and Button et al., supra note 32, at 31, 128 (discussing Iowa City's
domestic partner benefits ordinance and noting that Lotus, Levi Strauss, and IBM all pro-
vide domestic partner benefits).
120.  See Priv. Ltr. Rul. 98-50-011 (Dec. 11, 1998) (responding to a same-sex only domes-
tic partner benefits plan).
country that the IRS would issue a public ruling on the matter.\textsuperscript{121} Its failure to speak publicly is curious and certainly not an indication of respect for same-sex relationships.

Similarly, Congress has never taken any positive action toward the recognition of same-sex relationships under the tax law. For example, during the debate over DOMA, Congress debated whether same-sex couples should be spouses and never considered what default rules might apply to them if they are not treated as spouses. Thus, the message from Congress, as currently embedded in the tax laws, is that same-sex couples are not worthy of spousal treatment and, furthermore, their treatment under the tax laws is not even worthy of discussion.

III. Consequential Harms

While every same-sex couple covered by the tax laws experiences the same stigmatic harm, the consequential harms will differ depending on the specific situations of various couples. Some consequential harms were identified earlier in this article and include: (1) the negative impact that tax rules regarding domestic partner benefits have had on some couples' ability to obtain employer-provided health benefits for their families; and (2) the extra costs imposed on couples who wish to own property jointly but avoid the joint tenancy tax rules.

In other writings\textsuperscript{122} I have argued that the tax laws place an additional burden on same-sex couples because the tax rules are simply not clear when applied to such couples. For example, there is not a single ruling, published or private, regarding the tax consequences of property divisions between unmarried couples who terminate their relationships in ways similar to divorcing spouses. Nor is there a single case or ruling regarding the question of when a same-sex partner can be claimed as a dependent for tax purposes. Nor do the handful of private letter rulings regarding the tax treatment of employer-provided domestic partner benefits, discussed above, give sufficient guidance to the numerous employers and employees these rules affect. The IRS's silence on these matters is astounding given the frequency with which these matters are debated at national conferences and in academic journals. The uncertainty that results from this silence.

\textsuperscript{121} The IRS decides when to issue public revenue rulings and often does so when a matter in a private letter ruling is of sufficient national import that the IRS thinks it wise to make a public statement regarding its official interpretation of the tax laws.

\textsuperscript{122} See, e.g., Cain, supra note 14, at 98–99.
places additional, real, out-of-pocket costs on taxpayers who seek tax advice from lawyers and accountants.

Another category of consequential harm involves the extra costs that result from what can be described as "reporting burdens." Perhaps in part because the joint return is the norm, most record-keeping procedures by financial institutions include only one social security number on joint accounts and joint mortgages. Such record-keeping works well for people who share their tax reporting burdens through the joint return. This record-keeping may also make sense for non-spouses who open joint accounts, such as parents who make deposits and name children as joint account holders. In that case, the parent, as depositor, is the appropriate taxpayer. However, these procedures do not make sense for unmarried committed couples who must disentangle their joint endeavors at tax time. There are no IRS publications that explain how to report joint accounts and liabilities that occur outside of marriage. Practitioners and taxpayers have learned that attaching riders to the return that list the additional social security numbers and explain that the asset or liability is shared will usually take care of the problem. But, for the uninitiated who attempt to do their own returns, or rely on tax return software programs, additional correspondence with the IRS becomes necessary. This added cost is a consequence of heterosexual privilege, which fails to recognize that there are committed same-sex couples who do in fact share assets and liabilities.

Conclusion

This article was intended to expand the concept of discrimination by exploring secondary effects of the tax law's exclusion of same-sex couples from the provisions of the Internal Revenue Code that apply to married couples. To the extent long-term, committed, same-sex couples are similarly situated to married couples, the exclusion not only results in a denial of benefits, but also imposes costs in the form of stigma by communicating that same-sex relationships are less worthy and less valuable. The exclusion also imposes costs by requiring additional time and money to be spent by gay and lesbian taxpayers in order to determine or alter the consequences of the exclusion.

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123. For any readers unfamiliar with same-sex couples who have lived together for years and mirror the emotional and financial entanglements of married couples, see Eric Marcus, Together Forever (1998). The book details the lives of many same-sex couples whose stories make compelling, albeit implicit, arguments for better treatment by the tax laws of our country.
This Article has not proposed an ideal solution regarding the tax treatment of long-term committed partners, whether married or unmarried, whether same-sex or opposite-sex. That is the task of a future article. The discussion of heterosexual privilege and tax law was intended to suggest certain directions for future scholarship on the topic of marriage and income tax. First, scholars should pay closer attention to the non-marriage penalty imposed on those who cannot marry. Second, to those scholars who suggest that the ideal solution is to tax married couples as though they were unmarried, I suggest that such a solution ignores real personal relationships and would be a disaster, as it has been for gay and lesbian taxpayers. Thus, the ideal solution lies somewhere between. Real relationships should matter, and yet the tax law should be marriage-neutral.\footnote{My own preference would be to recognize personal relationship partnerships for tax purposes. The partnership would file a return that combines all shared income and expenses. Bottom line profits or losses would be reported by the individual partners. Assignments of income would be allowed so long as the assignments were real. As I have said, such solutions are the topic of a future article. Nonetheless, I thought it worth offering here a brief overview of what I have in mind.}